THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 27

Case No. 15,820 — Case No. 16,425

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

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

Printed in the United States of America.

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

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

THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 27

U. S. v. MORSE—U. S. (SWAT v.)

Case No. 15,820—Case No. 16,425

ST. PAUL
WEST PUBLISHING CO.
1896

†

FEDERAL CASES.

BOOK 27.

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

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

Case No. 15,820.

UNITED STATES v. MORSE.

[3 Story, 87.] [1]

Circuit Court, D. Maine. May Term, 1844.

COLLECTOR OF CUSTOMS—EMOLUMENTS—ADDITIONAL COMPENSATION AS INSPECTOR.

1. Under the act of 1822, c. 107 [3 Stat. 693], the offices of deputy collector and of inspector may be held by the same person at the same time.

2. The 15th section of the same act, limiting the emolument of the deputy collector to $1,000, applies only to the emolument received by him as deputy collector, and does not prevent him from receiving additional compensation for independent offices in the customs held by him at the same time.

3. A deputy collector is not bound by that act to perform the duties of inspector.

4. Where the words of a statute, prescribing compensation to a public officer, are loose and obscure, and admit of two interpretations, they should be construed in favor of the officer.

[Cited in U. S. v. Collier, Case No. 14,833; McKinstry v. U. S., 40 Fed. 818.]

[Cited in U. S v. Averill, 4 Utah, 416, 7 Pac. 530; Harrington v. Smith, 28 Wis. 70.]

[5. Cited in Platt v. Beach, Case No. 11,215, to the point that inspectors of the customs, are, in law, officers appointed by the head of the treasury department.]

Debt.

This case was submitted by Mr. Parks, U. S. Dist. Atty. (the successor of Mr. Holmes, U. S. Dist. Atty., who died pending the proceedings), and by Mr. Hobbs, for defendant, upon the following statement of facts:

The defendant [Samuel A.] Morse, was appointed collector of the customs for the district of Passamaquoddy on the —— day of June, 1836, and entered upon the duties of his office, July 2, 1836. John A. Balkam was appointed an inspector of the said customs, April 1, 1831, and served in that office, and received the per diem allowance as inspector, from that time until April 9, 1839. The said Balkam was appointed a deputy collector for the said district, Nov. 1, 1833, and performed the duties of that office, and received the commission therefor established by law out of the emoluments of the office of the collector, while acting and receiving his per diem allowance as inspector of the customs. The said Balkam was reappointed as deputy collector by the defendant, Morse, on July 2, 1836, and from that time to January 1, 1839, performed the duties of the said office, and was paid therefor by the defendant out of the emoluments of the office of collector, the sum of $2,407, and, at the same time, from the customs, his per diem allowance as inspector, and the same so paid said Balkam as deputy collector and inspector were charged in the defendant's quarterly accounts, as they had been in those of the defendant's predecessor in office, and were settled and allowed, from time to time, at the treasury department. It is further agreed, that, previous to the commencement of these suits, accounts of monies, thus paid by the defendant, were submitted to the consideration of the treasury department, and rejected by them, after they had been allowed and settled as aforesaid, and it is further agreed, that any official transcript or other official documents from the treasurer may be referred to by either party.

The points submitted were as follows:

For the government it was contended, that the defendant, Morse, wrongfully paid monies of the United States to one John A. Balkam, as deputy collector, he being also an inspector of the customs, and that he could not hold the two offices of deputy collector and inspector, and receive the pay and emoluments at the same time, under the act of congress (chapter 107, § 14) passed in 1822 [3 Stat.

[1] [Reported by William W. Story, Esq.]

693]. And further, that if the said Balkam could, by the said act, hold the offices of inspector and deputy collector at one and the same time, yet that, by the 15th section of the same act, the said Balkam, acting as aforesaid, could not receive "more than one thousand dollars in any one year for any services he may have performed for the United States in any office and capacity."

For the defendant it was contended, that such is not the true construction of the said act, and that the said offices are not inconsistently held by one person; and also, that, by section 10 of the said act of 1822, the said payment to Balkam is provided for as an incidental expense of the office of collector. And the defendant referred to the 18th section of the said act, as aiding in ascertaining the legislative intention.

STORY, Circuit Justice. The sole questions arising in this case are: First. Whether the deputy collector could be appointed as inspector, and hold both offices at the same time, and receive the emoluments thereof, under the act of 7th of May, 1822 (chapter 107, § 14). Secondly. Whether the limitation contained in the 15th section of the same act of the compensation of the deputy collector to $1,000, applies to the case where he also holds the separate office of inspector; and performs all the duties of both offices.

As to the first question, it appears to me to be too clear for argument. There is nothing in the nature or duties of the offices of deputy collector and inspector of the customs, which make them incompatible with each other. The 14th section of the act of 1822 (chapter 107) declares "that in the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, no person shall be an inspector, who at the same time holds any other office in the collection of the customs, in either of the said ports." Now the very enumeration here includes only certain specified ports, and, of course, excludes all other ports, upon the known maxim, "Expressio unius est exclusio alterius." The policy of the section doubtless was, that, in the enumerated ports, the duties of deputy collector would or might occupy all the time of that officer, and that it would be a public inconvenience, and perhaps lead to the gross abuse of creating sinecures, to allow him to hold another office at the same time, the duties whereof he could not adequately perform, or might injuriously to the public service neglect.

As to the second question, the fifteenth section of the act of 1822 (chapter 107) provides, "that the secretary of the treasury may from time to time limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy, of such collector, naval officer or surveyor; provided, that no such deputy in any of the districts of Boston and Charlestown, New York, Philadelphia, Baltimore, Charleston, Savannah, or New Orleans, shall receive more than one thousand five hundred dollars, nor any such other deputy more than one thousand dollars, for any services he may perform for the United States in any office or capacity." It is upon the last clause only, that the whole controversy hinges. It is certainly obscurely drawn; and the question is, what is the proper interpretation to be given to the words, "in any office or capacity." After weighing the subject with a good deal of care, I have come to the conclusion, that the true intent and meaning of the clause is to limit the emoluments of the deputy collector in that office to the sum specified, and to make no allowance to him on account of any incidental services he may perform, or emoluments he may receive beyond that sum; and that it was not intended to say, that if he actually performed the duties or services of any other independent office, such as inspector, in any of the nonenumerated ports, he was not entitled to receive the emoluments thereof. In short, I read the language, as if it were, "in any such office or capacity." The 18th section of the same act contains a provision, having a similar policy and operation, as to the incidental services and compensation, which might be claimed, virtute officio, by a collector, naval officer, or surveyor.

The office of inspector is an entirely distinct and independent office from that of deputy collector, having different duties, and requiring different services. Indeed, deputy collectors were not expressly authorized by law to be employed in the customs until the act of 3d of March, 1817, c. 282, § 7 [6 Bior. & D. Laws, 243; 3 Stat. 397], made perpetual by the act of 6th of May, 1822, c. 56, § 4 [7 Bior. & D. Laws, 55; 3 Stat. 681]. "In any office or capacity," may well be interpreted to mean "in any one office or capacity." If it were necessary to look back upon the pending terms of the 15th section of the act of 1822 (chapter 107), to seek for another as the true use of the language, it would be by no means a forced construction to suppose, that as the compensation of clerks of the collectors, as well as deputies, was to be fixed, that the object was to prevent a deputy collector from receiving at the same time compensation as clerk, the duties of the latter belonging as an appropriate incident in many cases, if not in all, to that of deputy. In this view, also, the interpretation of the section would steer wide of the objection raised by the United States, for the duties of inspector are not incident to the duties of deputy collector, as those of a clerk are and may be.

It appears to me, also, that, it ought not to be presumed, that the government, when it fixes the compensation of a deputy collector, means that he shall be compellable to perform the duties of inspector gratuitously; nor can it be presumed, that the government, when it fixes the compensation of a deputy collector, looks to any other thing than a re-

muneration of the duties, which he is to be called upon to perform as such. I know of no authority given by law to the secretary of the treasury to compel, or to require, any officer appointed to one office to perform the duties of another independent office, either as a condition of his appointment, or otherwise. The law, as I conceive, adjusts, or intends to adjust, the measure of the compensation of every officer to the duties to be performed in that office, and not in another independent office. It does not seem to me, therefore, that the court, except upon the most clear and positive language of a statute, ought to adopt any such conclusion; and where the words are loose or obscure, and admit of two interpretations, it seems to me, that the construction ought to be favorable to the claims of the officer, who performs the duties of two independent offices. It has always appeared to me, looking historically to the legislation upon the subject of compensation of officers of the customs, that the great object of the legislature was, not to cut down the reasonable emoluments of officers holding different offices, but to prohibit their union, when incompatible with public policy, or to prevent and suppress the growing evil of extra compensation claimed for services purely incidental to a single office.

Upon the whole, my opinion is, that the judgment ought to be rendered, upon the state of facts, for the defendant, for his full compensation as inspector, independent of his claim as deputy collector.

Case No. 15,821.

UNITED STATES v. MORTIMER.

[1 Hayw. & H. 215.] [1]

Circuit Court, District of Columbia. Jan. 4, 1845.

RECEIVING STOLEN GOODS—GOODS BROUGHT FROM ANOTHER STATE.

The receiving of stolen goods in this District, knowing that the goods were stolen in another state or jurisdiction, is an offence within the jurisdiction of the District of Columbia.

The defendant [Albert Mortimer] was indicted by the grand jury of Alexandria county, for receiving stolen goods. The goods were stolen in Maryland, and brought into Alexandria and received by the defendant, who knew them to be stolen. The indictment is in substance: That Albert Mortimer with force and arms, at the county aforesaid * * * of the goods and chattels * * * before then feloniously stolen, taken and carried away feloniously did receive and have (he the said Albert Mortimer then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away) against, &c. The defendant plead not guilty in manner and form, &c. A juror was withdrawn and the case was adjourned from the criminal court of Alexandria county to this court on a question of law.

Philip R. Fendall, for the United States.
Wm. L. Brent, for defendant.

The United States through their attorney offered evidence tending to prove that the goods charged in the indictment to have been stolen were stolen in the state of Maryland, that after being so stolen they were brought into the county of Alexandria in the District of Columbia by the person who stole them, and that they were after being so brought into said county received by the prisoner in said county with knowledge on his part that they were stolen, whereupon, the prisoner through his counsel prayed the court to instruct the jury that the prisoner is entitled to an acquittal. The question arising on said prayer was whether the receiving in the county of Alexandria of stolen goods, with knowledge on the part of the receiver, that said goods had been stolen in the state of Maryland and which goods were brought as aforesaid by the thief into said county of Alexandria, be an offence within the jurisdiction of the criminal court of the District of Columbia.

The following authorities were relied on by the attorney for the United States in support of the indictment: People v. Burke, 11 Wend. 129.[2] This was a case under a New York statute, but the remarks of Savage, C. J., were as to the general principle underlying the case. Cullins' Case, 1 Mass. 115; Ellis' Case, 3 Conn. 185; Andrews' Case, 2 Mass. 14; [3] Lord's Case, cited Id. 16; Rex v. Peas, 1 Root, 69; Somerville's Case, 21 Me. 14, cited in Law Magazine, for April, 1844, pp. 206, 207; U. S. v. Mason [Case No. 15,738], May Term, 1823; U. S. v. Tolson [Id. 16,530]; U. S. v. Haukey [Id. 15,328].

The counsel for the defendant offered the following: Tolson's Case, Dec. term, 1805. This was a case in which the prisoner stole a watch in Maryland and brought it to Washington. The prisoner was convicted of larceny. Haukey's Case, cited by the attorney for the United States. The prisoner was convicted. A horse was stolen in Maryland and brought to Washington. In the case of U. S. v. Bladen [Case No. 14,605], July term, 1809, indicted for manslaughter, the blow was given

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

[2] The court in this case says: The statute recognizes the common law, by which the possession of stolen property in contemplation of law remains in the owner, and the thief, therefore, is guilty of theft in every place into which he carries the stolen goods. This principle applied to the case of property stolen in one state and carried into another state.

[3] In this case the unanimous opinion of the court affirming the Case of Cullins was, that the offence charged is the receiving the goods, knowing them to have been stolen. If the principal could be tried and convicted in this county the accessory may be tried and convicted also. The same reason applies to the case of stealing goods in one state and bringing them into another.

in Alexandria and death occurred in Maryland. Judgment was arrested.

Upon consideration of the authorities cited, THE COURT held that the receiving in the county of Alexandria, of stolen goods, with knowledge on the part of the receiver that the said goods had been stolen in the state of Maryland, and brought by the thief in said county of Alexandria is an offence within the jurisdiction of the criminal court of the District of Columbia, and it is ordered to be certified accordingly.

Case No. 15,822.

UNITED STATES v. MORTON.

[1 Lowell, 179.] [1]

District Court, D. Massachusetts. Oct., 1867.

SHIPPING — PASSENGER REGULATIONS — LIABILITY OF MATE ACTING AS MASTER.

Under St. March 3, 1855, § 1 (10 Stat. 715), a mate who is appointed master at a foreign port, and leaves the port with intent to bring certain passengers to the United States, and does bring them, in excess of the number permitted by that statute, is liable to the fine imposed on masters, though the agreement with the passengers had been made by the former master, if the defendant had knowledge of the facts, and opportunity to annul the illegal contract before leaving the foreign port.

[Cited in U. S. v. Nicholson, 12 Fed. 524.]

Indictment under section 1 of the act of March 3, 1855 (10 Stat. 715). The case was, that the defendant [David H. Morton] was duly appointed master of an American vessel, in a port of the West Indies, on the death of the former master, and brought thence to the port of Boston certain passengers in excess of one to every two tons of the vessel. The evidence tended to show that the former master had made some oral agreement with the passengers, and that they were perhaps on board before the defendant's appointment. The judge ruled, that the defendant was not bound by the illegal agreement of the former master; but if he knew the number of passengers on board and had time and opportunity to correct the mistake or fault of his predecessor, and failed to do so, and left the port with intent to bring the passengers to the United States, and carried out that intent, he was liable.

J. F. Pickering, for defendant, moved for a new trial, on the ground that the defendant did not take the passengers on board, within the meaning of the law.

H. D. Hyde, Asst. Dist. Atty., for the United States.

LOWELL, District Judge. I am satisfied with the rule laid down at the trial. A construction of the statute which should hold the master responsible only for contracts made by him personally would annul it. In many cases, perhaps in most, the contract is made with the consignee or agent of the ship, and the passengers may come on board without the master's previous knowledge or assent. The statute requires him to see that its provisions are respected; and it must be held, that his permitting such passengers to remain on board is a taking on board. The mere physical fact of coming to the ship is not the material thing. They might come in one capacity as stevedores, &c., and remain in another. The phrase is used to explain the intent, as being something within the master's control, and to distinguish those cases where he has been deceived or misled without fault of his own.

The defendant being new to the office, and perhaps ill-informed of the law, no imprisonment is asked for; but the fine, which is a fixed sum, must be imposed. Motion denied.

Case No. 15,823.

UNITED STATES v. MOSELY.

[15 Int. Rev. Rec. 8.]

District Court, S. D. New York. 1871.

INTERNAL REVENUE—EJECTING DEPUTY INSPECTOR.

The defendant was indicted for obstructing and hindering a deputy collector in the exercise of the duties of his office. Mosely is a dealer in leaf tobacco and cigars, and the deputy called at his store to inquire respecting certain boxes of cigars taken in that day, May 16, 1871, some of which he was informed by the drayman were not stamped. After some conversation, in which the deputy stated his errand, not the least unfriendliness having been evinced on either side, Mosely, without warning, ejected the deputy forcibly into the street, the officer falling heavily in the gutter and suffering a fracture of the hip, which endangered his life, he being seventy-two years of age, and somewhat lame. The defence argued that the deputy having fulfilled his errand and stated that he was satisfied, had no more to do or say in the premises; Mosely had a right to eject him. THE COURT declared that officers must have free and peaceable egress as well as ingress to the places where they are authorized to make examinations, and that Mosely had no right to eject him in the manner he did.

The jury very promptly rendered a verdict against the defendant. A stay of sentence was granted, to allow argument on the law points raised.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

Case No. 15,824.

UNITED STATES v. MOSES.

[1 Cranch, C. C. 170.] [1]

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

WITNESS—INCRIMINATING TESTIMONY.

A witness is not bound to answer a question, the answer to which may tend to criminate himself.

E. J. Lee, for the United States, produced Billy, a witness. The confession of Moses had been given in evidence, that he bought the goods of Billy, (the goods having been proved to have been stolen.) The question was asked of Billy, whether he sold them to Moses. Objection by Mr. Jones, that it tended to criminate the witness.

THE COURT sustained the objection.

Case No. 15,825.

UNITED STATES v. MOSES.

[4 Wash. C. C. 726.] [2]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1827.

COUNTERFEITING—INTENT—WITNESS—PRIVILEGED COMMUNICATIONS.

1. In a criminal prosecution, the officer who apprehended the prisoner being examined as a witness for the United States, is not bound to disclose the name of the person from whom he received the confidential information which led to the prisoner's detection.

[Cited in Re Quarles, 158 U. S. 536, 15 Sup. Ct. 961.]

[Cited in State v. Soper, 16 Me. 295; Worthington v. Scribner, 109 Mass. 491; People v. Laird, 102 Mich. 135, 60 N. W. 457.]

2. The same witness being asked, if A B had told him if he would come to a particular house, (being that where the forgery, the offence charged, was carrying on,) on a certain day, he would have the prisoner there? The court required him to answer the question.

3. In a prosecution for forging the notes of the bank of the United States, it is necessary to prove that it was committed with intent to defraud some corporation or person, and that the notes stated in the indictment and given in evidence as forged, and those alleged to be forged, are the same.

[Cited in U. S. v. Shellmire, Case No. 16,271.]

The prisoner [Reuben Moses] was tried upon five indictments, three of which were for counterfeiting the notes of the bank of the United States, of different denominations, and the other two for having in his possession bank notes of different denominations, engraved and printed after the similitude of notes issued by the said bank, with intent to use them in forging the notes of the said bank.

Upon the trial of these indictments, the following points of evidence were ruled by the court: That the officer who apprehended the prisoner is not bound to disclose the name of the person from whom he received the information, which led to the detection and apprehension of the prisoner. Such a disclosure can be of no importance to the defence in this case, and may be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes which they know to have been committed. 1 Starkie, Ev. 106; Burr's Case [Cases Nos. 14692–14694a] in the circuit court of Virginia; 2 Starkie, Ev. 400. The witness was then asked, whether Bernard Johnson, the person, in whose house the defendant was apprehended whilst sitting on a table on which the counterfeit bank notes mentioned in those indictments were lying, had told him, that if he would come to his house on a certain day, being the day on which the prisoner was apprehended, he would have the prisoner Craig there. This was objected to by the district attorney, but the objection was overruled. The evidence may be all important to the defence, by showing or laying a ground for presuming that he was innocently at the place where the officer found him, in consequence of an insidious invitation given to him by Johnson. This is a very different question from the former.

Mr. Ingersoll, U. S. Dist. Atty.

Randall & Philips, for defendant.

WASHINGTON, Circuit Justice (charging jury). The crimes charged against the prisoner in the indictments, on which the jury have to decide, are: (1) The counterfeiting of certain bank notes of various denominations, purporting to be notes of the bank of the United States. (2) Having in his possession certain blank notes, engraved and printed after the similitude of the notes issued by that corporation, with intent to use them in counterfeiting notes issued by that corporation.

That the prisoner did counterfeit the notes under the first head, with intent to defraud the bank of the United States, or some other corporation or person, and that the notes set forth in the indictment and given in evidence, and those alleged to be counterfeit, are the same; ought to be proved to the satisfaction of the jury, to warrant them in convicting the defendant. As to the identity of the notes, the evidence is as follows: The officer who found the counterfeit notes as well as the blank ones on a table at which the defendant was sitting, swears that he bundled them up in different parcels, and delivered them to the mayor; who, upon his examination, has stated that he delivered the same notes to the district attorney; who, with his assistant in drawing these indictments, retained the possession of

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

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

them until they were delivered by the district attorney to the foreman of the grand jury, who has returned them with the bills to the clerk of the court. To prove that the notes alleged to be counterfeit are so, one of the tellers of the bank has been examined, and testifies that the signatures of the president and cashier, as well as the filling up of the blanks, are all false and counterfeit. No evidence has been offered to contradict, or to discredit this witness.

The only remaining inquiry is, were the notes charged to be counterfeited, counterfeited by the prisoner with intent to defraud the bank of the United States or any person? It is not necessary to the conviction of the accused that these facts should be established by positive proof. Circumstantial evidence is sufficient, if it be such as to satisfy the minds of the jury of the existence of the facts which it is intended to prove. These circumstances as stated by the witnesses in the present case, are the following: McClean, one of the high constables of the city, having received information that on a certain day he would find the prisoner and Craig at the house of B. Johnson, and employed in the business of counterfeiting; approached the house on that day, having with him two other constables, and finding the outer door unfastened, they entered and rushed up stairs; where, in a room in the third story, they found Johnson standing at a table, and the defendant seated at it, both of them with their coats off. On the table was a large number of counterfeit notes of the bank of the United States, and of blank notes in the similitude of the notes of that bank. The prisoner appeared to be greatly alarmed, and being asked by McClean what he was about, muttered something which the witness did not understand. On the table were three phials of ink and a couple of pens then wet with ink. On the first alarm the defendant suddenly rose from his seat and seized with one of his hands a bundle of notes which were on the table. He gave no explanation whatever when spoken to by McClean, tending to account for the situation in which he was found, or in any other way to exculpate himself. Among the articles found on the table were papers filled with the names of Nicholas Biddle and Thomas Wilson, the president and cashier of the bank; and on one of these papers was found the name of the prisoner three times written. Johnson, the prisoner, and Craig, who had been arrested on the stairs, were then taken to the mayor's office, when, upon an examination of the notes, four or five of them, amounting to $140, were found to be genuine, and were claimed by the prisoner as his property. A few days afterwards, some parts of a press were found in a cellar closet, at the house of the prisoner, which exactly fitted a press about the same time discovered in a privy of a house occupied by his brother. These are the material circumstances which have been given in evidence, and it is for this jury to say whether they are sufficient to establish the guilt of the prisoner, as charged in any or all of the indictments.

The jury found the prisoner guilty on all the indictments.

Case No. 15,826.

UNITED STATES v. MOTT et al.

[1 Paine, 188.] [1]

Circuit Court, S. D. New York. April Term, 1822.

INSOLVENCY—GOVERNMENT PRIORITY—EXECUTION CREDITOR—PARTIES.

1. Under the 5th section of the act of the 3d of March, 1797 [1 Stat. 515], an assignment, to entitle the United States to their priority, must be an assignment of all the debtor's property; but it need not be for the benefit of all his creditors.

2. An assignment made by a debtor of the United States, when his property was about being levied upon, under judgments obtained against him by one of his creditors, in trust, first for the debt of such creditor, and then for the debt of the United States, was held to be a voluntary assignment, and fraudulent and void against the United States, notwithstanding the creditor gave up his intention of levying, in consideration of such assignment, and that the property might be sold under it to the best advantage, for the benefit of the sureties to the United States.

3. And on a bill filed by the United States, to obtain their priority in such a case, against the creditor and sureties, who were joint assignees of the debtor's estate, the court refused to suspend its decree in favour of the United States, against the assigned property, until they should have proceeded to execution on their judgment against the sureties, or to make any decree in favour of the creditor against the sureties, notwithstanding the assignment had been received by the creditor for their benefit, and at their request, and they, by becoming parties to it, had covenanted for the execution of its trusts.

4. Whether such relief would have been afforded the creditor if the sureties had been properly before the court for that purpose? Quære.

This was a bill in equity, filed on behalf of the United States, under their priority acts, praying that certain property assigned by their debtor against whom they had obtained judgment, to two of the other defendants, might be subjected to the execution of the complainants, or that the assignees might pay over to them the proceeds of such property.

The bill stated, that on the 1st of January and 10th of April, 1815, and the 12th of January, 1816, Noel Blanche, to secure duties on distilled spirits, executed to the United States, his three several bonds for the penal sums of 15,000 dollars, 4505 dollars and sixty cents, and 4194 dollars and seventy two cents, with William Coulter and the defendant Jeremiah Vanderbilt, as his sureties, on which bonds judgments were recovered in

[1] [Reported by Elijah Paine, Jr., Esq.]

1819, at the May term of the district court of the Southern district of New-York, on which execution had been issued, and Blanche and Vanderbilt been taken. That these judgments were still unsatisfied. That Coulter died before the recovery of said judgments, leaving the defendants, Casparus Prior and Josiah Hornblower, his executors. The bill further stated, that Blanche, being insolvent, within the meaning of the act of congress entitled "An act to provide more effectually for the settlement of accounts between the United States and the receivers of public monies," passed March 3d, 1797, and the act entitled "An act to regulte the collection of duties on imports and tonnage," passed the 2d of March, 1799 [1 Stat. 627], made an assignment of all his property to the defendants, Vanderbilt, Coulter, and John Mott, but that the United States are, notwithstanding, entitled to a priority of payment under the said acts. That the defendants, John Mott and his copartner Richard S. Williams, and the defendants, Vanderbilt and Coulter, or some of them, had received sufficient property, under the said assignment, to satisfy the judgments of the United States, but refused so to apply it. That they had, on the contrary, applied it to the payment of debts due from Blanche to the said Mott and Williams. The bill also stated, that they had sold a part of the property to the defendants, Uriah R. Scribner and John Hitchcock, and prayed that they might be enjoined from paying, &c. It was also stated, that Blanche and Vanderbilt had presented their petitions to the president and secretary of state, and that their bodies had been discharged from execution. All the facts stated in the bill were either admitted or proved.

Mott and Williams in their answers stated, that Blanche being indebted to them in the sum of 5,424 dollars, on the 3d of April, 1816, confessed judgments for that amount in New-York and New-Jersey, which judgments were still unsatisfied. They also stated that the assignment from Blanche, mentioned in the bill, was made in order to prevent their taking out execution upon the said judgments, against the property of Blanche, and thus forcing a sale of it at a great sacrifice; and that had they not expected to be made perfectly secure by the assignment, they should have proceeded, as they were prepared to do, to levy upon his property. They stated that this was the understanding of all the parties to the assignment, and the motive for making it. That it was expected at the time of its execution, that the property assigned would more than pay their debt, which was preferred, and would pay a portion of the debt due the United States, which was next provided for; but that it was understood and agreed, that whatever might remain due to the United States, should be paid by Coulter and Vanderbilt, the sureties. And they insisted, that as this was the understanding of the sureties when they became parties to the assignment, the United States ought, in the first place, to exhaust their remedies against them, before they resorted to the assigned funds in the hands of Mott and Williams, who had been induced to relinquish their executions at the request and for the benefit of the sureties. They further stated, that Coulter's estate in the hands of his executors, the defendants, Prior and Hornblower, was more than sufficient to pay the United States; and that the United States had obtained judgment against them, but that execution had been stayed at the request of the executors, and without their consent. That the bill of the United States in this suit had been filed at the request and for the benefit of the sureties. Annexed to their answer was an account of the proceeds of the property received by them under the assignment, with their disbursements, by which it appeared that they had not received enough to pay their own debt.

The assignment made by Blanche, after stating his indebtedness to Mott and Williams, and that Vanderbilt and Coulter had become his sureties to the United States, and that he was unable to satisfy these engagements, proceeded, in consideration of the premises, to assign to Mott, Coulter, and Vanderbilt, who also executed it, certain real estate and all the personal estate of the assignor in trust, first, to pay the debt of Mott and Williams; secondly, the debt due to the United States, so that the sureties should be completely indemnified and saved harmless; and lastly, the residue to be applied to pay certain other debts. There was a covenant, on the part of the assignees, faithfully to perform and execute these trusts, according to their true intent and meaning.

It appeared by the testimony of the defendant, Vanderbilt, who was examined as a witness, that at the time the assignment was executed, it was understood by the parties to it, that Mott and Williams were about levying on Blanche's property, and that the assignment was agreed upon as a substitute for that course, in order that Mott and Williams might be first paid, and as much be made out of the property as possible for the benefit of the sureties. Mott and Williams were satisfied with their judgments, and considered themselves perfectly secure, and the assignment was proposed by Vanderbilt himself, to prevent a sacrifice of the property, and agreed to by Mott and Williams, entirely for the benefit of the sureties. It was believed at the time that there would be enough to pay the debt of the United States as well as the debt of Mott and Williams.

The record of the judgments of the United States against Coulter's executors were produced in evidence, by which it appeared that the judgments were obtained by de-

fault. Two hundred and thirty dollars of the assigned property had been received by Coulter, and Scribner and Hitchcock were indebted for a part which they had purchased of the assignees. The residue was received by Mott and Williams.

A cross bill had been filed in the cause by Mott and Williams, for the purpose of bringing Coulter's executors directly before the court, but it was never brought to a hearing, in consequence of the suit's being compromised on the coming in of the master's report at the next term.

R. Tillotson, U. S. Dist. Atty.

J. O. Hoffman and H. Wheaton, for defendants, Mott and Williams, insisted—

(1) That the assignment here was not a voluntary assignment within the meaning of the act of 1797. It was made by Blanche under such circumstances as showed that it was not an act of consent on his part, but of absolute necessity.

(2) That the nature of the transaction rebutted every presumption of fraud. The only motive of the parties was a desire to benefit the United States and the sureties on the bond, instead of defrauding them. It was also an assignment for a new and valuable consideration.

(3) The priority of the United States does not attach until the insolvency of the debtor is testified by some overt act. [U. S. v. Fisher] 2 Cranch [6 U. S.] 381. In this case the first act which would be so considered, was the execution of the assignment, and the equity of Mott and Williams was older than the assignment.

(4) Coulter, by becoming a party to the assignment, was estopped from denying its validity. Yet this suit is manifestly by the procurement of his executors, to reverse the order of the trusts in their favour.

(5) The court are bound to look at the relative equities of the defendants. The United States can resort to the property of Coulter as well as the assigned property. But Mott and Williams, although as against Coulter they are entitled to hold the assigned property, yet if deprived of this, they are without any remedy against his estate. It is precisely analogous to the case of two funds, where a court of equity will compel a party who can resort to either, to proceed so as not to injure another party who can resort to one only. 1 Vern. 445; 10 Mod. 488; Amb. 614; 8 Ves. 388, 391; 9 Ves. 209. And this rule applies as well to the crown as to individuals. 8 Ves. 388. That the estate of Coulter was amply sufficient to pay the debt due to the United States, is admitted by their suffering judgment to pass against them by default. If they had not sufficient assets, they should have pleaded the fact.

For these reasons it was insisted, that the court ought not to make a decree against Mott and Williams, until the United States should have taken out execution and levied on the estate of Coulter; or that they should make a decree in favour of the United States, directly against the executors of Coulter; or that, in the event of a decree's being made against Mott and Williams, one should also be made in their favour against the estate of Coulter.

D. B. Ogden, G. Griffen, and B. Haight, for defendants, Prior and Hornblower, replied,—

That the doctrine of election between two funds did not apply: it might, had both funds belonged to Blanche. If it did apply, however, as against a surety the court would not turn the United States round. It does not appear that there is any other fund than the assigned property. Non constat that Coulter's executors have any of their testator's property. At any rate, there is no evidence that the fund is adequate. Besides, Coulter's executors are not before the court so that a decree of the kind asked for, can be made against them. They are brought here to answer only for the property assigned by Blanche. It is admitted, that Mott and Williams have no remedy at law against Coulter's estate, and a court of equity will not charge a surety any further than he is chargeable at law. If Coulter were answerable here for the effect of his covenant in the assignment, that covenant is only to execute the trusts and not to indemnify Mott and Williams. Besides, it is evident Coulter became a party to the assignment, under a mistake as to the facts. He, as well as the rest, supposed that the property would be sufficient to pay all Blanche's debts—or the other parties deluded him into the assignment by such a representation. If the doctrine of election between two funds were not inapplicable here, a case cannot be produced where the property of the principal debtor has been left, and that of a surety resorted to. But the assignment is illegal and void; and if for one purpose, it is for all, and no body can claim under it. It is a fraud upon the United States. It also creates a preference, which equity discountenances. Equality among creditors is equity. Prec. Ch. 538. Equity will not decree the performance of an unjust agreement. 2 Brown, Parl. Cas. 296. Nor will it indirectly lend its aid to an agreement of which it will not decree a specific performance. If Coulter was bound by the assignment to indemnify Mott and Williams, they can sue his executors for whatever they may be obliged to pay the United States.

LIVINGSTON, Circuit Justice. Whether the United States are entitled to the priority, which it is the object of their bill to establish, and which is the first question arising out of the pleadings, is one of no difficulty, considering the decisions which have already been made on the fifth section of the act, to provide more effectually, for the settlement of accounts between the United States and re-

ceivers of public money, passed the 3d March, 1797. The words of this section, as far as they bear on the present case, are, that "where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, the debt due the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, as to cases in which an act of legal bankruptcy shall be committed." The debt of Blanche to the United States being admitted, as also the execution by him of the deed, bearing date the 20th of May, 1816, it remains only to examine the character of this instrument, and the situation of the grantor at the time of its execution. If he had not then sufficient property to pay all his debts, and if it were a voluntary assignment of his property—which has been decided to mean all the debtor's property—the right of preference in the United States must necessarily follow. It was argued by all parties as if it were necessary, that the assignment should appear to be for the benefit of all the creditors of the insolvent. This would be necessary if these bonds were for the payment of duties, in which case the assignment must not only be voluntary, but for the benefit of creditors, which words are not found in the act which governs the present case—But if the counsel are right and the court be mistaken in this respect, and the assignment, to give rise to the priority here claimed, ought to be for the benefit of creditors or of all the creditors, there well be no difficulty in fixing on it this characteristic also. That the assignment, although for a valuable consideration, was voluntary within the meaning of the act of congress, that is, made freely and without any legal compulsion, is not denied. There is some controversy whether it included all the property of the debtor, without which, under the decision in the case of the United States against Hoe and others, a priority would not attach, unless indeed it should appear, that for the purpose of evading the provisions of the law, a trifling part of the estate had been omitted. If the court had nothing for its guide but the assignment itself, it would not be a very forced construction of the instrument, taken altogether to regard it as a conveyance of all the debtor's property. It is professedly so of all his personal estate, without any exception, and it also comprises, as appears by the recitals, all his real estate in New-Jersey and New-York. This taken in connexion with the object of the assignment, would leave but little room to suppose that there might be lands elsewhere than in the states of New-York and New-Jersey, which were not included in this deed.

But whatever doubt might otherwise rest on this part of the case, it is dispelled by the following testimony produced by the United States, who have very properly taken on themselves the burthen of proving the fact; the deed not being as explicit as it might have been. Besides other witnesses who were well acquainted with the situation of Blanche, and who establish the fact, in a manner which ought to be satisfactory, the debtor himself has been examined as a witness,—and settles beyond controversy, that the deed did cover the whole of his property.

It is objected that Blanche is interested: but whatever feeling he may have, it must in point of interest be unimportant to him whether the United States succeed in this suit, and if they do, whether they are paid out of the estate assigned to Mott, Vanderbilt, and Coulter, or out of the private property of the latter. If the United States fail in this action, he continues their debtor—if they be paid out of the assigned property, his debt to Mott and Williams will be revived pro tanto; and if the plaintiffs are paid out of the assets in the hands of Coulter's executors, he will become a debtor to the amount of such payment to his estate. It is equally clear, if that be necessary to be proved, from the testimony of Blanche, and the terms of the assignment, that when he made it, he had not sufficient property to pay all his debts.

All the allegations of the complainants being thus admitted or proved, which were necessary to bring their case within the meaning of the act of the 3d of March, 1797—nothing would remain but for the court to make a decree pursuant to the prayer of their bill. But it is supposed by the counsel of the administrator of John Mott, and of his surviving partner Williams, that, instead of making them account immediately for the trust property of Blanche, a decree should be made in favour of the United States, in the first instance against the estate of Coulter, and leave the executors of his will to their remedy for reimbursement, if they have any, against Mott and Williams; or that if a decree be made against Mott and Williams in favour of the complainants, one should at the same time pass in their favour and for their indemnity against the estate of Coulter. It has been argued that the United States should have their remedy in the first place against the estate of Coulter, because he is a party to the deed of assignment, and thereby consented to postpone the debt for which he was surety, to that of Mott and Williams. It is also said in favour of such a decree, that there being two funds, out of which the United States can be paid, and but one from which Mott and Williams can have satisfaction, they have a right to compel the complainants to resort in the first instance to, and exhaust the one on which they can have no claim.

A defendant who asks of a court of chancery not to touch the only fund to which he can resort, while there is another one out of which the complainant can obtain satisfaction, ought to show not only that he has a clear and indisputable title, which will be respected in equity, to the fund which he de-

sires may be held sacred for his use, but that there are in reality two funds, of which an election can be made; and that by such election no injustice will be done to any of the other parties before the court. Thus where one person has two mortgages on different estates, and another has a mortgage only on one of them, nothing is more reasonable than to force him who holds the two mortgages to proceed first against that estate on which the other has no security—and to leave the other untouched in case the first estate be sufficient to satisfy him. There were not only two funds, but they were both before the court, and the title of neither party was liable to any doubt, nor could the mortgagor have any objection to such a decree. It would, therefore, have been most manifestly unjust to have acted otherwise.

The first answer then, to this course of proceeding on the present occasion is, that the two funds here spoken of, that is, the property mentioned in the deed of assignment or its proceeds, and the estate of Coulter, admitting it sufficient to pay the debt, are not both before the court, so as to justify any decree against the latter. Although it may be collected from the proceedings that Coulter was a co-debtor with Blanche to the United States, and that he may have property enough to pay the debt, nothing would be more unjust or improper than to make a decree against his estate, under the present bill, which, notwithstanding its general prayer, most manifestly confines any relief that may be afforded, to such as the United States may be entitled to out of the estate of Blanche, in consequence of the execution of the assignment by him before-mentioned. Coulter's representatives, therefore, have not been called upon, nor have they had an opportunity of contesting the right of the complainants to a decree against his estate. Nor have they been put on their guard by any intimation or allegation in the bill to dispute the grounds on which two of their co-defendants have placed the propriety of such a decree. If the United States had sought by their bill a decree against the estate of Coulter, on any other ground than as one of the trustees in the deed of assignment, a demurrer might have been interposed, their remedy on the judgment confessed by the executors, being clearly a remedy at law, unless for the purpose of discovery, they had thought proper to bring the executors into a court of chancery. It is not enough to put the executors of his will on their defence, that the suggestion has been made in a separate answer of one or more of the defendants.

Thus far the court has proceeded on the supposition, that there are two funds before it, out of which satisfaction may be had. But non constat that Coulter has left any estate at all;—nor, if he has, that any of it remains in the hands of the executors of his will; nor, that they are able, if they have inadvertently admitted assets by their plea in New Jersey, to pay so large a sum, or any part of it. It is believed that a court of chancery has in no case prevented a party, who had a clear and undoubted right, from proceeding against a particular fund to which another might also claim a title, although a subordinate one, without presenting to it another equally certain, if not as productive. In the present case, therefore, it would be unjust to delay the United States by a decree which might prove illusory, against an estate which might not produce a cent; when they ask for and have a right to receive payment out of a fund to which as far as it extends, the law has given them a title.

But if the reasoning of the court thus far be incorrect, there are other obstacles in the way of such a decree as is sought for by Mott and Williams. If Coulter has agreed, by being a co-trustee with Mott and Vanderbilt in the deed of assignment, that this property should first be applied to the payment of the debt of Mott and Williams; if this distribution be deranged by operation of law, and the decree of a court—it does not follow that he would be bound to find other property to satisfy Mott and Williams, or to indemnify them for what they might thus lose. Still less evident is it that the United States, or this court, are under an obligation to pursue any course, which should have for its object the securing to Mott and Williams indirectly the very benefit under this assignment which the law has taken from them—and the more especially as the instrument on its very face, avows the intention of creating a preference in their favour to the prejudice of the government, and against the policy and provision of all the laws which have been passed on this subject. Would not such a course of decision encourage rather than discountenance similar attempts? But there is another objection to such a decree, which if not conclusive of itself, is entirely satisfactory to my mind. It is admitted by all, that the debt due by Coulter is only as the surety of Blanche. Would not then a decree, operating in the first instance on the estate of the surety, if any such there were, and abstaining from the fund of the principal debtor, until the former were exhausted, be pregnant with injustice, and at variance with the whole course of chancery proceeding?

It is no answer to this difficulty to say, that the surety by his own act has justified this mode of proceeding. Such assent, may have been given on a belief that the property assigned would pay both debts, not meaning, however, to guaranty the payment of Mott and Williams, if the United States should think fit, notwithstanding this arrangement, to assert their priority. At any rate, before such conclusion be drawn, if it ever can be, the executors of Coulter's will should have an opportunity of controverting in a suit

with Mott and Williams, matters which they have not been called upon in this suit to take any notice of; and which, for any thing that yet appears, may defeat their right to any relief against him. But as it is intended to leave these parties to litigate either here or elsewhere, as they may be advised, it is not intended to express an opinion on any claim that Mott and Williams may set up against the estate of Coulter, to make good their loss by this suit, or on any defence which his executors may interpose to such claim. I only mean to say, that in the present suit, they are entitled to no relief against the estate of Coulter; and this being my view of the subject, I shall make the following decree.

This cause came on to be heard on the bill, answers, replication, and depositions, and was argued by the district attorney for the United States, by Hoffman and Wheaton for the defendants Mott and Williams, and by David B. Ogden, Griffen, and Haight for the defendants Casparus Prior and Josiah Hornblower, executors of the last will and testament of William Coulter, deceased. Whereupon this court doth order, adjudge, and decree, that the monies brought into court by the defendants, Uriah R. Scribner and John Hitchcock, be paid to the complainants, in part satisfaction of their demand against the defendant, Noel Blanche. And it is further ordered, adjudged, and decreed, that it be referred to William Ironside to ascertain and report what sum will remain due to the complainants, on the several bonds mentioned in their bill, as being executed by the defendant, Noel Blanche, by the said William Coulter, and by Jeremiah Vanderbilt, after crediting thereon, the sum which has been brought into court as aforesaid, and which is, by this decretal order, directed to be paid to the complainants. And it is further ordered, adjudged, and decreed, that the said William Ironside do also ascertain and report what property was conveyed by the deed of assignment in the pleadings mentioned, bearing date the 20th day of May, in the year of our Lord 1816, that is to say:—All the particulars, whether real or personal, of which the same consisted, and what part or parts thereof have been sold by the trustees therein named, or by either of them, and to whom, and for what prices, and what sums of money have been received by the said trustees, or by either of them, under and in virtue of the said deed of assignment, and how the same have been applied, and what part of the estate, real or personal, granted by the said deed, remains unsold, or in the hands of the said trustees, or either of them, and what is the value thereof. And also that the said William Ironside report, whether there were any and what encumbrances, and of what kind and nature, and to what extent, on any part of the real estate mentioned in the said deed of assignment; and whether any and what part of such estate has been sold in virtue thereof. And it is further ordered, that in taking the said account, the said William Ironside may examine on oath, the district attorney for the Southern district of New-York, or any of either of the defendants, as well as any other person or persons. And any further direction or decree is reserved until the coming in of the said report.

Case No. 15,827.

UNITED STATES v. MOULTON.

[5 Mason, 537.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1830.

CRIMINAL LAW — LARCENY ON HIGH SEAS — "PERSONAL GOODS" — MONEY.

Money and bank notes and coin are "personal goods," within the meaning of the sixteenth section of the crimes act of 1790, c. 36 [1 Story's Laws, 83; 1 Stat. 112, c. 9], respecting stealing and purloining on the high seas.

[Cited in U. S. v. Canoe, Case No. 14,718.]

[Cited in Com. v. Rand, 7 Metc. (Mass.) 476; State v. Williams, 19 Ala. 15.]

Indictment [against Henry Moulton], founded on the crimes act of 1790, c. 36, § 16 [1 Story's Laws, 83; 1 Stat. 112, c. 9]. It contained several counts The first alleged, that the defendant, on the high seas, &c., one piece of foreign gold coin, called a sovereign, of the value of $4.60; one other piece of foreign gold coin, called one eighth of a doubloon, of the value of $2.00; one piece of foreign silver coin, called a seven pence half penny, of the value of 12½ cents; twelve pieces of foreign silver coin, called Spanish dollars, each of the value of $1.00; one piece of silver coin of the United States, called a half dollar, of the value of 50 cents; twenty-four pieces of foreign silver coin, called quarters of a dollar, each the value of 25 cents; one other piece of foreign silver coin called a nine-pence, of the value of 12½ cents; one piece of silver coin of the United States, called a quarter of a dollar, and of the value of 25 cents; one bank bill of the New-Haven Bank, of the denomination of five dollars, and of the value of $5.00; one other bank bill of the State Bank of Boston, of the denomination of three dollars, and of the value of $3.00; one other bank bill of the bank of the United States, of the denomination of five dollars, and of the value of $5.00, of the personal goods of one John L. Bowman, did then and there feloniously take and carry away, with intent to steal and purloin, against the peace &c., and the form of the statute &c. The second count alleged the larceny to be of one piece of gold, of the value of &c.; one piece of silver, of the value &c.; enumerating the same coin as in the first count. There were two other counts, one of which was for a larceny of the foreign coin, and the other of the coin of the United States, in the first count mentioned.

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

The defendant pleaded guilty; and having no counsel, Dunlap, Dist. Atty., stated to the court, that there was a question of law open upon the record, how far the coin and bank bills, or either of them, were "personal goods," within the purview of the statute.

Dunlap argued as follows:

The indictment contains four counts. In the first, the defendant is charged with stealing sundry pieces of coin, and three bank bills; in the second, with stealing sundry pieces of gold and silver not alleging them to be coin or money, of a certain alleged value; in the third, with stealing certain pieces of foreign gold and silver coin; and in the fourth, with stealing certain coin of the United States. In the second, third, and fourth counts, the property described is admitted to be the same as the coin described in the first count. The question is, whether these bank bills and this coin, or either of them, are "personal goods" within the true meaning of the statute of 1790, c. 36, § 16 [1 Story's Laws, 83; 1 Stat. 112, c. 9], which prohibits and punishes the offence of taking and carrying away on the high seas, and in certain specified places under the sole and exclusive jurisdiction of the United States, with intent to steal or purloin, the "personal goods of another." It is admitted, that there are various authorities in the English books; decisions made in favorem vitæ, on account of the anxieties of judges administering the bloody code of Great Britain, to find loops to hang doubts on, and which tend to show that bank notes and money are not goods and chattels in penal statutes. Some of the authorities are to be found referred to and examined in the case of the U. S. v. Davis [Case No. 14,930], where it was holden, that a larceny of a promissory note, a chose in action, was not within this act of congress, because not the "personal goods of another." To the authorities of Jac. Law Dict. "Goods," "Chattels," Co. Litt. 118; Com. Dig. "Biens"; 2 East, P. C. 587–948; 2 Russ., Crimes, 1093, —may be added Fost. Crown Law, 79, where it is said, that money is not within the act of 10 & 11 Wm. III., against privately stealing goods in ware-houses, &c.; 2 Strange, 1133; 3 Chit. Cr. Law, 946; Dyer, 5; Leigh's & Grimes' Cases (decided in 1764) 1 Leach, 52, where it was holden, that dollars of Portugal money, and guineas, being money, were not "goods, wares, and merchandise," within the statute of 24 Geo. II. c. 45; Guy's Case (decided in 1782) 1 Leach, 241, where it was holden, that money is not within the meaning of the words "goods and chattels," within the statutes of 3 W. & M. c. 9, § 4, and 5 Anne, c. 31 § 5; and Davidson's Case, contained in a note to Guy's Case to the same effect, decided in 1766; Sadi's Case (decided in 1787) 1 Leach, 468, where it was holden, that bank notes are not "goods and chattels" within the before mentioned statutes of William & Mary and Anne; 6 Johns. 103, where it was holden that a larceny could not, at common law, be committed of a letter; and Perry v. Coates, 9 Mass. 537, where it was holden, that bank notes were not "goods, effects, or credits," within the statute of Massachusetts, respecting foreign attachments. These were the leading authorities and cases in favour of the defendant and in support of the doubt, whether money and bank notes were "personal goods" within a penal statute.

It would be contended on the part of the United States with great confidence, that money and bank notes are "personal goods." Some aid might be derived from recurring to the various definitions of larceny, and it would be found, that the most ancient and modern definitions were the most broad and sensible. In Bract. 3, c. 32, it is said, "quod furtum est secundum leges contractatio rei alienæ fraudulenta, cum animo furando," the word is "rei," the most extensive in its signification; and the only word in the definition which shows, that it must be even personal property is the barbarous word "contracetatio," a word, it is believed, unknown in the Latin language, implying that the thing stolen must be something which can be removed or taken and carried away. In the third Institute, 107, it is true, the definition is more strict, and the offence of larceny is described to be the "felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another." In 2 East, P. C. c. 16, § 2, the same expression, "mere personal goods," is preserved in the definition of larceny. But in a recent case, Hammon's Case, 2 Leach, 1089, a definition of larceny is given by Grose, J., more conformable to the ancient definition in Bracton,—"the felonious taking of the property of another." Under the word "rei" in Bracton, and the word "property" in the modern definition, it would seem, that money and bank notes were included. Money and bank notes are "personal goods." Things personal, according to 2 Bl. Comm. c. 24, are things moveable, or which may be carried about with and attendant upon a man's person. Certainly, money and bank notes are of this description of property, and indeed money is expressly mentioned in this description, by Blackstone. A chose in action is said to be a thing not in occupation or enjoyment, but merely "a bare right," to be recovered by an action; hence its name. But neither money, nor bank notes good and current, which are the representatives of specie, are choses in action. In form a bank note is a chose in action, and when dishonoured, it becomes the evidence of a right of action, a document for a debt; and the case in 9 Mass. 537, was of dishonoured bank notes.

The suspicion of the necessity of a law-suit to enforce the payment of a bank note would destroy its currency, which is its essence, and gives it its character of money. While therefore it circulates, it is as money, and Lord Mansfield lays it down decidedly, in the case of Miller v. Race, 1 Burrows, 457, 459, that bank notes are "not securities, nor docu-

ments for debts," but "money" and "cash." Money does not fall within the reason of the rule, why choses in action are not considered goods and chattels, so as to be the subject of larceny. The reason of that rule is said to be, because choses in action have no intrinsic value, and so far has this notion been carried, that the intrinsic value of the parchments on which they have been written, and even of the box containing them, has been disregarded. 2 Strange, 1188; 3 Inst. 109; 2 Russ. 1112; 2 East, P. C. 591; Hawkins, bk. 1, c. 25, § 33. But there is an intrinsic value in the metal, of which the money is made, without reference to the "form and pressure," which makes it coin. Ancient medals are not now money, yet they were once so (Priestley's Lectures on History, Lect. 6); and in an indictment, would now be described as goods and chattels. Another reason is assigned in Hawkins, in the passage already cited for the rule, that choses in action are not, at common law, the subject of larceny, as goods and chattels, because, being of no intrinsic value, and "of no manner of use to any but the owner, they are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner." Surely, gold and silver coin, and current bank notes, are not within the reason of this rule, and cessante ratione cessat ipsa lex.

Upon a close examination of the cases in which such a strict interpretation has been given to the word "goods," in favorem vitæ, by the English courts in construing penal statutes, it will be found, that it has been on account of the accompanying words, "wares and merchandise," which are not in the act of congress; hence it has been ruled, according to the maxim, "Noscitur ex sociis," that "goods" were to be understood as "ejusdem generis" with "wares and merchandise." Fost. Crown Law, 79. But there has been a later case than any of those cited which make in favour of the defendant, and in effect overruling them, Dean's Case, decided in 1795, and reported in 2 Leach, 693, where it was ruled, that a bank note was within the words "goods, wares, and merchandise," in the statute of 12 Anne, c. 7. In this court also, specie has been held to be "goods, wares, and merchandise," under the penal provisions of the revenue law of March 2, 1799 [1 Stat. 627], and liable to forfeiture when unladen without a regular entry, and a custom-house permit. In Holbrook's Case, 13 Johns. 90, and Richard's Case, 1 Mass. 337, it was held, that bank notes, in an indictment for larceny, might be described as goods and chattels. In the chancery court in England, at first view, apparently different opinions have been entertained upon the question, whether money or bonds ought to be considered as goods. In 1 P. Wms. 267, it was decided, that a devise of all one's goods passes a bond; and in 3 P. Wms. 112, it was decided, that under a devise to one of "household goods and other goods, plate, and stock, within doors and without," with the residue of the personal estate to another, the ready money and bonds did not pass. But the latter case does not contradict the former, for the decision was upon the ground of the intention of the testator, indicated by the residuary bequest, which would have been inoperative and ineffectual if the bonds and cash had passed by the general words of the first bequest.

In relation to the strict construction of penal statutes, often defeating the intention of the legislature, the favouring of astute quibbling exceptions has been lamented by the greatest judges as a blemish to the administration of justice, and less strict notions on this subject now prevail than anciently. Formerly, it was held under the statute of Edw. VI. c. 2, against stealing horses, that he, who stole but one horse, could not be convicted on that statute, 1 Bl. Comm. 89. But in Hassel's Case, 1 Leach, 1, it was held, that a person who stole but one bank note, was within the statutes 2 Geo. II. c. 25, § 3, and 13 Anne, c. 7, against stealing "bank notes." In the United States, where the laws are not written in blood, and where the people are governed by a mild and merciful system established by themselves, there has been less disposition in the courts than in England, to favour fanciful constructions of penal statutes enabling offenders to elude justice. In Fisher's Case, 17 Mass. 46, an unbroken series of adjudged cases giving a construction to the British statute of 7 Geo. II. c. 22, against the forgery of orders for the delivery of goods, of which the Massachusetts statute of 1804 (chapter 120, § 1), upon which the defendant was indicted, is almost a transcript, was entirely disregarded, and the court say, that the English cases cited for the defendant, though decidedly in point as to the construction of the English statute, admitted to be similar in its language to the Massachusetts statute, were "in favour of life," and sanctioned "a stricter construction" than they thought it necessary to give to the statute of Massachusetts, by which "the life of the offender is not put in jeopardy." To the same effect are the cases of People v. Johnson, 12 Johns. 292, and State v. Holly, 2 Bay, 262. In the celebrated work of that distinguished American jurist, Edward Livingston, the penal code prepared for the state of Louisiana, the rule of the English courts of favourable and unfavourable construction of statutes according to the civil or criminal character of the cause, is abolished, and "all penal laws are to be construed according to the plain import of the words taken in their usual sense." Pen. Code La. bk. 1, c. 1. In the supreme court of the United States, as well as in this court, it has been declared, that though penal laws are to be construed strictly, they are not to be construed so as to defeat the obvious intention of the legislature. [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76–94; The Industry [Case No. 7,028].

It is therefore contended, that the defendant's case is within the statute upon which he is indicted, and that the money, as money, and bank bills, are "personal goods," and that at all events, the defendant may be indicted and convicted for stealing the gold and silver money, described in the second count not as coin, but simply as pieces of gold and silver metal, on account of the intrinsic value, for in this count the property is described with all the accuracy the law requires, by number, species, and value. 3 Maule & S. 539, 547, 548.

In conclusion, it may be remarked, that in the latter part of the section, upon which the defendant is indicted, the word "property," which is broad enough to include money and bank notes, is used as of the same force and meaning, as the expression, "personal goods," in the first part of that section.

STORY, Circuit Justice. The 16th section of the crimes act of 1790, c. 36 [1 Story's Laws, 83; 1 Stat. 112], provides, "that if any person &c., upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another, the person &c. shall, on conviction, be fined not exceeding the fourfold value of the property so stolen," &c. The question is, whether foreign coin, and domestic coin, and bank bills, or any of them, are "personal goods" within the intent of the statute. In the strictest sense of the common law, "personal goods" are moveables belonging to, and the property of, some person, which have an intrinsic value. And even in this, the strictest sense, there cannot be any legal doubt, that the foreign and domestic coins, enumerated in the indictment, are "personal goods," for they have an intrinsic value. In a more large and liberal sense, the term "goods" may embrace moveables not having any intrinsic value, such as choses in action and monied securities, notes, bonds, and other debts, and evidences of debts. Thus, a bequest by a party of all his goods and chattels, without any other restrictive or explanatory words, would carry choses in action, bonds, &c., as well as money and other valuable moveables. And this upon the plain import of the words, as expressive of the intention of the testator. Anon. 1 P. Wms. 267. But in construing penal statutes, courts of law have often, in favour of the citizen, interpreted the word "goods" in its strictest sense; and, indeed, in capital felonies, have sometimes, in favour of life, adopted a far more limited meaning, savouring too often of unseemly nicety, if not of extravagant refinement.

The words of the present enactment approach very near to the definition of larceny at the common law. The usual definition of that offence is, the felonious and fraudulent taking and carrying away by any person of the mere personal goods of another (4 Bl. Comm. 229; 3 Inst. 107; 2 East, P. C. 553; 2 Russ. Crimes, 1032); and according to Bracton (liber 3, c. 32), "furtum est secundum leges contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit," answering very nearly to the description given by a late learned judge, that it is the felonious taking of the property of another, without his consent and against his will, with intent to convert it to the use of the taker. Hammon's Case, 2 Leach, 1089; 2 Russ. Crimes, 1032, 1033; 2 East, P. C. 553; Curwood's Hawk. bk. 1, c. 19, and note, Id. In the above definition, "personal goods" has always been construed to mean such moveables only, as have an intrinsic value; and therefore as not comprehending mere choses in action. The common law did not deem the latter the subject of larceny, because they were not of any intrinsic value, and did not import any property in possession of the person, from whom they are taken. 4 Bl. Comm. 234; 2 Russ. Crimes, 1112; 2 East, P. C. 597; Anon., Dyer 5; Rex v. Morris, 2 Leach, 525; 3 Inst. 107, 109; Co. Litt. 118b; Calye's Case, 8 Coke, 33a. It was upon this ground that this court thought itself constrained to hold, in the case of U. S. v. Davis [Case No. 14,930], that mere choses in action (such as a private promissory note for money,) were not personal goods within the purview of the act of 1790. It was presumed, that as the legislature made use of language importing, almost in the very words of the common law, a definition of larceny, such "personal goods" only, as might be deemed property in possession at the common law, were within the contemplation of the act. But to carry the exception farther, and exclude money and coin of foreign or domestic coinage, which are in the strictest sense "personal goods," having an intrinsic value, would, in our judgment, be to indulge a latitude of construction not properly belonging to judicial tribunals. The natural sense of the terms of the act ought to be adopted, unless the context affords clear proof of some more restrictive application of them. Very little light can be gathered from the decisions of the English courts, upon the construction of their own statutes, to assist us in this part of the inquiry. In the first place, as has been already intimated, courts of law, in cases of capital felonies, have been very astute, perhaps unjustifiably so, to escape from the literal meaning of the words, and to create conjectural exceptions. Such a proceeding, if it may be properly allowed in cases affecting life, is wholly inapplicable to cases of mere misdemeanors, and to other cases not capital. There is much masculine sense in the distinction taken on this subject by the court, in the case of the Com. v. Fisher, 17 Mass. 46. In the next place, there is not a single decision in the English books to our knowledge, which, in point of authority, ought to govern in the construction of the present act; for, in no English statute are the objects or the language substantially the same with ours. There are other accompanying words, or other clauses in the context, explan-

atory of the legislative intent, which might well authorize, if they did not absolutely require, the court to adopt the narrower construction, in favorem vitæ. It will be sufficient to cite a few of the more prominent cases in order to establish this position. In Rex v. Leigh, 1 Leach, 52, it was held by the court, that stealing money was not a capital larceny within the statute of 24 Geo. II. c. 45. The words of that statute are, "all and every person &c., who shall feloniously steal any goods, wares, or merchandises, of the value of 40 shillings, in any ship, barge, &c. upon any navigable river, or in any port, &c. or upon any wharf or quay, adjacent to such river or port." The court thought, that the construction ought to be confined to such goods and merchandises as are usually lodged in ships, or on wharfs and quays. Reliance was also placed upon the accompanying words, "wares and merchandises," (noscitur a sociis,) and upon the clause as to wharfs and quays; and very properly, for it was difficult to presume, that the legislature had a different intent, as to goods in ships, and on wharfs; and money is not usually lodged on wharfs. Fost. Crown Law, 79; 2 East, P. C. 647.

In the act of 1790, there are no such accompanying words; "personal goods" stand alone in the text, without any qualifying clause. In Rex v. Guy, 1 Leach, 241, which was an indictment for receiving two guineas, which were stolen, it was held, that under the statutes of 3 Woodb. & M. c. 9, § 4, and 5 Anne, c. 31, § 5, there cannot be an accessory after the fact for receiving money. The statute of W. & M., c. 9, provides, that "if any person &c. shall buy or receive any goods or chattels, that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, he &c. shall be taken and deemed an accessory &c. to such felony, after the fact." The statute of 5 Anne, c. 31, provides, that "if any person &c. shall receive or buy any goods or chattels, that shall be feloniously taken or stolen &c.," in the same general terms, as that of W. & M. 2 East, P. C. 743, 744. The judges, in the construction of these statutes, seem uniformly to have held, that the words "goods and chattels" mean such goods and chattels, whereof larceny could be committed at the common law, upon the plain ground, that the legislature did not intend to create any accessorial offence, except in cases where there was a principal offence already committed. It is certain, that guineas are "goods and chattels," in the common law sense of the terms, and as such, subjects of larceny; and it is somewhat difficult, therefore, to account for the decision in Rex v. Guy, upon the principle above stated. Mr. East supposes the decision to have proceeded upon the ground, that the statutes extended only to the receipt of such kind of goods and chattels, the property in which, being generally, and in its own nature, capable of being ascertained by outward marks and circumstances, made it more difficult for the thief to dispose of them without the aid of a receiver, by whom he was encouraged and protected, whereas money has no such distinguishing marks. 2 East, P. C. 748; 2 Russ. Crimes, 1307, 1308. This ground seems wholly unsatisfactory; for if larceny might be of money at the common law, which cannot be doubted (Hawk. P. C. bk. 1, c. 32, § 35; 2 Bl. Comm. 387), there seems no just reason, why the accessorial offence should not, if the words of the acts did not convey any restriction, be held co-extensive with the principal offence. The ground, however, such as it is, is inapplicable to the principal offence, and is limited to receivers. In Rex v. Morris, 2 Leach, 525, it was decided, that the receiver of bank notes, knowing them to be stolen, was not punishable as an accessory under the statute of 3 W. & M. c. 9, and 5 Anne, c. 31, notwithstanding the express declaration in the statute of 2 Geo. II. c. 25 (2 East, P. C. 598), that if any person shall steal any bank notes, &c. "he shall be deemed guilty of felony, of the same nature and in the same degree, &c. as if the offender had stolen or taken any other goods of like value, with the money due, &c." upon the ground, that the latter statute did not reach receivers of bank notes as accessories under the former statutes, but applied only to the principal offender in the larceny. But this case has been since shaken by the decision in Rex v. Dean, 2 Leach, 693. See 2 East, P. C. 646, 749; 2 Russ. Crimes, 883, and note; Id. 1307, 1308. These are the most material cases, and they fall far short of establishing the proposition, that "personal goods" in the act of 1790, do not include coin, or money. In our judgment, it would be an unjustifiable departure from the language of the legislature to hold, that coin and money are not included within the prohibition. They are equally within the terms and the reason of the enactment.

In respect to the bank bills included in the indictment, there is much more difficulty. I agree to the doctrine of Lord Mansfield, in Miller v. Race, 1 Burrows, 457, that bank notes are usually treated in the common business of life as money and cash, and not as goods and chattels, or securities for money. But that case turned upon very different considerations from those, which govern in the construction of penal statutes. There the only point was, whether bank notes, being used as currency, the owner could, in case they were stolen, recover them against a subsequent bona fide holder. The court adjudged, that he could not, upon sound principles of public policy. Now, there is strong reason to believe, that bank notes were not, before the statute of 2 Geo. II. c. 25, held to be "goods or chattels," within the meaning of the statutes of W. & M., and Anne, above referred to. This is not decisive; but it affords a presumption, that in the opinion of parliament, it was necessary to punish the larceny of bank notes by a spe-

cific description, eo nomine. Technically speaking, bank bills are merely promissory notes for the payment of money; and they may be declared on as such. Young v. Adams, 6 Mass. 182; Perry v. Coates, 9 Mass. 537. They are not in all cases treated as money, though in most instances, for the purposes of civil justice, they are so. In Com. v. Carey, 2 Pick. 47, the court declared, that a bank note might, in an indictment for theft, be described as a promissory note of the bank; and in this respect it was not distinguished from other private choses in action. In Spangler v. Com., 3 Bin. 533, the court seem to have treated bank notes as no otherwise the subjects of larceny than as statutable enactments had made them so. And Yeates, J., on that occasion said, that bank and promissory notes are mere choses in action. But in Com. v. Boyer, 1 Bin. 201, upon an indictment for larceny of bank notes, the court thought, that a description of them as the "goods and chattels" of the true owner was sufficient. The same doctrine is implied in Com. v. Richards, 1 Mass. 337. In People v. Holbrook, 13 Johns. 90, the point was directly decided; and it was held, that in such a case, "goods and chattels" implied property or ownership. But in each of these cases there was a state statute, which made the larceny of bank notes a substantive offence; and in two of them, the state statute was to the same effect as that of 2 Geo. II. c. 25; and it is not impossible, that these considerations had an influence upon the decision.

The doctrine in New York has gone farther; and bank notes have been held liable to be taken in execution upon a fieri facias, as money. Handy v. Dobbin, 12 Johns. 220. This decision would be entitled to very great weight, if it stood wholly uncontradicted. But in Massachusetts, an opposite doctrine has been maintained. Perry v. Coates, 9 Mass. 537. Still, there is this material difference between bank notes and other promissory notes, that the former in the common transactions of life are treated as money, and circulate as currency, and therefore have, in themselves, an intrinsic value in the common estimation of mankind. They are at least as much within the policy of the act of 1790 (chapter 30), and as important to be guarded against larceny as any personal property whatsoever. Under such circumstances, the court has been anxious to ascertain, whether bank bills have been in any cases of a penal nature treated differently from any other choses in action; and especially, whether in cases of statutable larcenies, they have been distinguished from other negotiable notes. In Rex v. Dean, 2 Leach, 693, the indictment was for stealing a bank note of the value of $20, the property of J. M., in his dwelling house. The statute of 12 Anne, c. 7, § 1, makes stealing "any money, goods, chattels, wares or merchandises of the value of 40 shillings," a capital offence. It was objected, that bank notes were not "money, goods, chattels, wares or merchandises," within the purview of the statute. But the judges were unanimously of opinion, that they were; for that the statute was intended to protect every species of property. But the statute of 2 Geo. II. c. 25 (2 East, P. C. 597, 598), already referred to, doubtless had great influence in the decision, since it put the stealing of bank notes upon the same footing as to nature, degree, and punishment, as the stealing of any other goods; though this ground does not expressly appear in the opinion of the judges. In Rex v. Clarke, 2 Leach (4th Ed.) 1036, the indictment was for larceny of certain bankers' notes, and for certain pieces of paper, of the value, &c. each stamped, and re-issuable, as bankers' notes, payable to the bearer. It appeared in evidence, that the notes had been taken up by the bankers' agents, and were stolen from a parcel in their transit to the bankers for the purpose of being re-issued. The objection was, that the notes, having been paid, were of no value, and consequently, not the subject of larceny. The prisoner was convicted; and the judges held, that he was rightly convicted. 2 East, P. C. 646, 749; 2 Russ. Crimes, 984, 1307, 1308; Rex v. Hammon, 2 Leach, C. C. (4th Ed.) 1089. Mr. Justice Grose, in delivering their opinion, said: "The question submitted in this case to the consideration of the judges was, whether the paper and stamps are, under the circumstances of the case, the subjects of larceny at the common law; or in other terms, whether they are the property of, and of any value to, J. J. and A. L., (the bankers,) who were unquestionably the owners. These gentlemen have paid for the paper, the printing, and the stamps of these papers, which once existed both in character and value as promissory notes. Their character and value as promissory notes were certainly extinct at the time they were stolen. But even in this state, they bore about them a capability of being legally restored to their former character and pristine value. It was a capability, in which these owners had a special interest and property. The act of re-issuing them would have immediately manifested their value, as papers, &c. In what sense or meaning, therefore, can it be said, that these stamped papers were not the valuable property of their owners? They were indeed only of value to those owners; but it is enough, that they were of value to them. Their value to the rest of the world is immaterial. The judges are, therefore, of opinion, that to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors." See, also, Id., 2 Russ. Crimes (2d Eng. Ed. 1828) 147, and note. It cannot escape observation, how strongly every word of this opinion applies to the case of bank notes, which are outstanding; and it is to be con-

sidered, that the question on the counts, to which alone the opinion applies, was, as to the larceny at the common law. If bankers' notes payable to bearer were of the value of the stamps, and paper, and printing, because re-issuable, and therefore to be deemed valuable property, the subject of larceny, a fortiori, bank notes, for which the holder must be presumed to have given value, and which have in his hands a present value as currency, must be deemed such. There is, indeed, such a persuasive good sense in the opinion, that one feels very great difficulty in escaping from its conclusive effect in cases of the larceny of other mere choses in action. Rex v. Ransom, 2 Leach, 1090, is not so strong in its application. But Rex v. Vyse, 1 Moody, Crown Cas. 218, not only affirmed the doctrine in Rex v. Clarke, but proceeded a step farther. It was there held, that bankers' notes, so paid and re-issuable, were not only subjects of larceny at common law, but might be described in the indictment, (as in that case they in fact were described,) as "goods and chattels" of the owners.

These cases distinctly show, that in modern times, courts of justice in penal, and even in capital cases, are disposed to look at the real nature of the things stolen, and though they are in form choses in action, yet, if possessing a real value in possession, to hold them subjects of larceny. The choses in action, which were held originally not to be the subjects of larceny at the common law, were those, which had no intrinsic value, (bank notes were not then in existence,) and did not import any property in possession of the person. Can it be truly said, that bank notes, payable to bearer, and passing as currency, have no present value in possession? The present indictment has described them as of the value, which they purport on their face to promise to pay. They pass as money; they are received as money. In courts of justice, they are treated as money. On a declaration for money had and received, proof, that the defendant received bank notes for the use of the plaintiff, would be sufficient to maintain the action. They have a present value in possession, not as a mere promise to pay money, but as money of an immediate, positive, exchangeable value. It seems to us, therefore, that it would be an over refinement to hold, that they are not "personal goods" within the sense of the act of 1790. They are far better entitled to the appellation of "goods and chattels," than the paid bankers' notes in Clarke's and Vyse's Cases above mentioned.

Besides, the bank notes of the bank of the United States, by the express provisions of the charter (of which, as a public act, we are bound judicially to take notice,) are receivable in payments to the United States; and they have, therefore, a present value, for such purposes, as cash. The same cannot be said of the other bank notes, stated in the indictment. But we are still entitled to consider them as of the present value of their respective denominations, as they are so alleged in the indictment.

If this were an indictment at common law, we might, as to the latter bank notes, have some hesitation, though the Cases of Clarke and Vyse would certainly go far to remove any technical scruples. One reason, why, at the common law, bonds and other choses in action were not deemed subjects of larceny, was, that they could not be used as property in possession by the thief, but were suable only by the owner. But bank notes, payable to bearer, are not now liable to such a consideration; for they are of present worth and value to the holder, and pass by delivery. We are now construing a public statute; and if we can perceive, that the words of the statute, in common and legal understanding, are large enough to comprehend bank notes, and that the policy of the statute applies to them with at least the same force, that it does to "personal goods" in the most restrictive sense of the terms, we are bound to give that interpretation, which carries the words to the extent of the mischief. We may say, as the judges did in Dean's Case, 2 Leach, 693, "that the statute was intended to protect every species of property," which may be deemed valuable property in possession. In the case of Rex v. Robinson, Id. 869, the judges held, that bank notes were a valuable thing under the statute of 9 Geo. I. c. 22, respecting threatening letters, which uses the words "money, venison, or other valuable thing." See, also, Rex v. Aslett, 2 Leach (4th Ed.) 958; 2 East, P. C. 1110; 2 Russ. Crimes, 1830, &c. But a private promissory note has been held not to be so. Rex v. Major, 2 Leach, 894; 2 East, P. C. 118. A distinction is here manifestly taken between choses in action, which are mere evidences of a debt, and those, which have a present value as currency. It can scarcely be doubted, that under the statute of 30 Geo. II. c. 24, respecting false pretenses, bank notes must have been deemed "money, goods, wares, or merchandises," although there is no case, now recollected, which turned on that point. See 2 East, P. C. 832.

Upon the whole, the court are of opinion, that the bank notes stated in the indictment, equally with the coin, are personal goods within the act of 1790, and therefore sentence must be passed upon the prisoner accordingly.

Case No. 15,828.

UNITED STATES v. MOUNTJOY.

[See Case No. 15,678.]

Case No. 15,829.

UNITED STATES v. MOUNTJOY.

[4 Int. Rev. Rec. 9.]

District Court, D. New Jersey. July 9, 1866.

INTERNAL REVENUE—FRAUDULENT RETURNS—USE OF UNAUTHORIZED FORM.

In the United States district court, Monday, July 9, the trial of George Mountjoy, of the firm of Mountjoy & McGinniss, of Rahway, for making fraudulent returns to the United States assessor, was resumed. [For prior proceeding, see Case No. 15,678.]

THE COURT called D.P. Southworth, United States assessor for the Fourth district of Pennsylvania, who had been charged with the investigation of the frauds charged in this case. It appearing by his evidence that the alleged return was made on an old form, such as was required under the law of 1862 [12 Stat. 432], and that the form prescribed by the commissioner of internal revenue, under the act of 1864 [13 Stat. 227], had never been used by the assistant assessor at Rahway, and the witness testifying that the return in evidence would not have been accepted by him, and was in no sense in compliance with the act of 1864, THE COURT interrupted the further progress of the case.

FIELD, District Judge, said that this was a difficulty that had occurred to his mind from the first, and now it appearing as a fact that no return had been made, he could not charge the jury that such a return had actually been made, and that it was for them to decide whether it was false and fraudulent or not. This difficulty arises from the fact that the assistant assessor, A. S. Bonney, of Rahway, N. J., to cover up his own deficiencies, and to subserve his own private ends, it appearing that he was deeply interested in the return, had arranged his monthly account, at least, in a way to suit himself. THE COURT felt it was only proper to state this to the district attorney, leaving it for him to make such statement as he might deem proper under the circumstances.

Mr. Keasbey, United States district attorney, said that this was a difficulty he had been called upon to consider at the outset of the case, and he had drawn the indictments with reference to it. He could not control the facts of the case, and if the court considered the objection an insuperable one, he must, of course, submit. He had tried to do his duty, and in future, as in this case, where evidence of fraud was presented to the grand jury, he should endeavor to secure a conviction.

THE COURT then directed the jury to return a verdict of "Not guilty," and under the direction of the court, the verdict was returned.

A. Q. Keasbey, U. S. Dist. Atty.

Charles T. Bonsall, David Sellers, and E. Mercee Shreve, for defence.

Case No. 15,830.

UNITED STATES v. MOXLEY.

[2 Cranch, C. C. 64.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

WITNESS—COMPETENCY—INTEREST—INDICTMENT FOR USURY.

Upon an indictment for taking usury, the borrower is a competent witness for the prosecution, if he has paid the money, and be not the informer.

[Cited in U. S. v. Anderson, Case No. 14,452.]

Indictment for taking usury from William Calder.

The attorney of the United States offered William Calder as a witness.

Mr. Morsell and Mr. Key, for defendant, objected that he was interested. First, because he is the informer, and entitled to half the penalty, under the Maryland law of September, 1704, c. 69, § 3; and secondly, because he is offered to invalidate his own contract. If he has paid the money he may recover it back; if he has not paid it he is interested to set aside the contract. 1 McNal. Ev. 105; Rex v. Whiting, 1 Salk. 283, 1 Ld. Raym. 396.

THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion that the witness was competent; having declared upon the voir dire, that he was not interested; and had paid the money, and it being admitted that he was not a voluntary informer.

Case No. 15,831.

UNITED STATES v. MUHLENBRINK.

[1 Woods, 569.] [2]

Circuit Court, N. D. Georgia. Sept. Term, 1873.

LIMITATION OF ACTIONS—PRESIDENT'S PROCLAMATION—END OF WAR—FEDERAL COURTS IN GEORGIA.

1. The suspension of the statute of limitations provided for by the act of congress, approved June 11, 1864 (13 Stat. 123), did not continue in Georgia after the proclamation of the president, of April 2, 1866 [14 Stat. 811].

[Cited in Stoughton v. Hill, Case No. 13,501; Amy v. City of Watertown, 22 Fed. 420.]

2. The fact that no term of the United States court for the Northern district of Georgia was held until September 10, 1866, and no clerk of that court appointed until that date, did not continue the suspension of the statute until that time.

This cause was submitted upon the motion of defendant, Hans Muhlenbrink, for a new trial.

Geo. S. Thomas, Asst. U. S. Atty.

L. E. Bleckley and L. J. Gartrell, for defendant.

---

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

[2] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

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

WOODS, Circuit Judge. This action was brought on the 19th of January, 1867, on the official bond of William T. Wilson, as postmaster of Atlanta, on which defendant Muhlenbrink was one of the sureties. Wilson died before suit brought, and the other surety was never served with process; Muhlenbrink was therefore sole defendant. He pleaded that the default of Wilson occurred on the 31st of December, 1859, and that the suit was not brought within two years after the cause of action accrued. The plaintiff replied that said default did not occur more than two years before the commencement of the action, after deducting the time during which the state of Georgia was in rebellion, and during which the ordinary course of judicial proceedings in the state was interrupted in consequence of the Rebellion, and that the Rebellion and interruption of judicial proceedings continued from the 19th of January, 1861, to the 10th day of September, 1866. To this replication the defendant rejoined that after the default there was an interval of more than two years before the commencement of the action, after allowing all proper deductions of time for the causes mentioned in the replication. Upon this the plaintiff took issue, the parties went to trial and the jury returned a verdict for plaintiff in the sum of $5,198 principal, and $50 interest. The court charged the jury that in computing the time during which the statute of limitations had run against plaintiff's cause of action, the period between the 19th of April, 1861, and the 10th of September, 1866, should be excluded. Defendant Muhlenbrink claims that this charge was erroneous, and on that sole ground moves for a new trial.

The question presented for decision is this: How long was the running of the statute of limitations obstructed between the 31st day of December, 1859, the date of the default of Wilson, and the 19th day of January, 1867, the date of the commencement of the action by reason of the matters alleged in the plaintiff's replication? In the state of Georgia, the late war of Rebellion began on the 19th of April, 1861, the date of the proclamation of blockade in that and six other states (12 Stat. 1258), and ended by the proclamation declaring the war closed on the 2d of April, 1866 (14 Stat. 811). The Protector, 12 Wall. [79 U. S.] 700. If the running of the statute of limitations was suspended only during the period of actual war, as that period was defined in the case of The Protector, namely, between the 19th of April, 1861, and the 2d of April, 1866, then the bar intervened before the bringing of this action, two years, one month and six days having elapsed, exclusive of the period aforesaid, after the default and before the bringing of the suit.

But it is claimed in behalf of plaintiff, that all the time, from the beginning of the war on April 19, 1861, to the commencement of the first term, after the war, of the United States court for the Northern district of Georgia, on September 10, 1866, should be included in the period during which the statute was suspended. To support this claim, reliance is placed on the act of congress approved June 11, 1864 (13 Stat. 123). This act declares that, "whenever, during the existence of the present Rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States or the interruption of the ordinary course of judicial proceeding, cannot be served with process for the commencement of said action or the arrest of such person; or whenever, after such action shall have accrued, such person cannot, by reason of such resistance to the execution of the laws of the United States, or such interruption of the ordinary course of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be so beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of the action." 13 Stat. 123.

The claim is put forward that, because no term of the federal court was held in Northern Georgia until September 10, 1866, therefore there was such an interruption of the ordinary course of judicial proceedings as prevented the service of process. As a matter of fact, were the United States courts closed in Georgia until the 10th of September, 1866, as a consequence of the Rebellion? We think that public history, the proclamations of the president, and the conceded facts in this case, show that such was not the case. On the 17th day of June, 1865, President Johnson issued his proclamation appointing James Johnson provisional governor of Georgia, and directing that the district judge for the judicial district in which Georgia is included, proceed to hold courts within said state, in accordance with the provisions of the act of congress, and that the attorney general instruct the proper officers to libel and bring to judgment, confiscation and sale property subject to confiscation, and enforce the administration of justice within said state in all matters within the cognizance and jurisdiction of the federal courts. 13 Stat. 764. On the 2d of April, 1866, the president issued his proclamation declaring that "no organized armed resistance to the authority of the United States existed in the state of Georgia, and that the laws could be sustained and enforced therein by the proper civil authorities, and that the people of said state were well and loyally disposed." 14 Stat. 812.

The conceded facts are these: The last term of the United States court, for the Northern district of Georgia, held before the passage of the ordinance of secession, began in September, 1860, and no other term of the court was held until the 10th day of September,

1866. John Erskine was commissioned United States judge, for the districts of Georgia, on July 10, 1865, and soon after qualified and entered upon the discharge of his duties. A marshal was appointed during the same year, for the two districts into which the state was divided; but no clerk was appointed for the Northern district until the 10th day of September, 1866. The first term of a United States court actually held in Georgia after the Rebellion was held in the Southern district, at Savannah, in May, 1866, and on the 16th of that month the judge, sitting in chambers at Savannah, made an order in a cause pending in the Northern district. The state courts were opened for the administration of justice in the fall of 1865, and thenceforward continued in the uninterrupted discharge of their duties. The failure of the judge to appoint a clerk is not one of the causes named in the act of congress, the existence of which suspended the running of the statute. It was the impossibility of serving process, arising from resistance to the execution of the laws, or the interruption of the ordinary course of judicial proceedings during the existing Rebellion, that suspended the running of the limitation, and that alone.

Lord Coke in his First Institute (volume 3, p. 40) says: "And therefore when the courts of justice be open, and the judges and ministers may, by law, protect men from wrong and violence, and distribute justice to all, it is said to be a time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be as it were, shut up, et silent leges inter arma, then it is said to be time of war. And the trial hereof is by the records and judges of the courts of justice, for by this it will appear whether justice had her equal course of proceeding at that time or no, and this shall not be tried by a jury." Tested by this passage, it seems to us that the courts of the United States were open in Northern Georgia at least as early as April, 1866. The records of the court, the proclamations of the president and the public history, of which this court will take judicial notice, all concur in establishing the fact that, at and before that time the Rebellion was subdued, the war over, peace returned, resistance to the laws at an end, and the ordinary course of judicial proceedings reestablished. If the suit of the plaintiff could not then have been brought, it must have been for some other reason than those named in the act of congress. When peace and order are restored, and judicial officers appointed, the suspension of the statute of limitations does not continue until it shall be convenient for them to act. Peace opens the courts, and a reasonable time after the end of actual hostilities having passed for the courts to resume their functions, the suspension of the statute of limitations must cease. As this action was not commenced within two years after the default, making all proper allowances for the suspension of the statute of limitations, we think the action was barred, and that a new trial ought to be granted.

Case No. 15,832.

UNITED STATES v. MULLANY.

[1 Cranch, C. C. 517.] [1]

Circuit Court, District of Columbia. Dec. Term, 1808.

WITNESSES—COMPETENCY — FREE-BORN NEGROES.

Free-born negroes, not subject to any term of servitude by law, are competent witnesses in all cases. Color alone is no objection to a witness.

[Followed in U. S. v. Douglas, Case No. 14,988.]

Indictment [against Michael Mullany] for assault and battery. The defendant was a white man.

CRANCH, Chief Judge. Several free-born negroes and mulattoes are offered as witnesses to support the prosecution. The counsel for the traverser have objected, and contend that they are not competent witnesses, being disqualified by the act of assembly of Maryland, (1717, c. 13,) by which it is enacted "that no negro or mulatto slave, free negro, or mulatto born of a white woman, during his time of servitude by law, or any Indian slave, or free Indian, native of this or the neighboring provinces, be admitted and received as good and valid evidence in law, in any matter or thing whatsoever, depending before any court of record, wherein any Christian white person is concerned." It is contended that the words "during his time of servitude by law," are applicable only to the "mulatto born of a white woman," and not to the "free negro." So that a free negro, whether under an obligation of servitude or not, is wholly incapacitated to become a witness in any case wherein a Christian white person is concerned. On the other side it is contended that the free negro, at all times except "during his time of servitude by law," is a competent witness in such a case. In order to support the traverser's construction of the statute, much reliance is placed on the word "his." It is said that if the legislature meant to apply the expression respecting servitude by law, to the free negro as well as to the mulatto, they would have said "during their time of servitude by law." The word "his," it is said, in grammatical construction, must apply to the last person antecedent, namely, the mulatto, and cannot comprehend both the mulatto and the free negro. This construction, it is also said, derives support from the third section of the act, in which it

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

is provided that "where other sufficient evidence is wanting against any negro or mulatto slaves, free negro, or mulatto born of a white woman, during their servitude by law, the testimony of any negro or mulatto slave, free negro, mulatto born of a white woman, or Indian," &c., "may be received as evidence, provided it do not extend to the depriving them, or any of them, of life or member." It is said that the legislature having used the pronoun in the plural number in the third section, and in the singular in the second, it is evident, they meant in the one case to refer only to the mulatto, and in the other to both mulatto and free negro. It was also said to be an absurdity in terms, to speak of the time of servitude of a free negro. That the expression, "during his time of servitude by law," was peculiarly applicable to the mulatto born of a white woman, because such mulatto, by the act of 1715, c. 44, § 27, was declared to be a servant until the age of thirty-one years; but that the expression was not applicable to the free negro, because there was no servitude by law imposed upon him.

The argument drawn from the circumstance that the pronoun personal is used in the singular number, is not considered of much weight, because the words "free negro" and "mulatto," are joined by the conjunction disjunctive "or"; and in such case the idiom of the English language admits the use of the singular pronoun as applicable to each member of the sentence so joined. In such a sentence, the word "his" may have the same force and effect, as the word "their"; and it is evident that in this very act, the legislature have used the words indiscriminately to the same effect. If the words of a statute be doubtful, and if recourse be had to construction, the first inquiry is, what was the evil which the legislature intended to remedy? In the present case, we are not left to conjecture upon that point; for the legislature in the preamble to the statute have expressly declared the evil for which they contemplated a remedy. They say, "Whereas it may be of very dangerous consequence to admit and allow as evidences in law, in any of the courts of record," "any negro, or mulatto slave, or free negro, or mulatto born of a white woman, during their servitude, appointed by law, or any Indian," &c. The evil complained of, is not the admission of free negroes and mulattoes as witnesses generally, and in all circumstances, but only "during their servitude, appointed by law." Here the meaning of the legislature cannot be misunderstood; the words "their servitude" must mean the servitude of the free negro, as well as that of the mulatto; they cannot be confined to the case of the mulatto, without charging the legislature with the grossest grammatical blunder. It is evident that the legislature contemplated some case in which a free negro could be subject to servitude by law; and by turning to the act of 1715, c. 44, (the same act which declares the mulatto born of a white woman to be subject to servitude,) we find a number of cases in which a free negro may be subjected to servitude by law. Thus in section 4, a free negro harboring a servant, or slave, forfeits one thousand pounds of tobacco, and if unable to pay, he is to make satisfaction by servitude. By section 6, a free person, taken up on suspicion of being a runaway, and unable to pay the reward of two hundred pounds of tobacco, shall make satisfaction by servitude. By section 7, a runaway, if not a slave, is to reimburse the county by servitude. By section 19, a runaway shall satisfy the reward by service, when free. By section 20, if such person be free and unable to pay the reward, he may be committed to prison until he give security, or make satisfaction by servitude or otherwise. By section 27, a free negro, the begetter of a child on a white woman, shall become a servant for seven years. By section 30, a free man, the father of a bastard begotten of a female servant, shall satisfy the damage by servitude or otherwise. So by the act of 1715, c. 26, § 2. A free person convicted of stealing, shall pay fourfold, and if unable to pay, shall satisfy by servitude. And by section 7, the fees of criminals may be paid by servitude.

These are some of the cases in which by the laws prior to 1717, a free negro might be subjected to temporary servitude by law. They are enough to show that the expression, "during his time of servitude by law," might with as much propriety be applied to the free negro as to the mulatto, and that his case was within the same reason. Why should the legislature limit the disability of the mulatto to his time of servitude, and not that of the free negro also? or why permit a free-born mulatto to be a witness, and reject the free-born negro? We can see no reason for such a whimsical distinction, and the legislature cannot be presumed to have had an intention to make it, unless such intention be very clearly expressed. The legislature, when in the third section they say "free negro, or mulatto born of a white woman, during their servitude by law," evidently mean the same thing as they had before expressed by the same words in the preamble, and by the words "free negro, or mulatto born of a white woman, during his time of servitude by law," in the second section. It was argued that by the third section, the legislature meant to exclude free negroes, as witnesses even on the trial of a slave, in cases which might affect his life or member, and a fortiori, on the trial of a Christian white person. By this section, slaves and free negroes and mulattoes, under all circumstances, that is, as well during their time of servitude by law, as otherwise, are admissible witnesses on the trial of a slave, in a case not affecting life or member. But how can it follow from thence, that on the trial of a slave in a case affecting life or member, a free negro or mulatto, not under servitude, would be excluded? Before the act of 1717, there was no law which excluded free ne-

groes from being witnesses; that act only imposes a disability upon them during their servitude by law. It was the condition of servitude that the legislature justly supposed ought to render them incompetent witnesses; for the same reason that slaves are incompetent. It was probably supposed that while under the control of a master, they might by means of fear or threats of ill treatment, or actual ill treatment, be induced to conceal the truth, and that it was not safe to trust to their testimony. That reason could justify their exclusion only while their state of servitude continued. This construction of the act seems to have been adopted by the legislature in 1796 (chapter 67, § 5), when they declared that no manumitted slave should be entitled to give evidence against any white person; for if all free negroes were already excluded by law, such a provision respecting those who were free by manumission, was unnecessary.

For these reasons, I am clearly of opinion, that free-born negroes, not in a state of servitude by law, are competent witnesses in all cases, or rather that color alone does not disqualify a witness in any case. At the time of the argument, I supposed the question had been decided by this court. But upon a careful examination of my own notes, and those of the late chief judge, I do not find any such case. In the case of U. S. v. Barton [Case No. 14,533], (a free mulatto), in Washington, July term, 1803, two manumitted negroes were admitted as witnesses against him, on an indictment for stealing. In the case of U. S. v. Swann [Id. 16,425], (a free mulatto,) a summons for a slave to testify for the defendant, was refused by the court; the court being inclined to the opinion that the slave was not a competent witness. But in U. S. v. Shorter [Id. 16,284], (a free black), at December term, 1806, a slave was admitted as a witness for the traverser. These are all the cases respecting the admission of people of color as witnesses of which I can find any notes. But see the case of U. S. v. Fisher [Id. 15,101], at July term, 1805. Fisher, a white man, was indicted for beating his wife. Lucy Butler, a free-born black woman, was admitted by the court as a witness against him.

NOTE. The court was full when the question was argued, but when this opinion was delivered. Duckett, Circuit Judge, was absent, and Fitzhugh, Circuit Judge, having some doubt, it was agreed to hear a motion for a new trial, upon the ground of admitting improper evidence. The verdict being against the defendant, the question was further considered upon the motion for a new trial in this case, and in that of Davis v. Swann [unreported], at this term, when the other judges gave their full assent to the above opinion.

The following is written by Judge Fitzhugh, in his note-book, in page 84: After stating the opinion in this cause at length, as above "the court intimated that they would hear a motion for a new trial—on the argument of which A. B. D. attended, and the court were unanimously satisfied with the opinion expressed in this cause."

Case No. 15,833.

UNITED STATES v. MULVANEY.

[4 Parker, Cr. Cas. 164.]

Circuit Court, S. D. New York. Jan., 1859.

OFFENCES AGAINST POSTAL LAWS—OPENING LETTERS, ETC.—EVIDENCE—CONFESSIONS.

[1. Defendant was indicted for opening a letter, which had been in custody of a mail carrier, before delivery to the person to whom it was directed, with design to obstruct the correspondence of another, etc. The evidence was that the letter was directed to another person, in care of defendant, at defendant's house; that it was left there by a mail carrier, with defendant, without any artifice on his part to obtain possession of it; and that it was then opened and destroyed by him. *Held*, that this was insufficient to warrant a conviction under the statute.]

[2. A person cannot be convicted of this offence where the only evidence of the corpus delicti is the confessions of defendant that he opened and destroyed the letter.]

[This was an indictment against John Mulvaney for opening a letter addressed to another, which had been in custody of a mail carrier, etc.]

Before HALL, District Judge.

The defendant was brought to trial upon an indictment which was in the words and figures following:

"Southern District of New York, in the Second Circuit. At a stated term of the circuit court of the United States of America, for the Southern district of New York, in the Second circuit, begun and held at the city of New York, within and for the district and circuit aforesaid, on the last Monday of February, in the year of our Lord one thousand eight hundred and fifty-nine, and continued by adjournment to and including the third day of March in the same year.

"Southern District of New York, ss: The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present: That John Mulvaney, late of the city and county of New York, in the district and circuit aforesaid, laborer, heretofore, to wit: on the seventeenth day of January, in the year of our Lord, one thousand eight hundred and fifty-nine, at the city of New York, in the Southern district aforesaid, and within the jurisdiction of this court, did open a letter which had been in custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct the correspondence, to pry into another's business and secrets, against the peace of the United States and their dignity, and against the form of the statute of the said United States, in such case made and provided.

"Second Count. And the jurors aforesaid, on their oath aforesaid, do further present: That John Mulvaney, late of the city and county of New York, in the district and circuit aforesaid, laborer, heretofore, to wit: on the seventeenth day of January, in the year eighteen hundred and fifty-nine, at New York, in the district and circuit aforesaid, and with-

in the jurisdiction of this court, did destroy a certain letter, which had been in custody of a mail carrier, before it had been delivered to the person to whom it was directed, with a design to obstruct the correspondence, to pry into another's business and secrets, against the peace of the United States and their dignity, and against the form of the statute of the said United States, in such case made and provided.

"Theodore Sedgwick,
U. S. District Attorney."

The defendant pleaded not guilty. The government proved, that on or about the seventeenth day of January, 1859, a city mail carrier left with defendant at his place of business (82 Catharine street), a letter directed to "John Stewart, Care of John Mulvaney, 82 Catharine Street, New York City"; that defendant at first objected to receiving it, but took it, and said he would see that it was delivered to the person to whom it was directed. Stewart testified that the letter was never delivered to him. Several witnesses testified that defendant, upon being asked whether he had received the letter, at first denied it, but afterwards admitted that he had received the letter, opened and read it, and then burnt it.

Henry L. Clinton, for defendant, contended that, inasmuch as the letter was delivered by the mail carrier, at the place to which it was directed, defendant having resorted to no fraud or artifice to get possession of it, the letter had passed out of the jurisdiction of the United States. Mr. C. also contended that there must be proof of the corpus delicti aside from the confessions of defendant; and as there was no testimony showing either the opening or destruction of the letter, except defendant's admissions, on this ground the jury should acquit. On this point, counsel cited People v. Hennessey, 15 Wend. 147.

After hearing Mr. Dwight, Asst. U. S. Dist. Atty., THE COURT sustained both points taken by the defendant's counsel, and directed an acquittal.

Verdict, "Not guilty."

UNITED STATES v. MULVANEY. See note to Case No. 15,624.

Case No. 15,834.

UNITED STATES v. MUNDELL.

[1 Hughes, 415;[1] 6 Call, 245.]

Circuit Court, D. Virginia. Dec. 9, 1795.

CRIMINAL LAW — PROSECUTOR — BAIL — RESISTING OFFICER—CONFLICT OF LAWS—PENALTIES.

1. It is not necessary that the name of the prosecutor in the courts of the United States should be written at the foot of the indictment.

2. In indictments for misdemeanors in the courts of the United States, the court, and not the jury, should assess the fine.

3. When a statute of the United States makes any provision upon a subject within the scope of the powers of the general government, the state laws upon the same subject cease to operate.

4. The existing statute of a state, applicable to any case at the time of the enactment of the act of congress, which refers to the laws of the states as rules of decision, must be considered in the same manner as if the words of the state law had been adopted, and specially re-enacted by the act of congress.

5. But such statute of the state must be completely applicable to the case, for if there be any part qualifying and modifying the rest, of which a party cannot have full benefit in the courts of the United States, this is not a case in which congress have given authority to adopt such part, since the whole law is not applicable, as the authority refers to entire law, and not to parts, which themselves are qualified by other parts, not applicable to the United States.

6. The authority given to the courts of the United States, to regulate the forms of proceedings, when exercised, is as binding as if it had been a specific part of the court system established by congress.

7. But the authority to demand bail is not of that description, and must depend upon some precise law.

8. Upon the principles of society, every person is bound, and has virtually agreed, to pay such sums of money as are charged on him by the sentence, or assessed by the interpretation of the law, and therefore, whatever the laws order any one to pay, that instantly becomes a debt, which he hath beforehand contracted to discharge.

9. The nature of the common and statute laws of the state, with alterations made in them by the Revolution, the Articles of Confederation, and the constitution of the United States, considered.

10. A revolution does not abolish all laws and throw people into a state of nature, therefore the Declaration of Independence did not totally abrogate all laws subsisting before, but only such as became inconsistent with the new form of government.

11. The laws of the states in regard to that share of legislative power retained to themselves, remained unaltered by the adoption of the constitution of the United States, and could only be changed by the states themselves, or by a treaty made within the legitimate objects of the treaty-making power.

12. The rule in England that the king is not bound by a general law, unless he be specially named, is confined to cases where he might otherwise be deprived of some personal or legal right, and not to provisions of general law arising from principles of public policy only.

13. Where a statute, with regard to process, is directory to the court or the clerk, and not to the sheriff, the latter is bound to obey the writ as he receives it, but as the indorsement of the true species of the action upon the writ is required by the act of assembly, that the sheriff may see whether bail is to be demanded or not, he must be judge himself, and act at his peril.

14. Bail is not requirable in an action of debt for the penalty of a statute.

15. Therefore, where there were two writs of capias ad respondendum against the same defendant, one for the penalty of a statute, and the other for a duty on stills, and the marshal demanded bail upon both, which the defendant refused to give, and resisted the

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

marshal, who meant to imprison him for want of bail, the resistance was lawful, and therefore an indictment against the defendant for that cause was not sustainable.

16. For although he was authorized to demand bail for the duty, he could not demand it upon the writ for penalty, notwithstanding the indorsement by the attorney for the United States.

17. For an indorsement, even by the court itself, unless in cases where they have a discretion, would not justify the marshal in requiring bail, where the act did not authorize it, because it would be altogether extrajudicial.

The defendant was indicted under the act of congress of April, 1790, c. 9, § 22 [1 Stat. 117], for resisting the deputy marshal when serving two writs of capias ad respondendum upon him, to wit, one for eleven dollars and eleven cents for the duty due upon a still; and the other for two hundred dollars, for penalty alleged to have been incurred under one of the revenue laws of the United States.

Mr. Wickham, for defendant, moved to quash the indictment, because the name of the prosecutor was not written at the foot of the indictment according to the directions of the act of assembly, passed in 1786, which he said ought to govern in this case, agreeably to the provisions of the act of congress, adopting the state laws (Sept. 1789, c. 20, § 34 [1 Stat. 92]) as the statutes of the United States, which had made no provision for it.

Mr. Campbell, U. S. Dist. Atty., insisted that the act of assembly was made for a purpose not applicable to this case, for that was intended to guard against the malice of individuals, who might attempt to harass each other without just cause, but this was a prosecution instituted by the attorney as part of his official duty, upon discovering that an offence had been committed against public justice and the authority of the United States.

The point was saved, and the jury sworn upon the plea of not guilty, when a question arose whether the jury, if they found the prisoner guilty, should assess the fine agreeable to the directions of the above-mentioned act of assembly, or should merely declare him guilty, and leave it to the court to impose the fine.

IREDELL, Circuit Justice. It is extremely clear that it was not necessary, at common law, that the prosecutor's name should be written at the foot of the indictment; and although the act of assembly requires it to be done, where the prosecution is at the instance of an individual, for the sake of rendering him liable for cost if he fails, that does not prevent the attorney for the public from preferring an indictment ex officio, or the grand jury from finding one of their own accord. For, besides the authority which the attorney had at common law, which is not taken away by the state statute, the act of congress makes it his duty, if he sees cause, to prosecute, ex officio, "all delinquents for crimes and offences cognizable under the authority of the United States." Act Sept. 1789, c. 20, § 35. And it is incident to the nature of the grand jury, to indict when they receive information of a crime. The latter was said to be a presentment merely, and not an indictment; but that is not strictly correct, for the difference between them is this: if the grand jury present of their own knowledge it is a presentment only; but if on knowledge of others, it is an indictment. Independent of that, however, the object of the act of assembly was merely to provide for costs. But upon that subject congress have acted themselves, and directed that the informer, if the prosecution fails, shall have the costs, without prescribing that his name shall be written at the foot of the indictment. Act May, 1792, c. 36, § 5 [1 Stat. 277]. And as the state statutes can be referred to only where the laws of the United States had not taken up the subject, nor made any provision concerning it, we think that the indictment ought not to be quashed. And upon similar principles we are equally clear as to the other point; for the act of assembly is a general provision, applying to all cases, and leaves the fine indefinite, except that it is to be according to the degrees of the fault and the estate of the defendant; but the act of congress provides for the very case itself, and declares the defendant on conviction, "be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars." Act Cong. May, 1790, c. 9, § 22. So that congress have not only taken up the subject, but have prescribed the limits to the punishment not to be found in the act of assembly, which, consequently does not apply to the case. The common law practice, therefore, must be adhered to; that is to say, the jury are to find whether the prisoner be guilty, and if unfortunately that should prove to be the case, the court must assess the fine. We should gladly have left the unpleasant service to the jury, but we are not at liberty to do so; for we are not to supply supposed omissions of congress upon the grounds that they have not gone far enough, or to confer authority where they have not thought proper to confide it. We must administer the law as we find it, and, under that point of view, we should not be justified in relinquishing a jurisdiction vested in the court, and which it will be our painful duty to exercise.

Mr. Wickham insisted on the trial, that there was no resistance, for the deputy marshal had actually served the writ without obstruction; and the resistance was against being committed for refusing to give bail, which the deputy marshal was not authorized to demand, on the writ for the penalty, but would have been guilty of false imprisonment if he had committed the defendant upon it, because he refused to give the bail. In support of which he said that both by

the common law and state statutes, the defendant was not liable to be held to bail in an action for a penalty given by a statute. Act Assem. 1788, c. 67, § 27. And as laws of the United States had made no provision upon the subject, the state laws must prevail.

Mr. Campbell, contra. By the state practice the capias is the first process, and commands the sheriff to take the body, and have it forthcoming, which he must do at his peril, unless in cases of special exception by some statute, and there is none such here. Consequently, as the act of congress directs that writs in the courts of the United States shall be like those of the states in similar cases (Act Cong. Sept. 1789, c. 21, § 2 [1 Stat. 93]), the defendant might have been lawfully held to bail. But some regard ought to be had to the situation of the officer, for the rule insisted on by the defendant's counsel would involve him in inextricable difficulties.

Mr. Wickham. At common law the defendant was not liable to be held to bail in actions of this kind. The original process in actions of debt was a præcipe quod reddat; which, if the defendant failed to obey, the capias went in consequence of the disobedience; but that proving tedious, the capias, at length, went in the first instance, upon a feigned disobedience of the original. That presumption, however, was not made to the prejudice of the defendant, for bail was dispensed with upon the capias. 3 Bl. Comm. 287. The writs were marked as follows: Upon that for penalty the indorsement is: "For a penalty under the act of congress of the United States. Appearance bail required. Alexander Campbell, Attorney for United States." And upon that for the duty on the still the indorsement is in these words: "For duties on still unpaid. Appearance bail required. Alexander Campbell, Attorney for the United States." The jury found the defendant guilty; but the verdict was to be subject to the opinion of the court whether the deputy marshal was authorized to demand bail.

Mr. Campbell. When the sheriff arrests the defendant he must either take bail or commit the prisoner, or an action lies for the escape. 1 Bac. Abr. 205. At common law nothing but imprisonment would suffice (2 Rolle, Abr. 112); and notwithstanding St. 23 Hen. VI. c. 9, authorized the sheriff to take bail, yet the plaintiff was not bound to accept the bond, but might require the body to be produced upon the return day of the writ (1 Vent. 55, 85; 1 Bac. Abr. 205; 1 Salk. 99; St. 4 Ann. c. 16, § 20), although the court would, upon motion, permit the defendant to give common bail (Boh. Inst. Leg. 48; 1 Bac. Abr. 209; 1 Salk. 100; T. Raym. 74; 1 Ld. Raym. 767). The inflexibility of the rule will appear by a short review of the statutes of bail. By that of 23 Hen. VI. c. 9, the sheriff was authorized to take reasonable sureties, but if they were not given he was bound to commit. By that of 13 Car. II. c. 2, § 2, the cause of action was to be inserted in the process, but still bail was to be demanded; and by that of 12 Geo. I. c. 29, the sum is to be indorsed upon the writ; but if bail be not given, the sheriff must imprison. 3 Bl. Comm. 287, 288, 290. So that notwithstanding the capias in practice has long ago become the first process (3 Bl. Comm. 282), the rule of the common law continues in force, and therefore the defendant must in every case give bail or go to prison.

Mr. Wickham. There is no difference between us where the capias was either the first or second process at common law, for in both the body could always be required, and the authorities cited by the attorney prove nothing more. But where the capias was not originally the first or second process, but became first by fiction of law, there a different practice obtained, unless the debt was verified, and the defendant was personally bound to pay it. Now a capias in debt could not issue, in the first instance, at common law; for, before the statute 25 Edw. III., the original process in that action was a præcipe quod reddat, and if that was disobeyed, a capias, grounded on the statute, followed (Fitzh. Nat. Brev. 263; 3 Bl. Comm. 280, 287; 3 Coke, 11; 5 Coke, 89), upon which the body might be required, as the contempt of the summons showed that a voluntary appearance was not to be expected. But when the præcipe fell into disuse, and the capias became the first process under color of an imaginary summons and contempt, the law, according to the rule in Liford's Case, 11 Coke, 51, that, "in fictione juris semper æquitas existit," would not subject the defendant to inconvenience, upon the pretence of disobedience to a writ which had never issued; and therefore, unless there was a breach of the peace, or the debt was due from the defendant himself, and verified either by a specialty, some sentence of the law or an affidavit, the defendant was not liable to be committed or bound to find sureties for his appearance (3 Bl. Comm. 287); which is the reason why executors, heirs-at-law, and femes covert cannot be held to bail. It is not true, therefore, that the sheriff must in all cases obey the writ to its literal expression; for, although the cepi corpus is the proper return, he may add that John Doe and Richard Roe are the bail for appearance, and if he had done so in the case in 1 Vent. 85, or had pleaded that the writ was a capias in the first instance, and that John Doe and Richard Roe were appearance bail, and got leave to amend his return accordingly, he would have been justified. Consequently, as there was neither a breach of the peace, a specialty, or an affidavit in the present case, the defendant was not bound to give bail or go to prison. But whatever may be the rule in England, the question is completely settled here by the act of assembly of 1788, c. 67, which says that "in all actions to recover the penalty for breach of any penal

law not particularly directing special bail to be given," the sheriff shall "be restrained from committing the defendant to prison or detaining him in his custody for want of appearance bail, but shall return the writ executed; and if the defendant shall fail to appear thereto, there shall be the like proceedings against him only as is directed against defendants and their appearance bail, where such is taken." This is decisive, as the act was made before the act of congress adopting the state laws, passed, and therefore is embraced by it as effectually as if the very words were inserted in the congressional statute.

Mr. Campbell, in reply. The act of assembly had nothing to do with the case; for penal laws of a country are local to that country, and therefore those of Virginia, being local to Virginia, cannot bind the United States. Nor was it intended by congress that they should; for uniformity of proceeding in all such cases was, and should be, the object. The man of Massachusetts should not, in this respect, be in one condition, and him of Virginia in another. Cur. adv. vult.

IREDELL, Circuit Justice, after stating the case, proceeded as follows:

The question is, whether, upon two capiases found by the special verdict, bail was requirable by the marshal. I say upon two, because, if requirable upon the one, and not upon the other, the marshal ought to have made a distinction, and not demanded bail generally. It was for this reason the question was reserved as to both, and not as to either singly. The only one upon which the doubt arises is as to the capias in debt for two hundred dollars, indorsed as follows, "for a penalty incurred under an act of the United States. Appearance bail required." Signed by the attorney for the United States for the district of Virginia.

The single question then is, "whether in an action of debt, at the instance of the United States in this court, for a penalty under an act of congress, the marshal has a right to require bail of the party." As the indorsement does not specify under what particular act of congress the penalty was recoverable, some doubt might have arisen in case there had been a distinction in any of the acts of congress, the demand of bail being warranted upon actions for some kind of penalties, but not upon actions for others. But, as I believe there is no such distinction, nor any penalty of a nature similar to any of the exceptions in the state law, this circumstance may be laid out of the case. If bail is requirable, it must be in virtue of some law of the United States; the whole of this subject, as is admitted, and is clear, depending, so far as the United States are concerned, on the authority of their own legislature. The congress have made some express provisions in regard to bail in criminal cases. They have made none that I can discover in civil cases.

It is scarcely necessary to stop here to observe that the proceeding in question was not a proceeding in a criminal case, within the meaning of the provisions of congress, but was, in truth, a civil suit; though for an act of disobedience for which a criminal prosecution might possibly have been commenced, if the act of congress does not expressly, or impliedly, exclude it, a point not material to consider, because the civil suit has, in this instance, been in fact adopted. A criminal proceeding, unquestionably, can only be by indictment or information. The proceeding in question was neither. There being, therefore, no express provision of any act of congress on this subject, it is our duty to see if there be an implied one. The provisions by congress material to be considered for this purpose are the following: In the act, entitled "An act to establish the judicial courts of the United States" (passed the first session of the first congress), there is a provision to this effect: "Sec. 34. That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply." The act of the first session of the second congress, entitled "An act for regulating processes in courts of the United States," etc., provides: "Sec. 2. That the forms of writs, executions, and other process, except their style, and the form and mode of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act, entitled 'An act to regulate processes in the courts of the United States,' in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules, and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit court, or district court, concerning the same."

In the first act mentioned (section 17), there is a power given to all the courts of the United States, "to make and establish all necessary rules for the orderly conducting business in said courts, provided such rules are not repugnant to the laws of the United States." In an act also of the second session of the second congress (chapter 66), entitled "An act in addition to the act entitled 'An act to establish the judicial courts of the United States,'" there is the following provision: "That it shall be lawful for the several courts, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations, and other pleadings, the taking of rules,

the entering and making up judgments by default, and other matters in the vacation, and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings."

Two different constructions have been contended for by counsel on both sides. One that, in this case, the law of Virginia alone is to be the rule by which we are to decide whether bail was demandable or not. The other, that some general law must be the rule, it not being supposable that in a case of this kind congress meant to refer to any local laws of the particular states, which might be inapplicable in all their circumstances to the cases of the United States, which, it was contended, was the case expressly in this instance, the act containing exceptions in no wise applicable to the condition of the United States. It has, therefore, been insisted upon that in this instance we must be governed by the general laws of England, which were the original groundwork of our own, detached from the local laws of Virginia in particular.

Upon the suggestion of these two constructions, the following preliminary observations occur:

1. That in the formation of laws for a new government, so peculiarly circumstanced as that of the United States, wherein each state had a separate government of its own for internal purposes, with a system of laws originally in substance the same, but varying in a number of particulars, as the different habits and views of thinking of so many unconnected communities would naturally occasion, it would have been very unwise, if at all practicable, to have suddenly changed their methods of proceeding in all such cases upon which congress had authority to legislate, in pursuit of a new, untried system of their own, the consequences and extent of which could not easily be foreseen.

2. That an attempt to establish such a system would, necessarily, have consumed more time than the exigency required; and any regulation they could have adopted would, in all human probability, in the end, have been found extremely defective, from an impracticability which every professional man must be convinced would have existed in making special provisions of their own, adapted to every possible contingency within the sphere of their legislative power.

3. That under these circumstances, congress, as a wise and discreet legislature, had no better resource than in respect to all cases requiring legislative provisions, where they could not devise a satisfactory special provision of their own, to refer generally to the laws of the different states, which before the institution of this government had possessed the whole legislative authority (with very few, if any, exceptions), as well in cases of general and local concern; and, therefore, might be presumed to have laws adapted to all the subjects recently appropriated to their own cognizance.

4. That in case of any such reference, we must consider of what nature the existing laws in each state were at the time of the reference, and whether they are applicable. In which case they must be considered in the same light as if the words of the act itself had been adopted and specially re-enacted by the legislative authority of the United States itself.

5. That this law must be completely applicable; because, if there be any part of the law qualifying and modifying the rest, of which a party cannot have the full benefit, this is not a case in which congress have given any authority to adopt such part, since the whole law is not applicable, of which alone congress speaks, and to which alone they can be supposed to refer; otherwise part of the law might be impracticable, which in itself would be oppressive; but, with the qualifications (inapplicable, and, therefore, rejected), might be wholesome and beneficial. It would, therefore, be altogether in the nature of a new law, and, of course, its adoption altogether unwarranted by any authority permitting only the application of an existing one.

6. That, as an exception from the general principle of a reference to the state laws in cases not specially provided for by their own, they have given a certain authority to their courts in regard to the form and method of proceeding, which authority, when exercised pursuant to the power given, is also equally binding, as if the regulation, accordingly made by the courts, had been a specific part of the court system established by the legislative authority itself.

These general principles being premised, let us inquire (1) whether this be a case within the general reference of congress to the laws of the states, or within the power given to the courts, or which is to be guided by some other law. (2) Whether, under the authority which is to guide us on the present occasion, bail was, or was not, demandable in the instance before us.

In considering the first point, if the court possessed any authority, so far as that has been exercised, it is certainly in favor of a reference to the state law. But, as to this subject, I really think, with the counsel for the United States, that the admission or non-admission of bail is a subject of legislation so important, and in which the liberties of the citizens are so concerned, that a power merely of directing the practice of the courts cannot justly be extended to a case of this kind, but it must depend upon some precise law. The same distinction would serve in respect to the process act, if that applied, which I conceive it does not; because "suits at common law" certainly mean suits in a court of a common law jurisdiction, as contrasted with courts of an admiralty and

maritime or equity jurisdiction, which every one knows are termed civil law courts, and proceed upon principles different from those which usually govern the courts of common law, though within their proper sphere recognized and protected by them. We are, therefore, to consider if this be a case which comes within the meaning of a reference to the state law, or is to be guided by some other law.

The words of the section comprehending a reference to the state law are as follows: "That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in all trials at common law in the courts of the United States in cases where they apply." [1 Stat. 92.]

First, it is proper to consider the import of these words, "in all trials at common law." Is this a trial at common law? A distinction is sometimes taken between a suit at common law and a suit upon a statute, where the latter is grounded upon different principles from the former, in which case perhaps it may properly be said that the one is a trial at common law, the other upon the statute. But it is evident that that cannot be the meaning in the instance before us, because all "provisions under the constitution, laws, and treaties of the United States are excepted." That plainly shows that, in the sense of the legislature, unless that exception had been made, cases arising upon the constitution, laws, or treaties of the United States might have been decided, according to the laws of the states, within the general reference to those laws, "as rules of decision in trials at common law." It must, therefore, have some other meaning. What can that meaning be, "but trials in a court of common law jurisdiction, when exercising that authority," as contrasted with the courts of admiralty, and maritime, or equity jurisdiction, which are directed to proceed according to the principles, rules, and usages which peculiarly belong to them? This brings the expression exactly to the same sense as the words "common law" are used in the process act. Thus, in this case, though it be an action on the statute, it is an action of debt, which is a common law action, and will be tried in a common law manner, and no otherwise deviates from the common law than that "the ground of the debt is not immemorial," as the general principles of common law are.

Neither would a debt contracted by bond by an individual to-day. Yet nobody would hesitate to call an action of debt, grounded on that bond, a common law action. Indeed, an action of debt, being an action on contract, could only be upon express or implied contract. Accordingly, Blackstone treats an action of debt of this description upon that very principle. "From these express contracts the transition is easy to those that are only implied by law, which are such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform, and, upon this presumption, makes him answerable to such persons as suffer by his non-performance. Of this nature, and first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party, and thus it is that every person is bound, and hath virtually agreed, to pay such sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that instantly becomes a debt which he hath beforehand contracted to discharge. On the same principle it is (of an implied original contract to submit to the rules of the community whereof we are members) that a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belongs to the body, or an amercement set in court lett, or court baron, upon any of the suitors of the court (for otherwise it will not be binding), immediately create a debt in the eye of the law, and such forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it, for which the remedy is by action of debt. The same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires." 3 Bl. Comm. 159, 160, 161.

The truth is, it is sometimes necessary to distinguish between actions of debt at common law and actions of debt upon a statute, for particular reasons not applicable to the mode of trial. For instance, it is necessary to show it to be "an action on the statute," because otherwise no cause of action will appear, a penalty in the case not existing at common law, and therefore creating no such contract. But when the cause of action is shown, the principles of common law pervade the whole of the trial. There may be other differences arising from particular provisions in a statute, but this is the leading one. But to open this exposition more fully, and lead directly to the considerations upon which the construction in question ought to be founded, I will consider the nature of the common and statute law of this commonwealth as they existed before the Revolution, and then inquire what alterations were made in either by the Revolution itself, the Articles of Confederation, or the present

constitution of the United States. The detail, if not immediately necessary, has a close affinity with the present subject, and will not be uninteresting, if the principles can be traced with any degree of certainty.

It has constantly, I believe, been considered to be law in this state, as in others, that the common and statute law of England, as they existed in England at the time of the first settlement of the country, and so far as they were applicable to its situation, were in force, except in those cases where there was a special law of the Virginia legislature itself. I need not, at present, take any notice of any qualification to this principle, arising from any parliamentary right supposed to have existed before the Revolution, in any case where the then American provinces were specially named in any act of parliament; no such exercise of power having been attempted, I conceive, upon a subject of this kind.

The laws of Virginia, therefore (so far as our present subject is concerned), consisted before the Revolution, (1) of the common law; (2) of the statute law. The first comprehended all such parts of the common law as were such in England, unaltered by any statute law, at the time of the first settlement of this country, and applicable to its situation, and which had not been altered by any act of its own legislature afterwards. The second comprehended two subjects: (1) The statute law of England as it existed at the time of the first settlement of this country, and so far as it was applicable. (2) The statute law of Virginia (as distinguished from the former), consisting of laws specially passed by the legislature of Virginia. All this body of law was of equal authority, and to be viewed in the same light, as if the whole had originally existed in Virginia itself, and no part of it had been adopted from another country, the adoption of it making it completely its own.

Instead of names, therefore, which may serve to confound us, we may more properly distinguish this body of laws as the common and statute law of Virginia generally, than speak of any part of it (unless merely to show its origin) as the common and statute law of England; by which means we may view the latter as it really is, repealable in the very same manner as any special act of the Virginia assembly, and by no means standing on any independent footing, which appears to have been the light in which it has been sometimes considered. In the most arbitrary countries, even where the people have no share in the government, the sacred right of the people to choose their government is so far respected that the whole origin of power is alleged to be grounded, where they attempt to reason at all, only upon an implied consent of the people at large. Consequently, every government, whatever be its form, exercises its trusts for the benefit of the people; and it is to be considered as having their authority for every act it performs in pursuance of its constitutional power. In this sense every legitimate act of government is in effect an act of the people themselves; it emanating from their authority either expressly or impliedly given. If the people could act in person, no one can doubt that whatever they once enacted as a rule, either of government or law, must remain such until altered by themselves. Their inability to act personally necessarily occasions a delegation of their power to others, but when delegated it is of the very same nature as if exercised by themselves in person. Therefore, every act of authority by their representatives must remain in being until altered by themselves, or by some future act exercised by persons possessing an equal share of power. Whence it follows that when the people of this state, by their representatives, declared their former government dissolved, and established a new constitution; so far as what they in this respect did was inconsistent with what had been done by their authority before; a new law was introduced and the old one changed; but every other part of it remained entire.

By the word "law" in this sense I do not mean law as distinguished from the constitution, under which a particular law has been enacted or adopted, and which is its most usual meaning, but I mean "the whole law of the state," including the constitution and all laws enacted, or being, under it; the only difference being that a constitution, while in existence, is the fundamental law of the state, not alterable by its ordinary legislature; but all other species of laws are. I know that some are of opinion that a resolution ex vi termini abolishes all laws, and throws the people into a state of nature, but this I can never conceive to be the case (if it be in any country) in one where all the laws of every kind are derived mediately or immediately from the authority of the people themselves, who never have admitted, and I trust never will admit, that they hold any rights as mere appendages of particular persons in power, which can alone, as I conceive, afford any foundation for the opinion I am considering. If government be a mere trust for their benefit; if all its officers are their officers, and their authority of consequence but as originally sanctioned by them; and if they think proper to choose a new mode, in which new laws are to be made and all laws properly enforced, what reason can there be for saying that merely doing this (which is simply the case of voluntary revolution) without doing or saying anything more, is in fact doing more than this? that is to say, not merely providing a new government for themselves, but actually abolishing all laws of every kind whatsoever which subsisted under the old one.

A constitution is one thing, particular and repealable laws subsisting under the con-

stitution are another. Consequently, the former may be changed, and not the latter; and, as the authority of the people is absolutely necessary to change the one, so it is also (in some mode, whatever they may be) to change the other. The result of my observation (if I am not mistaken in my principles) is, that the Revolution of 1776 did not totally abrogate all laws subsisting before, but only such as became inconsistent with the new form of government assumed and the new constitution established. The common and statute laws of Virginia, then, stood as follows: (1) Such parts of the common law as were unaltered by any English statute at the first settlement of the country, applicable to the situation of the people, and not altered by any subsequent act of the legislature of Virginia afterwards, and were not inconsistent with the new constitution adopted. (2) Such parts of the statute law of England, as were in force at the first settlement of the country, applicable to the situation of the people, and not unaltered by any subsequent act of the Virginia legislature, together with the addition of all other acts, then in force, which were originally passed by the Virginia legislature itself; so far as the whole was applicable to the new situation of the people, under the change of the government and the adoption of the constitution.

If these principles are right, it equally, or more strongly, follows that under the two great subsequent changes, arising from the Articles of Confederation, and the present constitution of the United States, no subsisting law was altered, but where it was plainly inconsistent with the powers, in the particular cases, transferred to the government of the United States. In order to illustrate this point, let us consider, in particular, the nature of the change operated by the present constitution of the United States. By that constitution, all legislative subjects were divided into two branches; one surrendered to the government of the United States, one retained to the state. In some instances the authority of both was a concurrent power (as in the instance of taxation, with a few exceptions); in other instances the power of the general government I consider as exclusive, as in the authority given "to establish uniform laws on the subject of bankruptcies, throughout the United States." The laws of the states, in regard to that share of legislative power retained to themselves, after the adoption of the constitution, remained unaltered, and were only alterable by the legislatures of the states themselves. Of this kind, for instance, is the law of Virginia relative to a descent of lands. The legislature of the United States have no power to alter the rules of descent of lands, nor can they be affected in any manner by the government of the United States, unless by treaty, in some singular instances where it may be fairly presumed certain regulations concerning them come within the legitimate objects of a treaty. Abstracted from this exception, if any person, having a right to sue for the recovery of lands in court, bring such a suit, he can only entitle himself to recover under the laws of Virginia as they existed at the time when the suit was brought.

In regard to the share of legislative power exclusively surrendered to the United States (which is the only part of it which concerns our present subject), the effect of this I take to have been (unless there was a manifest inconsistency in their continuing in being) that the subsisting laws as to such subjects did not ipso facto cease; but that they would remain as they then stood, until congress exercised its legislative authority. Of this kind, perhaps, is the power as to bankrupt laws, which I before noticed. The moment that power is exercised all state bankrupt laws cease; but until it is exercised it is at least questionable whether they do not remain in being; though I presume no separate legislature of the United States had a right to pass a new law upon the subject. The law concerning bail is perhaps of this nature. It is in no manner inconsistent, that I can perceive, with the change of government; and therefore I should have been strongly inclined to think that congress made no express reference to the laws of the different states as rules of decision, that until they made a law concerning such subject the state law in relation to it would have been in force. But I have no doubt that under the express reference, by the act of congress, to the laws of the several states, as rules for our decision, fortified by the considerations I have stated, the law, of Virginia, whatever it may be, concerning the requisition of bail in actions of debt by the public upon penal statutes, is that by which we are bound to decide on the present occasion.

The question then is, what is the law of Virginia upon that subject? The act of assembly produced, being the latest law on the subject of bail by which we can be governed, must be the guide in this instance, if this particular case is comprehended within its provisions.

If it be not, then we must consider what is the law of Virginia regulating cases of this description; whether it be a part of the common law, unaltered by any statutes, or a statute law relative to this subject, originally passed in England, but by adoption forming a part of the statute law of the commonwealth, or some particular act on the subject, passed in Virginia itself, if any.

The first inquiry is, whether a case like the present is within the act of assembly contended for at the bar, as the only rule of decision. Two objections are to be considered: One insisted upon by counsel for the United States, that the Virginia act containing exceptions not applicable to the situation of the United States, the whole law is not applica-

ble; and, therefore, is not within the meaning of the act of congress. The other is an objection suggested by the court, whether this act extends to suits by the commonwealth, or only to suits at the instance of private persons.

As to the first,I do not think it a sufficient objection, because it in no respect changes the principle of the application. If there be no case existing, or which can exist, under the government of the United States of the nature of those constituting exceptions as to the law in question, the exceptions stand, as to them, as if no such exceptions existed. If there be a possibility of any case, under the government of the United States, of the nature of the excepted cases, the law as to the exceptions will then prevail as to such cases under the government of the United States as it does in the general, in cases not within the exception; and, therefore, in every instance, either the general law as to bail, or the special law as to the exceptions, will have the effect intended by either. As to the objection taken by the court, and which came from myself, I am convinced on reflection it is of no weight. It is a general rule in England, from whence our principles of law are generally derived, that the king, who is the sole representative of the public there in all suits at law, is not bound by any act of parliament, immediately affecting his rights, unless particularly named. This, in some instances, may be grounded on mere prerogative, without any good reason, so far as it respects the public. But in many instances that privilege exists for the benefit of the public, and to prevent their sustaining an injury.

This may be exemplified as to the old doctrine 'Nullum tempus occurrit regi." So that a general statute of limitations affecting lands was held not to extend to the king; because the law presumed, from the variety of his public functions, that he could not have such opportunities of knowing of encroachments upon his landed property, formerly of great extent, as an individual could of encroachments upon his; and, of course, could not naturally be expected to be as vigilant in bringing suits to redress himself. This was a case wherein the public evidently had an interest as well as the king personally. A few years afterwards a limitation was put upon this prerogative, which had been abused. To a certain degree I presume that this privilege belongs to this commonwealth, as the public officers, in the immense territory comprised within this commonwealth, cannot be expected to have early or exact information of encroachments upon public rights. Other instances might be shown in which the possession of such a privilege by the public may be deemed proper. But, upon examining authorities, I find that though the rule I stated as in England be a general one, it admits of many exceptions; and, indeed, the privilege seems to be confined to cases where the king might otherwise be deprived of some personal or legal right, and not to provisions of general law arising from principles of policy alone.

Upon the present occasion congress, by creating the penalty and not superadding any new provision, by leaving it to be recovered at the option of the officer (which it expressly does by general words having that operation in another place) by action of debt, leaves it to the usual fate of actions of debt for penalties whatever may be the consequences that attend them. The words of the law being general, and there being no reason for excepting the case of the public on account of any peculiar privilege to which this subject has no relation, I conceive the act of assembly in question is that by which, under the general reference by congress, we are to be governed on the present occasion. This opinion is further strengthened by what was mentioned at the bar, that in common actions of debt by the commonwealth this act has been uniformly considered as the guide in the state courts. If the commonwealth is bound by the general words of the act in that case, no reason can be given, that I can suggest, why the commonwealth is not equally bound by the provisions of the act in every other case coming within its provisions. Even under the English law as now in practice (however introduced), though special bail is required in actions of debt for money upon a common contract, yet in actions of debt upon penal statutes it is not; and the reason assigned shows that whatever construction is given in favor of a defendant in the former case applies a fortiori to the latter. In 1 Bac. Abr. 210, it is said: "On a penal statute the defendant is not held to bail, because the penalty on a statute is in the nature of a fine or amercement, set on the party for an offence committed; and, therefore, no person ought to suffer any inconvenience by reason of such law till he is convicted of the offence." For which he cites Yel. 53; Brownl. & G. 293.

The act of assembly being thus established to be a rule of decision in the present case, for the reasons I have given, the next inquiry is, what is its operation? Upon this there can be no doubt. A capias is to be taken out, served on the party, and returned executed, but no bail to be required. I admit that if this act was only directory to the court, or to the clerk, but not to the sheriff, he would be bound to obey the writ he received, accompanied with the directions given, if any, and could not be said to act illegally in requiring bail, when under no injunction to the contrary. But the indorsement required by the act is an indorsement of the true species of action, in order that the sheriff may himself see whether bail was or was not requirable by the act. An indorsement as to the requisition of bail or not, even by the court itself, unless in cases where they may have a discretion, would not justify him in requiring bail where the act did not authorize it, because it would be altogether ex-

trajudicial. The indorsement in this instance, therefore (as was properly observed at the bar,) is only an indorsement of a highly respectable official character, whose opinions justly deserve very great deference, but are not conclusive. The greatest lawyers, even the greatest judges, are liable sometimes to mistakes in opinion. Lord Mansfield has, at least on twenty occasions, changed an opinion positively given. Lord Hardwicke has in some instances. So have many other illustrious characters. The greatest abilities are indeed generally accompanied with the greatest candor, and a desire, uninfluenced by any former conviction or prepossession, to do right under any circumstances whatever. The present instance was a case attended with many novel and difficult circumstances. They have served to embarrass the consideration of the court itself, anxious in a new case to proceed upon principles well examined and reflected upon.

The consequences of our decision cannot altogether be overlooked, because the nature of these subjects, upon which penalties may be enacted by the legislature of the United States, may reasonably require a different law from what prevails in cases under the law itself. The latter may indeed operate upon foreigners, but in most cases it will operate on citizens and residents of the country, and whose escape from prosecution may, therefore, be less apprehended. The penalties of the United States must from their nature as frequently, if not more so, operate upon foreigners as well as citizens, upon men who having no residence in the country, and having committed an offence, may avoid the penalty annexed to it by speedily quitting the country. These are consequences which may probably make a new law necessary. They are such as might well make the attorney for the United States cautious how he advised against requiring bail, unless he had the sanction of the court for such immunity. But they are consequences which cannot alter the construction of the law, where the law is clear, as I think it is upon all the considerations I have stated, though not perhaps obvious, upon a slight reflection. It may be lamented, in this case, that a man guilty of a most daring violation of the peace of the country, and an inhuman assault upon an innocent and meritorious officer, should escape punishment proportioned to his offence. But no passion must mingle in the administration of justice. The law alone ought ever to be, and I trust ever will be, the guide of our decision.

Upon the present occasion, we cannot give judgment against the defendant without saying that the marshal had a right to require special bail from him upon both of the precepts which were issued. But we are of opinion, for the reasons I have given, that he had no right to require special bail upon one of them. The consequence of which is, that there must be judgment for the defendant.

Case No. 15,835.

UNITED STATES v. MUNROE et al.

[5 Mason, 572.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1830.

INSOLVENCY—GOVERNMENT PRIORITY—ASSIGNMENT—EQUITY—REFORM OF INSTRUMENTS.

1. To entitle the United States to a priority of payment, under the 65th section of the collection act of 1799, c. 128 [1 Story's Laws, 630 (1 Stat. 676, c. 22)], out of the funds in the hands of assignees, there must be a general assignment by the debtor of all his property. A partial assignment of a portion, however large, without fraud, is not sufficient.

2. In what cases a court of equity will reform a written instrument, upon the ground of mistake. The mistake must be made out by the clearest and most unequivocal evidence.

[Cited in Babcock v. Smith, 22 Pick. 69; Shepard v. Shepard, 36 Mich. 179; Southard v. Curley, 134 N. Y. 152, 31 N. E. 331.]

3. Semble, that the court would not reform it to the prejudice of bona fide purchasers without notice.

This was a bill in equity, brought by the United States against the defendants [Washington Munroe and Elijah Loring] as assignees of Samuel Langton, to enforce their right of priority of payment of debts out of the effects of Langton, assigned to the defendants for the payment of his creditors. The cause was brought to a hearing upon the bill, answers and evidence.

Mr. Dunlap, Dist. Atty.

The celebrated rule of reasoning, laid down by Lord Bacon in his Reading upon the Statute of Uses, may well be adopted in this case. He says, "The nature of an use is best discerned by considering what it is not, and then what it is; for it is the nature of all human science and knowledge to proceed most safely, by negatives and exclusives, to what is affirmative and inclusive." So here it would be better ascertained what cases were included within the statutes giving a priority to the United States, by first considering what cases were excluded from these statutes. The cases decided against the priority of the United States, are, where mortgages and pledges of certain specified property, partial conveyances in the course of business, as contradistinguished from general assignments, have been upheld against the United States. In the case of U. S. v. Hoe, 3 Cranch [7 U. S.] 91, a mortgage of part of the debtor's property was upheld, and the court there say, that "there must be such a general divestment of property as would be equivalent to insolvency in its technical sense," to entitle the United States to a priority. In Bartlett v. Prince, 5 Cranch [9 U. S.] 431, the court consider the words "insolvency" and "bankruptcy" as "synonymous," and in Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 439, the court say, "Insolvency, in the sense of the statute, relates

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

to such a general divestment of property, as would, in fact, be equivalent to insolvency, in its technical sense." In U. S. v. Clark [Case No. 14,807], the court say, that the omission in an assignment of a part "to evade the statute," is not the only illustration, and that the assignment must be "the assignment of all, as contradistinguished from a partial assignment." In 1 Cooke, Bankr. Law, 102, the distinction is taken between partial assignments which are in the course of fair trade, and those which are considered general and technically total, though there may be omissions of some small portions of a debtor's property. In the latter case, the exceptions or reservations do not prevent the assignment from being considered general. From these authorities it is inferred and contended, that where, instead of a legal insolvency, a party makes a voluntary bankruptcy, and delivers over and assigns the bulk of his property to assignees, to secure the payment of his debts, the assignment is a general, as contradistinguished from a partial one, although there may have been some reservations by the debtor, either with a fraudulent design against the United States, or creditors, or from accident. In most cases of assignments, there is a reservation of household furniture, or a small allowance to the insolvent debtor; and if such reservations, as one of a library of books, or a little family plate, and things of that sort, can prevent such assignments from being considered general, the priority of the United States in those states where there are no bankrupt laws, is in fact destroyed.

Mr. Fletcher, for defendants, è contra.

STORY, Circuit Justice. The present bill seeks payment of certain judgment debts due to the United States upon custom-house bonds, out of the effects of Samuel Langton, assigned to the defendants, Munroe and Loring. The collection act of 1799, c. 128, § 65 [1 Story's Laws, 630 (1 Stat. 676, c. 22)], gives a priority of payment to the United States in certain cases of insolvency, and among others, in cases "in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors" The bill asserts two grounds, upon which the United States may maintain their claim: (1) That there was in this case, a general assignment by Langton of all his property; (2) that it was the intention of all the parties to the assignment, that the clause in the assignment, providing for a priority of payment upon custom-house bonds due to the United States, should apply to all the bonds of Langton then owing to the custom-house, and not, as the terms of the assignment purport, to those bonds only, upon which Munroe was surety.

In cases, where the United States seek to enforce such a priority upon the ground of a general assignment, it is necessary, that the bill should expressly aver, that the assignment does cover and convey all the property of the debtor. If the assignment be general in its words, so as to include all his property, the allegation may be in general terms referring to the assignment. But where, as in the present case, the assignment purports upon its face to convey specific property only, and not to be universal in its operation, it is necessary, that there should be a direct averment in the bill, that the assignment did in fact, though not in form, include all the debtor's property, so as to operate virtually as a general assignment. If any portion be omitted fraudulently to evade the statute, or unintentionally and by mistake, when the object was a general assignment, in each of these cases the bill should include an averment to meet the case, and obviate the difficulty. So in relation to the case of an asserted mistake in the language of the instrument, differing from the intention of the parties, if the bill seeks to correct that mistake, and reform the instrument, and obtain the consequent relief, it is not sufficient to allege generally, that the intention was different; but there must be an express averment, that the instrument, as existing, differs from the intention of the parties, stating the particulars; and the bill must conclude with a prayer for the correction of the mistake, and a decree according to the reformed instrument. It might be questioned, whether upon a critical examination the averments are so perfectly explicit in this bill, as to preclude all doubt. However, I throw out these observations rather for consideration in other cases, as the parties have taken no objection, and the cause has been argued upon the merits.

There is another question as to parties, whether all the proper parties are now before the court. Langton is no party to the bill, though he has, in writing, expressed a willingness to be made one, and to submit to any decree made by the court. But he is certainly the primary debtor, and might, if he pleased, contest the debts due to the United States, or prove a satisfaction of them. He is certainly, therefore, a proper party for the protection of his own interests, as well as those of the assignees.

But the answer of Munroe discloses another important fact; and that is, that since the assignment was made, he has himself become insolvent, and has assigned to certain persons all his property, including all that passed for his benefit under the assignment of Langton; and his (Munroe's) assignees are not parties to the bill. Now, in point of fact, it appears, that Munroe was the principal creditor of Langton; that he was also indorser and surety for a large amount; and the assignment of Langton provides for the entire payment of all debts due to, and liabilities of Munroe, before the satisfaction of any other debts. The answers also establish that the proceeds of the property under the assignment fall far

short of indemnifying Munroe for these debts and liabilities. The other assignee, Loring, is but nominally interested. If, therefore, the object of the present bill be (as it in fact is) to reach the effects of Langton in the hands of the assignees of Munroe, they ought to be made parties to the bill. If the object were only to charge Munroe and Loring personally (the latter does not appear to have any part of the property in his hands), and to get a decree against them for the amount, it might be otherwise. But as to Munroe, a personal decree would be useless, for he is already insolvent.

The questions, however, which the parties before the court are most anxious to dispose of, if decided in favour of the defendants, will render the further consideration of the question of parties unnecessary. How far, then, are the grounds of the bill maintained, in point of fact and evidence? In the first place, was this the case of a general assignment? The doctrine of the supreme court of the United States, is, that no assignment is within the statute unless it is general, and includes all the debtor's property. It must be such an assignment, as amounts to a total devestment of all his interest and estate. If it be a partial assignment only, it is wholly immaterial, how much or how little it includes; whether nine-tenths or ninety-nine hundredths; so always that the omission be not by fraud or mistake. Now, the answer of the defendant Munroe utterly denies, that in point of fact the assignment did include all the debtor's property, or was intended to include all. The assignment does not, in form, purport to convey all; but only specific and enumerated portions of property. The whole evidence, including that of Langton himself (who is a witness for the government), admits, that a small portion was not included. The amount is not great, being about $1000, and constituting not more than one twentieth of the debtor's property. The omission of this property is proved by all the testimony to have been by design, and not by accident. It was reserved to pay particular creditors, and not fraudulently to evade the statute. How, then, can the court give effect to this as a general assignment, when it conveyed a part only of the debtor's property? When the reservation was in good faith, and not by mistake?

In the next place, as to the asserted mistake in the draft of the assignment. The language of the instrument is perfectly unequivocal. In terms, it gives priority of payment to custom-house bonds, on which Munroe is surety, estimating them at $8,400. It is true, that the bonds on which Munroe is surety, fall short of that amount; and the bill avers, that all the bonds owing Langton, fall short of it. The sum, therefore, was adopted as a conjectural amount, and no light arises from that circumstance. The answer of Munroe explicitly denies, that any other bonds than those, on which he was a surety, were intended by the clause, the principal object of the instrument being to give him a universal priority or preference in payment of his debts and liabilities. How is this answer met? By general testimony from one witness, that he understood all bonds were to be included; and by the testimony of Langton, to the same effect. But Langton, if a competent witness, is not now without some bias; for it is now manifestly his interest to escape from being arrested in execution upon the outstanding judgments of the United States; and if taken in execution, he cannot be released except by some act of the government, or its authorized officers. In cases of asserted mistake in written instruments, it is not denied, that a court of equity has authority to reform the instrument. But such a court is very slow in exerting such an authority; and it requires the strongest and clearest evidence to establish the mistake. It is not sufficient, that there may be some reason to presume a mistake. The evidence must be clear, unequivocal and decisive; not evidence which hangs equal, or nearly in equilibrio. Now, in the present case, the scrivener who drew the instrument, has not been examined; and if examined, he could have stated his instructions. And if the draft conformed to the actual instructions given by both parties, and especially by the debtor, any antecedent loose conversations would not be entitled to much weight. They would be deemed merged in the more deliberate results of the written instrument. Besides, here the question is not merely a question of the correction of a mistake between the original parties. Munroe's assignees and creditors are essentially interested. They may have released their debts upon the faith of the validity of the assignment of Langton, in the original shape. Unless they had some notice of the mistake, it would be very difficult, even if they were parties before the court, to reform the assignment to their prejudice. As the case is presented before the court, my judgment is, that the bill ought to be dismissed. But there was reasonable cause for filing the bill, and I shall so certify. Decree accordingly.

Case No. 15,836.

UNITED STATES v. MURDOCH et al.

[2 Cranch, C. C. 486.] [1]

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

CUSTOMS DUTIES — LIEN ON GOODS AFTER BOND TAKEN — CONSIGNEE.

1. The United States have no specific lien on imported goods, for the duties, after having taken bond and security therefor, and delivered the goods to the consignee.

2. The consignee is to be considered, under the sixty-second section of the collection act of 1799 [1 Stat. 673], as the owner. The con-

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

signor never was debtor to the United States for the duties.

Bill in equity by the United States, against Murdoch, Youille, Wardrope, & Co. of Madeira, and James H. Hooe, administrator of William Hodgson, deceased. It charges that M., Y., W., & Co. shipped certain casks of wine to Hodgson in his lifetime, either on consignment, or as a sale to him. That Hodgson gave bond and security for the duties, upon which judgment was recovered by the United States against Hodgson in his lifetime, and remained in full force until his death. That the defendant J. H. Hooe took letters of administration on his estate (no execution having been levied upon his property to secure the debt), and obtained possession of his personal estate, and effects, among which is the very wine upon which the duties accrued; and that whether the wine belongs to M., Y., W., & Co. or to W. Hodgson's estate, the United States consider it liable for the duties, and that it may be subjected to the payment of the judgment against Hodgson, &c. The defendants, M., Y., W., & Co. answered, that William Hodgson was only their agent, and had no interest but in his commissions upon the sales of the defendants' wines. That in the year 1818, they shipped to him a cargo of wine by the brig Hebe, part under special orders procured by Mr. Hodgson, and part for sale generally for account of these defendants. That Mr. Hodgson secured the duties to the satisfaction of the United States, on that part of the cargo which was shipped upon their account, and which was thereupon delivered to him; and that the duties upon the residue of the cargo were secured by the persons upon whose orders it was shipped, and it was delivered to them. That Mr. Hodgson had charged these defendants with $518, being the amount of the duties which he had secured upon that part of the cargo consigned to him by these defendants for sale. That after allowing him credit therefor, he died indebted to these defendants in the sum of $1,679.45, which yet remains unpaid. They deny that the United States have any lien upon the wine for the duties after they have been secured, and the wine delivered. The answer of Mr. Hooe admits that sundry casks of wine came to his possession as administrator of Mr. Hodgson, upon which the duties had been secured by him in his lifetime but not paid; but that when the duties were secured to the satisfaction of the collector, the wine was delivered to the consignees.

Mr. Taylor, for defendants, contended that the lien of the United States upon the wine ceased with their possession, and cited the opinion of Mr. Justice Story in the case of U. S. v. Lyman [Case No. 15,647]. He also contended, that for all the purposes of paying or securing the duties, the importer or consignee was, under the sixty-second section of the collection law of 1799 (1 Stat. 673) to be considered as the sole owner of the goods imported, and alone responsible for the duties. The words of that clause of the section are as follows: "And to prevent frauds arising from collusive transfers, it is hereby declared, that all goods, wares, or merchandise imported into the United States shall, for the purposes of this act, be deemed and held to be the property of the persons to whom the said goods, wares, or merchandise may be consigned, any sale, transfer, or assignment, prior to the entry and payment or securing the payment of the duties on the said goods, wares, and merchandise, and the payment of all bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding."

Mr. Swann, contra, contended that the owner of the wine was debtor to the United States for the duties, and that this proceeding was in the nature of a chancery attachment of their effects in the hands of their agent, or his personal representative, the defendant, Mr. Hooe, as garnishee; Mr. Hodgson was the factor and agent of the defendants, Murdoch, Youille, Wardrope, & Co.; and their effects in his hands were liable to attachment for their debt. Although the consignee, for the purpose of giving bond and security for the duties, may be considered as the debtor of the United States, yet he is not the only debtor. He was only their agent, and although he may be bound himself, yet he bound his principal also, who must see that his agent discharges his bond.

Upon a reference, by consent, to a master commissioner, a balance of $1,679.45 was found due from Hodgson, at the time of his death, to the defendants, Murdoch, and others, and the cause having been set for hearing upon the bill, answers, and report of the master commissioner,

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that by taking the bond and security for the duties, and the delivery of the wine to the consignees, as mentioned in the bill and answers, the United States have relinquished their specific lien on the wine; and that, under the sixty-second section of the collection law of 1799, the consignee is to be considered, for the purposes of that act, as the owner of the wine; and that the consignors are not, and never were, debtors of the United States for the duties thereon; and if they were to be considered as the original debtors of the United States for those duties, yet, that that debt was extinguished by the taking of the bond and security, and prosecuting the same to judgment, and delivery of the wine; there being no evidence of any fraud in the case. It is therefore decreed and ordered, that the complainants' bill be dismissed.

The complainants prayed an appeal, but never prosecuted it.

Case No. 15,837.

UNITED STATES v. MURPHY et al.

[1 Cal. Law J. 217.]

District Court, N. D. California. Jan. 10, 1863.

MEXICAN LAND GRANTS—FINAL DECREE—REHEARING—"PENDING CASE"—PRACTICE.

Where a decree has been rendered, and a motion for a rehearing made thereon, until that motion for rehearing is finally disposed of, such case is still "pending;" and the act of 1860 [12 Stat. 35], whose provisions apply to all "pending cases," takes effect as to such case, though the decree was rendered previous to the passage of the law.

[This was a claim by Daniel Murphy and others for San Francisco de Las Llagas, six square leagues in Santa Clara county, granted February 3, 1834, by José Figueroa to Carlos Castro. Claim filed February 9, 1852. Confirmed by the commission August 22, 1854, and by the district court October 22, 1855 (case unreported), containing 22,979.66 acres.]

HOFFMAN, District Judge. The official survey in this case was originally ordered into court for examination prior to the passage of the act of 1860. The cause was heard and a decree made, setting the survey aside and adopting a previous survey, made by A. W. Thompson, United States deputy surveyor. A motion was subsequently made for a rehearing, but it remained unargued and undisposed of up to the date of the passage of the act of 1860. As by that law, all pending cases were subjected to its provisions, it was considered by the court that the operation of the decree, as a final judgment, was in effect suspended by the motion for a rehearing, and that the case was "pending," within the meaning and intent of the law. Proceedings, as required by the act of 1860, were accordingly had. Advertisements were published, and time afforded to the claimants and to the parties intervening to produce testimony.

No evidence whatever, in addition to that before the court at the time of making the decree adopting the Thompson survey, has been produced on the part of those who object to that survey. The claimants, however, have offered testimony corroboratory of that on which the decree was made. The final decree of confirmation entered in this court declares the land confirmed to be the tract embraced within the limits of a judicial possession given to the grantee, and approved and confirmed, after some contest, by the Mexican authorities. No limitation of quantity is mentioned in the decree, and in the engrossed copy in the decree book, a clause stating the quantity to be two leagues —a little more or less—has been erased by order of the circuit judge, by whom the decree was rendered.

The only question, therefore, is as to the limits of the judicial possession. The measurements, as specified in the record of possession, are evidently erroneous, and afford no means of ascertaining the limits of the tract; but the monuments set up at the corners and the delineation of the tract whereof possession was given, which was marked on the original diseño by the judicial officers, enable us to ascertain, with reasonable certainty, the limits of the tract measured off to the claimant. The record states that, at the end of each line, a flag was placed and a boundary-mark established. These marks are now pointed out and identified by the two surviving witnesses who assisted at the proceeding. They consist of ancient marks on trees. No testimony in opposition to their statements is offered, nor is any attempt made to show by examining the annulations of the wood that the marks were not made at the time the judicial possession was given. The lines thus established correspond with tolerable exactness to the rude delineation made on the diseño by the judicial officer. They have been followed in the survey by Mr. Thompson, and I see no reason to doubt that they are those established by the officer giving possession. They are, therefore, the boundaries of the land to which by the final decree the title of the claimant was confirmed. It appears, however, that a part of the land is included in the Solis rancho, which has been surveyed and patented. This portion the claimants in this case have agreed to relinquish, and have consented that the Thompson survey be modified so as to follow the line of the Solis rancho, so far as the two ranchos are co-terminous. A decree to that effect will be entered.

Case No. 15,838.

UNITED STATES v. MURPHY.

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

Circuit Court, District of Columbia. March Term, 1836.

HUSBAND AND WIFE—WIFE'S PERSONALTY—LARCENY—INDICTMENT.

The goods of the wife, are the goods of the husband, and must be so averred to be, in an indictment for larceny, although the wife kept a milliner's shop in Washington and the husband a tinman's shop in Alexandria, but the wife's shop was not for her separate use.

Indictment [against Patrick Murphy] for stealing the goods of Ann Hill. It appeared in evidence that Ann Hill was a feme covert; that her husband kept a tinman's shop in Alexandria, and his wife a milliner's shop in Washington, but not for her separate use. They lived together, that is, he came to Washington three or four times a week.

THE COURT (MORSELL, Circuit Judge, absent, and THRUSTON, Circuit Judge, doubting) told the jury that in law the goods stolen were the goods of the husband, and

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

ought to have been so stated in the indictment.

Verdict not guilty. The prisoner was remanded.

Case No. 15,839.

UNITED STATES v. MURPHY.

[Hoff. Land Cas. 77.] [1]

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

MEXICAN LAND GRANT.

No objection urged to the confirmation of this claim.

Claim for three leagues of land in Santa Clara county, confirmed by the board, and appealed by the United States.

[This was a claim by Bernard Murphy for Las Uvas, granted June 14, 1842, by Juan B. Alvarado to Lorenzo Pineda; claim filed January 22, 1852; confirmed by the board September 19, 1854,—containing 11,079.93 acres.]

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

Thornton & Williams, for appellee.

HOFFMAN, District Judge. This case has been submitted without argument on the part of the appellants; nor has any reason for reversing the decree of the board been suggested to us. On looking over the record, it appears that the genuineness of the original grant was fully established, and indeed does not seem to be controverted now. The evidence discloses a substantial compliance with the conditions of the grant, and the boundaries of the land are distinctly indicated by natural objects. The land thus bounded has been found, on a survey, to contain less than the quantity called for in the grant. We are unable to discover any reason for refusing to confirm the decree of the commissioners. A decree to that effect must therefore be entered.

Case No. 15,840.

UNITED STATES v. MURPHY.

[Hoff. Land Cas. 81.] [1]

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

MEXICAN LAND GRANT—RESIDENCE.

The validity of this claim fully established.

Claim for one league of land in Santa Clara county, confirmed by the board, and appealed by the United States.

[This was a claim by Bernard Murphy for the rancho La Polka, granted January 19, 1833, by José Figueroa to Ysabel Ortega; claim filed February 17, 1852; confirmed by the commission August 15, 1854,—containing 4,166.78 acres.]

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

Thornton & Williams, for appellee.

HOFFMAN, District Judge. It is unnecessary in this case to recapitulate the facts, which are fully stated in the opinion of the board of commissioners. The genuineness of the grant, and the residence of the grantee and his children on the land for more than twenty years, are fully established. The only difficulty in the case is obviated by the form of decree entered by the board, and which it is now prayed may be affirmed by this court. No objections having been raised on the part of the appellants, and none having been discovered by us, a decree as prayed for must be entered.

Case No. 15,841.

UNITED STATES v. MURPHY.

[Hoff. Land Cas. 154.] [1]

District Court, N. D. California. June Term, 1856.[2]

MEXICAN LAND GRANT—SUTTER GENERAL TITLE.

The validity of claims under the Sutter general title affirmed in Hensley's Case [unreported].

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

[This was a claim by James Murphy for the rancho Casadores, granted December 22, 1844, by Manuel Micheltorena to Ernest Rufus. Claim filed August 14, 1852. Confirmed by the commission July 17, 1855.]

William Blanding, U. S. Atty.

Thornton & Williams, for appellee.

BY THE COURT. The claim of the appellee in this case is founded on the general title issued by Micheltorena in 1844, the validity of which has already been affirmed by this court in the case of U. S. v. Hensley [unreported]. The testimony of Gen. Sutter shows the original grantee, Ernest Rufus, to have been one of those in whose favor the general title issued. It also appears that the conditions of occupation and cultivation were fully complied with, and the diseño which accompanies the petition indicates the tract granted with clearness and precision. The claim was confirmed by the board, and the case has been submitted without argument or objection on the part of the United States. The decision of the board must therefore be affirmed, and a decree of confirmation entered.

[The case taken by the United States, on an appeal, to the supreme court, where the decree of this court was reversed, and the cause remanded, directing this court to dismiss the petition. 23 How. (64 U. S.) 476.]

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

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

[2] [Reversed in 23 How. (64 U. S.) 476.]

Case No. 15,842.

UNITED STATES v. MURRAY.

[1 Cranch, C. C. 141.] [1]

Circuit Court, District of Columbia. Nov. Term, 1803.

LARCENY—BANK NOTES.

Quære, whether stealing a bank-note is larceny within the act of congress of the 30th of April, 1790, § 16 [1 Stat. 116].

[Cited in U. S. v. Canoe, Case No. 14,718.]

Indictment [against Francis Murray] under the statute, for stealing a watch, the property of Ben Brady, and a ten dollar bank-bill of the bank of ——, and twenty dollars in silver.

E. J. Lee, for defendant, objected to evidence being given as to the bank-note, it not being larceny to steal a promissory note, or bond, &c., and cited Morris' Case, 1 Leach, 468; 8 Coke, 33a, b; 4 Bl. Comm. 234.

Mr. Mason cited no authorities but argued generally.

THE COURT were of opinion that the evidence might go to the jury; they were inclined to be of opinion that bank-notes were within the meaning of the words, "personal goods," in the act of congress (1 Stat. 116); that the case in Leach, 468, was upon the construction of the act of parliament, and not binding as to the construction of the act of congress. That if the jury should find the prisoner guilty of stealing the bill only, the question might come on again on a motion in arrest of judgment. If they should find him generally guilty, they would consider the question in fixing the fine.

The jury found the prisoner "guilty of stealing the watch only."

E. J. Lee, for the prisoner, moved in arrest of judgment, that the jury had not found him guilty or acquitted him of the other things charged in the same count, to wit, the bank-note and the silver dollars, so that if he should be indicted again he would not be able to plead the conviction or acquittal.

But THE COURT overruled the motion and gave the judgment—39 stripes and 10 dollars fine, &c.

Case No. 15,843.

UNITED STATES v. MURRAY.

[5 McLean, 207.] [2]

Circuit Court, D. Ohio. April Term, 1851.

PUBLIC LANDS — CUTTING TIMBER — REPARATION.

1. Where full reparation was made for a trespass on the public lands, by purchasing the land in part, and by paying the purchaser of the other part, for the trees cut on it, a nominal fine only was imposed.

2. The trespasser seemed to have no intention of defrauding the public.

[This was an indictment against Jacob Murray.]

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

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

The United States District Attorney, for the United States.

OPINION OF THE COURT. This is an indictment for cutting oak and other timber on the land of the United States. The defendant confessed that he was in the employment of an individual, and cut, say, two thousand trees for ties for railroad. That the man who employed him intended to enter the land, and did enter two quarters of it, but the other quarter was entered by another individual. That he paid the individual who entered the quarter section for the trees cut on it. And the other entry covered the land on which the other trespass was committed. The trespass was not an aggravated one, and, in fact, did injury to no one, that was not satisfactorily settled. The land was sold at the price fixed by law, having been previously offered, but not sold at public sale. Upon the whole, the court will impose a nominal fine, as there was no intention, it would seem, to defraud the public. The defendant was fined five dollars and costs.

Case No. 15,844.

UNITED STATES v. MYERS et al.

[2 Brock. 516.] [1]

Circuit Court, D. Virginia. May Term, 1836.

EQUITY — CONCURRENT JURISDICTION — TRUSTS — PARTIES.

1. It is a general principle of equity, that wherever a party has a perfect remedy at law, he cannot come into a court of equity to enforce his rights: some defect in the legal remedy being the very foundation of the equitable jurisdiction. But where, superadded to this legal remedy, a trust is expressly created, either by the deed of the parties, or by the operation of law, or both, a court of equity has a concurrent jurisdiction with the court of law; and the party may proceed, at his option, either to enforce his legal security, or, may come into equity to enforce the trust.

[Cited in Pierpont v. Fowle, Case No. 11,152.]

[Cited in Hempstead v. Watkins, 6 Ark. 317.]

2. Although, a court of equity, will not interfere to adjust equities between a debtor defendant, and his debtor, upon a bare possibility that a resort may ultimately be had to the latter, yet, where the foundation of the suit is a trust, and the trust subject is distributed among several, the cestui que trust, has a right to call for an account of the trust subject, in whatever hands it may be found.

3. Where the jurisdiction of the federal courts has once attached, no subsequent change in the relation, or condition of the parties, in the progress of the cause, will oust that jurisdiction. The strongest considerations of utility and convenience require, that the jurisdiction being once vested, the action of the court should not be limited, but, that it should proceed to make a final disposition of the subject.

[Cited in Pierpont v. Fowle, Case No. 11,152; Davis v. Tileston, 6 How. (47 U. S.) 120.]

[Cited in Kittredge v. Emerson, 15 N. H. 261.]

[1] [Reported by John W. Brockenbrough, Esq.]

4. Where the jurisdiction depends upon the party, it is the party on the record.

5. The United States being plaintiffs and their debtors being entitled, by the award of commissioners under the treaty with France, to a sum of money more than adequate to the payment of their debt, *held*, that, although the United States may elect to retain the amount of their debt, it is altogether discretionary with them whether they will do so or not; and the right to retain, constitutes no impediment to the prosecution of their suit in a court of equity.

Moses Myers and John Myers, trading under the firms of Moses Myers & Son, and John Myers & Co., being largely indebted to the United States, for duty bonds, with Richard Drummond as their surety, by two several deeds, dated respectively in October, 1819, and March, 1820, conveyed all their property, whether real or personal, in possession and in action, to William B. Lamb and Richard Drummond, surety as aforesaid, in trust, to receive the debts due to them, and to sell and dispose of all their estate and effects, and after paying the reasonable charges of the trust, to apply the proceeds to the payment of their debts in classes, giving the preference to the debts due to the United States. Before the execution of these deeds, the Messrs. Myers had employed Myer Myers, then in Europe, as their agent, to collect a debt due to them in Norway, and particularly specified in a schedule attached to the deeds. A judgment at law was obtained by the United States against the obligors in the bond, which was in part satisfied. A portion of the debt not having been paid, the United States brought their suit in equity in this court, at the instance, as it would seem, of Drummond, the surety in the bonds, for the purpose of recovering it out of the trust fund, making Moses and John Myers, Lamb, and Drummond, the trustees, and Myer Myers, defendants. A motion was made at this term, to dismiss the bill, as against Myer Myers, upon the ground, that as against him, this court had no jurisdiction of the case.

Before BARBOUR, Circuit Justice, and DANIEL, District Judge.

DANIEL, District Judge. The objections to the jurisdiction of the court, urged by the counsel for this motion, are substantially these: 1. That this suit, although in form, a suit in the name and on behalf of the United States, is, in reality, a controversy between citizens of Virginia, and, therefore, proper for a state court only. 2. That, admitting this suit to have been properly instituted as against Moses Myers & Son, and that the United States had a direct and substantive claim against them, still that there never was just ground for joining Myer Myers as a party defendant, and this suit ought, therefore, as to him, to be dismissed. 3. That admitting the regularity of this suit, originally, as to all these defendants; yet the claim of the United States having been satisfied, the court should arrest its proceedings at this point, and not go on to adjudge the controversy as between the defendants.

1. In support of the first of these objections, it is pressed upon the court, that there never was any interest or necessity operating upon the United States to compel them to the course they have adopted. That by means of their judgment against Moses Myers & Son, and their surety, they had a perfect remedy at law, which they were bound to carry out to its utmost extent; and that the sufficiency of that security (nowhere called in question) relieved them from all necessity for resorting to other sources. For these positions, the case of Linney v. Dare, 2 Leigh, 588, is relied on. The principle, that wherever there exists a right or remedy exclusively legal, and perfect in its character and operation, a court of equity cannot take cognizance, is fully recognised: and, it is likewise conceded, that a court of equity will never interfere merely to settle equities between a debtor, and his debtor, upon a bare possibility that resort may ultimately be had to the latter. This last principle, and nothing else, I conceive to have been settled in Linney v. Dare, for in that case, there was no trust, nor other foundation for equitable interposition. The surviving partner and his surety were both living, and recourse to them, at law, was perfectly unobstructed. How is it with the case under examination? Here is a trust expressly created by deed. The United States, both by the terms of the conveyance and by operation of the statute, are made the cestui que trust. They have the right, I conceive, to enforce their legal security, or to proceed under the trust, ad libitum; and in the latter event, they have the consequent right, to call for an account of the trust subject in the hands of whomsoever it may be. In the latter event, too, the residence of the parties is wholly immaterial, for it is in virtue, not of the residence, but of the character of the plaintiffs, that the jurisdiction attaches. No importance is here yielded to the objection, that the United States are said to have sued upon notice and demand from the defendant Drummond; they had the right, upon the above view of the case, to sue independently of such requirement, though perhaps they were bound to use their right so as not to visit injury upon others. I can perceive then, neither from the pleadings, the evidence, nor the argument, that this first objection can be sustained.

2. With respect to the second objection, it would seem, that if the plaintiffs are rightfully in court, as cestui que trust, they have the right by regular consequence, to call for and pursue the subject, wherever it may be. I should think, that putting aside the proof or the confession of agency, for the trustees or their grantors, in the management of the subject, and simply upon the facts of possession, and indebtedness, or either of them, on the part of Myer Myers (once admitting

the right to the trust subject), it would be competent, on principles of justice, and advisable, on the score alike of prudence or celerity, to proceed against him, conjointly with the original debtors, and their trustees. But I do not think that, upon the pleadings in this cause, Myer Myers stands, prima facie, in a contingent attitude of creditor or debtor, wholly separated from the management of this fund. It seems, on the contrary, that he has had material agency in the management of the specific subject. Whatever, then, may be his ultimate responsibility, upon a full adjustment between the parties, I must regard him as an agent, taking upon himself the management of this subject, with full notice of its connexion with the rights of the cestui que trust, and emphatically, therefore, liable to account whenever a settlement should be called for. This opinion is in conformity with the decisions of Newland v. Champion, 1 Ves. Sr. 105; Utterson v. Mair, 2 Ves. Jr. 95; Alsager v. Rowley, 6 Ves. 748; and Burroughs v. Elton, 11 Ves. 29.

3. The third and last point, at first view, seems encompassed with rather more of difficulty than surrounds the two former; yet, this difficulty will, it is thought, upon nearer inspection, be found to be rather in appearance than reality. It may here, too, be remarked, that the question now presented, is, at this time somewhat premature; the facts assumed for its basis, not being formally before the court. There is no proof, direct and certain, that the United States have received, or will receive, satisfaction of their claim against Moses Myers & Son, from any source other than the trust subject.

The objection now considered, concedes the jurisdiction of the court at the time when this suit was instituted; but insists upon the assumption of a subsequent satisfaction, as having destroyed that jurisdiction admitted to have been once perfect. The authority of the court to adjudge the rights of the parties once admitted, it may naturally be asked, how that authority can have been impaired by a recognition of the rights of, or by a satisfaction made to, either party? Such recognition or satisfaction, does not change one legal feature or principle of the case, nor the positions in which the parties stand to each other, or to the court, but is, on the contrary, rather an admission, or confirmation of all these. In the case at bar, there is not the slightest change, either of parties, contracts, or duties; all these remain as at the institution of the suit; what possible ground, then, can there be, for changing the rules which were applicable to them at that period? I can perceive none whatever, in any supposed necessity for restricting the courts of the United States within their proper orbit, for that they cannot transcend, while they honestly limit their action to cases in which the United States are fairly and necessarily parties; and to such, they are imperiously bound to extend their action, whoever may be directly, or incidentally, embraced with it. If there be no paramount constitutional necessity for a change of forum, none surely can doubt the advantages as to economy, either of time or expense, of a system which terminates in a single proceeding, matters that otherwise would be drawn out in multiplied and costly litigation. A course like this, is, moreover, sanctioned by the inveterate practice of courts of equity, which, when once properly invested with jurisdiction, will never parcel out the subject of controversy to different tribunals. Should a practice like that proposed by the present motion, prevail in this court, the mischiefs incident to its establishment, are easily anticipated. Few instances will ever occur, where the priority of the United States will be asserted, which will not involve an examination of various and conflicting interests, because such cases will almost uniformly be those of absolute insolvency, or of different creditors claiming under specific liens upon the same subject, or by substitution in the place of those who may have been preferred. Again:—Where the United States may have no concern, suppose there should be several incumbrances upon the same subject, the last of whom should be a citizen of another state? In either of these cases, it would, probably, be indispensable to examine into the foundation, and to settle the rank, of the respective claims; to ascertain, by accounts to be stated, their precise extent, and to convert the subject pledged into funds applicable to some or all of the demands upon it. The representatives of all the different interests are convented, their rights adjusted, the subject converted into money and actually brought into court. What shall be done? Shall the court, dispensing justice to some of the parties only, turn from its door the residue, whom it had not only power to call, but whom it was compelled to call before it; and with their expulsion, cast from it as a waif, the remainder of the fund, to be struggled for in a different forum? The evils of such a proceeding, would, indeed, be grievous; and its absurdity most glaring, from a contrast with the admission, that over persons and subject the court once had complete jurisdiction; but that such jurisdiction has been taken away, the character of both parties and subject remaining wholly unchanged! But the question here discussed, appears to me not one of the first impression, or to be dependent solely upon reasonings from principle. It seems to have been considered by the supreme court, and by that tribunal, in effect, if not in terms, decided. Thus, in the case of Conolly v. Taylor, 2 Pet. [27 U. S.] 556, it is ruled, that "where there is no change of parties to a suit during its progress, a jurisdiction depending upon the condition of the parties, is governed by that condition, as it was at the commencement of the suit." So, too, the case of Dunn v. Clarke, 8 Pet. [33 U. S.] 2, cited and relied on by the counsel for this motion, appears to me to coincide with the authority just quoted, and

to operate strongly, if not conclusively, against the present application. In the latter case from Peters, a judgment in ejectment had been obtained in the state of Ohio, by a citizen of Virginia against citizens of Ohio, and an injunction to this judgment at law granted: the plaintiff at law, the defendant in equity, then dying, the suit was revived in the name of his representative, a citizen of Ohio. Upon this case, the question of jurisdiction was raised, the parties being then all citizens of Ohio. The court say, that although the defendant in equity, is a citizen of Ohio, yet, he was the representative of the plaintiff at law, who was a citizen of Virginia, and "this fact" (that is, his citizenship in Ohio) "will not deprive the court of an equitable control over the judgment." And again—"Of the action at law the circuit court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached." Finally, regarding this motion as neither enforced by any overruling authority by which the judgment of this court must be controlled, nor as consistent with justice to all the parties, I am constrained to refuse it.

BARBOUR, Circuit Justice, after stating the case, said:

Various points have been made in support of this motion, which I will briefly examine in the order in which they were presented.

1. It is contended, that this is substantially a contest between Drummond, the surety in the custom-house bonds, one of the trustees, and also one of the defendants, and Myer Myers, his co-defendant, and that the United States are only nominal parties: and, that, consequently, the court has not jurisdiction, because they are both citizens of Virginia. If this were so, then the consequence contended for would follow. But are the United States only nominal parties? It is not denied, that a debt is due to them, that it was originally due from Moses Myers & Son, and that it is charged upon the fund conveyed by them in trust, and that, independently of that charge, created by the parties, the law, in case of an assignment of the debtors' whole estate, as in this case, gives them a priority of payment; and this is a bill brought to enforce that charge, and that priority in behalf of a real creditor, competent to sue in this court. 1 Story's Laws, p. 465, c. 74, § 5; Act March 3, 1797 [1 Stat. 515, c. 20]. I understand the term, "nominal party," to import one to whom nothing is due, but who is suing in his name for the benefit of another. Now, here, there is something due to the United States, and this bill is brought to enforce the recovery, and the decree must be in favour of the United States. The counsel for the defendants relied upon the case of Brown v. Strode, 5 Cranch [9 U. S.] 303. That was a suit brought by the justices of a county court, to whom, as obligees, the defendant, an executor, executed an official bond, for the faithful discharge of the duties of his office. The nominal plaintiffs and defendants were all citizens of Virginia, and yet the supreme court held that this court had jurisdiction; but why? Because it appeared upon the record, that they sued, not for themselves, but for an alien creditor, having claim against the estate; they were, in truth, but nominal parties: to themselves, nothing was due: for themselves, they claimed nothing; but the suit was brought in their names, as by law it was obliged to be, for the benefit and at the relation of another, who was an alien creditor; the fact of his being an alien creditor, appearing, as it was necessary it should appear, upon the record, this case is in direct contrast with the one at bar, in the important particulars, that here, the United States are suing, not for another, but for themselves; not at the instance of a relator appearing upon the record, and who, under a decree in their name, would receive the amount; but prosecuting their own claim, at the request, indeed, as appears from Drummond's answer, of one of the defendants, in the spirit of a liberal justice, to make the burden fall where it ought to rest. If this would make the person at whose instance this course is pursued, the substantial party, as well might it be said, that if a principal and surety were to execute a joint and several bond, and the creditor were, at the instance of the surety, to prosecute his action against the principal only, that the surety was the substantial party plaintiff. We consider the principle settled, nay, it is said, in 4 [Pet.] Cond. R. 128, note [Morgan v. Morgan, 2 Wheat. (15 U. S.) 290], that it may be laid down as a rule without exception, that in all cases where the jurisdiction depends on the party, it is the party on the record. Now, the party plaintiff here, is the United States, who are undoubtedly competent to sue here as plaintiffs; and all the defendants, as far as the jurisdiction depends on citizenship, are citizens of Virginia, and, considered in that respect only, are clearly suable here as defendants.

2. It is argued, that the court cannot take jurisdiction of this case, because the United States having obtained judgment, for their claim against Drummond, the surety, who is solvent, they have complete remedy at law. Let us examine the application of this principle to this case. It is, indeed, enacted by the sixteenth section of the judiciary act, that suits in equity shall not be sustained in either of the courts of the United States, where plain, adequate, and complete remedy may be had at law. 1 Story's Laws, 59 [1 Stat. 82]. It has been decided, again and again, that this is nothing but an affirmance of the well known principle of equity; and it is said in Boyce v. Grundy, 3 Pet. [28 U. S.] 210, that to prevent resort to equity, the remedy at law must be as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity. The principle, which we are now

considering, applies to those cases in which, ordinarily, the only remedy is at law; but the party comes into equity on the ground, that by reason of some impediment in the way, or some unfair legal advantage acquired by his adversary, justice cannot be done him at law. The court inquires, whether such impediment, or legal advantage exists; and, accordingly, as it does, or does not, grants, or withholds relief. But it does not apply to those cases, in which the courts of equity and law, have a concurrent jurisdiction. In those cases, although the concurrent jurisdiction of the court of equity most probably originated, from the consideration, that there was not, or might not be, an adequate remedy at law, yet where that concurrent jurisdiction has been established, if a party elect to come into a court of equity, it is no objection to its jurisdiction in the given case, that the party might have remedy at law, even, although, in that particular case, the remedy might be adequate. Thus, if one man appoint another his bailiff, or receiver, I suppose there is no doubt that if money be received, and not accounted for, the party may bring a suit in equity for an account, or an action of account or assumpsit at law; and the equity jurisdiction will not be ousted, because these concurrent remedies lie at law. Again:—A party may now have remedy at law upon a lost bond; but that does not oust the ancient equity jurisdiction. But what is more in point, is, the case put by Mr. Johnson, which is admitted in all the books, that if a party have a mortgage and a bond for the same debt, he may even pursue both simultaneously, until he gets satisfaction. That is, in effect, the case here, for here, there is a specific lien, which places this case upon the same footing with the mortgage. If it were true, that where the United States had remedy at law, they could not be entertained in equity, then they never could come into equity, in cases of custom-house bonds, where the sureties are solvent, for they always have remedy on them at law; and yet, not to mention other cases, in U. S. v. Howland, 4 Wheat. [17 U. S.] 108, and Hunter v. U. S., 5 Pet. [30 U. S.] 173, they were plaintiffs, as here, seeking to charge a trust fund, in cases of custom-house bonds, and in the first of these cases, as here, a judgment, as appeared by the bill, had been obtained against the surety; and it does not appear in the case, that he was unable to pay.

3. It is contended, that the court cannot take jurisdiction against Myer Myers, who, it is said, stands in the relation of debtor to the plaintiffs' debtors, and, as such, cannot by them be called to account; and the case has been likened to one of a debtor to a decedent's estate, against whom, it is said, and we think correctly, the creditor of the decedent can have no remedy, except under special circumstances, such for example, as collusion with the executor, &c. We do not consider the cases alike. We look upon Myer Myers as standing in the relation, not of a mere debtor, and the plaintiffs as mere common creditors at large; but if Myer Myers has received and not accounted for any portion of the trust subject, then we consider him as the actual holder of part of a fund, as to which the plaintiffs are entitled to priority of payment, by operation of law, and to a specific lien, by the deed of the parties. Considered in this aspect, we think it can be shown on principle, that he is liable to account to the plaintiffs. But we forbear to pursue the reasoning on the subject, because we think the question is closed by authority. In U. S. v. Howland, before cited, Shoemaker and Travers were indebted to the United States on duty bonds; the principals became insolvent, and assigned all their estate, particularly the cargo on board a particular ship, to pay their debts, and that to the United States first. The United States obtained a judgment against the sureties, which was unsatisfied. The sureties filed their bill to subject the proceeds of that cargo to their claim, and made Howland and Allen, the owners of the ship, and who had received the proceeds of the cargo, defendants. It was objected, as here, that they were improperly made defendants, but the supreme court held otherwise. That we consider as a case directly in point, to prove that Myer Myers was properly made defendant. We give no opinion upon the state of his indebtedness; at present, the inquiry is, whether we can rightfully take jurisdiction, at the instance of these plaintiffs, as against him? Whether he holds anything liable to their claim, and if so, how much, will be the subject of future inquiry?

4. It is insisted, that under the treaty with France, sums of money have been awarded to Moses and John Myers, more than the claim of the United States, which they can retain in satisfaction of their debt, and, therefore, they ought not to prosecute their claim here. The United States may, if they elect so to do, apply so much of the money thus awarded, as will satisfy their claim. This they actually did in the case of the Spanish indemnity, by an act of congress, providing, that no part of the sums awarded to any of their debtors, should be paid to them without retaining the amount of their debts, respectively, to the United States. Whensoever, in relation to this case, they shall elect to pursue this course, it will be then proper to consider what bearing that will have upon the subject. That, however, is not the present posture of this case; and, we think, that the power to retain, until exercised, constitutes no impediment to the prosecution of this suit.

5. The fifth and last point, is this: Whether it is competent for this court to decree, as between co-defendants, in a case where plaintiffs and defendants are rightfully convened before the court, though on account of the citizenship of these defendants, one of them could not have maintained an original suit in this court against the other? Upon this point,

I acknowledge, I have felt a serious difficulty. On the one hand, such a course seems, in some sense, to be obnoxious to the objection that the court was thus taking jurisdiction between parties indirectly, which they could not take directly. On the other, the inconveniences of a contrary course are so great, that the argument, ab inconvenienti, presses with great weight. Thus, take the case of a citizen of Virginia, dying intestate, leaving all his distributees, but one, also citizens of Virginia, and also administration taken out by a citizen of Virginia. The foreign distributee brings his bill in this court against the administrator and co-distributees. This suit is rightly instituted, both in respect to plaintiff and defendants. Must a decree be made, assigning the plaintiff only his share, making no disposition of the remainder? Let us put another case. A citizen of Virginia, mortgages real estate in Virginia, to two or three citizens successively, and then makes a further mortgage to a citizen of another state; the last mortgagee brings his bill in this court, against the mortgagor, and all the prior mortgagees, praying a sale of the subject, and asking that what may remain, after satisfying the previous liens, shall be applied in discharge of his debt. The subject is sold: what shall be done with the proceeds?

We incline to think, that the true principle is this:, that all inquiries as to the character of parties in this court, are, in their nature, preliminary; and, that when the court is once satisfied that all the plaintiffs are such, as may properly come into this court, and all the defendants are such, as may properly be brought into this court, it is then competent to make any decree which a state court might make; in a word, that, although this court is limited, as to the persons for whom, and against whom, it may take jurisdiction, yet, when the suit is rightly constituted, as between plaintiffs and defendants, it is not limited in its action on the whole case. And our impression is that the cases may be explained on this principle. Thus, without going into them in detail, take the strongest one,—Dunn v. Clarke, 8 Pet. [33 U. S.] 1. There all the complainants, and all the defendants were citizens of Ohio; but, as it was an injunction to the circuit court of Ohio, the court sustained jurisdiction as against one defendant who was the representative of the plaintiff at law; but declined jurisdiction as to all the other defendants, who had not been parties to the suit at law. Even taking jurisdiction against the one, seems to be, in some degree, a departure from the strict rule, as all the parties were citizens of the same state; but it being necessary so to do, to stay the execution of their own judgment, they did so, whilst, as to the other defendants, this principle not applying, they disclaimed jurisdiction. No case has been found deciding this very point, but there being no case the other way, considering the great inconvenience, nay, mischief, which might result from a contrary course: that it seems rather to be a question of jurisdiction between the parties, than a question of power over them, after jurisdiction vests: that here all the parties are rightly constituted: that in any state court, a decree might be made under the circumstances stated between co-defendants: that the supreme court has said, in [Gassies v. Ballon] 6 Pet. [31 U. S.] 761, that the cases on the question even of jurisdiction as to the parties, have gone as far as it would be proper to go, we incline to think that a decree between co-defendants, though both citizens of Virginia, may be made in this court. The result of these views is, that the motion is overruled.

Case No. 15,845.

UNITED STATES v. MYERS.

[1 Cranch, C. C. 310.] [1]

Circuit Court, District of Columbia. June Term, 1806.

ASSAULT.

It is an assault to double the fist and run it at another, saying, "If you say so again I will knock you down."

[Cited in State v. Painter, 67 Mo. 87.]

Presentment, for an assault on Jane McGrath. The evidence was that the defendant [Samuel Myers] doubled his fist and ran it towards the witness, saying, "If you say so again, I will knock you down."

Mr. Key, for defendant, contended that it was not an assault. The words explain the act, and show the intention not to be to commit a battery. It was like the case of the man putting his hand on his sword, and saying, "If it were not term time or assizes, I would kill you," &c.; and he moved the court to instruct the jury that it was no assault.

Mr. Jones, for the United States.

THE COURT, (nem. con.) refused to give the instruction.

Verdict, "Guilty." Fined five dollars.

Case No. 15,846.

UNITED STATES v. MYERS et al.

[3 Hughes, 239; 5 Reporter, 364; 24 Int. Rev. Rec. 44; 25 Pittsb. Leg. J. 143.] [2]

Circuit Court, E. D. Virginia. Feb. 7, 1878.

INTERNAL REVENUE—DISTILLERY—ASSESSMENT—TESTIMONY—NEW TRIAL.

1. In a suit by the government on a distiller's bond for the amount of an assessment made by the commissioner of internal revenue under section 3182, Rev. St. U. S., it is competent for the defendant to produce evidence to show the incorrectness of the assessment, and to contradict it, although he has not first appealed to the commissioner of internal revenue against the assessment.

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

[2] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 25 Pittsb. Leg. J. 143, and 5 Reporter, 364, contain only partial reports.]

2. Where the government, in such a trial, fails to show by positive evidence that frauds (which might as probably or more probably have been committed at the rectifying-house) were committed at the distillery, and the defendant, by all the testimony that could well be brought to establish a negative, shows that the frauds were not committed at the distillery, and that they were probably committed at the rectifying-house, and the jury refuses to find a verdict for the government merely on the presumption that the frauds were committed there, the court will refuse to grant a new trial asked for on the ground that the verdict for the defendant was against the law and evidence.

Action of debt. Plea of conditions performed.

This was an action of debt against the late firm of M. [Myer] & E. [Ezekiel] Myers, as distillers of spirits, in the second district of Virginia, and their sureties [William Loftin Williams, Solomon Benjamin, and William W. Myers]. It was brought for the recovery of $47,800 claimed for taxes due and unpaid, as shown by an assessment of the commissioner of internal revenue. It was tried on the 22d January, 1878, and a verdict found for the defendants, whereupon the United States attorney moved for a new trial. The action was brought to recover an amount shown by an "Assessment List, Special No. 2," to be due for taxes on 68,400 gallons of distilled spirits at 70 cents per gallon, accruing from May 1st, 1874, to February 10th, 1875, amounting to $47,800. This list is a large folio sheet and contains at the bottom of it a certificate in these words: "I hereby certify that, as authorized and required by law, I have made inquiries, determinations, and assessments of the taxes specified in the foregoing list, and find to be due the amount specified in columns 8 and 9, of said list, from the persons against whose names said amounts are respectively placed. D. D. Pratt, Commissioner. Internal Revenue Office, Washington, November 18, 1875." The taxes thus assessed are claimed to have been due over and above the taxes which were regularly paid by the distillers while they were engaged in business, from May, 1874, to March, 1875. At the trial the government presented this "assessment list" in evidence, and proved its authenticity. It then insisted that this document was a final "determination" by a competent authority of the amount of taxes still due and unpaid by these distillers, for which they and their sureties were bound; and claimed that it was not necessary on its part to bring forward other evidence to show that the amount of taxes thus assessed and determined was in fact due; and, moreover, that it was not competent for the defendants, by any evidence on their part, to contradict this "determination" of the commissioner of internal revenue. But the court ruled that in the present trial, and especially as against the defendants, Benjamin and Williams, solvent sureties in the bond of these distillers, this "assessment list" was not conclusive proof of the amount of taxes really due; and that it was competent for the defendants to show, by other evidence, either that the amount assessed was not due, or that no amount was due, or that some other amount, and what, was really due. After this ruling, the trial proceeded on evidence produced by the parties on each side. The government showed that there had been found in New York and elsewhere 219,720 gallons of rectified spirits which had come from the rectifying-house of M. & E. Myers; whereas they had reported and paid taxes on only 193,119 gallons—an excess of 26,100 gallons, or 607 barrels, thus appearing against them; this excess calling for $18,270 of taxes more than they had paid, they having paid but $135,183; whereas there had accrued on 219,720 gallons the gross sum of $153,800. In short the government showed that 607 barrels had gone from the rectifying-house more than had been reported, and tax paid; on which $18,270 more of taxes were due than had been paid. But the government produced no evidence to show that an excess as large as 68,400 gallons (equivalent to 1590 barrels) had been actually distilled, except this "Assessment List, Special No. 2;" or to show that as much as $47,800 was still due of taxes in excess of the taxes that had been paid. The defendants produced no evidence in denial of the fact that 607 barrels more of distilled spirits had been sent from the rectifying-house than had been reported at and removed from the distillery. They proved that the rectifying-house was about half a mile from the distillery. They produced the two government storekeepers (one of them the day keeper, the other the night) who were on duty during the period from May, 1874, to March, 1875, who testified that they saw no illicit spirits removed from the distillery; that they would have known of the removal, if it had occurred to any extent; and that they did not believe that there had been any removal. Defendants proved that these witnesses were men of good character. They proved by all the men (save one) who had been employed in the distillery that they had seen no irregular removal, that they must have seen it if it had gone on to any extent, and that they did not believe that there had been any irregular removal. The whereabouts of the single employé not examined was unknown to the defendants. These employés were averred and appeared to be respectable laboring men. Defendants produced evidence tending to show that whatever frauds were practiced were practiced at the rectifying-house; that there was nothing in the regulations of the government to render it impracticable for barrels of rectified spirits to be sent from the rectifying-house containing less, by 5 to 8 gallons each, than called for by the gaugers' marks and stamps; an average short-filling of four gallons a barrel on 193,119 gallons (4500 barrels) being 18,000 gallons

(418 barrels), which would account for the larger part of the deficiency of 607 barrels charged against them. They adduced evidence tending to show how, in other feasible ways, an additional excess could result between the quantity of spirits dumped from the distillery at the rectifying-house, and the quantity sold from the rectifying-house; and how this could be done consistently with the government's receiving every dollar of the taxes due it on the spirits really distilled; the only fraud practiced being upon the purchasers of the spirits in receiving in the barrels less spirits than the gaugers' marks indicated. They presented evidence to show that all that was necessary to enable the rectifiers to put this fraud upon the public, was that they should be able to influence the government's gaugers in the discharge of their duties; and they presented evidence tending to show that the gaugers who had officiated at their rectifying-house had been as facile as could have been desired, in respect to these matters; and that some of them had been convicted of misdemeanors in connection with this same business. In short, the evidence of the defendants tended to prove that no frauds had been committed at the distillery; that in fact the government had received the taxes due to it on all the spirits which were actually distilled; that whatever irregularities had been committed had been committed at the rectifying-house; and that, even from these irregularities, the government had sustained no loss of taxes really due to it. The jury, on the evidence thus briefly described, took the case into consideration, and found a verdict for the defendants. Whereupon the United States attorney moved that the verdict be set aside as contrary to the law and the evidence. He moved for a new trial on this ground, and also because of the misruling of the court in admitting evidence at the trial in contradiction of the certificate of the commissioner of internal revenue, given in "Assessment List, Special No. 2," to the effect that he had "inquired, determined, and assessed" that $47,800 was due.

L. L. Lewis, U. S. Atty.

John S. Wise and John Lyon, for defendants.

HUGHES, District Judge. The first question arising upon the motion for a new trial is, whether the court erred in ruling that the "determination" of the commissioner of internal revenue was not conclusive upon the jury in the trial of this cause.

I. The various acts of congress relating to the internal revenue give ample powers to the revenue officers of the government for the collection of all taxes assessed by law; and the provision which has now taken the form of section 3224 of the Revised Statutes of the United States, prohibits the courts from interfering between collecting officers and taxpayers. The courts are glad to obey this injunction of the law, and are reluctant to interfere with the collection of any taxes assessed by revenue officers. It is necessary to the effective conduct of the government that these taxes be paid as they are assessed; and the courts, whenever they are at liberty to refrain, will refuse to interfere with the collection. It is the duty of citizens to pay the taxes as they are assessed, even though wrong and excessive taxes are levied. Having paid an unjust tax, the law gives the taxpayer a right of action against the collecting officer, to recover back in a court of justice the amount wrongly paid; but it provided, before 1872, that he should first have appealed to the commissioner of internal revenue against the assessment of the local assessor, and that his appeal should have been overruled by that officer. After such appeal and rejection, the law, as it stood before 1872, gave the taxpayer the right to sue the officer who had received the tax for a return of it. The law of December 24th, 1872, c. 13 (17 Stat. 401), abolished the local assessors of internal revenue, and consolidated their duties with those of the local collectors. But it provided that assessments should be made in the first instance by the commissioner of internal revenue, and by so doing, as it seems to me, it virtually abolished the provision, that before a suit could be brought by a taxpayer against the collecting officer, he should have first appealed against the assessment to the commissioner at Washington. For, an appeal to an officer who had already made a final determination against him, would seem to be a mockery. Even, therefore, if this were a suit by M. & E. Myers against the local collector, it would, in my judgment, be competent for them to have shown errors in the "Assessment List, Special No. 2," notwithstanding they might not have appealed from the assessment to the commissioner, and been overruled in their appeal. But this is not a suit of that sort. It is a suit by the government against M. & E. Myers and their sureties; and section 3226 of the Revised Statutes does not apply, even if an appeal to the commissioner of internal revenue as a court of final resort did now lie from a "determination" of this same commissioner as an officer of the revenue. Nor is this present suit one that has been brought in aid of the current collection of the revenue. It was not brought for more than a year after the business of M. & E. Myers ceased. It has not been pressed to trial until nearly three years after that business closed; and the effect of any ruling of the court in the case cannot be to impede or obstruct the prompt collection of the revenue.

I have carefully examined the voluminous laws of congress relating to the internal revenue, and if there is any provision in them which prohibits a court of the United

States, in a suit brought by the government against a taxpayer, from hearing legal evidence on issues of fact without restriction, and from rendering judgment in the course according to the law and the evidence, I have failed to discover it. Certainly no such law has been cited, and I do not believe it to exist. Moreover, I have looked carefully into all the decisions of the federal courts bearing upon this subject, and I find nothing in them to prohibit me from going behind "Assessment List, Special No. 2" in this case, except the cases which were cited at the trial by the United States attorney, of U. S. v. Hodson [Case No. 15,376], and U. S. v. Black [Id. 14,600]. I was much staggered by the able and learned opinion delivered respectively by Judges Hopkins and Shipman, who presided in the trial of these cases; which were actions by the United States against distillers and their sureties, precisely as in the present case; and in which it was held, that, in such actions, the assessment and determination of the assessor was conclusive against the taxpayer, even though there was no express statute to that effect.

It seemed to me, in view of well-settled elementary principles of jurisprudence and civil government, that it would not have been competent for congress to confer judicial functions, in matters of property, upon any officer of the executive department of the government; that judicial functions belong exclusively to the judicial courts of the country, and cannot be divested from the judiciary and transferred to the executive, and that any law to that effect would not only violate that cardinal theory of republican government which keeps distinct, separate, and independent, the executive, legislative, and judiciary departments of government; but would violate the fundamental law of the land (Const. U. S. Amend. 5), which provides that no person shall be deprived of his property without due process of law. In the numerous cases which have been decided by the United States supreme court, in which that court has passed or could have passed directly or incidentally on this question, although it has studied to promote the prompt administration of the revenue laws, and to avoid placing obstructions in the path of revenue officers; yet it has laid down no such principle and made no such ruling, as that a court when a suit has come properly before it, shall not decide it according to law and the evidence of the case. See Insurance Co. v. Ritchie, 5 Wall. [72 U. S.] 541; Philadelphia v. Collector, Id. 731; Nicholas v. U. S., 7 Wall. [74 U. S.] 122, 129; Baltimore v. Baltimore Railroad, 10 Wall. [77 U. S.] 552; U. S. v. Wright, 11 Wall. [78 U. S.] 648; Assessor v. Osbornes, 9 Wall. [76 U. S.] 567; Peabody v. Starke, 16 Wall. [83 U. S.] 240; Collector v. Hubbard, 17 Wall. [84 U. S.] 182; Dandelet v. Smith, 18 Wall. [85 U. S.] 642; Pohlman v. Collector, 20 Wall. [87 U. S.] 189; and Bailey v. Railroad Co., 22 Wall. [89 U. S.] 604. In the present case the ruling in U. S. v. Hodson [supra] and U. S. v. Black [supra] would have perpetrated a monstrous injustice; for here, the government in its proofs did not pretend that there was an excess liable to taxation of more than 607 barrels of spirits, over and above the quantity on which the taxes were paid; or that more than an additional $18,270 of taxes remained due; whereas the commissioner of internal revenue, by a purely perfunctory act, no opportunity having been afforded to the defendants for counter proof or appeal, had "determined" that the excess was 1590 barrels, calling for an additional tax of $47,800. Certainly the sureties of M. & E. Myers ought not, on the palpably erroneous determination of an executive officer in Washington, to be held accountable for nearly 1000 barrels of spirits, and made to pay nearly $30,000 of money which the government itself has offered no proof to show that they are accountable for. No case could be presented of a greater injustice resulting from a vicious ruling than the one now under consideration; and, even if I could find no warrant in the authorities for doing so, I should feel constrained to overrule the cases of Hodson and of Black, on principle. But since those cases were decided the supreme court of the United States has ruled in a manner which I conceive to have been more consistent with the requirements of the ancient tenets of English jurisprudence. The case of Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, was, like the present one, an action of debt on a distiller's bond where there was a plea of conditions performed. This very question of the conclusiveness of an assessment had been raised at the trial below; and the judge who had presided in the circuit court had ruled that the assessment, not having been appealed from, was res judicata, and conclusive; and that the defendant was precluded from showing to the contrary. The case arose before the law of December, 1872. It arose while assessments were made by local assessors; while liberal provisions of law allowing taxpayers an appeal and a hearing before these local assessors previously to the collection of taxes, were in force; and while taxpayers were allowed, besides an appeal to the local assessor, a right of final appeal to the commissioner of internal revenue. Well might the law, after making these careful provisions (all now swept away) for the protection of taxpayers against unjust assessments, go on then to command that they should pay the taxes when thus settled, and forbid them to sue for their return until final appeal had been taken to the commissioner.

The case of Clinkenbeard v. U. S. [supra] was a suit by the government on a distiller's bond given in 1868; and, as has already been stated, it had been contended by the government, that, no appeal having been taken to

the commissioner by the distiller, from the assessment sued for, the defendant was precluded from showing that the assessment was erroneous. But the supreme court, after drawing the obvious distinction between a suit by a taxpayer which could not be brought until after appeal, and a suit by the government, said: "No statute is cited to show that the defendant cannot when sued (by the government), set up the defence that the tax was illegally assessed, although he may not have appealed to the commissioner. * * * The decisions of an assessor, like those of all other administrative commissioners, are of a quasi judicial character, and cannot be questioned collaterally, when made within the scope of their jurisdiction. But, if they assess persons, property, or operations not taxable, such assessment is illegal, and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the government elects to resort to the aid of the courts, it must abide by the legality of the tax. When it follows the statute, its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs." This decision settles the law of the present case, and the objection of the district attorney to the action of the court in admitting evidence to contradict "Assessment List, Special No. 2" is not well taken, and furnishes no ground for setting aside the verdict.

II. As to the facts, there is less reason for setting aside the verdict. The affairs of this distillery have been before me so often, that I have learned to be pretty familiar with the facts of the case. There were two trials before me of the libel for the forfeiture of the distillery, and I believe I have tried one or two of the indictments against the government officers officiating at the distillery and rectifying-houses of M. & E. Myers. We also went through the trial of this case the other day. I can therefore speak with some confidence of its facts. There is no doubt but that the government has proved that M. & E. Myers sent to their customers in several places 607 barrels of spirits over and above the quantity on which they paid the proper taxes; that is to say, the government proves that they paid taxes on about 193,119 gallons of spirits, and they sold to their customers about 219,220 gallons. There is, therefore, but one single matter open to doubt. Did they commit these irregularities as rectifiers or as distillers? As rectifiers, did this excess of 26,100 gallons (607 barrels) represent additional proof spirits sold, upon which taxes were justly due, or did they represent merely the short-fillings of barrels refilled from the rectifying-house, and other frauds practiced by M. & E. Myers on their customers? The government has failed to produce any evidence proving affirmatively that any irregularities occurred at the distillery. It has failed to show any positive facts occurring on the distillery premises, which could raise a suspicion of the practice of irregularities there. And the defendants have proved as abundantly as there can be proof of a negative that no irregularities were committed there. The only question of evidence, therefore, is, whether the single fact of the existence of 607 barrels in nominal excess of the quantity on which taxes were paid, is a sufficiently strong presumption to warrant the conclusion that the fraud was practiced at the distillery. Two or three juries, who have had this issue of fact before them, have refused to find a verdict on this presumption; and I think they were right in doing so. Circumstantial evidence is in some cases even stronger than direct testimony; but experience has shown that it is never reliable, unless subjected to certain tests. One of these tests is, that the fact which it goes to establish shall be inconsistent with every reasonable theory which can be conceived in contradiction of it. Is that the case here? I think not. No one who has heard the evidence upon which the jury found for the defendants, can fail to have recognized, not only the possibility, but the probability, that the irregularities indicated by the re-use of 607 barrels, which had been removed regularly from the distillery, was effected by the connivance of the gaugers, and by manipulations at the rectifying-house. My own mind came to that conclusion, after the second or third trial of these Myers Cases in this court; and I have concurred with the juries in their reluctance to find verdicts against the distillery, and against these people as distillers, on the mere presumption that the fraud was committed at the distillery. In this conviction I believe that the verdict of the jury was in accordance with the evidence, and I must decline to award a new trial. I am well persuaded that no jury will ever find a different verdict.

Case No. 15,847.

UNITED STATES v. MYERS.

[14 Int. Rev. Rec. 14.]

District Court, D. Maryland. December Term, 1870.

INTERNAL REVENUE — OPPOSING AND RESISTING A REVENUE OFFICER.

At law.

In the case of United States v. John Myers, George Snyder, and John Voight, indicted for conspiring and combining to and actually resisting a United States revenue officer, GILES, District Judge, delivered his decision upon the prayers offered on behalf of the defence. The prayers were as follows:

First. That the defendants cannot be convicted unless the jury are satisfied by proof

that they resisted by force or with any such show of force as to intimidate the officer, Herold, knowing at the time that he had a distraint warrant, and that he was then endeavoring to execute it.

Second. The defendants cannot be convicted under the first count unless the jury are satisfied by proof that they concerted and combined together to resist by force the execution of a distraint warrant, previously to the attempt by Herold to seize the horse in question.

Third. That the distraint warrant offered in evidence is not legal process within the meaning of the twenty-second section of the act of 1790 [1 Stat. 117], and therefore the defendants cannot be convicted under the indictment in this case.

Fourth. That if William Myers was dead before the issue of the distraint warrant, the same was not legal, and the defendants cannot be convicted.

Fifth. That Herold was not justified in seizing the horse of John Myers under a distraint against William Myers, and the said John cannot be convicted for resisting the seizure of the said horse.

Sixth. That the warrant of distress was not authorized by the revenue laws, because there was no publication in a newspaper; therefore the defendants cannot be convicted.

GILES, District Judge, in delivering his opinion said: This is an indictment under the twenty-second section of the act of 1790, and the late act of the 2d of March, 1867 [14 Stat. 471]. It is an indictment for a conspiracy to resist a revenue officer. The question which meets us on the threshold is, does the evidence in the case bring it within the act of congress upon which it is founded? and that depends upon the true construction of the act of 1790. The United States district attorney contends that the process of distraint is such a legal process as is referred to in that act, but to this proposition I cannot assent. The contrary is clearly shown by both legislative and judicial authority. If the view of the district attorney was correct, there would not have been any necessity for the passage of the subsequent acts upon this subject.

Judge GILES then referred to and read these acts, viz. the act of 1793 (1 Stat. 173), and the act of 1799 (Id. 678).

These acts, said the judge, would have been nugatory if the construction put by the United States district attorney upon the act of 1790 were correct. Similar provisions are also to be found in 3 Stat. 185, and in 4 Stat. 63. The internal revenue law itself, passed recently, also provides for the punishment of offences of this kind in its 38th and 67th sections. Now all these acts show that the act of 1790 does not include the case at bar; but in addition to these, there have also been direct decisions upon this point. The judge then referred to a decision of Judge Curtis (U. S. v. Stowell [Case No. 16,409]), and also to U. S. v. Wilson [Id. 16,731].

These authorities are to the effect that the act of 1790 was never intended to protect anything but process issued by the courts, magistrates, or commissioners of the United States in pursuance of its laws. Such being my opinion, I must grant the third prayer of the defendants, and that puts an end to the case.

Mr. Stirling then requested the court to decide the other points raised by the defendants' prayers, but the judge declined to do so, saying that he had not considered them, and intimating that it was his opinion that if the officer was about to take the property of John Myers (and whether it was the property of John Myers was a fact that he would have to leave to the jury) for the taxes due by William Myers, then he was not protected by his warrant, and the defendants could not be prosecuted for resisting him.

The judge then instructed the jury to render a verdict of "not guilty," which they did, and it was entered by the clerk.

The case of U. S. v. Keene [unreported], who had been jointly indicted with the persons above named, but who had severed his case from theirs, was then called, a jury sworn, and a verdict of "not guilty" also entered, in accordance with the instructions of the court to that effect.

The evidence upon the part of the United States in the above case was that the deputy collector, Mr. Herold, in pursuance of instructions from the collector of internal revenue, Mr. Samuel M. Evans, undertook to execute a warrant of distress by seizing a horse, at the Belair Market, for the amount of $7 taxes due by a certain William Myers for a license as a produce broker, and that he was resisted while so doing by Myers, Voight, Snyder, and a number of others, who threatened him, pushed and crowded upon him and assaulted him, so that he was compelled to call to his assistance a constable and policeman; that those resisting him while doing so declared that the tax on market people was illegal, and that their counsel, Mr. Keene, had advised them to resist, and that when the above-named parties were brought before United States Commissioner Rogers, Mr. R. G. Keene said that he had so advised them.

The testimony on the part of the defence was that William Myers, against whom the distraint warrant was issued, had died some time before; that the horse seized belonged to John Myers; and that the objection made and resistance offered was because the officer wanted to take John Myers's horse for the tax due by William Myers.

Case No. 15,848.

UNITED STATES v. MYERS.

[16 N. B. R. 387.] [1]

District Court, E. D. Virginia. Nov. 27, 1877.

BANKRUPTCY — OBTAINING GOODS UNDER FALSE PRETENSES—INDICTMENT.

1. An indictment under section 5132, Rev. St. U. S., will lie before an order of adjudication in bankruptcy.

2. An indictment for obtaining goods under false pretenses, founded upon the ninth clause of section 5132, need not charge an intent to defraud creditors generally.

3. Such an indictment need not contain the negative averment that the accused was in fact not carrying on business and dealing in the regular course of trade when he obtained credit for goods on false pretenses.

This was an indictment [against Jacob E. Myers] for violating the 9th clause of section 5132 of the Revised Statutes of the United States. The case is heard on a motion to quash the indictment. The grounds of the motion are set forth in the judge's decision.

The indictment charges that proceedings in bankruptcy were commenced on the 15th November, 1877, against the accused, upon the petition of Edward Mahon and J. Francis Mahon, creditors of the accused, pursuant to the statute in such case made and provided; and that accused did, within three months next preceding the commencement of said proceedings in bankruptcy, to wit, on divers days and times from the thirty-first day of August to the day and year last mentioned, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from the said Mahons a large quantity of goods and chattels, to wit, twenty-five cases of shoes of the value in all of eighteen hundred dollars, with intent then and there to defraud the said Edward Mahon and J. Francis Mahon, and other persons to the grand jurors unknown, against the form of the statute in such case made and provided.

L. L. Lewis, U. S. Atty., and B. W. Hoxsey, his assistant, for prosecution.

A. G. Holladay and D. J. Godwin, for accused, on motion to quash the indictment.

HUGHES, District Judge. Counsel for the accused base their motion on three grounds:

(1) They say that there has been no adjudication upon the petition in involuntary bankruptcy filed by Mahon & Co. against the accused, and hold that the court has no jurisdiction to try the indictment; citing among other authorities U. S. v. Prescott [Case No. 16,084].

(2) They say, further, that the intent charged by the indictment ought to have been an intent to defraud creditors generally, and not merely the creditors signing the petition in involuntary bankruptcy, holding that the addendum, "and other persons to the grand jurors unknown," used by the pleader, has no value; and they cite among other cases U. S. v. Clark [Case No. 14,806], and U. S. v. [Penn Id. 16,025].

(3) They say, in the third place, that the affirmative charge in the indictment of obtaining the goods on credit, "under the false color and pretense of carrying on business and dealing in the ordinary course of trade," is not sufficient, and that there should have also been the negative averment, that the accused was not, in fact, carrying on business and dealing in the ordinary course of trade. They cite in support of this objection to the indictment the decision of Mr. District Judge Miller in U. S. v. Prescott [supra].

I. As to the first point, it is not well taken. It is true that under the law as it was before the adoption of the Revised Statutes of the United States, on the 22d June, 1874 [18 Stat. 178], there could be no indictment under section 44 [14 Stat. 539], until after there had been an adjudication in bankruptcy. Until then the language of that section was: "From and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy," do certain acts, or "within three months before the commencement of proceedings of bankruptcy," obtain goods on false pretenses, "he shall be guilty of a misdemeanor, and upon conviction" be punished, etc. And section 28 of the act as it then was provided that "the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, etc., etc., shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act." The language of the law as it stands in the Revised Statutes of 1874 is different. Section 5132 provides that "Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor, . . . who, within three months before the commencement of proceedings in bankruptcy," obtains goods on false pretenses, etc., etc., "shall be punishable by imprisonment," etc.; and section 4991 provides that "the filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy." While it was a question, therefore, in 1870, when the case of U. S. v. Prescott [supra], was decided, whether an indictment for obtaining goods on false pretenses would lie before adjudication, there is no such doubt now. The mere fact of "filing the petition" in involuntary bankruptcy fixes the date and fact of the "commencement of proceedings in bankruptcy," and renders the right and power of prosecution wholly independent of the adjudication.

II. Nor is the second point of the accused's

[1] [Reprinted by permission.]

counsel well taken. The indictment in the case of U. S. v. Clark [supra] was for fraudulently disposing of goods which had been obtained on false pretenses with intent to defraud creditors, and was founded upon the tenth clause of section 5132. In such a case it is necessary to charge an intent to defraud creditors generally. But for the bankruptcy law, the laws of most of the states allow a debtor to dispose of his property for the benefit of some creditors to the prejudice of others. But the bankruptcy law makes such disposal a fraud upon others, and makes it a criminal offense. It was therefore necessary to make the intention to defraud creditors generally a necessary ingredient of the offense defined in the tenth clause of section 5132. But the case of obtaining goods on false pretenses is quite a different one. If the goods are obtained from one person only, the intent to defraud that person alone makes a complete offense, and therefore it is only necessary to charge the intent as having existed with respect to that person.

III. I have more difficulty in regard to the third point taken by counsel for the accused. If they had stated their proposition less broadly, I might possibly have sustained them. But stated in the breadth which they give it, I do not feel authorized in sustaining it. If I may, by way of argument and illustration, refer to the case as set forth against the accused by the petition in bankruptcy, it is, that being a regular dealer in dry goods and shoes of long standing, and until lately of high credit and standing, he did, while carrying on business in the regular course of trade, yet obtain a very large quantity of goods on pretense of meaning to use them in his regular business, with intent to dispose of those particular goods out of the regular course of trade, at a sacrifice for ready cash, with intent to defraud the jobbers who trusted him for the price of the goods. Now, my opinion is that this offense, committed by a regular dealer, is indictable under the ninth clause of section 5132. But the proposition of the counsel of the accused is, that a regular dealer cannot commit the offense denounced by that clause. They claim that the indictment should have contained the negative averment, that the accused was not, in fact, carrying on business and dealing in the regular course of trade at all. I think that such an averment is not essential. It was not made in this case because it could not have been made with truth. The accused was a regular dealer; and his false pretenses were only held out in regard to the purposes for which he was purchasing on credit the particular goods which he is charged as having diverted, and having intended to divert from the regular course of his trade. I would prefer to have seen a negative averment as to these particular goods in the indictment; but as the absence of it is not complained of by counsel for the accused, the trial must go on, and that matter must take care of itself at a future stage of the proceeding. On this and on all the points of objection to the indictment made by counsel the motion to quash is overruled.

UNITED STATES (MYERS v.). See Case No. 9,996.

Case No. 15,849.

UNITED STATES v. MYLER.

[7 Leg. Int. 162.]

District Court, D. Maryland. 1850.

FRAUDS ON GOVERNMENT—LAND WARRANTS.

In the case of U. S. v. Myler, in which the accused was indicted for defrauding the United States of a land warrant, the counsel for the prisoner raised the point of law that the act of congress of 1823, c. 38, under which the indictment against the prisoner was framed, was intended only for the punishment of those charged with defrauding the government of sums of money, and that therefore the accused could not be convicted under it.

THE COURT sustained the objection, and instructed the jury to render a verdict of acquittal.

Case No. 15,850.

UNITED STATES v. MYNDERSE.

[7 Blatchf. 483.] [1]

Circuit Court, N. D. New York. June, 1870.

INTERNAL REVENUE—FRAUDS IN DISTILLATION OF SPIRITS—FORFEITURES—PENALTIES—HOW RECOVERABLE.

1. Under section 54 of the internal revenue act of July 1, 1862 (12 Stat. 452), which declares, that the owner of any still or other vessel used in distillation shall, for certain violations of law, forfeit all the liquors and the vessels used in distillation, together with the sum of five hundred dollars, to be recovered, with costs of suit, "which said liquors, * * with the vessels, * * may be seized by any collector * * and held by him until a decision shall be had thereon, * * provided, that such seizure be made within thirty days after the cause for the same may have occurred, and that proceedings to enforce said forfeiture shall have been commenced * * within twenty days after the seizure thereof, and the proceedings to enforce said forfeiture shall be in the nature of a proceeding in rem," an action in personam, to recover the forfeiture of $500 therein provided for, will lie, although the seizure of property provided for by that section has not taken place.

2. Such action is, under that section, to be a separate suit from the proceeding in rem against the property seized, for its forfeiture.

[Error to the district court of the United States for the Northern district of New York.]

[This was an action brought in the district court by the United States against Edward

---

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

Mynderse, to recover penalties. The cause is now heard on a writ of error.]

William Dorsheimer, U. S. Dist. Atty.
Theron R. Strong and William F. Cogswell for defendant in error.

WOODRUFF, Circuit Judge. This case presents a question touching the construction of section 54 of the internal revenue act of July 1, 1862 (12 Stat. 452). By that section, it is enacted: "That the owner, agent, or superintendent of any vessel or vessels used in making fermented liquors, or of any still, boiler or other vessel used in the distillation of spirits, on which duty is payable, who shall neglect or refuse to make true and exact entry and report of the same, or to do or cause to be done any of the things by this act required to be done, as aforesaid, shall forfeit, for every such neglect or refusal, all the liquors and spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, together with the sum of five hundred dollars, to be recovered, with costs of suit; which said liquors or spirits, with the vessels containing the same, with all the vessels used in making the same, may be seized by any collector of internal duties, and held by him, until a decision shall be had thereon according to law: provided, that such seizure be made within thirty days after the cause for the same may have occurred, and that proceedings to enforce said forfeiture shall have been commenced by such collector, within twenty days after the seizure thereof And the proceedings to enforce said forfeiture of said property, shall be in the nature of a proceeding in rem, in the circuit or district court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction."

This action was brought to recover several sums of five hundred dollars, liability for the payment of which is alleged to have been incurred by the defendant, by sundry violations of the 45th section of the same act, at sundry times in the declaration stated. On the trial, proof of such violations was given, on the part of the plaintiffs; but it was conceded that no seizure of the property of the defendant had been made, and that no proceedings to enforce the forfeiture were commenced within fifty days after the cause for the same occurred. Thereupon, the question arose—Can the action to recover the several sums of five hundred dollars be maintained; or, are a seizure of the liquors, spirits, stills, boilers, and other vessels, within thirty days after the cause for the same occurred, and the commencement of proceedings to enforce the forfeiture, necessary and precedent conditions to the right to recover from the owner personally the five hundred dollars? The seizure of the property, and the commencement of proceedings to enforce the forfeiture, within the times respectively mentioned, were held, on the trial, to be indispensable conditions precedent to a recovery of the five hundred dollars from the owner; and the jury were, therefore, on that sole ground, instructed to find a verdict for the defendant. [Case unreported.] The plaintiffs, by their writ of error, seek to review such rulings, and allege that it was an erroneous construction of the act.

In support of the ruling below, it is insisted, that the 54th section, upon which the action is based, contemplates one entire forfeiture, and only one proceeding for its enforcement, including therein the condemnation of the property seized, and a judgment against the owner personally for the five hundred dollars, or several sums of five hundred dollars, if he be liable for more than one; and that the proviso forbids any seizure or forfeiture, unless such seizure be made within the number of days mentioned after the cause of seizure occurred.

The statute is expressed in terms which are, in many respects, liable to criticism, and the structure of the section is somewhat confused. Its meaning is, nevertheless, sufficiently clear and intelligible; and, I think, it does not at all import that there shall be but one proceeding founded upon a violation of the law. The purpose was, to secure obedience to the statute, by subjecting its violators to a loss of the property produced and the instruments employed in the production, and to impose upon them personally a penalty. The penalty is to be recovered, with costs of suit This language is to be understood in the usual sense in which it is employed, namely, in a suit to be brought therefor, in which the person liable may be charged by a judgment against him, with costs. The statute uses the ordinary form of the ideo consideratum est, which embodies and declares the judgment of the court in an action for the recovery of money. On the other hand, the section says, expressly, that the proceedings to enforce the forfeiture of the property shall be in the nature of a proceeding in rem. In such proceeding, there is no personal judgment, and the property is defendant. Indeed, if, in such proceeding, the owner of the res does not see fit to appear and claim, he will not be before the court at all, to be charged by any judgment. The giving of a recovery, with costs of suit, indicates, per se, a discrimination intentionally made between the action for the penalty and the proceeding in rem; for, in the latter, all that is secured to the plaintiffs is the res itself, for condemnation and appropriation to their use; and, where the owner does not see fit to appear and claim, the whole subject of condemnation goes to the plaintiffs, and no more, whether the costs are greater or less. The costs of suit, spoken of, are not costs of the proceeding in rem, but costs of a suit for

the five hundred dollars. No mode is pointed out by which the owner can be required to appear in the proceeding in rem; and the construction in this respect would deprive the plaintiffs of any power, by any practice of the courts of law, to obtain such judgment against the owner personally, if he preferred not to intervene by claiming the property. There can be no just reason to suppose that congress intended to prescribe the practice of courts of admiralty, for the enforcement of this statute.

The proceeding in rem must, by the terms of the section, be taken in the district where such seizure is made. The owner of the property seized may reside in another district. Is it to be held, that, by this section, congress intended a constructive repeal, pro hac vice, of the eleventh section of the judiciary act of September 24, 1789 (1 Stat. 79), which declares, that no civil suit shall be brought against any defendant, being an inhabitant of the United States, out of the district in which he resides or may be found? If so, then, by what process, citation or notice can the court acquire jurisdiction of his person? Can the district court send its capias ad respondendum to another district? Upon its mandate, can the marshal of the other district act, in serving a citation, or other process or notice? Can the defendant be made a party by advertisement? Clearly, it is competent for congress to devise and provide for these and all like questions, and construct a proceeding which may accomplish the condemnation of the property, and give jurisdiction to order a recovery of the money penalty, with costs of the entire proceeding; but, in my judgment, they have not done so, or attempted to do so. The learned attorney for the United States has forcibly and, I think, justly and truly, suggested the reason why, under other rules and principles governing the subject, congress cannot be deemed to have intended, by the section under consideration, to work such a result as would flow from holding the proceeding to be necessarily single, and for both the condemnation of the property and the collection of the money from the owner, namely, that it "confounds modes of procedure which have always been held to be distinct—seeks in one action remedies wholly dissimilar—invents a new form of action, in which an individual and his property shall be pursued at the same time—an action, a part of which might, by the death of the owner, abate, and another part survive, and in which there must be two judgments, one to be enforced by writ of execution, the other by an order of sale. To one side of such a hybrid, mongrel proceeding any person having a claim to the property might become a party. To another side or part of the proceeding, he who had incurred the penalty would be the party, as sole defendant." I repeat, that, conceding the power of congress to do all this, they have not, in this 54th section, done so. Although not so expressed in distinct terms, the intention sufficiently appears, to authorize a suit for the recovery of the five hundred dollars, with costs, and a proceeding in the nature of a proceeding in rem, to enforce the forfeiture of the property, by its condemnation to the use of the plaintiffs. So far, therefore, as the support of the ruling below depends upon the idea that there can be but one suit or proceeding, I think it fails.

But the views above stated are not necessarily conclusive upon the principal question under examination. It is insisted that, whether the condemnation of the property and the recovery of the pecuniary penalty from the owner are to be effected by one or by two suits or proceedings, the condition annexed to both is, that a seizure must be made within thirty days, and proceedings to enforce the forfeiture be commenced within twenty days thereafter; and that the entire penalty and forfeiture, or whatever consequence the statute denounces for the violation of the law, is dependent on the performance of that condition.

Although the disposition of the first point above stated is not necessarily conclusive upon the present one, it is, nevertheless, of great significance, and at once lets in with great force the inquiry—what reason can exist for making the collection of the penalty from the owner dependent upon the seizure of the property also? I have had occasion to observe, in substance, in another case, recently argued (U. S. v. 36 Barrels [Case No. 16,468]), that this statute is not to be construed with rigid strictness, so as to favor any possible construction by which a defendant may be saved from the consequences of its violation, but that, on the contrary, it is to be interpreted with just and fair liberality, so as to promote the object of the statute and secure obedience to its requirements. The argument in behalf of the defendant in error places great stress upon the contrary rule of interpretation, namely, that a penal statute should be construed strictly, and, if there may be two constructions, that which is most in favor of the citizen should prevail. But, in the language of the court in the case of Cliquot's Champagne, 3 Wall. [70 U. S.] 114, 145, substantially borrowed from the opinion of the court in Taylor v. U. S., 3 How. [44 U. S.] 197: "Revenue laws are not penal laws, in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects." Construed in this spirit, I think the proviso should be held to relate to the forfeiture of the property, or rather to the seizure of the property. Indeed, it is no violence to the words or to the structure of the section to say, that it qualifies the paragraph immediately preceding, and

that only, to wit, "which said liquors, &c., may be seized, &c., provided that such seizure be made within thirty days, &c." There is reason for some limitation of the right to seize the liquors or spirits. They may pass lawfully into the hands of innocent third parties; and so, also, the stills and boilers and other vessels may be sold. It was, therefore, fitting that the right of seizure for past offences by the owner should have a limit in respect of time, which could have no application to the personal liability of the offender. If such seizure were declared a condition of such liability, on the rule of strict construction which is invoked, another question would at once arise—how extensive must the seizure be? The literal meaning of "such seizure," in the proviso, is a seizure of "all the liquors and spirits made," and the stills, boilers and other vessels used in distillation. These are what the collector is authorized to seize. Now, if the liability of the owner for the five hundred dollars depends on the making of the seizure, who shall say that the condition is satisfied by anything less than a seizure as extensive as the terms authorize? Authority being given to seize all the spirits made, and it being a condition that "such" seizure shall be made, can the court say that a seizure of a part of the spirits, &c., satisfies the condition? Not if the statute is to be construed with such literal strictness as would apply the proviso to the liability of the owner. On the other hand, a just construction in respect to the proceeding for a forfeiture of the property is, that what is seized may be condemned, and, obviously, no more than is seized can be. Any other construction would defeat the statute; for, obviously, portions of the property might be disposed of or eloigned, so that they could not be seized.

This brings into view another consideration in support of the views of the plaintiffs' counsel. The seizure of property has no relation to the owner's liability or the suit that is brought to collect the five hundred dollars from him. On the other hand, the seizure of property and the proceeding in rem to enforce the forfeiture are distinctly related, the latter being, in its very nature, dependent upon the former.

If the intention of the legislature, in enacting this section, may be inferred from subsequent legislation, or, if we may be aided by the latter in ascertaining such intention, then the provision introduced into the 68th section of the act of June 30, 1864 (13 Stat. 248) by the amendment of March 3, 1865 (Id. 462), furnishes, as was, I think, well insisted by the counsel for the plaintiffs, a significant, if not conclusive, guide to their meaning. By such 68th section, as amended, it is provided, that the offending party shall be punished by imprisonment; and the declaration of that punishment is introduced after, and in immediate connection with, the declared liability for the five hundred dollars and costs of suit, as follows: "together with the sum of five hundred dollars, to be recovered, with costs of suit, and shall be deemed guilty of a misdemeanor, and be subject to imprisonment for a term not exceeding one year." The construction contended for by the defendant would, therefore, involve the serious absurdity, that, unless a seizure of the property of the owner was made within thirty days, he could not be prosecuted at all for his offence against the law, nor punished for his misdemeanor.

Upon the most careful reflection, I am constrained to conclude that the ruling upon the trial was erroneous. The judgment must be reversed and a new trial ordered.

Case No. 15,850a.

UNITED STATES v. MYNDERSE et al.

[12 Int. Rev. Rec. 94.]

Circuit Court, N. D. New York. June Term, 1870.[1]

INTERNAL REVENUE — BONDS — NON-COMPLIANCE WITH STATUTORY REQUIREMENTS—VALIDITY — DISTILLER'S BOND.

[1. A bond in favor of the United States, which is extorted by a public officer under color of his office, but which contains conditions different from those prescribed by statute, is void.]

[2. Where a bond running to the United States and procured by a public officer is sued upon, and it is not alleged in the pleadings that it was illegally exacted or obtained by such officer under color of his office, the same will be presumed to have been given voluntarily.]

[3. Where a bond voluntarily given for the benefit of the United States contains obligations in excess of the requirements of the statute under which it is obtained, it may be valid to the extent of the obligations which are directed to be taken by the statute, and void as to the excess, provided that the excessive conditions are separable from the others. If they are not separable, the whole bond is void.]

[Cited in U. S. v. Humason, Case No. 15,421.]

[4. A distiller's bond given under the 39th section of the internal revenue law of July 1, 1862, and which contained obligations and conditions not required by that section, *held* void in toto, though voluntarily given, it appearing that the obligations in excess of the statutory requirement were not separable from those which were in accordance with the statutory provisions.]

HALL, District Judge. This case was argued before me alone in March, 1869, and in the ensuing vacation I prepared the annexed opinion sustaining the demurrer. Before the term at which judgment could be entered in accordance with that opinion I determined to order a re-argument of the case. The order for a re-argument was made at the October term, and the case was accordingly re-argued at the last March term. Being still of the opinion that the main question presented has been settled by repeated adjudications, and that until such adjudications shall be overruled by higher authority they should be followed in this

[1] [Reversed in 154 U. S. 580, 14 Sup. Ct. 1213.]

court, the annexed opinion is adopted as my opinion upon the re-argument.

This was an action of debt, upon a bond executed by the defendants and one Jane Goodwin. The declaration was in the following words:

"The United States of America, plaintiffs in this suit, by William Dorsheimer, their attorney, complain of Jane Goodwin, Edward Mynderse, and Charles D. Mynderse, defendants herein, being in custody, etc., of a plea that they render to the said plaintiffs the sum of $18,000 which to them they owe, and from them they unjustly detain. For that the said defendants heretofore, to wit, on or about the 23d day of February, A. D. 1863, by their certain writing obligatory, sealed with their seals, and now shown to this court, acknowledged themselves to be held and firmly bound unto these plaintiffs, under the name of the United States of America, in the sum of $18,000, to be paid by the said defendants to these plaintiffs. Which said writing obligatory was and is subject to certain conditions thereunder written, whereby, after reciting that the said defendant Jane Goodwin had made application to the collector of internal revenue for the Twenty-Fifth collection district of the state of New York, for a license as distiller at the distillery situated in the town of Torrey, in the county of Yates, and state of New York, it was conditioned that if the said defendant Jane Goodwin should truly and faithfully conform to all the provisions of an act entitled 'An act to provide internal revenue to support the government and pay interest on the public debt,' approved July 1, 1862 [12 Stat. 432], and of such other actor acts as were then or might thereafter be in that behalf enacted, then the said obligation to be void and of no effect, otherwise it should abide and remain in full force and virtue. And the said plaintiffs further allege that although the said defendant Jane Goodwin continued to be and was distiller of spirits and spirituous liquors and the owner and possessor of a distillery situated in said town of Torrey, with certain stills, boilers, and other vessels used for the purpose of distilling spirits and spirituous liquors, from and including the 1st day of March, A. D. 1863, to and including the 5th day of May, 1864, yet the said defendant Jane Goodwin did not during that time or any part thereof truly and faithfully conform to all the provisions of the said act of congress, entitled 'An act to provide internal revenue to support the government and to pay interest on the public debt,' approved July 1, 1862, and of such other act or acts as were thereafter in that behalf enacted. And for a further breach of the said obligation the said plaintiffs allege that the said defendant Jane Goodwin, at the town of Torrey aforesaid, in the said Twenty-Fifth collection district of New York, from and including the month of March, A. D. 1863, to and including the 5th day of May, A. D. 1864, was and continued during all that time to be a distiller of spirits and spirituous liquors as aforesaid, and was the owner of certain stills, boilers, and other vessels used and intended to be used for the purpose of distilling spirituous liquors, and had such stills, boilers, and other vessels under her superintendence on her own account, and used and intended to use such stills, boilers, and other vessels for the purpose of distilling spirituous liquors as the owner thereof, and neglected and refused, from day to day, to make true and exact entry, or cause to be entered in a book kept by her for that purpose, of the number of gallons of spirituous liquors distilled by her, and also of the number of gallons thereof sold or removed for consumption or for sale, and the proof thereof, and neglected and refused to keep such book always open in the day-time, Sundays excepted, for the inspection of said collector, and neglected and refused to allow such collector to take any minutes, memorandums or transcripts thereof, and neglected and refused to render to the said collector on the 1st, 10th, and 20th days of each and every month in each year, or within five days thereafter, or at any time, a general account in writing taken from her books of the number of gallons of spirituous liquors distilled and sold, or removed for consumption or sale, and of the proof thereof, for the period or fractional part of a month preceding said day, or for such portion thereof as may have elapsed from the date of said entry and report to the said day which next ensued, and neglected and refused to keep a book or books in form duly prescribed by the commissioner of internal revenue, and which form had theretofore been duly prescribed by him, wherein was entered from day to day the quantities of grain, or other vegetable productions, or other substances, put into the mash tub for the purpose of producing spirits, and neglected and refused to keep such book or books open at all reasonable hours for inspection by the assessor and collector of the said district, and neglected to verify or cause to be verified the said entries, reports, books, and general accounts, by oath or affirmation, taken before the said collector or some other officer authorized by the laws of the state to administer the same according to the forms required by law, and neglected and refused to pay to the said collector the duties on spirituous liquors so distilled and sold, or removed for consumption or sale, and in said accounts mentioned at the time of rendering an account thereof, or when such account should have been rendered; and neglected and refused to do any and every of the things by law required to be done by her as duly required by the 45th section and against the 45th section of the act of congress, approved July 1, 1862 [12 Stat. 432], entitled 'An act to provide internal revenue

to support the government, and to pay interest on the public debt,' and the several amendments thereof.

"And these plaintiffs, for a further breach of the condition of the said writing obligatory, allege that the said defendant Jane Goodwin was and continued to be a distiller of spirits and spirituous liquors at the said town of Torrey, in said Twenty-Fifth collection district of New York, from the first day of March, A. D. 1863, to and including the fifth day of May, A. D. 1864, and during that time at Torrey aforesaid made, manufactured, and distilled and sold, and removed for consumption and sale, a large amount of spirits and spirituous liquors, liable to duty and tax under the act of congress before mentioned and the various acts amendatory thereof to wit, 487,756 56-100 gallons of spirits and spirituous liquors, upon which there was due and owing to the said plaintiffs for duties and taxes under and pursuant to the said several acts of congress, the sum of $122,744 82-100, from the said Jane Goodwin, and which said duties and taxes the said defendant Jane Goodwin of right and law and under the provisions of the said act of congress hereinbefore mentioned, should have and was required to pay on the spirits and spirituous liquors made and distilled and sold, and removed for consumption and sale, by her on the 1st, 10th and 20th days of each month during said time, or within five days thereafter, to the collector of said district, upon the amount of spirits and spirituous liquors so made, distilled, and sold, and removed for consumption and sale by her during such periods or parts of such month respectively. Yet the said defendant Jane Goodwin did not make and render true account and reports thereof, or pay the duties and taxes due thereon to the collector for the said Twenty-Fifth collection district on the 1st, 10th and 20th days of each month or within five days thereafter during said time, nor did she pay or cause to be paid to the collector for said district the duties and taxes upon the said spirits and spirituous liquors made and distilled and sold and removed for consumption and sale as aforesaid during said period from March 1, 1863, to May 3, 1864, as of right and law according to the condition of the said bond she should have done; but on the contrary thereof the said defendant Jane Goodwin, of the said spirits and spirituous liquors so as aforesaid made, distilled, sold, and removed for consumption at Torrey aforesaid, during the period between March 1, 1863, and May 5, 1864, aforesaid, has at various times during that time returned to and paid the tax and duties due and owing as aforesaid to the collector for the said Twenty-Fifth district only upon 435,099 85-100 gallons thereof and no more, to wit, the sum of $107,708.76, and no more, and has hitherto fraudulently neglected and refused to return and pay the taxes upon 54,656 51-100 gallons of spirits and spirituous liquors so as aforesaid by her during said time between March 1, 1863, and May 5, 1864, at Torrey aforesaid, made and distilled and removed for consumption and sale, upon which there was due and owing from her to these plaintiffs for such duties and taxes under the acts of congress aforesaid the sum of $15,066.05, contrary to the condition of the said written obligations hereinbefore firstly set forth. Whereby an action hath accrued to these plaintiffs to demand, and have of and from the said defendants, the said sum of $18,000, the sum above demanded. Yet the said defendants, although often requested so to do, have not paid to the said plaintiffs the said sum of $18,000, or any part thereof, but to pay the same or any part thereof have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiffs of $18,000, and therefore they bring suit," etc.

After an imparlance, it was suggested upon the record, and admitted by the plaintiffs, that the defendant Jane Goodwin had died since the last continuance; and thereupon it was ordered that no further proceedings should be had against the said Jane Goodwin. The other defendants filed a general demurrer to the declaration. The plaintiffs joined in demurrer and the questions thus presented were brought before the court at the last term.

Mr. Cogswell, for defendants, made the following points:

1. The bond in question, being purely a statutory bond, given by virtue of a statute specially providing for the condition thereof, and not conforming in any respect to such statutory condition, is void.

2. The declaration is bad for not alleging the delivery of the bond; or, if it can be regarded as alleging the same argumentatively, for not alleging the circumstances under which it was executed.

3. The declaration is bad because it alleges several breaches in one count.

4. The second and third objections may be urged, although not specially assigned as cause of demurrer.

In support of these points, the counsel for the defendants cited the following authorities: U. S. v. Morgan [Case No. 15,809]; Dixon v. U. S. [Id. 3,934]; U. S. v. Gordon [Id. 15,232]; U. S. v. ——— [Id. 14,413]; Chit. Pl. 295; and he insisted in his written brief, that this is not the case of a bond taken by the proper authorities for the proper discharge of official duties, where the condition of the bond is not specially directed, or where the bond departs in some particulars from the condition prescribed, and that the cases cited by him, as above stated, were not affected by the cases of U. S. v. Tingey, 5 Pet. [30 U. S.] 114; U. S. v. Bradley, 10 Pet. [35 U. S.] 343; and U. S. v. Linn, 15 Pet. [40 U. S.] 290.

William Dorsheimer, U. S. Atty., made the following points:

1. The bond is sufficient. It is conditioned that the principal shall faithfully conform to all the provisions of the law referring to it, and such a condition is sufficient. So, surplusage will not vitiate a bond.

2. The case of U. S. v. Bradley, 10 Pet. [35 U. S.] 343, lays down a rule broad enough to cover this case.

In addition to the case of U. S. v. Bradley, the attorney of the United States, under his first point, cited the case of U. S. v. Maurice [Case No. 15,747], and upon the argument he relied in part upon the three cases referred to by the defendants' counsel as above stated.

HALL, District Judge. The second, third, and fourth points made by the defendants' counsel cannot be maintained. The assignment of several breaches in the same count may perhaps be a valid objection when made by a special demurrer, but the defect is one of form merely, and the objection can be made available only when it is specially assigned as cause of demurrer. Indeed, these three points were abandoned at the hearing, the defendants' counsel expressly waiving all merely formal objections to the declaration.

The first point presents a very serious question, and in the present state of the pleadings one quite difficult of determination. It will be observed that in the recital contained in the condition of the bond declared on it is set forth that Jane Goodwin, the principal in the bond, had made application to the collector of internal revenue for the Twenty-Fifth collection district of the state of New York for a license as a distiller; but it is not stated that such bond was required as a condition precedent to the granting of such license; nor is there in the condition of the bond, or in any part of the declaration, any statement that such bond was given in order to procure such license; or that such license was ever issued to the applicant. Indeed, the circumstances under which the bond was executed and delivered do not appear upon the record, in the form of a special plea or otherwise; and from this state of the pleadings arises one of the most embarrassing questions in the case. The law in force at the time this bond is alleged to have been made required the execution of a bond before the issuing of a license to a distiller. It also expressly prescribed in explicit and unequivocal language the precise conditions of such bond; and thus clearly defined and limited the extent of the liability to be imposed upon the distiller and his sureties. The provisions of this law are contained in the 39th section of the internal revenue act of July 1, 1862, which is as follows: "Sec. 39. And be it further enacted, that it shall be the duty of the collectors within their respective districts to grant licenses for distilling, which license shall contain the date thereof, the sum paid, and the time when the same will expire, and shall be granted to any person, being a resident of the United States, who shall desire the same, by application in writing to such collector upon payment of the sum or duty payable by this act upon each license requested. And at the time of applying for said license, and before the same is issued, the person so applying shall give bond to the United States in such sum as shall be required by the collector, and with one or more sureties, to be approved by said collector, conditioned that in case any additional still or stills, or other implements to be used as aforesaid, shall be erected by him, his agent or superintendent, he will, before using or causing or permitting the same to be used, report in writing to the said collector the capacity thereof, and information from time to time of any change in the form, capacity, ownership, agency, or superintendence which all or either of the said stills or other implements may undergo, and that he will from day to day enter or cause to be entered in a book kept for that purpose the number of gallons of spirits that may be distilled by said still or stills or other implements, and also of the quantities of grain or other vegetable productions or other substances put into the mash tub, or otherwise used by him, his agent, or superintendent, for the purpose of producing spirits, which said book shall be opened at all times during the day (Sundays excepted) to the inspection of the said collector, who may make any memorandums or transcripts therefrom; and that he will render to the said collector on the 1st, 10th, and 20th days of each and every month, or within five days thereafter, during the continuance of said license, an exact account in writing taken from his books of the number of gallons of spirits distilled and sold, or removed for consumption or sale by him, his agent, or superintendent, and the proof thereof, and also of the quantities of grain or other vegetable productions or other substances put into the mash tub, or otherwise used by him, his agent, or superintendent, for the purpose of producing spirits, for the period or fractional part of a month then next preceding the date of said report, which said report shall be verified by this act; and that he will not sell or permit to be sold or remove for consumption or sale any spirits distilled by him under and by virtue of his said license until the same shall have been inspected, gauged, and proved, and the quantity thereof duly entered upon his books as aforesaid; and that he will at the time of rendering said account, pay to the said collector the duties which by this act are imposed on the spirits so distilled; and the said bond may be renewed or changed from time to time, in regard to the amount and sureties thereof, according to the discretion of the collector." Upon the argument it was assumed that the bond declared upon was given in order to obtain the license provided for in this section, and it was conceded to be in the form prescribed for the bond of a distiller by

the commissioner of internal revenue. It was insisted by the defendants that the bond was void, because its condition was entirely different from that prescribed by law, and imposed upon the obligors a liability not only different from but much more burdensome than that authorized to be imposed by the act of congress under which it was taken. On the part of the United States it was urged that the bond, even though void in respect to that portion of the condition which required the defendant Jane Goodwin to conform to the provisions of acts of congress other than those relating to a distiller contained in the act of July 1, 1862, under which it was taken, was nevertheless good to the extent of the obligation authorized to be required under the provisions of such act. It was also insisted upon the authority of the case of U. S. v. Maurice [supra] that the reference to the provisions of the law contained in the condition of the defendants' bond was, in legal effect, the same as though such provisions had been contained within the condition itself; that surplusage did not vitiate; that so much of the condition as was not authorized by the statute should be rejected as surplusage; and that the bond should be enforced to the extent of the liability authorized to be imposed upon a distiller and his sureties, at the date of the execution of the bond.

Although the principles and effect of the cases cited by the defendants' counsel were somewhat discussed at the hearing, the question whether, under the pleadings in this case, the bond declared on should be considered as one voluntarily given or as a statutory bond, exacted by the collector colore officii, as the condition of issuing a license to Jane Goodwin, as a distiller, was not argued; although it is believed to be an important question upon the present demurrer. This will sufficiently appear upon a careful consideration of the cases which will be presently referred to. If the bond in this case is to be considered as a bond exacted from the distiller and her sureties as a condition precedent to the issuing of the ordinary distiller's license, it must necessarily be declared void. The officer by whom and the occasion on which a distiller's bond, with sureties, might be required, and the precise conditions which it should contain, are all prescribed by statutes, and the rule of law applicable to such statutory bonds is well settled. In the case of Hawes v. Marchant [Case No. 6,240], this rule was stated by Mr. Justice Curtis with the clearness and accuracy which characterize all the opinions of that distinguished jurist. In that case he said: "It is to be governed by the laws applicable to such obligations, among which is the rule that if a public officer, authorized to take a bond, has illegally exerted his official authority, and thereby compelled the obligee to enter into an obligation not required by law, it is not binding. This rule is settled by the highest authority. In U. S. v. Tingey, 5 Pet. [30 U. S.] 115, the defendant, who was a surety of a purser in the navy in a joint and several bond, pleaded that the condition of the bond differed substantially from the requirement of the act of congress, and that the same was extorted from the purser and his sureties as the condition of his retaining his office. The court held the plea good. In conformity with this are a great number of decisions, some of which are U. S. v. Gordon, 7 Cranch [11 U. S.] 287; U. S. v. —— [Case No. 14,413]; U. S. v. Gordon [Id. 15,232]; U. S. v. Morgan, [Id. 15,809]; Beacom v. Holmes, 13 Serg. & R. 190; Purple v. Purple, 5 Pick. 26. And the cases in which it has been held that if the condition of a statutory bond contains stipulations which are not required by the statute, but separable from those which are required, the latter may be enforced and the former rejected, silently, at least, acknowledge the same rule, by requiring that one should be separable from the other, and by denying all efficacy to those provisions which have been inserted without warrant of law. Among the latter class of cases are U. S. v. Bradley, 10 Pet. [35 U. S.] 343; U. S. v. Linn, 15 Pet. [40 U. S.] 315; Hall v. Cushing, 9 Pick. 395; Van Deusen v. Hayward, 17 Wend. 67; Ring v. Gibbs, 26 Wend. 502; Shunk v. Miller, 5 Barr [5 Pa. St.] 250. The rule which avoids such bonds rests upon the want of authority in the public officer to take them, and upon the policy of guarding the citizen against oppression by the illegal exercise of official power. It is well stated by Sewall, J., in Churchill v. Perkins, 5 Mass. 541, that where the plaintiff demands the fruit of an obligation obtained colore officii, it must be shown that the demand is justified by some authority of the office, otherwise it is against sound policy, and is void by the principles of the common law. By 'colore officii,' however, must be understood some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given. If all parties voluntarily consent to enter into the bond, and the departure from the precise requisitions of the statute is made by mistake, or accident, and without any design to compel the obligees to enter into an undertaking not required by law, the bond is not invalid simply because it contains something which the statute does not authorize. U. S. v. Bradley, 10 Pet. [35 U. S.] 364; U. S. v. Linn, 15 Pet. [40 U. S.] 290. Whether it can be enforced or not depends upon the possibility of separating the part of the condition authorized and required from the residue of the condition, where the condition is not wholly in conformity with the law; and that is the only objection to the bond." Under what circumstances of compulsion or constraint a bond or other obligation shall be considered as extorted or exacted without legal right or authority, and therefore void, or as voluntarily given, and therefore valid, is sometimes a question of much difficulty, and in respect to which, as in respect to the question of what shall be regarded a voluntary

payment, there has not been an entire unanimity of opinion. Apparently conflicting decisions upon these questions have been made in different states. The decisions of the courts of the United States have not, perhaps, been entirely uniform, but it is believed that it may be properly assumed upon the authority of those decisions that a bond not given by the obligor of his own free will, but illegally exacted by a public officer, as a statutory bond and as a condition precedent to the exercise of any legal right, is void. A careful review of the authorities bearing upon this question, or upon other questions arising in this case, will not be attempted, but several cases which it is supposed may have an important bearing upon some of those questions will be referred to, and a brief statement of some of the points decided will be made. It will perhaps be useful to consider most of these cases in chronological order:

In 1808, in U. S. v. Hipkin [Case No. 15,371] in the district court of the United States, at Norfolk, Va., it was insisted that a bond given for the enrolment of a vessel was void because its condition was not authorized by, but was contrary to, the express provisions of the law which required a bond on such enrolment, and also because it was hostile to the genius and spirit of the laws upon the subject of navigation and commerce. The question arose upon a general demurrer to the declaration. This declaration set out the bond, and the condition annexed; but it did not (so far as appears from the report of the case) set out the circumstances under which the bond was given, or any requirement by the collector that the bond should be given in the form adopted. After the argument on the part of the defendant had been concluded, Mr. Hay, the attorney of the United States, expressly admitted "that a condition in a bond taken by a public officer which was not authorized by the law which required the bond was void, and that no action could be maintained for the breach of such a condition." He also admitted that "if the laws referred to by the defendant's counsel were the only laws upon the subject, the argument which had been urged was unanswerable." He then asked time not only to examine the acts of congress upon the subject, but to consult with the officers of the customs in order to ascertain whether there was not some authority for taking a bond with the condition set out in the declaration. This being granted, the case was continued for several days. In the end Mr. Hay stated that he had not only made every examination into the subject he could, but had also applied to the officers of the customs for their aid in the research; that it had been in vain, for no other laws could be found applicable to the case; that the position for which the defendant's counsel contended he could not deny, and he should therefore dismiss the cause. The report states that this was done, and that at the same time several other causes instituted on similar bonds were also dismissed. It is true that there was no decision by the court in this case, but the distinguished character and the great legal learning and ability of Mr. Hay give to his deliberate opinions, thus expressed and thus acted upon, the force of a legal adjudication. It will, however, be observed that the question whether under the pleadings the bond ought to be considered as voluntarily given, or as having been illegally exacted, was not discussed; and that the case was apparently disposed of upon the conceded invalidity of the bond, upon the facts, as understood by the district attorney, irrespective of the form of the pleadings and without any discussion of the question whether if the bond had been voluntarily given it might have been enforced.

In 1811, in U. S v. Morgan [supra], in an action upon an embargo bond, Mr. Justice Washington decided that a statutory bond which bound the obligors to do more than the law required, was not the bond which the officer was authorized to take, and was void. The question arose upon demurrer to the defendant's plea, but the facts alleged by it are not set forth, and the only reference to the question of the validity of a voluntary bond, or to the allegations of the plea bearing upon that question, is to be found in that part of Mr. Justice Washington's opinion in which he says: "The court will not say that if such a bond be voluntarily given, it would on that account be valid. But there is no ground for saying that the bond in question was voluntarily given, since the reverse is stated by the defendant, and admitted by the United States."

In the same year, in Dixon v. U. S. [supra], Mr. Chief Justice Marshall sustained a demurrer to a declaration upon an embargo bond, the condition of which imposed upon the obligors a liability beyond that required by statute. This was caused by inserting in the condition of the bond a clause not authorized by law, and by the omission (in the required condition for re-landing the goods in respect to which it was made in some port of the United States) of the words "dangers of the seas excepted," as provided in the statute. The particular circumstances under which the bond was executed do not appear to have been set forth in the declaration demurred to, and the question whether the bond was voluntarily given or illegally exacted does not appear to have been discussed. In delivering his opinion in respect to the validity of the bond in question, the chief justice said: "A clause is inserted in the condition not warranted by law, and an exception is made by the law which is not inserted in the condition. The bond, therefore, does not pursue the statute. The question is, whether the variance be such as to

avoid the bond as a statutory obligation? That the member of the condition not required by the statute cannot be permitted to prejudice the obligors is admitted by the attorney of the United States. But he contends that it cannot affect so much of the condition as pursues the statute. The plaintiffs in error insist that it vitiates the whole bond, because it makes the instrument a different one from that which the collector was authorized to demand. The cases adduced by neither party appear to me to decide the question, nor have I been able to find one that does. If a statute renders a bond void, which is taken for a particular object, and one be taken with a condition in part for this illegal object, and in part for other objects not illegal, it is clear law that the illegal part vitiates the whole instrument. It is also believed that if a bond be given at common law, when both the obligor and obligee are free agents, acting for themselves on an equal footing, and a part of the condition be void, but there is no statute annulling the bond on account of that condition, the instrument is valid as to so much as is lawful. But the case of a bond taken under a statute by an officer specially empowered to take it, and containing additional conditions not warranted by that statute, differs essentially from either of these cases. The general policy of the law must require that the statute should be pursued, and the nature of the case requires that the power should be executed conformable to the act creating it. If the form of the bond and condition were prescribed, there could be no doubt of the necessity of pursuing that form strictly and literally, but the form of the condition is not prescribed, and it must be sufficient that the bond conform substantially to the statute. But may the statute be exceeded? It would certainly be mischievous to allow officers to insert in the bonds they are empowered to require, conditions not warranted by law. Although courts and lawyers may know that such conditions have no effect, obligors may not know it, and this abuse of official power may very materially affect the interest of individuals, who may regulate their conduct on the opinion that they are bound to the full extent of the instrument they have executed. That in this particular case, the condition inserted may not be in hostility to the general views of the legislature, cannot materially vary the question, for it is not warranted by the statute; and if the officer be at liberty, under the color of office, to introduce such conditions as his own judgment may approve, then his judgment and not the statute becomes the director of his conduct. Yet it is going far to say, that, for the insertion of even a material condition not warranted by law, not only the unauthorized condition but the bond, in other respects lawful, becomes absolutely void. The question, if considered in a general point of view, is certainly not without its difficulties. But there is a particular aspect belonging to the case itself which ought not to be entirely overlooked. It is said, that if this bond be void under the statute it is good at common law. That is, that if the statute had directed no bond, still judgment might be obtained on this obligation, as on a voluntary contract by which the obligors bind themselves not to do an act which the policy of the law prohibits. If this argument be correct, then these obligors are liable at common law, under this bond, for the breach of that part of the condition which is now under consideration. The third section of the first supplemental act—2 Story's Laws, 1072 [2 Stat. 451]—subjects the vessel and cargo to forfeiture in the very case which this condition contemplates; and on the failure to seize them renders the owner or owners, agent, freighter, or factor, liable for the double value. This forfeiture is not secured by bond. If, then, for the fact of going to a foreign port, the obligors are liable at common law, under this bond, and are also liable under the statute, this circumstance seems to strengthen very much the reasons for requiring, that bonds taken under color of office should contain no condition not warranted by law. This condition is exceptionable in other respects; it omits the words 'dangers of the seas excepted.' Original act of December 22, 1807, § 2. The attorney for the United States admits that if these words be material, the omission is fatal. I should have been astonished had he not admitted it. * * * There is still another part of this bond, which, in my judgment, deserves consideration. The vessel is averred in the declaration to have been a registered vessel, and the court must understand this to be the fact. If a licensed vessel, that part of the condition which stipulates that the vessel shall not proceed to any foreign port or place conforms to the statute. It is consequently a material part of the condition which binds the obligors, unless they could be permitted to contradict their bond, and could be certain to find evidence to support their plea. These are difficulties to which the collector has no right under the statute to expose them. The obligors could escape the effect of this argument only by maintaining that the bond is void as a bond given by a coasting vessel because it does not appear to have been executed by the owner as well as the master. But the owner and master may be the same person. One court has already decided that this objection would not be valid, and I am not confident that other courts might not affirm the decision. If so, the condition which is introduced without the authority of law is a material one. But if these points could be decided against the defendant, it is, in my opinion, not for an officer taking a bond under a statute to exclude a condition prescribed by law, because, in his opinion, its insertion is useless. It is a point

on which the judgment of the officer is not to be exercised; and whether right or wrong, the effect will be the same. He is a ministerial officer, whose business it is to pursue the statute, and if he fails to do so the statute will not sanction his act. Although the operation of the bond should be the same, whether the condition prescribed by law be inserted or not, the law considers that condition as material, or it would not have been prescribed. The record, then, as it appears in this court, exhibits a bond not demandable under the statute from a registered vessel, which this is admitted to be, and a suit on such bond cannot be sustained under the statute. If, as is my present opinion, the whole penalty be recoverable in a suit on a statutory bond, yet it is not recoverable on a bond rendered valid only by the common law, and deriving aid from the statute. This is a contract said to be good at common law, and if it be, then being a contract made in Virginia, the United States could only recover according to the laws of Virginia the damage actually sustained. In the judicial act it is declared that in such cases the court shall give judgment only for so much as is equitable, which must, on the application of either party, be referred to a jury. But I am strongly inclined to the opinion that bonds taken to the government by one of its officers to prevent the commission of an act rendered culpable by statute, if not valid under the statute, cannot be supported at common law so as to recover damages. I can perceive no criterion by which damages may be ascertained. I am by no means clear in this opinion, but as the award of a writ of inquiry, with directions to consider the penalty as no guide to the jury in estimating damages, would be obviously a proceeding never contemplated by the law in these cases, I shall not award one, but shall sustain the demurrer."

In the case of U. S. v. Gordon [Case No. 15,232], decided by the chief justice during the same year, it was held on demurrer to the defendant's plea that an embargo bond exacted and taken in a penalty greater than that prescribed by the statute was void; the plea having alleged that the bond was taken for more than thrice the value of the vessel and cargo instead of twice their value as required by statute; and that the obligors were constrained to execute the bond by the collector to clear the vessel until the bond was executed. In the case of U. S. v. —— [supra], decided by the same learned judge, at the same term, it was held that the embargo bond declared on was void because the words "dangers of the seas excepted" were omitted in the condition, as they had been in the case of Dixon v. U. S., supra. It was nevertheless intimated that a statutory bond, which superadds a condition that the statute does not authorize, is not vitiated by the surplus matter, but that the court would reject the surplusage as a mere nullity, and construe the bond as if such surplus matter was not contained in it. It is supposed, however, that this must be understood as referring to bonds voluntarily given.

In Armstrong v. U. S. [Case No. 549], decided the same year by Mr. Justice Washington, it was held that a bond given by a collector of internal revenue, and his sureties under an act of congress ought to conform, in substance at least, to the requisitions of the statute, and that if it went beyond it was void, so far as it exceeded such requisitions. The question arose upon a bill in chancery to restrain the enforcement of a claim under that portion of the condition which was not required by the statute. Neither in this case, nor in that of Gordon, does it appear that the question of the validity of such bond, when voluntarily given, was discussed by the counsel or passed upon by the court.

In the case of U. S. v. Sawyer [Case No. 16,227], decided by Mr. Justice Story in 1812, the pleadings were informally and incorrectly drawn, and the case is only important as tending to maintain the position that in order to avoid a bond for being illegally taken colore officii, all the facts which show such illegality should be specially set up by the plea of the defendants, unless indeed they fully appear on the face of the declaration.

In the case of U. S. v. Maurice [supra], decided by Chief Justice Marshall in 1823, the action was brought on a bond, the condition of which recited that Maurice had been appointed an agent for fortifications, and then provided that he should "truly and faithfully execute and discharge all the duties appertaining to the said office of agent." It was held that Maurice had never been legally appointed to such office; that, therefore, the bond was not valid as a statutory official bond; that it might nevertheless be considered as an obligation to perform the duties appertaining to the office of agent of fortifications; that those duties were prescribed by the army regulations; and "an undertaking to perform the duties prescribed in a distinct contract or in a law, or in any known paper prescribing those duties, is equivalent to an enumeration of those duties in the body of the contract itself." There was no allegation that the bond was not voluntarily given, and it was held good as a common-law instrument voluntarily executed by the obligors. The chief justice in his opinion declared that the capacity of the United States to contract was co-extensive with the duties and powers of government; that every contract which subserved to the performance of a duty might be rightfully made; that a contract executed by an individual and received by the government was prima facie evidence that it was entered into between proper parties; and the authority of an agent or officer of the government employed in making the con-

tract, is acknowledged by the individual when he makes the contract, and by the United States when the government asserts any rights under it.

In the case of U. S. v. Howell [Case No. 15,405], decided in 1826, Mr. Justice Washington expressed the opinion "that when a statute requires an official bond to be taken, and prescribes substantially the terms of it, it must conform to the requisitions of the statute, and if it goes beyond them it is void so far at least as it exceeds those requisitions;" but he added, "I have no doubt that the officers of the government may legally take bonds or other securities for debts due to the United States, although no act of congress authorizes their being taken in the particular case."

In U. S. v. Brown [Case No. 14,663], decided by Judge Hopkinson, 1831, the question "whether if the condition of a statutory bond contains more than is required by the statute the bond is wholly void," was very elaborately and ably discussed. The suit was brought upon a bond executed by a collector of direct taxes and his sureties. The statute directed that the collector should give a bond with sureties "for the true and faithful discharge of the duties of his office according to law, and particularly for the due collections and payments of all moneys assessed, etc.," and the condition of his bond as given was that "the said Nicholas Kern" (the collector) "has truly discharged, and shall continue truly and faithfully to discharge the duties of his said office." The objection to the bond was that it had a retrospective operation while the bond directed by the statute had not; and Judge Hopkinson stated that the question to be decided was not whether they could give to the bond a retrospective effect, as that was not pretended on the part of the plaintiffs, but whether by this departure from the statute the obligation was entirely void. It was not alleged by the defendant's plea that a bond containing that portion of the condition which was intended to give it a retrospective operation was required of the collector, by any other officer or any department of the United States. In deciding the question presented, Judge Hopkinson examined and at considerable length discussed the purport and effect of several prior decisions. The case under consideration was compared with the case of U. S. v. Morgan, supra, and, after declaring that there was an important difference between them, Judge Hopkinson said: "The condition of that bond was not, as ours is, in its nature or terms divisible. There was not in it a part which was bad, and a part which was good, and so set forth that they might be separated from each other; that the one might be retained and the other rejected; that the obligation might stand good for the one and not for the other; that the United States might say on the record, we ask for a judgment only on so much of this condition and its forfeiture as is according to law. It is impossible to make the bond in Morgan's Case conform to the law by taking away any part of it. You must make altogether a new and a different condition; you must add an important qualification or exception given by the act of congress and not given by the bond, and must essentially change, indeed expunge, another part of the condition which was not warranted by the law. In short, you must make a new contract between the parties. It was a very plain case, and this may account for the little attention that was given to the argument." In referring to the case of U. S. v. Hipkin, supra, Judge Hopkinson said: "No opinion was given by the court, nor was any necessary. The objection to the bond was that the condition was contrary to the express provisions of the law. It was not a case of a condition with several stipulations divisible from each other, some according to law and others not so. The district attorney admitted that no recovery could be had for a breach of a condition that was not authorized by the law which required the bond." The bond in Brown's Case was held by Judge Hopkinson to be binding to the extent of the condition directed by the statute, the learned judge stating in conclusion that the good part of the condition might be easily separated from the bad; that nothing was required to be added to the contract, and nothing to be taken from it, but what is favorable to the obligor, by diminishing the extent of his liability.

The cases thus far considered have been cases decided by judges of the district or circuit courts of the United States; but three cases decided by the court of last resort will now be referred to.

The first of these (U. S. v. Tingey, 5 Pet. [30 U. S.] 115) was decided in 1831. The suit was upon the bond of a purser of the navy and his sureties. The statute required that the official bond of a purser should be "conditioned faithfully to perform all the duties of purser of the navy of the United States;" while the bond actually given, instead of limiting the liability of the obligors to the duties or disbursements of the purser as such, made them liable for all moneys received by him, and for all public property committed to his care whether officially or otherwise. In this difference between the actual condition of the bond and that required by the statute, the case was not very unlike that now under consideration; but the pleadings in the two cases are widely different. In that case the defendant by special plea alleged that the navy department caused the bond to be prepared and transmitted to the purser, and required and demanded that the same should be executed by him, with sufficient sureties, before he should be permitted to remain in the office of purser or to receive the pay and emoluments attached to his office; and "that the same was under color and pretence of the said act of congress, and under color of

office, required and extorted" from the purser and his sureties. On demurrer to this plea judgment was given against the United States. Referring to these allegations of the plea, Mr. Justice Story, who delivered the opinion of the court, said: "There is no pretence then to say that it was a bond voluntarily given, or that though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly then an illegal bond, for no officer of the government has a right, by color of his office, to require of any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be not to execute, but to supersede the requisitions of law. It would be very different when such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond without any coercion or extortion by color of office." The capacity of the United States to enter into a contract or take a bond, in cases not previously provided for by law, whenever it was proper to do so in the exercise of the constitutional powers confided to the government, was expressly affirmed, and it was declared that the government, through the instrumentality of the proper department to which its powers are confided, might enter into contracts appropriate to the just exercise of such powers, and not prohibited by law.

In the case of U. S. v. Bradley, 10 Pet. [35 U. S.] 343, decided in 1836, the suit was upon a bond taken from a paymaster in the army and his sureties, and it was contended that the bond was void because the condition did not cover all the responsibilities required by the statute to be covered by the paymaster's official bond, and also because it imposed other responsibilities not required by the statute. The defendant's plea did not allege that the bond was extorted or required; but it was insisted that a bond void when required contrary to a statute (referring to Tingey's Case) was equally void when taken contrary to such statute. And the defendant's counsel also strongly resisted the claim on the part of the United States that the bond was good because voluntarily given, and that it was at least good so far as it conformed to the statute, even if void for the residue. Mr. Justice Story, in delivering the opinion of the court, again declared that a voluntary bond taken by the United States for a lawful purpose, but not prescribed by law, was valid. And he also declared that upon the face of the pleadings the bond must be taken to be a bond voluntarily given, there being no averment that it was obtained by extortion or oppression, under color of office, as there was in Tingey's Case. He further said: "It has been urged, however, in the present case, that the act of 1816, c. 69 [3 Stat. 297], does, by necessary implication, prohibit the taking of any bonds from paymasters, other than those in the form prescribed by the sixth section of the act, and therefore that bonds taken in any other form are utterly void. We do not think so. The act merely prescribes the form and purport of the bond to be taken of paymasters by the war department. It is in this respect directory to that department; and doubtless it would be illegal for that department to insist upon a bond containing other provisions and conditions differing from those prescribed or required by law. But the act has nowhere declared that all other bonds not taken in the prescribed form shall be utterly void; nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act to suppose that under such circumstances it was the intendment of the act that the bond should be utterly void. Nothing, we think, but very strong and express language, should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act to declare the bond void as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law, but of common sense. We think then that the present bond, so far as it is in conformity to the act of 1816, c. 69, is good; and for any excess beyond that act, if there be any (on which we do not decide), it is void pro tanto. The breach assigned is clearly of a part of the condition (viz., to account for the public moneys) which is in conformity to the act; and therefore action is well maintainable therefor."

In U. S. v. Linn, 15 Pet. [40 U. S.] 290, decided in 1841, it was held that an obligation, not under seal, voluntarily given by a receiver of public moneys and his sureties as security for the faithful performance of his duties as such receiver, was valid, although the act of congress directed that he should give a bond with approved security. The court again decided that a voluntary contract or security, taken by the United States for a lawful purpose and upon a good consideration, although not prescribed by any law, is not void. And the validity of such voluntary contracts was again affirmed in Tyler v. Hand, 7 How. [48 U. S.] 573, decided in 1849.

Prior to the decision of the two cases last referred to, in 1839, the case of Tabor v. U. S. [Case No. 13,722], was decided in the circuit court by Mr. Justice Story, upon a statement of facts agreed by the parties, and an agreement that if the defendants were not required by law to execute the bond in question in order to enable the ship therein mentioned to proceed on her voyage, judgment should be

entered for the defendants. This was then the only question, and it was held that they were not. Mr. Justice Story, in disposing of the case, said: "I am of the opinion that no action can be maintained on the present bond, as it seeks to enforce a supposed statute duty, and is in the nature of a penalty, and has been exacted by the officers of the government under a mistake, as well of their duty as of law." The bond had been taken by the collector as a bond required by statute, in a case not within its provisions; but the statement of facts agreed upon does not contain an admission that it was extorted or exacted, although it may justify the inference that it was required by the collector.

The cases above referred to, and others not cited, are sufficient to sustain the conclusion before stated, that the bond declared on in this suit if illegally exacted from the principal therein, as a condition precedent to the issuing of a distiller's license, is wholly void, but there being nothing in the pleadings to show that the bond was illegally exacted, or that it was not prepared, executed, and delivered without any previous requirement of the collector, it must, under the authority of the case of U. S. v. Bradley, supra, be held to have been voluntarily given. The cases above cited also show that a bond voluntarily given to the United States to secure the performance of any lawful act or the discharge of any legal duty is valid, if the United States, in its political and corporate capacity, has a legal pecuniary interest in the performance of the condition of the bond, although such bond is not required by any act of congress; and that a bond executed by a public officer or private individual, and his sureties, of their own free will, without any exaction or requirement on the part of the officer or agent taking the same on behalf of the government, and purporting to impose obligations not required by any statute, as well as obligations so required, is not wholly void, simply because it was erroneously supposed to be required, and was given, taken, and accepted as a bond required by an act of congress. It is true that the language of some of the earlier cases would seem to lead to a different conclusion, but in the more recent cases it is held that where the different obligations can be separated, the one from the other, the obligations in excess of the statute requirement may be rejected as surplusage, and the bond enforced to the extent of the obligations required by the statute. If the obligation in excess of the requirements of the statute thus voluntarily assumed would be held to be binding if not connected with the obligation directed to be taken by the statute, it might, in the absence of the cases deciding the question, be considered extremely doubtful whether an obligation, which, if standing alone, would be lawful and valid, should be held unlawful and void, merely because it was contained in the same instrument with another entirely lawful and valid obligation which happened to be required or provided for by statute. But at this time and in this court, the question must be considered as one of authority; and it is believed that the cases which hold such bonds to be good to the extent of the obligations required by statute, and void as to the excess, are so numerous and so authoritative that they must be followed in this court, until overruled by the court of last resort. And when, as in this case, the precise form and extent of the statutory obligation to be imposed is distinctly and exactly prescribed by statute, it must be conceded that there is much reason for saying that a bond which imposes other and very different obligations is against the policy of the statute and the intentions of the legislature; and that all obligations in excess of such statutory requirements, found in any such statutory bond, are therefore void. Assuming, then, that a bond voluntarily given as a statutory bond, but purporting to impose obligations in addition to those required by statute, may be good in part and void in part, as above stated, it becomes necessary to determine whether the bond declared on in this case is to be considered as a bond of that character, and whether, under the declaration, the United States are entitled to recover. The recital in the condition of the bond, and the statements made in assigning breaches of its condition, are deemed sufficient (independent of the admissions made upon the argument) to justify the assumption that this bond was executed and taken as and for the bond of a distiller under the act of 1862. Indeed there is nothing in the declaration to show that the United States had any other reason for taking the bond or have now any interest in enforcing its obligations, except as against the principal obligor as a distiller.

In this view of the case it is necessary to consider whether, under the cases cited, the United States can have judgment upon the ground that the bond declared on may be enforced in respect to a portion of its condition, although other portions of such condition, which are in excess of the condition authorized by statute, are illegal and void. And this depends upon the question whether the portions of such condition which are in excess of the statutory requirement are so separable from the other portions of the condition of the bond that they may be rejected as surplusage, and the residue of the condition then be of such tenor and effect as to allow a recovery upon the breaches assigned. It will be seen by the extract which has been made from the opinion of Mr. Justice Curtis, in the case of Hawes v. Marchant, that it was said by that learned judge that the cases in which it has been held that if the condition of a statutory bond contains stipulations which are not required by the statute, but separable from those which are required, the latter may be enforced and the former rejected, require that the one should be separable from the other; and that in the case of a voluntary bond the

question "whether it can be enforced or not, depends upon the possibility of separating the parts of the condition authorized and required from the residue of the condition, when the condition is not wholly in conformity with the law, and this is the only objection to the bond." And this statement is fully sustained by other cases. Where there is no doubt in regard to the interpretation or construction of the language of the obligation, this separation is to be made, not by arbitrarily restricting the effect of the language of such obligations, but by rejecting as surplusage whatever is unauthorized; thus reading and construing the writing as though such surplusage was stricken out. As was said in substance by Judge Hopkins in U. S. v. Brown, supra, there must be a part which is good and a part which is bad, so set forth that they may be separated from each other and one retained and the other rejected. Courts cannot make a new and different condition or contract, but may reject as surplusage any separate or separable words or sentences which have been improperly introduced. Thus in the present case there is no difficulty in rejecting as surplusage the words, "and of such other act or acts as are now or may hereafter be in that behalf enacted," but the difficulty is in going further. It is impossible to make the bond conform to the statutory requirement by striking out any part of the remaining condition which requires that "Jane Goodwin shall truly and faithfully conform to all the provisions of the act of 1862." In order to give such effect to the condition much more would be required. The provisions of that act relating to income returns, and to manufacturer's returns, to the payment of income and other taxes and duties, and to the affixing of stamps, are all in terms and effect covered by this condition, as much as the provisions of the 39th section under which a distiller's bond is required, and in order to make the bond conform to the statute an entirely new condition must be made. In short, the good and bad parts of this condition are not separable, and the bond cannot be made to conform to the statute in the only mode in which common law courts are authorized to reform such contracts. The bond must therefore be held to be wholly void. See Hawes v. Marchant, decided by Judge Curtis, and U. S. v. Brown, decided by Judge Hopkinson, hereinbefore referred to, and the cases there cited, and Lee v. Coleshill, Cro. Eliz. 529, and Chater v. Beckett, 7 Term R. 201.

But even if the bond in this case could be held to be good and valid to the extent of the obligations imposed by a bond properly executed and properly taken under the 39th section of the act of 1862, and with the condition therein specified, there would still remain another question of great importance which was not discussed on the argument, but in respect to which little doubt can be entertained. It is supposed that the only ground upon which the United States would be entitled to recover more than nominal damages, under the breaches assigned in the declaration, is the nonpayment of the duties legally due upon the spirits distilled by the principal in the bond; and the 39th section of the act of 1862, in prescribing the condition of the distiller's bond, intended to secure such payment, provides only for the payment of "the duties by this" (that) "act imposed" on the spirits so distilled. Now the act of 1862 imposed a duty of twenty cents a gallon only, and it was not until the passage of the act of March 3, 1864, that this duty was increased; by that act the duty on such spirits subsequently distilled and sold, or distilled and removed for consumption previous to the 1st day of July then next, was increased to sixty cents the gallon. The declaration alleges that Jane Goodwin continued to be a distiller to and including the 5th day of May, 1864, that is, for two months after the duty was increased to sixty cents by the act of 1864; and that she distilled up to and including said 5th day of May, 1864, 489,756 76-100 gallons of spirits, upon which there was due for duties and taxes under the several acts of congress the sum of $122,744.82; and it then admits the payment of $106,708.76, or nearly $10,000 more than a tax of 20 cents per gallon upon such distilled spirits would have amounted to; and there is nothing to show that any of the unpaid taxes were imposed in the act of 1862. It would seem then that under this state of the pleadings nothing beyond nominal damages could be recovered upon this bond, even if it should be held to be valid to the extent of the obligation required to be assumed by the distiller and her sureties in the bond required to be executed under the 39th section of the act of 1862. But this question relates rather to the amount of damages than to the bare right to recover at least nominal damages; and, therefore, it has been necessary to examine other and more embarrassing questions. The defendants are entitled to judgment upon the demurrer, but the plaintiffs will be allowed to amend their declaration.

[There was a difference of opinion between Judge Hall and Judge Woodruff, in consequence of which the case was certified to the supreme court. The opinion of Judge Hall above was reversed. 154 U. S. 580, 14 Sup. Ct. 1213. For opinion of Judge Woodruff, see Case No. 15,851.]

Case No. 15,851.

UNITED STATES v. MYNDERSE et al.

[11 Blatchf. 1;[1] 12 Int. Rev. Rec. 104.]

Circuit Court, N. D. New York. June, 1870.[2]

INTERNAL REVENUE — DISTILLER'S BOND — NON-COMPLIANCE WITH STATUTORY REQUIREMENTS—VALIDITY—SURPLUSAGE.

1. The 39th section of the internal revenue act of July 1, 1862 (12 Stat. 446), describes

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

[2] [Affirmed in 154 U. S. 580, 14 Sup. Ct. 1213.]

the bond to be given to the United States by distillers, on application for a license to distil, and specifies the several conditions of such bond in detail. The declaration herein averred, that G. made application to the collector of internal revenue for a license as a distiller, and that the defendants thereupon became bound, by writing obligatory, sealed, &c., to the United States, in the sum of $18,000, conditioned that the said G. should truly and faithfully conform to all of the provisions of the said act, and of such other act or acts as were then, or might thereafter be, in that behalf enacted: *Held*, that the bond was a valid bond, and the defendants were liable thereon.

2. Where a statute makes it the duty of a public officer to require of another an official bond, or a bond on granting a license, or the like, such bond is not necessarily invalid because it contains conditions which the statute does not prescribe, or exceeds the requirements of the statute.

3. When such bond is voluntarily given, and is not exacted or extorted colore officii it is binding.

4. When conditions in excess of the statute requirement are inserted therein, such conditions may be rejected as surplusage, and the bond be sustained as to the others.

[This was a suit by the United States against Edward Mynderse and Charles D. Mynderse.]

William Dorsheimer, U. S. Dist. Atty.

William F. Cogswell, for defendants.

Before WOODRUFF, Circuit Judge, and HALL, District Judge.

WOODRUFF, Circuit Judge. It is conceded, on the argument of the defendants' demurrer to the declaration herein, that the only question to be considered is, whether the bond declared upon is a valid instrument. It recites, that Jane Goodwin had made application to the collector of internal revenue for the 25th collection district of the state of New York, for a license as distiller, at the distillery situated at the town of Torrey, in, &c., and is conditioned, that, "if the said Jane Goodwin shall truly and faithfully conform to all the provisions of an act entitled 'An act to provide internal revenue to support the government, and to pay interest on the public debt,' approved July 1st, 1862, and of such other act or acts as were then, or might thereafter be, in this behalf, enacted, then the said obligation to be void, and of no further effect, otherwise," &c. By the 39th section of the act of July 1, 1862 (12 Stat. 446), referred to in the bond, it is made the duty of collectors, within their respective districts, to grant licenses for distilling to any person, being a resident of the United States, who shall desire the same, by application, &c., upon payment of the sum or duty prescribed; and it is provided, that, "at the time of applying for said license, and before the same is issued, the person so applying shall give bond to the United States, in such sum as shall be required by the collector, and with one or more sureties, to be approved by said collector, conditioned," (1) "that, in case any additional still or stills, or other implements to be used as aforesaid, shall be erected by him, his agent or superintendent, he will, before using, &c., report in writing to the said collector the capacity thereof, and information from time to time of any change in the form, capacity, &c., which either of the said stills, &c., may undergo;" (2) "that he will, from day to day, enter, or cause to be entered, in a book to be kept for that purpose, the number of gallons of spirits that may be distilled by said still or stills, &c., and, also, of the quantities of grain, or other vegetable productions, or other substances, put into the mash tub, or otherwise used by him * * * for the purpose of producing spirits, which said book shall be open at all times during the day (Sundays excepted) to the inspection of the said collector, who may make memorandums or transcripts therefrom;" (3) "and that he will render to the said collector, on the first, tenth, and twentieth days of each and every month, or within five days thereafter, during the continuance of said license, an exact account, in writing, taken from his books, of the number of gallons of spirits distilled and sold, or removed for consumption or sale, * * * and the proof thereof, and, also, of the quantities of grain, &c., * * *. put into the mash tub, or otherwise used by him, * * * for the purpose of producing spirits, for the period or fractional part of a month then next preceding the date of said report, which said report shall be verified by affidavit in the manner prescribed by this act;" (4) "and that he will not sell, or permit to be sold, or removed for consumption or sale, any spirits distilled by him under and by virtue of his said license, until the same shall have been inspected, gauged, and proved, and the quantity thereof duly entered upon his books as aforesaid;" (5) "and that he will, at the time of rendering said account, pay to the said collector the duties which by this act are imposed upon the spirits so distilled."

It is, of course, conceded, that the bond described in the declaration is not in the words of this 39th section. It is conditioned for conformity by the distiller to "all the provisions" of the act, and of such other acts as were then, (i. e., at the time of the execution of the bond,) or might thereafter be, in that behalf, (i. e., in regard to the duty of distillers,) enacted. Now, if the condition of this bond, in its broad generality, did, in fact, require, as a condition, nothing which is not included in the details enumerated in the section describing the bond, the only question would be—is the bond void, because it does not follow the words of the section, but, in lieu thereof, employs general language, having no greater meaning; or, in another form, if the bond prescribed by the 39th section, literally followed, would be conditioned for the performance of specific acts and duties, which, in truth, embrace all the duties imposed by the act, does the failure to enumerate all those duties in detail invalidate the bond? I

think not. In such case, the words, "conform to all the provisions" of the act, are, in meaning and in legal effect, the same as, "do and perform the several things in detail, enumerated in the act." Grouping the various duties in one phrase, and describing them as "conformity to all the provisions," is exactly equivalent to an enumeration of each in detail. Such a bond is no more onerous to the principal obligor, or to the sureties, and binds them to nothing which the statute did not require that they should, by the bond, be bound to do and perform.

But, laying out of view, for the present, that part of the condition of the bond in suit which requires conformity to the provisions of acts which may thereafter be enacted, I am not ready to agree that a bond voluntarily given upon an application for a license as a distiller, conditioned for the performance of all the duties imposed on distillers by the act under which the license is granted, is invalid, even if the applicant might have claimed such license upon tender of a bond less comprehensive in its scope. The cases relied upon by the defendants do not affirm such a proposition, but rather the contrary. It is to be carefully observed, that it does not appear that the collector, in the case before us, required, exacted, or extorted the bond in the particular form in which it was given; but, only, that Jane Goodwin was a distiller of spirits, and owner of a distillery in the said town of Torrey, &c., and the defendants, by their certain writing obligatory, sealed, &c., recited an application to the collector for a license as distiller, and acknowledged themselves bound to the United States in the sum of $18,000, conditioned, nevertheless, that the said Jane Goodwin should truly and faithfully conform to all of the provisions of the act under which such license was permitted. It is an undertaking, upon the granting and acceptance of a license to distil, that she will obey the statute which regulates her conduct as a distiller.

In the first place, as we must assume that such a bond was voluntarily tendered, the rule, and the cases which hold that a bond exacted by a public officer, colore officii, is void, if it embrace conditions which he is not authorized to require, have no application to the case. U. S. v. Tingey, 5 Pet. [30 U. S.] 115; Hawes v. Marchant [Case No. 6,240]; U. S. v. Gordon [Id. 15,232].

On the other hand, in the case of U. S. v. Tingey [supra], in which the rule last mentioned is stated and applied, the opinion of the court distinctly and unequivocally declares, that "it would be very different where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office." In that case, the statute required that a purser should give bond "conditioned faithfully to perform all the duties of purser in the navy of the United States." The bond actually given was construed to require him to account for all moneys received by him, and for all public property committed to his care, whether officially as purser, or otherwise, and was deemed clearly not in the terms of the act, and Mr. Justice Story, in giving the opinion of the court, says: "Upon this posture of the case, a question has been made, and elaborately argued at the bar, how far a bond voluntarily given to the United States, and not prescribed by law, is a valid instrument, * * * in other words, whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond, in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion, that the United States have such a capacity to enter into contracts." Upon further discussion, and full affirmance of this doctrine, the opinion of the court places the decision of the case upon the sole ground, that the bond was (as the demurrer was held to admit) required and extorted by the secretary of the navy, under color of office. Upon the principles declared in the opinion, it cannot be doubted, that, had the bond then in question been found a voluntary bond, executed without duress or requirement, it would have been binding according to its terms, and would have bound the sureties for any public property committed to the care of their principal.

The case of Speake v. U. S., 9 Cranch [13 U. S.] 28, necessarily involves the same principle. There, the statute required the execution of a bond in double the value of a vessel cleared from a port of the United States. The defence was, that the bond in suit was taken in a greater sum. But, in the absence of allegations that it was unduly obtained by the collector, colore officii, by fraud, oppression, or circumvention, the sureties were estopped to allege that the value of the vessel and cargo was less than one-half the penalty. This, of course, affirms that the bond was valid according to its terms, and must operate according to its common-law import; whereas, if any excess in amount, though voluntarily inserted, would render it void, it could have no operation between the immediate parties, even by estoppel.

In the state of New York, the statute (2 Rev. Laws, p. 139, § 5) required the treasurer of a county to give a bond conditioned "that he shall well and faithfully execute the office of treasurer of such county, and pay all moneys which shall come to his hands as treasurer, according to law, and render a just and true account thereof to the said supervisors, or to the comptroller of the state." In Supervisors v. Van Campen, 3 Wend. 48, a bond executed by a county treasurer was held a valid bond, although, instead of being conditioned according to this specification in the statute, it was simply that the said M. V. C. "shall well, truly, and faithfully execute and perform the duties of treasurer of said county, according to law."

In U. S. v. Bradley, 10 Pet. [35 U. S.] 343, a bond voluntarily given by a paymaster, though not in conformity with the statute prescribing the bonds of such officers, was held valid, notwithstanding it purported to bind the sureties to a broader extent than the act prescribed. It is true, that, in that case, the breaches alleged were of the very condition which the statute required to be inserted in the bond, namely, that he account, &c.; and it was not necessary for the court to decide whether the sureties would be liable for a breach of duty mentioned in the condition of the bond, but not specified in the statute prescribing the condition; and the court, therefore, while they reaffirmed the doctrines of the opinion in U. S. v. Tingey, decided all that was material, when they held the bond valid as to the conditions prescribed by the statute, and effectual to charge the sureties for the breaches against which the prescribed bond was intended to protect the government.

It is to be observed, that the case now before us charges only breaches of the very condition mentioned in the statute (section 39), describing the bond to be given by a distiller; and we are, nevertheless, asked to hold, that, because the bond is conditioned for the performance of all the duties required of a distiller under the act, it is not good as to those duties which the statute requires shall be secured by bond.

The case of U. S. v. Linn, 15 Pet. [40 U. S.] 290, reaffirms, in a still stronger case, the validity of an instrument executed to the United States, not conforming to the statute requirements, and upon the principle of the case above stated.

I am quite aware, that it has been insisted, that, when a statutory bond contains conditions required by the act under which it is taken, and other conditions which are not so required, it is void as to the latter. See Armstrong v. U. S. [Case No. 549]; U. S. v. Howell [Id. 15,405]. And this proposition finds some color in the opinion of Chief Justice Marshall in Dixon v. U. S. [Id. 3,934]. But, it will be seen, that, in that case, his language relates to conditions introduced by the officer taking the bond, under color of office, which conditions are not warranted by law, and that the point in judgment was, whether the bond was wholly void. And in U. S. v. —— [Id. 14,413] he held, in conformity with the remarks in the former case, that, in dealing with a statutory obligation, matter inserted in the obligation, which the statute did not require might be rejected as surplusage, and the bond stand valid for the residue. Observations of a similar purport appear in the opinion of Mr. Justice Story in U. S. v. Bradley, 10 Pet. [35 U. S.] 343, above referred to

This distinction may well exist where the bond has no legal existence except by force of the statute which has prescribed the taking of the bond; and, if it is applicable to all cases in which congress have assumed to direct the taking of a bond, it should not be applied to a bond in substantial conformity with the statute, and containing no condition that is not within the clear duty imposed by the act itself. But, conceding that the bond now in suit is to be tested by the views last adverted to, what conditions are inserted in it which the statute requiring the bond does not contemplate? The condition is, that the distiller shall truly and faithfully conform to all the provisions of the act of July 1, 1862 (being the act which authorizes the license to distill), and of such other act or acts as were then, or might thereafter be, in that (or this) behalf, enacted. Now, the 39th section of the statute does not provide for a bond to comply with future enactments. So far, then, as it relates to duties created by future statutes, let the words, "or might thereafter be," be struck out as surplusage, according to the opinion of Chief Justice Marshall. What, then, is embraced in the condition, which the statute did not prescribe? The duties of a distiller, in keeping books, and making entries therein, of the spirits distilled, and of the materials used, to be open to inspection, and in making returns to the collector, on the 1st, 10th, and 20th of each month, of sales made or spirits removed, and in paying the duties thereon, are prescribed in section 45 of the act, and almost in the words of the 39th section, which prescribes the bond to be given: and it is the violation of the requirements of this 45th section which constitutes the breach of the bond in suit. The bond clearly embraces the alleged defaults. The statute clearly requires that the bond shall be conditioned against such defaults. Had the bond been conditioned in the very words of the statute, it would have been broken by the alleged defaults on which the action is founded. There is no pretence that the defendants are now sought to be drawn into a new liability or subjected to one which the statute did not contemplate. Had the words of the statute been followed, the defendants would have been in the same condition in which they now are. It is the defendants who are seeking, on grounds highly technical, to avoid a just liability. Why, then, is not the bond effectual? It is said, that other violations of the act may be committed, which would be a breach of this general condition of the bond, and that the court cannot sustain the bond, because the language of the bond includes both indiscriminately. If the fact be as assumed, I could not assent to the inference.

The propositions stated are, that the conditions which are inserted in the bond, but which are not mentioned in the statute, are inoperative; that the general words of the bond include both; that the court cannot reform the language of the bond, and, to strike out any of the words, would be to destroy the whole condition; and that the

court cannot, by construction, limit the operation of the bond to what it might lawfully require, and must, therefore, of necessity, hold the bond altogether void. This argument may be illustrated by an example. If the bond was, by the statute, required to enjoin obedience to the 45th section, and it was so drawn as to require obedience to the 45th and 56th, the court could treat all reference to the 56th as surplusage, and hold it good as to the requirements of the 45th, but, if in terms drawn so as to require obedience to all the provisions of the act, the court cannot regard any portion of it as surplusage, or limit its operation to the 45th, even though it should appear that only those two sections create or impose any duty. This does not seem to me reasonable, or as resting upon any sensible ground. In my judgment, the present case is fairly illustrated by the above example. I do not find in the act any duty imposed upon a distiller, in the behalf mentioned in the bond in this case, (except what is contained in the 56th section of the act,) which the bond prescribed in the 39th section, (and which, in every view, it was lawful to take,) does not embrace.

It was suggested, in the argument, that the bond, as now framed, would make failure to pay the license tax, to make manufacturer's returns, or to comply with the stamp act, breaches of the condition. Not so. They have no relation to the duties of distillers, as such. The distiller has not to make manufacturer's returns, other than what are mentioned in the 39th, 45th, and 56th sections. The single duty which I find imposed upon distillers, the performance of which is not required to be made by the 39th section a condition of the bond, is, that he will make monthly returns to the inspector. All else is properly embraced in the bond, as prescribed. The objection to the bond comes, then, to this—it is conditioned for conformity to all the requirements of the act. The section directing the giving of the bond does not require that the distiller shall give a bond conditioned to make the monthly returns to the inspector, and, in that respect, the bond in question exceeds the requirement. It seems to me more in accordance with good sense, with the maxim which prefers that "res magis valeat quam pereat," with the spirit and intent of the decisions above referred to, and with what is just to both parties, to say, that this bond is in substantial, though not literal, compliance with the statute; that it was voluntarily given, to secure what it was not only lawful, but the duty of the distiller, to do; that it was manifestly taken in good faith, for the single purpose of securing those things which it was intended such bond should secure, and has in it no taint of illegality whatever; and, finally, if its terms are so comprehensive as to embrace a duty to render an account, which duty, if separately specified, would have been rejected therefrom as an excess or surplusage, that it is our duty to regard the requirement embodied in the general words used as not, in point of law, including it, and to hold that the breach which is alleged, and which is clearly one which constitutes a breach of the bond described in the statute, is covered by the condition.

These views lead me to the conclusion that the plaintiffs should have judgment on the demurrer.

HALL, District Judge, did not concur in the foregoing opinion, but came to the conclusion that the defendants were entitled to judgment on the demurrer. See his opinion [Case No. 15,850a]. The case was then certified to the supreme court, upon a difference of opinion. In that court, the bond was held valid, in affirmance of the conclusion of Judge WOODRUFF, and, on the return of the mandate, judgment for the plaintiffs, on the demurrer, was ordered. [154 U. S. 580, 14 Sup. Ct. 1213.]

UNITED STATES v. MYNDERSE. See Case No. 14,562.

Case No. 15,852.

UNITED STATES v. NAGLE et al.

[17 Blatchf. 258;[1] 8 Reporter, 772.]

Circuit Court, S. D. New York. Nov. 3, 1879.

CRIMINAL LAW—INFORMATION—SIGNATURE OF DISTRICT ATTORNEY.

1. The fact that an indictment against a person has been quashed because of insufficient averments is no ground for quashing an information subsequently filed by the district attorney against the same person for the same offence.

2. It is no objection to an information filed in open court by the sworn assistant of the district attorney, that the signature of the district attorney to the information was written by such assistant by virtue of a general authority conferred upon him by the district attorney.

[This was an information against David J. Nagle and others. Heard on motion to quash.]

Sutherland Tenney, Asst. U. S. Dist. Atty.

Augustus F. Bays, for defendant.

BENEDICT, District Judge. The fact that these same defendants were indicted by the grand jury for the same offence described in this information, which indictment was quashed because of insufficient averments, affords no ground whatever upon which to ask that this information be quashed. The district attorney had the right to proceed by information notwithstanding the fact that, on a former occasion, he had elected to proceed by indictment and had submitted the case to the consideration of a grand jury.

It is no objection to an information filed in

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

open court by the sworn assistant of the district attorney, that the signature of the district attorney attached to the information was written by such assistant, by virtue of a general authority conferred upon him by the district attorney.

The motion to quash the information is denied.

Case No. 15,853.

UNITED STATES v. NAILOR.

[4 Cranch, C. C. 372.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

CRIMINAL EVIDENCE—KEEPING HOUSE OF ILL FAME.

Upon an indictment for keeping a house of ill fame, evidence of the ill fame of the defendant herself, cannot be given.

Indictment [against Priscy Nailor] for keeping a house of ill fame, &c.

THE COURT, (THRUSTON, Circuit Judge, absent,) on the authority of the case of U. S. v. Jourdine [Case No. 15,499], refused to permit the United States to give evidence of the ill fame of the defendant herself.

Verdict, "Not guilty."

Case No. 15,854.

UNITED STATES v. The NANCY.

SAME v. The CAROLINE.

[3 Wash. C. C. 281.] [2]

Circuit Court, D. Pennsylvania. April Term, 1814.

NON INTERCOURSE—PROHIBITED ARTICLES—CONTINUITY OF VOYAGE—INTENT IN LADING.

1. The prohibited articles, the importation or the putting on board of which, with intent to import the same, is made a cause of forfeiture by the 5th section of the act of March 1, 1809 [2 Stat. 529], are, as well those which are prohibited on account of the place at which they were laden, as those which are the growth, produce, or manufacture, of the offending nation.

2. Although the merchandise, which is the subject of this information, was landed, and the duties paid thereon, at Amelia Island, in Florida, and thence trans-shipped to Philadelphia—yet, as the goods were originally put on board the vessel, with intention to import them into the United States, no question can arise as to the continuity of the voyage; the offence under the law consisting, not in the importation, but in the intention with which the merchandise was put on board.

3. The non-importation law of March 2, 1811 [2 Stat. 651], which revived the act of March 1, 1809, the provisions of which extended to the possessions, as well as the colonies and dependencies, of Great Britain, did not extend to the possessions, but only to the colonies and dependencies of that power.

4. Malta was not a dependency of Great Britain.

[Appeal from the district court of the United States for the district of Pennsylvania.]

WASHINGTON, Circuit Justice. These are informations, filed on behalf of the United States, against the brig Nancy and her cargo, and also against the cargo of the Caroline, for breaches of the non-importation laws of the United States. The Nancy is claimed by an American citizen; and the goods in the two vessels are claimed by Willing & Francis, for themselves, and on account of certain persons residing at Malta. The facts, in these cases, are—that the goods imported into the port of Philadelphia in these vessels, were shipped at the island of Malta, in the ship Union, by the jurats of the university of the four cities of Malta, some time in the month of February, 1811, consigned to Willing & Francis at Philadelphia, to be sold by them, and the proceeds to be invested in a return cargo of flour. It appears, by the letters from the shippers of this cargo to their consignees, that in case the non-importation law as to Great Britain should be renewed, the Union, with the cargo on board, was to be ordered to Amelia Island, where her cargo was to be taken out and replaced by a cargo of flour, which the consignees were to send forward to that place. On the 6th of May, 1811, Willing & Francis received information of this consignment, and immediately sent orders to the master of the Union, who had then arrived on the coast of the United States, to proceed to Amelia Island; to which place, they informed him, they would despatch two vessels with flour, to load the Union, and also to receive her cargo to bring to Philadelphia. The flour was accordingly sent to Amelia Island in these two vessels, the Nancy and the Caroline, in which the cargo of the Union was imported into Philadelphia, some time in August, 1811. A pro forma decree having been made by the district court, dismissing the information [case unreported], appeals were entered to this court.

The questions arising in these causes, are—(1) Was the cargo of the Union, in whole or in part, the growth, produce, or manufacture, of the island of Malta? (2) Was the importation into the United States to be considered as having been made from that island, or from Amelia Island? (3) Was the island of Malta a dependence of Great Britain?

1. As to the first question, there can be no doubt, upon the evidence, that the articles composing this cargo are not produced in the island of Malta for exportation; and that this particular cargo was imported into that island from Italy and other places, not belonging in any respect to the British government.

2. In order to arrive at a clear understanding of the subject, to be considered under the second head of argument; it will be proper to take a brief view of the different acts of congress, which interdicted commercial inter-

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

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

course between the United States and Great Britain.

The act of March 1, 1809, prohibits, after the 20th of May following, the importation into the United States, of any goods, &c., wherever grown or manufactured, from any port or place situated in Great Britain, or France, or in any of the colonies, or dependencies; or in the actual possession of either of those nations. It also prohibits the importation of any goods, being the growth, produce, or manufacture of those countries, or of their colonies, dependencies, or places, in their actual possession, from any port whatever. The 5th section of this law declares, that all such prohibited articles, imported into the United States, contrary to the true intent and meaning of the act, or which should be put on board of any vessel, with intention of importing the same into the United States, together with all other articles on board of the same vessel, belonging to the owner of the prohibited articles; should be forfeited. The sixth section provides, that if the said prohibited articles should be put on board, with intent to import the same into the United States, with the knowledge of the owner, or master of such vessel, the vessel also should be forfeited. The operation of this law as against Great Britain, was suspended for a short time, by the president's proclamation, issued on the 19th of April, 1809 (5 Am. Reg.), in consequence of the arrangement with Mr. Erskine; and was to take effect on the 10th of June following—and was again revived by proclamation, dated the 9th of August, 1809. But it at length expired, by its own limitation, in May, 1810, no law having been passed, during that session, further to continue it. By the act of May 1, 1810 [2 Stat. 605], it was however declared, that in case either Great Britain or France should, before the 3d of March, 1811, so revoke or modify her edicts, as that they should cease to violate the neutral commerce of the United States—which fact, the president was to declare, by proclamation; and if the other nation should not, within three months thereafter, do the same thing, in relation to her edicts, that the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 18th sections of the act of March 1, 1809, should, from the expiration of the said three months from the date of the said proclamation, be revived against the dominions, colonies, and dependencies, and the articles the growth, produce, or manufacture of the dominions, colonies, and dependencies of the nation so refusing, or neglecting to revoke, or modify her edicts; and that the restrictions imposed by this act, (which relate only to the prohibition of our waters to the armed vessels of those two nations,) should, from the date of the proclamation, cease, in relation to the nation so revoking her decrees. On the 2d of November, 1810, the president issued his proclamation, declaring that France had complied with the conditions of the law of the 1st of May, 1810; in consequence of which, the above sections of the act of March 1, 1809, were brought into operation against Great Britain, her colonies and dependencies, to take effect from the 2d of February, 1811, unless, before that time, Great Britain should repeal her offensive edicts. Then came the act of March 2, 1811, which enacted, that until the president should, by his proclamation, declare, that Great Britain had revoked, or so modified her edicts, as that they had ceased to violate the neutral commerce of the United States, the provisions of the above sections of March 1, 1809, should have full force, and be immediately carried into effect against Great Britain, her colonies and dependencies.

From this view of the above laws, the two following positions appear to the court to be perfectly clear; 1st, that the prohibited articles, the importation of which, or the putting on board of which, with intention to import the same into the United States, is made, by the fifth section of the act of the 1st of March, 1809, a cause of forfeiture, are, as well those which are prohibited on account of the place at which they were put on board, as those which are the growth, produce, or manufacture of the offending nation. The object of the law was to interdict all commerce with the ports, as well as in the products of Great Britain and France, so far as related to importations into the United States; and a violation, or intention to violate this policy of our government, was, in reason, as well as by the plain construction of the law, made punishable in either case. If then the island of Malta should be determined to be a prohibited place, and the intention of the owners of this cargo, at that place, was to import the same into the United States; or, without such intention being proved, the importation was made, either directly or indirectly; the forfeiture was complete, as soon as the cargo came within the jurisdiction of the United States, notwithstanding the landing, and paying of duties, at Amelia Island, and the trans-shipment at that place, for the port of Philadelphia. In the latter case, that is, of an original importation, from Malta to Amelia Island; there can be no doubt, but that if the cargo had been bona fide sold at Amelia Island, the purchaser might have imported it into the United States, without incurring a forfeiture; because the continuity of the voyage, from the forbidden place, would have been substantially broken, and not in form merely. Contrivances to evade a law, may sometimes be so deeply laid, as to elude detection, notwithstanding the strictest examination of all the circumstances that can be brought to light. But whenever it is made clearly to appear, that the law, in its obvious spirit and intention, has been violated by covert means, a court of justice would forget its duty, by affording its sanction to such contrivances. But, when it appears, that the cargo was originally put on board, with intent to import the same into the Unit-

ed States, no question, it is conceived, can arise, as to the continuity of the voyage; for here the offence consists, not in the importation, but in the intention with which the cargo was put on board. Now, as to the facts in this case, there can be no doubt. The letters from the owners at Malta, to their consignees, and from those consignees to the master of the Union, and to their agent at Amelia Island, as also to the person whom they sent in the Nancy—all prove clearly, that the cargo was put on board at Malta, with an intention to import the same into the United States; directly, if the laws would permit; and if not, then indirectly, by trans-shipping it at Amelia Island.

The second position which arises out of the view before taken, of the different acts of congress on this subject, is, that the non-importation law of March 1, 1809, which interdicted commerce with the possessions, as well as with the colonies and dependencies of Great Britain, was revived only against that nation, her colonies, and dependencies; and this conducts us to the third and most difficult question in the cause. Is Malta to be considered as a dependence of Great Britain? In deciding this question, the court has not had an opportunity to derive much information from books. The precise meaning of the word "dependency," as it is used by congress, in the law under consideration, cannot be ascertained with any degree of certainty. It may, however, be safely concluded, that it imports some civil and political relation, which one country bears to another, as its superior, different from that of a mere possession. The introduction of the words "actual possession," into the act of March 1, 1809, and the omission of them in that of May 1, 1810, afford strong evidence, that congress did not consider a dependency, as synonymous with a possession; but, on the contrary, the difference was so material, as to induce congress to sanction a trade with the former, which had been previously interdicted with both. As soon as this distinction is established, the mind of a legal man is irresistibly led to annex to the one, the idea of possession, accompanied by title, in opposition to a mere naked possession, obtained either by force, and against right, or rightfully acquired, and wrongfully withheld from the legal sovereign; and this, the court is strongly inclined to think, is the true definition of a dependency;—that is, a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe. It is not a colony, because it is not settled by the citizens of the sovereign, or mother state; but it is lawfully acquired or held, and the people are as much subjects of the state which has thus obtained it, as if they had been born in the principal state, and had emigrated to the dependent territory. The usual ways by which such acquisitions are made, are by purchase, or by conquest in war. The first, being made with the consent of the sovereign, is permanent and indefeasible; but the latter is subject to uncertainty, and liable to restoration to the sovereign, from whom it was taken, unless confirmed by a treaty of peace, or unless it be voluntarily relinquished by such sovereign. When so confirmed, or relinquished, and not before, it seems to be, in the true sense of the word, a dependency; that is, it is durably incorporated into the dominions of the conqueror, and becomes a part of his territory, as to government and national right. Conquests in war, are, by the best authorities amongst elementary writers on national law, and according to the modern practice of nations, considered only as temporary possessions, held by force, and subject to be defeated by re-capture, or by the peace. Barbeyrac, in a note on part of the 8th chapter of Grotius, expresses the general idea on this subject. "But the object of a just war, does not require of itself, that one should acquire over the vanquished, an absolute and perpetual sovereignty. It is only a favourable opportunity of gaining dominion; and it requires always, beyond this, a consent either express, or tacit, of the conquered; otherwise a state of war always continues. The sovereignty of the conqueror, is nothing more than a title by force, and endures no longer than the conquered people are in a state of incapacity to throw off the yoke." "It is true," he adds, "that neutral powers are not to call in question this conquest, or say that it is unlawful, or the war unjust." But this does not alter the nature of the case, or give to the possession perpetual right and duration. It remains a conquest, liable to all the vicissitudes of war, and not a dependency—durably, legally, and indisputably attached. The dominion is only temporary, and it cannot be considered as a national territory and domain, being held on condition, and not in perpetual right. Vattel is full upon this subject. "Immovable lands, towns, provinces," &c. he says, "pass under the power of the enemy, who makes himself master of them; but it is only by the treaty of peace, or the entire submission and extinction of the state to which these towns and provinces belong, that the acquisition is completed, and the property becomes stable and perfect." Vatt. Law Nat. bk. 3, c. 13, § 197. So, also, section 198. See, also, Puff. Law Nat. bk. 8, c. 6, § 20.

It is not within the province of this court, to settle disputed rights between nations. But it is under the necessity of expounding laws, and of discovering, for our guidance, the meaning of the terms in which they are expressed. The court has not had an opportunity to enter into a minute investigation of the actual or political state of the island of Malta. But, on a general view of the books which detail its history, from the time it was

invaded by the French, until the period when this shipment was made, it does not seem to have been at any time permanently or rightfully incorporated with the domains of Great Britain. It continues a possession, gained by conquest from France, and not from the people or ancient government of the island; and consequently, the law of nations imposed an obligation upon the conquerer to restore the island to the people, and not to bring it under subjection to a new master. Vatt. Law Nat. bk. 3, c. 13, § 203. The island appears to be under a military government, notwithstanding the commander is styled "civil governor," or "commissioner;" and the officers of police, and a judge of the admiralty, are appointed by the military and civil governor. See Eton's Materials for a History of Malta, p. 89. The ancient laws of the island, executed by native magistrates, are yet in force—as is often the case in conquered countries, held in temporary subjection. No doubt, these magistrates are subject to the power and control of the occupant by conquest, for the time being. But the natives have never ceased to claim an independent right to the government and soil; although, from a detestation of their former oppressors and perfidious betrayers, the knights of St. John, they have frequently requested, and have as often been denied, the privileges and laws enjoyed by British subjects. See Pasley, pp. 306, 390, 391, 31, Memorial of the Maltese Deputies. Nothing shows more strongly that they are not considered by Great Britain herself as part of her subjects, or the island as part of her territories. By the treaty of Amiens, (after the offer of the Maltese to place themselves under the British government,) the British administration agreed to re-deliver the island to the knights, contrary to every stipulation, actual or implied, with the inhabitants. Quart. Rev. 1813, pp. 4, 5. This was a breach of confidence, palliated by her own writers only on the principle of expediency, and the advantages to be derived to England, either positively, or as a prevention to its falling into the hands of the French, to whom the knights were alleged to be devoted. Still, however, Great Britain bound herself, by this treaty, to abandon any claim she might have acquired to the island, and to restore it to its ancient government. After this, her title by conquest, imperfect and defeasible as it was, changed entirely its character. Before this agreement to restore the island, she had but a mere possession; but that possession was rightful—the continuance of it, after the treaty, was wrongful.

Under all these circumstances, the court is of opinion, that the island of Malta has been, and now is, held by Great Britain, by force, without right, in direct contravention of a solemn treaty. It is not the period, long or short, of such forcible possession, but the stability and right of the occupant, which, in the opinion of the court, will satisfy the true meaning of the term "dependency." It is only a foreign possession, without certain permanence or settled right. The decree of the district court affirmed.

Case No. 15,855.

UNITED STATES v. NARVAEZ.

[1 Cal. Law J. 341.]

District Court, N. D. California. July 25, 1862.

MEXICAN LAND GRANTS—LOCATION OF QUANTITY—EXTENSION BEYOND BOUNDARIES OF GRANT—OBJECTIONS TO SURVEY—ESTOPPEL.

[A grantee reserved to himself a given quantity of the lands granted, and sold the excess. The purchasers of the excess themselves laid off the quantity reserved, and in so doing extended the line beyond the limits of the grant to include a strip of which the grantee had long maintained possession. *Held*, that the ancient possession and cultivation of this strip, the general recognition of the boundary by the grantee's neighbors, and impliedly by the former government in granting the adjoining ranch according to such boundary, the act of the purchasers of the excess in making the location, together with the fact that the United States did not complain thereof, was sufficient to warrant the court in confirming a survey which adopted the boundary in question.]

[This was a claim by José Augustin Narvaez for San Juan Bantista, two square leagues, in Monterey county, granted March 30, 1844, by Manuel Micheltorena to J. A. Narvaez. Claim filed February 27, 1852; rejected by the commission November 15, 1853; confirmed by the district court July 15, 1855. Case unreported. It is now heard upon objections to the survey. Vanderslice & Clarkson and Branham & Lewis, intervenors.]

HOFFMAN, District Judge. By the final decree in this case there were confirmed to the claimant two square leagues of land to be located within the boundaries described in the grant. The petition of Narvaez to the board, after setting forth the grant, etc., represents that within its exterior boundaries are contained about three leagues and one-tenth. That he has caused two leagues to be accurately surveyed, and that the same are indicated by red lines on the map of the survey of the whole rancho, which he submits to the board. He therefore prays that his title may be decreed to be valid for all the land embraced within the exterior boundaries. But if the board should be of opinion that he is only entitled to two leagues, then that the said two leagues may be confirmed to him, and surveyed so as to embrace the land inclosed with red lines on the map. In the same case a supplemental petition was filed by Vanderslice & Clarkson. This petition, after setting forth the grant, and the ancient occupation and settlement of Narvaez, alleges that on the 11th April, 1850, Narvaez conveyed to the petitioners the whole of the said rancho, excepting two leagues, which he reserved to himself, and which were to be measured off by the peti-

tioners; that this was done accordingly. The petitioners further represent that the original grant, the deed of Narvaez to themselves, and maps of the land claimed by them, with a duly authenticated plat of survey, are already on file in the case. They therefore pray that their title may be decreed to be valid to the whole of the land, excepting the two leagues set apart and measured off to Augustin Narvaez.

The deed from Narvaez to Vanderslice & Clarkson confirms the statements of their petition, and it expressly mentions that the land intended to be conveyed is the sobrante or excess above two leagues, which may be found within the exterior boundaries of the rancho.

It is evident that the claim of Narvaez was restricted to the two leagues which had been, in accordance with his agreement with Vanderslice & Clarkson, measured off to him, and which, on the map referred to, in both petitions, was indicated by red lines; while the claim of Vanderslice & Clarkson was for the sobrante, which on the same map is inclosed in green lines. By the final decree of this court the claim was confirmed to the extent of two leagues only. The application for a confirmation of the sobrante was therefore in effect rejected. There has accordingly been surveyed to Narvaez the two leagues reserved by himself, and in accordance with the plat of survey presented by him and by Vanderslice & Clarkson to the board. To this survey the United States make no objection. Objections, however, are filed by certain intervenors claiming under Vanderslice & Clarkson, and under another conveyance from Narvaez, which will hereafter be noticed.

It is urged that the two leagues are located to the north and west beyond the exterior limits of the diseño; that the boundary line on the northwest, thereon delineated, is not the Los Gatos creek, but an imaginary line to the southeast of it, and that the line of the survey should be drawn, as indicated by the diseño, so as to cross the Alisal at a point to the south of its present location. By thus cutting off a considerable tract to the northwest, the quantity of two leagues can only be obtained by a corresponding extension to the southeast, and thus a portion of the sobrante conveyed to Vanderslice & Clarkson will be included, which they, or their representatives, claim to hold by virtue of Narvaez deed. The inequitableness of this pretension is apparent. It is plain that Narvaez intended to sell, and Vanderslice & Clarkson supposed they were buying, only the excess over and above two leagues, which might be found within the exterior limits. The petition of Narvaez indicates, by the alternative form in which his prayer for confirmation is expressed, that he had little expectation that his title would be deemed valid for more than two leagues, and we may presume that the consideration paid for the assignment of his possible title to the sobrante was much less than the value of the land, if his title to it had been clear. If, in measuring off the two leagues and separating the sobrante, a mistake has been committed, it was the mistake of Vanderslice & Clarkson, by whom the measurement was made. Their claim to the tract, inclosed in green lines, proceeded on the hypothesis, and indeed the express allegation, that there had already been measured off within the exterior limits to Narvaez the two leagues reserved by him; and his claim to the tract within the red lines was, in like manner, founded on the idea that that tract was wholly within the exterior boundaries, and would constitute the two leagues which he reserved. When, therefore, the claim of Vanderslice & Clarkson for the sobrante was rejected, they lost all to which they could assert any title. And the speculation on which they bought the sobrante failed, it being decided that there was no sobrante which could have been conveyed to them.

The attempt now made by them, or their representatives, to change the location made by themselves of the two leagues reserved by Narvaez, and by making it include a part of what they acquired as a sobrante, claimed as a sobrante, and measured off under their deed, because it was a sobrante, seems to me palpably unjust. If successful, the effect would be to deprive Narvaez of a portion of the two leagues which it was well understood by all parties he was to retain, and, profiting by their own mistake in measuring the land, to permit them to acquire under a deed for the sobrante, or excess beyond two leagues, a portion of the two leagues which their grantor expressly reserved to himself. It seems to me that by their own measurement, plat, and survey, filed with the board, by the terms of their deed and their petition, they and their representatives are estopped to contend that the two leagues measured off to Narvaez were not correctly located, or that the land, or any part of it, deeded to them beyond the red lines, was a part of the two leagues reserved by Narvaez, or other than the sobrante or excess over and above those two leagues.

But the intervenors also claim the right to object to this survey by virtue of a conveyance from Narvaez to Isaac Branham and Jackson Lewis, of a certain portion of the rancho not included in the survey. In this conveyance the part of the description material to notice is as follows: "Thence southeasterly along said line to the southeast corner of the land of said Bassham; thence southwesterly along said Bassham's line, and in continuation thereof, until the same strikes or arrives at the original boundary line of the said Rancho San Juan Bantista or Narvaez Rancho; thence along and with the line of said original boundary of said Narvaez Rancho, in a southeasterly direction, to the

Arroyo de los Capitancillos; thence down and along with said Arroyo," etc.

It is contended on the part of the claimants that the "original boundary line of the Narvaez Rancho, "referred to in this description, is the boundary of the rancho proper, as the same was established by the survey of Vanderslice & Clarkson; and that, therefore, the deed embraces no part of the sobrante, and all the land conveyed to Branham and Lewis is within the official survey. Hence they have no right or interest to object. On the other hand, it is urged that the reference to the original boundary line of the rancho is too explicit to be mistaken. That the land of Bassham extended to the boundary which divided the two leagues of Narvaez from the sobrante, and inasmuch as the deed describes the northerly line of the premises conveyed by it as running "along Bassham's line, and in continuation thereof, in the same direction," it must have been intended to run beyond the dividing line between the two leagues and the sobrante at which Bassham's line stopped. To this it is replied that the westerly line is described as "running with said original boundary line in a southeasterly direction to the Arroyo de los Capitancillos;" and that the exterior boundary line cannot be meant, for that line runs in a direction nearly due south, and terminates at the Sierra Azul, and not at the Arroyo de los Capitancillos. It is also urged that, even if a portion of the sobrante conveyed to Clarkson & Vanderslice be included within the boundaries mentioned in the deed, that instrument, by an express exception, excludes from its operation "all lands or portions of the same included in the description, which may have heretofore been legally and properly sold by the said parties of the first part, and in accordance with law."

It is certainly not easy, if the line referred to in this description be the boundary of the two leagues measured to Narvaez, to account for that part of the description which calls for a boundary along said Bassham's line, and in continuation thereof, until it strikes or arrives at the original boundary line of the Narvaez. On the other hand, if the exterior boundary be meant, that boundary corresponds, neither in its course or points of termination, with the description of it in the deed; for it is described as running in a southeasterly direction, and terminating at the Capitancillos creek, whereas the exterior boundary of the rancho, or the line of Hernandez, runs in a nearly southerly direction, and terminates at the sierra.

Mr. Bassham, by whom, as agent for Narvaez, the negotiations were made and the sale effected, swears that it was well known to all parties that the land beyond the boundary of the two leagues had already been sold to Vanderslice & Clarkson, and that the reservation in the deed was understood to apply to that land, if any of it were embraced within the general description. The tract officially surveyed to the claimant is precisely that measured off for him by Vanderslice & Clarkson, and for which his claim was presented to the board. The grant describes the disputed boundary "as the place or rancho of Hernandez, and the Pueblo of San José, without passing the Alizal which pertains to the latter." The line of Hernandez is not disputed. It forms the western boundary of the rancho. The only designation of the northern boundary, which is the boundary in controversy, is the call for the "Pueblo without passing the Alizal." But the Pueblo and Alizal can only serve as a limit on the easterly end of the northern boundary. For the location of the remainder of that line we must have recourse to the diseño. On this diseño we find a dotted line, which, on its upper or western portion, was evidently intended to indicate the boundary of Hernandez; but the lower or northwestern and northern portions seem equally clear to have been drawn to mark the limits of the rancho in those directions. This line is at a considerable distance to the south of the Gatos creek, and if this indication be scrupulously observed, that creek cannot be reached. It has, notwithstanding, been taken as a boundary in the official survey; and the line, when produced across the Monte, includes a larger portion of the Alizal, and strikes the Guadalupe creek at a greater distance from the San Juan Bantista hills, than would seem to be warranted either by the delineation on the diseño, or the calls of the grant. This strip of land lying along the "Gatos" appears to have been from an early period occupied, and a portion of it cultivated, by the grantee. At a place within it, called the "Abra," he established one of his sons; and the "Gatos" seems to have been generally recognized as his boundary by his neighbors. At the time he obtained his title, the grant to Hernandez had already been made. This latter rancho lay at the base of the sierra, and extended on both sides of the Gatos, a considerable distance down that stream. The diagonal dotted line, on the westerly corner of the diseño, was intended to mark the boundary of Hernandez. But Hernandez' land does not extend along the creek the whole distance from the sierra to its mouth, and there would seem to have been no motive for assigning to Narvaez an imaginary and arbitrary line for a boundary, instead of allowing [him] to come to the creek below the line of Hernandez, and where he would interfere with no one. The only boundary on this side, mentioned in the grant, is the pueblo of San José; and it appears that out of the lands of that pueblo a grant of a place called "Los Coches" was subsequently made, the diseño of which shows that it lay below the rancho of Hernandez, and on the lower portion of the Gatos. But that creek forms its southern boundary, and is inserted "Arroyo de la Mojonera," a circumstance which may justify the inference that the government, when granting Los

Coches up to the Gatos, and no further, supposed that the rancho of Narvaez, on the opposite side of the creek, also extended to it. Such seems to have been the understanding, not only of Narvaez himself but of the vecinos and colindantes; and, as before remarked, the principal part of his cultivation was on lands between the dotted line and the creek.

As early as 1850, the survey of Day was made, which was intended to segregate the two leagues reserved by Narvaez from the sobrante conveyed by him to Vanderslice & Clarkson. The location appears to have been acquiesced in by all parties. No objection to it is made by the United States, or by any colindante. The only exception to it is taken by parties who acquired their interests with full notice and understanding that any lands outside of this location were conveyed as part of the sobrante, and that no title passed unless it should be held that the grant to Narvaez was not restricted to the quantity of two leagues, but embraced all the land within the exterior boundaries.

For the reasons already given, it has appeared to me that the representatives of the grantees of the sobrante cannot now be heard to object to the location made by themselves, and on the faith of the correctness of which, the supposed sobrante was conveyed to them. The right of the representatives of Branham to object is more open to debate. But it has seemed to me that the deed to him, as limited by the reservation contained in it, cannot be construed to embrace any lands not included within the two leagues which had been measured off to Narvaez; and, even if any such lands were included, that it was understood that they were to be taken out of what was recognized on all hands as the sobrante.

I am aware that to confirm a location which extends beyond the exterior limits of the diseño or grant is an apparent departure from the principle by which the court is required to be governed. But in this class of cases no rule can be inflexibly observed, nor any principle be of universal application. The whole of the two leagues measured off to Narvaez has been sold, and the contest is, in effect, between those who have bought the land claimed to be without the external boundaries and those who have bought lands supposed to be part of the sobrante. The ancient possession and cultivation of Narvaez—the general recognition of his boundaries by his neighbors—and impliedly by the former government in their grant of the adjoining rancho of Los Coches—and the express and emphatic recognition and adoption of the same boundaries by the purchasers of the sobrante when laying off the two leagues reserved by Narvaez, with the fact that if these boundaries be now changed the practical effect will be to deprive the representatives of Narveaz of a part of the two leagues intended to be reserved, and to give to the intervenors, as a part of the rancho proper, lands that they bought as a sobrante,—these considerations, and the fact that the United States acquiesces in the location, and that no colindante objects, have led me to the conclusion that I ought not to disturb a location so long recognized, and which there can be no doubt would have been adopted and confirmed by the former government, or by the officer giving judicial possession, if called on to perform that duty. I think, therefore, that the survey should be approved.

Since the foregoing opinion was delivered, it has been suggested to the court that the official survey does not exactly conform to the division of the rancho made in pursuance of the deed to Vanderslice & Clarkson. Leave was therefore given to the counsel for the claimant, by whom the slight discrepancy had been overlooked, to file objections to the official survey nunc pro tunc; and, in accordance with the views expressed in the opinion, the survey must be modified so as in all respects to conform to the lines agreed upon as has been stated.

February 3d, 1863.—It having been found that the modification of the survey above indicated will embrace lands now occupied by certain parties claiming under the United States, and the intervenors Easeley et als., through their counsel, J. J. Williams, Esq., having signified to the court their willingness to waive any modification of the official [survey], and to accept the same as a correct and proper survey of said rancho, and the United States having opposed no objection to an approval of the same, it is now, on motion of Mr. Williams, ordered that he have leave to withdraw the exceptions of Mr. Easeley to said survey heretofore allowed to be filed nunc pro tunc—and that a decree be entered approving said official survey as returned into this court.

Case No. 15,856.

UNITED STATES v. NASH et al.

[4 Cliff. 107.] [1]

Circuit Court, D. Massachusetts. May Term, 1869.

CUSTOMS DUTIES—TENDER—WAIVER—WEIGHTS—PRINCIPAL MARKETS—TEAS.

1. Under § 18, 13 Stat. 216, teas imported from London were subject to a duty of 25 cents per pound, and also 20 per cent ad valorem.

2. Certain importers of teas stated to a deputy collector of customs that they would make a tender of a certain amount of duties due on the same, and he told them they need not do so, as he would acknowledge the tender. *Held*, no tender, especially as none was pleaded.

3. A deputy collector of customs has no authority to make such a waiver.

4. When teas are bought in England for export, what is delivered as one hundred pounds

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

actually weighs more, and importers into this country reckon their profits with reference to the difference between the weight there and here. *Held*, that the customs officers here were not bound by the invoice weight.

5. Ad valorem duties, where they are required to be assessed on a given weight, must be so assessed on the actual weight when landed, as ascertained by the proper officer of the customs.

6. Appraisers determine the actual market value, or wholesale price, of the merchandise in the principal markets of the country from which the same were imported; but they have no authority to determine the weight or quantity of the importation.

7. Appraisers must determine what are the principal markets of the country from which the goods were imported, in order to determine what was the actual market value or wholesale price there at the period of exportation; but their powers do not authorize them to extend their inquiries beyond what is necessary to enable them to appraise the value of the merchandise as required by law.

8. Although included in the invoice, goods lost on the voyage are not subject to duty.

[Cited in Balfour v. Sullivan, 17 Fed. 232. Distinguished in U. S. v. Bache, 8 C. C. A. 258, 59 Fed. 764.]

9. Where the United States weigher ascertained the exact weight of the teas, the collector was bound to adopt that quantity, and the value ascertained by the appraiser as the legal basis for the assessment of the duties.

The case was submitted on the following facts agreed: This was an action of assumpsit to recover the sum of $1,048.25 in coin, with interest from Dec. 4, 1865, the time when payment of said sum was demanded of the defendants [Nathaniel C. Nash, Spaulding & Co.] by the United States. The defendants imported into New York, per ship "Cella," from London, Sept. 20, 1865, a lot of teas, of different grades and prices, purchased by them and invoiced to them in London as 2,558 packages, 100,179 pounds, at a total cost of £8,030. 13s. 10d. The same were entered for consumption by the defendants at the port of New York, Sept. 20, 1865. The proper samples and the invoice were sent to the appraisers, who appraised the same and reported invoice value correct by writing on the back of the invoice the word "correct" and signing the same. The teas were then duly weighed by the United States weigher in New York, and he reported the weight to be 103,808 pounds avoirdupois. The estimated duty of 25 cents per pound on 100,179 pounds ($25,044.75) and 10% ad valorem on £8,030. 13s. 10d. ($38,869÷10=$3,886.90), being the number of pounds, and the value named in the invoice, amounting to $28,931.65, was paid by the defendants, and the teas were delivered to them, the United States not thereby waiving any claim for duties.

On the receipt of the reports of the appraisers and weigher, the collector of the port of New York assessed the duty and liquidated the entry, Dec. 4, 1865, as follows: 25 cents per lb. on 103,808 lbs., $25,952.00; less already paid (25 cents on 100,179 lbs.), $25,044.75,—due, $907.25. Multiplying the value per pound as stated in the invoice by the number of pounds reported by the weigher as the weight of the several packages, the collector estimated the value of the teas to be $40,279, on which he assessed a duty of 10%, $4,027.90; less amount already paid, $3,886.90,—$141.00. And he claimed that there was due to the United States $1,048.25 in coin.

The defendants offered to pay the said sum of $907.25 in coin, and saw Mr. Hanscom, then the deputy-collector in New York, and said to him they had that amount of gold, which they admitted was due the United States, and would make the tender of it; to which he replied that they need not do that, as the government would acknowledge the tender, and that suit should be brought, merely to settle the matter in dispute. This sum the collector refused to receive. No money was paid into court.

The defendants duly protested, and appealed to the secretary of the treasury, whereupon the secretary affirmed the decision of the collector. This suit is brought to recover said $1,048.25.

The 2,558 packages imported and weighed at the custom-house were the same packages which the defendants purchased in London for the said sum of £8,030. 13s. 10d., and which they expected to receive, which the seller intended to deliver to them, and which were in fact delivered to them, as and for the weight and price in said invoice mentioned. The purchase was made at the actual market rate in London, and the invoice contained all charges and commissions that ought to be included, and there was no change in the market rate at London up to the time of shipment. The standard pound avoirdupois fixed by law in England and the United States is the same. The weighing at the custom-house gives the exact weight in pounds avoirdupois. Although the standard pound is the same in England as in America, by the general custom and usages of the exporting and importing trade, well known to merchants in the United States and in England, better weight is given in England than in America, so that what is bought for and delivered in England as one hundred pounds of tea weighs more than one hundred pounds exact weight, and it is in consequence of this customary and usual mode of weighing in England, that the weight of the tea in New York was found to be greater than the invoice weight, which is its weight in England. Purchases and sales are always made, and prices quoted and stated in England, with reference to the manner of weighing in England, and importers in the United States reckon their profits with reference to the difference between the English weight and the American weight. The court was to draw any inference which a jury would be authorized to draw, might hear and determine any facts it deemed material not herein agreed without the intervention of a jury, and might render such a judgment as the law requires. The teas were all goods,

wares, and merchandise of the growth and produce of countries east of the Cape of Good Hope, and were imported from a place west of the Cape of Good Hope.

W. A. Field, Asst. U. S. Atty.
J. J. Storrow, for defendants.

CLIFFORD, Circuit Justice. Merchandise of the growth or produce of countries east of the Cape of Good Hope, except raw cotton, was subject to a duty of 20 per cent. ad valorem, in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production. 13 Stat. 216, § 18. Id. 493, § 6. When imported directly from the country of their growth or production, teas were subject to a duty of 25 cents per pound. 13 Stat. 203, § 1. Imported as these teas were from London, they were subject to the duty of 25 cents per pound, and also to the duty of 20 per cent. ad valorem, because not imported directly from the country of their growth or production. The amount of duties is estimated on the number of pounds, and the value of the merchandise, as given in the invoice, was $28,931.65; and the defendants paid that amount, and the teas were delivered to them, the United States not thereby waiving any claims for any balance that might be due. Payment of the estimated amount of the duties does not affect the rights of the parties in this suit, nor does the delivery of the importation, as the payment and delivery were made with the understanding that neither party waived any of their legal rights. On receipt of the report of the appraisers and the weigher, the collector assessed the duties in conformity to those reports. Adjusted in that manner, the balance due, as specific duties, was $907.25, and the balance due for the ad valorem duties was $141.00, making in all the precise sum claimed by the plaintiffs in their writ and declaration.

The defendants admitted that the amount claimed, as the balance for the specific duties, was due to the plaintiffs, and offered to pay it; but the collector refused to receive payment of that sum unless the other sum claimed was paid at the same time. They stated to the deputy-collector that they had that amount of gold, and that they would make a tende· of it, to which he replied, that they need not do that, as the government would acknowledge the tender. No other tender was made, and no money has been paid into court. Argument to show that the conversation between the defendants and the deputy-collector was not equivalent to a tender is unnecessary, as the statement of what occurred is sufficient to disprove any such theory. Authority to make such a waiver is not vested in the deputy-collector, and if it was, the conversation was too indefinite to amount to any such agreement. Apart, therefore, from the question as to the sufficiency of the sum which the defendants offered to pay, it is quite clear that the conversation between them and the deputy-collector, cannot avail them as a tender, especially as no tender was pleaded, and no money was paid into court. Tender of the whole amount claimed is not pretended, and if it was, the proposition could not be adopted, as it would find no support in the evidence. Unable to make any satisfactory adjustment with the plaintiffs, the defendants protested against the action of the collector, and appealed to the secretary of the treasury, and the department affirmed the decision of the collector. They protested against the doings of the collector, upon the ground that the weight of the teas, as reported by the weigher, was excessive, and they now contend that the plaintiffs, under the circumstances of the case, were bound by the weight as expressed in the invoice.

Fraud is not imputed to the defendants in respect to the invoice. On the contrary, the parties agree that by the general custom and usage of the exporting and importing trade, well known to merchants engaged in the trade, better weight is given in England than in the United States, so what is bought for and delivered in England as one hundred pounds of tea, actually weighs more than one hundred pounds, and that it was in consequence of that custom and usual mode of weighing there, that the weight of the tea here was found to be greater than the invoice weight Purchases and sales are always made, and prices are quoted and stated in England with reference to the manner of weighing in that country, and importers here, as the agreed statement shows, reckon their profits with reference to the difference between the weight there and in this country. But the standard pound avoirdupois is the same in both countries, and much of the difference in the result, as shown in this case, arose from the fact that the weigher here weighed a large number of the packages at one draft, instead of weighing each package separately, as the practice is in England. Some allowance is necessarily made for draft, in order to secure good weight; and the greater the number of the drafts, the greater must be the aggregate of the allowance, to secure that object. But ad valorem duties, where they are required to be assessed on a given weight, must be assessed upon the actual weight when landed, as ascertained by the proper officer of the customs. Appraisers determine the actual market value or wholesale price of the merchandise, in the principal markets of the country from which the same was imported; but they have no authority to determine the weight or quantity of the importation. They must determine what are the principal markets of the country from which the goods were imported, in order to determine what was the actual market value or wholesale price there at the period of exportation; but their powers do not authorize them to extend their inquiries beyond what is

necessary to enable them to appraise the value of the merchandise as required by law. Stairs v. Peaslee, 18 How. [59 U. S.] 521; Marriott v. Brune, 9 How. [50 U. S.] 619; U. S. v. Southmayd, Id. 637; Lawrence v. Caswell, 13 How. [54 U. S.] 488; Belcher v. Linn, 24 How. [65 U. S.] 508. Goods lost on the voyage are not subject to duty, although included in the invoice; and goods imported are subject, though not included in the invoice.

Guided by these rules, it is clear that the court must give judgment for the plaintiffs, as the parties agree that the United States weigher ascertained the exact weight of the teas. Such being the case, the collector was bound to adopt that quantity, and the value ascertained by the appraisers, as the legal basis for the assessment of the duties.

Judgment for the plaintiffs, with interest and costs.

UNITED STATES v. NASH. See Case No. 16,175.

UNITED STATES (NASON v.). See Case No. 10,024.

Case No. 15,857.

UNITED STATES v. NATHAN.

[4 Cranch, C. C. 470.] [1]

Circuit Court, District of Columbia. Oct. Term, 1834.

SLAVE—PUNISHMENT FOR LARCENY.

A slave, convicted of larceny in Alexandria county, is to be sentenced to be burnt in the hand and whipped.

Indictment [against Negro Nathan, a slave] for stealing a pair of shoes, of the value of one dollar. The prisoner pleaded guilty, and he was sentenced by the court to be burnt in the hand in open court, and to be whipped with ten stripes. See U. S. v. Clark (November term, 1825) [Case No. 14,802].

Case No. 15,858.

UNITED STATES v. NAYLOR.

[19 Law Rep. 449.]

District Court, D. New York. Nov. 19, 1856.

SLAVE TRADE—STATUTES.

History and construction of the statutes in relation to the slave trade. Act March 22, 1794 [1 Stat. 347], is still in force.

At law.

BETTS, District Judge. The defendant was arrested upon capias for a fine and penalty imposed by the act of congress of March 22, 1794 (1 Stat. 349–352), and is held to bail upon the arrest under an order of a judge of the court. He now applies to the court to discharge the arrest and action on the ground that the act of 1794 is no longer in force. The statute has not been expressly repealed by congress, but the argument insists that the subsequent legislation on the matter amounts to a repeal by implication. A collation of the statutory provisions on the subject will bring the point distinctly to view, and tend to solve the question more satisfactorily than a diffuse dissertation upon the general theme touching the operation of posterior enactments in working a repeal of antecedent ones. The provisions of the act of 1794 relate (1) to the consequences to the ship, directing if the master, factor or owner shall build, equip, load, or otherwise prepare any ship or vessel within the United States, or shall cause her to sail from any port of the United States for the purpose of procuring from any foreign country inhabitants thereof, to be transported to any foreign country, to be sold as slaves, &c., the penalty of forfeiture of the vessel. (2) The punishment of every person "so building, fitting out, equipping, loading, or otherwise preparing or sending away any ship or vessel, knowing or intending that the same shall be employed in such trade or business," penalty $200 fine. Vessels suspected of being intended for the slave trade, required to give bonds on clearing out for the coast of Africa not to receive natives of the coast on board within nine months. A forfeiture imposed of $200 each for all persons taken on board for the purpose of selling them as slaves. The title of the act is "An act to prohibit carrying on of the slave trade from the United States to any foreign place or country." The succeeding act of March 2, 1807 [2 Stat. 426], is entitled "An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States," &c. The act in ten consecutive sections enacts provisions for enforcing that purpose. The second and third sections adopt the language of the first and second sections of the act of 1794, with the difference that the prohibition in one applies to transporting persons from one foreign place to another, to be held and sold as slaves, and in the other the particular classes of persons are designated, and the prohibition is for causing them to be transported to any place within the United States, to be sold and held as slaves. The penalty upon the ship is the same in each statute, but, on the persons, the fine in the act of 1807 is $20,000.

This statement of the provisions of the two statutes demonstrates that they no way conflict with each other. They look to wholly different objects, and are leveled against distinct offences,—the first acting against the slave trade abroad and applying to the transportation of inhabitants of one foreign country to be sold to slavery in another foreign country, without discrimination of color; and the other being limited to negroes, mulattoes, or persons of color, and the dispatch of vessels from the United States to any foreign port or place for the purpose of pro-

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

curing such persons to be transported from such foreign country to the United States, to be held to service or labor. The interpretation of the latter act, as operating a repeal of the former, contended for by the defendant, cannot, accordingly, be maintained. The act of April 20, 1818 [3 Stat. 450], is entitled "An act to prohibit the introduction (importation) of slaves into any port or place within the jurisdiction of the United States, &c., and to repeal certain parts of the same," and by the tenth section the first six sections of the act of 1807 are repealed. Within those repealed sections are included the provisions above adverted to, and it is manifest that, inasmuch as they did not when in force affect the enactments in the act of 1794 upon a correlative subject, their absolute repeal can have no legal bearing upon those enactments. Congress framed the two statutes diverso intuitu, the one in relation to the foreign slave trade, and the other to the domestic. The act of 1818, as its title denotes, has exclusive reference to the importation of slaves into the United States. It goes beyond the repealed act of 1807, in embracing foreign vessels in the interdiction, but it introduces no description of offences which are prohibited by the act of 1794. Its enactments may be so directly in pari materia with those included in the repealed sections of the act of 1807, as to amount to an implied repeal of those provisions, if no express repeal had been declared, but as before shown, the existence or removal of the act of 1807 no way touches the act of 1794, in the particulars in question.

It is to be observed that there is a further radical distinction between the enactments on this subject in both the preceding acts. The offence therein created and described, upon which the pecuniary punishment was to be inflicted, was the fitting out or sending away a vessel, "knowing or intending that she should be employed" in such trade or business. But in the act of 1818 the offence consists in fitting out or sending away the vessel, or procuring it to be done, "with intent to employ such ship or vessel in such trade or business." The distinction between these transactions is palpable. The guilt of the one is equipping or sending away a vessel for the purpose of enabling third persons to employ her in the forbidden traffic; and of the other, the immediate and personal participation in the crime by the party accused, —fitting out or sending away the vessel with intent to employ her in the illicit trade. The supreme court regards this distinction as cardinal, and holds that the two phrases are not convertible in a true interpretation of the act of congress. U. S. v. Gooding, 12 Wheat. [25 U. S.] 460. I am, therefore, of opinion that the act of congress of March 22, 1794 (section 2), upon which this action is founded, remains in full force.

The motions on the part of the defendant are accordingly denied.

Case No. 15,859.

UNITED STATES v. NEALE.

[2 Cranch, C. C. 241.] [1]

Circuit Court, District of Columbia. April Term, 1821.

WITNESS—COMPETENCY—FREE NEGRO.

A free colored man who has resided in this district eight years, and publicly acted as a freeman, and so generally reputed to be, is a competent witness for the United States against a free colored person.

Indictment for assault and battery.

THE COURT permitted Edward Pleasants, a black man, to be sworn as a witness for the United States, after proof that he had publicly lived and acted as a freeman for eight years, and was generally reputed to be free.

Case No. 15,860.

UNITED STATES v. NEID.

[28 Leg. Int. 36; [2] 8 Phila. 169; 13 Int. Rev. Rec. 28.]

District Court, W. D. Pennsylvania. 1870.

INTERNAL REVENUE ACT—MANUFACTURE AND SALE OF CIGARS.

[Where cigars are made in the back part of a room, and sold in the front part thereof, the back part is to be regarded as a manufactory, and no cigars can be removed therefrom to the front part without first branding and stamping them.]

McCANDLESS, District Judge. Julius Neid was indicted in the United States district court at Erie for violations of sections 78, 82, 86, and 89 of the act of July 20, 1868 [15 Stat. 125]. The indictment contains five counts: (1) Manufacturing cigars without posting the collector's certificate of the number of cigar makers for whom bond had been given. (2) Not keeping correct books. (3) Removing cigars from the "place of manufacture" to the "place of sale" without the stamps, marks, brands, etc., required by law. (4) Selling manufactured tobacco not stamped. (5) Not placing manufacturer's notice on cigar boxes. H. C. Rogers, the collector of the Nineteenth district, accompanied by J. H. Manley, revenue detective assigned to the Western district of Pennsylvania, visited the manufactory of Julius Neid, in the city of Erie, on the 29th of December. The retail department and manufactory were in the same room. Along one side of the room, toward the rear end, were the tables or benches where the cigars were made. On the other side was a counter and show-case, with shelves. On these shelves they found thirty-five boxes of cigars unstamped, and only one of them had the manufacturer's notice. They found a caddy of tobacco open, with part of the tobacco gone, and no stamp upon it.

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

[2] [Reprinted from 28 Leg. Int. 36, by permission.]

Also two glass jars upon the shelf with plug tobacco in them. There was no collector's certificate posted on the wall. The stamp account showed that he had purchased stamps for 230,700 cigars—while his books showed the sale of 251,800, leaving a discrepancy of some 18,000 cigars, for which no stamps had been bought. The last entry of cigars made, was on Sunday, December 18, 1870. Various lots of tobacco were purchased by him, and not entered in his book.

The defence, which was conducted by E. Camphausen, Esq., turned chiefly on the third count. It was alleged that the whole room was the manufactory—that the cigars found on the shelves were placed there to dry—that none were sold, or removed from the room without stamps, etc.

District Attorney Swoope contended that a fair and proper construction of the act of congress required that the place of manufacture should be kept separate and apart from "the place of sale;" that if both branches of the business were carried on in the same room, there must be a dividing line, and that boxes of cigars could not be placed on shelves where other articles were exposed for sale, until they were stamped, marked, and branded according to law.

McCANDLESS, District Judge, charged the jury substantially as follows:

The defendant is indicted for five distinct offences under the act of congress regulating the manufacture and sale of tobacco and cigars. It may seem to you trifling and unimportant that all these minute details should be specified in an act of congress, or that the government should take cognizance of these apparently mere technical violations of law. But in no other way could the revenue, the great bulk of which is properly derived from liquors and tobacco, be collected. In this case you observe that some 18,000 cigars have been made on which no tax had been paid. When you consider the number of similar establishments all over the land, you can form a proximate idea of the immense aggregate out of which the government would be defrauded. Hence the necessity for these minute specifications in the act of congress, and in the regulations made by the treasury department, which are in effect a part of the law itself. They are designed to secure the collection of the revenue, and would simply prove abortive if they were suffered to be disregarded and disobeyed. The facts, gentlemen, are for you, and you must say whether the defendant is guilty of these several charges, and before you can pronounce him guilty you must be satisfied beyond a reasonable doubt. The defense seems to have been directed more especially to the third count in the indictment, which charges the defendant with the removal of cigars from the place of manufacture without the stamps, marks, and brands, required by law. In McDonald's Case, tried at Pittsburgh, there was a board partition between the place where the cigars were made and where they were sold. The evidence in that case further showed that a work bench was placed in the front room, where one of the hands, when not engaged in retailing, manufactured cigars. We held there that the back room, notwithstanding the bench in the front room, was the manufactory. [Case unreported.] In the case now under consideration, there was no partition—the cigars were made in the back part of the room, and sold in the front. We instruct you that the back part is the manufactory, and no cigars can be removed from that part of the building to the place where they are offered for sale, although it may be in the same room, without first branding and stamping them. Any other construction of the law and the regulations of the department, would deprive the government of a large portion of its legitimate revenue.

The jury, after a brief absence, returned a verdict of guilty on all the counts.

Case No. 15,861.

UNITED STATES v. NELSON.

[1 Abb. (U. S.) 135.] [1]

District Court, W. D. Michigan. Oct. Term, 1867.

COUNTERFEITING—SELLING SPURIOUS NOTES.

1. Under a statute which punishes one who shall "utter" or "pass" spurious notes, knowing them to be such, with intent to defraud, and which does not in terms require that they be uttered as true or genuine (Act June 30, 1864; 13 Stat. 221, § 10), a defendant may be convicted of uttering or passing, upon proof that he sold and delivered the notes as spurious notes to another person with intent that they should be passed upon the public as genuine.

[Cited in State v. Painter, 67 Mo. 87. Distinguished in State v. Watson, 65 Mo. 120.]

2. The words "uttering" and "passing," used of notes, do not necessarily import that they are transferred as genuine; the terms include any delivery of a note to another for value, with intent that it shall be put into circulation as money.

3. The fact that other provisions of statute exist which expressly provide a punishment for selling spurious notes, does not prevent convicting a defendant under an indictment for passing, uttering, and publishing such notes, upon proof that he sold them as spurious, with intent that the purchaser should cause them to be put in circulation as genuine.

Motion for a new trial upon an indictment.

John T. Holmes and L. Patterson, for the motion.

A. D. Griswold, Dist. Atty., and E. S. Eggleston, for the Government.

WITHEY, District Judge. The respondent, Theodore Nelson, was indicted in May last, and tried at the present October term on a charge of passing, uttering, and publish-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

ing a counterfeit United States fractional note with intent to defraud the United States. The trial consumed ten days, and resulted in a verdict of guilty.

At the coming in of the verdict, a motion was made for a new trial, on the ground of evidence improperly admitted. The proof was, that a person employed by the government officials, as a detective for the purpose, applied to Nelson for counterfeit money, to be, by the detective, put in circulation.

Negotiations were had between them, and resulted in Nelson selling to Mitchell, the detective, four hundred and ten dollars of spurious United States notes, for which he received in good money and a promissory note, one hundred and thirty-three dollars.

When the testimony was offered objection was made, that on a charge for passing, proof of selling was not admissible. The objection was overruled, and the testimony admitted. It is this ruling that forms the basis of the motion for a new trial.

It is urged by learned counsel in behalf of the respondent, that it is no offense, under the act of June 30, 1864, to utter, pass, and publish counterfeit notes as and for spurious; that the offense charged is committed only when the notes are passed, uttered, or published as true; that the words "pass," "utter," "publish," import "as true;" that to pass is to put into circulation, as Worcester defines "pass," and therefore to dispose of false notes as and for spurious is not passing, —i. e., is not putting them into circulation.

It is said that congress has by another statute, viz: the act of February 5, 1867 [14 Stat. 383], created the offense of selling, under which Nelson might and should have been indicted; hence selling spurious notes is a distinct offense for which there can be no conviction under a charge of having passed, uttered, and published; that the charge should have been for selling.

It is true, that it has been held that uttering is a declaration that the note is good, and that to offer it as genuine is an uttering—that to constitute an uttering there must be an intent to pass the note as good. U. S. v. Mitchell [Case No. 15,787], and cases there cited.

But what is the statute under which the indictment is found, and what its meaning? The act of June 30, 1864, defines the offense to be, "to utter, pass, publish, or sell counterfeit United States notes, knowing them to be such, with intent to deceive or defraud." There is an omission of the words "as true or genuine," or any equivalent words.

Whatever reason may have existed in the mind of the pleader who drafted the indictment for omitting to charge the respondent with having sold the notes, is not important to know. The single question which I find it necessary to determine is, whether, under the statute last referred to, any delivery of a spurious note to another for value, for the object or purpose of being passed or put into circulation as and for money, is a passing within the meaning of the act of congress.

Mr. Justice Baldwin, in the case referred to, says: "The note is uttered when it is delivered for the purpose of being passed. When put off it is passed." In the case of State v. Wilkins, 17 Vt. 151, the indictment charged the defendant with having "uttered, passed, and given in payment one certain false, forged, and counterfeited bank note, with intent to defraud;" and the supreme court say: "It is objected to this indictment that it is not alleged that the bill was passed as a true bill." The court also remark, the statute 15 Geo. II. provided "that if a person should utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, he should on conviction be subject to certain penalties." Under this statute, in the case of Rex v. Franks, 2 Leach, 644, the indictment charged the respondent simply with uttering a piece of false and counterfeit money, and it was held that the offense was complete, even though it was uttered as base coin. In that case the indictment did not state the uttering to have been in payment as and for a piece of good money, and if it had, the evidence in the case would have rebutted the charge. The court further on say, neither in the statute of 1818, nor in the Revised Statutes of Vermont, is it made a part of the description of the offense that the counterfeit bill should have been uttered, passed, or given in payment as and for a true bill; and the court held the indictment good.

Again, in the case of Hopkins v. Com., 3 Metc. (Mass.) 460, when the statutory offense was having in possession any counterfeit bank bills, with intent to pass, knowing the same to be counterfeit, and the indictment charged in the language of the statute, the supreme court of Massachusetts say the omission of the words "as true," strengthens the conclusion that the legislature intended to prohibit the passing of counterfeit bills as money, or to be used or passed as money, by any person at any rate of discount, or otherwise, whether as between him and the immediate receiver they were passed as true or not.

And further on in the case, the court say: "The word 'pass,' as used in the statute, and generally as applied to bank notes, is technical, and means to deliver them as money, or as a known and conventional substitute for money." And therefore to sustain such indictment,—i. e., an indictment for passing, —"it must be proved that the party who is charged, passed the counterfeit bill to another for some valuable consideration, or otherwise as for money, or as to be used for money, with the guilty purpose of defrauding the community."

I find no case in conflict with those I have referred to; hence the conclusion at which I arrived when the question arose on the trial is not shaken but confirmed.

The congress of the United States has defined it an offense to utter, pass, publish, or sell a counterfeit United States note, with intent to deceive or defraud, omitting the words "as true," or any equivalent words. The manner of passing, or the terms upon which the notes are put off or disposed of, are not material, so long as the delivery or putting off of the false notes be as and for money, in lieu of money, or to be used as and for money, with intent to deceive or defraud.

And whether the receiver knew the notes were false or not; whether he took them at what their face purported, or for one-half, or one-third, or any other value, if the purpose was to put them into circulation as money, it is not only passing, but as the tendency would be to defraud the government, it must be held to be passing with intent to defraud the United States. A sale and delivery for circulation of forged notes is a felonious passing within the act of congress.

Pass, utter, publish, and sell, are in some respects convertible terms, and, in a given case, "pass" may include utter, publish, and sell. So far as the act of February 5, 1867, is repugnant to, or inconsistent with, the act of June 30, 1864, it should be held to repeal the latter; but I am not inclined to take the view that there is any repugnancy. I think a given case may be presented under either statute, and this case is one of them. In the one case, under the act of June 30, 1864, the indictment must charge the passing to have been with intent to deceive or defraud; to prosecute for the same act of passing under the statute of February 5, 1867, the indictment must charge the passing to have been with intent that the false note will be passed as true.

In conclusion, I would remark, that I have, by letter, referred the questions arising under this motion to my learned brother, Justice Swayne, who writes me he has examined the authorities, and is satisfied that I decided aright. Sustained by the high authority of this learned justice of the supreme court of the United States, I am doubly assured that the judgment which I pronounce is no denial of legal rights to the respondent.

The motion for a new trial is denied.

Case No. 15,862.

UNITED STATES v. NELSON et al.

[2 Brock. 64.] [1]

Circuit Court, D. Virginia. Nov. Term, 1822.

BONDS — EXECUTION IN BLANK — AUTHORITY TO FILL BLANKS—VALIDITY—SURETIES.

1. A. and B. consented to become sureties in an official bond. A printed paper in the usual form prepared for official bonds was signed by them. At the time that A. and B. signed it, all those parts which are usually written, including the penalty, the names of the obligors, &c., were blank; and C., the principal, had not yet signed it. A. and B. signed it with a perfect knowledge of the purpose for which it was designed, but the blanks were afterwards filled up in their absence, and without any express authority from the sureties, and the bond so executed was accepted by the proper authorities of the United States, as the official bond of C., with A. and B. as his sureties. *Held*, that such bond is not obligatory on A. and B.

[Distinguished in City of Chicago v. Gage, 95 Ill. 611. Cited in City Council of Charleston v. Ryan, 22 S. C. 339; Danker v. Atwood, 119 Mass. 148. Cited in brief in Keyser v. Hitz, 2 Mackey, 518. Cited in Lockwood v. Bassett, 49 Mich. 549, 14 N. W. 492; People v. Organ, 27 Ill. 29; Preston v Hull, 23 Grat. 610; Trice v. Cockran, 8 Grat. 448; Rhea v. Gibson, 10 Grat. 220. Disapproved in Van Etta v. Evenson, 28 Wis. 37; White v. Duggan, 140 Mass. 20, 2 N. E. 110.]

[2. Cited in White v. Vermont & M. R. Co., 21 How. (62 U. S.) 578, which holds that bonds issued in blank are negotiable and payable to the holder as bearer, and that the holder may fill up the blank with his own name, or make them payable to himself or bearer, or to order.]

Debt for $7,000 against Thomas Nelson and Samuel Myers, surviving obligors of John Archer, Thomas Nelson, and Samuel Myers. This action was founded on an instrument purporting to be an official bond executed by the above parties in the penalty of $7,000, the condition whereof was, that the said Archer should faithfully discharge the duties of paymaster of the twentieth regiment of infantry, of the army of the United States, The declaration assigned various breaches of the condition of the bond, and the defendants pleaded severally a special non est factum. The jury found a special verdict presenting the following state of facts, viz.:

That John Archer, the deceased co-obligor of the defendants, was, previous to the date of the paper writing in the declaration mentioned, appointed paymaster, &c., and, as such, was by the law of the United States bound to give such bond and security as the bond in this case purported to be: that the said paper writing, purporting, &c., was signed, sealed, and delivered, by the defendants as their act and deed, and when it was so signed, sealed, and delivered, none of the manuscript parts (the formal parts of the bond being printed) were written. (The bond, with the manuscript parts aforesaid in italics, is in the words and figures following, viz.:)

"Know all men by these presents, that we, *John Archer, lieutenant in and paymaster of the twentieth regiment of infantry in the army of the U. S. of North America, Thomas Nelson and Samuel Myers*, are holden and stand firmly bound and obliged unto the United States of North America, &c. in the penal sum of *seven* thousand dollars current money, &c. well and truly to be paid, &c. for which payment faithfully to be made and done we the said *John Archer, Thomas Nelson, and Samuel Myers*, do bind ourselves, &c. Signed with our hands, and sealed with our seals, this *first* day of *September*, in the year one thousand eight hundred and *twelve*. The

[1] [Reported by John W. Brockenbrough, Esq.]

condition, however, of the above obligation is such, that whereas the above bounden *John Archer*, is appointed *paymaster of the twentieth regiment* of *infantry* of the army of the United States aforesaid: Now, if the said *John Archer* shall well and truly execute, and faithfully discharge his duties, &c. then this obligation to be void, else, &c. Done at *Richmond*, in the state of *Virginia*, the day and year above written. *John Archer*, (L. S.) *Thomas Nelson*, (L. S.) *Samuel Miles*, (L. S.)

"Signed, sealed, and delivered in the presence of *William Powers as to the two last, William Y. Archer as to ditto, William Woodford as to the first.*

"I, *John Archer*, do solemnly swear that I will diligently and faithfully execute and perform the duties *of paymaster of the twentieth regiment of infantry*, of the army of the United States of North America, according to the best skill and abilities of which I am possessed—so help me God. Sworn and subscribed to at *Fredericksburg*, in the state of *Virginia*, this *fourth* day of *September*, eighteen hundred and *twelve*, before *me, J. Newly, J. P.*"

That the manuscript parts had been written in the absence of the defendants, and that the said paper had not, since the same was written, been sealed, or acknowledged, as the deed of the defendants by either of them, and at that time, the name of John Archer, the principal obligor was not subscribed to said paper. That the defendants, when they so signed, sealed, and delivered, as aforesaid, the said paper in blank, in the respects aforesaid, well knew that the paper aforesaid was to serve as the bond of the said deceased obligor, and of the defendants, as his sureties, for the duties of his said office, and by their signing, sealing, and delivering, aforesaid, the defendants intended to bind themselves as sureties in the official bond of said deceased obligor. That the said manuscript parts of said paper, afterwards, as aforesaid, inserted, were so inserted without any other authority from, or consent of, the defendants, than that which is given by, or implied from, their said act of signing, sealing, and delivering the said paper in blank, aforesaid, with full knowledge of the object and purpose aforesaid, intended to be attained thereby, and their consent, at the time of such signing, sealing, and delivering the said paper, it should serve that purpose: That the said paper so, as aforesaid, signed, sealed, and delivered, was accepted by the proper authorities of the United States, as the official bond of said deceased obligor, and of the defendants as his sureties.

Upon this state of facts the jury submitted to the court the question, whether the paper in question be, or be not, the deed of the defendants? If it was their deed, then they found for the plaintiffs the debt in the declaration mentioned to be discharged by the payment of $1932 74, the amount of Archer's defalcation; otherwise, for the defendants.

MARSHALL, Circuit Justice. John Archer was appointed paymaster of the twentieth regiment of infantry, in the army of the United States. The defendants, Nelson and Myers, agreed to become his securities, and to execute such bond as was required by law. A printed paper, in the usual form prepared for official bonds to be given by paymasters, was presented to and executed by them. At the time of its execution and delivery, all those parts which are usually written, including the penalty, the names of the obligors, and the date, were blank. John Archer, the principal, had not executed it. This blank bond was afterwards filled up in the absence of the said Nelson and Myers, without their knowledge, and without any authority from them, other than is implied from their having executed the said paper with intention to bind themselves as the sureties of the said Archer, and with full knowledge of the object of the said bond. The jury further find, "that the paper so as aforesaid signed, sealed, and delivered, was accepted by the proper authorities of the United States as the official bond of the said Archer, and of the defendants as his sureties."

The defendants pleaded a special non est factum, and the jury has found the facts, and referred to the court the question, whether this be the deed of the defendants? At the common law, all instruments under seal were considered as deeds. Every contract not under seal was considered as a parol contract To the consummation of every deed, the solemnity of a delivery is indispensable. Opinion of Marshall, C. J., in Bank of U. S. v. Danbridge, 12 Wheat. [25 U. S.] 90. Until delivery, the writing does not become the deed of the party who had sealed it. It is also necessary to the validity of a deed that it be in writing. Shep. Touch. p. 76. These two circumstances must concur, or there is no deed binding on the party whose seal is affixed to the paper. The rule requiring that the deed should be written, implies, necessarily, that it binds no further than the writing binds. Perk. Com. § 118, says: "If a common person seal an obligation, or any other deed, without any writing in it, and deliver the same unto a stranger, man or woman, it is nothing worth, notwithstanding the stranger make it to be written that he who sealed and delivered the same unto him is bound unto him in £20." There are many other authorities to the same effect. It would be useless to quote them, because the principle is not denied. In the case now under consideration, there being no sum of money mentioned in the bond, the defendants were no more bound by the instrument they had executed, at the time of its execution, than if the paper had been all blank. The Unit-

ed States could not have availed themselves of the bond in its then condition. The whole question then, is, whether the defendants have authorized any other persons to fill up this bond, in such manner as to create an obligation which did not exist when it was delivered.

It is found by the jury that the defendants executed this bond with the knowledge that it was to be received as an official bond, and with an intention to bind themselves as the sureties of John Archer, as paymaster, by this sealing and delivery of it, but that no special authority was given to any person to fill it up, nor any authority whatever, other than is implied from their sealing and delivering the paper. Does this act authorize any person whatever to insert the penalty and other written parts in the bond—and does it make the writing, in its present form, their deed? If this question depended on those moral rules of action which, in the ordinary course of things, are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties, at the time of its execution, intended it should have. But there are certain technical rules growing out of the state of things, when many of our legal principles originated, which are firmly ingrafted on the law, and still remain a part of it, though the circumstances in which they had their birth are totally changed. Perhaps every distinction between a sealed and an unsealed instrument is of this description. But the distinction, and the rules which are founded on it, have taken such fast hold of the law, that they can be separated only by the power of the legislature. Till that authority shall interpose, the courts must respect the rules as they are found in adjudged cases Those cases must be referred to in order to determine whether this be the deed of the defendants. In the case stated in Perkins, the inference to be fairly drawn from the sealing and delivery of a paper, on which nothing was written, is, that the person to whom it was delivered was authorized to write over the signature and seal, if not any obligation he pleased, an obligation for some certain thing previously agreed on by the parties, and that the person making the instrument confided in him to whom this implied authority was given, for its faithful execution. It means this, or it means nothing. Yet the obligation written over this signature was declared to be of no validity It follows, that the sealing and delivery of a paper does not imply an unlimited power to write even what had been previously agreed on by the parties. Shepherd, in his Touchstone (page 54), referring to this section of Perkins, says: "The agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This declaration, if it be law, is conclusive, with respect to a paper which is sealed and delivered as the act and deed of the party, but which, at the time of the sealing and delivery, has nothing written in it. I proceed to those cases in which an obligation is written on the paper, which is incomplete at the time, and is afterwards made complete, or in any manner varied.

The case of Markham v. Gonaston, which is reported in Cro. Eliz. 626, Moore, 547, was argued at great length, and considered by the court. That case depended on the question, whether an obligation executed with blanks for the Christian name and place of residence of a person named in it, became void by filling up those blanks. The point was argued in three different suits. The first suit was brought against Fox, on an obligation made by Sir Francis Willoughby and said Fox, and upon the plea of non est factum being pleaded, the plaintiff became nonsuited. The party injured then brought an action on the case against the person who made the alteration, who pleaded that he had written the obligation by the command of Sir Francis Willoughby, with those blanks in it: that it was in this state executed by Fox: that the blanks were then filled up by order of Sir Francis Willoughby, with the assent of Fox: after which Sir Francis executed the obligation. This plea was held ill on demurrer, and the court said, that the alteration was material, and that it avoided the bond. Moore in his report of this case, says (note) that the plaintiff afterwards brought a new action on the obligation against Fox, who pleaded the special matter, and concluded that it was not his deed. The plaintiff replied, that it was filled up with the assent of both of the obligors; and upon demurrer it was adjudged for the plaintiff in B. R. The note in Moore does not give us the words of the replication, but the term "assent" certainly implies an assent expressed, and the special plea of the person who made the alteration, as appears from Coke, was, that the alteration was made by order of one of the obligors with the assent of the other. Hargrave and Butler, in their notes on Co. Litt. quote this case in the following terms: "Obligation, with a condition to save harmless, against Tracy, with a blank. A stranger, after the delivery, fills up the blank with a Christian name, with the assent of the obligor, yet adjudged to avoid the deed because material. But if the addition is not material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself, it doth avoid it." In the case of Zouch v. Clay, reported in 1 Vent. 185, 2 Lev. 35, the defendant pleaded, that at the time of his executing the bond, there was a blank in it, which

was afterwards filled up, with the name of another obligor, and so it is not his deed. The plea was held ill. Ventris says, the court considered the insertion of the name of a new obligor, as not affecting the person who had previously executed the obligation, it remaining the same as to him. Levinz, in his report of the case, says, that the name was inserted with the consent of all the obligors, and, therefore, the obligation was still binding. In these cases, the obligation was complete, although the blanks had never been filled up. The alteration did not create or enlarge the obligation, or vary it to the injury of the obligor. They do not, therefore, contradict the law, as laid down in Perkins and Shepherd's Touchstone. In the case put by them, the obligation, if it exists, is created by the writing inserted after delivery. In the subsequent cases which have been noticed, the obligation was complete when it was delivered. The alteration was in the words, not in the obligation of the instrument, and that alteration was made with the assent of parties. I understand this to be an assent to the specific alteration; and to be an assent, not implied, but expressly given.

A case has been cited from 5 Mass. 538 (Smith v. Crooker), decided by a judge, whose opinions deserve to be greatly respected, and whose decisions must always have great influence with any court in which they are quoted. The case is this: An official bond was prepared for C., with a blank for the name of the surety. Cushing, afterwards agreed to become surety, and executed the bond. The blank was filled up with his name in his absence; and then C. also executed it. Cushing pleaded non est factum to this bond, but it was determined to be his deed. No person will controvert this decision. The alteration was immaterial, and not being made by the obligor himself, could not, on any sound principle of law, affect the instrument. But a principle is laid down in the opinion, which goes much farther than the decision. Judge Parsons lays down the general rule, that any material alteration will avoid the bond, but states as an exception to this rule, an alteration made by consent of parties. He adds that, "the party executing the bond, knowing that there are blanks in it, to be filled up by inserting particular names or things, must be considered as assenting that the blanks may be thus filled, after he has executed the bond." Any distinction between an express and an implied assent, in a case where the implication is so strong, as it must be where a blank is to be filled of course "with a particular name or thing," is here denied. In such a case, there is undoubtedly, good sense in the opinion which rejects this distinction; but I am not sure that it is sustained by law. He who adds to the obligation of another, must do so by the authority of that other; and I know of no case, in which, as respects a deed, such authority is implied in a court of law, certainly of none, when not even the person is designated, by whom the authority is to be executed. But the proposition laid down by the very able judge who gave this opinion, does not necessarily extend to the case at bar. He lays down his principle, in a case "where a blank is to be filled by inserting particular names or things;" that is, where the blank is to be filled up only in one manner. But this principle does not apply to a blank to be filled up with a sum of money, which sum is not precisely fixed. It is also observable that in reviewing the cases on which he founds his opinion, the judge takes no notice of Perkins or Shepherd; and the case before him, as well as that which he supposes in giving his opinion, was not produced by a paper which was blank, or of no obligation whatever, when it was delivered. A blank of such vital importance, that the paper, while it remained, was a nullity, does not seem to have been in his view. For this reason, too, whatever authority may be ascribed to the opinion of Judge Parsons, and no person acknowledges his authority more willingly than myself, its application to the case at bar may well be doubted.

In Russel v. Langstaffe, Doug. 496 (2 Doug., Frere's Ed., 514) it is determined by the court, that "the indorsement on a blank note, is a letter of credit for an indefinite sum." The same principle is asserted by this court, in Violet v. Patton, 5 Cranch [9 U. S.] 151, 2 Pet. Cond. R. 214. If these decisions apply to sealed instruments, they decide the cause now before the court; for the presumption is at least as strong, that the defendants intended, when they executed this bond, to allow the blank to be filled with such sum as the government would require in the official bond of a regimental paymaster, as that the person who signs a blank paper, intends to give indefinite credit to the person who receives it. They, would, too, completely overturn the principles laid down in the old books. But there are certain diferences in law between sealed and unsealed instruments, which make it difficult to apply the principles of one species of contract to the other; all unsealed instruments being considered as verbal contracts, they require neither writing nor delivery; they were not governed by those technical rules which are founded in the necessity of writing and delivery. General and liberal principles, therefore, which are laid down in such cases, cannot safely be applied to sealed instruments, unless the courts have expressed the intention so to apply them.

But the case on which most reliance is placed, is that of Speake v. U. S., 9 Cranch [13 U. S.] 28.[2] Speake, Beverly, and Eliason,

[2] 3 Pet. Cond. R. 244. See, also, Steele's Lessee v. Spencer, 1 Pet. [26 U. S.] 552. In an action of ejectment, a deed was produced exe-

had executed an embargo bond, and afterwards the name and seal of Eliason were removed, and those of Ober substituted in their place. To an action brought on this bond, the defendant, Beverly, pleaded that this alteration was made "without his consent, license, or authority." The plaintiff replied that the alteration was made "with the assent, and by the concurrent license, direction, and authority of all the defendants, and of the said Ebenezer Eliason." The defendant demurred to this plea, and the court overruled his demurrer. On appeal to the supreme court, the judgment was affirmed.

The pleadings present the case of an express authority to make the alteration, and the only questions were, whether this express authority could avail the obligee, and whether it could be given by parol. Whatever previous difficulty might have existed on this point, there is none now. The case of Speake v. U. S. [supra], has settled them; but that case goes no farther; it does not decide that an obligation may be created originally, by virtue of an authority which is not expressly given, but is implied from the sealing and delivery of a paper, which, in its existing state, can avail nothing. This point does not appear to have been ever decided in the case of a sealed instrument. The case of Speake v. U. S., in determining that parol evidence of such assent may be received, undoubtedly goes far towards deciding it; and it is probable that the same court, may completely abolish the distinction, in this particular, between sealed and unsealed instruments. In this place I do not feel authorized to disregard it. In the English courts, from which the rules applicable to this subject are derived, the distinction is still maintained in a case which bears some analogy to this. The right of one partner to bind another, so far as respects the business of the trade, and the partnership property, is unquestioned; yet, if a partner affix a seal to the instrument, by which he promises in the name of the company to pay money, the English judges, with what propriety I shall not now say, have determined that the company is not bound by it.[3]

I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on this verdict is, in my opinion, with the defendants.

Notwithstanding the strong distrust expressed by the chief justice, of the correctness of the above decision, no appeal was taken from it. [See White v. Vermont & M. R. Co., 21 How. (62 U. S.) 578.]

cuted by Spencer, in which Steele was grantee, but it was apparent that the deed had been altered in this, viz., that the name of the grantee wherever it occurred, was written on an erasure, and with ink of a different colour; as also the words "Ross," and "Ohio," in describing the residence of the grantee, and these alterations were not accounted for in any manner by the testimony in the cause. The court below instructed the jury, that if the deed was altered in a material part, after it was sealed, attested, and acknowledged, such alterations made the deed absolutely void. But the supreme court said this was error, although it might be true that a material erasure or alteration in a deed, after its execution, might avoid the deed, yet, the instruction ought not to have been given in the terms used by the court. Whether erasures and alterations had been made in the deed or not, was a question of fact proper to be referred to the jury; but whether they were material or not, was a question of law which ought to have been decided by the court.

Case No. 15,863.

UNITED STATES v. NELSON.

[4 Cranch, C. C. 579.] [1]

Circuit Court, District of Columbia. Oct. Term, 1835.

SLAVE—PUNISHMENT FOR LARCENY.

A slave, convicted of larceny, is to be punished by whipping, although not charged as a slave in the indictment.

The prisoner [negro Nelson] was convicted of stealing a hair cap, of the value of one dollar and twenty-five cents. It appears, in evidence, that he was a slave, although not charged as such in the indictment.

THE COURT (nem. con.) sentenced the prisoner to be whipped with twenty stripes.

Case No. 15,864.

UNITED STATES v. NELSON.

[5 Sawy. 68; [2] 1 San. Fran. Law J. 398.]

District Court, D. Oregon. Jan. 25, 1878.

PUBLIC LANDS—CUTTING TIMBER—LAND OCCUPIED AS MINING GROUND.

1. The enactment of the pre-emption, homestead and mining laws by congress has modified the operation of the act of March 2, 1831 (section 2461, Rev. St. [4 Stat. 472]), prohibiting absolutely the cutting or removal of timber on the public lands, so that persons occupying portions of such lands under such laws may, before becoming the owners thereof, cut and use the timber thereon so far as the same may be necessary to accomplish the purpose for which the land is occupied.

[Cited in U. S. v. Williams, 18 Fed. 477; U. S. v. Murphy, 32 Fed. 378; U. S. v. Stone, 49 Fed. 850.]

2. A person occupying a portion of the public land as mining ground under the mining law of the United States is not bound to pur-

[3] But see a relaxation of this principle in Anderson v. Tompkins [Case No. 365], and the authorities there cited. See, also, 2 Selw. N. P. tit. "Partners," c. 2, and the notes. In Virginia, a scroll affixed by the obligor by way of seal, is of the same validity as if it were an actual seal of wax. 1 Rev. Code, p. 510; and where the formal parts of the bond were printed, and the blanks filled up before the obligor signed it, the scroll being printed; this was held to be a good sealing within the statute. Buckner v. Mackay, 2 Leigh, 488.

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

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

chase the same, but until he does so, he has a mere license to work the ground for the precious metals therein, and has no right to cut or use any timber growing or found thereon, except as the same may be necessary to enable him to mine the same conveniently.

3. The defendant occupied seventy acres of public land as mining ground and cut timber from four acres thereof in advance of his mining operations, and disposed of the same for his own benefit, assigning as a reason therefor, that by cutting the timber in advance of the mining operations the stumps would rot and therefore be more easily removed: *Held*, that this cutting was not necessary to the mining operation and therefore unlawful.

[Cited in Ladda v. Hawley, 57 Cal. 55.]

Information for cutting timber on the public land in violation of section 2461 of the Revised Statutes.

Rufus Mallory, for plaintiff.

L. O. Stearns, for defendant.

DEADY, District Judge. On November 24, 1877, an information was filed in this court by the district attorney against Levi W. Nelson, charging him with cutting and removing from the lands of the United States, to wit, a certain described portion of township 9 south, range 39 east, in the district of Oregon, five hundred pine trees, of the value of one hundred and twenty-five dollars, for his own private advantage and profit, contrary to section 2461 of the Revised Statutes. The defendant pleaded "not guilty;" and the case was submitted to the court for judgment upon an agreed case, that was stipulated and agreed should be deemed and taken as a special verdict.

The special verdict substantially finds: (1) That between January 1, 1875, and November 1, 1877, the defendant cut and removed timber, as alleged, but that there were only one hundred and fifty of the trees, of the value of twenty-five cents each; (2) that in 1870 the defendant took up and claimed the premises, containing about seventy acres, for the purpose of placer mining, and in August, 1872, caused the same to be duly surveyed and platted as a placer mining claim; (3) that in 1873 the defendant made due proof of the performance of the conditions necessary to entitle him to a patent from the United States for the premises, except the payment of the price fixed by law therefor, which has never been paid, and that said premises are not within any organized mining district; (4) that said premises are "placer mining ground;" and it is necessary, to successfully mine the same, to remove the trees standing thereon, and "that it is better for the purpose of such mining that the timber be removed so far in advance of the work as to give opportunity for stumps to rot and so be more easily disposed of;" (5) that between 1870 and 1877, the defendant, for the purpose of working the premises as a mining claim, constructed buildings, flumes and ditches thereon to the value of two thousand five hundred dollars; and has worked said ground continuously during the mining season of each year by employing from fifteen to twenty miners during such period; (6) that it is the business of the defendant to work such mining ground during the mining season, and he expects to continue the same permanently; (7) that about one third of an acre of said ground is worked over each year, and that said one hundred and fifty trees were taken from about four acres of the same.

Neither the information nor the special verdict states according to what meridian the township containing the locus, is nine south and thirty-nine east. But as there is but one meridian in this judicial district, the Wallamet, it must be construed as referring to that. This locates the premises in Baker county, Oregon. Section 2461, supra, upon which this information is founded, is section 1 of the act of March 2, 1831. It prohibits absolutely the cutting or removal of any timber from the public lands for any purpose "other than the use of the navy of the United States," under a penalty of not less than three times the value of the timber, and imprisonnient not exceeding twelve months. The pre-emption, homestead and mining laws of subsequent date which confer the right of occupation of limited quantities of the public lands upon settlers and miners for agricultural and mining purposes, and with a view of enabling them to obtain patents therefor, are laws upon the same subject—in pari materia—with the timber act of 1831, and must be construed with it. It is not to be supposed that congress authorized the occupation of the public lands by the laws aforesaid for the purposes of agriculture and mining, without intending to so modify the operation of the timber act as to permit the occupants thereunder to cut and use the timber upon their respective claims so far as the same is necessary for the purpose for which they are occupied. By the enactment of these laws, the timber act is so far repealed. Such has been the ruling of this court in giving instruction to juries in several unreported cases.

In Re U. S. v. McEntee [Case No. 15,673], the defendant was sued in the district court for Minnesota, to recover the value of timber cut by him on the public lands. The defendant justified the cutting upon the ground that he occupied the premises under the homestead act of 1862 [12 Stat. 392]. The court (Nelson, J.), instructed the jury that "everything necessary for the cultivation of the land and manifesting an intention to make permanent occupancy and bona fide settlement, is legitimate and proper to be done. The land can be cleared and timber sold, if cut down for the purpose of cultivation; but if sale and traffic is the only reason for severing the timber, and it is not done with a view of improving the land, the intentions of the lawgiver are subverted."

The jury found a verdict for the United States.

Section 2319, Rev. St. (section 1, Act May 10, 1872 [17 Stat. 91]), declares that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States," under certain regulations as to quantity and work thereon during the period between selection and purchase. Among the conditions upon the keeping of which this right of occupation rests, is the performance of a certain amount of labor upon the premises annually. If the claim is a vein or lode, the occupant may purchase the same upon proof of the performance of the conditions precedent by paying therefor at the rate of five dollars per acre, or if, as in this case, it be a "placer," at the rate of two dollars and fifty cents per acre. Title 22, c. 6, Rev. St. It is manifest from the reading of the whole of this chapter of the Revised Statutes that in contemplation of the law this right or privilege of exploration and occupation is only given as preliminary to a purchase by the occupant, and that if it shall be ascertained that the location contains "valuable mineral deposits," he will proceed without unnecessary delay to obtain a patent from the United States therefor, by making proof of the location and labor thereon and the payment of the purchase price therefor. But, as was held in Chapman v. Toy Long [Case No. 2,610], there is no specific provision of the law, compelling the occupant to purchase, and he may continue to hold the claim by occupation and labor, so long as he desires, and then abandon it. The defendant in this case occupies the premises under this law, and claims the right to cut and remove the timber therefrom as incidental to and in aid of his right to mine thereon. But he is not the owner of the land until he pays for it, and obtains the United States patent. It is a part of the public domain. In the meantime the defendant is occupying it under a mere license from the government, which may be revoked at any time by the repeal of the act giving it. The defendant, however, is not to be considered in default for not having paid for the land. His license under the statute to occupy and to work it as mining ground is sufficient for that purpose until withdrawn by congress, without purchasing it. But in considering the question whether this land is occupied by the defendant solely as mineral land or in whole or in part for its timber; and whether the trees in question have been cut and removed only as a necessary and convenient means of working the ground as a placer mine, and not otherwise, the fact that he has occupied it under the act of 1872, for nearly six years, as land containing "valuable mineral deposits," without availing himself of his right to purchase it at the mere nominal price of two dollars and fifty cents per acre cannot be overlooked. If the land or the greater portion of it is of little or no value as mining ground but valuable for its timber, the defendant might occupy it for a few years until he had stripped the tract of its timber, and worked out the few acres that really contained valuable deposits, and then abandon it to the government. In the region where this land is situated timber is very scarce and valuable. The temptation to locate one hundred and sixty acres of timber land as mining ground, and by putting a few dollars' worth of labor upon it annually, be thereby enabled to dispose of the timber upon it at from fifty to one hundred dollars an acre, is very great, and if the defendant's construction of the law is to obtain there is nothing to prevent its being done. No proof is required as to the amount of mineral deposit in the land; and the only security against the law being used as a cover to strip the public lands of their valuable timber is to limit the right of the locator of a mining claim to the use of such timber thereon as is necessary to the actual working of such claim.

Apply these suggestions to this case. The defendant has located seventy acres of land under the mining law, and occupied it as a mining claim for several years. During this time he has worked over two or three acres of the ground, and cut timber off of four other acres, and disposed of it for his private benefit—probably sold it for firewood. It is admitted that the defendant has a right to cut down or destroy the trees so fast as the earth in which they stand is dug or washed away in the process of mining; and it may also be admitted that such timber may be used or disposed of by the locator in any way that is most profitable to himself rather than to let it remain on the ground to decay. But whether the cutting of the timber is merely incidental to a bona fide mining operation, or the mining operation is a mere pretext for appropriating and disposing of the timber is a question of fact to be determined in each case by its own circumstances. But when a party goes beyond this, and removes and disposes of acres of timber in advance of his mining operations for no better reason than that "it is better" for the purpose of mining to remove the timber "so far in advance of the work as to give opportunity for the stumps to rot" before the bank on which they stand is sluiced or dug down, in my judgment, he is speculating in United States timber rather than mining for the precious metals. If the law were construed so as to permit four acres of timber to be removed to give the stumps time to rot before mining operations were commenced, that from ten, fifty, or one hundred acres might be removed for the same reason. The removal of timber from a mining claim to be justifiable should proceed pari passu with the operation of mining. Whoever wants to go further or faster than this, and for any reason appropriate the timber to his own use in advance of

his mining operations, can only do so safely by paying the purchase-price of the land, and becoming the owner thereof.

There must be judgment for the plaintiff on the verdict. In arriving at this conclusion it is not necessary to impute to the defendant a conscious purpose to practice any of the devices which it has been shown his construction of the law would permit. They have only been suggested to show that the consequences of such a construction would be a material perversion and abuse of the law, and therefore it ought not to prevail. The defendant may have been honestly mistaken as to his rights, or he may have become so accustomed to the violation of the law with the apparent consent of the government, that he regarded it as of no effect.

Since the settlement of this coast the law has been enforced by fits and starts, most oftenly against the "small-fry." The executive department, in case of the large operations at least, has usually nullified the action of the courts by arbitrary pardons, or ignored the law by compromising in advance with the trespassers in consideration of a trifling compensation, called "stumpage." In 1864, a party who had openly taken hundreds of thousands of dollars worth of a rare and most valuable cedar timber from the public lands near Port Orford, and manufactured and sold the same in the San Francisco market, was found guilty in this court of violating the statute and fined the comparatively small sum of eighteen thousand seven hundred dollars—the smallest fine the law allowed. Shortly after, the executive department without consulting the district attorney, or having any information concerning the merits of the case except the ex parte and interested statements of the defendant, granted him a full and unconditional pardon.

Under these circumstances I do not deem it expedient to punish the defendant further than the law requires. The government by its indifference and neglect to enforce the law has encouraged its violation.

The defendant will be sentenced to pay a fine equal to triple the value of the timber cut and removed—seventy-five dollars.

UNITED STATES (NELSON v.). See Case No. 10,116.

Case No. 15,865.

UNITED STATES v. The NEPTUNE.

[3 Am. Law Reg. 48.]

District Court, D. Maryland. 1854.[1]

SHIPPING—REGULATIONS—PENALTIES—HOW RECOVERABLE.

This was a libel in rem filed against the vessel, and in personam against the captain and owners, to enforce the penalties of the act of 1848, passed in reference to passenger vessels.

GILES, District Judge, decided that the said penalties could only be recovered by an action of debt on the common law side of the court, and not by libel; and that the penalties were personal, and there was no lien on the vessel, and no remedy in rem, to enforce them.

Decree affirmed on both points, on appeal, by the circuit court. Taney, Circuit Justice. [Case unreported.]

[1] [Affirmed by circuit court; case unreported.]

Case No. 15,866.

UNITED STATES v. NETCHER.

[1 Story, 307.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1840.

OFFENSES ON HIGH SEAS — LEAVING MARINER IN FOREIGN PORT.

1. The crimes act of 1825, c. 276, § 10 [3 Story's Laws, 2001; 4 Stat. 117, c. 65], enumerates three distinct offences, viz.: (1) maliciously and without justifiable cause, forcing an officer or mariner on shore, in a foreign port; or, (2) maliciously or without justifiable cause, leaving any officer or mariner behind in a foreign port; or (3) maliciously and without justifiable cause, refusing to bring home again all the officers and mariners of the ship in a condition to return, and willing to return. It is not necessary, to complete the first or second of the enumerated offences, that the officer or mariner should be in a condition to return, and willing to return. These latter words apply only to the third and last of the enumerated offences.

2. Where a mariner applied for a discharge, which was refused by the master, and he thereupon used abusive language to the master, for which he was imprisoned by the master, so that he was unable to return, and the ship sailed without him; it was *held*, that the leaving him behind was an offence within the intent of the crimes act of 1825, c. 276, § 10 [3 Story's Laws, 2001; 4 Stat. 117, c. 65].

[Cited in Jay v. Almy, Case No. 7,236; Wilkes v. Dinsman, 7 How. (48 U. S.) 128.]

Indictment against the defendant [George E. Netcher], master of the ship Cornelia, of New Bedford, for maliciously and without justifiable cause, leaving one Thomas Turner, a seaman of the said ship, on shore in a foreign port, called Coupang, in the Dutch Island Tima, in the Chinese seas, contrary to the 10th section of the crimes act of 1825, c. 276 [3 Story's Laws, 2001; 4 Stat. 117, c. 65]. Plea, not guilty.

The facts being established, the case ultimately turned upon the question of the true construction of the statute.

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

B. R. Curtis, for defendant.

STORY, Circuit Justice. The tenth section of the crimes act of 1825, c. 276 [3 Story's Laws, 2001; 4 Stat. 117, c. 65], provides, "that if any master or commander of any ship or

[1] [Reported by William W. Story, Esq.]

vessel belonging in whole or in part to any citizen or citizens of the United States, shall, during his being abroad, maliciously and without justifiable cause, force any officer or mariner of such ship or vessel on shore, or leave him behind in any foreign port or place, or refuse to bring home again all such officers and mariners of such ship or vessel, whom he carried out with him, as are in a condition to return, and are willing to return, when he shall be ready to proceed in his homeward voyage, every master or commander so offending shall, on conviction thereof, be punished by fine, &c." In my judgment, this section enumerates three distinct and independent offences: (1) The maliciously and without justifiable cause, forcing any officer or mariner on shore in any foreign port; (2) the maliciously and without justifiable cause, leaving such officer or mariner behind in any foreign port; and (3) the maliciously and without justifiable cause, refusing to bring home again all the officers and mariners of the ship in a condition to return and willing to return on the homeward voyage. It is not necessary, therefore, as the argument at the bar supposes, that the officer or mariner should have been forced on shore, as well as left behind, or refused to be brought home, in order to constitute an offence within the true intent of the statute. It is sufficient if the officer or mariner is either forced on shore, or left behind, or refused to be brought home. In the present case, there is no pretence to say, that the mariner was forced on shore. But it is perfectly clear, that he was maliciously (that is, wilfully and designedly) and without justifiable cause, left behind in a foreign port. It is also said, that the mariner was not willing to return home in the ship, and therefore the case is not within the provisions of the statute. But this (as has been already intimated) is not necessary to a completion of the offence of maliciously, and without justifiable cause, leaving him behind in a foreign port. The grammatical order and connexion of the language requires the words, "as are in a condition to return and willing to return," to be read as a part of the last clause of the section, and not as a part of the prior clauses of forcing ashore, or leaving behind. It would sound strange to say, that if the master shall force any officer or mariner on shore, he would not be within the penalty of the statute, unless such officer or mariner were in a condition to return and willing to return in the ship. And yet the words must be applied equally in all the cases stated in the section, unless they are limited to the last clause, viz. the refusal to bring home the officer or mariner. In this connexion, they have their just and natural import and effect. In the present case, indeed, the defendant had no option at all allowed him. He went on shore voluntarily, it is true, in the ship's service; but the master thereupon put him in gaol, and there had him kept in confinement until the ship sailed from the port. It is true, that the mariner had previously applied to the master to be discharged, and was willing to be discharged from the ship. But the master refused to discharge him; and inflicted upon him the imprisonment, as a punishment for some real or supposed abusive language, used by the mariner, in consequence of his refusal to give him a discharge. In short, the master maliciously and without justifiable cause, sent the mariner to prison, and left him behind, without even giving him an opportunity to express willingness or unwillingness to return. It is one thing to have a free discharge in a foreign port, and quite another thing to be left in prison there, under the pretence of promoting the wishes of the party.

Upon this intimation of the opinion of the court, the defendant, with the consent of the district attorney, withdrew his plea of not guilty, and pleaded nolo contendere, and thereupon received the sentence of the court.

Case No. 15,866a.

UNITED STATES v. NEW et al.

[N. Y. Times, Nov. 2, 1859.]

Circuit Court, D. Connecticut. Nov. 1, 1859.

ROBBING THE MAILS—PRINCIPAL AND ACCESSORIES—INDICTMENT.

[An accessory after the fact cannot be tried as a principal, under the statute, for the crime of robbing the mails, unless the indictment shows either that the principal has been convicted, or has fled from justice, or cannot be found to be put upon his trial.]

Jacob New and Adolph New were put on trial under an indictment against them as accessories after the fact to a robbery of the post-office by one Lewis Stern, who took out of the office a letter addressed to "L. Stein," containing various valuable coupons, and which afterwards came into the possession of the defendants.

Judge Whiting appeared for the defendants, and after a jury had been impanelled, moved to quash the indictment, on the ground that the section of the statute which allows parties accessory to be tried as principal offenders only allows it in case "the principal offender has fled from justice or cannot be found to be put on his trial," and that there was no allegation in the indictment that Stern had either been convicted as the principal, or had fled from justice, or cannot be found to be put on his trial.

INGERSOLL, District Judge, after argument, sustained the objection to the indictment; but on his suggestion a juror was withdrawn, in order that the question might be brought before him subsequently on more formal argument, and that the trial might proceed, in case he should change his views on the point involved.

Case No. 15,867.

UNITED STATES v. NEW BEDFORD BRIDGE.

[1 Woodb. & M. 401; [1] 10 Law Rep. 127.]

Circuit Court, D. Massachusetts. April 15, 1847.

NAVIGABLE WATERS—BUILDING BRIDGE—OBSTRUCTION TO NAVIGATION—CONSTITUTIONAL GRANT OF POWER—CONTEMPTS.

1. In an indictment against a corporation for obstructing the navigation of a river, but which had been authorized by a state law, the construction as to its acts must be liberal in its favor. Nothing can be deemed an offence by such a corporation in the courts of the United States, except what has been made so by the constitution, or a treaty, or an act of congress. These courts being of limited jurisdiction under a government of limited powers, a case must be clearly within its jurisdiction, or it will be dismissed, whenever and however the objection is made.

[Cited in Heriot v. Davis, Case No. 6,404.]

2. A grant of power to congress, probably, does not prevent the states from continuing to act on subjects within the grant till congress legislates fully concerning it, and so as to conflict with the doings of the state, unless there is an express prohibition on the states to act further in the matter, or it is implied strongly from the nature of the case. Where the states do not grant to congress powers over their internal commerce or police, those powers can continue to be exercised to any extent by them till they conflict with the proper exercise by congress of other powers, which are granted to it, such as those over foreign commerce and the revenue, and then the acts of the state, so far as repugnant and conflicting with the due exercise of the other powers by congress, must yield.

[Cited in Perry Manuf'g Co. v. Bowen, Case No. 11,015; Passenger Cases, 7 How. (48 U. S.) 524, 537, 540, 553, 559, 561.]

[Cited in City of Chicago v. McGinn, 51 Ill. 273.]

3. A grant of powers to congress, in the constitution, over certain subjects, does not invest any particular courts with that authority till congress confer it by a law, except in some specified powers given in the constitution to the supreme court.

[Cited in Passenger Cases, 7 How. (48 U. S.) 563.]

[Cited in People v. Wilson, 64 Ill. 225; State v. Mathews, 37 N. H. 453. Cited in brief in Ex parte Davis, 41 Me. 45. Cited in Ex parte Dalton, 44 Ohio St. 150, 5 N. E. 136.]

4. The authority to punish for contempt is granted as a necessary incident in establishing a tribunal as a court. The common law cannot be resorted to for aid in giving jurisdiction in the courts of the United States, but only in deciding certain questions after jurisdiction is otherwise obtained.

5. The grant of power to congress to regulate foreign commerce, and the declaration that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, do not enable a court to punish any act as a crime, unless some part of the constitution, or a treaty, or some law of congress, makes it a crime, and confers authority on that court to punish it.

[Cited in Hathaway v. Roach, Case No. 6,213.]

[Cited in Com. v. New Bedford Bridge, 68 Gray, 347; Sweeney v. Chicago, M. & St. P. Ry. Co., 60 Wis. 68, 18 N. W. 756.]

6. The act of 1789 (chapter 20), as to the powers of the circuit court, neither makes such act a crime, nor confers on this court authority to punish the erection of a bridge over tide water, or the obstruction of navigation in navigable waters. Semble, it might have done the last, if it had been declared to be a crime. Nor to the treaties with foreign powers, allowing ingress and egress to our ports for trade, do either; nor the acts of congress creating the port, where the obstruction is, a port of entry; or making a collection of duties there; or giving coasting licenses; or punishing breaches of the revenue laws. The old states had, before the constitution, sovereign power over tide waters, as well as others navigable, and could obstruct them by bridges or otherwise, whenever they deemed it demanded by the public interests. They still retain the powers before possessed, except where granted to congress and legislated on, unless prohibited. But individuals could not obstruct them, without being liable at common law in most of the states to a prosecution for a nuisance. If individuals owned the soil beneath or adjoining such rivers, it was subject to the easement of navigation by the public, the jus publicum being not inconsistent with the jus privatum in the soil.

[Cited in U. S. v. Staly, Case No. 16,374; Passenger Cases, 7 How. (48 U. S.) 557, 564; Selliman v. Hudson River Bridge Co., Case No. 12,852; The St. Joseph, Id. 12,230; Gilman v. Philadelphia, 3 Wall. (70 U. S.) 725.]

7. The states composed from the Northwestern Territory cannot obstruct their navigable rivers, they being by the ordinance declared to be forever public highways.

[Cited in Huse v. Glover, 15 Fed. 296.]

8. When the old states obstructed their own navigable rivers by laws, the persons acting under those laws are not punishable in the state courts for such acts, unless the acts are contrary to some clause in the constitution, or a treaty, or an act of congress. Then they are, and also in the courts of the United States, if some act of congress make it a crime, and gives power to this court to punish it.

9. When an individual suffers special damage by such an obstruction, he may have civil redress by a suit, though the obstruction be authorized by a state, if it is contrary to, or conflicts with some clause in the act of congress, such as a coasting license. The admiralty law as to crimes at no period has yet been adopted en masse by the constitution, or any act of congress; and the adoption of it as to civil cases, without defining at what period, and in what place, and with what restrictions, has proved embarrassing to the courts. By the admiralty law as to crimes, such an offence as the one charged in this indictment could not be punished in the courts of admiralty in England, since 15 Rich. II.; nor is it known that it could be in the vice admiralty courts in the British colonies. It is doubtful whether any misdemeanors, as this is, were punishable in the admiralty courts at all since 28 Hen. VIII., but merely felonies. Certainly no offences, committed like the acts in this case, within the body of a county, and not on the high seas, and not in great ships in great rivers below the bridges, would be punished in an admiralty court.

[Cited in New Jersesy Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 422.]

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

10. The only mode of punishing acts, as crimes, which obstruct the navigation of rivers and ports within the limits of a state, and are not now crimes under the laws of a state, or the United States, is by further legislation by congress, under its authority to regulate foreign commerce, and that between the states, declaring what obstructions shall be penal, if not removed or modified, and in what court the offence shall be tried.

This was an indictment, found by the grand jury at the last term, and to which the respondents pleaded not guilty. The indictment alleged, that there was a river in the state of Massachusetts, called the "Acushnet," which was navigable, and in which the sea ebbed and flowed with its tides, running by and forming the port of New Bedford, a port of entry on the one side, and the port of Fairhaven, a town lying on the opposite and eastern side thereof. That the citizens of this district and of the United States were accustomed to pass and repass on the waters of said river and ports, and that the respondents being a bridge corporation, under the direction of William Roach, Jr., and others, have, by force and arms, raised an embankment in the channel of said river on its bed, and erected a bridge across the river eight hundred yards in length and one hundred feet in width, and, from A. D. 1820, till the finding of the indictment, have kept up the bridge, so that navigators and citizens cannot pass to and from the sea into New Bedford and Fairhaven as they before did and of right ought to do, thus injuring the coasting and foreign trade of other nations in alliance with this country, as well as our own citizens. There were two other counts substantially like the first, except containing averments, that sand, rocks and wood were placed in the channel of said river, at points within the admiralty jurisdiction of the courts of the United States; and that the import and export trade were injured by these obstructions, the channel made more shallow, and the danger of navigation increased; and that the directors of the bridge ought to remove these obstructions, but neglected it, to the injury of out citizens and the public, and against the laws and statutes in such case provided. When the trial of this indictment came on, and after the case had been opened to the jury on the part of the United States, the following motion was submitted for the respondents: "And now the said defendants come and move the court here that the said indictment be quashed, for that congress has not declared the act charged in the indictment to be an offence against the United States, and so this court hath not jurisdiction to try the same, or render judgment therefor."

Ch. L. Woodbury and R. Rantoul, Dist. Atty., for the United States.

B. R. Curtis, R. Choate, and J. H. W. Page, for respondents.

WOODBURY, Circuit Justice. This motion has been argued on both sides with a fullness and ability suited to the importance of some of the questions involved in it. I have taken time to examine those questions, and shall now proceed to dispose of them with as much brevity as is consistent with their difficulty and number, and the wide interests connected with them. They include national and constitutional considerations of great moment, and a decision on them involves results which affect practically most of the states in the Union. Most of them have authorized bridges to be built over navigable waters, and several of them have done it within the ebb and flow of the tides of the sea, and at, if not below the limits of some ports of entry as well as of delivery, and to the obstruction in some degree and generally to the delay of all navigation above them. Their power to do this in the progress of internal improvements and of turnpikes, canals and rail-roads, with a view to advance internal commerce and travel, is to be considered, on the one hand, as well as the authority of the general government on the other hand, to check, prevent or suppress such works, whether bridges, or aqueducts, or viaducts, whenever injurious to that foreign commerce of the country which is placed under its regulation, and whenever impeding the navigation between the states as well as foreign navigation, and whenever conflicting with the full use of the ports of entry or delivery within the United States by other nations in friendly alliance with us.

In considering the jurisdiction of this court to punish the respondents for doing what is alleged against them in this indictment, and which is the sole question presented by the motion now under consideration, it may be proper to notice in the outset, that the acts done by the defendants are justified under authority from the state of Massachusetts as early as 1795, and have thus been allowed not merely for the private gain of the stockholders, but for facility to public travel, and the internal trade and intercourse of that portion of the state and Union. The acts of the respondents, then, are not wanton acts of wrong, nor conduct undertaken merely for the purpose of private emolument. They are virtually the acts of the state. The respondents, in substance, justify under the state; and the merits of the case are the same as if the parties were the United States against the state of Massachusetts herself. Consequently the respondents are not to be punished by this or any other proceeding, unless their acts were authorized originally by the state without constitutional power; or unless their acts now come in collision with some subsequent and lawful legislation by congress; or unless, in the lapse of time, what was done at first, without affecting injuriously public navigation, has caused accumulations of sand and a shoalness in the channel, so as to obstruct passing and repassing with

vessels; or, unless, by the increased size of vessels and steam-boats the draw of the bridge has become too narrow for them to go through, or the large additions to their number prevent them from being accommodated within more restricted limits, and in passing through a single draw. Such being the grounds on which alone the respondents could be convicted, the general inquiry is, if this court possesses authority to sustain an indictment against them for the acts done.

The motion in excepting to the jurisdiction of this court to try a case like the present, specifies, as the ground of it, the omission or refusal by congress to have such acts as are charged in the indictment declared to be an offence against the United States. And if for that or any other reason, it should appear to this court a question of real doubt whether it possesses any jurisdiction in such a case over the subject-matter, it will be its duty not to proceed further in the trial (Maisonnaire v. Keating [Case No. 8,978]); because, being a court of limited jurisdiction, it cannot transcend those limits, though the parties make no objection, but is bound, itself, to pause ([Capron v. Van Noorden] 2 Cranch [6 U. S.] 126; [State of Rhode Island v. State of Massachusetts] 12 Pet. [37 U. S.] 719; Kemp v. Kennedy [Case No. 7,686]); and in any stage of the case (Kitchen v. Strawbridge [Id. 7,854]; Davison v. Champlin, 7 Conn. 244; Perkins v. Perkins, 7 Conn. 559); whereas in England, their higher courts have general jurisdiction, and proceed till it is excepted to; and the presumptions are not as here, that a case is without their jurisdiction, till the affirmative is clearly shown ([Turner v. Bank of North America] 4 Dall. [4 U. S.] 11, Ellsworth, C. J.; [Kemp v. Kennedy] 5 Cranch [9 U. S.] 185).

In the courts of the United States, jurisdiction must be derived from the constitution itself, or treaties, or acts of congress, and the question here relates first to jurisdiction by the United States over the subject-matter, as a crime, in the place of this transaction; and next, whether that jurisdiction is vested in this court, if it exists over the subject. Though the motion speaks only of no act of congress giving us jurisdiction, yet the argument in its favor proceeds on the ground, that in order to give to this court jurisdiction, there must be some clause in the constitution, or a treaty, or an act of congress, making proceedings like those by the respondents an offence, and conferring on this court the trial and punishment of it, and that there is no clause of that kind in either. While, on the other hand, on the part of the government, doubting whether any such special legislation is necessary, it is contended, that the constitution and treaties, as well as several acts of congress, make such conduct as that of the respondents illegal, and devolve the punishment of it upon this court. The conduct of the defendants being permitted by the state, as described in this indictment, can hardly be deemed a crime on its face. All sovereignties, bordering on the seashore, have a right to exercise jurisdiction over the waters adjoining. Vatt. Law Nat. bk. 1, c. 231; Bevans's Case, 3 Wheat. [16 U. S.] 337; Pollard's Lessee v. Hagan, 3 How. [44 U. S.] 212; Just. Inst. bk. 2, tit. 1, § 294. This usually does not extend outside of capes and ports, and beyond low water on the open coasts, except as hereafter explained, for revenue, fishing, &c., and as to foreigners, sometimes a cannon shot from shore. Vatt. Law Nat. bk. 1, c. 23, §§ 281–295. It has been settled, however, in Massachusetts, that power over those waters or obstructions in them by bridges, can be authorized by the state, but cannot be authorized by commissioners of roads, or any power short of the state itself, through legislation. Vatt. Law Nat. 43, bk. 1, c. 9; 12 Pick. 467; 4 Pick. 460; 2 Mass. 492; Inhabitants of Arundel v. McCulloch, 10 Mass. 70; 2 Pick. 344; 5 Pick. 199; Com. v. Inhabitants of Charlestown, 1 Pick. 180; Ang. Tide Waters, 45, 46, 128; 15 Wend. 113; Mayor, etc., of Georgetown v. Alexandria Canal Co., 12 Pet. [37 U. S.] 91; State v. Town of Hampton, 2 N. H. 22. Where a stream, as here, is within the limits of a state in its whole course, I see no reason, as a general principle, why that state might not obstruct its navigation, or suspend it. In Rex v. Montague, 4 Barn. & C. 598, it was held, that a right to navigate in a river or creek might be taken away by act of parliament, or by the commissioners of sewers, or by natural causes, e. g. filling up or the recess of the sea. Vooght v. Winch, 2 Barn. & Ald. 670. If a road exists there now, courts may presume that the right to navigate was extinguished before, if no proof is given where or how it was done. Before the federal constitution existed, it is, therefore, not to be doubted, that each state, as sovereign, could govern, within its own limits, roads, ferries, bridges, regulations of quarantine and health, ports of entry, navigation and commerce, internal and external. When forming that constitution, they conferred the power to regulate commerce with foreign nations and between states, and to collect revenue from imports, on the general government, retaining still the powers over the other matters as before, and not to be restricted in them unless their exercise should in some case conflict with the due exercise of the paramount powers granted to congress. [U. S. v. Bevans] 3 Wheat. [16 U. S.] 387; 14 Pet. [39 U. S.] 617 App The states, then, can of course continue forever to regulate and punish what they have not delegated to the general government. [Chisholm v. Georgia] 2 Dall. [2 U. S.] 432–435; [Ex parte Bollman] 4 Cranch [8 U. S.] 75; [Ex parte Watkins] 3 Pet. [28 U. S.] 201; [Kendall v. U. S.] 12 Pet. [37 U. S.] 524; Pollard's Lessee v. Hagan, 3 How. [44 U. S.] 212. Besides this, they can continue, probably, to do the same as to what they have delegated, but not exclusively, (and

where they are not expressly forbidden to act,) until congress legislate in respect to it, in such a manner as to supersede their action. But of this last proposition more hereafter.

Under these views of the relations between the states and the general government, since the constitution was formed, it has been held, that navigable rivers themselves for some purposes and the soil under them, as well as the tide-waters within the capes and counties, still belong to the states where they are situated. [U. S. v. Bevans] 3 Wheat. [16 U. S.] 383; [Martin v. Waddell] 16 Pet. [41 U. S.] 410; [Pollard v. Hagan] 3 How. [44 U. S.] 212. So all other rights over her waters, not ceded for navigation merely remain in a state; e. g. as to fisheries; and hence she can continue to regulate them in subordination to the other. Ang. Tide Waters, 105; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 383. Regulations of rights of property in lands and fishing on the coasts of a state, are not regulations of commerce, and do not conflict with the constitution or any act of congress. Corfield v. Coryell [Case No. 3,230].

States may regulate ferries, roads, inspections, &c., without violating the grant over commerce to congress, (though in some degree and indirectly affecting commerce,) if it does not come in clear and direct conflict with some legislation by congress. Corfield v. Coryell [supra]; [Wilson v. Blackbird Creek Marsh Co.] 2 Pet. [27 U. S.] 245. But the jus privatum in the state must be so exercised as not to impair or obstruct the higher jus publicum in the United States and the people at large. Corfield v. Coryell [supra]; [Pollard v. Hagan] 3 How. [44 U. S.] 230; 1 Story, Const. 432; Peirce v. New Hampshire, 5 How. [46 U. S.] 504; 15 Wend. 113. And it was laid down generally, in U. S. v. Bevans, 3 Wheat. [16 U. S.] 337, 389, that admiralty and maritime jurisdiction, ceded to the general government, did not pass the waters where that jurisdiction exists, or any territory, and hence, no general jurisdiction over them, but only over that specific matter of admiralty jurisdiction, the rest remaining in the state contiguous. A bay or haven, however, must be out of the jurisdiction of a state, to make an offence punishable there under many of the acts of congress, as congress has not, if it can, extended powers over waters in a state always concurrent with the state, and made offences there punishable. If congress can punish them under any ceded power, it has not yet. I think it may punish obstructions or nuisances, if necessary to regulate foreign commerce, preserve buoys and break-waters, or collect revenue, but perhaps only what is necessary to enforce that grant and others as to maintaining a navy, &c. [Pollard v. Hagan] 3 How. [44 U. S.] 230.

A state retains the powers before named, because not granted away, and the exercise of them by congress is invalid, because not granted to it, on the same ground that its exercise of others is valid only because they are granted to it. Hence, on the subject of roads, a state thus sovereign and unlimited in its own constitution, could, as to its own citizens and powers, pass a law to stop up any of its public roads or navigable rivers, or to erect bridges and viaducts over them without draws or with insufficient draws. [Pollard v. Hagan] 3 How. [44 U. S.] 212, 229; [Martin v. Waddell] 16 Pet. [41 U. S.] 410. It would rest in its discretion, to make the interests of those concerned immediately in the coasting and foreign trade, to yield to those engaged in interior commerce. So on the subject of floating logs on those rivers, it is a local species of business if it be commerce, and may be regulated by a state, and clearly so, till congress act on it differently. Scott v. Willson, 3 N. H. 321. It has been customary, therefore, for all the seaboard states to authorize bridges across navigable streams, under certain limitations, connected with common highways, turnpikes and railroads. In Massachusetts alone there have been since Charles river bridge, in 1785, fourteen or fifteen special licenses and acts of incorporation of that kind. See 1 Sp. Laws, p. 93, and onward; Sp. Laws, vols. 2–7. This, without objection till now, is strong evidence of the right. Briscoe v. Bank of Kentucky, 11 Pet. [36 U. S.] 257, 318. The legislature has always been in the habit of thus promoting its domestic or internal commerce and convenience in traveling, when of an opinion that its people would gain more by the bridge than the navigation under it without the bridge. 1 Pick. 180. But not forgetting navigation, they seldom if ever allow such an obstruction without a draw of sufficient width to accommodate navigation and ship-building, and vessels wishing to pass through. Incorporations of bridges in such places have frequently been recognized by state judiciaries, as suitable exercises of power by states. 17 Conn. 64; 8 Cow. 146; 1 Pick. 180; 7 N. H. 35. In the states within what was governed by the ordinance for the Northwestern Territory, perhaps, this could not be done, as that ordinance declares that all navigable rivers within it shall continue to be "common highways." 3 Ohio, 496; Spooner v. McConnell [Case No. 13,245]; [Pollard v. Hagan] 3 How. [44 U. S.] 224. But I speak of states without any such restriction, or any in their own constitutions, or in the assent to their admission given into the Union by congress. Pollard v. Hagan, 3 How. [44 U. S.] 212. Or where no treaty by the general government, like that of 1783 and 1794, stipulated for the free navigation of a river like that one of the Mississippi. "The navigation of the river Mississippi from its source to the ocean shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." Article 8 of treaty of Sept. 3, 1783 (8 Stat. 83). "The river Mississippi shall, however, according

to the treaty of peace, be entirely open to both parties." Article 3 of treaty of 1794 (8 Stat. 117).

It is yet unsettled, whether if a river navigable above one state, then runs into another before it joins the ocean, the lower state may not obstruct it or exact tolls. This point was not started, nor decided, though it would arise in [Mayor, etc., of Georgetown v. Alexandria Canal Co.] 12 Pet. [37 U. S.] 97, nor need it be settled here, as all this stream is in one state. The free navigation of the Mississippi or of the Florida rivers, however, was never yielded to us, while Spain, a foreign state, owned the territory at their outlets. Nor is that of the St. Lawrence or of the St. Johns owned by the British, yielded except by treaty and for a quid pro quo. The arguments in favor of their freedom in such cases, though plausible, have never yet been admitted as rendering the question a settled one in national law in their favor. 1 Am. St. Papers, "Foreign Relations," 252, 253, 260; 3 Am. St. Papers, 341; Jour. of Old Cong. 1787; 1 Lyman, Dip. of U. S. 239, 267; 2 For. Rel. 101. Even the Sound duties in the Baltic for passing through an arm of the sea, are acquiesced in by most nations, though it is rather to defray the expense of keeping it lighted, as light-money is paid on other coasts, and to remove and replace buoys yearly, as the ice forms and disappears, and keep the passage free from piracies, than any departure from the general principle that the sea is free to all, however rivers may be, as the sea is the great highway of nations rather than of one nation; and the outlet usually is not enclosed by the territory of any one government. The case of the Black Sea may be an exception, at the Straits, as there that is preserved a close sea by Turkey, and its passage obstructed and regulated as if a navigable river, entirely within her territory, though resisted, and at times, successfully, by other nations. See on these, Vatt. Law Nat. bk. 1, c. 23, §§ 281–295. But that not being this case, nor this being an obstruction by an individual, without a claim of authority from the state, I feel compelled to admit that the state itself may set up her state rights to legislate concerning the waters where this bridge exists clearly within her limits, and partially obstruct them, if she thinks it beneficial, till her acts conflict with some law of congress connected with foreign commerce, or that between the states. Kellogg v. Union Co., 12 Conn. 7.

But while conceding such rights to states over their navigable waters, I think that corresponding duties are imposed on them to treat wanton or careless obstructions in them by individuals, as offences, and to punish or remove them as nuisances. This is the doctrine of both the common and the civil law. Spooner v. McConnell [supra]; Mayor, etc., of Georgetown v. Alexandria Canal Co., 12 Pet. [37 U. S.] 91; Bac. Abr. "Nuisance," B.; 2 Ld. Raym. 1163; 10 Mass. 70; Coop. Just. 68, and note, 455; Ang. Tide Waters, 15, 16; Vatt. Law Nat. bk. 1, c. 22; 20 Johns. 98; 17 Johns. 195; 3 Caines, 319; 2 Conn. 481. The passing upon such rivers belongs to the public or people at large, as public highways, and can be obstructed only by acts of parliament in England, or the states here; or, perhaps, in some cases by congress, when under the execution of some of its special powers. Martin v. Waddell, 16 Pet. [41 U. S.] 367, 410; Hale, De Jure Maris, 11; Com. v. Ruggles, 10 Mass. 391. Thus in England, while the king owns the soil between high and low water, the sea and navigable waters are open to be used in common by the people, whether for navigation or fishing, unless the former is stopped by the sovereign power before named, or the fishing is in fresh water owned by an individual on both sides. There is a jus privatum and a jus publicum. Ang. Tide Waters, 16, 19, 109; 5 Com. Dig. 102; 10 Coke, 141; 1 Salk. 357; 1 Mod. 105; Rex v. Smith, 2 Doug. 441; 5 Coke, 107. And if fishing, as one public right, should conflict with navigation, another, the former, as of minor importance, must yield, and the parties take in their seines. Ang. Tide Waters, 32, 95; Post v. Munn, 1 South. [4 N. J. Law] 61. In Massachusetts, the province or colony so changed the common law principle on this subject, that the soil on the sea-shores belonged to the contiguous owners rather than the king, (or the province, and afterwards the state,) for one hundred rods, when the tide ebbed out so far. 1 Pick. 180; 6 Mass. 153, 435. And, by some usage or common law, it has been held, that the owner may build houses or wharves on the flats one hundred rods, and thus obstruct the navigation there, but leaving it open beyond. Ang. Tide Waters, 154, 155; Austin v. Carter, 1 Mass. 231; Adams v. Frothingham, 3 Mass. 352. It is otherwise, if not left open beyond. Ang. Tide Waters, 157; 2 Davies' Abr. 697. But in Respublica v. Caldwell, 1 Dall. [1 U. S.] 150, it is held, that one cannot build a wharf encroaching on navigable water, though room enough beyond is left for navigation. So in England, semb. 2 Starkie, 511, 3 Serg. & Lowb. 453. Generally, however, whether the soil under the tide, and under navigable rivers is owned by individuals or the states, it is, till changed by special legislation, subject to the public easement of passing over it as a water highway. Ang. Tide Waters, 53, 109; Adams v. Frothingham, 3 Mass. 352. Such right was expressly reserved in the Massachusetts charter (pages 1, 148). And if an individual owns the soil on both sides of a navigable river or arm of the sea, he cannot erect a bridge across, so as to impede or injure the jus publicum for navigation. Com. v. Inhabitants of Charlestown, 1 Pick. 180. If done by an individual, or any persons without authority from the state, such obstacles to navigation are and should be punishable, and usually are under the local government.

Without going into discriminations as to different kinds of obstruction and the different modes of redress, whether the former be by bridges, or ballast, or sunken ships, or the latter by a suit for damages, or an injunction or indictment, information or abatement as of a nuisance, it is sufficient here to refer to the following cases. Russ. Crimes, 485; 1 Cowp. 86; Ang. Tide Waters, 29, 31, 45, 101; 10 Mass. 70; Harg. Tr. 36. See appropriations by congress to remove obstructions in the Mississippi and other rivers, and in harbors, as in New Bedford, and especially sunken ships near Savannah and Baltimore; and 5 Coke, 101; 2 Salk. 459; 3 Bl. Comm. 5; Nabob of The Carnatic v. East India Co., 1 Ves., Jr., 371; 5 Barn. & Ald. 268, and cases cited, post; Malynes' Lex Mercat. See cases before cited. 6 Barn. & C. 566; Leach, Crown Law, 388; 2 Leach, 1093; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 366, note; [Wilson v. Blackbird Creek Marsh Co.] 2 Pet. [27 U. S.] 245; East, P. C. 773; Bac. Abr. "Injunction B."; Rose v. Groves, 5 Man. & G. 613; 1 Esp. 148; Cro. Eliz. 664; 2 Bing. N. C. 281; Willes, 74; 4 Maule & S. 101; 2 Scott, 446. So in England, a grant of land covered by the sea, does not justify the grantee in putting up obstructions to the free navigation. 10 Price, 350, 378. See post, Ang. Tide Waters, 141, 150; 8 Brow. T. R. 18. The public rights to navigate, &c., go to ordinary high water (Ang. Tide Watters, 67; 2 Johns. 337; Com. v. Inhabitants of Charlestown, 1 Pick. 180); while private rights begin at the same place (Id.). From all this it is manifest, that the place where this bridge is situated and the subject-matter of it, and of nuisances in the river there, are within the scope of state authority to punish or permit, till congress legislate for some of the objects within its sphere, in such a way as to come in collision with the action of the state.

If it be asked, then, whether the state laws make these acts a crime, it may be answered from what has been stated, that but for their special legislation, allowing this bridge, those acts doubtless would be a nuisance, and punishable as a crime in the state courts as at common law. But an obstruction of a public highway within the limits of the state, by its own permission, probably could not be punished as a crime there, if the act of incorporation by the state permitting it be constitutional. 15 Wend. 114; [Wilson v. Blackbird Creek Marsh Co.] 2 Pet. [27 U. S.] 245; Dover v. Portsmouth Bridge, 17 N. H. (Strafford county, 1846) 200. It would be difficult to regard that as an offence against state laws which has been done in conformity to them, under an act of incorporation from them. She is, perhaps, the best judge on all local matters, all sections and interests being represented in her public councils; and at least if she, for public considerations, authorizes a bridge under certain restrictions and limitations, which she deems safe, it would be an anomaly for her herself to consider its erection a crime. If she authorizes it injudiciously, and injures navigation to her ports more than she benefits interior travel and trade, she is the chief sufferer.

Such being the condition of state powers, state rights and state laws on this subject, without reference to the constitution of the United States, the next inquiry is, how have these been affected by that constitution, either by prohibitions to the states, or by the grants to the general government before referred to, and the legislation which has taken place under them? After the federal constitution was adopted, if a law by a state on this subject violated any prohibitory clause in it, or any act of congress, duly enforcing any grant of power from the states, it would of course be unconstitutional; but whether it would then be a crime, under the federal government, and punishable by indictment in this court, as legislation now stands, depends on still other considerations, which will soon be examined. Before deciding what part, if any, of the constitution, the acts done by the respondents violated in any degree, we must ascertain what authority in respect to such subjects the states parted with. The powers not granted by the states remained as before; that is, they were reserved to the states or the people, as either may have exercised them before. Thus in Miln v. New York, 11 Pet. [36 U. S.] 102, 139, it is held, that the powers reserved to the states are usually unaffected by the federal constitution. Again, the states may continue to legislate for internal commerce, for police, for roads, ferries, canals, &c., and regulate all, and "the use of them, where such regulations do not interfere with the free navigation of the waters of the state for purposes of commercial intercourse, nor with the trade within the state, which the laws of the United States permit to be carried on." Corfield v. Coryell [Case No. 3,230]. Three kinds of commerce are confided to the general government,—foreign, between the states, and with the Indians. Hence, congress possesses the power to regulate them, over those navigable waters, and to punish offences in public vessels sailing upon those waters. [Pollard v. Hagan] 3 How. [44 U. S.] 230; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 387. In this instance, it is contended, that the doings by and under the state interfere with and obstruct foreign commerce and that between the states. But this is not done eo nomine, nor was such the avowed design; for Massachusetts was regulating domestic or internal commerce, and hence acting on a subject not granted at all to congress, but among those reserved. Brown v. Maryland, 12 Wheat. [25 U. S.] 419, 452 (Thompson, J.); Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 194 And the only ground of complaint in such a case is, that

the state has so exercised her power over that reserved subject as to impair the rights of the public and the general government, as to foreign commerce or that between the states. Do the acts, authorized to be done by Massachusetts, violate then any thing delegated to the general government over foreign commerce, or that between the states? And if so, is such a violation made a crime by the general government, and the trial of it devolved on this court?

In order to consider a state law as void, because conflicting with one of the United States, it must not only affect the subject-matter, have some influence over it, but be directly incompatible or repugnant,—an extreme inconvenience to it. 1 Story, Const. 432. Then must interpose, but not till then, the supremacy of the laws of the general government within its proper sphere, prevailing over those of the states, when so using their own as to encroach on others. If "clashing sovereignties" come before us —if one claims a right to set up what the other claims a right to pull down, or one to use powers of taxation so as to abuse them, and violate what is confided to the general government—then we must decide which is right, and if the general government is, then its laws must be paramount, and prevail. Holding the laws of the state to be subordinate when in conflict, is not giving to the United States any odious supremacy; but merely saying, that when the states have parted with certain powers to congress, they shall not so continue to exercise what are reserved as to impair the grant and use of those they have, for paramount public objects, confided elsewhere. Verba fortius accipiuntur contra proferentem. The exercise of reserved powers by the state, when conflicting with legitimate acts of congress, must yield, if so used as to be repugnant, as must the exercise of concurrent powers by the states, when becoming repugnant. Otherwise the general government could not move on, and its constitution and laws be paramount even within their proper sphere. [City of New York v. Miln] 11 Pet. [36 U. S.] 103, 137, 147, 156; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 195, 209; [Brown v. State of Maryland] 12 Wheat. [25 U. S.] 419, 446; 6 Pet. [31 U. S.] 515; Com. v. Kimball, 24 Pick. 359, 365; U. S. v. Hart [Case No. 15,316]; Holmes v. Jennison, 14 Pet. [39 U. S.] 540, 574. This is necessary by the constitution itself (article 6). "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." So clearly was it supposed when the constitution was adopted, that the acts of congress under it would prevail over conflicting state laws, that the only objection was, they would ride over the state constitutions also. But Mr. Madison, in the 44th number of the Federalist, shows clearly that they must prevail over state constitutions, also, when conflicting; or there would be no uniformity of laws in operation, over all the Union, but some would be nullified in one state by its constitution, but be in full force in others.

In Corfield v. Coryell [Case No. 3,230], in speaking of the power to regulate commerce invested in the general government, the judge says it "comprehends the use of a passage over the navigable waters of the several states," and further, it "renders these waters the public property of the United States for all the purposes of navigation and commercial intercourse, subject only to congressional regulation." Hence, I cannot doubt that the power to regulate commerce abroad and between the states, conferred on congress, authorizes it to keep open and free all navigable streams, from the ocean to the highest ports of delivery or entry, if no higher, and protect the intercourse between two or more states, on all our tide waters. De Lovio v. Boit [Id. 3,776]; [Pollard v. Hagan] 3 How. [44 U. S.] 230; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; New York v Miln, 11 Pet. [36 U. S.] 102, 135; Ang. Tide Waters, 50. Congress may remove unauthorized obstructions, or punish them by acts of congress, and it may punish injuries on land, if they tend to interfere with foreign commerce and navigation, or those between different states, though mere admiralty powers may not go above the sea. U. S. v. Coombs, 12 Pet. [37 U. S.] 72. See in detail, Miln v. New York, 11 Pet. [36 U. S.] 102, 155, by Justice Story.

In the recent case of Waring v. Clarke, 5 How. [46 U. S.] 441, it has been settled, that jurisdiction in admiralty exists over torts, by collision of vessels, committed above the sea or tide water, however far it flows into the body of a county. But this is not the English law; and it is to be hoped will never be extended in this country to crimes, the subject we are now considering. The powers of congress, however, embrace much wider matters than those of mere admiralty on account of its authority over our foreign relations, and the regulation of our commerce, not only with foreign nations, but between the states. And, as one evidence, that the framers of the constitution meant that the latter should cover matters on land often, as well as at sea, power was given to congress, not only "to define and punish felonies committed on the high seas," but "offences against the law of nations." These last happen as often on land as water; as do offences against the revenue, and the purity of our coin and the security of the mails, and of all public property. Mere admiralty au-

thority is much more restricted. By that, also, as well as by the authority to regulate commerce, no soil may pass. The right to the soil is one thing, the right to navigation in the water over it another, and is vested elsewhere, for some purposes, in our government, as well as in other governments.

It seems, that now in England, where a grant is made to a town or city of lands between high and low water mark, it is not to be construed as giving a right to obstruct free navigation, carried on by any, or all people under general rights of trade, such as are enjoyed under our federal government. And where obstructed, a bill may be filed in the exchequer by the attorney general, to restrain and abate the obstruction as a nuisance. Attorney General v. Burridge, 10 Price, 350; Attorney General v. Parmeter, Id. 378. If towns here claim jurisdiction over waters navigable below low water, they have no right to the water, nor any to the soil below high water. Palmer v. Hicks, 6 Johns. 133. For purposes of foreign commerce, and of that from state to state, the navigable rivers of the whole country seem to me to be within the jurisdiction of the general government, with all the powers over them for such purposes (whenever they choose to exercise them), which existed previously in the states, or now exist with parliament in England. So by the civil law, "navigable rivers," "the sea and its shores," are destined to common use (1 Domat, lib. 8, § 1, art. 1), and the common use here for conveyance is with the Union. They are a species of highway, and, therefore, cannot be appropriated to private use, except temporarily, either by individuals or corporations. New Orleans v. U. S., 10 Pet. [35 U. S.] 662, 724, 729. Certainly not, in a permanent manner, unless authorized by the paramount government, which supervises and controls them as highways. There is a very instructive case on this subject in 10 Price, 350 (Attorney General v. Burridge), which seems to have escaped the research of the counsel. It was an information by bill, praying that the defendants might be restrained from obstructing Portsmouth harbor, "so that the sea may again flow and reflow over the piece or parcel of ground mentioned in the bill." The obstruction was by buildings on piles over navigable portions of the harbor, and it was justified under a grant of the soil from the king. It seemed to be conceded, that the king may own the shore between high and low water, and grant any private interest in it. See pages 369 and 401. Such is the doctrine as to the states. [U. S. v. Bevans] 3 Wheat. [16 U. S.] 383. But it was, also, held, that the people, or, in other words, the public, have a right to the navigation, and an interest in all ports. 10 Price, 372. Hale, De Portibus Maris, pt. 2, c. 7. The king or his grantees have the soil, jus privatum, but subjects generally and alien friends, have a right to navigate the water, a jus publicum; and hence, if the buildings are a nuisance, they can abate them (10 Price, 373, 378), as if on a public highway (2 Anstr. 603). Individuals must use their own so as not to injure others. 10 Price, 378. Sic utere tuo ut non alienum lædas. What does encroach on or straiten the harbor, or lessen the depth of water and navigation, is a fact, questio facti. Id. 374. But when done, it is an offence against the power which supervises the general commerce of the country. Hale, De Portibus Maris, 35, 84. See, also, next case, Attorney General v. Parmeter, 10 Price, 378, 412; Attorney General v. Richards, 2 Anstr. 603, 608. But though congress is enabled to make laws, keeping navigable rivers and navigation unobstructed, as high up at least as the ports of entry and delivery, if not as high up as the waters are navigable, and impose punishments for such obstructions as crimes, yet if it has not been so done, can we punish it as a crime? If we cannot, this stands in the threshold against sustaining the present indictment in a court of the United States, and the act of incorporation by the state, allowing the bridge to be built, stands in the way of punishing the obstruction by it as a crime in the state courts.

Some hold, that a grant being made to congress to regulate foreign commerce, and extend its judicial power to all cases in admiralty, and collect a revenue from imports, and maintain a navy, those grants alone, without any action on them, by the general government, as to bridges and other obstructions, divest the states of all authority to make laws in connection with navigable waters, and that hence such an act of incorporation as exists in this case is unconstitutional and void, and is to be put out of the case as if not existing. While others contend, that as the states have not granted the power to congress over their internal commerce, that remains exclusively in the states, and that under this, they may erect bridges connected with that internal commerce, without being amenable to any supervision or check by the general government; and certainly not, unless the legislation conflicts in point of fact with some which has actually taken place under congress. My own views do not accord exactly with either of these general positions. I think (1) that the power is, by the grants above referred to, vested in congress over navigable waters connected with our foreign and coasting trade, and for purposes of revenue, but does not by those grants prevent the states from continuing their former legislation over them, and especially as to reserved objects, till it conflicts with some laws passed by congress under those grants, or some treaties made, or some express provisions of the constitution. [Holmes v. Jennison] 14 Pet. [39 U. S.] 594. And (2) that when the states exercise the powers reserved, as to their internal commerce and police, they may do it with im-

punity, while not in conflict with any thing before done on the part of the general government. But when in conflict, the express grant to congress, and the action on it properly by the paramount government, must overrule and control all which is done repugnant to it by the state. 12 Conn. 7.

If it was necessary to admit that the state here, as contended by the prosecution, was exercising a power to regulate that foreign commerce, such as is confided to the general government in the constitution, its conduct was perhaps still valid, till it conflicted with some act passed by congress, or some duty or right under its federal relations. [City of New York v. Miln] 11 Pet. [36 U. S.] 103; [U. S. v. The Arnistad] 15 Pet. [40 U. S.] 574. But it would hardly be necessary in this case to go into that, if all admitted that a state might do this act of empowering a bridge to be erected here, under its reserved rights as to internal commerce. For then of course it would be valid, till conflicting with some paramount act of congress under its conceded authority to regulate foreign commerce and that between the states. [Wilson v. Blackbird Creek Marsh Co.] 2 Pet. [27 U. S.] 245. Yet this, as before remarked, being contested, and it being considered by some vital against the constitutionality of the state laws, if affecting a matter of foreign commerce, or that between the states, though not conflicting with any act yet passed by congress, I shall make a few remarks on it here, and refer to others made by me in Peirce v. New Hampshire, 5 How. [46 U. S.] 554, 618.

I think it the safer and sounder opinion, that a mere naked power, unexercised and dormant in the general government, with no prohibition, express or implied, to the states, to act on the same matter, could not make the state legislation upon it nugatory or unconstitutional, much less render acts crimes, which are done under state laws of that description. Wilson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 245. Such are laws as to weights and measures. Besides these, as to disciplining the militia, and on bankruptcy, and regulating the army. Groves v. Slaughter, 15 Pet. [40 U. S.] 449. The subject under consideration now, as to roads and bridges, was, however, never of that mere doubtful character, but was among the powers supposed to be reserved to the states, where it before belonged. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 203. It was always to continue to be exercised by them for domestic or interior commerce within each state, that branch of commerce not having been granted at all to the general government. And, as hereafter explained, it could never be questioned in its exercise till it impaired or encroached on some power over foreign commerce, or that between the states, which had been confided to all the states united. If the states can and will, till special legislation by congress, punish such acts as they deem injurious to the public interests, and do it either under their reserved or concurrent powers, no necessity exists for any forced construction to enable this court to act, in order to prevent such wrongs from going unprosecuted. If done under their reserved powers, and able to be vindicated under them, their right is clear. But if done as a concurrent power, and relating to some local matter, connected with foreign commerce, either allowing or punishing it, their right is less clear, but in my view, can be successfully vindicated.

Supposing that I have not succeeded in showing this act of incorporation, and the conduct of the defendants under it to be legal under the reserved powers of the states, it seems to me legal as before intimated, under a concurrent right in the states to legislate on local matters connected with foreign commerce, till coming in actual and serious collision with some measures by congress. My reasons for this opinion are these. The states were the great fountains of legislation, the bulwarks of social and civil rights. Where they had acted before the constitution, they would be likely to continue to provide as to local matters within their own limits, till congress got ready to provide for them, when the power was granted to congress. This would especially be the case as to such pressing and interesting matters as commerce. The constitution, when not expressly forbidding the states to act longer on the matter, nor forbidding it by necessary implication, seems to allow it, and the continuance of some local state cognizance over it is often requisite for the public peace and safety. Hence, it has become the more prevailing doctrine among jurists and statesmen in these cases of powers bestowed on congress, and not expressly, or from the nature of the case, prohibited to the states; that till congress find it expedient to make specific laws under them, the authority of the states must be regarded as still continuing, in order to preserve order and the public tranquility, and to regulate and punish, or license and uphold local measures according to the views of each state, or the interests of the community within its boundaries. Because otherwise, there could be no punishment for some of the most flagrant outrages, and because the makers of the constitution well knew, that congress could not at once and forthwith provide for the full exercise of all its clear powers, if it wished, and would find it expedient not to use some, till time and occasion might develop the necessity of using what had been confided to it, and then would provide for the emergency by further and specific legislation. In the mean time, considering the states as still legally entitled to preserve the public interests and peace within their limits, and punish violations of them, in cases where they did it before, would not be derogatory to the general government, nor strip it of any le-

gitimate authority; it would treat the continued exercise of such powers by the states as only concurrent, or rather subordinate, till the general government found it expedient to legislate, and then of course the concurrent or subordinate authority of the states, yielding to the exercise of the same authority by the general government, which it had been empowered to use, and whose exercise of it, where once commenced, would be paramount.

The following books and cases sustain this course of reasoning: 4 Elliott, Deb. 367; 3 Jeff. Sp. 425–429; Peck, Tr. 401, 434, 435; [Fisher v. Blight] 2 Cranch [6 U. S.] 397; 3 Serg. & R. 179; [Sturges v. Crowninshield] 4 Wheat. [17 U. S.] 196, 198. See others, post, and in Houston v. Moore, 5 Wheat. [18 U. S.] 1, 49; Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 196; Willson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 245; Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539, 627, 655, 664; 9 Johns. 568; Miln v. New York, 11 Pet. [36 U. S.] 103, 132 (by Thompson, J.); [U. S. v. Bevans] 3 Wheat. [16 U. S.] 386; Calder v. Bull, 3 Dall. [3 U. S.] 386; 1 Kent, Comm. 364. This view is not limited to that class of cases, where the states have not granted to the general government any power, though bordering closely on express grants, as in case of fisheries. They still retain the power to regulate these on their rivers and on their coasts as before, and have never parted with the power over them. Corfield v. Coryell [Case No. 3,230]; Martin v. Waddell, 16 Pet. [41 U. S.] 367. So as to quarantine laws, police regulations, ferries, and roads and bridges, the states retain the general power over them all. Miln v. New York, 11 Pet. [36 U. S.] 102, 141, 142, 151.* So in respect to pilots, they continue to legislate by the express assent of congress; and it is not, in my view, a truth that the states and the people have not granted power to congress, which may affect ferries, roads, and bridges, in certain cases, by granting authority to the general government to regulate commerce, foreign and between the states, but probably that, till congress act on the subject, the states should continue to act for reasons before stated, and when congress have legislated on a part only, should afterwards continue to act so far as congress have not come in collision with the state laws.

The cases of the militia, and of bankrupt laws, weights and measures, taxation of land, &c., have been before referred to, and are familar cases, where the states have continued for half a century to act, when congress did not conflict with them, though they are powers clearly and expressly granted to the general government, in the same language and article with those as to commerce, but not seeming to be exclusive in their character. And in numerous other instances, since the first years of the operations of the government, the courts of the United States have, for the first time, been specially empowered to try for offences in cases, where previously they possessed no such authority to do it, and where previously even the acts complained of were not offences by any laws in force under the government of the United States. See many cases as to crimes, in the act of March, 1825. It is, at the same time, conceded that the courts of the United States have felt indisposed to decide cases on this ground, when able to dispose of them on other grounds. Hence, in Miln v. New York, 11 Pet. [36 U. S.] 102, the judgment was rendered on the ground, that the state was exercising a reserved right, and so in Groves v. Slaughter, 15 Pet. [40 U. S.] 509; and so a part of the court in Holmes v. Jennison, 14 Pet. [39 U. S.] 540, 580. But Justice Thompson, in the former, held this doctrine, and Chief Justice Taney seemed to do it in the latter, though he said [Groves v. Slaughter, 15 Pet. (40 U. S.) 509] it was not yet decided, nor was it necessary to decide, whether a state law was not good as to foreign commerce, till it conflicted with some act by congress.

In the recent decision in what are called the "License Cases," 5 How. [46 U. S.] 504, some members of the court went into this question, and held, that if the license laws were regulations, affecting our commerce abroad or between the states, they were defensible as local measures, not intended to encroach on the acts of congress, and not in fact impugning any of their provisions to produce uniformity, and regulate generally, the trade of navigation of the country. They were like colonial laws in respect to a parent country, or by-laws of cities, towns, and corporations, as compared with their charters, or rules of the navy and war departments, and of courts under general provisions organizing them. All are permissible, yet all subordinate, and none are void till repugnant and inconsistent. See the License Cases, 5 How. [46 U. S.] 504. Thus, for illustration, congress has made no provision for keeping many of our ports and harbors free from sand-bars and deposits of mud, so as to enable vessels engaged in the foreign or coasting trade to enter and depart under the general regulations of commerce for that purpose; and some have deemed it unconstitutional for congress to expend money on such objects. But cannot the states remove those bars and deposits? States and cities have often done this. Because congress has made the place a port of entry, can the states do nothing in relation to it, under the idea that the power of congress is exclusive? Cannot the states and cities under them, also, appoint harbor masters to regulate ballast, and the place of anchorage of the foreign vessels? Cannot they make or authorize wharves, at which the vessels can unload? or prescribe how their fires shall be extinguished or guarded while in port, so as to prevent conflagration to the shipping and the town?

It is not mere quarantine or health laws, or inspection laws, or police laws, or pauper laws, or bridges and roads, or laws as to internal commerce within the state, all of which may be considered as reserved, and the power over them never granted, but much as to the improvement and regulation of harbors and vessels in port in other respects, the loading and unloading, and various minutiæ, some as to pilotage, and some as to the crews, all connected with the vessels engaged in foreign navigation, as well as others, but not directing any thing in respect to them, which conflicts with any actual existing legislation by congress.

In [Holmes v. Jennison] 14 Pet. [39 U. S.] 579, the chief justice and a majority of the court, held, that unless the power was exclusive in the general government, a state might continue to exercise it, if she had done it before the constitution; and that it was not exclusive, unless expressly forbidden to the states, or in its character, one which should be exercised alone by the general government, and implies an exclusion of the states entirely; e. g. legislation over the District of Columbia (page 589). On such principles if, says Justice Barbour, "they can be construed as being exclusive," "then the necessary consequence is, that the states cannot exercise them, whether the general government shall or shall not think proper to exercise them. If, on the contrary, they are not exclusive, but concurrent, then the states may rightfully exercise them, and no question of repugnancy can ever arise whilst the power remains dormant and unexecuted by the general government." As some powers are expressly prohibited to the states, this raises a presumption that all are, which it was meant should be. And as these local powers in connection with foreign commerce are not expressly forbidden to the states, they were not to be so considered, and have not been in practice for the last half century. The advocates of the exclusiveness of this power in congress, will no more allow the states to act, where congress has not acted, than where it has. They hold, that the power is gone from the states entirely, and that congress by its silence as emphatically speaks, that nothing shall be done, as by its legislation that something shall be. The Chusan [Case No. 2,717]; Golden v. Prince [Id. 5,509]; Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539, 618; [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 209; Groves v. Slaughter, 15 Pet. [40 U. S.] 504 (by McLean, J.), 511 (by Baldwin, J.); Miln v. New York, 11 Pet. [36 U. S.] 158 (by Story, J.); [Houston v. Moore], 5 Wheat. [18 U. S.] 1, 21, 22; [Brown v. State of Maryland] 12 Wheat. 438. But how does this tally with the fact that the general government, under the new constitution, went into effect March 3d, 1789? Owens v. Speed, 8 Wheat. [21 U. S.] 420. Most of the important laws as to imposts, ports of entry, and the judiciary, did not pass for some months after. See 1 Laws by Litt. & B. 24, 27, 72. Hence, on this theory it is obvious, that an entire interregnum of law has existed, and must exist in many cases, till congress legislate expressly on matters that have been confided to it.

I am not here going into the powers expressly reserved to, and left with, the states, but those which are granted, though in their nature not granted exclusively in every respect, local or otherwise, and not exercised in hostility, but in allegiance and subordination to the general government. [M'Ilvaine v. Cox] 2 Cranch [6 U. S.] 297; 9 Johns. 507; 3 Serg. & R. 179. A regulation by a state may aid or co-operate with an act of congress, be a friend and not an enemy, and though it is not a police one, yet if within the legislative scope of the action of a sovereign state, it may move on till impinging against something actually prohibited to the states, or actually and legitimately done by congress contrary to it. See case of Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539, 657, views of the minority. The idea, that because congress can act on the matter, but have not, all state action, though favorable and assisting the object, is ipso facto void, seems to me entirely untenable. Daniel, J., page 657, and Thompson, J., page 635. And it is equally void in the views of some if the action of the state coincides and aids any exercise of powers by congress, as if conflicting with it. Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 651. All permitted to the general government, is not enjoined to be done, and at once, but only when necessary, useful or required by public exigencies, e. g. to declare war, to borrow money, to lay and collect taxes, as well as to regulate commerce. And when some loans are needed, or some taxes, or some regulations of commerce, it does not follow that all are, or all these powers at once are to be acted on and exhausted; or that the states cannot continue to borrow money, or collect taxes, or pass any local laws concerning commercial matters, when not expressly prohibited, and not conflicting with those by congress for general and uniform purposes. [Turner v Bank of North America] 4 Dall. [4 U. S.] 11; [Bank of U. S. v. Deveaux] 5 Cranch [9 U. S.] 61.

All the powers have never yet been legislated on, which are given to congress in the constitution. [M'Intire v. Wood] 7 Cranch [11 U. S.] 504; Ex parte Cabrera [Case No. 2,278]; Corfield v. Coryell [Id. 3,230]; Livingston v. Van Ingen [Id. 8,420]; [Turner v. Bank of North America] 4 Dall. [4 U. S.] 10; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 387. The constitution has merely empowered congress to regulate certain matters when its members please. But till they please to do it, and in all which congress do not please to touch at any time, the states may usefully continue to regulate the subject within their respective limits, till congress finds it expedient and a duty to act, for the whole. See cases before cited. In one part of the constitution (article 1, § 10) the states are at once and absolutely prohibited

longer to do certain things, and then of course there is no concurrent power; as for instance, "no state shall declare war," "no state shall make any thing but gold and silver a tender," "no state shall emit bills of credit," &c. But in other places, and especially as to the regulation of commerce, it is not so. It is not "no state shall longer regulate commerce," but "congress shall have power" "to regulate commerce, or foreign," &c., and so is the grant. That is, congress shall have power to regulate it whenever and to whatever extent it pleases, but in the mean time till it chooses to regulate it, and in all it leaves unregulated of a local character, the states are not prohibited to do what they before had a right to do. Congress may in terms, also, be at times invested exclusively with a power, or its further exercise by a state may be inconsistent, incompatible, or absurd. Such is the government of the District of Columbia, or of the navy. They stand, of course, like prohibitions, and are governed accordingly. Houston v. Moore, 5 Wheat. [18 U. S.] 49.

It is not a little singular, that amidst so high-toned and broad constructions as Hamilton generally adopted, he still acquiesced in this system of construction concerning the grants of judicial power to the general government, and held them never to oust that of the states before existing, unless clearly contradictory. In No. 82 of the Federalist he says: "But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty, which they before had, and which were not, by that act, exclusively delegated to congress. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases; where the constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant." But can it be pretended, that the action by a state on mere local matters of a commercial character, and about which congress has not yet legislated, is contradictory or repugnant? Certainly not, till congress do something concerning this particular matter, and then, as before shown, its laws and regulations must be considered paramount. [Groves v. Slaughter] 15 Pet. [40 U. S.] 509. The chief importance in settling the true construction of grants like these, to be such as not to prevent the state courts and state legislatures from continuing to act till congress legislates, is, that it takes away any apology for forced and broad constructions, and a resort to common and admiralty law analogies and aids, without acts of congress evidently and clearly made in order to punish offences. For without such a dangerous construction and resort, they can be punished by the states, if the states please. But if they could not be either so punished or allowed, how would the argument stand? An act would merely go unpunished till congress choose to denounce it as a crime, and provide what court should try it. And for this reason can limited courts like this, under a limited government like that of the United States, assume, that because the people and the states have empowered congress to regulate commerce, and define piracies and felonies committed on the high seas, and given to its courts authority over all cases of admiralty and maritime jurisdiction, the offences connected with these matters are sufficiently defined in the constitution itself? Surely not.

The next question to be examined in detail, and with the care its deep interest to the state and the general government deserves, is, whether the conduct described in this indictment, though at a place where the powers of congress may reach for commercial purposes, can be regarded as a crime by this court, unless it has been clearly so declared by the constitution, or a treaty, or an act of congress, and its trial devolved on us? Various decisions have been made, which hold that some act of congress, or at least the constitution or a treaty, must expressly define a crime and grant jurisdiction over it to the circuit court, before the latter can sustain an indictment for any conduct supposed to violate the public rights or public peace. And, in accordance with these, it has been further held, that a matter must be presented to a court of the United States in some authorized form, before it becomes a case under the constitution or laws. Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738; [American Ins. Co. v. Canter] 1 Pet. [26 U. S.] 511. The decisions, above referred to, proceed upon the ground, that the general government itself is one of limited powers, and hence possesses no authority to punish conduct, beyond what is expressly granted to it, or is necessary and proper to carry into effect what is expressly granted. That it hence follows, no conduct can be declared a crime by congress, which does not come within such power. That the constitution, being an organic instrument and form of government for general purposes, does not usually establish courts, and limit their jurisdiction, and parcel out among them and define various offences, but leaves that duty to congress. The definition of treason in article 3, § 2, is almost the only exception.

It is furthermore held, that if congress does not declare particular acts to be offences, and prescribe the extent of punishment and place of trial, though the subject-matter is within the powers granted to the general government, no particular court has any right to try a person for doing these acts, or affix any punishment to them, as every court under the general government is limited to the trial and punishment of such matters, and such only as congress has been pleased to confide to it. [U. S. v. Bevans] 3 Wheat. [16

U. S.] 389; [M'Culloch v. State of Maryland] 4 Wheat. [17 U. S.] 407; Rhode Island v. Massachusetts, 12 Pet. [37 U. S.] 657, 721; 3 Kent, Comm. 333, 341, 364; 1 Kent, Comm. 363.

It has been repeatedly held, that though certain powers are granted to the general government, it is considered that no acts done against them can usually be punished as crimes without specific legislation. Thus, it is said: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence." See U. S. v. Hudson, 7 Cranch [11 U. S.] 34 (Johnson, J.); [Turner v. Bank of North America] 4 Dall. [4 U. S.] 10, in note to Stanley v. Bank of North America. And again, that acts of congress, as well as the constitution, must generally unite to give jurisdiction to a particular court. 1 Kent, Comm. 294; [Turner v. Bank of North America] 4 Dall. [4 U. S.] 8; Clarke v. Bazadone, 1 Cranch [5 U. S.] 212; McIntire v. Wood, 7 Cranch [11 U. S.] 504. The circuit courts cannot act, unless the power is conferred by congress. Corfield v. Coryell [Case No. 3,230]; Barry v. Mercein, 5 How. [46 U. S.] 103. It is unlike the king in England, who has divided all his judicial power among his several courts. So, generally, it is not enough to constitute an act a crime, that it is opposed to some law or the constitution, unless they declare it to be criminal or punishable. It often is but a civil injury or wrong. Evans v. Foster, 1 N. H. 374. Though in many cases, from the nature of the opposition or violation of a law, it may be criminal on common law principles, in other cases it would not be. Is it then an offence under the constitution by construction and a resort to any common law principle? In Ex parte Bollman, 4 Cranch [8 U. S.] 75, 93, the true guide in answering this question is given: "Courts, which originate in the common law, possess a jurisdiction, which must be regulated by the common law, until some statute may change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction" (Marshall, C. J., and page 102, Johnson, J.). Treason is defined in the constitution; but when cases are not clearly within it, courts will leave them to receive such punishment as the legislature in its wisdom may provide. Page 127.

It may also be deemed an exception to the requirement of a specific act of congress in every case, and for all purposes, if the constitution or a treaty should define a crime with precision, as the former does treason, and the latter do at times the crimes where surrenders shall be made, and in the latter the matter should also be within the authority of the treaty making power. (See the extradition treaties with France and England.) But unless they went further and in the constitution or treaty, or elsewhere, designated the court or magistrate to try or examine the offence, that must still be done by legislation, or the jurisdiction in any particular court could not be sustained. (See case of the British Prisoners (Case No. 12,734].) For all the courts of the United States being, as before explained, formed under a constitution of limited powers, and being courts of limited jurisdiction, a case must come within what is confided to any one of them before they can try it. The grant in the constitution of judicial power does not vest it in any court. But by another clause it is vested in the supreme court and such inferior courts as congress may from time to time establish. Congress, therefore, must say how much or what shall vest in one inferior court, and what in another; and how much by one act, and when the residue.

In Livingston v. Van Ingen [Case No. 8,420], the court holds, that when an action at law is given in circuit courts, it does not follow that it may enjoin on the equity side, as no such express grant of jurisdiction is made; but it has been given since by act of congress in 1819. There is no power even in civil matters in this court to take cognizance of them, unless an act of congress has given it. Livingston v. Van Ingen [supra]. If so limited in civil cases, it is a fortiori in criminal cases. Courts when established, get only what is conferred on them by congress, and not what is in the constitution given to congress, except some jurisdiction which is there given to the supreme court, and will soon be referred to in detail. Much power remains dormant in congress, which it is not expedient to exercise at particular periods, or about which congress have not yet agreed how to legislate. Livingston v. Van Ingen [supra]; Corfield v. Coryell [supra].

To enable this court to act, a case must not only fall within the judicial power of the United States, as conferred by the constitution, but jurisdiction over it must have been conferred on the circuit court by some act of congress. Conk. Prac. 69, 88. Such cases alone are those described in the judiciary act, as "cognizable under the authority of the United States." U. S. v. Ravara [Case No. 16,122].

The same doctrine prevails as to a mandamus, except in the District of Columbia. McIntire v. Wood, 7 Cranch [11 U. S.] 504; [Kendall v. U. S.] 12 Pet. [37 U. S.] 524. So as to suits by the first United States bank, the act of incorporation being silent. Bank of U. S. v. Devereaux, 5 Cranch [9 U. S.] 61. So as to crimes. U. S. v. Hudson, 7 Cranch [11 U. S.] 32; U. S. v. Bevans, 3 Wheat. [16 U. S.] 336; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; U. S. v. Smith, Id. 153, 157; U. S. v. Grush [Case No. 15,268]; [U. S. v. Coombs] 12 Pet. [37 U. S.] 73; [Turner v. Bank of North America] 4 Dall. [4 U. S.] 10; 3 Kent, Comm. 363. It continues in this way till congress calls into action its otherwise dormant powers, which, as before remarked, it evokes slowly but seldom fully. [McClung v. Ross] 5

Wheat. [18 U. S.] 115, note; Conk. Prac. 70, 71; [Carneal v. Banks] 10 Wheat. [23 U. S.] 190. Indeed we must look entirely to the constitution, treaties, and acts of congress, to see what constitutes an offense in this court. The United States has no unwritten code to give it jurisdiction, though the common law, as before remarked, may be resorted to for analogies and definitions, where jurisdiction is conferred. Over civil cases in admiralty, jurisdiction is expressly given to the district courts by congress by a general grant, and to circuit courts an appeal in them, but not over criminal cases in admiralty, either to the district or circuit courts. Jurisdiction cannot be exercised over the last except as parcelled out and granted by particular acts of congress, or by some general transfer to this court of all cases of a criminal character in admiralty. Conk. Prac. 82, 83; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 387. The only cases contrary to this are U. S. v. Coolidge [Case No. 14,857], overruled in [U. S. v. Coolidge] 1 Wheat. [14 U. S.] 415, and dicta in De Lovio v. Boit [Case No. 3,776], and remarks in the note to [M'Clung v. Ross] 5 Wheat. [18 U. S.] 115, and in U. S. v. M'Gill [Case No. 15,676], by Justice Washington. If concurrent jurisdiction is given to state courts in some cases, then the exclusive jurisdiction in the circuit courts is thus far modified. Houston v. Moore, 5 Wheat. [18 U. S.] 29. And a judgment in either, is probably a bar to a suit in the other. U. S. v. French [Case No. 15,165]. Id.; 11 Johns. 519. But a mere arrest is not a bar. So a circuit court has no cognizance of military offences, that being by law conferred on courts martial. Id.; 3 Kent, Comm. 341. That is, probably, if happening on the high seas. 1 Kent, Comm. 362. Op. Atty. Gen. 114, 120.

I acquiesce in these principles and in this course of reasoning, as the safest and soundest in our complicated system of government, and one which has the sanction not only of the contemporaneous construction to this effect, placed on it by some of the framers of the constitution, afterwards seated on the bench of the supreme court, but of succeeding times, and of many of the statesmen and jurists of the last half century. It is an exception to a part of this reasoning for the previous action of congress, where the constitution itself provides for a supreme court, and declares some of the matters which shall belong to its jurisdiction, and hence takes from congress any power to dispense with such a tribunal, or to confer the trial of those specified topics on any other tribunal. See article 3, §§ 1, 2. Thus, "the judicial power of the United States shall be vested in the supreme court, and in such inferior courts as the congress may from time to time ordain and establish." Section 1. And "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. This last has been amended. Amendment 11. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." Section 2. This prevents congress from conferring original, or any but appellate jurisdiction on the supreme court in any cases except those specified. Marbury v. Madison, 1 Cranch [5 U. S.] 137, 173; 3 Croke, 75; [Ex parte Kearney] 7 Wheat. [20 U. S.] 42; [U. S. v. Hamilton] 3 Dall. [3 U. S.] 17. And it is another exception, or perhaps more properly speaking, an incident to the establishment of such a court and other inferior courts under the constitution, that they, like the legislative bodies of the senate and house of representatives, possess authority to punish for contempts in the transaction of the business entrusted to them. It is considered an authority inherent in such bodies appurtenant and indispensable, never necessary under any other governments to be conferred by particular laws, though open as this has been to subsequent legislation, modifying and regulating it, as was done after Judge Peck's impeachment, in respect to courts. See Anderson v. Dunn, 6 Wheat. [19 U. S.] 204; [Ex parte Kearney] 7 Wheat. [20 U. S.] 45; Act March 3, 1831; 4 Johns. 317; 9 Johns. 395; U. S. v. Hudson, 7 Cranch [11 U. S.] 33, 34; 6 Johns. 357; 14 East, 1; 5 Dow. 165; [Ex parte Bollman] 4 Cranch [8 U. S.] 94.

Having thus seen that this indictment cannot be sustained in this court, unless some law of the United States has declared it to be a crime, and given to this court jurisdiction over it, a necessity exists in the next place to examine whether any portions of the constitution, or treaties, or acts of congress have in fact done this; whether any of them have really prohibited as crimes such acts as those of the respondents, and empowered this tribunal to punish them. It is more convenient often, and therefore I am inclined to consider these last questions together, as they depend on like principles and precedents. I do not understand it to be contended that any part of the constitution, or treaties, or acts of congress specifically declares the placing such obstructions as those in navigable tide waters, like those at New Bedford, to be a nuisance, or any other offence against the United States, and punishable by fine or otherwise in this court. But the reliance is chiefly on general provisions and principles involved in them, supposed to be comprehensive enough to include this case.

The discussion on this branch of the case has taken a very wide range, and will receive, as it requires, some detail in its consideration, in order to cover the whole ground. I am not aware of any clauses in the constitution, relied on so much for this purpose, as that in section 8, art. 1, which provides that "congress shall have power" "to regu-

late commerce with foreign nations, and among the several states, and with the Indian tribes;" and that in the second section of article 3, declaring that "the judicial power shall extend to all cases in law or equity arising under this constitution, the laws of the United States and treaties made, or which shall be made under their authority," and "to all cases of admiralty and maritime jurisdiction."

We will therefore examine the effect of these clauses first. It will be seen that both of them relate to the powers conferred on congress by the people of the states, and not to the powers conferred by congress on any of the courts of the United States. They merely prescribe the extent to which congress may go in legislating as to commerce, and instead of themselves providing for details in the constitution, they wisely leave to congress to make such regulations as to commerce as it shall deem useful and proper, to define what shall be crimes against it, and declare how they shall be punished, and in what courts. U. S. v. Coombs, 12 Pet. [37 U. S.] 72. They proceed, also, to authorize congress in express terms "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations" (section 8), but do not attempt it in the constitution itself. It will be manifest from all the expressions, no less than from the character of the instrument as a more general frame of government, and not one filling up and providing for details of legislation, that these clauses lay down rules as to the powers of congress, rather than the powers of this court and its jurisdiction. It leaves the latter powers as they should be left, to the discretion of congress and the public necessities and welfare, as these may from time to time require congress, within the scope of the authority thus conferred on it, to define and parcel out for trial whatever it may deem unlawful and properly punishable by the judicial tribunals of the United States.

Judge Chase says in a note to Stanly v. Bank of North America, 4 Dall. [4 U. S.] 10: "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution, but the political truth is, that the disposal of the judicial power, except in a few specified instances, belongs to congress. If congress has given the power to this court, we possess it, not otherwise; and if congress has not given the power to us or any other court, it still remains at the legislative disposal," and concludes it is not best for congress at once to go as far as it may. [U. S. v. Bevans] 3 Wheat. [16 U. S.] 387. See cases before. And such would seem to be the conclusion as to crimes by the admiralty law, by like analogies and reasons, except for the expression before referred to in the constitution, saying that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." But that is only one of the enumerated subjects like that "to regulate commerce," which before belonged to the sovereign control of each state, and which by the constitution it was provided should be thereafter placed under the control of the general government, and be acted on by its judicial tribunals. Chief Justice Marshall says in Bevan's Case, 3 Wheat. [16 U. S.] 387: "It proves the power of congress to legislate in this case, not that congress has exercised the power." After that provision, it was still necessary, in order to enable one of its tribunals to try cases of admiralty and maritime jurisdiction, whether civil or criminal, to confer such authority on them to try all such cases, or to try only that portion of them, which congress might then choose to legislate on, and define and entrust to such tribunals. The same necessity existed for the action of congress in this respect, as in respect to another enumerated grant to the judicial power over controversies "between citizens of different states." No court after being created by congress could have ventured to try such a case, under that grant merely in the constitution, without some legal provision, conferring that particular power on that court. And so as to "all cases in law or equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," though placed within the judicial power of the Union rather than of the states, not one of those cases, whether of a civil or criminal character, could be tried by any particular court of the United States, till an act of congress empowered that court in particular to try it, with the exception before alluded to of cases affecting "ambassadors, other public ministers and consuls, and those in which a state shall be a party," and which with appeals are, by the constitution itself, conferred on the supreme court. The convention knew that admiralty power under the Confederation had been exercised by each state, except at times as to prizes. 1 Mad. Papers, 91, 105; 2 Mad. Papers, 712. They knew that in order to produce uniformity and regulate commerce, the power should thenceforward be exercised by the general government. Hence in the early drafts of the constitution to the supreme court was given jurisdiction over "all cases of admiralty and maritime jurisdiction." 2 Mad. Papers, 743, 744, and it was to be original there at first. The convention was at first opposed to having any courts but state tribunals and a supreme court of the United States; and after letting the former try all cases, permitted appeals to the supreme court. It, therefore, at first gave also to that supreme court admiralty and maritime jurisdiction, as being a matter not suitable for the state tribunals, and at one time struck out entirely any power in congress to establish "inferior courts." 2 Mad. Papers, 729. At last it restored inferior courts, and gave to the supreme court

still jurisdiction over admiralty cases and others now in the constitution granted to the judicial power. But it provided, that in other cases, except the trial of the president when impeached, jurisdiction might be devolved on inferior tribunals. 2 Mad. Papers, 1238. Towards the close (page 1556) it assumed the present form, and the jurisdiction of "the judicial power" was extended to admiralty cases, rather than that of the supreme court. But what is decisive, that in doing this they did not mean to adopt the whole admiralty code, criminal and civil, and confer jurisdiction over it on any particular court, but leave that to congress; as it might find it expedient, to define or adopt parts of it from time to time, it proceeded in another clause expressly to authorize congress to make definitions of piracies and maritime felonies. This would have been unnecessary and improper, if the whole admiralty code as to crimes had already been adopted. The reasons for this were, that different punishments in different states existed for these felonies, and as they were under admiralty power, and refer to foreign commerce, and are vague at common law, it was best to enable congress to make them more certain. 9 Mad. Papers, 1348, 1349, and in the Federalist (No. 42) it is also said: "But neither the common nor the statute law of that (Great Britain) or any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption." No. 42, by Madison.

When all the powers, not expressly granted to congress, or not necessary and proper to carry those granted into effect, are reserved cautiously to the people and the states, it would hardly answer to enlarge the powers of courts by a very broad construction. If the immediate delegates of the people were to be strictly restrained, much more should be their delegates in the judiciary, whose members are not subject to re-elections and short terms of office. These clauses, then, not seeming to grant these powers to this court, but rather to congress, can they be aided so as to make out the definition of a crime in this case, and confer the trial of it on this court by a resort to any other clause of the constitution or to the common law, or the admiralty law in connection with the constitution?

Looking for a constitutional definition of the present offence, and the power conferred on this court over it, and nothing being found done or completed in either of the great and leading clauses on this subject, that have already been considered, it was not likely to have been done in any other clauses, if not accomplished in those already examined, so important and so germain to the subject. It belonged to topics of commerce and admiralty jurisdiction, and to the power of courts rather than other matters, unless we were justified in expecting the unqualified adoption of some whole code of laws in a constitution. Had there been a provision in it like that of our ancestors at Plymouth Rock, respecting the Mosaic Code, directing the laws of any country or sovereign to be in force till congress could make better ones, and offences under them to be prosecuted in any courts created by congress, the difficulty in this case would have been cured, if the conduct of the respondents should amount to an offence under those laws. Or had there been a provision of a like tenor, adopting the common law, or the civil law, or the admiralty law, as a whole, and placing the execution of them in charge of this court, then our jurisdiction would be clear, if the acts complained of were made an offence under and by them. But no such clause exists, and none was likely to exist for reasons, some of which have already been alluded to, and others that will occur to every reflecting mind. Beside the circumstance, that a constitution is generally designed to regulate the legislative department, as well as others, rather than to make the laws themselves, it is obvious from the great extent of territory and different systems of jurisprudence and numerous people to be operated upon by laws of the United States, that their agents could not find time in one convention to make a constitution and code of laws also, or consider how much of any existing code it was best to adopt absolutely. That they were not delegated to meet for the latter purpose; that, therefore, they did not attempt it; and consequently, instead of doing it or adopting any general code as a guide, they merely empowered congress within certain limits to legislate on certain topics, and, with a view to prevent an interregnum, left of course the state laws in force till congress should do this, except where prohibiting expressly, or by strong implication, the further action of the states on certain subjects. Nor was the convention which formed that instrument ripe and ready to adopt absolutely even the common law, much less the civil or admiralty law, with all their details and with many uncertainties and much vagueness, as to their extent at different dates, and discriminating from which date they should be regarded, as taking effect. [U. S. v. Smith] 5 Wheat. [18 U. S.] 182, by Livingston. The different states had conducted differently as to each of them; some introducing the common law as existing when their ancestors first emigrated hither; some as existing at the Revolution; and some, with large exceptions from it at both periods, of what did not accord with our situation and habits and new form of government. Again, some had adopted much of the civil law in their courts of equity and courts of probate, and others but little, and that only as an appurtenant to their common law tribunals and jurisdiction, and some from their interior position, had adopted nothing of the admiralty law, and

others little if any of it as existing peculiarly on the continent of Europe, and others more or less, perhaps, of what prevailed in England at the time of our Revolution. Hence it was wise not to wrangle and divide, as they must, by attempting to introduce, by means of the constitution, the common law of England, or of any one state, or of all the states, so far as it might be in force in all. The uncertainty, as to its extent, the difficulty of fixing it in cases of doubt, and the specific or general exclusion of all parts of it not suitable to our condition, were matters too formidable to be encountered in connection with their other great labors. It is also very inconvenient to adopt in any constitution any code as a part of the law of the land, without at the same time proceeding to make it alterable by legislation alone, as the interests and wants and experience of society might require. Otherwise the smallest change, however urgent, could not be effected, but with all the delay, expense, and formality of amending a constitution, or the whole organic form of government for a great people. Hence the common law of England has been considered as not put in force, directly or indirectly, by means of any clause in the constitution of the United States, so as to create, make, or help to make, any thing an offence, which has not been made so by the constitution itself, or acts of congress passed under it. Dup. Jur. p. 9, says: "The common law of the United States is no longer the source of power or jurisdiction, but the means or instrument through which it is exercised." See, also, Wheaton v. Peters, 8 Pet. [33 U. S.] 591, 658; U. S. v. Worral, 2 Dall. [2 U. S.] 384; 1 Tuck. Bl. Comm. 378, notes; Serg. Const. Law, 274; Federalist, No. 42; U. S. v. Stephenson [Case No. 16,386]; U. S. v. Lancaster [Id. 15,556]; 2 Burr, Tr. 437, 482; Dorr's Case, 3 How. [44 U. S.] 103, 105; U. S. v. Coolidge, 1 Wheat. [14 U. S.] 415; Dup. Jur. Pref. xiv.; Goodenough, Am. Jur. 276; 1 Kent, Comm., 318, 319; 1 Story, Comm. 132, 137, 141; [Ex parte Bollman] 4 Cranch [8 U. S.] 75; U. S. v. Hudson, 7 Cranch [11 U. S.] 32; [Pawlet v. Clark] 9 Cranch [13 U. S.] 333; Ex parte Randolph [Case No. 11,558]; [Van Ness v. Packard] 2 Pet. [27 U. S.] 144; [Southwick v. Postmaster General] Id. 446; [The Orleans v. Phœbus] 11 Pet. [36 U. S.] 175; [Kendall v. U. S.] 12 Pet. [37 U. S.] 524. Contra, Jameson v. The Regulus [Case No. 7,198] note; [U. S. v. M'Gill] 4 Dall. [4 U. S.] 429 (Washington, J.). And however courts may properly resort to the common law to aid in giving construction to words used in that constitution and those laws (U. S. v. Palmer, 3 Wheat. [16 U. S.] 610, e. g. "robbery"), the body of the common law, as such, does not alone give jurisdiction in any case, and enable the court to declare any acts to be offences under the United States and to try them, where the constitution and the acts of congress have been silent concerning them. [U. S. v. Hudson] 7 Cranch [11 U. S.] 32; [U. S. v. Coolidge] 1 Wheat. [14 U. S.] 415; [Gelston v. Hoyt] 3 Wheat. [16 U. S.] 336; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76.

At the same time, in deciding on private rights in civil cases, which must often be according to the laws of the respective states, the common law will govern us so far as it is in force in each state. U. S. v. Stephenson; U. S. v. Lancaster [supra]; [Elmendorf v. Taylor] 10 Wheat. [23 U. S.] 158. But it will be as the law of that state rather than of the United States. So as to the admiralty law, as a code in civil or criminal matters, it is not adopted and put in force in this court by any part of the constitution. But congress is merely authorized to confer jurisdiction on its courts in cases arising under that law, though it has not yet done so except to the district court in civil cases, as we have already shown.

There being no definition of this particular offense as a crime in the constitution and no right to aid it in such a definition by the common or the admiralty law, and there being also no grant in the constitution to this court to exercise jurisdiction over it, but only a grant to congress to legislate upon such matters, the next inquiry is, has this defect been supplied by any provision in any treaty made in pursuance to the constitution? A treaty being, by the sixth article of the constitution itself, declared to be "the supreme law of the land," it will govern this case if full and detailed upon it. Sometimes treaties may require no appropriations to carry them into effect, or any change of existing laws, being minute enough and explicit enough to be enforced without any new or additional provision, and in such case, it may be the duty of the judicial tribunals to execute them without any act of congress. See British Prisoners [Fed. Cas. No. 12,734]. In other cases and generally, modified, or at least, declaratory, laws will be first necessary. But there is no pretence here that any treaty between this country, and any other, stipulates that obstructions like the bridge of the respondents and its consequences shall be deemed an offence, and be punished by this court on account of its injury to alien friends and their vessels in entering and departing from our ports and harbors. Such obstructions, however, may be prejudicial to foreigners, and to their rights under treaties if allowing trade and navigation here to be interrupted, whether the obstructions be temporary or permanent. But it would be difficult to try them as crimes, when no where declared to be so, or to try them by this court, unless jurisdiction over them is in some appropriate manner clearly conferred on it. Such an obstruction seems to violate the spirit of the treaty of November 19, 1794 (article 3), with England. It stipulated for each party "freely to pass and repass by land or inland navigation, into

the respective territories and countries of the two parties on the continent of America," "and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other." 8 Stat. 116. It did not admit vessels "into seaports, harbors, bays, or creeks of his majesty's said territories, nor into such ports of the rivers in his majesty's said territories, as are between the mouth thereof and the highest port of entry from the sea," except in small vessels between Quebec and Montreal, nor yield the admission of British vessels from the sea into rivers of the United States beyond the highest ports of entry for foreign vessels from the sea. But it meant to permit such free navigation up to the highest port of entry here for foreign vessels from the sea; yet no clause has been found in this or any other treaty, making obstructions like these crimes, if placed within the limits of such ports or below them, and giving this court cognizance of them. Whether a civil action would not lie in such case for delay and damage by an alien friend, against the respondents, or by one of our own citizens, without any further legislation, and under existing treaties and existing laws, is a different question, and one to which some attention will be given before I close.

The only other legitimate source of power by this court over this case, is some act of congress. Conk. Prac. 57. None giving it, eo nomine, has been referred to; none is pretended to exist. The one most relied on in support of it substantially, is that of 1789, which in section 11, gives to this court jurisdiction "of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." 1 Stat. 79. But this seems to relate rather to the power of the circuit court to try this case, if a crime, than to make it a crime.

Though it is contended by the counsel for the government, that it is an adoption and grant to this court of jurisdiction over all offences which exist under admiralty and maritime law, because all such are "cognizable" under the constitution, and hence "under the authority of the United States," and that the acts now in question are crimes by admiralty law. But if the words "cognizable under the authority of the United States," were meant here to embrace all offences over which the judicial power was extended by the constitution, it would cover all other offences, under that constitution or treaties, without any acts of congress being necessary to define them and confer jurisdiction over them on this court. Again, "cognizable under the authority of the United States," used here as applied to a court, means of course, "triable," or placed under its jurisdiction by the constitution, or treaties, or laws of the United States. See Kendall v. U. S., 12 Pet. [37 U. S.] 524, 637, 648. The word is so used by Blackstone in speaking of "injuries cognizable by the courts maritime or admiralty courts." 2 Bl. Comm. 106. So Bayley, J., says: I think the true construction of this statute is to restrain the operation of the 4th section to cases cognizable in the superior courts. Rex v. Crisp, 1 Barn. & Ald. 282, 287. This act might mean, that the circuit court should exercise jurisdiction over all matters which were made crimes by the constitution or laws, when no particular court was otherwise designated that should try them. But it still leaves the question open, What is a crime by that constitution or those laws? And till the acts complained of in this case are declared to be crimes by the constitution or laws, this court, though having cognizance of all crimes which exist under them, cannot pronounce any acts to be crimes within their purview.

A different construction, if competent under the words of this act of congress, does not seem to accord with its spirit or cotemporaneous construction by congress and the courts. It was early seen that a different course would leave the whole criminal code vague, loose, undefined and uncertain, where certainty in all countries is most desirable. That specific legislation under the general grant in the constitution, would be much safer to property, liberty and life. And finally, that the construction, limiting the expression, "cognizable under the authority of the United States," to what was made cognizable as a crime by any part of the constitution or by any act of congress, was more in unison with the strictness belonging to all criminal codes. Accordingly, under this view, specific legislation at once commenced defining special offences, which otherwise would have been unnecessary. Besides this, the courts of the United States at once held, as before shown, that this kind of legislation was first proper and necessary, in order to make even ordinary offences "cognizable under the authority of the United States," so as to be tried by this court. Other considerations tended to sustain the idea, that this expression as to "authority," referred to what was implicitly enacted by congress,. or expressly declared in the constitution to be crimes, rather than all which might possibly be done by congress under the constitution. Again, had congress declared, that all acts criminal by admiralty and maritime law should be so here, (and certainly, if going further, had said, also, that they should be tried by this court, as offences under the constitution of the United States,) then, probably, they might have been cognizable by us under its "authority," in the same way that congress, having conferred the trial of all civil cases in admiralty on the district courts, they are all triable there. Similar provisions would probably have been made in both cases if the course meant to be pursued was the same in both; and if nothing was said as to the kind of punishment, it might perhaps be as the punishment was in admiralty generally, (or possibly by fine and impris-

onment,) and be prosecuted by indictment. For, whatever the law declares to be a crime, it is said must be prosecuted here by indictment, unless a remedy by information is specially given. U. S. v. French [Case No. 16,165]; U. S. v. Mann [Id. 15,718]; [U. S. v. Tyler] 7 Cranch [11 U. S.] 285. But considering the jealousy of our ancestors as to courts of admiralty, on the ground, that except on confession, for which torture was once used, the proof must be equal to two witnesses, and that no trial by jury was allowed till 28 Hen. VIII., with other reasons hereafter alluded to, the framers of the constitution would not be very likely to mean to adopt its criminal code en masse. Under 28 Hen. VIII., the definition of crimes remained, but not the rules of evidence or trial without a jury. 5 Dane, Abr. 342. And though some of the ancient objections to the admiralty are obviated here by trial in crimes by jury, yet those in respect to its system of proofs in criminal cases might remain, and the prejudices on this subject prevented the exercise of much admiralty power over crimes before the Revolution in any of the thirteen provinces, and still less on any matter during the Revolution and afterwards till the adoption of the constitution, except as connected with subjects of prize. Bains v. The James & Catherine [Case No. 756]. Perhaps I ought to except revenue matters, as by 7 & 8 Wm. III., admiralty courts were allowed to control those here, and punish in a king's court rather than in a colonial one, in order to deprive the colonists of trial by jury when enforcing obnoxious laws of trade. 6 Dane, Abr. 342. If this was in one sense acquiesced in after much resistance, as hopeless to be remedied (see [U. S. v. Bevans] 3 Wheat. [16 U. S.] 384, 385, arguendo the history of it), it was considered a great grievance in principle, as will be hereafter shown, and a topic of loud, long and most indignant remonstrance, till ended by the Revolution. See on this the opinion of the minority of the court in Waring v. Clarke, 5 How. [46 U. S.] 441. To the illustrations there given, may be added the express provision in the bill of rights in the constitution of New Hampshire (article 20), that the trial of jury shall be sacred in all cases, except those happening "on the high seas," and "seamen's wages."

It is true at the same time, that when forming a general government, whose chief duty was in respect to foreign affairs and foreign commerce, and its regulation not only abroad, but between the states, the sagacious framers of the constitution saw that it should be invested with all the admiralty and maritime powers which might be proper to be exercised within our own territory. Hence they conferred the exercise of them on that government, but still left that government in its legislation to bestow at once, or gradually, all or a part of the civil powers in admiralty on such courts as it deemed most appropriate, and all or a part of the criminal powers in admiralty in a like manner, under such limitations and restrictions of every kind as it might think useful. Hence, likewise, congress, in order to carry on at once the ordinary business in admiralty, connected with commerce and navigation, bestowed all power "in civil cases" on the district courts. But it saw and knew the difference between the clause in the constitution and their own legislation, and instead of copying it so as to embrace "all cases in admiralty," limited the power given to only "civil cases" in admiralty. Now, if congress intended to reserve the criminal cases in admiralty, and bestow a jurisdiction over them generally on the circuit court, it would probably have proceeded to do so in terms ipsissimis verbis. But, instead of that, it then and since merely selected out particular cases of admiralty offences, defined them, and conferred jurisdiction on this court over them under certain limitations and without specifying whether it exercised power over them as crimes in admiralty, or under its authority to regulate commerce, or under some other constitutional grant. Indeed, it is hardly to be presumed that congress intended by the act under consideration to confer power on this court to try, as a crime, any thing which might be made a crime, but which had not been made nor defined to be one, either in the constitution itself or any law, when such caution was used in defining some crimes, and imposing restrictions and limitations as to others.

The act of March 3, 1825, which defines so many, and makes them, like others enumerated in the act of 1790, specifically punishable in the circuit court, generally does not give jurisdiction to this court, unless the offence is defined and its punishment prescribed, if on the water, as committed on the "seas," or "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state." See sections 4, 6.

Generally, too, cases of crimes come to this court only where a state has no jurisdiction. [Waring v. Clarke] 5 How. [46 U. S.] 441. Such was the definition by Blackstone of the admiralty court, to try cases without the jurisdiction of the common law courts on the seas. It is a wise policy to leave as much with the states as may be, though congress has the power to go further in some cases if it pleases. [Turner v. Bank of North America] 4 Dall. [4 U. S.] 11; [Bank of U. S. v. Deveaux] 5 Cranch [9 U. S.] 61; Bains v. The James & Catherine [supra]; [Rhode Island v. Massachusetts] 12 Pet. [37 U. S.] 721; [Martin v. Hunter] 1 Wheat. [14 U. S.] 326; [M'Culloch v. Maryland] 4 Wheat. [17 U. S.] 407; [U. S. v. Bevans] 3 Wheat. [17 U. S.] 389.

Another forcible reason why congress did not mean to have any criminal cases in admiralty, "cognizable" as such by this court, originally, was, that this was not the ad-

miralty and maritime court created by congress under the constitution. Jensen v. Vrow Christina Magdalena [Case No. 7,216]. That was the district court. [Glass v. The Betsey] 3 Dall. [3 U. S.] 6. And had congress intended to confer general criminal jurisdiction in such cases on any court, it would have been likely to have given it to that court as it did the civil cases, and allowed the trials in the former to be by jury there, as they must have done under the sixth amendment of the constitution, as well as under a provision in the body of it. Article 3, § 2. Appeals in cases criminal as well as in civil could have been allowed to this court; but without an express allowance, this court never has got any jurisdiction by general grant or implication as a court of admiralty, because it was not such a court originally, and was never converted into one since. The Vrow Christina Magdalena [supra].

It is another decisive objection to a construction of the act of 1789, which would, under the words "cognizable under the authority of the United States," embrace all admiralty crimes, as existing here or abroad at the Revolution, that this branch of our criminal code would thus be left very uncertain as to the crimes themselves thus intended to be embraced. Laws defining crimes should be precise and clear, so that all men may know easily what they are to avoid. U. S. v. Sharp [Case No. 16,264]. And it is most dangerous, by mere construction, to convert that into an offence which is otherwise permitted. By the opposite view it would be left uncertain at what era and place the admiralty law, as to crimes, was meant to be adopted, and thus doubtful whether this very offence, described in this indictment, was intended to be embraced, and questionable whether the kind of punishments in any case, where the punishments happened to vary, was to be affixed according to Rhodian or Roman law, the assizes of Jerusalem or the consular system, the Danish, French or English codes, or those of some other period and people since the voyage of the Argonauts.

It is a matter of some regret that congress had not been a little more slow, cautious, and discriminating, when they conferred jurisdiction in all civil cases, and had not either enumerated what it considered properly as civil cases in admiralty, specifying subjects and places, or referred to some era, or code, or country as to its civil admiralty jurisdiction as a guide. Misera est servitus ubi lex est vaga aut incerta. For now in that, as we should be obliged to do in crimes, had power over them been given, one judge thinks he ought to go to the Rhodian laws for the test, another to the Consulato del Mare, another to the laws of Oleron, another to those of Wisby, another to the era before Richard II., another to the black book of the admiralty, another to 13 and 15 Rich. II., another to the act of parliament of 28 Hen. VIII., and others to periods still later. See [Waring v. Clarke] 5 How. [46 U. S.] 441. Some trace the power which is to be the standard, to Saxon, some to Norman, some to Saracen or Carthagenian, some to Roman, and some to Turk or Crusader. Again, one judge gets admiralty jurisdiction both criminal and civil by the locality of the act, as if on the ocean at all; another, if on it, where the tide ebbs and flows; another, if on it, without the limits of a country; another, if on great rivers navigable below their bridges, though not salt; another, by the subject-matter, if maritime or not; another, by the parties, if seamen or landsmen. See cases in the precedent last cited. This same uncertainty exists about what are maritime contracts, as may be seen by the order of the supreme court at the same session for a re-argument in New Jersey Co. v. Merchants' Bank [6 How. (47 U. S.) 344], in a libel on a domestic charter party in admiralty, where the court was supposed to be equally divided as to jurisdiction. Such vagueness and uncertainty, even in civil cases, have agitated the courts of the United States the whole half century of their existence, and it may have been foreseen, as still more objectionable, in respect to the crimes punishable in admiralty, and probably this helped to lead to a refusal to legislate in the same general way as to them. As to them they have selected out particular and urgent cases for punishment, within careful limits, as to the places where they occurred, and made them punishable in such cases only, leaving the others to the state tribunals, till some failure of justice or emergency for new power to prevent guilt from escape, should justify and require further provisions for punishment by the courts of the general government.

That these are no imaginary uncertainties, which stand in the way of supposing such a code was meant to be adopted in cases where life and liberty were at stake, some judges have deliberately held, that we should go to the continent of Europe to ascertain what our admiralty law is, and not to England. See cases in the precedent just referred to. Others, that we must go to England alone. They differ vitally, also, as to eras of the admiralty, when its laws and practice are in force here, whether civil or criminal, and going only to England for the law, as most do. U. S. v. McGill [Case No. 15,676]. Some hold, that the constitution referred to the admiralty law as existing in England before the important legislation of 13 and 15 Rich II. See in [M'Clung v. Ross] 5 Wheat. [18 U. S.] 114, note; Conk. Prac. 145; The Amiable Nancy [Case No. 331]. And again and again it is insisted that these statutes, the great landmarks of admiralty law in England, are not in force here at all. See The Jerusalem [Case No. 7,294]; De Lovio v.

Boit [Id. 3,776]; Hall, Prac. 17 Pref.; Stevens v. The Sandwich [Case No. 13,409]; Steele v. Thacher [Id. 13,348]; [Waring v. Clarke] 5 How. [46 U. S.] 441. While others maintain that they involved the inestimable trial by jury, and the highly prized principles of the common law against the civil code of a foreign conqueror, and came here with our fathers as much as Magna Charta itself, and were in as full force in Maine and Georgia as in the county of Kent or Bristol in England. See [Waring v. Clarke] 5 How. [46 U. S.] 441 (opinion of minority). Others hold the admiralty law throughout to be as it was in England when our ancestors emigrated here. Ramsay v. Allegre, 12 Wheat. [25 U. S.] 612; (Johnson, J.); 1 Kent, Comm. 377; Conk. Prac. 155. Others limit it as in use in America at the time of our Revolution, and thus collecting it rather from the obscurity and darkness of colonial practice than any other more certain sources. De Lovio v. Boit [Case No. 3,776]; Hart v. The Littlejohn [Id. 6,153], note; The Amiable Nancy [Case No. 331]; Peele v. Merchants' Ins. Co. [Id. 10,905]; Bains v. The James & Catherine [Id. 756]; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 638 (Johnson, J.). Others modify the time to the period of the adoption of the constitution, which is much the same in effect. 1 Kent, Comm. 377; Parsons v. Bedford, 3 Pet. [28 U. S.] 446. The sounder opinions seem to me those which incline to these last eras. U. S. v. M'Gill [supra], and cases in Waring v. Clarke, 5 How. [46 U. S.] 441. And if a foreign code be thus adopted in the grant of power to congress over it, or in the act of congress as to civil admiralty cases in the district courts, it must probably be considered the code as then existing, and not as at some prior period. Kendall v. U. S., 12 Pet. [37 U. S.] 524. Thus in England, the control and curtailments which had been exercised by the common law courts, were recognized as proper and obligatory, according to some, and the admiralty courts had at last submitted in England to the claims of the common law courts, and the contest was at a rest. 1 Law J. 425; Hall, Adm. But the supreme court ([Waring v. Clarke] 5 How. [46 U. S.] 441) has recently, by five to three of its members, given a judgment in a case of collision of vessels on the Mississippi, two hundred miles above the ocean, and where it is very doubtful whether the influence of the tides is felt at all, and within the heart of a county in Louisiana, for reasons entirely different from some which have been suggested by me as the true test of what admiralty law ought to prevail here. But those reasons being dissented from by four to four of the court, I do not undertake to state or adopt them, though the judgment of the court on the point then in controversy is binding, and will be respected by me till changed. But that judgment is confined to maritime torts, not embracing the subject of crimes now under consideration. In short, then, if we look to English decisions as to crimes, being those referred to in "cases of admiralty" in the constitution, and in the act of 1789, the English precedents are to control us. There the admiralty court is governed by the civil law, the law marine and law merchant, unless where those laws are controlled by the statute law of the realm or by the authority of the municipal courts, which unquestionably possess a superintending power, and might restrain that court, should it overstep the just limits of its jurisdiction. The Neptune, 3 Hagg. Adm. 129, 136. See "Prohibitions," 3 Bl. Comm. 112; Curt. Merch. Seam. 344; Zane v. The President [Case No. 18,201]; 6 Bane, Abr. 350, "Prohibitions." Except in prize admiralty jurisdiction, these powers must extend or contract as "authorized usage and established authority" require, but not go beyond these, as it is a suspected jurisdiction, not being exercised with juries. 2 Hagg. Adm. 55. In fine, then, according to such views, the maritime laws of England, in force or existing at our Revolution, must be the chief guide. Few admiralty decisions were then reported, and we must go to common law courts for cases and rules, as to them, when in collision. Gardner v. The New Jersey [Case No. 5,233]; Thompson v. The Catharina [Id. 13,949]. Next the Roman and civil law, where no English cases or statutes are to be found. Walton v. The Neptune [Id. 17,135]. We must include in English, the laws of Oleron, &c., except as by statute overruled and disused in case of punishments harsh and barbarous. Walton v. The Neptune [supra]; Com. Dig. "Admiralty," E. 112; Percival v. Hickey, 18 Johns. 257, 292.

Courts of admiralty do not proceed according to the law of nations, except in cases of prize (18 Johns. 271, arg.); or unless suits are brought in admiralty under the law of nations, on the instance side of the court (18 Johns. 279, arg.; Doug. 648). There if the common law is resorted to for a definition or principles, it covers the law of nations, as whatever is penal by the law of nations is by the common law. [U. S. v. Smith] 5 Wheat. [18 U. S.] 176, note.

But to show still further uncertainties in the admiralty law, if adopted en masse as to crimes, some others, in the teeth of all this, hold, that the decisions of the common law courts in England, restraining and limiting the admiralty jurisdiction, though well settled before A. D. 1776, are not to be respected and enforced here. The Jerusalem [Case No. 7,294]; Ex parte Lewis [Id. 8,310]; Plummer v. Webb [Id. 11,233]. Those who hold these doctrines, and go to ages before 13 Rich. II., and to the continent of Europe for guides on points well settled in England by statutes and decisions before our Revolution, make every thing vague and afloat on a sea of uncertainty.

If we go to those early ages, to the birthplace of admiralty law in the Mediterranean, where consular courts may have preceded those called admiralty, and where those of the "fisc" may have embraced some admiralty as well as revenue powers, and where under different nations, different forms of government, and in different advances of civilization, different punishments and crimes and rules of admiralty law clearly did prevail on many points, which are we to be governed by? If we were to take the admiralty law as in force here about crimes, and "cognizable under the authority of the United States" by this court, and as it existed elsewhere than in England, or here at the Revolution, which is insisted on in this case as in many others ([Waring v. Clarke] 5 How. [46 U. S.] 441, and cases cited), all would be uncertain, not only on this, but still other accounts. In Holland, the care of mounds and dikes was confided to the admiralty; in Denmark and Sweden, of the marine; in England, of the navy; in France, of the fisheries. Stevens v. The Sandwich [supra]. It was of little consequence, comparatively, on the Continent, to preserve any settled lines between the admiralty and other courts, as all of them followed the civil law, and had no trials by jury. But when an attempt was made to transfer admiralty courts and powers to England, in which the common law and not the civil prevailed, and the barons, as in Magna Charta, avowed that they were unwilling the laws of England should be changed, nolumus leges Angliæ mutari quæ hujuscunque usitatæ sunt et approbatæ, it soon became important, to protect themselves in the enjoyment of the common law and of the trial by jury, to limit admiralty jurisdiction as was done by 13 and 15 Rich. II., and again, as further modified, in 28 Hen. VIII. It is just as important in this country as in England to discriminate between what really belongs to the admiralty system and courts as admiralty, and what not, and what has of late been conferred on them by statute, which did not belong to them on mere admiralty principles. Indeed it is more important here on account of state laws and state rights; because in the last, as in other things not theirs, not belonging to courts of admiralty at our Revolution, the trial of jury is still a right of the people, and the course of the common law in evidence and a court composed of more than one judge, and a trial by neighbors in their own state tribunals and by their own laws, rather than at a distance and by a different code.

Finally, these conflicts and uncertainties as to what belonged to the admiralty as such, even in civil cases, is one of the strongest reasons for not adopting by a forced construction merely of the constitution, under the act of 1789, the still more vague and doubtful code of admiralty as to crimes.

But there are stronger objections to the idea that our fathers intended by the act of 1789 to confer on this court a cognizance of all the admiralty crimes that existed in England or on the continent in the fourteenth century. A brief reference to the establishment and curtailment of the admiralty power in England, will demonstrate this. The admiralty court was considered by the people of England as an intruder from abroad, not tolerated in its large claims for a single half century, and more and more obnoxious here as well as in England, to the very moment of the Revolution; and hence its powers were not likely to be extended or enlarged here, or hastily adopted and enforced as to crimes. Even the word "admiral" or "admiralty," however long existing in France, or Turkey, or the Mediterranean, or in Arabia ([U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 106, note), appears in the English language but seldom before the fourteenth century, and then Edward III. first organized the admiralty court as a court. Note to [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 113; 2 Bl. Comm. 64, 69; Bac. Abr. "Court of Admiralty." All the records and commissions before King John, if any existed, are said to be lost. Com. Dig. "Admiralty Court"; Selden, Mare Clausum, bk. 2, c. 14. But it is very probable that the whole regular establishment of the admiralty did not exist two generations before 13 and 15 of Rich. II., the immediate successor of Edward III., limited and checked by the parliament, as it deprived the barons of some privileges as to wrecks, and introduced new laws, as the civil, and new modes of trial, as not by jury, and new kinds of evidence, by forced confession or two witnesses. See 28 Hen. VIII.

The practice before Richard II. had been for admiralty without juries, certainly in contracts, and by rules of the civil law to extend jurisdiction so far, that more than half of the commercial jurisprudence of the realm was absorbed in it. [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 616 (Johnson, J.). Its power was not perhaps so much an usurpation on what was practised in other courts on the continent, all of whose tribunals were governed chiefly by the civil law and without juries, and hence magnifying and enlarging admiralty power, did not encroach on the rights of parties there and rules of decision, and on judicatories governed by different laws. But in England, it was a deep and sudden inroad on the former laws of the realm and rights of the people, and was strenuously resisted. The Conqueror was regarded in the eleventh century as prostrating English liberties (Thompson on Magna Charta, p. 1), and one of the new instruments for it, under his successors, was the court of admiralty. One of the great engines by the barons and the people, to protect themselves, was the first charter about the year 1100, under Henry I., and again the great charter, towards the close of that century, under King John, and in which, in article 25th, it was expressly guaranteed, that thereafter persons be tried "according to the judgment of their peers

in the king's courts." Thompson's Charter, p. 54, and also p. 55, art. 29. And after the continued breaches of these charters so as to require from thirty to forty compulsory renewals and confirmations of them, a further resort was had to acts of parliament of a more stringent and precise character against the encroachments by the admiralty courts. The nature as well as cause of the curtailment then made of its general claims as to criminal jurisdiction, is no where so well embodied as in the terse and pointed language of the act of parliament itself (13 Rich. II.): "Chapter 5. What things the admiral and his deputy shall meddle. Item.—Forasmuch as a great and common clamor and complaint hath been oftentimes made before this time and yet is, for that the admirals and their deputies hold their session within divers places of this realm as well within franchise as without, accroaching to them greater authority than belonged to their office, in prejudice of our lord the king and the common law of the realm, and in diminishing of divers franchises and in destruction and impoverishing of the common people, it is accorded and assented, that the admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble prince, King Edward, grandfather of our lord the king that now is." 1 Stat. 385, Ruffhead. To remove any evasions by the general expressions here used of the realm or the sea, this was followed in two years by another statute (title 15, Rich. II. 1391): "In what places the admiral's jurisdiction doth lie." There had been complaints of his encroachments and injuries to king and cities, and is herewith "established that all manner of contracts, places and all other things rising within the bodies of the counties as well by land as by water, and also of wreck of sea, the admiral's court shall have no manner of cognizance, power nor jurisdiction," but shall be tried "by the laws of the land." "Nevertheless of the death of a man and of a mayhem done in great ships being and hovering in the main stream of great rivers only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers the admiral shall have cognizance." This. it will be seen, first limited the criminal as well as civil jurisdiction to acts not done within the body of a county, whether on land or water, except in great ships on great rivers, murder and mayhem, and thus excluded the present case. This is still the law in respect to crimes, in England. Co. Litt. 260; 2 Browne, Adm. & Civ. Law, 487; De Lovio v. Boit [Case No. 3,776]; La Caux v. Eden, Doug. 594; 4 Coke, 137. If the exception there, "beneath," that is, "below" the bridges, used the word "pountz," in Norman French, which meant points or capes of the land and not "pons," bridges, as some contend (Owen, 122; [Talbot v. Three Brigs] 1 Dall. [1 U. S.] 106, note; 3 Rowe, Hist. E. L. 198, note), then the places below them were deemed a species of haven outside of the county, and was in keeping with the rest of the act. But no similar provision exists in our legislation about crimes, and if it enlarged admiralty power any in England, we have in this respect shown a disposition to limit or narrow it more than even in 13 Rich. II.

In the struggles of the two following centuries, further curtailments rather than enlargements took place in England in respect to crimes. Hence, after passing first 13 and then 15 Rich. II., throwing the common law jurisdiction over most offences, instead of admiralty, and especially within the body of counties, though on navigable water, next came 28 Hen. VIII., bringing under the cognizance of common law judges in part, and of juries and of common law principles, all the crimes before left for trial in the admiralty courts, and committed even on the high seas and without the body of a county, 2 Browne, Adm. & Civ. Law, 458; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76, 115, note. See the whole statute in 4 Pick. St. 441, and interesting matters connected with it. 3 Inst. 111; 6 Dane, Abr. 350; Bains v. The James & Catherine [Case No. 756]. It was under this statute that the notorious Captain Kidd was tried at the Old Bailey in 1701, for offences committed in India and elsewhere, charged to be "in admiralty jurisdiction," and by a commission, partly of common law judges, "to execute the office of lord high admiral." 14 How. State Tr. 230, 297. It is said in some books (see cases before cited, and Hall's Prac. XVII. Pref.) that these two statutes do not extend to the colonies in terms. This is true, because these colonies did not then exist. And in Stevens v. The Sandwich [Case No. 13,409], Judge Winchester thinks those statutes, as construed in England, did not apply here. So Steele v. Thacher [Id. 13,348], and De Lovio v. Boit [Id. 3,776]. But in all these, the remarks concerning them are in connection with contracts and not crimes. Our fathers had grown up under those statutes, were attached to their principles, and that of 28 Hen. VIII. came here so, and continued so, as regards crimes. See fully [Waring v. Clarke] 5 How. [46 U. S.] 441. Why not then take admiralty law as in England, at our Revolution, and not as before Rich II., as respects crimes, except as changed in England in the form of trial before our Revolution, by 28th Hen. VIII.? All these statutes, when enacted, extended to all Englishmen, English rights and English liberties, and they have been carried with them, when emigrating to every quarter of the globe as their birthright. All such statutes, as well as the common law, when not inapplicable to our condition (Hal-

sey v. Fairbanks [Case No. 5,964]), were insisted on as a part of our colonial and inestimable privileges. See the case of Waring v. Clarke, 5 How. [46 U. S.] 441, and cases cited there, and Mayo v. Wilson, 1 N. H. 53, 58; Houghton v. Page, 2 N. H. 42; State v. Rollins, 8 N. H. 550; 1 Story, Const. 140, note; [Wheaton v. Peters] 8 Pet. [33 U. S.] 688. They were conformed to in most of the colonies, and their vice admiralty courts, as regards the limits of counties, the common law and juries as to crimes committed within them, till the Revolution, and even to the adoption of the constitution, so far as any traces of such trials can be found here. [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 638, semb.; Bains v. The James & Catherine [Case No. 756]. And crimes never appear in our colonial existence, to have been tried here in admiralty courts, or on admiralty principles, and by the civil law in force there, without juries, except under two express statutes, under Wm. III. and Geo. I., passed to tyrannize over the colonies, crimes were sometimes attempted to be tried by commissioners in vice admiralty courts without a jury. In such a case, in 1769, that court held it had the power to try in Massachusetts a seaman, who had killed a lieutenant for attempting to impress him. But under a vehement public indignation, he was acquitted. Hutch. Hist. of Mass. Bay, p. 236. The admiralty, likewise, was none the less liked by our fathers, because it was one of the instruments used at home, as well as here, to enforce impressments. Com. Dig. "Admiralty, G." Beside this, by 7 and 8 Wm. III. the admiralty courts were made the instruments to punish violations of the laws of trade and navigation in the colonies, and the appointment of their judges were taken by the crown from the lord high admiral (3 Hagg. Adm. 279), and penalties were prosecuted there, and our fathers stripped of jury trials in such cases, and subjected to vexatious forms of proof, the burthen being flung on the claimants in case of seizures, rather than the government, and the informer shielded from costs.

This was resented no where more highly than in Massachusetts, and instead of being acquiesced in gradually, was resisted till the Revolution itself. Thus the Massachusetts house of representatives, in the preliminary contest some years before the Revolution, passed the following resolve (State Papers Mass. p. 51, 1768–1770): "(13) Resolved, that the extension of the powers of the court of admiralty within this province, is a most violent infraction of the right of trials by juries; a right which this house, upon the principles of their British ancestors, hold most dear and sacred; it being the only security of the lives, liberties, and properties of his majesty's subjects here." See Steele v. Thacher [Case No. 13,348].

A volume of similar expressions of censure on the admiralty encroachments here on jury trials and other rights of the colonies, might be presented. In the old congress, in 1774, it was declared to be a special and great grievance to be tried in admiralty for acts "arising within the body of a county." Bains v. The James & Catherine [supra]. In the Declaration of Independence, too, one grievance was "for depriving us in many cases of the benefit of trial by jury." See more fully on this, Waring v. Clarke, 5 How. [46 U. S.] 441 (opinion of the minority). Beside what is stated there, it is not a little curious that our forefathers, in only three years after landing at Plymouth Rock, "ordained, 17th December, 1623, by the court then held, that all criminal facts, and also all matters of trespass and debts between man and man should be tried by the verdict of twelve honest men, to be impannelled by authority in the form of a jury on their oaths." Russell's Guide to Plymouth, 169, note. It is shown fully in [Waring v. Clarke] 5 How. [46 U. S.] 441, how tenaciously our fathers insisted that they brought with, and continued in force in the colonies, all laws and rights favorable to the subject, and as to them were stern as the barons of old, in Magna Charta, against changes and encroachments. So, unless by positive statutes at home, admiralty power continued here unenlarged, and rather restricted from what it then was in England, than widened, as many have conjectured. Probably the admiralty in England submitted at first to curtailment with more grace, as the lord high admiral, whose "deputy" the judge in admiralty is (2 Browne, Civ. & Adm. Law, 457), was still allowed to hold naval courts martial in fleets and ships, for trying all naval offences, and thus keeping up a police, and preserving the public peace, not only in ships of war, but on the great highway of nations. Id. 487. And the odium attached to capital trials and punishments by courts martial without a jury, would have been such as tending to abolish them, if the parties had not by the terms of enlistment voluntarily stipulated for such trials by military peers, and the exigencies of war did not often render their speedy and summary mode of procedure almost indispensable.

In the mutiny act of 22 Geo. II., a special proviso is introduced, that the powers of naval courts martial shall not extend to any matters still left to admiralty jurisdiction. 1 McArthur, "Courts Martial," 174; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 360, note. And an additional reason, corroborating all this, is, that the admiralty court had not for two centuries in England as an admiralty court, but only through a commission, including other judges and a trial by jury, had any jurisdiction over felonies; and it was doubted whether it had any over misdemeanors at all. Indeed, another strong illustration of the strength of public sentiment in England against trials in the admiralty for any offences whatever, is, that though 28 Hen.

VIII. is in terms relating, not to misdemeanors, but only felonies, yet since its passage, no crimes whatever, whether misdemeanors or felonies, are tried in the court of admiralty by the judge of admiralty alone; but they are all tried by a jury, and all prosecuted in the courts of common law or under a commission, or under special statutes. 2 Browne, Civ. & Adm. Law, No. 3 App. 519; 2 Chit. Bl.; Corfield v. Coryell [Case No. 3,230]. In truth, the better opinion is, that admiralty courts, at the time our constitution was adopted, did not punish misdemeanors; and hence there must be an act of congress to punish such misdemeanors, or no jurisdiction over them exists in the circuit courts. Corfield v. Coryell [supra].

In accordance with this view, by 29 Geo. III., it was enacted, that all other offences than felonies, committed on the high seas, be tried by a commission as by 28 Hen. VIII. Russ. & R. 1, note. And so far from there being any disposition evinced here to depart from such restraints, that the framers of the constitution, in giving congress a power to define "piracies and felonies committed on the nigh seas," undoubtedly meant to go as far as had been gone by 28 Hen. VIII., and cover all offences tried in the admiralty since then, and leave nothing to loose and general construction, as to what was and what was not an offence merely by admiralty law. They meant further, by the 4th and 6th amendments of the constitution, to secure the use of a grand jury in all cases of crimes formerly tried otherwise in admiralty, and a "trial by an impartial jury," and by witnesses face to face. 1 Tr. Bl. 72, 73. And the legislation since (Bains v. The James & Catherine [Case No. 756]), from the start to the present moment, has corresponded by saying, in almost every crime committed on water, that to give the courts of the United States jurisdiction over them, they must, as by 15 Rich. II., be committed out of the body of a county, or, in other words, "out of the jurisdiction of any state." They do not except even those in great ships on the great rivers below the bridges, if within any part of a state.

It is doubtful whether many of the framers of the constitution thought of any criminal jurisdiction in extending judicial powers to cases in admiralty. It was "civil cases." It was those that belonged to commerce. It was a separate grant to define and punish piracies and felonies committed on the high seas, and probably thinking that power had not been embraced in giving authority over cases in admiralty.

When congress came to legislate about cases in admiralty, it did, in order to prevent any doubt, confer on the admiralty court jurisdiction over civil cases only. And it gave cognizance of crimes in admiralty neither to that court nor any other, as over crimes in admiralty, but gave cognizance of several specified offences to the district court, and of several to this court. It is most important to have as much as possible granted by congress under the power to regulate commerce, &c., rather than by admiralty merely, as in the last case no jury is allowed by the constitution, but in others one is, and the trial is also by the state laws, or those of congress, and not by a foreign code. The whole leaning of this court, therefore, in case of any doubt, should be towards obtaining jurisdiction over commercial questions or crimes against navigation and trade by special legislation of congress, rather than by broad constructions of any grants of mere admiralty power. Because there a jury can be used, under the power to regulate commerce. The only prominent attempt to revive here the ancient admiralty jurisdiction over crimes by construction, when committed on the water, within the jurisdiction of a state, has been in U. S. v. Coolidge [Case No. 14,857]. This has been overruled in [U. S. v. Coolidge], 1 Wheat. [14 U. S.] 415. Some others have been noticed as to revenue seizures and torts, in the case of the Waring v. Clarke, 5 How. [46 U. S.] 441. And though some have supposed that the word "maritime," added in the constitution after the word "admiralty," might be construed as extending the present meaning of the word "admiralty" (De Lovio v. Boit [Case No. 3,776]; 3 Story, Const. 527, and note to [M'Clung v. Ross] 5 Wheat. [18 U. S.] 113), yet it would seem to me to raise an implication that it was restrictive, and if any thing had got into admiralty which was not strictly maritime, or happening on the seas, (mare) it was not to be embraced, as the cases must be as admiralty and maritime jurisdiction, that is, of both, must be of things on the sea maritime as well as called admiralty. See, also [The Thomas Jefferson] 10 Wheat. [23 U. S.] 418, 429; [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175; Thackarey v. Farmer of Salem [Case No. 13,852]. At the utmost, "maritime" and "admiralty" courts are treated as the same, and the expression a plecnasm in Selden on Fleta, and Federalist, No. 8, p. 531. See, also, "Courts Maritime or Admiralty Courts," 3 Bl. Comm. 68, 106.

Again, in another view, the difference now is merely nominal between admiralty and maritime, since the admiralty court has ceased to be military. Stevens v. The Sandwich [Case No. 13,409], note. Hence maritime in the constitution may be to show that no military or naval power is granted in it, but only maritime; and thus, too, it is restrictive rather than enlarging. Now after all this, to suppose that our ancestors intended in any statute, like that of 1790 or 1789, unless their language was more clear and explicit to that effect, to grant a power to this court to try and punish every thing as an offence in particular places which was one in admiralty in England or on the Continent in the fourteenth century, though never since, or on the Continent in 1789, is presuming

against what was probable from the whole subject-matter, and the history of ourselves no less than our ancestors, both legal and political. Showing, then, that an act like this was prosecuted in admiralty in England, in the fourteenth century, is not enough to make it a crime now, unless such continued to be the law and usage there at the time of the adoption of our constitution.

The references have been very full by the counsel for the government to prove that the admiralty courts on the continent of Europe formerly, and in England before Richard II., exercised a power over such subjects. And it may not be disputable, that for a brief period, they did, if looking to the ancient commissions and inquisitions, and the usages in France and some parts of the Mediterranean. But the conflicts which quickly arose in respect to the exercise of this and other criminal jurisdiction by the admiralty court in England, led, as before seen, to the restraining statutes of 13 and 15 Rich. II. The struggle was afterwards only occasionally renewed, till it led to a still more restraining, and in some views, more important statute of 28 Hen. VIII., A. D. 1520, which took from the court of admiralty as such all important criminal jurisdiction, and devolved it on a commission, composed of judges at common law as well as in doctors' commons, and required all the trials of crimes to be by a jury. Hence, if congress, in the act of 1789, had expressly conferred on this court jurisdiction to try all criminal cases in admiralty as it did on the district court to try all civil ones, and had declared, that what was criminal by admiralty laws should be so considered and punished by this court, this would have made a stronger case. [U. S. v. Smith] 5 Wheat. [18 U. S.] 153. But still, doubt would exist, whether the acts of the respondents amounted to an offence in admiralty. Certainly they would not, if the correct test as to such an offence be what was understood to be one in England or here when the constitution was adopted, however little doubt might exist if we looked to what was a crime in admiralty before 13 and 15 Rich. II. in England, or since, on the continent of Europe. This will be seen in what has already been stated in respect to the boundary of admiralty jurisdiction, before and after those celebrated curbs on its encroachments.

But beyond this, to render it very improbable that many matters, before treated as crimes in admiralty, continued to be so treated, many will doubtless remember the long struggle between the court of admiralty and courts of common law in the thirteenth and fourteenth centuries, for jurisdiction over offences as well as civil cases, on navigable waters within the body of a county, and which led to the restraining statutes of Rich. II., and was one with many other quarrels, which terminated in the hanging of some of the judges on both sides. The Chief Justice Tresilian seems to have headed one party, and Arundel, the lord high admiral, the other. 1 Henry, Hist. Eng. 258, 263; 1 Harg. St. Tr. 1.

After such a warning, the admiralty court would not be very likely to encroach again soon into the bodies of counties, and punish as crimes in admiralty there what the common law courts and parliament itself by the restraining statutes of Richard considered as offences to be tried only in the latter tribunals, and which it was afterwards made penal to prosecute in admiralty. Though some of the old commissions to the admirals may have retained their old forms, as to an inquiry into nuisances by seines and weirs for fishing, and rubbish, obstructing navigation, as quoted by Sir Lionel Jenkins and others. See Zouch, Adm. 92; Clerke, Prac. 99; 7th Article of the Practice of the Court of Admiralty, in the Black Book; Bract. p. 12, § 6; Spel. Relics Adm. 286; Constable's Case, 5 Coke, 106; 2 Hale, P. C. 11–20; Rich. I.; Edw. III.; Rich. II.; Hen. VIII. (Ruffhead's Ed. pp. 6, 260, 329, 424, 448); 2 Browne, Civ. & Adm. Law, 463, 465, 474. Yet in many cases the inquiries were limited to places below or beneath the lowest bridges. See before, and (Zouch, Adm. 92), usually "below" them, or only up to them from the sea (Lex Mercatoria, p. 88; 2 Hale, P. C. 18). They seldom if ever extended into the body of a county, unless sometimes on salt water when the tide was in. 2 Browne, Civ. & Adm. Law, 30; Bac. Abr. "Court of Admiralty"; Constable's Case, 5 Coke, 106. And the common law courts had concurrent jurisdiction as to those crimes in rivers. 2 Hale, P. C. 16, 54; 1 Starkie, 16. Or unless the collection of gravel or rubbish actually obstructed navigation or periled ships and life in great rivers in fresh or "sweet" waters towards the sea below the bridges (Clerke, Prac. p. 119); and this was all before 15 Rich. II., or violated that statute, if the rivers were in the body of the county. See Black Book Adm. c. 34, p. 109. See, also, the Inquisition of Queensboro', in Hall, Adm. Prac. 20, Pref. See the articles drawn up under James I., as to the power of the court of admiralty. Pref. of Hall, Adm. Prac. 24; 2 Browne, Civ. & Adm. Law, 79; 2 Hale, P. C. 16, 118; Dunl. Adm. Prac. 7. It is true that the Inquisition of Queensboro' was in Edward III. 49 (A. D. 1376.) Zouch, Adm. 34; 4 Partesue Col. 200. But this was before 15 Rich. II., and centuries before our Revolution. As before remarked, Sir Lionel Jenkins also attempted to revive the ancient jurisdiction, and in his charges went nearly as far as before Rich. II. He says, inquire of "all such as have cast ballast, rubbish or filth into our navigable rivers below the bridges next the sea," or stones for lighters to fasten to, and not laid a yard deep in the ground, so harbors not become "choaked up." Curtis, Adm. Dig. 341, Ap. 530, 532. Strictly speaking, he might mean to confine these inquiries to the sea and below bridges,

as he says, "all nuisances and abuses upon our salt waters and navigable rivers beneath those bridges which are next the sea" (page 540), and hence not like the present case. But if he did not mean to confine himself to the high seas, or to the era before Rich. II., as to offences, his views are a departure from express statutes and the actual jurisdiction exercised in admiralty as well as common law. [Ramsey v. Allegre] 12 Wheat. [25 U. S.] 635 (Johnson, J.). If he meant to go as far as the words in the ancient and obsolete forms of commissions, as shown in the Black Book of Admiralty, in Clerke's Practice, he meant to violate express acts of parliament, unless keeping below the bridges. The old inquest or inquiry run (article 14, Clerke, Prac. translated into Latin) into "alias causas quascunque super mare, et infra quoscunque rivos, aquas seu rivulos maris," but takes care to add, "usque ad primum pontem emergentes terminare." So in a note to the 14th article in felonies, "felonias spoliationes," the power run to sweet or fresh waters, "aquis dulcibus" as well as "super mare;" but it was only in them "ubi dominus magnus admirallus Angliæ habet aut habere consuevit auctoritatem sive jurisdictionem," i. e. below the first bridges in cases of murder and mayhem. The same attempt was made, by construction of old phrases and otherwise, to depart from the true limits of admiralty jurisdiction, that is, "the high seas," in Massachusetts, when a colony, and was resisted in a remonstrance by the house of representatives, in 1770, as first in the list of their grievances, and by a committee, of which John Hancock and Samuel Adams were members. "We have seen of late innumerable encroachments on our charter; courts of admiralty, extended from the high seas, where, by the compact in the charter, they are confined, to numberless important causes upon land;" followed by a list of other grievances. Mass. State Papers, p. 47.

The modern commission or patent to the judge of admiralty includes several things as of old, but not now by law in his power. 1 Hagg. Adm. 312. Indeed, a great part of the powers given by the terms of the commission are totally inoperative. Id. See, also, The Little Joe, Stew. Vice. Adm. 407. Again, by the resolutions of the judges (Feb. 4, 1632), an attempt was made to revive the ancient jurisdiction of the admiralty concerning obstructions in rivers. This was placed, not on any ground except to try mayhem and murders there in great vessels below the bridges, but as to the admiral, it was said, that "by exposition and equity thereof, he may inquire of and redress all annoyances and obstructions in those rivers that are an impediment to navigation or passage to or from the sea," and not be prohibited. See Dunl. Adm. Prac. 14; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 367, note; Hall, Adm. Prac. 24, 25, Pref. But beside this being probably below only, and not at or above the bridges, those resolutions were not laws, could not abrogate the laws, and were disavowed afterwards as assented to by several of the judges. Hall, Adm. Prac. 26, Pref.; T. Raym. 3; [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 617; Clinton v. The Hannah [Case No. 2,898.] They do not appear ever in this respect to have been practised on. Bac. Abr. "Court of Admiralty, A." Again, this was an exception in a statute of only murder and mayhem in great ships; and it would be most extraordinary to consider an exception expressed, as a good reason for making other exceptions not expressed. On the contrary, the sound legal maxim is expressio unius est exclusio alterius. So of many other matters cited in old books as admiralty powers. They were such as are now obsolete since Rich. II., and with the growth of cities and distribution of such powers among municipal officers and other courts. Thus, when an inquiry in admiralty was ordered as to the anchorage of vessels and their injury to each other in port (Zouch, Adm. p. 97), it related to a maritime matter, and was before Rich. II., and hence took place in admiralty. So as to the demeanor of seamen and ferrymen, and to repress their uncivil manners, it related to maritime men, and was previous to that statute., Zouch, Adm. 91; Lex Mercat. p. 77.

The admiral, at first, merely governed and punished seamen by a sort of naval rather than commercial code. After the navy was separated, and merely protected the mercantile marine, he continued to settle disputes as to matters happening any where on the sea flood, out of the body of counties, as the county magistrates and juries did not exist there, and it seemed to be the appropriate theatre of his power. 2 Browne, Civ. & Adm. Law, 30. Though restrained within the counties, he was powerful without, and the claim of the king to the four narrow seas, and his ancient admiralty jurisdiction over them, were never relaxed. They were beyond the corpus comitatus. See Selden's Right and Domain of the Sea, "Ownership of the Sea," 384; Hale, De Portibus Maris, pp. 85, 86. All nations were in them for a time made to "veil the bonnet." 2 Browne, Civ. & Adm. Law, 469, 470.

Shutting the admiralty court, then out of all criminal jurisdiction since 13 and 15 Rich. II., and certainly since Hen. VIII., in England, as to matters happening within a county, how could the framers of the constitution or the authors of the act of 1789 mean to use language broad enough to make the present case "cognizable" in admiralty, a case happening several miles within a county? I will not undertake to say, that some of the members of the supreme court, in the recent case [Waring v. Clarke] 5 How. [46 U. S.] 441, have not gone far enough to make the admiralty law, as existing in England in the most remote ages, and as on the continent in more modern times, the true rule for deciding what are or are not within

the jurisdiction of admiralty courts here in certain civil cases. The decision will speak for itself. But believing that a majority have not said so, if any of them mean so as to crimes, I do not feel justified in regarding as guides in this instance, any thing which was not deemed proper matter for admiralty cognizance in England at our Revolution, unless made so here by colonial changes or made so since by our constitution and acts of congress. See more fully on this, my dissenting opinion, and the cases there cited.

Look a moment to the facts in the present indictment. Though the acts complained of were committed on salt water, within the ebb and flow of the tide, and where the river was navigable, yet the obstruction is not below, but above, and at the bridge, and is within the body of the county. Where is the instance in England of treating one of the bridges on the great rivers as itself a nuisance, either since or before Rich. II.? But there is no doubt that such an act unauthorized, if an obstruction to navigation, whether by throwing in rubbish or timber, would be a nuisance at common law, and punishable not only there, but in most of the state courts for the trial of crimes and questions at law, rather than of equity or admiralty. See cases, post. As strong proof that the admiralty has not for many centuries punished any nuisances, all the cases reported of prosecutions for nuisances are either in common law courts or in the exchequer by a bill for an injunction. None are found in admiralty, though Sir Lionel Jenkins (1 Zouch, Adm. 88, 96) claimed the power in ports and navigable rivers. Com. Dig. "Admiralty, E." 13. But where is the case of its undisputed exercise in admiralty since Rich. II.? Where at the time of our Revolution? "The water, banks, &c., within ports and havens, are within the power of the commission of sewers." Com. Dig. "Navigation, D." Cal. 38. A penalty for throwing ballast into them is imposed by 19 Geo. II., and is a fine collected before a magistrate and not in admiralty. Id.

The city of London has, by patent or grant, charge of the Thames, as well as the soil under it, and assesses taxes to repair wharves and remove rubbish. Calth. Cas. pp. 122, 123. We have, also, already shown, that the admiralty courts in England punished no misdemeanors when our Revolution took place; and that all their criminal jurisdiction was probably intended by the framers of the constitution to be parcelled out, and indeed conferred on congress, to grant to its courts under other heads, and not as mere admiralty offences.

But to consider that an offence in admiralty, which was committed within a port, within the fauces terræ, the promontories of it, within the jurisdiction of a state, within the body of a county, within the reach of state laws and the state courts, not on board a public ship, or in a fort or lighthouse, or navy-yard under the exclusive jurisdiction of the United States, not in any ship whatever; and yet, in this age or that of the framers of the constitution, to be regarded as clearly within the cognizance of an admiralty court merely as such, and having no aid from specific acts of congress otherwise reaching and punishing the act as injurious to commerce, or to some other subject like revenue or navigation, placed under its regulation and protection; that, I think, would be a pretty bold stride, whatever may have been the law in England at the time of the Crusades, or in the Mediterranean, where the pliable principles of the civil law, rather than those sturdy and jealous ones of the common law, predominate. Seeing all this difficulty as to what powers of admiralty, at what era and in what country, are in force here, and the doubts even in some civil cases not yet removed ([Waring v. Clarke] 5 How. [46 U. S.] 441), it is perhaps fortunate, that congress adopted a different course as to criminal cases, and instead of conferring all power over them in the gross on this or any other court, merely granted it in detail, in particular cases, from time to time, as the public exigencies and obvious expediency required congress to act. In this way congress did not disturb the colonial prejudices against such a broad jurisdiction in admiralty as we and our ancestors had for so many centuries been opposing, and especially in criminal matters. In this way, also, the prejudices in favor of trials in the common law courts, or courts acting on their law side, and on common law principles, and in common law forms, were acquiesced in, and left to the tribunals in each state, without any action on them by congress, or the offences specially defined by acts of congress, and the jurisdiction over them specially given to the circuit court, and given to it, not as a court of admiralty, but as a law court. In this way they avoided collision with the states, the state courts, state jealousies, state jurisdiction and state rights; selecting only for offences acts committed without state jurisdiction, or on the high seas, or in places expressly ceded to the United States.

Having shown, from this cursory view of the history of the curtailment of admiralty jurisdiction in England, that the construction claimed by the prosecution as to what is "cognizable under the authority of the United States," in the act of 1789, could not, on any fair grounds, be intended by its makers, as it thus would become necessary to ride back, and ride over all changes in admiralty since the beginning of the fourteenth century, and having shown that a transaction like this, an obstruction in any waters within a county, has not for centuries been deemed a crime cognizable in admiralty in England or in this country, however exceptionable and punishable it once was in admiralty, or may at times be now in the courts of common law, I might stop as to this. But it is very doubtful whether the place of this offence, even were the act

a crime in some places and cognizable in admiralty, was within the criminal jurisdiction of admiralty courts in England or here at the time of the Revolution. An act may be a crime in one place against admiralty law, which is not, if done in another place. This act was not done on the high seas, nor out of the body of a county, though within tide water. Locality in crimes, as in torts, has ever been considered the chief test of admiralty jurisdiction. The very acts of congress which punish crimes connected with maritime affairs, usually require in express terms, that they shall have been committed out "of the jurisdiction of a state;" but the bridge and the nuisance, if any in this case, are confessedly within the body of a county; and though over tide water, are not on the high seas, nor on a narrow arm of the sea or harbor without the boundaries of a county.

This question is in some aspects like the last, but in others is different, and fortifies it, because developing the local boundaries of all criminal jurisdiction in admiralty, whether for nuisances in public waters, or other offences to be without the locus in quo here. I shall, under this head, say nothing of the character and locality of this particular offence as charged in the indictment, except by showing, that all jurisdiction of all crimes in admiralty, with a single exception before named, was in England, both in 1776 and 1789, excluded from a place like this. The general rule is, that the admiralty jurisdiction in crimes, after 15 Rich. II., was only on the sea without the body of a county. Com. Dig. "Admiralty, E," 5, note; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 371; 2 Browne, Adm. & Civ. Law, 465, 475; Hall, Adm. Prac. 19; U. S. v. Grush [Case No. 15,265]. Super mare altum, Com. Dig. "Admiralty E." 1; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76; [Handly v. Anthony] Id. 379; [Kendall v. U. S.] 12 Wheat. [25 U. S.] 623, 627 (Johnson, J.); Hale, Hist. Com. Law, p. 35, c. 2; 3 Story, Comm. p. 534. That this included the sea thus situated, to high water mark, though some say only to low water mark. U. S. v. Kessler [Case No. 15,528]; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 336; 3 Inst. 113; U. S. v. Smith [Case No. 16,337]; U. S. v. Hamilton [Id. 15,290]; Steele v. Thacher [Id. 13,348]. See cases above. That it embraced even ports, havens, and creeks, if so situated without the county. Montgomery v. Henry, 1 Dall. [1 U. S.] 49. There they are considered "the high sea" or "main sea," and so also when without the capes. U. S. v. Grush [supra]; 3 Rob. Adm. 336; Harg. Law Tracts, 88. But they are usually infra corpus comitatus, within the fauces terrae, landlocked, and then admiralty criminal jurisdiction ceases, and, of course, that of the United States founded on it. [U. S. v. Coombs] 12 Pet. [37 U. S.] 72; Com. Dig. "Navigation, K." and "Admiralty, E." 5; 4 Inst. 148; The Harriet [Case No. 6,099], 1 Bl. Comm. 110; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 99, 184; The Abby [Case No. 14]; 1 Hawk. P. C. c. 37, § 36; U. S. v. Grush [Case No. 15,268]; U. S. v. Robinson [Id. 16,176]; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 336. To show the application of this to the present facts, this is the law in the river Thames. Com. Dig. "Admiralty, F." 2; 4 Inst. 139; 1 Rolle, Abr. 539. And in other rivers, however salt or strong their tides [U. S. v. Bevans] 3 Wheat. [16 U. S.] 94. So in most roadsteads. 1 Rob. Adm. 233. But not so in an open roadstead in a foreign country. [U. S. v. Pirates] 5 Wheat. [18 U. S.] 200; The Liverpool Packet [Case No. 8,406], U. S. v. Ross [Id. 16,196]; U. S. v. Davis [Id. 14,932]. So an "arm of the sea" may be within a county as the mouths of many rivers are regarded in England. U. S. v. Grush [supra]. So most creeks are within the county. 10 Price, 401; Hale, De Port. Mar. 46–48. Hence a creek is said not to be a port or haven, or to have this privilege. Com. Dig. "Navigation, C."; Bac. Abr. "Courts of Admiralty." Certainly not, if fresh water or within the county. [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76, note. And it is hence, as hereafter explained, probably, that in the Blackbird Creek Case, Chief Justice Marshall says nothing of the dam across it violating the rights to go to any port of delivery, or to sail upwards to the highest ports. See post. The acts of congress concerning the fisheries, give a bounty when "employed at sea for the term of four months," and this has been construed to mean out of the ports and harbors of the seacoast. The Harriet [Case No. 6,099]. The space between capes of the main sea, or high seas, or ocean, is usually so wide, that one cannot see what is done across, and the coroner, sheriff or people not be able to see and know an act done. Ang. Tide Waters, Pref. xiii., and cases. In cases of doubt, the county acts, more especially if it has been the usage for it to act there. 2 East, P. C. 804; 6 Dane, Abr. 341, 346; 1 Com. Dig. "Admiralty, F." 2; Ang. Tide Waters, 300, 301; 4 Inst. 140. Such cases must arise often, as the state of the air would make a great difference as to the distance things could be seen distinctly. The Arabs in the north of Africa consider it a mile, when so far as not to be able to distinguish a man from a woman. The punishment of crimes, without such limits, congress may impart to such courts as are thought most proper. 4 Elliot, Deb. 290, 291; 1 Kent, Comm. 319; [U. S. v. Bevans] 3 Wheat. [16 U. S.] 356, arg. So if a crime be committed on the high seas, but in a foreign vessel, we have no jurisdiction of it. A gun fired, and killing, the act is done where the vessel is, on board of which occurs the killing. U. S. v. Davis [Case No. 14,932]; 1 Leach, Club. Cas. 432. That may be on the high seas, if outside, and the vessel is afloat, though the ground is bare there at low tide. If in a foreign vessel, we have no jurisdiction. U. S. v. Davis [Case No. 14,932].

It is, pro tanto, foreign territory. U. S. v. The Pirates, 5 Wheat. [18 U. S.] 197; U. S. v. Kessler [Case No. 15,528].

Piracy being an offence against the law of nations, as well as our own laws, may be punished here wherever committed, on the sea, if not in a vessel of some foreign power. U. S. v. Klintock, 5 Wheat. [18 U. S.] 152. A revolt, under the statute of April 30, 1790, need not be on the high seas, as the statute does not say in this crime it must be out of the jurisdiction of the state, or on the high seas, but only in some ship. U. S. v. Hamilton [Case No. 15,291]; 1 Bro. Laws, 113. But congress makes this a crime within the body of a county, not by its power over admiralty matters, as those matters in crimes do not arise within the county. It is rather by its power to regulate commerce, and punish offences committed in the prosecution of it and in vessels. This may be done on land as well as water in several cases, as congress governs the commerce between the states, often wholly on land. [Brown v. State of Maryland] 12 Wheat. [25 U. S.] 446. The revised act of March 3, 1835, punishes a revolt, if "on the high seas, and in their admiralty jurisdiction," but does not say, out of the limit of a county. 4 Bro. Laws, 776. Hence its meaning in this respect is to be settled, though in other cases the high seas have been held to be the unenclosed ocean. See before, U. S. v. Grush [Case No. 15,268]. Confining a captain on board an American ship, if in port, is punishable. U. S. v. Stevens [Case No. 16,394]. Yet it is not an admiralty case, but one under the power to regulate commerce.

I should have much confidence in this view as to the locality of crimes, in order to give admiralty jurisdiction over them; and that this indictment must fail on this account alone, if on no others, had it not been equally strong as to a like locality of maritime torts being necessary to give admiralty jurisdiction over them; and the supreme court recently, in [Waring v. Clarke] 5 How. [46 U. S.] 441, held that locality in the latter to confer such jurisdiction, need not be on the ocean or outside of a county. They held it might be any where on tide water, though two hundred miles in the interior of a state, and in the centre of one of its counties. To be sure, the decision is carefully confined to the case of collision between vessels, and does not in terms extend to other torts, or to contracts or crimes. But I must confess that my opinion is weakened in respect to this ground concerning crimes. And I abandon all analogies, which had before been relied on by me, on account of a like rule in torts generally. The cases in respect to them may be seen, however, in [Waring v. Clarke] 5 How. [46 U. S.] 441, collected in the dissenting opinion. So also may be seen there the reply as to any contrary reasoning or analogy derived from the locality of contracts, and of cases of seizures for breaches of the laws of revenue and trade on the water.

In other matters more than crimes, connected with admiralty jurisdiction, it may be important at times to discriminate between the sea and the high sea, a river navigable and not navigable, whether the tide ebbs and flows at a particular place or not, and whether jurisdiction does not extend for some purposes to other than our own vessels, beyond the seashore. But I apprehend, that in crimes, "the seas," or "the high seas," or "the ocean," mean much the same (6 Dane, Abr. 348), and that in other matters "the ebb and flow of tide," "the flood mark," or "the sea flood," were often much the same, though not always (De Lovio v. Boit [Case No. 3,776]). So when it becomes material to decide what is navigable or not, as in the act for revenue seizures on streams navigable from the sea by boats of ten tons burthen, the act of congress in this way itself virtually defines what is meant by the term navigable for that purpose. There may be many places, also, where the tide ebbs and flows, which are not navigable (Mayor of Lynn v. Turner, Cowp. 86); or if navigable, are not public (Id.; 5 Taunt. 86). They may be not public, though the tide ebbs and flows, if made navigable by expense of the owners, and the use by them has been exclusive. Miles v. Rose, Id. 705. But I shall not go into this inquiry, though an interesting one, it not being necessary to dispose of the present motion. Some of the leading cases on it are, Hooker v. Cummings, 20 Johns. 98; People v. Platt, 17 Johns. 195; 3 Caines, 319; 2 Conn. 481; 4 Burrows, 2162; Dav. Ir. K. B. 55; Ang. Tide Waters, 63, 91; Rex v. Smith, 2 Doug. 441; The Planter, 7 Pet. [32 U. S.] 343.

So, looking to foreigners and other purposes, the territorial limits of the United States extend a marine league from shore, a cannon shot. Vatt. Law Nat. bk. 1, c. 21; [Grant v. Naylor] 4 Cranch [8 U. S.] 234; Church v. Hubard, 2 Cranch [6 U. S.] 187, 234; The Ann [Case No. 397]; [U. S. v. Palmer] 3 Wheat. [16 U. S.] 630; Acts 1798, 1820; U. S. v. Kessler [Case No. 15,528]; Ang. Tide Waters, Pref. xii. Sometimes further it is said (U. S. v. Kessler [supra]) to keep foreigners from fighting and smuggling. The Apollo, 9 Wheat. [22 U. S.] 370; [U. S. v. Pirates] 5 Wheat. [18 U. S.] 201; Append. 123. But the details on this are not material to the present inquiries, and will not be pursued. The leading views on them may be seen in Soult v. L'Africaine [Case No. 13,179]; Jennings v. Carson's Ex'rs [Id. 7,281], note; 1 Azuni, Mar. Law, 195; 8 Geo. I. c. 12; 3 Hagg. Adm. 289.

A provision, making acts like those of the respondents a crime, and entrusting the trial of them to this court, not being found in the act of congress of 1789, in express words, nor the power being embraced in or under it,

by any clear reference to any admiralty code of any age or people, as meant to be adopted by it, nor being likely to be meant as included, from its vagueness, and the exclusion of an offence like this within a county, from the English admiralty code since Rich. II., and admiralty jurisdiction over offences generally not reaching a place like this in England, either in 1776 or 1789, it may next be asked, if this matter was acted on in admiralty in this country, while we were colonies, and has thus, by any implication connected with the act of 1789 and the constitution, become a crime? It seems to be contended, and perhaps ought to be conceded, that if the admiralty code in England had been departed from here, by any voluntary law, or general and uniform usage in this or other matters freely adopted, so as to be likely to be well known and recognized, at the time the constitution was adopted, such modification might be supposed to be adopted by implication. But such an usage on any point in any one of the thirteen colonies, not recognized or acted on in the residue of the thirteen, could not be regarded as thus operating in the minds of the framers of the constitution. This matter, however, has in all its ramifications been examined by me, so far as any means exist in relation to our colonial history, colonial reports, and colonial statutes, in the case of [Waring v. Clarke] 5 How. [46 U. S.] 441. And it will be only necessary to refer to these here, and to say, that in my opinion, notwithstanding the broadness of commissions, copied from old and obsolete forms, the doings under them prove clearly a very close conformity by the vice admiralty courts in the British colonies to the admiralty jurisdiction and principles at home, except where in one or two instances altered by express acts of parliament to harass and oppress them. And if the feelings prevalent here before the Revolution in respect to admiralty powers are evidence of what was meant in the constitution by "cases in admiralty," or in subsequent acts of congress, no doubt can exist, that a restriction rather than enlargement beyond the English practice, even as then existing, was desired, and the trial by jury meant to be more widely secured.

There is not a more striking illustration, that Massachusetts refused to tolerate or approve any of the enlargements and encroachments of admiralty jurisdiction, which in some respects were forced on them while colonies, by statutes at home, than the indignant remonstrances she so often put forth on the subject, emanating from some of her most intelligent patriots. See one specimen before given. This view would not prevent congress, under its power to regulate commerce, and allowing a trial by jury if desired, expressly to invest the district court or this court with jurisdiction over both torts and crimes within the body of a county on tide waters, as it has already invested it with jurisdiction in cases of seizures for breaches of the laws of trade and revenue. But this was never possessed in England by the court of admiralty. It belonged there to the exchequer, and was made an appurtenant here to the admiralty, both before and since the Revolution, because no court of exchequer existed here, and not because it ever was or ever can be in its nature an admiralty power, when the seizure is not only above the ocean and above tide water, but as far into the interior as a boat of ten tons burthen can be floated.. See [Waring v. Clarke] 5 How. [46 U. S.] 441. In a like manner, congress, under that power to regulate commerce, has conferred on the district court jurisdiction over maritime matters on the tideless lakes in our interior, but not as belonging to it by means of its admiralty jurisdiction, else this specific grant would have been unnecessary, the court before having cognizance of all civil cases in admiralty, and else the allowance given of a trial by jury would not have been in symmetry. And how much better it is that new powers should thus be conferred and doubtful ones invested in it with certainty, than to force them within it by construction only of grants not specifically embracing them, will be strikingly manifest, when if thus expressly conferred, the inestimable trial by jury exists, and the principles of evidence applied may generally be those of the common law; while in the other grant no trial by jury is allowed, certainly none in civil cases, and they are tried by a different code of law and evidence from what we and our fathers have been much accustomed. Many things look now as if belonging to the admiralty jurisdiction, which do not in modern times belong to it here or in England. Such are lighthouses. But they were granted to the Trinity House, and placed in their charge as early as Hen. VIII. Bac. Abr. "Court of Admiralty." So buoys and beacons, once in charge of the admiralty (1 Sid. 158), have not been of late, except by a patent or grant from parliament. And who ever dreamed here, that the expenditure of the vast sums which have been appropriated in this country for the improvements of rivers and harbors, and the removal of snags, and sawyers, and sand-bars, belonging to the care of the district courts as courts of admiralty in all civil cases? On the contrary, here and in England these have ever been matters of special legislation and general supervision, entirely under other legislative powers. McCulloch's Dict. "Buoys and Beacons." Though lighthouses and beacons have at times, under a special patent, been erected by the admiralty, the duties collected on them and the charge of them belonged to the Trinity House, long before the Revolution. See 8 Eliz.; 4 Inst. 149; Com. Dig. "Navigation, H. Beacon and T." 3.

The powers exercised here by the general government over commerce, and matters and waters connected with it, are not all of admiralty origin and character, but much wider.

So when congress erects lighthouses, and builds breakwaters and a navy, and goes far beyond the admiralty in England at the Revolution, in removing snags and sand-bars, and making moles and piers, and marine hospitals. Bac. Abr. "Court of Admiralty, B." Many of the offences connected with these are new and not of admiralty origin, and are within capes and headlands, and some within the body of counties, and on the land. In truth, with the power to regulate commerce, and carry on our foreign relations, and build forts, and navy-yards, and lighthouses, maintain a navy, &c., a code of criminal law has grown up connected with these powers and for their protection, which belongs to the whole matter, and not to admiralty alone. See post.

What they then were in England, and since have been till 1776 or 1789, are the guides as to what must now be understood as the extent of the criminal jurisdiction meant to be allowed to congress to confer on the courts of the United States, as mere admiralty powers, or as being, per se, admiralty powers. The learning and labor of the counsel for the government, as to earlier periods, have been interesting, and shed much light on the antiquity of different kinds of admiralty power. But the practices in such remote ages, and under governments so different from that of England, cannot control the present case, under the laws as existing when the constitution was adopted, with the modifications and additions since made by acts of congress. And as the growth of the country is developed, and national exigencies arise, the further exercise of its just powers will often be called for, entirely independent of any grants of admiralty jurisdiction, and leaving more and more doubtful what parts, if any, as to crimes, were ever meant to rest merely on those grants. Stanly v. Bank of North America, 4 Dall. [4 U. S.] 10, note. It is by no means certain, if the grant of admiralty jurisdiction had been omitted entirely in the constitution, that the other grants to regulate commerce, maintain a navy, declare war, and collect a revenue from imposts, and establish courts, &c., would not have enabled it to confer on those courts all the criminal jurisdiction, if not the civil, which they now possess, connected with maritime affairs. The admiralty code of criminal law was also one in some respects too bloody for us and this age, as for example, death to remove a buoy. Curt. Adm. Dig. 544; Jenkins' Works.

As the ground has been taken I shall next proceed to inquire briefly, if the acts complained of in this indictment are made punishable by the force of any other act of congress than that of 1789, either directly or by construction. In examining any other acts, we are met not only by the presumption, that congress would not mean to do indirectly or circuitously what ample reasons showed they would be inclined to do directly, and which they did not do directly, but by the impropriety of holding that to be an offence, and prosecuting it as such, which is so only by construction, or inference, or implication. The act chiefly relied on, as being violated indirectly by this obstruction, and rendering it illegal, is that making New Bedford a port of entry. See it in 1 Stat. 629. It is made to "include all the waters and shores within the towns of New Bedford, Dartmouth," &c. This bridge is within the limits of that port, as a "port" would usually be defined, i. e. the waters within the gate, or door, or outlet towards the sea. This port is allowed by congress to be a place for shipping produce to foreign countries or other domestic ports, and for introducing merchandise from abroad for home consumption. It is an encroachment on it to place bridges across it without draws sufficiently wide for all vessels to pass and repass, or to throw stone and gravel into its bed so as to make parts of the channel too shoal for navigation. It is a very important port, possessing over one hundred thousand tons of shipping, equal in that respect to any in England or America except four in each of them, and superior to any whatever in France. Its freedom from improper obstructions ought, therefore, to be carefully watched over and preserved. And it is contended, that any encroachment on it, or violation of the rights existing, when it was made a port of entry, ought to be considered a crime or misdemeanor. But supposing that it should be, can it be considered as made a crime or offence by this act of congress? This act merely allows exports and imports there, but does not punish any obstruction in its waters. In England, many important and exclusive privileges have been conferred on certain ports, as the Cinque ports, and the ports of London and Hull. But here, no preference can, by the constitution, be given to one port over another (article 1, § 9); and whatever power properly belongs to congress in regulating commerce and establishing ports of entry and delivery, to protect them by penalties from encroachments and obstructions by wharves, buildings and bridges, it is in this case sufficient to say that congress has not yet exercised that power. But if wharves or bridges are so made as to obstruct a port or any navigable waters, they are undoubtedly illegal under the laws of Massachusetts, unless authorized by the city, or state, or general government, which may possess authority over this matter. Whether illegal, so as to constitute a crime, or only a civil wrong, must depend on the laws of the government possessing jurisdiction over the place and subject. If made a crime by that government, they may be criminally prosecuted as the laws shall specify, in those courts having jurisdiction over the place and subject. The state of

Massachusetts possesses the jurisdiction over this place for many purposes, though navigable water, as before shown; and can and would punish an obstruction as a nuisance in a highway, if she had not herself authorized it. Such bridges and wharves, when built out of the territory over which congress exercises exclusive legislation, such as the District of Columbia, are erected by state authority, and regulated entirely by state laws, or are constructed at individual pleasure and responsibility. They are, as here, within the limits of the state, and one of its counties; and though in regulating commerce congress might probably make laws, which would render penal any obstructions to foreign navigation, whether placed there with or without state permission, yet till congress do this, can such an obstruction be said to violate this act of congress, merely creating the port of New Bedford into a port of entry? Much more, can it be a crime under that act? The officers of such a port are usually state officers; its warden, its health officers, its harbor masters. The general government usually places no person there except for purposes of revenue, such as the collector, and his subordinates. If there be light-houses or forts near, then there are other officers, in connection with them, rather than the port as a port.

In ancient times, when some harbors or ports were secured by chains, and the chain master or master of the key, opened it for vessels to pass, and collected revenue or tolls, he may have had authority to look into and prosecute such matters; and in France, he was required to report offences of this kind to the admiralty. French Laws, bk. 4, tit. 2. See Laws, 254–257, 340. Though in some instances he was appointed probably by the city authorities, rather than by the central government or the admiralty. Such is the case here, usually, as before remarked, as to wardens of ports, harbor masters, &c. Those who commanded the forts at the entrance, as well as the navy for defending the port, were public officers of the government, but they never had, and cannot here have, any concern with the domestic or civil police and erection of bridges and wharves within the harbor. It is difficult then to hold, that by the express words of the act creating the port of New Bedford to be a port of entry, or by implication from analogies and usages elsewhere, that the punishment of obstructions, like this bridge, belongs to the general government or any of its officers. On the contrary, it belongs usually to the local authorities, and though congress may be authorized under the constitution to regulate and punish them, yet till done by specific laws for that purpose, its courts cannot regard such acts as an offence against the United States, however they may be in some cases crimes and private injuries under the state or local laws.

The free ingress and egress of our people to all ports of entry in the Union; the obstructing navigation in one of them, and especially one so important as New Bedford, is not to be countenanced when done by individuals without authority, and could effectually be punished as nuisance in the state courts. Nor can it be shut up in part, or entirely, as the port of Boston was by the Boston port bill before the Revolution, without working inequality and partiality, whether it be done by a license or order from the state, or the United States, and by force of a law, or by rocks, wood, or chains across its mouth, by individual and private speculation. And if a wrong or injustice has been perpetrated, under color of law, and cannot be prosecuted in the state courts while that law remains in full force, and cannot be redressed as a crime in the United States' courts, till some further legislation occurs defining or declaring it to be a crime, and empowering them to try it, yet it is a misfortune, which might soon be obviated by congress, and one which now might perhaps, as will soon be examined further, be relieved against in a civil remedy by damages to the person aggrieved specially by it, so as at an early day to correct the evil, provided this conduct delays, or interrupts, or injures the navigation of the country. See post.

But it is next contended, that if no jurisdiction over the matter is obtained by the act, making this port a port of entry, it is conferred by force of the acts appointing custom-house officers there and collecting revenue. See section 2, Act March 2, 1799, c. 22 (1 Stat. 627). The like reasoning applies to this position as to that concerning the port as a port of entry, except that the officers to collect the revenue are officers of the general government, and the revenue also belongs to that government. All which they are authorized to do, may, therefore, be connected with the federal power and federal supervision, and any obstruction to their rightful acts may be an offence punishable in the federal courts. Such is the course of some of the laws on this subject, and such have been the decisions where such specific laws have existed, but not without. Here, however, no clause in any of them is pointed out, which make obstructions like these a violation of any revenue law. It is true, that the tendency of such obstructions may be to lessen the amount of business and revenue at New Bedford, but it will increase them probably at other ports, to which business may be thus diverted, and hence not injure the revenue of the country as a whole.

So, it is argued that the "Force Bill," as it has been called, conferred larger powers on custom-house officers to remove custom-houses when the collection of revenue at them was obstructed, and gave to this court wider jurisdiction to punish them. But it was only where the obstructions were not to

the navigation by stoue, or gravel, or timber, but by the interference of the state authorities, or of unauthorized individuals, to prevent the entry of foreign merchandize, and the payment of duties thereon. That law was passed March 2, 1833 (4 Stat. 999). It was passed entirely diverso intuitu as all know, who were actors in those scenes, and never contemplated the punishment of obstructions like these. It was against "unlawful obstructions, combinations or assemblages of persons" (section 1). The additional jurisdiction there given to the circuit court, was to try in civil cases persons guilty of such assemblages, and injuries by them (section 2), and to try offences against the revenue laws, where jurisdiction has not been already conferred. This was all. The act authorizing coasting licenses, and for regulating the same, is also supposed to be violated by this obstruction. See the act of February 18, 1793 (1 Stat. 395), and March 2, 1819 (3 Stat. 493). It is certain that this act was meant to empower such vessels to go and trade in all the navigable waters of the United States, and on its coasts, and that any prevention of this would violate the spirit of those acts. [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 1. It speaks of the going on "seacoasts" and "navigable rivers." Hence in the case of Gibbons v. Ogden 9 Wheat. [22 U. S.] 1, it was held, that a law of New York, excluding steam-boats with such licenses from navigating the Hudson river, or giving an exclusive right to certain boats to do it, was deemed unconstitutional and void. And for aught I see, an obstruction placed in navigable waters by an individual, without constitutional authority, would violate such license, and be a ground for civil redress in damages. It disturbs navigation, and navigation is one branch of commerce, and a law of congress covering it, is thus violated. See [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 1. It is, perhaps, this idea in connection with the right which belongs to vessels to go to ports of entry and delivery, unimpeded and undelayed, that the counsel in People v. Rensselaer & S. R. Co., 15 Wend. 113, 121, conceded that a bridge, though with a draw, if below a port of entry, was unconstitutional. If so at all, it must be because it restricts and curtails, in some degree, the full privileges of licensed and registered vessels to egress and ingress, as to all parts of such ports in the pursuit of their lawful business. It also violates the rights before alluded to, by some of our treaties, given to foreigners tc visit such ports, and these considerations may confer a power on the general government to remove obstructions below such ports that do not exist above. See the Maysville road veto. I do not understand the court, in 15 Wendell, to hold that any bridge at or above a port of entry like New Bedford, with a draw in it, is unconstitutional, if only somewhat incommoding navigation, but only when it stops or cuts off some of it entirely (page 132). New York v. Miln, 11 Pet. [36 U. S.] 102. But the same difficulty exists here as in the other acts of congress, in regarding the obstruction as a crime against the United States, without some clause in the constitution or in an act of congress declaring it to be one.

The acts complained of in the indictment, being then authorized by the state, and hence not a crime under its laws, the states having power to authorize them till conflicting with some provision in the constitution, or a treaty, or an act of congress, and there being no such conflict with any, that makes these acts a crime, or confers power on this court to punish it, the conclusion follows, that we have no jurisdiction to sustain the indictment. I am strengthened in this conclusion, till congress legislate further, by the consideration, that even now any individual, suffering by this obstruction in his rights to free navigation, is not probably without redress. The power then in the state of Massachusetts to incorporate the New Bedford bridge with a draw to allow vessels to pass, existed in 1795; and this exercise of it violates no prohibition in the federal constitution, no treaty, and no act of congress enforcing the granted powers under it to the general government, unless it be that giving coasting licenses. It violates that, perhaps, only as to vessels which from their size cannot pass through the draw, or as high up the harbor, from deposits, as they used to; and the owners of such, when actually obstructed and delayed by means of this bridge, might probably have redress in damages, or by way of injunction against it in chancery. Spooner v. McConnell [Case No 13,245]; People v. Rensselaer & S. R. Co. 15 Wend. 113, 135. But even they could not prosecute the bridge as for a crime, in the federal courts, when no clause in the federal constitution or the acts of congress declare such an obstruction to be a crime. No prosecution for a crime can now be sustained any where, even in the state court, for reasons already given, unless the act of incorporation to the defendants should be held void by those courts, as trenching on the powers of the general government, or on the rights of coasters under acts of congress. How that might be, they must decide for themselves, when appealed to. Civil redress, however, in the cases before described, seems obtainable in the courts both of the states and United States, notwithstanding the decision in [Foster v. Neilson] 2 Pet. [27 U. S.] 253, as there, it does not appear that any port of entry existed above, and here it does; and that the stoppage of some navigation to some parts of it is as entire as the state prohibition in Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 221. We may say with Chief Justice Holt, when we agree that one hath a right, "if so, then they must have some remedy to come at it" (Rex v. Hornby, 5

Mod. 57; 1 Term R. 512; 2 Ld. Raym. 953); ubi jus ibi remedium. And the "judicial powers should be coextensive with the legislation, so far at least as they are to be enforced by judicial proceedings." Kendall v. U. S., 12 Pet. [37 U. S.] 527. But the question of a right is first to be settled, and then where the remedy is to be sought. At law; or in equity; before courts martial; or in admiralty; or before the legislature; and in state courts and legislatures, or in the United States? Though there is then no part of the constitution, or treaties, or acts of congress appearing on their face to make such an obstruction a crime, there is no necessity to give a forced construction to bring the case within those acts in order to punish it, there being full redress without doing this, to such individuals as specially suffer by it.

We have already shown, that in the absence of legislation by congress, making acts crimes, which may be within some of the constitutional grants of power to congress, such as the regulation of commerce and cases in admiralty, the states possess concurrent or subordinate authority over such matters, till the paramount action by congress takes place, if it choose to make the acts crimes, but if not, then to give civil redress, if the acts be contrary to its own laws or those of the United States. The establishment of courts of the United States did not in many cases divest the state courts of any jurisdiction before exercised. It would seldom do it, unless on matters vested exclusively in the general government as crimes against it, or in its jurisdiction, and forbidden to the states. See Federalist, No. 82. And it is every day's practice for a citizen, though able to sue in the federal courts, to prosecute his rights in the state courts. For some acts on navigable waters, redress may be had in either. Corfield v. Coryell, supra. Congress, in the act of February, 1838, granting admiralty jurisdiction over the lakes, specially reserved all concurrent rights in state courts and at common law. See before. In Alabama, their supreme court has entertained a libel against a steam-boat for wages. 9 Port. 112, 181. Yet the better opinion seems to be, that when an exclusive power like that in admiralty is conferred on the courts of the United States, no concurrent remedy, except a common law one, exists in the state courts. 3 Story, Const. 534, 553, note. See, also, 1 Kent, Comm. 351, 377, note; Rawle, Const. 202; American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 512, 546; [Martin v. Hunter] 1 Wheat. [14 U. S.] 337; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246, 312, 313; The Chusan [Case No. 2,717].

I have added several cases connected with this question, without stopping to enter into the consideration of their bearing in detail. If the act of incorporation in this case should be held void, as contrary to some act of congress, it is obvious, that then both the old civil and criminal remedies might exist in the state courts, for such an obstruction of navigable waters, but only a civil remedy in this court, from the want of some law making the obstruction a crime against the United States, and punishable in this court.

The objection against treating as a crime what has not been made so by any clause in the constitution or an act of congress, does not apply to a civil suit. For by the 34th section of the judiciary act, private rights and civil remedies are to be governed by the laws of the states, if none exist of the United States, even when tried in the federal courts, in cases where the latter have jurisdiction over the question and the parties. See before. And though that could not be deemed a private wrong or civil injury, any more than a crime, which a state law authorized, in conformity to its constitution and that of the United States, yet it might be considered criminal under the state laws, as to highways and nuisances, if considering the act of incorporation under which it was done, as unconstitutional, it being then in conflict with some power or law of congress, and might be open to a civil action in the federal courts, as being illegal both under such state laws as are valid, and also by the laws of the United States.

In the course of the argument it has been asked, if a state can with impunity levy and collect duties on tonnage and imposts, or forbid entries of vessels into a port? The reply is now obvious, that it cannot; and any such act by a state, conflicting with any rights under existing acts of congress, would be actionable, and civil redress be had in this court, and civil if not criminal in the state courts. Such virtually was the case of Gibbons v. Ogden. States may continue to use old and concurrent powers on these matters till congress legislate on them, when the states must yield. McCulloch v. State of Maryland, 4 Wheat. [17 U. S.] 316; [U. S. v. Gratiot] 14 Pet. [39 U. S.] 535; Commissioners of Erie v. Dobbins, 16 Pet. [41 U. S.] 435. There is little doubt, that laws enough now exist to protect in this court, by appropriate civil suits, all the rights and interests of the United States in any lands within them, or any personal property, or any easements on land or water, or any franchises. So they can try the rights of others in these, where the parties reside, so as to give us jurisdiction in that respect. Full civil jurisdiction to that extent is conferred by the 34th section of the judiciary act, before quoted. On the civil remedies and rights of this character, in such cases, in behalf of the United States, this court has recently given its views at length in U. S. v. Ames [Case No. 14,441]. But no law or section confers on this court all jurisdiction in such cases to punish acts considered as crimes by the admiralty, or maritime laws, or by common law; nor is there any such section or act, that makes an obstruction in navigable waters, a nuisance or

other crime, and gives jurisdiction over it to this court.

The 34th section of the judiciary act has been thought by some to be broad enough to give relief here. It is: "That the laws of the several states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." It might be inferred by some from the face of this, that we could get from the state laws some common law jurisdiction and principles, if not statute law, to give us authority to punish in this case. Dup. Jur. 43, 44. But there are several objections to that view. We must first obtain jurisdiction by the constitution or acts of congress over a crime or civil suit, before we can apply in the trial the laws, statute or common, of a state. The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175; The Planter, 7 Pet. [32 U. S.] 324, 337. And that jurisdiction we have not yet got, as yet ascertained over this as a crime.

In the next place, after getting jurisdiction, the application of the state laws to the trial of the case is only where it is a civil and not a criminal case. 2 Burr. Tr. p. 180, Append. Otherwise the court might entertain jurisdiction over most of the crimes in most of the states in the Union. 1 Kent, Comm. 398. Cases in chancery are in doubt also in this respect whether the state laws can be applied in equity trials by this court, as they and the practice in them rest on general principles of the civil law and usage in England, applicable here, and are not "trials at common law." See Rhode Island v. Massachusetts, 12 Pet. [37 U. S.] 657, 697. And finally, if the state laws, after we got jurisdiction, were to govern in the trial, they would prevent our punishment of this act complained of, though open to be done usually. For here it has been authorized by the state in incorporating the respondents, and allowing them to erect this bridge, and must be conformed to, unless the measures of the state and of the respondents under them are void for repugnancy to some act of congress.

Under these doubts as to the validity of the various grounds urged in support of this indictment, I feel compelled to dismiss it. In all questionable cases in courts like this, of limited jurisdiction, instead of leaving so much to construction by courts, and leaving so many uncertainties and conflicts, both in civil and criminal cases in admiralty, it seems to me wise for congress to legislate freely, as difficulties may appear, regulating the future, and removing that vagueness as to the law, which is so great a curse to the community. As the country increases in wealth and population, and the interior commerce and travel may outgrow its foreign and preponderate in the state legislatures, and lead to bridges for turnpikes, or viaducts for rail-roads, and aqueducts for canals, obstructing seriously the navigation of our great rivers and arms of the sea, and, as in this case, not requiring draws suitable to the dimensions and passage of modern steam vessels, it may become necessary for congress to exercise more of its powers to regulate commerce. It may be proper to protect the foreign trade and that between state and state by water, against inroads upon its freedom by those, looking more to land travel and land freights. And though obstructions in navigable waters by state authority or without, may injure some of the towns and some of the business of that state more than the business of other portions of the Union, or of alien friends trading here, yet other portions and other business of the state may reap more than a proportional benefit, and hence, as a state measure, it may on the whole be useful. But when looking at its influence on other parts of the Union and their citizens, who trade thither only by water, and treating it, as must be done under the government of the Union, as a national matter, and its influence as on the whole nation, it may be an unmitigated and uncompensated evil to many other states, and in respect to some alien friends under treaties, be a measure wholly unjustifiable. In such case, on looking to such events, and in the rapid multiplication of such bridges and obstructions, it may become necessary for congress to wake up more of its dormant powers to regulate commerce, and provide relief and redress, criminal and civil, in all cases of this kind clearly within its authority, and clearly requiring punishment or redress. I should be one of the last to desire to see such legislation take place prematurely or hastily, or at first with severity, as the subject is one possessing much delicacy, and many ramifications of deep interest. But it is more and more exciting public attention; and an era is approaching, if not come, when the general powers of the central government for the whole on matters connected with the interests of the whole, may be called for to protect private rights and remote privileges, and overcome local combinations of wealth and influence, seeking their own profit rather than looking to national duties and rights in respect to others; and, likewise, to correct errors of state legislatures in granting unlimited powers as to time to keep up a bridge over a navigable river, which by a change of business may have become a great public evil; or limited and unchangeable powers as to time, and the width of a draw for vessels to pass, which last, by an unexpected change in the size of vessels, has become useless, and a total obstruction to that class of ships; or powers, supposed not injurious to the river below, or at the bridge for navigation, but which have unexpectedly been followed by accumulations of sand and mud, obstructing most seriously and permanently the whole commerce of a large river.

In some cases, the legislation of congress

might not require the bridge itself to be removed, but only draws widened, so as not to damage the commerce between states or abroad, if the states themselves cannot and will not correct them by legislation or otherwise. In some cases it might require the obstructions collected in deposits of stone, gravel or mud, to be removed; and in others, the whole bridge to give way for a ferry, if the injury to navigation was great, and could in no other mode be obviated. As the states have exercised this power of erecting bridges across navigable streams over half a century, and in numerous cases, over navigable waters, where the tide ebbs and flows, in Maine, New Hampshire, Connecticut, New York, Pennsylvania, Delaware, &c., and congress have followed their example in the District of Columbia, any new and restrictive legislation by the general government would be unjust, if not suited to the exigencies of the case, and of course, go no further than is necessary to discharge its duties in relation to the powers confided to it for the benefit of the states and the people as a whole. Its true attitude is one not seeking collision, or being punctilious as to trifles, nor acting with harshness, where a fair exercise of ancient powers and usages has been indulged in, and where by a double government and some concurrent powers over like subjects, some difficulties are unavoidable, and are to be met always in a charitable, conciliatory and compromising spirit. It must act only in cases worthy the government of the whole Union, and in a manner becoming the government of the whole Union, dignus vindice nodus.

After such legislation, there would need be no grounds of jealousy or distrust as to its effect, as the laws will be made by our own delegates in the general government, under our own constitution, the cases tried, as in the states, by juries, rather than without, and by our own jurors, before our own judges, under our own ameliorated codes of law, and the punishments be as mild and suited to modern notions of civilization in the states. But in doing this, it would not be enough, as before suggested, for congress to vest jurisdiction in this court in all cases of mere admiralty and maritime crimes, even if enumerating and defining them when misdemeanors as well as felonies, because the power of congress over commerce is much broader as to both territory and subjects, than what belongs to admiralty courts as such. It is unrestricted as to commerce between the states as well as abroad, and is increased by the powers to maintain a navy, and defend the country by forts, and improve harbors, and make breakwaters and hospitals, and collect revenue on imports. Hence, it can extend to numerous cases, which in England were under the jurisdiction of other courts than the admiralty, and can well be entrusted to the circuit court, as is most of its other powers, not as admiralty ones, except appeals from the district tribunals. Nor will it be necessary in any of these cases, to make the jurisdiction exclusive of the state courts, except where the power that is executed by it is exclusive in its nature. In all other cases, the rights, and remedies, and duties and liabilities of our people can be taken care of in the state courts, except where the laws of the latter may conflict with those of congress on the same subject.

This opinion was mostly prepared before the decision in the case of Waring v. Clarke, 5 How. [46 U. S.] 441, although it was not delivered until after.

UNITED STATES v. NEWCOMB. See Cases Nos. 15,868 and 15,869.

Case No. 15,868.

UNITED STATES v. NEWCOMER.

[33 Leg. Int. 94;[1] 22 Int. Rev. Rec. 115; 11 Phila. 519; 1 Cin. Law Bul. 69; 23 Pittsb. Law J. 221; 13 Alb. Law J. 221.]

District Court, E. D. Pennsylvania. Feb. 29, 1876.

CIVIL RIGHTS—REFUSAL OF HOTEL CLERK TO RECEIVE NEGRO.

The act of congress March 1, 1875 [18 Stat. 336], is authorized by the fourteenth amendment of the constitution of the United States, and a clerk in charge of the reception of travelers at a hotel may be liable to conviction for a violation of the provisions of the act.

The evidence for the prosecution showed that the defendant was in charge of the office at a hotel called the Bingham House; that Fields Cook, a Baptist minister, from Alexandria, Va., a man of color, applied for accommodation, and was refused a room by defendant; that Cook left and returned and was allowed to sit in a side room all night; that some eighteen other persons were admitted to rooms during the night. It also appeared that another guest of the house, a witness, applied to the defendant, stating his willingness to receive Fields Cook in a room occupied by the witness and two others, in which there was a spare bed, but defendant said he did not desire to have anything to do with Cook. The defendant told him that he had refused him the room because of his color.

Mr. Valentine, U. S. Dist. Atty., and Mr. Hazlehurst, Asst. U. S. Dist. Atty.

B. H. Brewster, for defendant.

CADWALADER, District Judge (charging jury). The fourteenth amendment of the constitution of the United States makes all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States, and provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state * * * deny

[1] [Reprinted from 33 Leg. Int. 94, by permission.]

to any person within its jurisdiction the equal protection of the laws. This amendment expressly gives to congress the power to enforce it by appropriate legislation. An act of congress of March 1, 1875, enacts that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, and makes it a criminal offence to violate these enactments by denying to any citizen, except for reasons by law applicable to citizens of every race and color * * * the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated.

As the law of Pennsylvania had stood until the 22d of March, 1867, it was not wrongful for innkeepers or carriers by land or water to discriminate against travelers of the colored race to such an extent as to exclude them from any part of the inns or public conveyances which was set apart for the exclusive accommodation of white travelers. The legislature of Pennsylvania, by an act of March 22, 1867, altered the law in this respect as to passengers on railroads. But the law of the state was not changed as to inns by any act of the state legislature. Therefore, independently of the amendment of the constitution of the United States and of the act of congress now in question, the conduct of the defendant on the occasion in question, might, perhaps, have been lawful. It is not necessary to express an opinion upon this point, because the decision of the case depends upon the effect of this act of congress.

I am of opinion that under the fourteenth amendment of the constitution, the enactment of this law was within the legislative power of congress, and that we are bound to give effect to the act of congress according to its fair meaning. According to this meaning of the act, I am of opinion, that if this defendant, being in charge of the business of receiving travelers in this inn, and of providing necessary and proper accommodations for them in it, refused such accommodations to the witness Cook, then a traveler, by reason of his color, the defendant is guilty in manner and form as he stands indicted.[2] If the case depended upon the unsupported testimony of this witness alone, there might be some reason to doubt whether this defendant was the person in charge of this part of the business. But under this head the additional testimony of Mr. Annan seems to be sufficient to remove all reasonable doubt. If the jury are convinced of the defendant's identity, they will consider whether any reasonable doubt of his conduct or motives in refusing the accommodations to Fields Cook can exist. The case appears to the court to be proved; but this question is for the jury, not for the court. If the jury have any reasonable doubt, they should find the defendant not guilty: otherwise, they will find him guilty.

Jury found defendant guilty.

[2] This point of law was reserved.

Case No. 15,869.

UNITED STATES v. NEWCOMER.

[12 Pittsb. Leg. J. 140.]

District Court, N. D. Ohio. Oct., 1864.

CRIMINAL LAW — REMOVAL OF PRISONER TO ANOTHER DISTRICT—PROCESS—ARREST.

Before a warrant for the removal of a prisoner to another district in which a warrant for his arrest issued on indictment found, can be granted, some proof must be offered showing that the defendant committed the crime charged, or in lieu thereof, the information or affidavit on which the warrant issued, or copies of the same certified by the magistrate issuing the warrant, or a copy of the indictment with a certificate of the clerk of the court, in which the indictment was found, of its genuineness, and that the same is still pending, must be produced.

The defendant, upon application of the marshal of Indiana, alleging that Newcomer was indicted in that district, had been arrested upon a warrant issued by the district judge, the Honorable H. V. WILLSON, and now R. F. Paine, Esq., district attorney, moved the judge to issue a warrant removing the defendant to Indiana for trial, and to sustain said motion offered in evidence a capias in the usual form, issued from the district court of Indiana, directing the marshal to arrest Henry Newcomer to answer an indictment found in that court. He also offered an affidavit of one Lockhart, a deputy marshal of Indiana, stating that said indictment was still pending.

B. White opposed the motion.

[Before WILLSON and McCANDLESS, District Judges.]

Held by WILLSON, District Judge, that, before the warrant of removal can be granted some proof must be offered showing that the defendant committed the crime charged; or in lieu thereof, the information or affidavit on which the warrant issued, or copies of the same certified by the magistrate issuing the warrant or a copy of the indictment with a certificate of the clerk of the court in which the indictment was found, of its genuineness, and that the same is still pending must be produced. As the proof offered does not meet either of these requirements the defendant is discharged.

Case No. 15,870.

UNITED STATES v. NEWMARK.

[3 Sawy. 584; [1] 22 Int. Rev. Rec. 114.]

District Court, D. California. March 28, 1876.

CUSTOMS DUTIES—FORFEITURES—UNDERVALUATION—CONSIGNEE.

Where, in a suit brought by the United States to recover the value of certain goods alleged to have been fraudulently invoiced below their true cost, it appeared that the defendant was not the owner or shipper of the goods, but merely a consignee thereof for the purpose of selling them: *Held*, that knowledge on his part of the fraudulent undervaluation was necessary to establish the "actual intention to defraud the United States" within the meaning of the sixteenth section of the act of June 22, 1874 [18 Stat. 189].

[This was an action at law by the United States against J. P. Newmark.]

Walter Van Dyke and John M. Coghlan, for the United States.

Latimer & Morrow, C. A. McNulty, E. B. Mastick, and Eastman & Neuman, for defendant.

HOFFMAN, District Judge. This is an action brought by the United States to recover the value of certain hides alleged to have been fraudulently imported into this port by the defendant. The alleged fraud consisted in entering the goods by means of false and fraudulent invoices, which stated the cost of the goods at the place of exportation to be a less sum than the actual cost thereof, with intent to evade a part of the duties thereupon and legally chargeable thereon.

By the sixteenth section of the act of June 22, 1874 (18 Stat. 189), it is in substance provided that in all actions to enforce a forfeiture or to recover the value of goods by reason of any violation of the provisions of the customs revenue laws, it shall be the duty of the court to submit to the jury as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by the jury, and if the cause be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact, and unless intent to defraud shall be so found, no fine, penalty or forfeiture shall be imposed.

Two separate issues are thus presented in this case: (1) Were the goods undervalued in point of fact and the invoices thereof false; and (2) were the entries of the goods made with an actual intention on the part of the defendant to defraud the United States.

The evidence as to the actual cost or market value of the goods at the places of exportation is very voluminous and conflicting. I have not thought it necessary to enter into an elaborate analysis of it, as the plaintiffs have, in my judgment, failed to prove the actual fraudulent intent on the part of the defendant which the statute requires the court to find as a distinct and separate proposition before a forfeiture can be imposed. In discussing the evidence bearing upon this proposition, I shall therefore assume that the goods were in fact invoiced at less than their cost. The question is, did the defendant know it? The number of false entries upon which the action is brought is twenty-seven. They were made during a period extending from July 29, 1869, to February, 1872. If the defendant was the owner of the goods, or, if the importations were made on his account, the inference would be irresistible that he was aware of the false valuation. He could not have failed to know what prices he paid for them. But he contends that in every instance he was a bare consignee, that he had no knowledge of the price paid by his consignor, and that he merely sold the goods and placed the net proceeds to the credit of the latter.

To these facts the defendant testifies in the most positive manner. To meet this proof the government has produced the entries made at the custom house with the oaths and invoices that accompany them. From these entries it appears that in twelve instances out of twenty-seven the defendant on entering the goods took the "owner's oath" instead of that of a consignee. It is replied that this was done through the mistake of the broker who prepared the papers, and in support of this averment the defendant appeals to his books. The entries from the custom house show that on the first five importations the defendant took the consignee's and not the owner's oath. The entry of the sixth importation is missing. But in all of these instances the journal of the defendant shows that the proceeds of the goods were credited to the consignor. The book containing the copy of the account of sales of these shipments rendered to the shippers is not produced. It is alleged to have been destroyed. The evidence on that point will be considered hereafter.

On the seventh importation the defendant took the owner's oath. He claims that this was by the mistake of his broker, and in support of his assertion refers to the fact that the consular certificate presented with the invoice to the custom house shows that the consignor was the shipper and owner. He also exhibits the entries in his journal where the proceeds are duly credited to the consignor, and his press-copy account of sales, in which an account is rendered to the consignor of the proceeds of and charges upon the goods.

The circumstances are similar in regard to the eighth importation. The defendant took the owner's oath. But the consignor

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

declares before the consul that he is owner and shipper, and the journal and account-sales-book show that an account of sales and charges was duly rendered to the shipper, and a corresponding credit given in the journal. It is unnecessary to state in detail the circumstances as disclosed by the custom house papers and the defendant's books with regard to each importation in which he has taken the oath as owner. They may be summarized as follows:

In six instances out of the twelve the papers show that the shipper declared before the consul that he was the owner of the goods shipped. In the other cases he declared himself to be the shipper. In every instance but two, both the journal and the account-sales-book show that accounts of sales of the goods were duly rendered to the shippers, and credits duly given in the journal. In the two instances referred to, the entries in the journal cannot be found. But the accounts of sales are produced. In every other instance the oath taken by the defendant is that of a consignee. The journals show a credit given to the shipper, and the account-sales-book an account rendered to him, except as before stated in the case of the first six importations, the account-sales-book relating to which has been destroyed.

The broker employed by the defendant corroborates in the most positive manner the testimony of the defendant. He states that his instructions invariably were to enter the goods in the name of defendant as consignee, and that if the form of oath as owner has been filled out and submitted for his signature it was through mistake. He attributes the error to the great haste with which business of this nature is necessarily conducted. He might with probably equal truth have added that such errors arise from the laxity and carelessness which universally prevail when any "custom-house" oath is to be taken or administered. The broker's statement as to his mistakes or those of his clerk is confirmed by the fact that in several instances where the owner's oath was taken by the defendant the papers themselves disclosed that the shipper was the owner. No proof has been offered on the part of the United States to rebut the evidence on this point produced by the defendant. The correspondence between himself and the shippers of the goods for a considerable period has not been produced. The district attorney suggests that it may have been purposely destroyed. But the defendant has shown by his own testimony, by that of his partner, and by the porter in his employment, that the papers in question were packed in a box and placed in a cellar where they became saturated with water and rat-eaten. His partner ordered them burnt up as useless, which was done by the porter. This occurred, they assert, before this suit was commenced or anticipated. This evidence is uncontradicted except by some testimony tending to show that it was possible that the defendant might have been aware that some investigations with regard to these importations were on foot.

We are, I think, justified in concluding that the government has failed to establish a guilty knowledge of the falsehood of the invoices, and the consequent intent to defraud, from any relation of the defendant to the goods as owner. But if he had that knowledge as agent, merely, it would be sufficient to establish the fraudulent intent. But of this there can scarcely be said to be any proof. The defendant had, as he testifies, no interest whatever in the shipments, not even by way of commissions. His remuneration was derived from commissions on purchases made by him at this place, of goods to be shipped to his correspondents. No commissions were charged by him on goods consigned to him for sale.

The price at which the goods in question were valued in the invoices had been for a long time uniform and universal among all the importers. They appear to have valued them at one dollar and fifty cents each, irrespective of their quality or condition. This valuation had been for years accepted as just by the custom-house authorities. I see no reason for supposing that the defendant, receiving the goods as he did, would be more likely to know their real cost or true value than the officers of the government charged with the duty of ascertaining those facts. If, however, the facts were clear and the undervaluation gross and undeniable, we might still suspect that the defendant must, in the course of his business, have become aware of it. But even after the very full investigation which the subject has undergone in the trial of this cause, the evidence remains very conflicting, and the conclusion to be reached open to doubt. It is, I think, plain, that parties at this place who sought to engage in the trade were unable to obtain at Mazatlan, La Paz, and Cape St. Lucas, hides at the price at which these goods were invoiced. The explanation of this fact, given by the defendant's witnesses, is that the trade in hides is at these places in the hands of a small number of persons who enter into contracts with the rancheros to take all their hides, of whatever quality, at a fixed price, and to make advances to them on the credit of the hides to be subsequently delivered. They thus have, it is said, a kind of monopoly which not only enables them to secure hides at a lower rate than that which a foreigner would be obliged to pay, but also to advance the prices at the ports of shipment. It is also testified that when "culls," or damaged hides, bull hides, etc., are taken into account, an average price of one dollar and fifty cents is not an unfair statement of the cost, although selected lots

might be worth much more. A large number of witnesses testify to these facts, among them three ex-consuls of the United States, who are acquainted with or have been engaged in the trade.

What conclusion should be reached after a careful consideration of all the testimony, I have not determined, and it is unnecessary now to decide. I advert to the state of the proofs merely to show that the undervaluation, if any, was not so gross and indisputable as to justify the belief that it was notorious to all engaged in the trade, and consequently was known to the defendant. On the issue, therefore, upon which, by the terms of the act, I am required to pass as a distinct and separate proposition, I find that it is not proved that the acts alleged in the complaint were done with an actual intention to defraud the United States.

Judgment must, therefore, be entered for the defendant.

Case No. 15,871.

UNITED STATES ex rel. RANGER v. NEW ORLEANS.

UNITED STATES ex rel. PETERKIN v. SAME.

[2 Woods, 230.] [1]

Circuit Court, D. Louisiana. April Term, 1876.[2]

MANDAMUS — TAX LEVY — STATUTORY LIMITATION OF DEBT—PRINCIPAL OF DEBT.

1. The purpose of the writ of mandamus is to enforce, not to create legal duties.

2. It will not issue to compel officers of municipal corporations to levy and collect a tax unless the legislature has, either expressly or by implication, made it the duty of such officers to levy and collect such tax.

3. The imposition of taxes is the exercise of a legislative, not of a judicial function.

4. A general statute of Louisiana prohibited municipal corporations from incurring any debt or liability unless in the ordinance creating the same full provision was made for the payment of principal and interest; at the same time a special statute prescribed the form of the ordinance by which a particular debt might be created, and declared that such ordinance must be submitted to the legal voters of the corporation, and the assent of a majority of such voters was made a condition of its validity. *Held*, that where such ordinance, so submitted to the voters for their approval, contained no provision for the levying of any tax to pay the principal of the debt, but did contain another provision, which was evidently deemed ample for such purpose, it was the evident intention of the legislature that the principal debt should not be paid by taxation, and in such case the writ of mandamus to compel the levy of a tax to pay such principal was refused.

5. The acts of the legislature and the ordinance mentioned in the preceding headnote being in force, and the statute having declared that certain stock therein named should be perpetually pledged for the payment of the principal of the debt which the municipal corporation was, by the same statute, authorized to contract, the predecessors of respondents made a sale of said stock for the sum of $350,000, which sum had long since been spent for other purposes, and no part of which was, or ever had been, in the possession or under the control of respondents. *Held*, that relators were not entitled to the writ of mandamus to compel the application of the sum of $350,000 to the payment of the principal of their debt.

These were applications for writs of mandamus, to be addressed to the mayor and administrators of the city of New Orleans, comprising the common council thereof, commanding them to levy and collect a tax sufficient to pay the principal of certain bonds issued by the city in the year 1854. The return made by the respondents showed the following to be the facts: In the year 1854, the general assembly of the state of Louisiana authorized the city of New Orleans to subscribe for stock in certain contemplated railroads centering in said city. To pay for said stock, the city was authorized to issue bonds equal in amount to the stock at its par value (see Acts 1854, Nos. 108–110). Judgments had been obtained in this court for the principal of the sum named in said bonds, and an execution had been issued thereon, which had been returned nulla bona. [See Cases Nos. 11,026 and 11,564.] The return then alleged that there was no provision in these statutes, or any other statute of this state, for the levying and collection of this tax, and referred to this statute, especially the second section, to show that the legislature did not intend that any tax should be levied to pay the principal of these bonds, but that it intended that the principal should be paid out of the stock and its revenues. To this return the relators demurred, and the question was, whether upon this state of facts the court would grant the writ.

T. J. Semmes, Robert Mott, Thos. Allen Clarke, Thos. L. Bayne, H. B. Kelley, and D. C. Labatt, for relators.

B. F. Jonas, City Atty., John Finney, and H. C. Miller, for respondents.

BILLINGS, District Judge. I think the proposition cannot be questioned that this court is without authority to direct a levy of a tax unless it be in accordance with the provisions of some law which makes it the duty of the city common council to levy the same. In other words, that this court cannot create, but can only enforce a clear legal duty.

Mr. Justice Bradley, in Heine v. Levee Commissioners [Case No. 6,325], whose decision was affirmed by the supreme court, says: "The power of taxation belongs to the legislative branch of the government. The judicial department has no general power over the subject. If the officers who are charged with the duty of levying or collecting taxes refuse to perform their functions, the courts, in a clear case of failure, and at the instance of the party directly interested, can, by the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] [Reversed in 98 U. S. 381.]

prerogative writ of mandamus, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all the judicial department can do on the subject, unless the legislature has expressly conferred upon it further powers." The question is, has the duty or power to levy this tax been committed by the legislature to the city administration?

It is urged by the counsel for the relators that prior statutes, namely, those of 1835 and 1836, gave this authority, and that the power to levy and collect a tax may be fairly deduced from the permission to contract the debt. The act of 1835 (section 6) provides: "The said mayor and city council shall have power to raise by tax, in such a manner as to them may seem proper, upon the real and personal estate within said city, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleaning, paving and watering the streets of the said city; for supporting the city watch, the levee of the river, the prisons, workhouses and other public buildings, and for such other purposes as the police and good government of the said city may require. It seems to me that subscriptions to works of internal improvement are excluded from all the purposes here specified. The act of 1836 (page 31, § 4) continued to the several municipalities into which the territory of the old city was then divided, the powers of the old corporation, and those powers were again continued when the different municipalities with additions were consolidated. But there is here no power given to levy this tax.

This brings me to consider the second and principal point urged by the relators' counsel, viz: That the legislature, by authorizing the incurring of the debt, authorized the levy of the tax to pay it. The decisions of the courts of last resort of several states were cited, which it is not necessary for me to consider, because they depend upon the statutes of these states; nor need I, upon this point, refer to more than one decision of the supreme court of the United States. The result of what it has said upon the general subject may be summed up in this: It has held that the collection of judgments of the United States courts may be aided by mandamus whenever there is a refusal or failure on the part of the officers to perform any ministerial act clearly imposed by law; it has treated the repeal of laws in force at the time of the issuance of the bonds, and which carried with them substantial rights, as void; and, generally, has given in behalf of parties obtaining judgments in the courts of the United States, the same aid to which parties similarly situated would have been entitled in the courts of the state in which the cause of action arose; but it has never assented to the unqualified proposition that legislative permission to issue bonds carried with it the authority to tax.

The principle upon which alone such a deduction is maintainable is, with its appropriate restrictions, clearly stated by Mr. Justice Miller in the case of Loan Association v. Topeka, 20 Wall. [87 U. S.] 655. The question was as to the validity of certain interest coupons upon which an ordinary suit had been brought. The defense was that taxation could only be invoked for purposes distinctively public, and that permission to issue the coupons carried with it the right to a tax to pay them, and that as the purpose for which these coupons were issued was not a public one, the statute authorizing them and the obligations themselves, were void. He had said that ordinarily the debt of municipal corporations had to be paid by means of taxation. He adds (page 660): "It is therefore to be inferred that, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

I think it to be indisputable that the absence of any permission by the legislature for a tax, and the substitution of some other means of payment which was deemed fully adequate, would as completely repel the inference that a resort to taxation was intended, as would a restriction upon the power of taxation itself.

Now, it is urged by the counsel for the city, that the statute by which these bonds were authorized shows that the legislature intended that the principal should be paid by means other than taxation. An examination of this statute has convinced me that the belief of the legislature was that the principal sum could, and its intent was that the principal sum should, be paid out of the stock and its revenues. The act pledges in perpetuity the stock for that purpose; it gives the right to the bondholder to convert his bond into stock; it provides that all dividends derived from the stock above six per cent. should be devoted to extinguish the principal; and while providing with extreme rigor for the payment of the interest, in case dividends from the stock should not be altogether sufficient, and, while providing that until the ordinance levying this yearly tax to pay the interest had been passed by the common council, no valid resolution could be adopted, it is profoundly silent as to any tax to pay the principal. The implication is that the legislature intended the bondholders should, for the collection of the principal sum, look to the stock, at least to the exclusion of taxation.

But, among the statutes of the state, with reference to the city of New Orleans, and among the general statutes of the state, are found acts that give the absence of any particular means of payment in a city ordinance creating a debt a special significance. The

act of 1852, No. 51, entitled "An act to consolidate the city of New Orleans and provide for the government," etc. (section 37, p. 54), contains the following provision: "And no ordinance (of the city of New Orleans) creating a debt or loan, shall be valid, unless for some single object, or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed or the debt incurred."

The act of 1853 (No. 258, p. 234) provides "that the police juries of the several parishes of this state, and the constituted authorities of incorporated towns and cities in this state, shall not hereafter have power to contract any debt or pecuniary liability without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

A subsequent section provides that "whenever police juries or authorities of incorporated towns or cities shall have provided for the payment of a debt by levying a tax, and shall fail or refuse to cause said tax to be collected, the court rendering judgment may issue its mandate," etc.

Now, since the general statute, and the statute with reference to the city of New Orleans, struck, with nullity, all obligations of cities, unless the ordinance creating the same, fully provided for the payment; and since one of the same statutes makes special enactments with reference to cases where "the provision for payment shall be by levying a tax," thereby showing that taxation was included in the term "means," it seems to me, that, when a contemporaneous legislature authorized a city to issue bonds and prescribed the form of the ordinance which the city common council should adopt, creating the obligation, the failure of such ordinance, to prescribe any provision for taxation, and the insertion in such ordinance of other means of payment which appear to have been deemed abundantly adequate, of itself, repels the inference that taxation was intended.

The legislature knew that the ordinance was void unless it contained full provision for payment. It meant, therefore, to set forth all the "means" which were to be considered as provided, and any addition of means by way of inference is excluded.

It follows, therefore, that since the legislature of the state of Louisiana has not by any general or special statute expressly or by implication made it the duty of the common council to levy this tax, this court is without any authority to direct its imposition.

It remains for me to consider the special circumstances in the case of Morris Ranger. The petition alleges, and the return admits, the sale of this stock by the predecessors of the present common council, provided they had the power to sell the same, and that they received therefor the sum of $320,000. The return then states that "no part of said proceeds of said so called sale is now in the treasury of the city, or in the possession, or under the control of these respondents; that the said proceeds have long since been used and expended, and no portion thereof ever came into the possession or under the control of these respondents, the present authorities of said city. These respondents show that no writ of mandamus can issue to compel the payment of the relator's demand out of said proceeds, because said proceeds are not in existence." Courts cannot issue a writ commanding the performance of an admitted impossibility.

If there are no funds arising from this sale in the treasury of this city, now under control of respondents, and they were spent years since by respondents' predecessors, then it would be idle to issue a mandate to the respondents to pay the relator out of them. Whatever may be the remedy of the relator by reason of the special facts of this transaction, it is clear that he is not entitled to a mandamus.

Let the demurrers be overruled, and the writs of mandamus refused.

[Writs of error were sued out by the relators in the supreme court, when the judgments of this court were reversed, and the causes remanded, with direction to issue the writs of mandamus as prayed. 98 U. S. 381.]

UNITED STATES (NEWPORT & C. BRIDGE CO. v.). See Case No. 10,186.

Case No. 15,872.

UNITED STATES v. NEW YORK GUARANTY & INDEMNITY CO.

[8 Ben. 269.] [1]

District Court, S. D. New York. Dec., 1875.

INTERNAL REVENUE—FAILING TO MAKE RETURNS—PENALTY—ASSESSMENT OF TAX—PLEADINGS.

1. Under the provisions of sections 110 and 120 of the internal revenue act of June 30, 1864 (13 Stat. 277), as amended by the act of July 13, 1866 (14 Stat. 136), but one penalty is imposed for all failures to make the returns required to be made, prior to the commencement of a suit to recover penalties for such failure.

[Followed in U. S. v. Erie Ry. Co., Case No. 15,056; U. S. v. Brooklyn City & N. R. R., 14 Fed. 285. Cited in Re Snow, 120 U. S. 286, 7 Sup. Ct. 562.]

2. To a claim to recover a tax due under the internal revenue law, on an allegation that a less tax than was due had been paid, the defence was interposed, that the amount paid was determined to be the true amount by the assessor of internal revenue, and to this defence a demurrer was interposed. *Held*, that the defence was one which would more properly be passed on at the trial, and that the demurrer must be overruled.

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

This case came before the court on a demurrer by the defendant to the second, fourth and sixth of the causes of action stated in the complaint, and a demurrer by the United States to the second defence set up in the defendant's answer. In the second cause of action on behalf of the United States, it was alleged that the defendant was a bank engaged in the business of receiving deposits as such, and that it became the duty of the defendant to render to the assessor of internal revenue for the proper district, monthly, for each month from November, 1865, to August, 1872, a true and accurate return of the amount of its deposits, with a declaration annexed thereto, and the oath of the president or cashier of the defendant, that the same contained a true and faithful statement of the amounts subject to tax; that the defendant had neglected to make such returns; and that thereby the defendant became liable, at the end of each of said months, to pay a penalty for each such neglect and refusal respectively, of two hundred dollars. The fourth cause of action was similar, for neglecting to make monthly returns of capital for each month from November, 1865, to December, 1872. In the sixth cause of action it was alleged, that it became the duty of every person having the care and management of said corporation defendant, to render to the assessor of internal revenue for the proper district, on or before the 10th of January, 1871, and on or before the 10th of August, 1871, and on or before the 10th of February, 1872, a true and complete return of the amount of income and profit declared in the preceding month and of the taxes thereon; that no person made such return, but the defendant made default in respect thereto; and that the defendant forfeited to the United States, for each such default, the sum of one thousand dollars.

The defendant demurred to these three causes of action, because several causes of action had been improperly united in each of said causes of action, each of them being for the recovery of numerous alleged penalties, each of which, if ever incurred, constituted a separate liability and cause of action, and the defendant, if liable at all, being liable for only one penalty for all the alleged violations of law charged in each cause of action respectively.

The provisions of the statute under which the claims for these penalties were made, were sections 110 and 120 of the internal revenue act of June 30, 1864 (13 Stat. 277), as amended by the act of July 13, 1866 (14 Stat. 136). By the first, third and fifth causes of action in the complaint, the United States sought to recover various amounts of taxes which were alleged to have become due under the provisions of the internal revenue law. The causes of action contained allegations that various amounts of taxes therein stated had become due; and that the defendant had paid certain smaller amounts and was indebted for the remainder of the taxes unpaid. To these causes of action the answer of the defendant set up two defences, the second of which was, that the defendant was always ready to pay any tax which it was liable to pay; that, by the due determinations of the assessor of internal revenue of the proper district, the amount of tax which the defendant was liable to pay was fixed and determined at the amounts alleged to have been actually paid by the defendant; and that the defendant acted in good faith upon said determinations and the same ought to be binding on the plaintiffs. To this defence the plaintiffs interposed a demurrer.

R. M. Sherman, Asst. U. S. Dist. Atty.
William Allen Butler, for defendant.

BLATCHFORD, District Judge. I am of opinion that the provisions of section 110, respecting penalties for neglect to make return and payment of tax as to amount of deposits and capital, require only a single return to be made covering deposits and capital, and impose only one penalty of $200 for all neglects or defaults prior to the commencement of the suit. The penalty is not imposed for each and every refusal or neglect, but for any refusal or neglect. Nor is the case varied by the fact that the tax is required to be paid each month upon deposits and each month upon capital, and that the return of deposits and capital is required to be made monthly.

So, also, under section 120 respecting penalties for neglect to make return as to dividends, only one penalty of $1,000 is imposed for all defaults prior to the commencement of the suit. The demurrer of the defendant to the second, fourth and sixth causes of action is therefore allowed.

As to the demurrer of the plaintiffs to the second defence set up in the amended answer, I overrule the demurrer, on the ground that the defense is one which it is most proper should be passed upon at the trial.

Case No. 15,873.

UNITED STATES v. NEW YORK LIFE INS. & TRUST CO.

[9 Ben. 413;[1] 24 Int. Rev. Rec. 118.]

District Court, S. D. New York. April, 1878.

INTERNAL REVENUE—LEGACY TAX.

Under section 124 of the act of June 30, 1864 (13 Stat. 285), and section 125 of that act, as amended by section 9 of the act of July 13, 1866 (14 Stat. 140), the United States sued a trustee under the will of a person who died in 1868, to recover a legacy tax of one per cent. on a sum of money which the trustee received and held in trust under the will for F., on the ground that F. had become entitled, in 1875, to the possession and enjoyment of such sum. By section 3 of the act of July 14, 1870

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

(16 Stat. 256), the taxes on legacies were repealed on and after October 1, 1870, saving taxes "assessed or liable to be assessed, or accruing" under former acts. It appearing that F. had not, on October 1, 1870, become entitled, under the will, to the possession or enjoyment of, or to the beneficial interest in, any of the principal sum of said money, it was *held* that the tax sued for had not accrued to the United States before October 1, 1870, and could not be recovered.

R. M. Sherman, Asst. U. S. Dist. Atty.
John J. Townsend, for defendant.

BLATCHFORD, Circuit Judge. The 124th section of the act of June 30, 1864 (13 Stat. 285), provides, that "any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property, as aforesaid, shall exceed the sum of one thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows, that is to say: First, where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister, to the person who died possessed of such property, as aforesaid, at the rate of one dollar for each and every hundred dollars of the clear value of such interest in such property." The 125th section of the same act, as amended by section 9 of the act of July 13, 1866 (14 Stat. 140), provides, "that the tax or duty aforesaid shall be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom, and the same shall be a lien and charge upon the property of every person who may die, as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every administrator, executor or trustee, having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof to the assessor or assistant assessor of the district where the deceased grantor or bargainor last resided, within thirty days after he shall have taken charge of such trust; and every executor, administrator or trustee, before payment and distribution to the legatees or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the assessor or assistant assessor of the said district a schedule, list or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the commissioner of internal revenue, which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and, upon such payment or delivery of such schedule, list or statement, said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by the laws of any state or territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And, in case such executor, administrator or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list or statement of such legacies, property or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list or statement of such legacies, property or personal estate, under oath, as aforesaid, or shall deliver to said assessor, or assistant assessor a false schedule or statement of such legacies, property or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the assistant assessor shall make out such lists and valuation as in other cases of neglect and refusal, and shall assess the duty thereon; and, in case of wilful neglect, refusal or false statement by such executor, administrator or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dollars, to be recovered with costs of suit; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or per-

sons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid, under its direction, to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act."

This suit is founded on a liability claimed to have been created by the foregoing statute, and is brought by the United States against the New York Life Insurance & Trust Company. On the 1st of November, 1868, Frederick Bronson died, leaving three children (two daughters and a son, Frederick), having duly made his will, by which he bequeathed and devised to his executors the residue of his estate, real and personal, on the following trusts: First, that they should divide the same, from time to time, as soon and to as large an amount as its condition might admit, into three equal shares or portions, and set apart and designate one of such shares or portions to each of his children. Second, that they should pay to the New York Life Insurance & Trust Company (the defendant) one-third of each of such shares or portions, to be held by such company in trust for each child, as follows, to wit, to invest the same, with the proceeds or income thereof, from time to time, in securities designated in the will, and to pay the income, or the portion thus deposited in said company, for his daughters respectively, if demanded, to such daughter semi-annually, and, on her death, the whole of such portion, with the accumulations thereof, if any, to go to her children, unless devised by her, as thereinafter provided; and to pay over to his said son, after he should attain the age of twenty-one years, the whole of the annual income of the accumulated sum of that portion held in trust for him, if demanded, in semi-annual payments, and, on his attaining the age of twenty-five, the whole principal sum so held in trust for him, with the accumulations thereof, except the sum of seventy thousand dollars, which should be held by said company in trust, to pay over to him the income thereof semi-annually during his life, and, at his death, the whole of the estate held in trust for him, as well as the said seventy thousand dollars, to be paid according to his will, if he should die married or leaving children him surviving; but, in case he should die unmarried, leaving no children, then to his sisters or their children, the latter taking per stirpes and not per capita. The will then provides, that the executors shall invest the residue of the several portions of the estate in securities designated in the will, and apply the income of that portion then belonging to the son according to their discretion, not exceeding $3,000 annually, to his education and support, until he should arrive at the age of twenty-one years, and, after that time, the whole of such income, until he should reach the age of twenty-five, at which time they should transfer the principal sum, with the accumulations, if any, to him, except that portion thereof so devised in trust for him to the New York Life Insurance & Trust Company. After that the will contains the following clause: "I hereby authorize my son, in case of his marriage before attaining the age of twenty-five, to dispose of the whole sum herein devised to him by last will and testament, and, in case he dies intestate, leaving lawful issue, the same shall descend to such issue; but, in case of his death before reaching the age of twenty-five years, unmarried, and without lawful issue, then the whole of such sum shall go to his sisters, or their children, the latter taking per stirpes and not per capita; but, in case of his death during the lives of his sisters, or either of them, said share shall be held in trust for them, in the same manner as is provided for their shares."

The complaint alleges, in its first count, that the defendant received, as a trustee, the shares or portions which it was so to receive for the son for said purposes; that the amount thereof exceeded the sum of $1,000; that the principal sum and accumulation thereon of the share or portion of the son, held in trust by the defendant at the time such son attained the age of twenty-five years, after deducting the sum of $70,000 therefrom, amounted to the sum of $281,593; that such son attained the age of twenty-five years on the 1st of November, 1875, and became entitled to the possession and enjoyment of the principal sum and accumulation thereon aforesaid, and thereupon a duty or tax of one dollar for each and every hundred dollars of the said sum of $281,593, to wit, $2,815.93, became due and payable to the United States from the defendant; that thereafter, and within the time prescribed by law, the commissioner of internal revenue duly assessed said tax against the defendant; and that said tax is unpaid. There is a second count, which claims to recover fifty per centum of such tax, as a penalty for not making a return of such tax and paying it. The complaint demands judgment against the defendant for the tax and the penalty, with interest on the tax from November 1, 1875.

The answer of the defendant, after a general denial, alleges, that the testator bequeathed all his personal estate to his executors in trust, who in due time gave due notice thereof to the assessor of the district where the deceased last resided, and, before payment and distribution to the defendant or any party entitled, paid to the collector of said district the amount of the duty or tax assessed upon the distributive share directed to be paid to the defendant in trust for the said son, and also made and rendered to said assessor a schedule, in duplicate, of the amount of all legacies or distributive shares passing by the will of said testator, with the amount of duty which had accrued or should accrue thereon, duly verified and in due form as required by law, and delivered the duplicate thereof to the said collector; that said tax so paid was duly assessed upon the clear value of the interest of said son in the whole estate, then ascertained to be $292,171, according to the true intent and meaning of said will; and that such valuation was made, and such tax assessed upon the executors, by the assistant assessor and assessor of said district, and returned by them to the said collector of said district in the list for the month of May or June, 1870. The answer prays judgment if the United States ought to be admitted, against the record of the valuation of the interest of said son in said personal property, and the record of the assessment of $2,921.71, assessed, as aforesaid, as the tax to be paid, at the rate of one per centum of the clear value of such interest, to maintain this action or to make any assessment whatever against the defendant.

The case has been tried before the court without a jury, on an agreed statement of facts. At the trial the plaintiffs moved to strike out of the first count the allegation as to an assessment, and to strike out the second count entirely. The will, dated December 19, 1864, was put in evidence, containing the above recited provisions. It was admitted to probate November 17, 1868. The defendant accepted the position of trustee under the will, and in that capacity had in charge and trust for the son certain sums of money and securities, of the value altogether, in money, of $164,425.34, which were received by it at five several dates, from November 2, 1869, to February 1, 1873. The son attained the age of twenty-one years on the 23d of June, 1870, and attained the age of twenty-five years on the 23d of June, 1874. There was paid to him by the defendant, as trustee under the will, from the 23d of June, 1870, to the 23d of June, 1874, inclusive, under the clauses of the will providing that he should receive the income of the principal sum from the time he should become twenty-one years of age until the time he should become twenty-five years of age, the sum of $36,370. The defendant, as trustee under the will, paid to the son, on the 11th of July, 1874, as the amount which, by the terms of the will, he was entitled to receive on attaining the age of twenty-five years, money and securities of the value altogether, in money, of $98,084.22. The defendant, as trustee under the will, retained the principal sum of $70,000, which it has hitherto held, and still holds, in accordance with the directions in that regard in the will. The executors of the testator gave notice to the assessor of the proper district of the terms of the will, and of all the particulars of the estate which passed from the testator, and delivered to the assessor of the proper district a schedule or list, and to the collector of the district a duplicate, which was in fact prepared by the assessor. The list was handed back to the executors by the assessor, and at the same time the assessor delivered to the executors a written paper, as a statement of the amount of tax due, based on the information which the executors had given to the assessor. In this statement the entire net personal estate of the testator was put down at $1,054,780.14. One-third of that amount for each of the three children was put down at $351,593.38. The values of the life estates of the two daughters severally in the sum of $351,593 were put down at the sums of $278,087 and $285,661 severally. The value of the life estate of the son in the sum of $351,593 (deducting $1,000) was put down at the sum of $292,171. The total value of the three life estates was put down at the sum of $855,919 and the tax thereon, at one per centum, was put down at $8,559.19. The assessment was put by the assessor into his monthly list for June, 1870. On the 23d of July, 1870, the executors paid to the collector, as the amount of the tax so assessed, $8,559.19, and received his receipt for the same. All the property which passed to the defendant in trust under the will was included in the property embraced in said lists, statement and receipt.

The United States, on the foregoing facts, claim to recover from the defendant a tax of one per centum on the value, at the death of the testator, November 1, 1868, of an annuity for seven years, on $164,425.34, computed by the Northampton tables, with interest on the amount of such tax from November 1, 1868; also a tax of one per centum on $98,084.22, with interest on such tax from June 23, 1874; also a tax of one per centum on the value, on the 23d of June, 1874, of an annuity for the life of the son, on the sum of $70,000, computed by the Northampton tables, with interest on such tax from the 23d of June, 1874.

By the third section of the act of July 14, 1870 (16 Stat. 256), it is provided, that, on and after the 1st of October, 1870, the taxes on legacies and successions imposed by the internal revenue laws then in force are repealed. The seventeenth section of said act of 1870 provides, that "all acts and parts of acts relating to the taxes herein repealed, and all the provisions of said acts, shall continue in full force for levying and collecting all taxes properly assessed or

liable to be assessed or accruing under the provisions of former acts, or drawbacks, the right to which has already accrued, or which may hereafter accrue, under said acts, and for maintaining and continuing liens, fines, penalties, and forfeitures incurred under and by virtue thereof; and this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved."

It was entirely uncertain, under the terms of the will, whether the son would ever be entitled to the possession or enjoyment of any part of the principal or income of the one-third share put in trust for him in the hands of the defendant, or to any beneficial interest in such share, except, perhaps, in the income or profits accruing therefrom. He could not have any of the income of such share until he attained the age of twenty-one years, nor could he have any of the principal of such share until he attained the age of twenty-five years. He might have died before he became twenty-one. The testator died November 1, 1868. The son became twenty-one on the 23d of June, 1870. If the son had died before he became twenty-one, unmarried, leaving no lawful issue, the estate held in trust for him by the defendant would not have passed under any disposition of it made by him by will, but would have gone, under the terms of the will, to his sisters or their children. On the 1st of October, 1870, when the repealing act took effect, the son had become entitled, at most, to the possession or enjoyment of, and to the beneficial interest in, nothing but the income, for his life, of the share held in trust for him by the defendant. He had not, at that time, become entitled to the possession or enjoyment of any of the principal sum which he was entitled to have on reaching the age of twenty-five, or to any beneficial interest therein, as a principal sum. If, on or after the 1st of October, 1870, he had died before reaching the age of twenty-five, without marrying, leaving no lawful issue, the estate held in trust for him by the defendant would not have passed under any disposition of it made by him by will, but would have gone, under the terms of the will. to his sisters or their children.

On the foregoing facts the question arises, whether any of the taxes sued for or claimed to be recovered herein had "accrued" to the United States before the 1st of October, 1870. None of them were due or payable, by the terms of the statute, until the son became entitled to the possession or enjoyment of the moneys in respect of which the tax is claimed, or to the beneficial interest in the same or in the income thereof. The taxes were repealed before the son became so entitled to anything, except, perhaps, the income for life of the share held by the defendant in trust for him, and, when the taxes were repealed, it was uncertain, under the terms of the will, whether the son would ever be entitled to anything more. Under these circumstances the defendant could never be called upon to respond for any tax on the share held by it in trust for the defendant, except, perhaps, the legacy tax on his life estate in such share, the value of such life estate being the clear value of his beneficial interest in such share.

The purport of the decision in May v. Slack [Case No. 9,336], is, that a tax "accrues" on a pecuniary legacy on the death of the testator, only where the legacy becomes vested by the death of the testator, and would pass under the will of the legatee, or to his personal representative, or could be assigned by him. In the present case, even if the right to the income for life of the trust share in the hands of the defendant accrued to the son when the testator died, and before the son became twenty-one, so that the legacy of such life estate became vested by the death of the testator and would thereafter pass by the will or assignment of the son, yet no right to anything else, or to the principal of the trust share, accrued to or became vested in the son before October 1, 1870.

On the 1st of October, 1870, it was uncertain when any legacy tax or duty would have to be paid in respect of any of the estate held in trust by the defendant, except, perhaps, the life estate of the son therein, or whether the son would ever enjoy anything but such life estate, or to whom the estate, beyond such life estate, would pass. The son's sisters and their children might all of them die before the son, and then he might die before reaching the age of twenty-five, and then the property held in trust by the defendant might pass to others. In such a case, according to the decision in Mason v. Clapp [Case No. 9,233], no tax would have accrued before the repeal took effect. In that decision, Judge Shepley, commenting on May v. Slack [supra] points to the fact, that, in May v. Slack, the tax accrued before the repeal, because the person who was to receive the legacy had before that been ascertained, and it was absolutely due to a specific legatee. But he holds that the evident intention of the exception in the repealing act was to provide for levying and collecting such taxes as should have been assessed before October 1, 1870, and such tax as before that time had accrued against any particular person, where, as against him, the right had accrued and become absolute. .

In Mason v. Clapp [supra], the devise was of real estate, to the testator's widow for life, and, on her death, to the plaintiff. The effect of the succession tax statute in that case was the same as the effect of the will in the case now before us, that is, to prevent the saving clause in the repealing act from reaching the case. The views of

Judge Shepley are adopted by the supreme court in Clapp v. Mason, 94 U. S. 589. There is nothing inconsistent with those views in the decision of Judge Shepley in Mason v. Sargent [Case No. 9,253]. In that case the legacy was to the testator's widow for life, and on her death, one-half of it to his son and the other half to his daughter. They were both of them living and of full age at the time of his death.

In the present case a tax of one per centum on the value of the life estate of the son at the time the testator died, in $351,593, namely, on $292,171, was paid. The only tax sued for in the complaint is a tax of one per centum on $281,593, as the principal sum, and accumulation thereon, of the share of the son which was held in trust by the defendant at the time the son attained the age of twenty-five years, after deducting the $70,000 therefrom. The complaint avers, that the son attained the age of twenty-five years, and became entitled to the possession and enjoyment of the principal sum and the accumulation thereon, at a date long subsequent to the 1st of October, 1870, and that the tax sued for became due and payable when the son attained the age of twenty-five years, and the complaint claims interest on such tax from the time when the son attained the age of twenty-five years. The complaint claims nothing in respect of any tax on the value of any life estate of the son. It follows, that the United States have no valid claim to recover from the defendant the tax sued for in the complaint.

The case was tried by the parties on the theory that the plaintiffs would be allowed to claim a recovery in the case for all or any of the three taxes before stated to be claimed by them from the defendant, if entitled to recover such tax or taxes on the facts proved, although the form of the complaint was limited to the specific tax claimed in it. I, therefore, proceed to consider the claims for those three taxes.

The claim to the tax on the $98,084.22 paid to the son by the defendant, after he attained the age of twenty-five years, is the same claim that is set forth in the complaint, the $281,593 being, on the evidence, really only $98,084.22. The defendant received $164,425.34, and paid to the son $98,084.22. The difference, $66,341.12, represents substantially the $70,000 directed by the will to be retained. The claim to a tax on the value of an annuity for the life of the son on the $70,000 must be rejected, for the same reason for which the claim to a tax on the $98,084.22 is rejected.

The remaining tax claimed is a tax of one per centum on the value, at the death of the testator, of an annuity for seven years on the $164,425.34 paid to the defendant, from time to time, in trust for the son. The tax is imposed by the statute on the share passing by the will, from the testator to the distributee, and is imposed on the clear value of the beneficial interest of such distributee at the time the share passes by the will, that is, at the death of the testator. In the present case, the clear value of the beneficial interest of the son in the one-third of the personal estate of the testator, at the time of the death of the testator, was, under the will, at most, the value of the estate for life of the son in such one-third. Such one-third, according to the statement of facts agreed on at the trial, included all the property which passed to the defendant in trust under the will. Such one-third was, as appears by the will, to be one-third of both real and personal estate. One-third of the personal estate, according to inventory, was $351,593. One-third of that, given in trust to the defendant for the son, was $117,197.67. The difference between that sum and the $164,425.34 paid to the defendant as one-ninth, if not presumably to be accounted for as the proceeds of real estate, or as accretion of value of personal estate after the death of the testator, is not explained. On the evidence, the United States received, in receiving the $8,559.19, a tax of one per centum on the clear value, at the time of the death of the testator, of an estate for the life of the son in all the personal property which passed to the defendant, under the will, in trust for the son. This includes a tax on the value, at the same time, of an estate for seven years, or of an annuity for seven years, in or on such personal property, and includes the tax now claimed. Such tax has, therefore, been paid.

It results, therefore, that there must be judgment for the defendant.

Case No. 15,874.

UNITED STATES v. NEW YORK, N. H. & H. R. CO.

[10 Ben. 144; [1] 24 Int. Rev. Rec. 341.]

District Court, S. D. New York. Oct., 1878.

INTERNAL REVENUE — DISTRICTS — JURISDICTION.

Under Rev. St. U. S. § 733, which is a re-enactment of the 41st section of the act of June 30, 1864 (13 Stat. 239), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 111), and which provides that "taxes accruing under any law providing internal revenue may be sued for and recovered, either in the district where the liability for such tax occurs or in the district where the delinquent resides," a suit will not lie to recover such tax in a district other than that in which the tax accrues or that in which the delinquent resides, although he may be found and served with process therein.

Mr. Hill, Asst. U. S. Dist. Atty.

H. C. Robinson, for defendant.

CHOATE, District Judge. This is a suit brought to recover a tax alleged to have ac-

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

crued against the defendant, a railroad corporation, in the year 1864, under the act of June 30, 1864 (13 Stat. 275). The defendant pleads to the jurisdiction that the tax, if any is due, accrued in the district of Connecticut, and that the defendant is not a New York corporation, but incorporated under the laws of Connecticut, and not a resident of this district. To this plea the plaintiff demurs.

The question raised is whether a suit for this tax can be brought in a district, other than that where the defendant resides or where the tax accrues, or whether it can also be brought in the district where the defendant shall be personally served. It is conceded by the learned counsel for the defendant that under the judiciary act of 1789, c. 20, § 11,—Rev. St. § 739 [1 Stat. 73],—which prohibits the bringing of a civil suit against an inhabitant of the United States "in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ," a corporation may be sued out of its domicile, if found in another district; and the defendant does not contend that this defendant was not "found" within this district within the meaning of that section. The claim of the defendant is that by Rev. St. § 733, the plaintiff is restricted to the district where the tax accrues and the district where the defendant resides for the purpose of this action. That section is as follows: "Taxes accruing under any law providing internal revenue, may be sued for and recovered either in the district where the liability for such tax occurs, or in the district where the delinquent resides." In the absence of any statute regulation as to the courts where such a suit is to be brought, no doubt the United States could sue in any district where the defendant could be found. And it is argued on behalf of the plaintiff that the language of section 733 is permissive, merely, and not restrictive, the words being "may be sued for," etc., and that the section adds another district in which the suit may be brought, namely, that in which the tax accrues, to those in which under the general terms of section 739 it could otherwise alone be brought, namely, those in which the defendant resides or can be found. Section 733 is a re-enactment of part of the 41st section of the act of June 30, 1864 (13 Stat. 239), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 111).

The act of 1864 (chapter 173, § 41) provided as follows: "That it shall be the duty of the collectors aforesaid or their deputies, in their respective districts, and they are hereby authorized, to collect all the duties and taxes imposed by this act, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by virtue of this act, and all fines, penalties and forfeitures which may be incurred or imposed by virtue of this act, shall be sued for and recovered in the name of the United States in any proper form of action, or by any appropriate form of proceeding, qui tam, or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction." It will be observed that under this statute no special provision was made as to the district in which suits for taxes should be brought; such suits were therefore liable to be brought and could be only brought in the district where the defendant resided or in the district where he was found, while suits for fines might be brought in the district where the fine was incurred, and also "in any other court of competent jurisdiction," which included certainly a circuit or district court of the United States for the district where the offender might be found. Section 41 of the act of 1864 was amended by the act of 1866 so as to read as follows (page 111): "That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized to collect all the taxes imposed by law, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties and forfeitures which may be incurred or imposed by law shall be sued for and recovered in the name of the United States in any proper form of action or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction. And taxes may be sued for and recovered in the name of the United States in any proper form of action before any circuit or district court of the United States for the district within which the liability to such tax may have been or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action." A provision as to suits for fines, penalties and forfeitures differing only in some unimportant respects was also made by the 179th section of the act of 1864 (13 Stat. 305), in connection with a provision imposing on collectors the duty of collecting such fines, etc. And this also was verbally amended by the act of 1866 (14 Stat. 145), but not in any particular varying its terms in respect to the courts having jurisdiction of suits and proceedings therefor.

A comparison of these two statutes shows, I think, that the purpose of amending the statute was to restrict the plaintiff in a suit for taxes to the two districts, that in which the tax accrues and that in which the defendant resides. Some change in the mode of collecting fines or taxes was intended by this amendment. In the original act the collectors are required to collect taxes, but no court was specified to which they are to resort. In the amending act, fines are still to be sued for in the circuit or district court of

the United States, for the district where the fine is incurred or in any other court of competent jurisdiction, the same as before. The change made is, by adding the provision as to taxes, that suits may be brought in the district where the liability for the tax is incurred or in the district where the defendant resides. Now if the purpose of this amendment had been merely to allow the United States to sue for a tax in the district where the liability was incurred, that purpose would have been well expressed by simply providing that the suit may be brought in that district. The language being in form permissive only, the United States would seem not, by that language, to be restricted from suing in any other district in which, by the existing law, it could already sue, namely, the district where the defendant resides or the district where he may be found; and if it was the purpose of this language, as claimed on the part of the United States, to confer a new right as to the place of suit, the words "or where the party, etc., resides," are wholly unnecessary and unmeaning. They are unnecessary because the right to sue thus conferred already existed; they are unmeaning because the existing alternative right to sue thus referred to, if it be supposed that it was intended to express by these words the existing alternative right, is only half expressed by the language used. The words are not apt nor broad enough to be supposed to have been used ex majore cautela to guard against the possible construction that the liberty to sue in the district where the tax accrues was intended to be exclusive, and the only place in which suit could be brought, and so that these added words were intended to save existing rights to sue. This is obviously not the intention, because the words used plainly express a distinct part and only a part of the existing right as to the place in which the suit may be brought, that right as then existing embracing, besides the district where defendant resides, the district also where he may be found. But words thus introduced into a statute, particularly by way of amendment, must be held to have been deliberately used and to have some force and meaning; and the only construction that can be put on these words, as it seems to me, to give them any sensible meaning or application, is that they are restrictive, limiting the right to sue to the district where the defendant resides, and the district where the tax accrues,—that they were intended to regulate the whole matter of the place of such suits. It seems impossible to give the words any proper force or to account for their being introduced into the statute on any other theory. Further support is given to this view by the juxtaposition of the two provisions, one as to fines, the other as to taxes. In the one the language used in the alternative to the new right given, is "any other court of competent jurisdiction," which includes the district where the offender can be found. Immediately follows the provision as to taxes. And different language is used for a similar alternative provision. It must be assumed that this difference of language was intended, and that the purpose had in view in using the expression employed as to suits for taxes would not have been effected by using the same language adopted as to fines. Such marked differences in language used for a similar purpose in the same act and the same section, cannot be held to have been accidental.

Moreover, it may well have been thought that the privilege given to the government to sue for a tax in the district where the tax accrues, and in the district where the defendant resides, afforded ample and convenient means of collecting the tax, and that it was unnecessary to preserve the right to sue, also, in the district where the defendant may be found. There seems to be nothing unreasonable in this arrangement as to suits for taxes, while as to suits for fines, penalties and forfeitures it has been thought wise to preserve to the government all existing rights to sue, while specially granting the new right to sue where the fine, penalty or forfeiture was incurred.

These provisions of the act of 1866 were embodied in sections 732 and 733 of the Revised Statutes with a change of form, but hardly of substance, as to suits for fines. Section 732 provides that suits for fines, etc., may be brought in the district where they accrue or in the district where the offender is found. And by section 733, as above cited, suits for taxes may be brought in the district where the tax accrues, or in that where the defendant resides. Thus the revisers appear to have indicated their understanding that the distinction in the act of 1866 was an intended difference in the two cases, by preserving the same distinction of language in the revision. Certainly this re-enactment detracts nothing from the reasons in favor of holding that the words were used in a restrictive sense in the act of 1866. And the presumption is against any change being intended by the substantial re-enactment of these two clauses taken from that section of the act of 1866, in these two sections of the Revised Statutes.

Demurrer overruled and judgment for defendant.

UNITED STATES (NEW YORK RECTIFYING CO. v.). See Case No. 10,214.

Case No. 15,875.

UNITED STATES v. NICHOLLS.

[4 Cranch, C. C. 191.] [1]

Circuit Court, District of Columbia. Dec. Term, 1831.

GUARDIAN — ACTION ON BOND — LIABILITY FOR MONEY RECEIVED IN ANOTHER JURISDICTION—DECLARATION.

1. A guardian appointed by the orphans' court of the county of Washington, D. C., is

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

liable, upon his bond given here, for money received by him in Maryland, for the use of his ward.

2. In an action upon a guardian's bond for not delivering up the property of the ward agreeably to an order of the orphans' court, it is not necessary to set forth in the breach all the grounds and reasons of that court for making the order; nor all the facts which would justify such an order.

This was an action of debt against the defendant as surety for John H. Beale, in his bond as guardian of Anne Lee Beale.

The declaration recited the bond with its condition, and assigned two breaches: (1) In not paying over to David Butler, Jr., who had been appointed guardian in his place, the sum of $288.87 due by him to his ward upon the settlement of his guardianship account to that time, the orphans' court having revoked his letters of guardianship and appointed the said Butler in his place. (2) In not delivering up and paying over to the said Butler $150 received by the said Beale for rent of the said Anne L. Beale's share of the rent of land in Calvert county in Maryland, according to a like order of the said orphans' court.

At the trial of the cause on the 24th of December, 1831, the defendant took a bill of exceptions, which stated that the plaintiffs, to support the issue on their part, offered in evidence to the jury an account of the said J. H. Beale, as guardian of the said Anne L. Beale, showing a balance of $288.87 due by him to his ward, and one of the items charged to him was the sum of $151.88 for "his ward's proportion of the interest on $12,656.69 (being an undivided legacy from the late Dr. William Potts in the hands of his executor,) for one year." Whereupon the defendant's counsel offered evidence to show that the said Dr. William Potts died in Frederick county, in the state of Maryland, and that Richard Potts of the said county and state, is the executor referred to in the said account; and also produced the will of the said Dr. William Potts. And thereupon prayed the court to instruct the jury that the defendant was not liable upon this bond on account of any moneys received by the said J. H. Beale, unless the same was received by him as guardian of his said ward on account of lands of the said ward lying in Washington county in this district, or from a personal estate of a deceased intestate or testator, of which estate administration hath been granted in the same county.

But THE COURT (CRANCH, Chief Judge, absent) refused to give the instruction, and the jury found a verdict for the plaintiffs, for the $288.87, with interest.

Key & Dunlop, for defendant, then moved for a new trial and in arrest of judgment; and contended that the said J. H. Beale, the guardian, was not liable here for money received in Maryland. That he had no right to receive his ward's money in Maryland, and Dr. Potts' executor had no authority to pay it to him, and is still liable to her for the same. That he could only discharge himself by payment to a guardian appointed in Maryland. That the first breach assigned is bad. It ought to have shown that the money was received on account of lands or estate in this county. That the bond only covers what he had a right to receive; and that he had no right to receive money out of this district. That the breach assigned ought to show the authority of the orphans' court to remove Beale from the guardianship, and to appoint Butler in his place. The only case in which the orphans' court can remove a guardian, is where he refuses to give new security when required by the court. Neither breach shows any such refusal, or any other ground for his removal. That court is of limited and special jurisdiction, and all the circumstances which will justify the removal ought to appear upon the face of the proceedings.

Mr. Hellen, in reply, was stopped by THE COURT, who said they would hear him if they should think it necessary.

THE COURT (MORSELL, Circuit Judge, contra), overruled both motions.

MORSELL, Circuit Judge, thought the breach bad in not averring that Beale had refused to give new security.

[See Case No. 15,876.]

Case No. 15,876.

UNITED STATES v. NICHOLS.

[4 Cranch, C. C. 290.] [1]

Circuit Court, District of Columbia. March Term, 1833.

GUARDIAN — ACTION ON BOND — LIABILITY FOR MONEY RECEIVED IN ANOTHER JURISDICTION —REVOCATION OF AUTHORITY.

1. A guardian appointed by the orphans' court for the county of Washington, D. C., is liable to account there for money received by him for his ward in Maryland.

2. A guardian, whose authority is revoked, is bound by his bond to pay over the money in his hands to the person appointed by the orphans' court to receive it, although the person so appointed had not given bond as guardian.

Debt against a surety in a guardian's bond.

The condition of the bond was that the guardian should faithfully account with the orphans' court as directed by law; and should "also deliver up the said property to the order of the said court, or the directions of law," &c. The declaration averred two breaches of the condition of the bond: (1) By not paying a balance in his hands of $78.87 to David Butler, according to the direction of the orphans' court; the said David Butler "being" appointed guardian in the place of John H. Beall, whose letters of guardianship were revoked. (2) By not paying to the said David Butler, according to the directions of the orphans' court, $150 which the

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

said John H. Beall had received for rents of the orphan's real estate in Maryland. The pleadings resulted in a demurrer, the principal questions in which were, whether the guardian was bound to account here, for money received in Maryland; and whether the orphans' court could lawfully order the money to be paid over to the new guardian before he had given bond for the faithful discharge of his duty.

Key & Dunlop, for defendant, contended that the defendant, who is a surety, is only liable for such property as the guardian here had a right to collect; and that he had no right to collect the effects of the ward in Maryland; and that, although a guardian may be liable in an action for money had and received, yet it is only because he has received it; and he is only liable as any other person would be, who has received the money of the ward. That the person from whom Beall received the money in Maryland was not justifiable in paying it to Beall, and is still liable for the same. That the surety who is about to sign the bond, considers the amount of property which the guardian would have a right to receive, and ought not to be made liable for more. They cited the act of Maryland of 1798, c. 101; Id. c. 12, §§ 1, 4; Williams v. Storrs, 6 Johns. Ch. 353; Morrell v. Dickey, 1 Johns. Ch. 153; and Genet v. Tallmadge, Id. 3.

Mr. Hellen, contra, cited Raborg's Adm'x v. Hammond's Adm'r, 2 Har. & G. 49.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the pleas were bad, and said (among other things):

The first plea admits the receipt of the money, and the order to pay it over; but denies that it was money for which the said John H. Beall was liable to account as guardian. The court, however, is of opinion that, although the money came from the funds existing out of the District of Columbia, yet, as it was received by him under color of his authority as guardian, he is bound to account for it as guardian. For if a stranger receive the rents and profits of an infant's estate, he may charge him and call him to account as guardian. Bac. Abr. "Guardian," I; 1 Rolle, Abr. 661; Cro. Car. 221; Yallop v. Holworthy, 1 Eq. Cas. Abr. p. 7, pl. 10; Newburgh v. Bickerstaffe, 1 Vern. 295; Falkland v. Bertie, 2 Vern. 342. And his bond covers all that he is bound to account for as guardian.

The second plea is, that at the time the order was made to pay the money over to Butler, he had not given bond as guardian, and, therefore, was not lawful guardian to receive the money. This plea assumes that the orphans' court had no authority to order the guardian to pay the money over to a stranger, and that such an order is absolutely void, and, therefore, it was no breach of the bond to disobey the order. But it does not appear that the orphans' court might not lawfully order the money to be paid over to Butler, although he had not been appointed guardian; or had not given bond. He might have been appointed a receiver for safe keeping. The declaration does not aver that Butler had been appointed guardian before the order was made, or before the money was to be paid; it merely describes Butler as "being appointed guardian." But if it were necessary that Butler should give bond and security before he could lawfully receive the money, the order to pay it over would not be illegal, as no time of payment was specified in the order stated in the declaration; and if previous security were necessary, the order would be considered as conditional, and to become absolute upon the security being given. It does not, therefore, necessarily follow that the order was void because the security was not given until after the date of the order.

The court is of opinion that all the pleas are insufficient.

[See Case No. 15,875.]

Case No. 15,877.

UNITED STATES v. NICHOLSON et al.

[3 Woods, 215.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1878.

ELECTIONS — CONGRESSIONAL REPRESENTATIVES — BALLOT BOXES.

1. The purpose of section 5515 of the Revised Statutes was only to punish a violation of the state laws regulating elections, when such violation affected the election or the result of the election of a delegate or representative in congress.

[Cited in Ex parte Perkins, 29 Fed. 906.]

2. The election law of the state of Louisiana, approved April 11, 1877, does not authorize the use, by the commissioners of election, of two ballot boxes, one for the election of state and parish officers, and the other for the election of representatives in congress.

This was an indictment [against Daniel Nicholson and others], under section 5515 of the Revised Statutes of the United States, against three commissioners of election appointed under the state law to conduct an election for member of congress, state, parish and ward officers, in one of the wards of Caddo parish, in the state of Louisiana. The charge of the court can be understood without any recital of the facts.

A. H. Leonard, U. S. Atty.

J. R. Beckwith, B. F. Jonas, C. H. Luzenberg, and J. C. Egan, for defense.

WOODS, Circuit Judge (charging jury). The defendants in this case are charged in an indictment containing two counts. The first count alleges that at the general election for members of congress, held on the fifth of November, 1878, in the Fourth congressional district, in this state, two of the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

defendants, to wit, Daniel Nicholson and Samuel Fells, were the commissioners of said election, and the other defendant, Thomas B. Chase, was clerk thereof; and that they, the officers of such election, did unlawfully, feloniously and with intent to affect the result of such election, furnish for use at the said election two boxes for the reception of ballots, in addition to the one provided for by law, and required said boxes to be used as follows: One of the boxes as the exclusive receptacle for all ballots cast for representative in the congress of the United States, one box as a receptacle for all ballots cast for officers of the Fourth ward of the parish of Caddo, and the remaining box as the receptacle for all ballots voted for officers of the parish and members of the state legislature.

The first count further charges that the commissioners at the said election announced and proclaimed that all ballots to be voted for representative in the congress of the United States were required to be deposited in the box set apart by them for the reception of such ballots; and that all ballots voted for ward officers were required to be deposited in the box designated for the reception of such ballots; and that all ballots to be voted for the parish officers and members of the state legislature were required to be voted in the box designated for the reception of such ballots by the commissioners. And that the commissioners of the election further proclaimed that any ballot deposited in a box other than the one designated by them for its reception would neither be listed nor counted. The first count of the indictment further alleges that the said officers of the election refused to count two hundred ballots cast at such election by duly qualified voters of the state and precinct for a representative in the congress of the United States. The second count charges that the defendants, being officers at said election, as mentioned in the first count, did refuse to perform their duty as such, and did neglect and refuse to count two hundred ballots cast at said election by duly qualified voters of the parish and state, for J. Madison Wells for member of congress for the United States.

As to this second count, I say to you, if there is any evidence at all in support of it, it is sufficient to prove the allegation, and it is your duty, therefore, to render a verdict of not guilty on that count. You will, therefore, address yourselves to the consideration of the question, whether or not the United States have succeeded in establishing the guilt of the accused upon the first count of the indictment. The presumption of law is, and you will bear it in mind, that the defendants are innocent until it is satisfactorily established that they are guilty, and guilt cannot be satisfactorily shown unless it is proved beyond reasonable doubt.

What is the charge brought against these defendants by the first count? It is that they did an act unauthorized by law, with a view and purpose of affecting the result of the election for member in congress of the Fourth congressional district of Louisiana. I instruct you that congress has no power to punish a state officer for a violation of a state law, if it only affects the election of state, parish or ward officers, and that section 5515 of the Revised Statutes of the United States does not undertake to punish state officers for a violation of state law, so far as such violation only affects the election, or the result of the election, of state, municipal or parish officers. That section (5515) declares that "every officer of an election at which any delegate or representative in congress is voted for, whether such officer be appointed or created by or under any law or authority of the United States, territorial district or municipal law or authority, who neglects or refuses to perform any duty in regard to the said election required of him by any law of the United States or of any state or territory thereof, or who violates any duty so imposed, or who knowingly does any act thereby unauthorized, with intent to affect any such election, or the result thereof, or who fraudulently makes any false certificates of the result of such election in regard to such representative or delegate, or who neglects, withholds, conceals or destroys any certificate of record so required by law respecting the election of any such representative or delegate, or neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures or advises any voter, person or officer to do any act by this or any of the preceding sections of this act made criminal, or to omit to do any duty the omission of which is by this or any preceding section of this act made criminal, shall be punished as prescribed by section 5511 of this act." It is clear that the purpose of this law was only to punish a violation of the state regulations, so far as such regulations affected the election, or result of the election, of a member of congress, and no further.

Now, as to the charge against these defendants under the first count: The state law requires or authorizes the use of one, or at most of not more than two ballot boxes. It is charged that at the general election held on the fifth of November last, these defendants, "with the intent to affect the result of an election for representative in congress, held on that day, employed three ballot boxes, and required that all votes for members of congress should be deposited in one box, and that all votes for parish officers and members of the state legislature should be deposited in another box, and that the votes for ward officers should be deposited in a third box." It is alleged, further, that defendants declared that any

votes for members of congress which might be deposited in a box designated for either the state or parish officers, or for ward officers, would not be counted. And it is further alleged, under the first count, that the object of the defendants in this action was to affect the election, or the result of the election, for member of congress.

The first question for your determination is this: were the acts which are charged against the defendants in this indictment committed by them. There is no dispute between the counsel for the prosecution and the counsel for the defense on this point. It seems to be conceded that three boxes were used at the elections held in Caddo parish, at the precinct named, on the fifth of November last.

A question of law arises here, and it is whether or not three ballot-boxes were or were not authorized to be used by the law of this state. It seems that on the tenth day of April, 1877, an act was approved by the governor of this state, providing, among other things, for the election of justices of the peace and constables, and on the eleventh of April, 1877—the next day—an act was approved which provided for the election of the various state officers, and also for the election of members of congress, and this act ended by repealing all laws on the subject of elections, excepting those relating to contested elections.

Under the view I take of this case, it is immaterial whether the act of the tenth of April, 1877, is in force or not. Whether or not it was repealed by the act approved next day is not important. My judgment is, that the state of Louisiana, by the act of April 11, 1877, did not authorize the employment, by commissioners of election, of a separate ballot-box for state officers and parish officers, and another ballot-box for members of congress. Section 2 of the act of April 11, 1877, declares, "that the election of members of the general assembly shall be held on the first Tuesday after the first Monday in November." Section 3 provides that all other officers, the time and place of whose election is not otherwise provided for by law, shall be elected at the time and place provided for the election of senators and representatives. Section 7 declares that all general elections for representatives in congress shall be conducted in the same manner as elections for representatives to the general assembly. Now, this act, you will see, provides for the election, as I have already stated, of twenty-two members of the general assembly and other state officers, and members of congress. Section twenty-three of the same act declares, that all the names of persons voted for shall be written or printed on one ticket, and that the names of the persons and offices voted for shall be accurately printed or written on the tickets. If this law is followed, it is impracticable that there should be two ballot-boxes, one for parish officers and members of the legislature, and the other for members of congress. In my judgment these commissioners were not in any event authorized, under the law of the state, to employ more than two ballot-boxes for ward, state and parish officers and members of congress. I think that a fair construction of Act No. 58 of 1877, shows that the use of one box for the reception of ballots for parish officers and members of the legislature, and another for ballots for members of congress, as it was conceded was done by the defendants, was authorized by law.

The vital question in this case is, what was the intent of the commissioners in using the three ballot-boxes? The prosecution charges that it was done for the purpose of affecting the election of a member of congress, or the result thereof. No matter how much it affected the results of the election for ward officers, parish officers or members of the state legislature; we have nothing to do with that. And unless the purpose of the defendants was to affect the election of members in congress there can be no conviction in this case. The rule of law is that every man intends the natural result of his act. Now, if the natural result of the act of these defendants was to affect the result of the election of a member of congress, you might infer that such was their purpose.

A question for your consideration is, did the use of three ballot-boxes naturally affect the result of the election of a member of congress? If it did not affect it, that is the end of this case. If it did affect it, then you are to inquire further whether the presumption arising from the nature of the act has been rebutted by the proof. The defense claims that no such implication would necessarily follow from such an act, and if it did, that they have succeeded in rebutting such implication. On this point the defense has introduced evidence tending to show that one of the defendants, or two of them, perhaps, took legal advice as to what their duties were under the Acts Nos. 57 and 58 of 1877, of the legislature of the state of Louisiana, and that they were advised that these laws did not prohibit the employment of two or even three ballot-boxes. I instruct you that if these defendants sought this advice in good faith, with the design and purpose of honestly arriving at what their duties were, and followed that advice in good faith, they cannot be convicted under this indictment. If the evidence on the part of the prosecution does not satisfy you that the employment of those three boxes, and the manner in which the defendants proclaimed that the different ballots should be deposited therein, were intended to affect the result of the election of a member in congress, you shall find the defendants not guilty. But if you are satisfied, from the evidence, that they did these acts with a design and purpose to affect the

election of a member in congress, and not under an honest mistake as to their duty, if you are satisfied of this beyond a reasonable doubt, it is your duty to return a verdict of guilty as to those defendants who participated in the act, its design and purpose. Chase, one of the defendants, testified, as I recollect the evidence, that he had nothing to do with the procuring of the two additional boxes, and the defendant Fells testified that the three boxes were at the poll when he arrived there. If the boxes were there, whether they procured them or not, and if the defendants Chase and Fells concurred in the use to which they were put, it is immaterial who brought the boxes to the polls.

You will take the case and determine whether or not the guilt of the defendants has been made out, and if you are not satisfied beyond a reasonable doubt that every necessary ingredient of the offense charged has been established, you will return a verdict of not guilty. But if you are convinced by the proof that the additional boxes were used by the defendants in the manner charged in the indictment, and for the purpose and with the intent charged, and not under an honest mistake as to their duty, you will find them guilty.

Case No. 15,878.

UNITED STATES v. NICKERSON.

SAME v. TAYLOR.

[17 Law Rep. 266; 1 Spr. 232.] [1]

District Court, D. Massachusetts. May, 1854.

PERJURY—FISHING BOUNTY.

1. The seventh section of the act of congress of July 29, 1813, c. 35 [3 Stat. 52], the act providing for the payment of the fishing bounty, does not require any oath to the agreement referred to in that section.

[Cited in U. S. v. Howard, 37 Fed. 667; U. S. v. Bedgood, 49 Fed. 56.]

2. The act of July 29, 1813, c. 35 [3 Stat. 52], expressly prescribes the kind of proof of compliance with the requirements of that act, necessary to entitle the owner of a fishing vessel to claim the bounty, and it is not, therefore, competent for any officer of the United States to require new oaths, so as to make the false taking of them legally criminal.

Indictments were found by the grand jury of the district court for the March term against Lindsey Nickerson, Jr., one of the owners, and Hezekiah Taylor, the late master, of the schooner Silver Spring, charging each of them with perjury in having sworn falsely in matters to which an oath was required by the statute of July 29, 1813, in order to obtain the bounty or allowance on the said schooner Silver Spring, for the fishing season of 1853.

The indictment against Nickerson, though it had but one count, charged him with swearing falsely in two particulars: First. As to the national character of the fishermen on board the Silver Spring. The certificate of the owner, signed and sworn to by Nickerson, declared that three-fourths of the crew were "citizens of the United States, or persons not the subjects of any foreign prince or potentate." The indictment alleged them to be foreigners, subjects of Victoria, queen of Great Britain, etc. Second. With swearing falsely, that the paper (a common fisherman's paper), produced to the collector at the custom-house on claiming the bounty, was the original agreement between the owners, master and men on board the said schooner, during the season of 1853, when it was not so, and when in fact the men were shipped on wages and not on their lay.

The indictment was brought under the seventh and ninth sections of the statute of July 29, 1813. The first of these provides, that "the owner or owners of every fishing vessel of twenty tons or upwards, his or their agent or lawful representative shall, previous to receiving the allowance made by this act, produce to the collector who is authorized to pay the same, the original agreement or agreements which may have been made with the fishermen employed on board such vessel as is herein before required, and also a certificate to be by him or them subscribed, therein mentioning the particular days on which she sailed and returned on the several voyages, or fares she may have made in the preceding season, to the truth of which he or they shall swear or affirm before the collector aforesaid." The ninth section provides, that "any person who shall make any false declaration in any oath or affirmation required by this act, being duly convicted thereof, in any court of the United States, having jurisdiction of such offence, shall be deemed guilty of wilful and corrupt perjury."

THE COURT (SPRAGUE, District Judge), on the reading of the indictment expressed an opinion that the first charge, if sustained, could not authorize a conviction for perjury under the statute of July 29, 1813, because that statute contained no requirement that three-fourths of the crew should be citizens of the United States.

C. B. Goodrich, and T. K. Lothrop, for defendant, contended, that the seventh section did not require an oath as to the agreement; but merely an oath as to the truth of the certificate of the days of the vessel's sailing and returning. And, therefore, that the first charge in the indictment could not warrant a conviction for perjury, even supposing the defendant to have sworn falsely as to the agreement as alleged; the oath to the agreement being not required, and idle. That the word "certificate" in the seventh section was the only required antecedent of the relative pronoun "which," and that the statute being penal must deceive a strict construction.

Mr. Hallett, U. S. Dist. Atty., argued, that the whole statute must be construed together,

[1] [1 Spr. 232, contains only a partial report.]

and not a single section by itself; that the whole statute should receive that construction which would best support the intention of congress in its enactments; that the intention of congress to require an oath as to the agreement, as well as one to the certificate, was perfectly clear; and that the rules of grammar would be perfectly satisfied by referring which to both the words "agreement" and "certificate."

THE COURT (SPRAGUE, District Judge). The precise question, here, and it is a question of importance not only in this particular case, but as regulating the proceedings in future cases arising under this statute is, whether the seventh section of the statute requires the oath of the owner to the truth of the agreement and of the certificate described in that section, or to the truth of the certificate alone. That section requires two things: First, that the owner should produce the original agreement made with the fishermen; second, and also a certificate specifying certain particulars, to the truth of which he is required to make oath. The whole question thus turns on the force and effect of the word "which." Does it refer to "certificate" alone, or does it embrace both "certificate" and "agreement"?

The first observation which I have to make on this point is, that the force and effect of the word "which" is entirely satisfied grammatically and philologically by the word "certificate." It may include the other; but the word certificate is a sufficient antecedent for it to answer all the rules of grammatical construction. Is the meaning and intent of the section satisfied by this construction? It is suggested by the district attorney, that if you strike out the words specifying the contents of the certificate, which are, as it were, parenthetical, and may be omitted without injury to the sense, so that the clause will read, "shall produce the original agreement, and also a certificate to be subscribed by him to the truth of which he shall swear," etc., the construction will then be clear, and the intention of the legislature to require an oath, as well to the truth of the agreement as to that of the certificate, certain and manifest. Is this so? Is the language of the section appropriate for this construction, if you strike out the intermediate clause? I think not. Persons do not swear to the truth of an agreement, but to its genuineness, or that it is the original agreement. And here the printed oath to which the owner is required to swear is divided to suit this difference. And he swears that the certificate is true, and that the paper produced is the original agreement. Is this oath, that the paper produced is the original agreement made with the men, the same as an oath to the truth of the agreement? It may be so, but perhaps it is not. For part of the case here may be that there was another verbal agreement originally, and that this written one was made subsequently. We all know the minute description of the oath required in an indictment for perjury. Can we say, therefore, that when the oath is that the agreement produced is the original one, that an indictment setting forth this oath, and charging the defendant with perjury in having taken it falsely, will satisfy a statute requiring an oath as to the truth of the agreement, and providing that this oath, if taken falsely, shall subject the person so taking it to the pains and penalties of perjury. I only adduce this to show that in requiring an oath to the agreement it has been found necessary to alter the phraseology of the statute.

But, further, there is nothing in the seventh section of the statute of July 29, 1813, which requires that the two acts therein made requisite for obtaining the fishing bounty should be done at the same instant. They may be done at different times. The certificate may be made at one time and the agreement produced at another, a week, a month, or six weeks later, it is immaterial. The word "also" has besides to a legal ear a peculiar force and significance. It indicates that you are going to a distinct and independent matter, and if this statute was drawn by any one familiar with legal language, there was probably a purpose in its insertion. At all events the language is at least so doubtful that no court of justice would allow a person to be convicted of so grave an offence upon language so vague, ambiguous, and indeterminate. Congress may have intended to require an oath as to the agreement, or they may have not. It is so uncertain that I cannot say.

It is argued on the part of the government that two things are necessary to qualify a vessel to obtain the fishing allowance: First, that the vessel should have been four months at sea; second, that a certain specified written agreement should have been made with the fishermen employed; that an oath of the owner is required to prove a compliance with the laws in the first particular, and that there is equal reason for requiring it as to the agreement. But the question is not what congress might have done, but what they have done. And I see a ground of distinction that may have induced congress to require an oath as to the certificate when they did not as to the agreement. It is provided by another section of the same statute that fraud in producing the agreement, or in any proceeding necessary to obtain the bounty, shall cause a forfeiture of the vessel. This is a heavy penalty, and congress may have been satisfied that this was a sufficient punishment for fraud relating to the agreement. The owner is to produce to the collector who is to pay the bounty a certificate of the days on which the vessel sailed and returned. This is the only document required by the statute. The circular of the secretary of

the treasury obliges the owner of a vessel claiming the bounty, to produce the log book kept on board the vessel during her fishing voyage. But the only thing the statute requires is the certificate. The time the vessel has been in port during the season is necessarily excluded in the computation of the time she has been engaged in fishing, and in the absence of a log book—and the statute, as already stated, makes no provision for the existence of such a book—there is great difficulty in proving this, and so the oath of the owner was required by the statute to the certificate of the days of the vessel's sailing and returning, as proof that she was the proper time at sea. Courts of justices are not inclined to increase or extend custom-house oaths. In the present case the legislature probably did not intend to require an oath as to the agreement.

Upon learning this opinion of the court, the district attorney proposed to prove that the oath as to the agreement was taken in pursuance of instructions of the secretary of the treasury to the collectors, relative to the payment of the fishing bounty, and contended upon the third section of the statute of March 1, 1823, c. 37 [3 Stat. 730], and the case of U. S. v. Bailey, 9 Pet. [34 U. S.] 238, that the secretary of the treasury had a right to require an oath as to the agreement, and that such an oath so required would be a legal one, the false taking of which would sustain an indictment for perjury.

THE COURT (SPRAGUE, District Judge), without expressing an opinion on this point, held the evidence inadmissible, in support of the present indictment, which rested upon different grounds, and charged the defendant with perjury, committed by falsely swearing in an oath required by the statute of July 29, 1813, and thereupon ordered the jury to return a verdict of not guilty.

In the case of Taylor, the master of the vessel who was charged with a similar offence under the same statute, the jury, under the direction of the court, returned a verdict of not guilty. A motion was thereupon made for his discharge.

Mr. Hallett, U. S. Dist. Atty., objected on the ground that further proceedings would be instituted against him under the statute of March 1, 1823, c. 37, § 3 [3 Stat. 770], which provides that "any person who shall swear falsely touching the expenditure of public money, or in support of any claims against the United States, shall, on conviction therefor, suffer as for wilful and corrupt perjury"; and he cited the case of U. S. v. Bailey [supra], to show that such an indictment might be maintained.

THE COURT (SPRAGUE, District Judge). It is proper for the court on a motion for the discharge of a defendant to see whether he may be liable on any new charge, and whether he should therefor be detained in custody to answer further proceedings. The defendant in this case is charged with swearing falsely that the agreement produced by him to the collector is the original agreement made with the fishermen on board the schooner Silver Spring, during the last season. The indictment was brought under the statute of July 29, 1813, and the court have already decided that no oath to the agreement is required by that act, and the jury under the direction of the court have returned a verdict of not guilty. A motion has been made for the discharge of the defendant, to which the district attorney objects on the ground that he wishes to retain him in custody, that he may institute new proceedings against him for the same offence. He states that the oath as to the agreement was taken in compliance with the instructions of the secretary of the treasury, and in conformity with the usage for the last forty years in all cases where claims have been made for the fishing bounty, and he cites the decision of the supreme court of the United States in U. S. v. Bailey, 9 Pet. [34 U. S.] 236, to show that the secretary of the treasury has power to require oaths to be taken in support of claims, and that they are legal oaths.

The case in 9 Pet. [34 U. S., supra], though the decision of the supreme court, and therefore binding on this court, is undoubtedly the very extreme of the law, and is not to be extended. Let us compare it with the present case, and see if there is any distinction between them. In that case an act of congress authorized the treasury department to adjudicate upon and settle certain claims on the state of Virginia, for pay for military service, which had been assumed by the United States. There was no provision as to the kind of proof the secretary might require, and the adjudication of the department was, I think, final. The supreme court say that congress must be supposed to have acted with reference to the well-known usage of the department to require the oath of the claimant in support of claims payable there. And therefore that the secretary had authority to insist upon the oath in that case, and that the oath so taken was a legal one. But by the statute of July 29, 1813, congress has seen fit to prescribe expressly the kind of proof of compliance with the requirements of that act, for obtaining the fishing bounty, which shall be necessary to entitle the owner of a fishing vessel to claim the bounty. It has directed that the owners of vessels of more than twenty tons, shall produce the agreements made with their fishermen, and also a certificate of the days of the vessel's sailing and returning, and of the time that she was at sea. And it has further required the oath of the owner to the truth of the certificate. There are other requisitions for

boats and vessels between five and twenty tons, and when these proofs have been made, the collector is to pay the bounty. Now when congress, the supreme legislative authority, has thus directed precisely what shall be done to entitle a party to receive the bounty—what papers shall be produced, and to which of them an oath shall be required, it is not competent for any officer to require new oaths, so as to make the false taking of such oaths legally criminal. The difference between this case and that in 9 Pet. [34 U. S.] is that in that case no mode of proof was provided by law; in this, congress has seen fit to prescribe the amount and manner of proof.

I might further say that in this case the secretary of the treasury has no authority by the statute. And that the power of deciding on the claims is left entirely to the collector. As to the power of the secretary or of the collector to regulate the proof necessary in relation to matters required by other statutes, in which no mode of proof is provided, I have no occasion to express any opinion. The only oath which it is alleged that the defendant Taylor took falsely is the oath as to the agreement. And as the production of the agreement is one of the requirements of the statute of July 29, 1813, while no oath regarding it is required by that act, the oath alleged to have been taken could not have been a legal one, and could not therefore be the ground of an indictment for perjury. For these reasons the defendant must be discharged.

[NOTE. In the circuit court the defendant Nickerson joined in the demurrer to his former acquittal, and the judges were divided in the opinion as to whether or not that plea was good in bar to the indictment. The question was certified to the supreme court, where it was held that the special plea pleaded by defendant was a good plea in bar to the indictment. 17 How. (58 U. S.) 204.]

Case No. 15,879.

UNITED STATES v. NICOLL et al.

[1 Paine, 646.] [1]

Circuit Court, D. New York. Oct. Term, 1826.

GOVERNMENT PROPERTY — POWER TO SELL — AFFIRMANCE OF TORTIOUS SALE.

1. Under the 3d section of the 4th article of the constitution of the United States, no property belonging to the United States can be disposed of except by the authority of an act of congress.

2. The war department has no authority, express or implied, to sell the public property put under its management and superintendence; nor is any such power vested in the treasury department.

[Cited in U. S. v. Ames, Case No. 14,441.]

3. A commandant of an arsenal of the United States sold a quantity of lead, belonging to the United States and placed in the arsenal, to the defendants, but afterwards, by a fraudulent collusion with the defendants, converted the sale into a loan of the lead to a third person, who was in a few months to return it to the arsenal, the defendants guaranteeing its return. On a suit by the United States for the price of the lead, *held*,—that the commandant was a mere agent for safe keeping, and that the sale by him was a tortious act, and the subsequent loan void; but that as no agent or department of the United States had power to sell originally, they could have no power to waive the tort and affirm the sale for the United States, as in cases of individuals; and that as the treasury department had no such authority to sell, their directing the suit to be commenced was not an affirmance of the sale.

R. Tillotson, for plaintiffs.

T. A. Emmet and C. Graham, for defendants.

THOMPSON, Circuit Justice. This is an action of assumpsit [against Francis H. Nicoll and others] for goods sold and delivered. Upon the trial of the cause several exceptions were taken, on the part of the defendants, to the charge of the court to the jury, and a bill of exceptions was duly sealed. A verdict was found for the plaintiffs. No judgment, however, has been entered upon the verdict, and a motion is now made for a new trial, considering the bill of exceptions in the nature of a case made for that purpose. In the view which I have taken of the present motion, it will be unnecessary for me to notice very particularly the facts which appeared upon the trial. It is sufficient to state, generally, that the property in question consisted of a quantity of lead, belonging to the United States, and placed in the arsenal in this city, then being under the command of Captain Edward Tyler. In August, 1815, Captain Tyler sold the lead to the defendants for six thousand two hundred and twelve dollars sixty-four cents, for which they gave their note payable sixty days after date. In October, of the same year, by the procurement of the defendants, this sale was converted into a loan of the lead, by Captain Tyler to George W. Murray, to be returned by the 1st of March then next; and which return was guaranteed by the defendants. For which change of the transaction Captain Tyler, by arrangement between him, George W. Murray, and the defendants, received for his own benefit one dollar on each hundred weight of the lead; amounting to about five hundred and sixty dollars.

The jury were instructed by the court, that as no evidence had been offered touching the authority of Captain Tyler to sell the lead, his powers in this respect must be governed by his legal authority, growing out of the situation in which he was placed. That, as commander of the arsenal, he had no right to sell the public property. That he was a mere agent for safe keeping; and that in selling the lead, he violated his duty and transcended the authority with which the law had clothed him. But admitting him to have been an agent to sell, this would not imply a right to loan; and if the sale was valid, Captain Tyler could not rescind it and convert it into a loan.

[1] [Reported by Elijah Paine, Jr., Esq.]

The sale having been made, his powers were at an end, and his subsequent conduct in converting it into a loan to George W. Murray was without authority and void. So that neither the defendants by the sale, nor Murray by the loan, acquired any legal right in the property, and the title still remained in the United States. But that the plaintiffs had a right to waive these tortious acts, and confirm the sale, and bring an action for goods sold and delivered. That they were not bound to bring the action upon the note: It was not a sale for the note of a third person. And where goods are sold, and a note given by the purchaser for the consideration, the seller may bring his action upon the original sale, when the rights of third persons are not involved, and the note is brought into court and cancelled upon the trial. And the note in this case having been delivered up to the defendants, no objection lay to the present action on that ground. It was submitted to the jury to decide from the evidence, whether the defendants were chargeable with a fraudulent collusion with Captain Tyler; with instructions, that if they should be of opinion that they were not, then the defendants were entitled to a verdict; but if they were, a verdict ought to be found against them; that the bringing of this suit for goods sold and delivered, was a ratification of the sale made by Captain Tyler to the defendants; and that in cases of this kind there was no distinction between the United States and individuals.

These are briefly the points upon which exceptions were taken, and which have been argued upon the present motion for a new trial. But the conclusion to which I have arrived, renders it unnecessary for me to notice any of them, except the last branch of the instructions to the jury. It may not, however, be improper for me to observe, that I have examined all the other points presented, and am confirmed in the view taken of them upon the trial; and which, under the finding of the jury, would establish the plaintiff's right of recovery, if there was no impediment growing out of the form of the action. The merits of the case being clearly with the verdict, I have examined this question with a strong desire to surmount the difficulty, but have not been able to sanction the doctrine laid down at the trial, without violating what I deem to be an important principle in the administration of the government, with respect to the disposition of public property. That Captain Tyler was a mere agent for safe keeping, and without authority to sell the lead in question, cannot be doubted. As between individuals, where an agent wrongfully, and in violation of his authority, sells the goods of his principal, the principal may affirm the act of his agent, waive the tort, and maintain an action of assumpsit for goods sold and delivered. But the affirmance of the act, in such case, is by the party who is owner of the property, and has the absolute right to sell; and his subsequent ratification of the act of his agent is equivalent to an original authority to sell. But that principle cannot be brought to bear on the present case. The lead being the property of the United States, nothing short of the authority of an act of congress would justify its sale originally. And it would require the like authority to ratify the unauthorized conduct of the agent, and convert his tortious acts into a sale of the lead. This grows out of our constitution, and the organization of the different departments of the government.

The constitution declares (article 4, § 3) "that congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, and other property belonging to the United States." No public property can therefore be disposed of without the authority of law, either by an express act of congress for that purpose, or by giving the authority to some department of the government, or subordinate agent. No law has been shown authorizing the sale of this lead. Nor is any such authority to be inferred from the general powers vested in any of the departments of the government. This power, if lodged any where, would seem most appropriately to belong to the war department. But there is no such express or implied power in that department, to sell the public property put under its management and superintendence; and there is nothing contained in any of the laws regulating the ordnance department, which in the least countenances the right of selling or loaning the public property. See Acts 14th May, 1812, and 8th Feb., 1815 (4 Laws U. S. 430, 792 [2 Stat. 732; 3 Stat. 203]). But the case furnishes no evidence whatever that this sale has been ratified or approved by the war department, or any other branch of the government, except what is to be inferred from the mere act of bringing the present suit for goods sold and delivered. If the principle I have laid down be correct (and I think it cannot be denied), that no one can ratify the act of the agent in such case, and convert his tortious disposition of the property into a legal sale, except he who had the right to sell, it will necessarily follow, that the simple act of bringing an action for goods sold and delivered, will not amount to such ratification. Such suits are brought under the direction of the treasury department; but that department has no right to sell public property without the authority of an act of congress for that purpose

By the act of the 3d March, 1817 (section 10, 6 Laws U. S. 201 [3 Stat. 366]), it is made the duty of the first comptroller to superintend the recovery of all debts due to the United States, and to direct suits, and legal proceedings, and to take all such measures as may be authorized by the laws, to enforce prompt payment of all debts to the United States. By the act of 15th May, 1820 (6 Laws U. S. 520 [3 Stat. 592]), this duty is transferred to another officer. The president is authorized to designate some officer of the treasury department, as agent of the treas-

ury, whose duty it shall be to direct and superintend all orders, suits, or proceedings in law or equity, for the recovery of money, chattels, lands, tenements, or hereditaments, in the name, and for the use of the United States. By no possible construction, however, can this authority be converted into a power to sell and transfer public property. It is the mere right of superintending suits, and enforcing the claims and demands of the United States, as he shall find them. Nor is it to be inferred, that the United States have ratified this sale, from the circumstance that the suit is brought by the district attorney, who is a public officer of the United States. By the last mentioned act (section 7), he is required in the prosecution of all suits, to conform to the directions and instructions of the agent of the treasury. Our government being a government of laws, it speaks to its agents through its laws; and it is to them only that we are to look for the authority of such agents. And no law having been shown authorizing the sale of the lead in question, or vesting in any department of the government any general authority to sell public property, no such sale can be inferred from any of the circumstances appearing in this case. And an action of assumpsit for goods sold and delivered cannot be maintained. The verdict must therefore be set aside.

Case No. 15,880.

UNITED STATES v. NIHOLS.

[4 McLean, 23.] [1]

Circuit Court, D. Michigan. June Term, 1845.

PERJURY — FALSE BANKRUPT SCHEDULE — OATH — POWER TO ADMINISTER.

1. An intentional omission to place a part of his property on a schedule, in an application under the bankrupt act, which he swears to, as containing a true account of all his effects, is perjury, under the act of congress.

2. A deputy clerk, being authorized to act, the same as the principal, has a right to administer oaths in bankruptcy.

[Cited in U. S. v. Evans, 2 Fed. 152.]

3. Such oaths are presumed to be administered in the presence of the court, and by virtue of its authority.

[Cited in U. S. v. Evans, 2 Fed. 152.]

4. The act of 1825 [4 Stat. 115], in relation to perjury, being a general law, applies to all subsequent cases which come within it.

Mr. Bates, U. S. Dist. Atty.

Mr. Vandyke, for defendant.

OPINION OF THE COURT. This is an indictment for perjury, under the 1st and 7th sections of the bankrupt law [of 1841 (5 Stat. 440, 446)]. The act of congress (Gordon's Dig. 737) makes false swearing perjury. The indictment charges that the defendant, in applying for the benefit of the bankrupt law, in the schedule attached to his petition, did not state all his property, as the law requires. That he had a right, or credit, against one King, of one hundred dollars, which was not returned. That a debt due from Benjamin King of two hundred dollars, was not included. That he had other rights and credits against King, which were not placed upon the schedule.

The defendant's counsel filed a demurrer to the indictment, for "the reason that the act of 1825 does not govern cases of false swearing under acts passed subsequent to that act; and that the petition was sworn to before a deputy clerk, George G. Bull, who was not authorized to administer the oath. The act of 1825 is an act defining the crime of perjury generally; and it is not confined in its operations to acts passed anterior to that time, but is applicable to false swearing under the bankrupt law, as well as in other cases. The bankrupt law must be construed with the act of 1825, as in pari materia. Under the proceedings in bankruptcy, the false swearing charged must be considered as having been done in court. The bankrupt court was always open. Swearing to the petition was a proceeding in court, within the law, and if false, subjects the petitioner to punishment as for perjury. An affidavit to hold to bail, is a proceeding in court, if the oath be administered in the presence of the court, or under its requirements. 7 Term R. 315; 2 Chit. Cr. Law, 312; Rosc. Cr. Ev. 758.

But it is contended that the deputy clerk had no authority to administer the oath. This position is laid down too broadly. Admit that Bull, as deputy clerk, had no authority to swear the defendant to the truth of his petition; yet it will scarcely be contended that he had not the power to do so in the presence of the court, and by its express order.

There is another view of this case which is equally conclusive. The bankrupt court ordered on the 16th of January, 1843, that "during the absence of the clerk, his deputy may receive and file petitions, administer the oath to petitioners, and perform all the duties required of the clerk of this court." The word "deputy," here, is used as descriptive. The power to act is derived from the court. We think that the power to administer the oath to the petitioner was undoubted; and also that the perjury is well assigned, if proved by the evidence.

The demurrer is overruled.

At the same term, on the traverse of the indictment, the defendant was acquitted by the jury.

Case No. 15,880a.

UNITED STATES v. NINE CASES.

[Nowhere reported; opinion not now accessible.]

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

Case No. 15,881.

UNITED STATES ex rel. AMES v. NINE HUNDRED AND FIVE PACKAGES OF TOBACCO et al.

[10 Int. Rev. Rec. 124.]

District Court, E. D. Missouri. June 10, 1869.

FRAUDS AGAINST INTERNAL REVENUE LAWS—FALSE RETURNS—TOBACCO TAX.

The 905 packages are claimed by D. M. B. Brown, who also claims 172 of the 272 caddies. The remaining 100 caddies are claimed by Gen. E. B. Brown. The value of the tobacco and machinery involved in the case is estimated at about $15,000. W. H. Powell, the inspector whose name has been frequently mentioned in the progress of the case as having attempted to defraud the government, is in Canada, where, it is stated, he fled from justice. The factory of M. B. Brown was burned after its seizure by the United States marshal, but the origin of the fire has remained unknown.

Gen. Noble and Gen. Chester, for the United States.

Mr. Harding and H. B. Lightheuser, for claimants.

The evidence in the case having been all adduced, Mr. Lightheuser addressed the jury for the claimants, and argued that they had no connection with Powell. Mr. Dietrich had come upon the stand and showed that there was a nice little arrangement between himself and Powell by which he (Dietrich) was to make a clear profit of one half the taxes on the tobacco he manufactured. Mr. Dietrich was afraid he would be discovered, and he states he was sent by Powell to Mr. Brown to get some instructions as to keeping his books; but Mr. Brown told him that he kept no sales book and that he entered his sales in a day book. Dietrich's testimony did not establish anything against Mr. Brown. The latter did not tell him that he was keeping his books with a fraudulent intent. The evidence of this witness only went to show that Mr. Dietrich went to Brown and disclosed to him his fraudulent intent, and Mr. Brown said nothing. Dietrich had testified that Brown's instructions were to show to the inspector heads of caddies which had been inspected, for reinspection. Where the tobacco which had been in caddies was damaged tobacco, and was being remanufactured, it was very proper that the old inspection should be presented to the inspector that they might not be charged twice for one inspection. But what was their conduct with respect to these caddy heads thus taken from this damaged tobacco? As had been shown by the head pressman, it was their universal habit to burn them up. He referred to the demeanor of Dietrich while on the stand, and argued from it that his testimony was not to be believed; for while he pretended to remember conversations had over a year ago, he could not say a word of a conversation had not three weeks since. Everything showed that his story was a fabrication, plainly and palpably false on the face of it. That part between the witness himself and Powell was, he thought, true. He thought his anxiety about his own suits has made him over-zealous in his efforts for the government in this case. He contended that no jury should disbelieve the evidence of Dietrich so far as it relates to Mr. Brown. Powell and Brown undoubtedly had a conspiracy; if they had not, the latter would not have turned state's evidence. He hoped the government would let Mr. Dietrich off, as the servant was worthy of his hire, and he had come up nobly for them. It seemed to him it would take an immense sight of money to make a man come up in a court of justice, and acknowledge his guilt, as Dietrich had done; no man would do it voluntarily; it must be involuntarily. He did not know whether the district attorney intended to accuse them of having committed murder, or of having burned the factory. What motives could they possibly have for doing so? They had no interest in the destruction of the factory, but every interest in its preservation; and now that it has been destroyed, the government and its officials are anxious to bring about a conviction or a forfeiture, as they know the claimants will have to have restitution of this property, if a verdict is rendered in their favor. He asked the jury to give such a verdict.

Gen. Harding followed with an address in behalf of the claimants. In the course of his remarks he said it would have been the height of folly for a merchant of Mr. B. Brown's standing to have done what he was charged with, in any effort to defraud the government of its taxes. He would have been the veriest fool in St. Louis. The district attorney had said that two serious blows had been struck at the government: one was the burning of the factory and the other the murder of a man by the name of Christian. He (Gen. Noble) had taken pains enough to say that he did not charge this claimant, not even by insinuation, with having anything to do with these matters, and he, the speaker, conceived all through the case why it was that he was eternally bringing them up, and making it necessary for them to show that Mr. Brown was absent in New York, and had been in Washington city before, when the factory was burned; making it necessary to show that with all that property there, he had but one policy of insurance upon it, and that but for $3,000, while there were 905 caddies of tobacco, worth nearly $10,000, besides the machinery in it. The attempt to connect Mr. B. Brown with Powell had utterly failed. Mr. M. Matteson, formerly governor of Illinois, went on Mr. Brown's bond, and it was signed at Gen. Brown's office as the most convenient for him, he having then been but a short time in the city.

Gen. Noble put an interrogatory—Did he wish to know what "Governor" Matteson is now doing? Dealing in whisky in New Orleans.

Gen. Harding continued. It had been stated that Powell had pursued an extraordinary course—inspecting tobacco and returning only 1/5 as inspected, then dividing 4/5 with his accomplices. But there was no evidence to this effect upon which he would hang a dog. Supposing there were, the attempt to connect the claimant with it had signally failed. Mr. Harding then compared the returns and accounts, and stated there was a considerable discrepancy in the exhibit of Mr. Ames. If their books had not been destroyed their accounts would have been seen to have been all correct.

Gen. Noble addressed the jury for the government. He commenced by adverting to the necessity which exists of the law being stringently enforced, to prevent fraud and protect the honest manufacturer and dealer. Who is the man entitled to the protection of law, he asked? Is it the thief, who is evading by every means in his power the payment, not only of the tax on the tobacco which he reports, but on that which he does not report? Or is it the man who pays the tax into the treasury from the money he receives from the consumer, and, if necessary, goes and puts his paper, with his friend's name to it, in the bank and pays whatever is required by law? The internal revenue law is just one of those laws that if a man is a friend of his country he will endeavor to see enforced strictly, constantly, unremittingly, and bring to justice those who do not observe it. He will endeavor to bring such a case as this before the bar, and have it investigated by the people, instead of it being compromised and so have no investigation at all. Let the law, the guardian law of our country, have its due operation, and every man will bear an equal burden. We ought all to rejoice that a case like this has not been compromised, and that it has been brought to a trial. There are some ideas, some principles connected with this case, that involve not only the relationship of the mercantile classes, but enter our homes, say who shall prosper, whose family shall be provided for, whose bills of credit shall be met, who shall be protected by the virtue and the bright confidences of justice, and who shall suffer. If suffering there be, it is far better that the man who cheats, who attempts to defraud, should be deprived of his property by the justice which we all admire, while honest men who attempt to compete with him in the market, like Mr. Rucker, who testified that he has had to abandon his business after 44 years of labor, are compelled to close their factories. He did not know how tobacco was manufactured so cheap then; because there was an ingredient in it; he did not choose to deal in fraud. He would not make a false oath; he said he was an old man, and had lived too long in this country to cheat the government. So honest manufacturers have fallen off by the hundred, like the leaves of a tree whose roots have been poisoned. While there is a resemblance of honesty in this fraud there is death to the revenue in it and any one who comes in contact with it. The law is that the tax on tobacco shall be paid before it is removed. Were it otherwise he might postpone it for years and never pay the tax at all. This is the point in this case. This man was removing and absolutely selling far more than he ever reported to the government. M. B. Brown had been a manufacturer in Cairo, Ill., and, though it did not appear distinctly, it seems there had been some difficulty, and a change of base became necessary. You do not find him here any more (referring to Mr. Brown not being present in court). He has retired early from this contest, and left Mr. Lightheuser to bear the brunt of the battle. (Subdued laughter). The gentlemen smiled, and could hardly restrain their laughter as the government opened, but as it has proceeded, a deep shade of melancholy has taken possession of their souls. Dr. Brown came from Cairo in September, and Powell commenced to operate in October. Where was Dr. Brown to be found? In W. H. Palmer's, on Olive street, which Mr. Lightheuser had defined the "common loafing place for the most respectable citizens in St. Louis." (More subdued laughter.) He was to be found more frequently there than at his office. He (Gen. Noble) had expected that M. B. Brown or E. B. Brown would have come upon the stand and testified. They could have been witnesses and testified in their own case. Why did they not do it? Why did they not come to strengthen their own case? Why did not M. B. Brown take the stand? He was afraid to do it. Why did not E. B. Brown come and prove where he bought Reid's tobacco. He knew that he could not do it, and that as big a lie has been told as was ever perpetrated in a court of justice. Why did he not come forward and tell you when he bought it; he was in this court while this trial was progressing. I subpenaed him so that they could not say he was away. Matteson, who was stated to have been governor of Illinois, had no right to go on Dr. Brown's bond. If he was a governor, what kind of a governor was he? It is well known in this Western country who "Governor" Matteson was. He took advantage of his official position to deprive that state of its revenue. He was not a resident in this district, and had no right to have his name on the bond. Have we no men in the state of Missouri who can go on a tobacco bond?

Gen. Noble continued his remarks, and argued that steps were taken to secure the appointment of Powell as inspector, and a conspiracy between him and Dr. Brown. He then gave a lengthy résumé of the accounts

to demonstrate that Brown had manufactured a great deal more tobacco than he had reported. He commented on the ever enlarging proportion of fraud, and the interest the community had in the case being tried. Dr. Brown did not keep the books required by law. Mr. Harding had said that Mr. E. B. Brown could not afford to have mercantile transactions in his own name; he was pension agent, and perhaps did not know that the bribe offered to an officer of the government would not be received; he expected the trial to be compromised; he was pension agent, and had influence. The speaker drew a picture of how the government can be cheated—a plan which, if carried out, would be successful; he said the plan would be to get a bar-keeper appointed an inspector, drink with him early and often, have him keep the records, get your friends to swear to your returns, have your bank in your pocket; if the factory is seized, let it be burned down, destroy the records, and collect the insurance money, if there is any; to have some one destroy the chief witness in the case, bribe the prosecuting witness and have your lawyer to betray the confidence of any witness that tried to come in. Well may the witnesses for the United States, like Mr. Dietrich, stand in awe and fear in the presence of the fate of Henry Christian. I do not say these men, this man, or either of these men, did it. But I say there was a happy collusion of circumstances in their favor throughout this cause. It was proved to you that the government had no interest in the destruction of the factory. He (Christian) may have been intemperate in his habits, and received a blow from some one with whom he may have quarreled. This case, he said, will purify the atmosphere; it is worth thousands of dollars to the United States, whether you give a verdict for the United States or not. It lets them understand there is some place where men are called to justice, and there is a community looking on hearing the words of the witnesses, and the result in the community is the same; those men are marked. He believed he recognized in the jury a purity of soul, an experience in life, that would enable them to give a just verdict, and he concluded with an earnest appeal to their sense of right and justice.

THE COURT instructed the jury, and reviewed the several counts in the informations. The first information, against the 905, narrows itself down to the investigation whether M. B. Brown made a true or a false return for the month of April. If it is true, that ends the matter so far as he is concerned. But if it is not true,—if he manufactured more than he reported in that return, or sold more than he reported,—they would find a verdict for the plaintiff. The second information referred to 272 caddies found in various mercantile houses about the city. It is charged with reference to this, that all of that tobacco was removed from M. B. Brown's factory, with intent to defraud the United States of its tax. Of this, E. B. Brown claimed 100 caddies, on the ground that he is the owner of them, and had bought them in good faith. The enquiry divided itself. First, were the 172 caddies, M. B. Brown's, in his possession or under his control in the hands of these commission merchants, and if so were they there for the purpose of being sold with a view to defraud the government of its tax? And, so far as these 100 caddies, claimed by E. B. Brown, were they his or M. B. Brown's?

The jury retired, and came into court in about four hours. The foreman stated that one of them disagreed. A juryman said they wanted to know if they had to take into consideration criminal intent. Some thought that if a false return was made that was sufficient without reference to any criminal intent.

Gen. Noble beseeched the court to keep the jury until a verdict had been given. The verdict should be given. If they passed over Sunday, he was confident they would never get a verdict in the case. Now or never is the decision to be made, one side or the other, he did not care which.

THE COURT decided to allow the jury to separate, and said it would give fuller instructions on Monday. THE COURT trusted to their personal integrity not to converse with any one on the matter. THE COURT adjourned, and the jury scattered.

On Monday, a verdict for the United States, on all the articles of information, was rendered.

Case No. 15,882.

UNITED STATES v. NINE HUNDRED AND TEN BALES OF COTTON.

[Nowhere reported; opinion not now accessible.]

Case No. 15,883.

UNITED STATES v. NINE HUNDRED BASKETS OF CHAMPAGNE.

[Nowhere reported; opinion not now accessible.]

Case No. 15,884.

UNITED STATES v. NINE PACKAGES OF LINEN.

[1 Paine, 129.] [1]

Circuit Court, D. New York. April Term, 1818.

CUSTOMS DUTIES—FRAUDULENT ENTRIES—INCORRECT ENTRIES—MISTAKE—EXCUSE.

1. Where goods are libelled under the sixty-seventh section of the law for the collection of duties [1 Stat. 677], for disagreeing with the

[1] [Reported by Elijah Paine, Jr., Esq.]

entries, and the claimant sets up mistake as an excuse, the circumstance that probable cause of seizure has been made out, does not impose on the claimant the necessity of making out an unusually clear case of mistake. All he has to do is to produce ordinary proof.

[Cited in U. S. v. The Governor Cushman, Case No. 5,646.]

2. Circumstances must be of a controlling and irresistible nature to justify a disregard of positive testimony.

3. It was holden a sufficient and legal excuse for an incorrect entry of goods, that they were entered from an invoice made out in great hurry and agitation, while the goods were packed at Caen, in the absence of the owner, in order to secure them by removal from an apprehended pillage by the Prussian soldiery, who occupied the place.

[Cited in U. S. v. The Governor Cushman, Case No. 5,646.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was an appeal from a sentence of the district court of the Southern district of New York. A part of the goods libelled, had been condemned, and a part restored in the district court [case unreported], and both the libellants and claimant appealed from the decree.

The cause of forfeiture alleged in the libel was, that the goods which had been imported from France, were entered at the custom-house at less than their real quantities. It was alleged that nine packages of linen, two packages of silk, two packages of crapes, two packages of gloves, one package of stockings, one package of linen and napkins, one package of flounces, two packages of shawls, and twelve packages of clocks, were on suspicion of fraud opened and examined in the presence of two respectable merchants, and found to contain greater quantities than the quantities at which they were entered. The difference in the quantities as stated, amounted to from one-half to one-sixth in the dry goods, and the twelve cases of clocks which were entered as containing twelve clocks were stated to have contained nineteen.

The defence set up in the claim of William Vintroux Hersan, was, that the goods were not incorrectly entered with the intention of defrauding the revenue, but in consequence of mistake and accident. That the goods were packed at Caen in France, when that place was in possession of the Prussians and threatened with pillage, in great haste and confusion for the purpose of removal, and that if the entry was wrong, it was owing to this circumstance. That a large part of the merchandise imported had been found on examination to contain no more than the quantity at which it was entered. William Vintroux Hersan claimed the clocks as the property of John Louis Vintroux of Paris, and the rest of the goods as his own property.

A great number of witnesses were examined in the cause on both sides, some of them residing at home and others abroad, for the purpose of showing the circumstances under which the goods were purchased, packed up and sent to America, their situation here both before and at the time of the seizure, and the variation of the real quantities from the invoice and entries.

There were thirty-three packages of goods libelled. These packages were a part of seventy-two packages or boxes, with various marks, shipped by the claimant (who came with them) at Havre, in the ship Ann Williams, about the 1st of October, 1815, and consigned to Joseph Bouchaud of New York. On their arrival at New York, some delay in entering them was occasioned by a variation between the marks of two or three packages in the invoice and bill of lading. After the entry was made, a part of the goods were sent to Bouchaud's store and a part remained at the public stores. A part of those sent to Bouchaud's store were also removed to the house where the claimant lived, for the purpose of being unpacked and exposed for sale. While the claimant was engaged in unpacking them, the whole were seized for the causes alleged in the libel. Examiners were appointed by the collector to ascertain the real quantities contained in the packages. The thirty-three packages libelled were found to exceed the quantities at which they were entered, as stated in the libel. The rest of the seventy-two packages were found correct. Of the packages libelled, ten contained linen, and twelve contained clocks. These were condemned in the district court. The remaining eleven packages, containing crapes, silk goods, gloves, shawls, and stockings, were acquitted.

The excuse set up by the claimant was, that there was no intention to defraud the revenue, but that the variances in quantity were the result of accident. It appeared that the claimant kept a dry goods and jewelry store at Caen in France. He left that city for Paris about the 25th of August, 1815, to buy goods. France was then in the possession of the allied armies, and goods were very low. In the course of the month, he bought and sent considerable quantities of goods to Caen, intending them for the United States. About the 1st of September, learning from his wife that the Prussians, who then occupied Caen, were committing great excesses, and threatening the city with pillage, he sent her word to pack up all the goods in his store with as much haste as possible and send them immediately to Havre, to be shipped for the United States. The claimant remained in Paris. John Louis Vintroux, the father of the claimant, who lived at Paris, had consigned at one time a box containing six clocks, and at another time a box containing twelve clocks, to the claimant at Caen for safety; the troops at that time occupying Paris, but not Caen. He also learning the state of things at Caen, wrote Madame Vintroux, directing her to send the eighteen clocks to Havre, to be

shipped for the United States. He at the same time sent her an invoice of the clocks, footing the amount of each consignment separately. The claimant disclosed his proceedings to several persons then in Paris, and who afterwards came over with him to this country.

At Caen there were twenty thousand Prussians and Cossacks, and from six to fifty Prussian soldiers were quartered on each citizen. Their presence is described to have been troublesome, alarming, and dangerous in the highest degree. They threatened to pillage the place, and it was once published in the Paris gazettes that it had been pillaged. Affrays continually occurred between the troops and citizens. The inhabitants hid their goods in the cellars and buried their valuables. Many secretly built partitions in their cellars, behind which they packed up their goods and sent them away. Six soldiers were billeted on Madame Vintroux when she received the direction to pack up her husband's goods. His clerk, who was used to packing goods, with the assistance of a servant or porter, packed them up in the cellar in the best way they could, and made out the accompanying papers in great agitation, hurry, and confusion. This was done in the night while the Prussians were asleep. The clerk made out the invoices after the packing was all finished, from the memorandums made at the time. The servant called off the ticket attached to each piece, and the clerk took it down. The goods were sent from Caen in the day time in the diligence and a private wagon. Madame Vintroux and the clerk went with the goods to Havre, and shipped the greater part of them before the arrival of the claimant.

The claimant's clerk in making the invoice of the twelve cases of clocks, which stood in the cellar, supposed that each case contained a clock, and made the invoice out accordingly. This invoice corresponded with the invoices of the consignment of the twelve clocks sent to Madame Vintroux by John Louis Vintroux. A large box containing shawls, which the clerk had already packed, but had forgotten it, was standing among them, and he supposed it contained the other six clocks. This he put in the invoice as containing six clocks, and charged the prices the same as in the invoice (of the other six) sent from Paris. The linens were purchased in August by the claimant at the fair of Guybray, of M. Despierre of Alençon the manufacturer. He testified that in consequence of the precipitation with which the linens were put up at Alençon, owing to their fear that the place would be pillaged, all the mistakes made in the entry at New York were made in invoicing the goods before they were sent from Alençon to Caen. On discovering the errors, he claimed the difference of Madame Vintroux, who desired him to wait until she could hear from her husband in New York, as she had not ascertained the contents of the packages of linen before they were shipped. This testimony corroborated, and was corroborated by a letter written by Madame Vintroux to her husband, informing him of this mistake, and produced on the trial.

Twenty-five merchants of Caen, and the chamber of commerce of that city, as well as numerous other witnesses, examined in the cause, bore testimony to the high character of the claimant as a merchant. Each of the most material facts above stated was proved by several witnesses who were uncontradicted. Claimant went from Paris to Havre where he met his wife, and found part of his goods already shipped. The rest were shipped with difficulty and in confusion, owing to the great press to ship goods in the vessel. While at Havre, claimant suddenly resolved to come out with his goods.

After his arrival in New York, where he was examining some of the packages at his room, assisted by two clerks, and in the presence sometimes of other persons, he first discovered the errors in the quantities. He at first complained of these, and then declared that he would go and inform the officers of the customs. His clerk told him to wait and see if there was any excess. The box of shawls which was invoiced as containing six clocks, was opened in the presence of several persons, and claimant expressed his surprise at the mistake. They had only opened six packages when the seizure was made. The dry goods, including the linens, were found packed in some instances, two pieces in one bundle, and this was the way in which they overrun the invoice. The ticket on one or the other piece in the bundle generally corresponded with the invoice, as did the number of bundles in the packages. Two of the examiners testified that it was not unusual to find silks, crapes, &c., packed two pieces in a bundle, but they had never known the same thing occur in opening linens. They said that a bundle of the goods which they examined, composed of two pieces, might be easily mistaken by a porter for one piece. Two other of the examiners testified that the packages were so large that any one accustomed to the kind of goods could tell by looking at the outside, that they contained more than the invoice quantity of pieces. They also stated that the goods were very well packed.

J. Fisk, U. S. Dist. Atty., and C. Baldwin, for the United States.

T. A. Emmet and C. Graham, for claimant.

LIVINGSTON, Circuit Justice. The goods, mentioned in this libel, were proceeded against in the district court for the Southern district of New York, as forfeited under the sixty-seventh section of the collection law (3 Bior. & D. Laws, 199 [1 Stat. 677]), because, as was alleged, the packages containing them differed in their contents from the entry

which had been made of them at the custom-house. The property was claimed by William Vintroux Hersan, for himself, and John Louis Vintroux, of Paris; that is to say, all the merchandise libelled, was stated to belong to the former, except the twelve cases of clocks, which were said to belong bona fide to the latter. The claim, without in terms denying that the contents of the packages differed from the entry of them, insists, that if such difference existed, it proceeded from accident or mistake, and not from an intention to defraud the revenue—and alleges, that the cases were packed up at Caen, in France, while that place was in possession of the Prussian troops, and after it had been threatened to be pillaged by them, which circumstance occasioned the goods to be packed in great haste and confusion, and may have caused a difference between the invoice and the actual contents of the packages. After a hearing in the district court, the clocks and linens mentioned in the libel were condemned, and all the other articles acquitted. The United States and the claimants have both appealed.

This is a case not without its difficulties, and has been argued with an ability due to its importance and intricacy. There is no doubt that the allegations in the libel are substantially made out, and that there were many, and in some instances considerable variations between the actual contents of the packages, and their contents as exhibited by the entry at the custom-house. If the court, therefore, were not permitted to look beyond that fact, it would be difficult for any of the articles libelled to escape confiscation. But the law, under which these proceedings have been instituted, supposes that such differences will sometimes intervene by accident or mistake; and if that can be made out to the satisfaction of the court, in which the prosecution is depending, a forfeiture shall not attach.

The court will now proceed to examine how far the claimant has established his innocence. If he has designedly attempted to impose on the officers of the customs, he must submit to the consequences, penal and calamitous as they may be; but if he has succeeded in establishing any facts, which may reasonably account for the differences complained of, it will be the duty of the court, and must always be a pleasant one, to restore to him his property. That part of the case which relates to the linens will be first disposed of.

It has been said in argument, that probable cause having been shown for the seizure, a very clear case must be made out by the claimant, to entitle him to a restoration of the property; and the court has been cautioned not to place too much reliance on positive and direct testimony, if it shall appear to be in conflict with the many and strong presumptive circumstances which appear in the case. Notwithstanding the fact is made out on which the seizure proceeded, and which unexplained would have been followed by forfeiture, all the claimant has to do, is to prove the mistake on which he relies, in the ordinary way, and the court is not authorized to call upon him to present a clearer case, than it would have a right to require in the investigation of any other matter of fact. It is no less melancholy than true, that a court is sometimes compelled, however reluctantly, to reject the most positive declarations of witnesses, although delivered under the high and sacred sanctions of an oath, when opposed to presumptive circumstances, which it is not easy to reconcile with such testimony. A court will not, however, easily suspect the truth of such declarations, when corroborated by many witnesses, who have a fair character, and who have no interest in the matter in controversy; but rather than reject, will do all in its power to reconcile them with such circumstances; and if that cannot be done, the latter must be numerous and of the most controlling and irresistible nature to justify an entire disregard of the positive testimony.

With respect to the linens, there are no circumstances to induce the court to believe, that the mistake in this article may not have been accidental, and altogether unknown to the claimant, until after their examination in this country. These linens appear by the testimony of Mr. Despierres, jun. a merchant of Alençon, (which has been taken under a commission since the cause came from the district court,) to have been purchased of him at a fair at Guibray for the claimant, for the sum of seven thousand four hundred and fifteen francs and ninety-two centimes, which is the price at which they were invoiced, and on which duties were calculated at the custom-house. This witness, in addition to the very important fact which he establishes of their being invoiced at the price of their actual cost, also proves that shortly after the sale, and as soon as they had recovered at Alençon from the fear of being pillaged by the foreign troops, he discovered errors against himself in the sale of the linens, of which he immediately apprized Madame Vintroux and claimed from her the difference. That lady begged his forbearance, in order to refer the matter to her husband, to whom the linens had been sent without examination of them. These mistakes proceeded, as the same witness informs us, from the precipitation under which they were packed, to withdraw them from the pillage, from which Alençon narrowly escaped, having already experienced all the horrors of war. Relying on the probity of Mr. Vintroux, with whom he had had dealings before, Mr. Despierres consented to the delay.

That this story is no fabrication of recent date, to answer the purposes of the claim-

ant, appears by a letter written by Madame Vintroux at Caen to her husband, on the 15th of October, 1815, very shortly after his leaving France, and which it is proved, by witnesses on the spot, was received by him not many days after his arrival in this country, in which letter the reclamation of Mr. Despierres is distinctly stated, and Mr. Vintroux is requested to take proper measures to ascertain the extent of the error that had taken place. On this testimony, although it does not appear what excess was claimed on the linens, yet as there is no contradictory evidence on this point deserving of any attention, the court feels itself bound to order a restoration of the linens to the claimant. It is proved positively, that the linens cost no more than the sum at which they were invoiced, and of course, unless the mistake committed at the fair of Guibray, was known to Mr. Vintroux, at the time of the entry of them, which is not proved, his conduct as far as concerns this article is free from every imputation.

The allegation against the clocks will be next examined. It is, that the twelve packages of clocks, marked and numbered W. No. 1, on to W. No. 12 inclusive, were found to differ in their contents from the entry, in this; that these packages were entered, as containing twelve clocks, and that the same contained nineteen. Another box containing six clocks and marked V. H. No. 1, was entered at the same time, so that in all eighteen clocks only were entered, and duties paid on them. On examination, however, it was found, that the whole number of clocks entered were found in the cases marked W. No. 1 to 12. Hence suspicions were excited (V. H. No. 1 having also been entered as containing six clocks,) that twenty-four clocks had been imported by the claimant instead of eighteen. If the actual importation of that number had been proved the libellant would have made out a clear case, so far as relates to this article; but although attempts were made to establish that fact, they were quite unsuccessful; and notwithstanding the pains which were taken with that view, there is no evidence in the cause, that any one of the persons, who were about the claimant after his arrival in this country, some of whom assisted in examining his goods, ever saw any of the six clocks, which it is supposed were fraudulently subtracted from an entry. Nor has any person, who deals in this article in this city, been found, who can fix on the claimant, or any agent of his, the sale of more clocks than were entered, although two witnesses, who were dealers in clocks, were examined with that intent. If the allegation, therefore, in the libel be true, that in the twelve cases were more clocks than they were entered as containing; yet if it shall appear that no clocks were contained in any other case, which was entered as containing six, no fraud has been committed on the revenue, nor could any have been intended, and of course no forfeiture has been incurred. The claimant, not relying on the absence of all positive proof, on this point, has endeavoured to satisfy the court, that all the clocks imported by him in the Ann Williams were regularly entered; and that, although in the cases which were supposed to contain only a dozen, eighteen or nineteen were found, not a single clock was discovered in any other package.

The court is greatly mistaken if the claimant's proof on this part of his case, will not be found very satisfactory. There is no doubt, that the eighteen clocks were an adventure, belonging, not to the claimant, but to his father at Paris, by whom they were sent to Madame Vintroux at Caen to be forwarded to the United States. The first we hear of them is in a letter written by the elder Mr. Vintroux to the wife of the claimant. Mr. Bellair, who put up the goods belonging to claimant, declares that he packed no clocks for him; and knows of none, except those in the box marked V. V. or W. No. 1 to 12—and a wooden clock, and two which were entered on the invoice made by him as contained in the package marked V. H. No. 22. This witness also informs us how it happened, that each of the boxes from No. 1 to 12 were entered as containing each one clock, and another box as containing six. After he had packed the goods of the claimant, Madame Vintroux gave him the bill of parcels of the clocks, which came from Paris By this he found there were eighteen clocks, and supposed that the cases marked from one to twelve contained only one clock each. The other six, therefore, he supposed were contained in a large case which was among the others, and although this case was one, which he had packed himself, yet not adverting to that circumstance at the time, he marked it V. H. No. 1; and entered it in the invoice, under that mark, as containing clocks.

This corresponds with the information which the claimant gave to another witness on his passage to this country, that he had only eighteen clocks which belonged to his father, which declaration, although it comes from a person now interested, is entitled to some attention, considering the time and circumstances under which it was made. This same witness, Mr. Collet, was also present when a box was opened, which the claimant expected to contain clocks, but in it were only Angora shawls or gloves. This box, he says, was opened in the street, because, as he supposes, the entry of the house, before which it stood, was too small to admit of its being taken up stairs. Mr. Demolliens proves the same thing, although he is somewhat more particular in his relation, and unless we believe him guilty of wilful perjury, we must be satisfied that the

case marked No. 1, V. H., notwithstanding the invoice, did not contain a single clock. He was directed by Mrs. Vintroux, in order that the watchmakers might examine the clocks, to bring it to his chamber, where it was found, on examination, to contain articles which were invoiced as being in another package. Mr. Scheffelin also proves that two large cases were opened which contained Angora shawls, gloves, &c. Mr. Bouchaud, whom all parties appear willing to believe, declares that he never saw any clocks in the possession of the claimant, except those which came from the public store. Considering how much Mr. Bouchaud had to do with this cargo, and how frequently he must have been with the claimant, after his arrival, this circumstance is entitled to very great consideration. It seems impossible that these clocks, which are now supposed to have been disposed of, should not have been seen by this gentleman before they were sold. Yet neither he, nor any other person about the claimant, ever saw them.

But without pursuing this subject farther, the court is satisfied, that this part of the libellant's case is not made out, unless no explanation can be received to establish the innocence of a transaction, which unaccounted for, must have drawn after it all the consequences of a confiscation. But this explanation, in the opinion of the court, has been given, and can only be got rid of by opposing to it some circumstances, which although sufficient to raise doubts, ought not to be permitted to outweigh so much of positive testimony, with which this part of the claimant's case abounds. If the court does not stop to notice these circumstances, it is not because they have not been attended to, but because it is of opinion, after full consideration, that all of them together will not justify a sentence of condemnation. The clocks therefore must also be restored.

The case of the other articles libelled will now be considered. The circumstances attending them are so much alike, that they must all be liable to the same judgment. The excuse, which applies particularly to this portion of the importation, is, that it was packed up at Caen in the absence of the proprietor, and in such haste and confusion, in consequence of apprehensions entertained at that place of the Prussian troops, that all the mistakes and inaccuracies which have been discovered are attributable to those causes, and did not proceed from any intentional fraud on the part of the owner. This defence has been treated with great levity by the counsel for the United States, and attempts were made to induce the court to believe that the testimony, which appears in support of it, has all been fabricated, to suit the purposes of the claimant. But such a body of evidence, whatever suspicions may be entertained by those who have an interest in disbelieving every part of it, must have its influence on a court, so long as it is mindful of its duty, and does not think itself absolved from every obligation to decide according to the proofs before it. Both of the persons, who packed these goods, Mr. Bellair, a clerk of the claimant, and Joseph Boissellier, a resident of the city of Caen, prove that the packing took place at night in a cellar of the claimant. That this was done in much haste and confusion, from an apprehension of being discovered by the Prussians, some of whom were quartered in the house of Mr. Vintroux. The packages were sometimes marked the same night, and sometimes not until the next day, which may account why the contents of some of them were marked as being in another.

It was doubted on the argument, whether this apprehension of the Prussians, was well founded, and much was said of the tranquillity of France after the return of Louis XVIII., which was effected by the battle of Waterloo. But whatever might have been the condition of other parts of that kingdom, more than twelve witnesses have been examined, most of them residents of Caen, who describe the conduct of the military, who occupied that place, during the fall of the year 1815, as well calculated to excite the fears of the inhabitants about the safety of their property. So great and general was this apprehension, that many buried their valuable effects to place them beyond the reach of the soldiery. It would appear indeed, that previous to Madame Vintroux's receiving directions from her husband, who was then in Paris, to pack up his goods at Caen, to be sent to America, she had determined to have it done merely to send them to some place of greater safety. But it was not only at Caen that excesses were committed by the army of occupation; for it appears, from the examination of Mr. Despierres, a merchant who resides at Alençon, that the inhabitants of that place were also under apprehensions of a military pillage.

There is nothing to detract from the credit due to such a mass of corresponding testimony, but the solitary declaration of one witness who was but two days at Caen, and saw no obstructions to business, the shops being open as usual. Now this may very well be, and yet none of the material facts, on which the claimant relies, are disproved by it. The town may have been very quiet the two days which this witness passed on his party of pleasure at Caen; and yet the soldiers may have behaved very much amiss both before and after; and the alarms and fears, which are spoken of may well have been very general at that place. The troops there were very numerous, and had already committed many outrages. When they might proceed to others still greater, no one could say. Nor is it any thing against the truth of this representation, that these goods were publicly removed from Caen, and in the day-time. Property in that situation would not be so liable to pillage in a place where any discipline at all was observed, as if it were concealed from

public view, but in places to which the troops might easily have access, and that at a time when their officers, or those who might feel disposed to check them, were asleep.

The absence of Mr. Vintroux at Paris, while these goods were packing, and his going direct from that city to Havre, without his ever having been at Caen, since his leaving it in the latter end of August, 1815, is as well, if not more certainly established, as that part of his defence which arises out of the irregularities and violences of the Prussian army. Nor was this an unimportant fact to make out, for it will readily be conceded that more indulgence is due to a merchant whose goods are packed in his absence, than if he had been on the spot to attend to the business himself. The letter signed by him, and annexed to the invoice, although dated at Caen, is proved to have received his signature at Havre, having been previously written at Caen by Mr. Bellair, under the direction of Madame Vintroux, who appears herself to have been a merchant. The regular name in which the invoice is made out, has also been urged as an argument against the haste under which it is alleged, that these packages were made up. This is accounted for by Mr. Bellair, whose relation is no way improbable. The invoice was made by him, at his leisure, from the memoranda preserved at the time of packing, and he supposed, and so informed Mr. Vintroux, that it was correct.

The sudden resolution of the claimant to come to this country is also treated as a mere pretence. It is not improbable that such intention was first conceived at Havre; but the court does not think it worth while to employ any time in ascertaining the truth of this representation, feeling, as it does, a repugnance which it is not desirous of overcoming, at condemning a valuable property on a doubtful circumstance, which has not a very important or direct bearing on the immediate point in controversy. With the same remark it might dismiss all consideration of the very great surprise which has been expressed at this property's being consigned to Mr. Bouchaud, and being entered by him, after the owner had determined to accompany it, and actually did arrive with it in this city. If it be true, as the court believes, that this property was put up in the absence of Mr. Vintroux, and the invoice made out by his clerk, it is not easy to conjecture any improper motive for applying to Mr. Bouchaud to make the entry. Mr. Vintroux could very conscientiously have taken the usual oath. A motive, and a fair one therefore, may be assigned for this part of his conduct. This gentleman, being a stranger, might well employ Mr. Bouchaud, who was on the spot, and better acquainted with the manner of doing business at our custom-house. He might also have found it necessary, in order to obtain security for the duties, to place them in the hands of Mr. Bouchaud, who might then as well make the entry also.

It has likewise been imputed, as something more than an oversight, to Mr. Vintroux, that he omitted to apprize the collector of the mistakes, as soon as they were discovered. If the examination had been finished before the seizure, and his silence had then continued, there might have been some ground for this imputation; but a seizure took place so soon as to render impossible any communication, that would have been satisfactory; for, that the claimant contemplated informing the collector of the errors which might be discovered, as soon as the examination was closed, there is some ground to believe, from part of the testimony in the cause. It may be, that the apprehension of a seizure deterred Mr. Vintroux from a disclosure. Such neglect would have been improper, and would have exposed him to very just suspicion. And yet, during the present term, a sentence of restitution has proceeded on the very ground, that a prosecution took place in consequence of such information having been given to the custom-house, and in good faith, by the importer himself.

It is but just here, to remark, that the conduct of Mr. Vintroux, after he was apprized of a determination to seize, was ingenuous and very different from what would be looked for, in a person who had, from the beginning, laid a plan to defraud the goverument. Instead of concealing any part of the property, which might easily have been done, the whole of it being under his control, we find him pointing out where it was, and affording every facility in his power to the officers of the customs. This may not be an improper place to remark on the character of the claimant, which, in a proceeding of this nature, is not to be entirely disregarded. All the witnesses, who have had occasion to speak of it, represent him as a gentleman of probity and property, and very highly respected in his own country, and consider him incapable of meditating a fraud of this, or any other kind. It is indeed difficult to persuade oneself that a man of good standing, and fair character in his own country, and of large property, should commence his career in a country, of which he intended to become a member, with a fraud, so easy of detection, from which indeed a miserable saving might have resulted, but not without great hazard, not only of losing a large portion of his fortune, but of fixing on his reputation a stain, which no time could wash away: for it must be remembered that a fraud of this nature cannot be practised, without wilful perjury in the party himself, or, (which would be almost as culpable,) without his procuring or permitting another to swear to what he himself knew to be a falsehood. There was no adequate motive for so deep and unequal a game, nor is it to be reconciled with the former habits and character of the claimant; which, as has just been mentioned, are proved to have been honourable and upright.

The court considers it evincive of the good

faith and integrity of the claimant, that, in order to explain this transaction, he has taken so much pains, and gone to such an expense in examining so many witnesses in a foreign country, and that too in his absence, which he would hardly have done, but under a consciousness that they could testify to the truth of the circumstances, on which he relied as proofs of his innocence. But admitting the correctness of Mr. Bellair's relation and of the other witnesses, it was insisted that his gross negligence, as it was termed, either in the packing of the goods, or in not informing Mr. Vintroux of the manner in which it was done, must be regarded as a fraud in his principal, under whose instructions, the presumption is, that he acted as he did. The court is at a loss, how such an inference is to be made consistent with the testimony of this gentleman, who discloses no such instruction, and declares that the goods were packed as well as could be done, under existing circumstances, and that nothing was said on the subject to Mr. Vintroux, because, notwithstanding the precipitation which attended the putting up of the goods, he believed the invoice would be found correct.

The veracity of this witness has also been called in question, on a supposition that he must be incorrect in the cause which he assigns for Madame de Vintroux's not accompanying her husband to the United States. This is considered as an invention of his own, as that lady was not confined until several months after the Ann Williams left Havre. Now it so happens that Mary Botte, who resided in the family of the claimant at Caen, proves the same fact; and there is no doubt at all, that although there was no immediate expectation of his wife's confinement when the claimant left Havre, yet her situation must have been such as is described by Mr. Bellair, and as might well have deterred her from undertaking a voyage to this country. Nor is it quite correct, as was asserted on the hearing, that all the differences which were discovered between the invoice and the actual contents of the packages, were uniformly in favour of the claimant: for some of the packages were correct, and others contained less in quantity than was represented on the entry. Some packages, therefore, were not seized, and others which had been seized, were returned.

Upon the whole, it is the opinion of this court, that whatever differences existed in this case between the entries at the custom-house, and the real contents of the packages, the claimant has succeeded in exculpating himself from all intention of fraud; and that therefore the sentence of the district court must be affirmed so far as it acquitted any part of the property libelled, or adjudged that there was probable cause of seizure, and ordered the claimant to pay the costs of that court; and reversed as to the residue of said decree. Each party must pay his own costs on the appeal.

Case No. 15,885.

UNITED STATES v. NINE TRUNKS.

[22 Int. Rev. Rec. 317.]

Circuit Court, D. New Jersey. Sept. Term, 1877.

CUSTOMS DUTIES—ILLEGAL IMPORTATION—REMOVAL FROM VESSEL.

1. The act of July 18, 1866 [14 Stat. 178], applies to all dutiable goods, wares and merchandise, and, under the provisions of section 44 of this act, their irregular importation forfeits the goods and subjects the importer to fine or imprisonment.

[Cited in U. S. v. Jordan, Case No. 15,498.]

2. The construction is too liberal which treats the wharf as constructively a part of the vessel; and the removal of dutiable goods from the vessel to place them upon the wharf or dock, subjects them to the hazard of seizure and forfeiture.

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

STRONG, Circuit Justice. After much reflection I have come to the conclusion that a new trial should be ordered in this case. The information claimed a forfeiture of the merchandise under the act of congress of July 18, 1866, and also under the fiftieth section of the act of March 2, 1799 [1 Stat. 665]. The first mentioned of these acts is entitled "An act further to prevent smuggling, and for other purposes," and it is enacted by the fourth section, that "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares or merchandise contrary to law, * * * such goods, wares and merchandise shall be forfeited." The fiftieth section of the act of 1799, enacts that no goods, wares or merchandise brought in any ship or vessel from any foreign port, shall be unladen or delivered from such vessels within the United States but in open day, nor at any time without a permit from the collector and naval officer, if any, for such unlading and delivery.

It was claimed at the trial that the property seized was subject to forfeiture under the act of 1866, because it had been imported "contrary to law." The undisputed evidence was that the claimant was a manufacturer of female clothing in New York, that in March, 1874, he went to London for the sole purpose of buying silks and other goods for his trade. He reached London on the 23d of March, and remained until April 4th. While there he ordered the goods subsequently seized from Marshall & Snellgrove, amounting in value to $10,000 or upwards, and directed them to be sent to his lodgings, where they were sent in parcels wrapped in paper. He asked and received only a single invoice or bill. Having received the goods he went to several stores and purchased eight second hand trunks, which had been much used, and some of which had upon them the initials of former owners. These trunks he directed to be sent to his lodgings. There he

packed in them the goods which he had purchased from Marshall & Snellgrove, putting some in another trunk which contained some of his personal apparel. There was also included a new silk dress, which had been ordered by another party. He placed upon the trunks no other marks than those which were upon them when he bought them. Having thus packed the goods he took them in a cab to the railway station, went with them to Liverpool, and left the trunks at the station until the next day. He then sent the hotel porter with his bag, and had it with the trunks put on board the steamer as his personal luggage. He made no inquiry for a consul, and procured no triplicate invoice as required by the act of congress of March 3, 1863 [12 Stat. 742]. He communicated to no one on the steamer that the trunks were filled with merchandise. He put down the number as nine in the list of the passengers with their luggage, and they were entered, as, of course, upon the ship's manifest as passengers' baggage. When the ship arrived at quarantine, New York, and the revenue officer was engaged in the cabin in taking baggage declarations of the passengers, the claimant told the officer he had some trunks containing merchandise, and the officer being busy told him to wait. He did not however, wait, but went upon the deck, and neither then, nor at any time, made or offered to make any baggage declaration. When the ship came to the dock the trunks were unladen and placed on the wharf, under a permit to land passengers' baggage. There was no permit to land them as merchandise. While they were being landed the officer accosted the claimant, and was told that he had some trunks containing merchandise. He was then asked for the invoice, and he gave to the officer Marshall & Snellgrove's bill, with the heading torn off. The officer then told him he was liable to arrest for importing goods in that way, whereupon he immediately left the ship and the dock, returning no more to the dock, nor going to the custom house, though he heard of the seizure of the property on that day, or the next.

In view of this state of facts, exhibited by the evidence, the first question considered by the district court, and upon which instructions where given to the jury, was whether the property was imported by the claimant "contrary to law," within the meaning of the act of 1866, and whether it was, therefore, subject to forfeiture. The learned district judge was of opinion, and so in effect charged, that the provisions of the act of 1866 had no applicability to the case. That importing goods, subject to duties, without procuring triplicate invoices, and a consular certificate and without their entry upon the ship's manifest as merchandise, is not such an importation as the law permits so far as relates to its mode, and that it is contrary to law does not seem to have been doubted. The act of 1863 applies to all invoices of goods, wares and merchandise. But the district judge held that the fourth section of the act of July 18, 1866, which enacted that any goods, wares and merchandise imported contrary to law be forfeited, and that the importer should be fined or imprisoned, applied only "to the importation either of special articles where the importation is wholly prohibited, or of merchandise admitted under some conditions or circumstances, and subject to duty, or forbidden under others," and that "it did not include the importation of dutiable goods without the payment of duties." With this construction of the act of 1866, I find myself unable to concur. I agree that the act is to be construed in view of other acts relating to the same subject matter; and, so far as possible, in harmony with them. But if a new provision is introduced into a statute, effect must be given to it, though it changes the prior existing law. It is true the act of 1863, which required triplicate invoices, with a consular certificate, did not prescribe a forfeiture for neglecting to obtain them. It only declared that without them the goods should not be admitted to entry. Forfeiture was prescribed for making entries by means of false invoices or certificates. But all this is not inconsistent with the power of congress to provide other penalties for importing goods without pursuing the prescribed forms of law. The manifest purpose of the act of 1863 was to protect the revenues against smuggling and other frauds. Hence the requisition of triplicate invoices and of the consular certificate, which could not be given without a minute and particular declaration, specifying facts very material to be known by the revenue officers. The act of 1866 professes by its title to be an act further to prevent smuggling. It is practically a remedial act, therefore, in a very just sense, though some of its provisions are penal. It is to be construed with reference to the mischiefs it was intended to remedy. Now, it is plain, the mischiefs in view were not only the introduction into the country of goods, the importation of which was prohibited, but illegal importation of dutiable articles. That dutiable goods were in contemplation of congress is made manifest by the provisions of the third section, which authorizes a search for goods "subject to duty," or "which have been introduced into the United States in any manner contrary to law," and in case they are found, authorizes a seizure of them and a forfeiture. Then follows the fourth section, containing a more general provision, which prescribes forfeiture of any goods imported contrary to law, and imposes a penalty upon the importer. Goods imported in the manner in which the goods now in controversy were imported are, in my judgment, imported contrary to law, as much as if they had been goods which could not legally be imported at all. And I find no warrant for restraining the language used by congress beneath its natural meaning. If it be restrained, as it

was in the district court, the act ceases to be what it professes to be, an act to prevent smuggling, and there exists no penalty for smuggling dutiable goods in the country.

The act of August 30, 1842 [5 Stat. 548], which provides for the punishment of introducing into the United States secretly or clandestinely goods, wares or merchandise subject to duty, and which should have been invoiced, without paying or accounting for the duty, has been omitted in the Revised Statutes, probably because it was supposed to have been supplied by the fourth section of the act of 1866. I cannot think it would be dangerous to hold that the latter act does not apply to illegal importations of goods subjected by law to duties. The only argument against this construction of the act which addresses itself with force to my mind is that it seems harsh. It is said it may result in the forfeiture of goods imported without any criminal intent of the importer. A person it is urged may not know of the act of 1863, or of any of the acts which prescribe the mode in which importations may be made, or he may bring in his trunk, with his personal apparel, a single article which is subject to duty, intending to submit it to the inspection of the revenue officers, and to pay the duty charged upon it. To subject it, under such circumstances to forfeiture, it is urged, would be unnecessarily severe and unreasonable. To this, however, it may be replied, not merely that every person who comes into the country must be presumed to know the law, but that ample provision is made to protect an importer against suffering in consequence of innocent mistakes. The secretary of the treasury is authorized to remit fines, penalties, and forfeitures, if, in his opinion, they have been incurred without wilful negligence or any intention of fraud. This is a sufficient shield to every honest importer. I am aware that in U. S. v. Thomas [Case No. 16,473], Judge Hall, of the Northern district of New York, appears to have entertained an opinion different from that I have expressed. The circumstances of that case were very unlike the facts of the present. It was an indictment not against an importer, but against a person charged with having knowingly and unlawfully received and concealed goods subject to duty, which had been imported without the payment of the duties. The district judge held that the offence charged was not covered by the act of 1866. For aught that appears, the importation in that case was lawful, and all that was unlawful was conduct after the goods had lawfully come into port, or in other words, been imported. In this case the unlawfulness consisted in bringing the goods into port at all, without triplicate invoice and a consular certificate. It must be admitted, however, that the language of the judge implies, though it does not positively assert, that the fourth section of the act of 1866 applies only to importations of articles entirely forbidden, or of articles allowed to be imported in some specified form or condition. And following the reasoning of Judge Hall, the very learned judge of the district court of New Jersey, so decided in U. S. v. 95 Boxes [Id. 15,891]. After giving careful attention to the subject, I am not convinced that such is the meaning of the statute, and I must therefore hold that there was error in the instruction given to the jury in the present case that the provisions of the fourth section of the act of 1866 were inapplicable to it. It is the uniform practice, as I learn from the highest authority, to treat as subject to forfeiture under this act and the act of 1799, importations through the mails.

I think also there was error in charging the jury, as was done in effect that the removal of the property from the vessel to the dock or wharf, in virtue of a permit to examine and land personal baggage, did not work its forfeiture under the 50th section of the act of 1799. There was no permit to land it as merchandise. The prohibition of the act is that "no goods, wares or merchandise brought in any ships or vessels from any foreign port shall be unladen or delivered from such vessel within the United States but in open day, nor at any time without a permit from the collector and naval officer if any, for such unlading or delivery." This is a prohibition to the carriers as well as to the importer. The carriers only can unlade or deliver. It is intended for greater security to the revenue. Goods, wares and merchandise are not so secure against illegal removal where placed upon the wharf as they are when remaining on the vessel, and I think the construction is too liberal which treats the wharf as constructively a part of the vessel, and a removal of the goods to the wharf as no unlading, though it be made for the purpose of a more convenient examination; it would hardly be contended, I think, that all the cargo entered on the manifest as such, might lawfully be removed, without permit, to the dock, though such removal might possibly facilitate examination. In such a case it could hardly be held that the dock was in any sense a part of the vessel, and that there had been no unlading. The acts of congress, as well as the regulations of the treasury department, recognize a distinction between dutiable goods and personal luggage. Now, if the latter may be placed upon the wharf or dock, it is quite clear the former may not be without a permit, unless at the hazard of seizure and forfeiture. I do not attach as much importance as seems to have been attached to it in the district court to the question whether the claimant procured the unlading of the property. If it was unladen without a permit to unlade merchandise, it was subject to forfeiture under the act of 1799. This is not a proceeding against the importers. It is against the goods imported. They are treated as guilty. If the officers of the ship unladed them in violation of law

and of the rights of the importer, they, or the ship, may be responsible to him. But in this case the jury might very correctly have found that the claimant procured the unlading under a permit to unlade passenger's baggage, and therefore under no sufficient permit. He shipped the trunks and their contents as baggage in Liverpool. He had them put among passenger's baggage in the hold. He gave the officers of the vessel no intimation that the property was not what it appeared to be, passenger's luggage. He did not have it placed upon the ship's manifest. This was as clear an intimation as he could give that it was passenger's baggage, and that it was proper to land it as such. True, he told the revenue officer, he had merchandise in some trunks, but when told to wait until the officer could attend to his case, he left and made no effort to make a baggage declaration. He did not point out his trunks to the officer, nor tell him in which, or in how many of the trunks he had merchandise, and he never told the officer of the vessel that any of his trunks contained dutiable articles. In view of this it is difficult to come to any other conclusion than that the unlading of the trunks, and their transfer from the vessel to the dock, was at his instance and with his consent. Whether it was or not, that it was a violation of the law, I cannot doubt, and I think the jury should have been so instructed. The opinion I have thus expressed harmonizes with the ruling of Judge Blatchford in U. S. v. Three Cases of Merchandise [Case No. 16,498], and with the decision referred to therein. It is in harmony also with U. S. v. Four Packages of Human Hair [unreported], decided by Blatchford, J., in the Southern district of New York, the judgment having been subsequently affirmed in the circuit court. See, also, U. S. v. The Sarah B. Harris [Id. 16,223], and U. S. v. Twenty Cases of Merchandise [Id. 16,559]. And I know of no practice that ought to force a different construction of the act; nor of anything in the treasury regulations. See Judge Blatchford's decision above cited.

I have thus considered the two most important questions in this record. There are some minor ones which it is not important to discuss, in view of what I have said. I concur with the district judge in holding that the act of June 22, 1874 [18 Stat. 186], applies to the case, and that the case is not taken out of that act by the exception contained in the twenty-sixth section. While therefore the question whether there had been collusion between the claimant and the officers of the customs, may have had some bearing upon the other question whether their acts tended to prove a fraudulent intent in the claimant, the absence of such a collusion, if it was absent, does not, it seems to me, negative the illegality of the importation or the fact of unlading without a permit, and the consequent liability of the goods to forfeiture, provided the importer intended to defraud the United States. The court was right in submitting to the jury to find whether such an intent existed. If it did, and the goods were imported contrary to law, or unladen without a permit to unlade merchandise or such goods, the United States were entitled to a verdict, whether there was collusion between the claimant and the custom house officers or not. The case must go back for another trial. Judgment reversed and a venire de novo ordered.

[On the new trial there was a judgment in favor of the United States. Case unreported. This judgment was affirmed by the circuit court. Case No. 15,886.]

Case No. 15,886.

UNITED STATES v. NINE TRUNKS.

[6 Wkly. Notes Cas. 542; 24 Int. Rev. Rec. 327; 6 Reporter, 613; 26 Pittsb. Leg. J. 38.] [1]

Circuit Court, D. New Jersey. Sept., 1878.

CUSTOMS DUTIES—VIOLATION OF LAWS—INFORMATION OF FORFEITURE—EVIDENCE—BURDEN OF PROOF.

[1. In a proceeding to forfeit imported goods on the ground of fraud, the goods themselves are regarded as the defendant and offender, and therefore it is no objection to the admission of proof of communications made to the revenue officers that they were made in the absence of the claimant.]

[2. Where goods have been seized for illegal importation, it is competent to prove that the fact of an intended illegal importation was previously known to the revenue officers, and that they acted thereon in making the seizure. Such information may properly be regarded as so connected with the illegal act itself as to constitute part of the res gestæ. U. S. v. 661 Bales of Tobacco, Case No. 16,297, approved.]

[3. In a suit to forfeit goods, after the passage of the act of June 22, 1874, which requires proof of an actual intent to defraud the government, there is no error in charging the jury that, after an actual importation in violation of law has been shown, if the claimant knew that his method of importation was contrary to law, the burden is upon him to show affirmatively that he did not adopt such method with intent to evade payment of duties.]

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

An information was filed by the United States attorney against nine trunks and one bag, containing principally silks alleged to be subject to duty as imports, and which were imported into the United States on board the steamship Russia, and landed without the permit of the collector or naval officer of the port, and without payment of duty; whereby, under the fiftieth section of the act of congress of March 2, 1799 [1 Stat. 665], they became forfeited to the United States. The information alleged that the goods were landed without permit, with intent to evade the payment of duties, and prayed the appropriate process that the goods might be condemned and the proceeds

[1] [6 Reporter, 613, contains only a partial report.]

appropriated according to law. Subsequently B. G. Bean filed a petition of intervention, claiming the goods, and answered and pleaded to the information that the goods and merchandise therein mentioned did not become forfeited in manner and form as alleged.

A trial was had in the court below, and a verdict rendered for the claimant, under the ruling of the district judge that the act of congress of July 18, 1866 [14 Stat. 98], did not apply to goods of this character, but only to goods whose importation was wholly forbidden, and, that under the act of 1799, the landing of these goods, with passengers' baggage under a general permit, was not an unlading and delivery that subjected them to forfeiture. This judgment was subsequently reversed on error to this court, Mr. Justice Story holding that the goods were forfeitable, under the act of 1866, if they were shown to have been imported contrary to law, of which fact he said there was no doubt, under the evidence, and that under the proofs touching their transfer to the wharf from the vessel they were forfeitable under the act of 1799. He further decided that the act of June 22, 1874 [18 Stat. 186], passed during the trial, which provided that there should be no forfeiture of the goods unless the jury were satisfied that there was an actual intent to defraud the government, was applicable to the case; saying that the court was right in submitting to the jury to find whether such an intention existed, and that if it did, and the goods were imported contrary to law or unladen without a permit, the United States were entitled to a verdict, whether there was a collusion between the claimant and the customs officers or not. [Case No. 15,885.]

On the second trial of the case the following facts appeared: Bean, the claimant, purchased in Europe the goods seized, and packed them in eight second-hand trunks, which he bought there, and in one other trunk of his own; that the trunks were entered on the manifest of the steamer Russia, by which he was a passenger, as his own personal baggage; that no certified invoice was obtained by him of the goods, and no declaration of the contents of the trunks was made by him. There was evidence that Bean was a dressmaker in New York, and intended to use the silks in his business. On the arrival of the steamer at her dock in the port of New York, these trunks were placed, according to the usual custom, with other passengers' luggage, on a portion of the dock set apart for the purpose of examination by the revenue officers, and that no baggage could be removed from this part of the dock without due examination and permission of the proper officers. It appeared that it was customary for the inspector after the examination of any particular trunk, and payment of duties, if any were found to be due, to mark each trunk so examined with his initials, the number of his badge, and the word "Passed." After the trunks in question were upon the dock, one of the inspectors marked them in this manner, and the trunks were then moved up the dock by the workmen on the pier to the pile of "passed" baggage. This was done after Bean had left the vessel, and by the direction of one Brackett, a special agent of the treasury who was on the dock watching these trunks. Bean not appearing, Brackett made seizure of the trunks, and took them to the custom house. At this stage of the testimony Brackett was asked, as to an inquiry made by himself of one Gross, an employé of the steamship company having charge of their dock, Bean not being present at the time: "What did you ask Mr. Gross relative to these trunks of Bean, and what reply did Mr. Gross make?" Objected to as hearsay, and that a statement of a third party, not shown to be connected with Bean, in his absence, was incompetent and irrelevant. Objection overruled, evidence admitted, and exception. Answer: "I asked him if these trunks had been regularly passed, and he replied that they had been. I then ordered their seizure." Brackett, it appeared had gone to the steamer to look for Bean, in pursuance of information which had been given at the office of the special agent of the treasury. He was asked, on his examination, from whom he had obtained the information that these silks were to be brought on in the Russia, and what the information was. Objected to. Objection overruled, and exception taken.

The Court (Nixon, District Judge) charged the jury, inter alia, that (the law declared the goods to be forfeited, under the circumstances of this importation, if they were satisfied that the claimant intended, by what he did, to bring into the United States these goods and merchandise without the payment of the duties which the statute imposed; and that it was a question of fact for them to decide whether the claimant adopted this method of importation to secure that result, or that he did it for the purpose of saving time and freight, intending that the silks should be entered for the payment of duties after his arrival.) * * * (You must commence your inquiry with this proposition, that the importation of the goods was contrary to law. That much has been settled in the case on the previous trial. Then if you are of the opinion, from the facts shown, that Mr. Bean knew that his method of bringing in the merchandise was unlawful, the burden rests upon him, to satisfy you, by affirmative proof, that he did not adopt this method for the purpose of evading the payment of duties, but for some other and lawful purpose; as, for instance, to save freight, or to save time in the manner of transportation.) But if you are of the opinion that he

was not aware that such a mode of bringing in or unloading of the goods was contrary to law, then the government is obliged to establish by positive proof to your satisfaction that all the steps taken by him in the direction of their transportation were taken with a fraudulent intent, to wit, for the purpose of getting the merchandise into the country without the paying of duties.

Verdict for the United States, and judgment of condemnation and forfeiture was subsequently entered thereon. The claimant, Bean, thereupon sued out this writ of error, assigning for error, inter alia, the admission of the testimony excepted to as above, and the portions of the charge inclosed in parenthesis.

Stanley, Brown & Clarke, for plaintiff in error.

A. D. Keasby, contra.

McKENNAN, Circuit Judge. The court below permitted the United States to prove, by the officers who made the seizure, upon what previous information they acted and from whom that information was derived, and also by their informant, what he had told them, touching the proposed illegal importation of the goods. The conversations offered to be proved occurred in the absence of the claimant, and were objected to as hearsay, and it is now urged that the proof of them ought to have been excluded upon that ground. If the claimant were the subject against which the proceeding was directed and was, therefore, necessarily a party to it, there might be force in the objection, as the reason of the rule which excludes hearsay evidence might be invoked in his favor. But he was a voluntary intervener, the goods themselves being the defendant and offender, if there was any offence, and subject to the punitive consequences of a violation of the law committed by any person in reference to them. In U. S. v. 661 Bales of Tobacco [Case No. 16,297], Judge Blatchford said: "If any person does so and so, in regard to goods, they are forfeited. In all the statutes the merchandise is personated, the merchandise is called the offender; and if any person does in regard to that merchandise,—and, for the purposes of this case, I will limit it to any person lawfully connected with the merchandise,—if any person does the forbidden acts, the merchandise is forfeited. It is not like an indictment, in a criminal case, where personal guilt must be brought home to the individual, and where he is not responsible criminally for the acts of another; but in this case, and in all cases of this kind, the merchandise is responsible for the forbidden act of any person connected with it." So also, said Mr. Justice Strong, in his opinion in this case: "This is not a proceeding against the importers. It is against the goods imported. They are treated as guilty."

It is plain, therefore, that if the communications to the revenue officers, proposed to be proved, were relevant to the inquiry in hand, they were not objectionable because they were made in the absence of the claimant. There was evidence to show that the goods were imported, and were removed from the vessel in violation of law, and it was necessary to determine whether a violation of law was actually intended. Was it not then pertinent to show, that what was done in reference to the goods was in pursuance of a prearranged plan; that the fact of an intended illegal importation was known to the officers before hand? And if the subsequent mode of dealing with them by the person in whose control they were accorded with the information given to the officers, as to what was proposed to be done, may not the essential illegal intent be impressed upon the goods? If an illegal act is committed, may not information communicated to an officer, within the scope of his duty, of a purpose to commit it and of the manner of committing it, although not derived directly from the wrong doer, be considered to characterize the intent with which the act was committed? Indeed, I think, where a seizure has been made, and the question is whether it was warrantable, information of a purpose to do an act, touching the subject of it, which is verified by the commission of the act, may properly be regarded as so connected with the act itself, as to constitute part of the res gestæ, and is provable as such, in proceedings of this kind. Evidence of a kindred character was allowed in the case of U. S. v. 661 Bales of Tobacco, supra, the judge saying, "It was admissible under the decisions of the supreme court, not for the purpose of proving the body of the offence, but for the purpose of characterizing the intent with which a given act may have been done."

I do not understand the court below as having unqualifiedly instructed the jury that the burden of proof, as to fraudulent intent, was upon the claimant. The language of the judge was: "You must commence your inquiry with this proposition, that the importation of the goods was contrary to law. That much has been settled in the case in the previous trial. Then, if you are of the opinion, from the facts shown, that Mr. Bean knew that his method of bringing in the merchandise was unlawful, the burden rests upon him to satisfy you by affirmative proof, that he did not adopt this method for the purpose of evading the payment of duties, but for some other and lawful purpose, as, for instance, to save freight, or to save time in the matter of transportation. But, if you are of opinion, that he was not aware that such a mode of bringing in or unloading of the goods was contrary to law; then the government is obliged to establish by positive proof to your satisfaction, that all the steps taken by him, in the direction

of their transportation, were taken with a fraudulent intent, to wit, for the purpose of getting the merchandise into the country without the paying of duties." There is no error in this. Its obvious import is, that, if the claimant knew he was violating the law, an intent to evade the duties might fairly be imputed to him by the jury, and that hence it devolved upon him to present satisfactory counter proof that he was actuated by a lawful purpose. In other words, that the presumption of fraudulent intent arising from wilful violation of the law, shifted upon the claimant the burden of proving the absence of such intent. This does not confound guilty knowledge with fraudulent intent, but correctly states, that an intent to evade the payment of duties and thus to defraud the government, may properly be inferred from an overt wilful violation of law, and that the duty of disproving this unfavorable inference devolved upon the claimant.

No special notice of the other errors assigned seems to me to be necessary. It is sufficient to say, that I do not think they are sustained. The judgment is affirmed.

Case No. 15,887.

UNITED STATES v. NINETY DEMI-JOHNS AQUADIENTE.[1]

[MS.]

District Court, S. D. Florida. Nov., 1879.[2]

FORFEITURES—VIOLATION OF TARIFF LAWS—INTENT TO DEFRAUD—ADMIRALTY PRACTICE.

1. A violation of the requirement in Schedule D of the act of 1870 (Rev. St. § 2504 [16 Stat. 256]), that "wines, brandy, and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles," does not subject liquors not so packed to forfeiture, for there is no statute declaring such a forfeiture, and a constructive forfeiture is not justified except in cases of the most urgent necessity.

2. To entail a forfeiture, it is not sufficient that there has been a violation of law by means of the thing sought to be forfeited, but there must have been such a violation as will bring it directly under the letter of the law declaring the forfeiture.

3. The act of June 22, 1874, § 16 [18 Stat. 189], which makes the finding of an intent to defraud a prerequisite to forfeiture of goods, though in terms restricted to cases in which issue of fact is joined, may nevertheless be considered applicable to suits in rem, in admiralty, even when there is no answer or appearance; since the admiralty practice is adapted to protect the rights of the absent owner.

G. Bowne Patterson, U. S. Atty.

LOCKE, District Judge. This is the second libel against this property on account of irregularities in the packages in which it was found, it being, as is alleged, in large bottles, to wit, demijohns, and not packed in packages of not less than twelve. The question at issue is whether the portion of Schedule D, Act 1870 (section 2504, Rev. St.), which provides that "wines, brandy, and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package," authorizes a forfeiture of such property if not so packed. It is admitted that there is no forfeiture declared by the language of any statute, nor has any law or decision been cited, under which or wherein it may or has been enforced; nor am I aware of any. Forfeitures are not favored in law, and, in my opinion, there can be none without a direct violation of a positive enactment for which they have been declared to be the penalty. Implications either of violation of law or character of penalty will not justify them. In order to entail a forfeiture, it is not sufficient that there has been a violation of law by means of the thing sought to be forfeited, but there must have been such a violation as will bring it directly under the letter of the law declaring the forfeiture. I consider this principle so well established that nothing but the most urgent necessity would justify a constructive forfeiture, and I do not consider such a construction necessary for the protection of the revenue any more than supported by authority. If it has not been declared by legislation, it cannot be assumed to have been intended as a penalty. Had all importations in any manner irregular been declared contraband, and the general penalty of forfeiture been declared, or no penalty been attached, so that the general penalty of forfeiture might attach for a violation of law by presumption, it might be regarded with more favor; but such is not the case, and the very presence of the declaration of forfeiture under other circumstances, as, for instance, in this same section, where it is declared that all liquors imported in casks of a less capacity than fourteen gallons shall be forfeited, makes the absence of such declaration presumptive evidence of the absence of intent in the legislators to affix it as a penalty.

There is another question presented in this case aside from the one of the insufficiency or absence of any law justifying a forfeiture not positively declared, and that is the provisions of the 16th section of the act of June 22, 1874, which provides that in all actions, suits and proceedings for the forfeiture of any goods, wares, or merchandise the distinct proposition whether the acts alleged to be done were done with intent to defraud the United States shall be inquired into, and, unless the intent to defraud be found, there shall be no forfeiture. The language of the section confines it to actions in which an issue or issues of fact are joined, but it may well be considered whether in admiralty issues of fact are not joined by the force of law and practice, even though there may be no answer or appearance. This question has been discussed and decided to a certain extent in the affirmative

[1] [Not previously reported.]

[2] [Affirmed in 8 Fed. 485.]

by Justice Bradley in U. S. v. The Mollie [Case No. 15,795], and there appear to be good grounds for so considering them, and requiring strict proof in every cause in admiralty, even though the parties in interest may be in default.

Admiralty practice is adapted to, and in a vast majority of cases founded upon, actions in rem, against the thing, not able to answer for itself, while the actual owner is absent, either entirely uninformed as to the condition of his property, or unable to respond in person, often too ill informed as to its circumstances to respond understandingly at all. The very liberality of such practice is intended to throw around the property of absent owners all the protection which the court having it in possession can grant, and although it may not be so much demanded today with steam and telegraphic communication as in the past, yet the spirit of protective equity which has made courts of admiralty trusted abroad as well as at home requires that it should not be disregarded.

In seizures made on land a judgment of condemnation is made on default, but where the seizure is made on water "the court shall hear the case ex parte, and adjudge therein as to what law and justice may appertain;" treating such case as if issue were joined on any question of fact essential to a condemnation. In one of these cases the presumption is that the seizure is from the custody of the actual owners; in the other, that the owners receive no personal notice, and perhaps none at all. Under the section quoted, it is made the duty of the court, where issue of fact has been joined, to consider the proposition of the presence of an intent to defraud, and it seems but reasonable that the same proposition may be considered in cases where it is the privilege and duty of the court to deem such issue of fact joined in practice as in the case of admiralty seizures.

If this position is correct, as I consider it is, it precludes any forfeiture, as there is no allegation of an intent to defraud, nor do the circumstances point to any such intent, and the libel must be dismissed.

[On appeal to the circuit court, the decree of this court was affirmed. 8 Fed. 485.]

UNITED STATES (NINETY-FIVE BALES OF PAPER v.). See Case No. 10,274.

Case No. 15,888.

UNITED STATES v. NINETY-FIVE BARRELS OF DISTILLED SPIRITS.

[8 Int. Rev. Rec. 105.]

Circuit Court, E. D. New York. 1868.

INTERNAL REVENUE ACT—FORFEITURE BY AGREEMENT—RIGHTS OF INFORMER.

[Where liquor is forfeited by consent in pursuance of an agreement made by the commissioner of internal revenue, and upon a relinquishment by the government of a portion of the proceeds of sale, very convincing evidence is necessary to entitle one to share in such proceeds on the ground that he furnished sufficient facts to the government to condemn the property.]

BENEDICT, District Judge. This case comes before me upon a motion to confirm the report of a commissioner to whom it was referred, to ascertain and report the person, if any, entitled to share as informer in the proceeds of the forfeiture of certain distilled spirits condemned and sold in this action. The report of the commissioner is that one Joseph G. Ward is the person who first informed of the matter whereby the forfeiture was incurred; to which report objection is made by the district attorney, who, on the part of the government, insists that under the facts disclosed no person is entitled to share as informer. I have examined the evidence with care, and am unable to agree with the commissioner in his conclusion.

It appears that the forfeiture in this case was by consent in pursuance of an agreement made by the commissioner of internal revenue; and upon a relinquishment by the government of a portion of the proceeds of sale, so that in point of fact the government has realized less than the amount of tax to secure which the spirits were in bond at the time of the seizure. Under such circumstances very convincing evidence would be necessary to justify the conclusion that facts sufficient to condemn the property had been communicated to the officers of the government by any person. Here the evidence is far from convincing to my mind, and viewed in its most favorable aspect, does not present a state of facts upon which I can feel justified in adjudging that a forfeiture of this property has been incurred by reason of any matter or thing first communicated to the proper officers of the government. The report, therefore, must be set aside, and the fund distributed to the proper officers of the government.

Case No. 15,889.

UNITED STATES v. NINETY-FIVE BARRELS OF DISTILLED SPIRITS.

[12 Int. Rev. Rec. 123.]

District Court, D. Massachusetts. Sept. Term, 1870.

INTERNAL REVENUE — STAMPING AND BRANDING CASKS—FORFEITURE.

1. Wholesale dealers are bound to "cause" their casks to be stamped and branded in the cases which come under sections 25 and 47 of the act of July 20, 1868 (15 Stat. 136, 144).

2. A knowing and wilful failure to comply with section 25 will cause a forfeiture of the goods by virtue of section 96, because no other penalty or punishment is anywhere provided for such failure. Otherwise with a neglect of the requirements of section 47, because that section provides a penalty for a breach thereof.

[Cited in U. S. v. 4,800 Gallons of Spirits, Case No. 15,153; U. S. v. 1,412 Gallons Distilled Spirits, Id. 15,960.]

LOWELL, District Judge. The demurrer to this information raises two points: (1) Whether, under statute of July 20, 1868, it is the duty of wholesale dealers, etc., to cause their casks to be stamped in the cases mentioned in sections 25 and 47; (2) whether their neglect to do so will work a forfeiture of these goods under section 96. See 15 Stat. 136, 144, 164.

The first question has been answered in the affirmative by two judges in U. S. v. One Rectifying Establishment [Case No. 15,952], and U. S. v. One Hundred and Thirty-Three Casks, etc. [Id. 15,940]; and in the negative by one in U. S. v. Thirty-Seven Barrels, etc. [Id. 16,466].

I consider the question a nice one, but on the whole incline to the former opinion. It is true that the government gauger is to do the work; but he cannot in fact do it nor be held responsible for its neglect unless the owner shall notify him when and where to do it. Then, considering the peculiar language of section 96, which punishes the wilful neglect to do or cause to be done any of the things required by law in the carrying on or conducting of the business, which last phrase, "cause to be done," seems to refer to acts which the owner is not to do personally nor by his mere agent, and that this phrase is dropped presently when the section speaks of doing prohibited acts; and considering that these are civil penalties, it seems to me that section 96 imposes these penalties on the owner who wilfully neglects or omits to see to it that the business is properly conducted, in accordance with the act. If he has notified the officer, and the real neglect is on the part of the latter, the case would fail.

As no penalty or punishment is imposed on wholesale dealers nor on their property for neglect of the things required by section 25, it follows that if a wilful neglect is made out under that section, the forfeiture is incurred, by the general words of section 96.

Not so with section 47, which forfeits the casks or packages, and those only which are without the marks required by that section. Here is a penalty imposed, and section 96 applies only to acts or omissions for which no penalty or punishment is imposed by any other section. It is argued that section 96 is to be divided, and to read thus: If no other penalty or punishment is imposed, there shall be a penalty of $1,000; and the offenders, whether punishable under any other section or not, shall forfeit their gooods.

There is no sufficient ground for so distorting the words of the act. The whole paragraph is connected, and the qualification extends to the pecuniary penalty and to the forfeiture. The language is so clear and explicit, that any paraphrase is rather likely to obscure it than to make it more plain. It means: If there be any wilful omission, and no other penalty or punishment has been provided, then we impose this payment and forfeiture. It was argued that the forfeiture of the unmarked goods imposed by section 47 is neither a penalty nor a punishment; but the statute often uses "penalty" and "forfeiture" interchangeably, as where it says the distiller shall forfeit the sum of, etc., and in other places, shall pay a penalty, etc.; and besides, a forfeiture is a penalty, and is so treated by section 96 itself. I have carefully read a charge to the jury reported to have been given in Quantity of Distilled Spirits [Case No. 11,495], which if correctly given,[1] which I take leave to doubt, seems to hold that these penalties are imposed for all wilful acts and omissions in addition to the penalties imposed for the same acts and omissions if not wilful. Now, in the first place, it is very doubtful whether "knowingly" and "wilfully," in section 96, qualify anything but neglects, omissions, and refusals. I am inclined to think they do not, and that the careful qualification as to mere neglects that they must be knowing and wilful, and which much strengthens the argument on the first point, is purposely omitted when prohibited acts are spoken of, which are personal and must be presumed to be wilful. But however this may be, I cannot believe that congress intended to forfeit one thousand dollars and the stock in trade for the same acts and omissions for which it had already denounced a great variety of punishments, some much larger and including the same goods, and some much less, and amounting to only a very small fine. Indeed, if there were no express reservation of previous penalties, there would be a necessary contradiction in saying that the stock should be forfeited for an act or omission for which already a different penalty had been established. It might in such a case be necessary to adopt the later section as overruling the former; but this is a rude and artificial contrivance, not to be adopted except in the last resort, from which we are relieved by the clear language of section 96. In this construction I am supported by the deliberate judgments of two learned judges in the cases first above cited, to which I am happy to be able to refer. U. S. v. One Rectifying Establishment [Case No. 15,952], and U. S. v. One Hundred and Thirty-Three Casks [Id. 15,940].

The demurrer to the second count is sustained, to the first count overruled.

[NOTE. The parties having reformed the pleadings, the claimant filed a second demurrer, and on the hearing of the cause, the demurrer was sustained on both counts. Case No. 15,890.]

---

[1] It was correctly given.

Case No. 15,890.

UNITED STATES v. NINETY-FIVE BARRELS OF DISTILLED SPIRITS.

[14 Int. Rev. Rec. 6.]

District Court, D. Massachusetts. April, 1871.

INTERNAL REVENUE—UNSTAMPED PACKAGES.

The forfeiture of distilled spirits by section 57 of the act of July 20, 1868 [15 Stat. 150], is general, and that section imposes a penalty for a violation of section 25 in case the unstamped packages contain more than five gallons.

R. M. Morse, Jr., for claimant Lotan Gassett.

J. C. Ropes, Asst. U. S. Atty.

LOWELL, District Judge. Since this case was before me on demurrer the parties have by consent reformed the pleadings, and the claimant has filed a second demurrer, which raises the single question whether section 57 of the statute of July 20, 1868 (15 Stat. 150), does not impose a penalty or punishment for a violation of section 25. In my former decision [Case No. 15,889] I expressed the opinion that there was no penalty imposed for a violation of section 25, and three district judges have expressed a like opinion. U. S. v. One Rectifying Establishment [Id. 15,952]; U. S. v. Thirty-Seven Barrels, etc. [Id. 16,466]; U. S. v. One Hundred and Thirty-Three Casks [Id. 15,940]. And this was agreed to be the case by both counsel at the former hearing. But it seems that section 57 contains a clause which, taken literally, is broad enough to reach every neglect to brand or stamp or cause to be branded or stamped any cask or package of more than five gallons. It is: "And all distilled spirits found after thirty days from the time this act takes effect in any cask or package containing more than five gallons without having thereon each mark and stamp required therefor by this act shall be forfeited to the United States." It is argued by the district attorney that the meaning is to punish merely the violation of this section, and that "act" in the latter part of the clause should read "section;" and such was the opinion of Judge Ballard in one of the cases above referred to. In none of the other decisions that I have seen has this section been construed or cited, and it is not clear that the point was fully argued in that case. There is great force in the argument from proximity of place and context; all the remainder of that section refers to spirits already distilled and held for sale at the date of the passage of the act, and this forfeiture is interposed in the middle of a sentence of which the former part relates only to such spirits.

It was very frankly admitted by the district attorney that a great many forfeitures have been adjudged here on informations framed under the broad construction of this clause in defaulted cases; and it never occurred to me, in reading or hearing these informations, as I always do in such cases, that there ought to be an allegation that the spirits were in existence and owned by some persons who intended to sell them at the time of the passage of the act, which would be necessary to bring them within the more restricted construction. Of course, the government must abide by the same interpretation when it will relieve the goods as when it will forfeit them; but I understand their position now to be, that any informations that may have been brought against unstamped spirits by virtue of this clause were ill-advised excepting where the spirits were held for sale at the date of the passage of the act; and as this is the first time the point has been distinctly raised, they certainly ought not to be precluded from taking their present position. Upon the best consideration I can give the question, I am of opinion that the forfeiture is general and not to be limited by the context. The language is unambiguous that all distilled spirits found in any cask, etc., not having each mark and stamp required by the act, shall be forfeited. There appears no reason of justice or policy for confining the meaning of "act" to "section," but rather the contrary. It is proper and usual that the goods which are not stamped should be forfeited, and it is so provided in respect to cigars and tobacco by sections 70 and 90 of this act; but there is no general provision forfeiting unstamped spirits unless it be the clause now under consideration. To limit the meaning will not only require us to read "act," as if it were "section," but to disregard "each" because there is but one particular stamp required by this section, and this would naturally be mentioned as "the stamp required by this section," or by some such expression. I consider the more reasonable construction to be that congress having by this section put all spirits on an equality in this respect, namely, that all must be stamped and branded whether made before the statute was passed or afterwards, intended to say that all spirits which were not properly stamped and marked should be forfeited, whatever the previous history of the spirits might be, or whatever the special marks or stamps which ought to be put upon them. I must, therefore, sustain the demurrer on both counts and dismiss the information, leaving the United States to their remedy by writ of error.

Case No. 15,891.

UNITED STATES v. NINETY-FIVE BOXES, ETC.

SAME v. TWO HUNDRED AND THIRTY-EIGHT BOXES, ETC.

[19 Int. Rev. Rec. 101.]

District Court, D. New Jersey. March 21, 1874.

CUSTOMS DUTIES — ENTRIES AS PASSENGERS' BAGGAGE — FORFEITURES.

Where dutiable merchandise was imported as passengers' baggage, but no attempt was made by the owners and consignees to have it passed as such, and the owner, without knowledge of the seizure by the officers of customs, offered the goods, with correct bills of lading and moneys, for entry at the custom house, *held*, that such goods were not forfeitable either under the 50th section of the act of March 2, 1799 [1 Stat. 665], the 1st section of the act of March 3, 1863 [12 Stat. 742], or the 4th section of the act of July 18, 1866 [14 Stat. 179].

A. Q. Keasbey, U. S. Dist. Atty.

Stanley, Brown & Clarke, for claimants.

NIXON, District Judge. The claimants, the principles involved, and the facts, in the two cases above stated are substantially the same. The goods described in the informations were seized by the collector of customs of New York, at Hoboken, in this district, and informations were filed claiming their forfeiture under section 50 of the act of March 2, 1799, section 1 of the act of March 3, 1863, and section 4 of the act of July 18, 1866. Sacks & Herzberg, merchants and importers, doing business in New York, put in claims and duly filed answers to the informations. On the trial of the first stated case, the result of which, by consent of counsel, was to determine the second, no question was raised, in regard to the facts, and the court directed a verdict for the government, subject to the opinion of the court upon the questions of law; and also requested the jury to find specially whether or not the claimants were guilty of intentional fraud, and design to evade the payment of duties. This was done for the information of the secretary of the treasury, if the case should afterwards come before him on application in behalf of the claimants for remission of the forfeiture. A general verdict for the government was found, as directed, but the jury failed to agree upon the question of fraud.

The facts in the two cases are substantially as follows: The goods in question were owned by the claimants, Sacks & Herzberg, importers of dress trimmings in New York; one member of the firm, Sacks, residing in New York, and the other, Herzberg, in Berlin. They had been in the habit of importing goods from Hamburg, which were shipped from time to time by their agents in that city. Morris L. Sacks, father of one of the claimants, was in Germany in the winter of 1872-3, visiting his relatives, and when about to return to this country, in the month of February, received a letter from his son requesting him to go to the shipping agent of the firm in Hamburg, and ascertain whether there were any goods prepared for transportation, and, if so, to bring them with him. He did so, and found two cases of goods ready for shipment. They were put on board the Frisia by their agent, and marked "personal luggage" of Mr. Sacks, the elder, who had taken passage in that steamer. The reason assigned for so marking the cases was to save, in part, the costs of transportation. Each passenger was allowed by the steamship company a certain number of cubic feet for his baggage, and, as he had little of his own, he would be obliged to pay on this merchandise only for the space occupied by it in excess of the usual allowance for baggage. The Frisia was to sail on the 19th of February. On the 18th, Mr. Sacks, in consequence of sickness, found that he was unable to go on board, and endeavored to have the goods withdrawn from the steamer, but was unsuccessful, in consequence of their being stowed in the hold of the vessel. They came over among the personal baggage of the steamer; were not entered in the ship's manifest; were landed on the wharf at Hoboken, with the passengers' baggage under the general permit granted by the collector for that purpose, and no one claiming them, they were seized by the officers of the customs, and sent to the seizure room for forfeiture. Mr. Sacks, the elder, sailed a week later in the Westphalia. Four other cases were then ready for shipment, and were taken by him on board, and marked as, and deposited with, the personal baggage. They were put upon the manifest of the ship as passengers' baggage, and not as merchandise, and on the arrival of the steamer in Jersey City were landed upon the dock for examination under the permit to remove personal baggage, where, as in the other case, they were seized. None of the cases contained anything except merchandise, subject to duties.

Upon this state of facts, it is insisted by the district attorney in behalf of the United States, that the mode of importation was an experiment by the parties, to ascertain whether the payment of duties could be avoided by inducing the officers of customs to allow the goods to pass without inspection, as passengers' baggage exempt from duty, and ultimately intending to pay the duties if payment should be demanded, and he claims that the goods are forfeited under the 50th section of the act of March 2, 1799, and also under the 1st section of the act of March 3, 1863, and the 4th section of the act of July 18, 1866.

The facts place the case before me, so clearly outside of the provisions of the sections of the two last recited statutes, that I shall not stop to particularly consider them. The penalty of forfeiture authorized by the first section of the act of 1863, refers to frauds or attempted frauds in regard to the

entry of goods by the owner, consignee, or agent; and is only incurred by some overt act, after their importation, in respect to their entry at the custom house for the payment of duties. The alleged unlawful or fraudulent practices here complained of were in connection with the importation and not the entry of the goods, which are quite distinct matters. The importation is complete before the time for entry begins. Waring v. Mayor, 8 Wall. [75 U. S.] 118; Act 1799, § 36. The goods were seized before an entry was attempted to be made. The 4th section of the act of 1866 prescribes the penalty of forfeiture in cases of the fraudulent importation of goods contrary to law, and as was held by the late Judge Hall in U. S. v. Thomas [Case No. 16,473], refers not to the importation of dutiable goods without the payment of duties, but to the bringing in either of special articles whose importation is wholly prohibited or of merchandise admitted under certain circumstances and subject to duty, or forbidden under others, as for instance importing cigars in boxes containing more than five hundred and brandy or other spirituous liquors in casks of a capacity less than thirty gallons. It is for the wisdom of the legislature to impose these prohibitions and restrictions in its discretion, and the importing of such articles in any other than the prescribed mode might be deemed an importation contrary to law. But it is not as a general rule against the law to import or bring into the United States goods subject to duty without first paying or securing the duties, for nothing is due or payable thereon until after the importation has taken place, and the necessary entries have been made and the duties ascertained.

We are then brought to the single question whether these goods are liable to forfeiture under the provision of the 50th section of the collection act of 1799. The prohibition of the section is that, "no goods, wares, or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen or delivered from such ship or vessel within the United States, but in open day; nor at any time without a permit from the collector and naval officer, if any, for such unlading or delivery." The goods in controversy were taken from the steamer and placed upon the dock for examination under permits, from the collector and naval officer to examine personal baggage. These permits were issued by virtue of the 46th section of the collection act, which provides "that whenever the collector and naval officer, if any, shall think proper, so to do, they may and are hereby authorized in lieu of the provisions and directions before mentioned" (in reference to the entry of personal baggage by the owner and in his behalf), "to direct the baggage of any person arriving within the United States to be examined by the surveyor of the port or an inspector of the customs, and to make a return of the same, and if any articles shall be contained therein, which in their opinion ought not to be exempted from duty, according to the true intent and meaning of this act, due entry shall be made therefor and the duties thereon paid or secured to be paid; and provides, that whenever any article or articles subject to duty shall be found in the baggage of any person arriving within the United States, which shall not at the time of making entry for such baggage be mentioned to the collector before whom such entry is made by the person making the same, all such articles shall be forfeited," etc. These provisions are intelligible and require the officers making the examination to pass the personal baggage, and to hold all goods, not falling properly within the designation, for entry and payment of duties, and they authorize the seizure and forfeiture of those articles only which are found to be withheld from the collector when the entry is made.

It was in proof, that for many years past no examination of passengers' baggage has taken place on shipboard; that it has been the custom, on account of the practical inconveniences of making a proper examination in the hold of the vessel, to have everything imported as personal baggage, placed on the dock where it remains under the inspection and control of the officers until examined and passed by them; that the inspector of customs directs the removal from the ship to the dock by virtue of the permits of the collector and naval officer, authorizing the examination, and that it is made solely to facilitate such examination. The permits in this case, of which the following are copies, were produced and admitted: The naval officer says: "The inspector on board the steamship Frisia from Hamburg, will examine the baggage of all the passengers, and if nothing be found but personal baggage, permit the same to be landed and send all other articles not permitted in due time to the public store." The collector's general order is substantially the same: "The inspector on board the steamer Frisia, E. Mier, master, from Hamburg and Havre, will send to the public store No. —— Hoboken stores, all packages when landed, and for which no permit or order shall have been received by him contrary to this direction, except perishable articles, gunpowder and explosive substances, not permitted for consumption, which you will retain on board and send notice of to this office. The usual weighing, gauging and measuring to be done before sending goods under this order." These authorize the examination of the baggage by the inspector according to the proviso of the 46th section above mentioned, and direct all articles or packages not falling within the description of personal baggage to be sent to the public stores for entry and the payment of duties.

It is claimed on behalf of the government that the removal of the goods which came as personal baggage, but which, in fact, were

not personal baggage, from the ship to the dock, for the special and only purpose of examination, was such an unloading or delivery of the articles from the vessel, as to bring them within the forfeiture of the 50th section. This would seem to be a harsh and strained construction of the act. The goods are in the possession and under the sole direction of the officers. They are removed to a portion of the dock assigned for the purpose by his order and for his convenience, and remain as fully under his control there as in any part of the ship; and in view of the special object of the transfer, it does no violence to language to hold that no unlading or delivery has taken place, and that, constructively, they are still on board of the vessel. If such removal, in itself, subject the goods to seizure and forfeiture under this section, then the other penalties of the section may be enforced, and the master of the ship and all other persons—including the inspectors that order and superintend the transfer—who are knowingly concerned or aiding therein, forfeit and become liable each to pay for every offence the sum of four hundred dollars, and are disabled from holding any office of trust or profit, under the United States, for a term not exceeding seven years; and when the value of the goods amounts to four hundred dollars, the vessel, her tackle, apparel, and furniture are subject to like seizure and forfeiture. I do not say that such results, however startling and severe, should deter the court from enforcing the plain provisions of a statute; but they are properly adverted to, and entitled to weight, in cases like the present, involving construction. This interpretation of the laws is in harmony with the practice of the government, and is confirmed by the rulings of its officers for many years past, and, so far as it appears, from the beginning.

The counsel for the claimants put in evidence the printed instructions of the surveyor of the port to the inspectors, from which I make the following extracts bearing upon the case: "It is expressly enjoined on officers of the customs that they must be careful that, while no unnecessary delay or needless embarrassment is occasioned, proper scrutiny must be made to detect and report for entry and payment of duties or security therefor, in pursuance of law, all articles found among the baggage liable to duty. They are cautioned, however, that the prime object of their labor is to secure the duties of the United States, and that they are to avoid making seizure of baggage because of the presence of dutiable articles, unless the intention of fraudulent importation is evident." "In the absence ot the entry clerk or appraiser, dutiable articles, taken from passengers' baggage, will be sent by the inspector, as soon as possible, to the appraiser's stores, and the passenger will be furnished by the inspector with the usual baggage certificate." "Baggage agents and all other persons (without the permission of the surveyor) will be excluded from the vessel and from so much of the dock as is used for examining the baggage, until the examination of all the baggage is completed." "The inspector stationed at the gate on the arrival of a steamer must not allow any trunk or package to be removed from the dock unless it is properly passed and checked by the examining inspector. All baggage remaining on the vessel or dock not claimed within a reasonable time by any passenger, must be sent by the inspector to the public store designated in the general order."

The counsel also read in evidence from the printed regulation of the treasury department, issued by the secretary, as follows: "It is expressly enjoined on officers of the customs that they must be careful that, while no unnecessary delay or needless embarrassment is occasioned, proper scrutiny must be made to detect and report for entry and payment of duties or security therefor, in pursuance of law, all articles found among the baggage liable to duty. They are cautioned, however, that the prime object of their labor is to secure the duties due to the United States, and that they are to avoid making seizures of baggage, because of the presence of dutiable articles, unless the intention of fraudulent importation is evident." "Should any passengers' baggage contain dutiable articles to the value of five hundred dollars, it will be sent to the appraiser's store for regular entry and appraisement, as provided by law." It is submitted, in passing, that if the officer had obeyed these plain instructions in the case, and sent the goods to the public store instead of the seizure room, no fraud upon the revenue could possibly have been committed, and the present controversy would not have arisen. The claimants were advised by letter of the shipment. A bill of lading was sent, and invoice in triplicate regularly made and forwarded, according to the act of 1863, and they received their first knowledge of the seizure of the goods when they went to the custom house with the bill of lading and invoice, for the purpose of entry and payment of the duties. The following letter of the secretary of the treasury to the collector of the port of New York, in reference to the seizure of goods belonging to one Levi, made May 8, 1873, was also exhibited, to show the construction which the highest officer of the department has given to the law: "Washington, June 10, 1873. Sir: Your letter of the 23d ultimo is at hand, reporting on the application of M. B. Levi for release of certain new wearing apparel, seized for the reason as reported by the seizing officer—that they were landed as passengers' baggage, and found to be merchandise not on the ship's manifest. The department is unable to see any ground for the seizure in the reason assigned; only goods belonging or consigned to the master, mate, officers, or crew of a vessel are liable to forfeiture when omitted from the manifest, and dutiable goods, found in baggage, are forfeitable only when regular entry has been

made in the manner prescribed in section 46, act of March 2, 1799; and such dutiable goods have not been mentioned to the collector at the time of making the entry. As it does not appear that Mr. Levi was an employee of the vessel, or that he made a sworn entry of baggage, it is the opinion of the department that the property should be considered as detained for duty, and not as seized." This is not quoted, of course, as an authority or rule of decision for the court, but to reveal the fact that the mode of procedure of the subordinate officers in this case is not in accordance with the views of their superior.

I have given to the questions involved a careful consideration, because a different construction of the act was most ably and earnestly pressed by the district attorney, and because the result at which I have arrived differs, as I learn, from U. S. v. Three Cases, etc. [Case No. 16,498], from a number of decisions of Judge Blatchford, whose judgment in such matters is entitled to great weight. For this reason, and because serious doubts existed respecting the interpretation of the law, under the peculiar circumstances of the case I shall give a certificate of reasonable cause.

The method of importation adopted by the claimant is exceptional, and is not to be encouraged. It is liable to suggest to the subordinate officers of the customs, suspicions and intentions to defraud when no such intentions were in the mind of the parties. I find none in the facts of the present case, but if I did, it must be remembered that the law does not punish intentions, but attempts to evade its provisions. The verdict must be set aside, and judgment in both cases be entered for the claimants.

Case No. 15,892.

UNITED STATES v. NINETY-TWO BARRELS OF RECTIFIED SPIRITS.

[8 Blatchf. 480.] [1]

Circuit Court, N. D. New York. June 20, 1871.

FORFEITURE—POSSESSION OF PROPERTY—SEIZURE—JURISDICTION.

1. Jurisdiction to proceed by information for the condemnation of property forfeited under the revenue laws, depends upon the possession of the property, actual or constructive.

2. Property was seized, as forfeited for a violation of the internal revenue laws. Before any information was filed, the property was bonded, under section 48 of the act of June 30, 1864, as amended by section 9 of the act of July 13, 1866 (14 Stat. 111), and surrendered. An information was then filed against the property, counting on a violation of the said 48th section, and also of section 26 of the act of July 13, 1866 (14 Stat. 154). On the trial, in the district court, there was a verdict for the claimant on the count based upon the said 48th section, and a verdict for the United States condemning the property, on the count based upon the said 26th section: *Held*, that the verdict of condemnation could not be sustained, because, when the information was filed, the property was not, actually or constructively, under seizure, as respected proceedings for a violation of the said 26th section.

3. Nor was the difficulty remedied by the fact, that, after the information was filed, the property was reseized, and then taken possession of by the marshal, on a monition founded on the information, and then bonded by its owner.

[Error to the district court of the United States for the Northern district of New York.]

Joseph R. Swan, for plaintiffs in error.
William Dorsheimer, U. S. Dist. Atty.

WOODRUFF, Circuit Judge. Jurisdiction to proceed by information for the condemnation of property forfeited under the revenue laws, depends upon the possession of the property, actual or constructive. There must be a seizure, and that seizure must continue, unless, as in section 48 of the act of June 30, 1864, as amended by section 9 of the act of July 13, 1866 (14 Stat. 111), there is special authority given to the officer or person making the seizure to take a bond for its value, which, in such case, is treated as a substitute for the property itself.

In this case, the property was seized on the 26th of September, 1867, but, before any information was filed, the collector making the seizure had surrendered the possession of the property to the owner. He received, on such surrender, a bond for its value, as authorized by the said 48th section, when a seizure is made for the cause mentioned in that section. By taking such bond and surrendering the property, the collector did not waive the claim to a forfeiture. On filing such bond, it would become the duty of the district attorney to proceed, and the court had jurisdiction of the matter; but, to make such jurisdiction effectual, the process of the court must be served by notice to the parties executing the bond, and, thereupon, the proceeding would have like effect as if, after the seizure, and before the surrender, the proceeding had been commenced, and the property had been taken by the marshal under process In such case, the bond is required as a substitute for the property. But the district attorney, although he filed an information on the 7th day of October, did not proceed as for property bonded under the 48th section. He counted upon a violation of that section as one ground of forfeiture, but no notice was given to the parties executing the bond. The proceedings upon that count failed on the merits, and the judgment against the claimant and his sureties cannot be sustained by the 48th section, not only because that section was not complied with by giving the notice prescribed therein, and because the rules of the court were not observed, but also, and conclusively, because the verdict of the jury was for the claimant upon that count of the information.

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

If the judgment can be sustained at all, it is by the second count in the information, which is for a violation of the 26th section of the act of July 13th, 1866 (14 Stat. 154). When a seizure is made for a violation of the provisions of that section, the seizing officer has no authority to take a bond and surrender the property. No such bond can, therefore, be regarded as a substitute for the property seized. When, therefore, the information was filed, there was no property actually or constructively in possession, warranting a proceeding by information in rem.

An effort was made to remedy this defect. The collector, being advised that his surrender of the property was improper, made, on the 22d of October, a reseizure, after which a monition, founded on the information theretofore filed, was issued to the marshal, and, by virtue of that process, the marshal took possession of the property. Thereupon, the owner claiming the property applied to the court and gave bond for its value, and obtained possession thereof, according to the customary and proper practice in proceedings to enforce a forfeiture, where the property is liable to perish or to become greatly reduced in value by keeping, &c. This did not preclude the claimant from insisting, as he did, by answer to the information filed before such re-seizure, that, when the information was filed, there was no jurisdiction to proceed for a condemnation of the property under the second count of the information. He was at liberty to defend the suit by all just and legal defences. The owner of goods seized by the marshal is not compelled to submit to their loss by perishing or their being wasted by keeping; nor does his appearance and giving bond to avert that result preclude his alleging that the information filed did not warrant a taking of the property by the marshal.

After the reseizure by the collector, a new information should have been filed, counting upon that seizure and alleging the grounds of forfeiture. Then, the court would have had jurisdiction; and then a verdict of the jury, finding the cause of forfeiture under the 26th section, would have warranted the condemnation of the property, and a judgment against the parties giving bond, (if such bond had, in that case, been given,) would have been regular and legal. But the present judgment stands only upon an information filed against property not under seizure, and of which there was no possession, actual or constructive, warranting condemnation under the 26th section, under which alone the judgment was pronounced. This conclusion necessarily results from the decisions in The Ann, 9 Cranch [13 U. S.] 289; The Josefa Segunda, 10 Wheat. [23 U. S.] 312; and The Abby [Case No. 14], where it is held, that, to sustain a condemnation, there must be a good subsisting seizure at the time when the information is filed. These cases nor the present regard a forcible, tortious, or fraudulent dispossession of the seizing officer as invalidating or displacing a seizure; and I do not suggest that a proceeding may or may not be valid where the owner voluntarily waives actual seizure and voluntarily appears and answers to an information, as to which see U. S. v. The Henry [Id. 15,352]. Here, the proceeding was altogether hostile. When the information was filed there was no subsisting seizure, and the bond given was necessarily given to save the property.

I am of opinion that the judgment is erroneous and should be reversed.

Case No. 15,893.

UNITED STATES v. NISSLEY et al.

[13 Int. Rev. Rec. 174; 1 Dill. 586.] [1]

Circuit Court, D. Iowa. 1871.

INTERNAL REVENUE — ESTIMATED PRODUCTION OF DISTILLERY.

Under section 20 of the internal revenue act of July 20, 1868 (15 Stat. 125), a distiller is bound to pay taxes on 80 per cent. of the producing capacity of his distillery, although this may be on more than the amount of spirits actually produced.

This was an action on a distiller's bond dated 26th day of August, 1869, and containing the usual conditions. The breach is alleged in the following terms: "That the defendant did not comply with all the provisions of the law in relation to his duties as a distiller, in this, to wit: that in operating his distillery in the months of March and April, 1870, he only paid the assessment on the amount of spirits actually produced, whereas he was bound by the acts of congress to pay on 80 per cent. of the producing capacity of the distillery during the period aforesaid, making a difference of $3,164 between the amount of spirits actually produced by the defendant during the said two months, and the amount legally due the United States when estimated upon the basis of 80 per cent. of the producing capacity of the defendant's distillery." To recover this difference the action is brought, and it is alleged that the amount claimed has been duly ascertained and assessed by the assessor of the district. The defendant [Samuel H. Nissley] demurred to the petition, and the question argued thereon was whether the defendant, having paid the tax on all the spirits actually produced, was bound to pay also the difference between that sum and 80 per cent. of the producing capacity of his distillery? The opinion of the court (in which all the judges before whom the cause was argued concurred) was orally pronounced by Mr. Justice MILLER, who examined and commented on various sections of the act of July 20, 1868.

Mr. Sapp, U. S. Dist. Atty., and Mr. Lowe, Asst. U. S. Dist. Atty.

[1] [1 Dill. 586, contains only a partial report.]

Mr. Leffingwell, for defendant.

PER CURIAM. It is the opinion of the court that under the 20th section of the act of July 20, 1868 (15 Stat. 125), the defendant is liable to pay the amount which the government seeks to recover. Under the act, the distiller is bound to pay taxes on all the spirits distilled or produced by him, and hence the various provisions contained in it requiring oaths, books, reports, etc. But in order the further to guard against fraud, the act provides for surveying, estimating and determining the true producing capacity of every distillery (section 10); and it makes it the duty of the assessor each month to determine whether the distiller has accounted in his returns for the preceding month for all the spirits produced by him (section 20), and it prescribes a legislative test or mode of determining the quantity to be accounted for—to wit: forty-five gallons of mash are declared to represent not less than one bushel of grain, and seven gallons of mash not less than one gallon of molasses. If the distiller returns less than the amount this test requires, he is to be assessed for the deficiency. Then follow the concluding words of the section, "but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than 80 per centum of the producing capacity of the distillery as estimated under the provisions of this act." Upon a survey of all the provisions of the statute, the intention of congress seems to be plainly this: The distiller must pay on all he manufactures, even if he produces up to 95 or 100 per cent. of the capacity of the distillery, and therefore we find in the act that the government anxiously provides so many checks against frauds. But to set a limit (which congress deemed to be reasonable) to the extent to which the government might be defrauded, the act declares that the distiller shall absolutely account for 80 per centum of the producing capacity of his distillery. He will have to pay more than this if he actually produces more and it can be shown; but in no event can he escape paying less than 80 per centum of the amount which, as estimated by the act, the distillery has the capacity to produce during the time it is in operation. Demurrer overruled.

Case No. 15,894.

UNITED STATES v. NOAH.

[1 Paine, 368.] [1]

Circuit Court, S. D. New York. April Term, 1825.

SHERIFF — ESCAPE OF DEBTOR — TAKING BOND — ASSIGNMENT OF BOND—SURRENDER BY SURETY—PROCESS.

1. Under the act of congress of 6th January, 1800 [2 Stat. 4], the sheriff of a county is bound to take a bond for the limits, as provided by the state laws, from a prisoner confined on process from the courts of the United States, and false imprisonment would lie on his refusal.

2. Such a bond has in all respects the same incidents and the like legal effect with a bond taken under the state laws.

3. It is assignable, and an assignment discharges the sheriff from liability for a subsequent escape.

4. The United States are expressly named in the act, and bound by it, and an assignment of a bond to them when they are plaintiffs, is valid.

5. The secretary of the treasury having accepted such an assignment, the court presumed that he was authorized, and held the plaintiffs bound by his acceptance.

6. The term "process," in the act, includes executions as well as mesne process.

7. After a prisoner has been enlarged upon a limit bond, the sheriff can confine him again only on the bail's becoming insufficient. He cannot accept a surrender of him—certainly not after an assignment of the bond.

Error to the district court of the United States for the Southern district of New-York.

The plaintiffs brought an action of debt in the court below against the defendant [M. M. Noah] as sheriff of the city and county of New-York, for the escape of one Joseph Wilson, a prisoner committed to his custody on a capias ad satisfaciendum, at the suit of the plaintiffs. At the trial it appeared that the plaintiffs on the 4th of May, 1819, issued a ca. sa. on a judgment against Wilson, directed to the marshal of the district, on which he was taken, and afterwards delivered over under the act of congress to the sheriff of the city and county of New-York. The defendant on coming into office received the prisoner from his predecessor, and on the 10th of April, 1821, enlarged the prisoner upon a bond for the limits, which bond was afterwards assigned under the statute of the state to the plaintiffs, and the assignment accepted by the secretary of the treasury through the district attorney. After the assignment of the bond, the surety offered to surrender the prisoner, and demanded that the bond should be cancelled, both which were refused by the defendant; and subsequently, on the 28th day of November, 1822, the prisoner escaped.

R. Tillotson, U. S. Dist. Atty.

E. W. King, for defendant.

THOMPSON, Circuit Justice. This case comes up on a writ of error to the district court of the United States for the Southern district of New-York, on a judgment in favour of the defendant in error. The suit in the court below, was an action of debt, against the defendant as sheriff of the city and county of New-York, for the escape of one Joseph Wilson, a prisoner committed to his custody on a capias ad satisfaciendum, at the suit of the United States. Wilson, after his commitment, was not permitted to go at large, nor did the alleged escape take

[1] [Reported by Elijah Paine, Jr., Esq.]

place, until he had duly entered into bond for the jail liberties pursuant to the law of the state of New-York; and the only questions which arise here are, whether the sheriff was authorized to take such bond and set the prisoner at liberty, and whether such bond, having been assigned to the plaintiffs, an action can be sustained against the sheriff for the escape.

Congress, by a resolution of the 23d of September, 1789, recommended to the legislatures of the several states, to pass laws making it the duty of the keepers of their jails to receive and safe keep therein, all prisoners committed under the authority of the United States, until they should be discharged by due course of the laws thereof, under the like penalties, as in the case of prisoners committed under the authority of such states respectively. The state of New-York, in 1801 (1 Laws N. Y. 208, K. and R. revision), passed a law making it the duty of the sheriffs of the several cities and counties of the state, to receive into their respective jails, and safely keep, all prisoners who shall be committed to the same, by virtue of any process to be issued under the authority of the United States; and in case any prisoner should escape out of the custody of any sheriff or keeper to whom such prisoner might be committed, such sheriff or keeper is made liable to the like actions and penalties, as he would have been, had such prisoner been committed by virtue of any process issuing under the authority of the state. By an act of congress passed the 6th of January, 1800 (3 Laws [Bior. &. D.] 301 [2 Stat. 4]) it is provided "that persons imprisoned on process issuing from any court of the United States, as well at the suit of the United States, as at the suit of any person or persons in civil actions, shall be entitled to like privileges of the yards or limits of the respective jails. as persons confined in like cases on process from the courts of the respective states are entitled to, and under the like regulations and restrictions."

These laws and the resolution of congress are in pari materia, and to be construed together. The object of congress was to obtain permission from the respective states, to have the use of their jails for the safe-keeping of prisoners committed under process from the courts of the United States. This state granted this permission, and congress adopted the state laws as to the privileges of the yards and limits of the jails, to be allowed to such prisoners. Under the act of congress, Wilson had a right to demand of the sheriff to be admitted to the privilege of the limits in the same manner as if he had been committed on process from a state court, and we must look to the state law to ascertain what that right was; and by that law (1 Rev. Laws, 429) it is expressly made the duty of the sheriff, to permit any prisoner who shall be in custody on civil process only, to go at large within the limits of the jail liberties, provided he gives a bond with sufficient sureties, in double the amount of the sum for which he is confined; conditioned to remain a true and faithful prisoner, and not to escape or go without the limits of the liberties of the jail until discharged by due course of law. Such bond was duly made and delivered to the sheriff; and he no longer had any authority over the person of Wilson, to prevent his going at large wherever he pleased. The sheriff however is not exonerated from an action for the escape, should the prisoner go without the limits, and he must look to his bond for indemnity. Such bonds however are made assignable, and it is made the duty of the sheriff, upon the request of the party at whose suit the prisoner was confined, to assign the bond to such party who is authorized to bring a suit thereon as assignee of the sheriff. If the party does not choose to take an assignment of the bond, but bring an action against the sheriff for the escape, the court where the suit is prosecuted is authorized to stay the proceedings, until the sheriff shall have had a reasonable time to prosecute the bond. The bond in the present case was duly assigned to the plaintiffs, and the assignment accepted by the district attorney of the United States for the Southern district of New-York, he being authorized so to do by the secretary of the treasury, and the escape for which the sheriff was prosecuted took place after such assignment and acceptance.

It is not pretended on the part of the plaintiffs that in the state courts, under like circumstances, an action could be sustained by a private person, against the sheriff for the escape. But it is contended: 1. That the laws of the United States do not authorize the taking of bonds for the privilege of jail liberties. 2. That the sheriff was bound to accept the prisoner Wilson, when offered to be surrendered, and by refusing so to do, made himself liable for the subsequent escape.

Neither of these positions appears to me tenable. The state laws on this subject would not be obligatory upon the courts of the United States, unless such laws had been adopted by the United States; but I think they have been so adopted. It cannot be necessary where the laws of the United States adopt and sanction any state law or practice, to incorporate the detailed provisions of such law or practice; a general reference thereto is sufficient. The act of congress of the 6th of January, 1800, is very general in its provisions, and seems obviously intended to adopt the state law in all respects, so as to place prisoners confined under process from the courts of the United States, on the same footing with those confined on process from the state courts. The words of the act are very broad—"shall be entitled to like privileges of the yards or limits." Prisoners under

United States process have by the express provision of this act a right to demand the liberty of the limits. And what is the sheriff to do? Would it not be false imprisonment in him to refuse this liberty? The act does not to be sure by detailed provisions point out the duty of the sheriff in such case, but refers him to the state laws to ascertain what he is to do; and declares that the privilege is to be granted, "under the like regulations and restrictions" as to prisoners confined in like cases on process from the state courts; and that, as has been already shown, is to admit the prisoner to the privilege of the limits of the jail on his giving the bond and sureties as directed by the statute, which bond must have the same legal effect, as in like cases of prisoners under state process. Any other interpretation would fall short of what was obviously the intention of congress. So long as the state jails were to be used for the United States' prisoners under United States process, it was highly fit and proper they should be dealt with as prisoners under state process. The state officers would then know and understand their duty, and not be likely through ignorance of the law to expose themselves to penalties and consequences not understood. And the law of this state subjects the sheriff in case of escape to the like actions and penalties, as he would have been subject to had such prisoner been committed by virtue of process under the authority of the state. The whole duty of the officer is imposed by the state law, and he is entitled to the protection of that law for his indemnity. No law of the United States could compel him to receive a prisoner arrested under process from the courts of the United States. It was by virtue of the state law that Wilson was received in custody; if not, he was received without authority; and the plaintiffs must look to their own officer, the marshal, for the escape: but no such consequence is involved in the case. The law of the state made it the duty of the sheriff to receive Wilson into the jail of New-York; and the United States law, not only authorized, but made it his duty to admit the prisoner to the privileges of the jail limits, and under the like regulations and restrictions as prisoners confined on process from the state courts are admitted. This was by taking bond with sureties as has been done in this case, and all the other provisions attached to such bond follow of course. It becomes assignable at the request of the party plaintiff in the suit. The act of congress of the 6th of January, 1800, extends in terms to prisoners confined on process issuing from courts of the United States, as well at the suit of the United States as other persons in civil actions, and the law of this state makes the bond assignable to the party in the suit. The United States are the plaintiffs, and the assignment to them is no doubt valid. If they are competent to bring a civil suit, the cause of action must be vested in them, and they are as competent to take a bond or an assignment as a natural person.

The record in the suit against Wilson is not before me, and the present case does not show what was the cause of action. It is fairly to be presumed that it was an action under the direction and control of the secretary of the treasury, or he would not have undertaken to give any authority to accept the assignment of the bond to the sheriff. The United States must necessarily act by some agent, and must be bound by the acts of their authorized agents. I must therefore assume that the assignment of the bond for the jail liberties has been accepted by the plaintiffs. The plaintiffs were not bound to take an assignment of the bond. They might have resorted to the sheriff for the escape, and left him to look to his bond for indemnity; but having voluntarily taken the assignment, they have waived their remedy against the sheriff; he is chargeable with no negligence or misconduct. There was no escape until after the bond had been assigned; and it would be the extreme of injustice to make the sheriff responsible, after the plaintiffs had taken from him all the means in his hands to indemnify himself.

It was suggested on the part of the plaintiffs in error, that the term "process" in the act of congress of the 6th of January, 1800, does not extend to executions, but is to be restricted to mesne process. For this construction however there can be no foundation. The term is broad enough to embrace all process upon which a party is imprisoned, and there is no reason why it should not be taken in this general sense; and this construction is fortified by the provision in the second section, which is applicable only to cases where the imprisonment is on execution, and the term is then qualified and called process of execution.

2. It remains only to inquire in the second place, whether the defendant, by refusing to receive Wilson in custody when offered to be surrendered by his surety, has made himself responsible for the escape, and upon this question no doubt can be entertained. The sheriff, after having taken the bond for the limits, lost all authority and control over the prisoner except in one single event, which was, if he should discover to his satisfaction, that the bail taken was insufficient; the law then authorizes him to confine the prisoner in jail, until other good and sufficient bail for the liberties be offered. The sheriff had therefore no authority to receive the prisoner or to detain him in custody, unless the bail was insufficient. Such is the plain and obvious construction of the act, and the one that has been given to it by the supreme court of this state, in the case of Sullivan v. Alexander, 19 Johns. 233. But admitting that the

surety might, in exoneration of himself surrender the principal in any case, it must be done whilst the sheriff has possession and control over the bond. In the present case the offer to surrender was after the assignment of the bond, which being made assignable by law the sheriff had parted with all his interest in, and control over it. The whole right and interest in the bond had become vested in the plaintiffs, which the sheriff could not devest by any act of his.

I am accordingly of opinion that the judgment of the court below must be affirmed.

Case No. 15,895.

UNITED STATES v. NOBLE.

[5 Cranch, C. C. 371.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

COUNTERFEITING — BANK NOTE — UTTERING — POSSESSION OF OTHER COUNTERFEITS.

1. An indictment under the 18th section of the charter of the late Bank of the United States (April 10, 1816), for uttering as true a forged note of that bank, must aver that it was made "in imitation of, or purporting to be, a bill or note issued by order of the president, directors, and company of the said bank."

2. But without such averment, it may be a good indictment under the 11th section of the penitentiary act for the District of Columbia, of the 2d of March, 1831 [14 Stat. 449].

3. Notwithstanding the expiration of the term for which the corporation was created, its corporate capacity continued to exist, under the 21st section of the charter, for two years, for the final settlement and liquidation of its affairs; and during that period the bank was liable to be injured by the forgery of its notes, and such forgery committed within the two years, was properly averred in the indictment to be "to the prejudice of the right of, and with intent to defraud the president, directors, and company of the Bank of the United States."

4. An indictment, under the 11th section of the penitentiary act for the District of Columbia, for uttering as true a forged paper writing, must aver that the uttering was to the prejudice of the right of some person, body politic or corporate, or voluntary association, and with intent to defraud such person, body politic, &c.; but quære, whether it is not a good indictment at common law?

5. Upon an indictment for uttering forged bank notes, evidence may be given on the part of the United States, that a parcel of counterfeit checks and drafts on other banks, and others printed on bank paper, not filled up, were found in the defendant's possession.

Four indictments were found by the grand jury gainst the defendant [Nathaniel Green Noble].

(1) The first contained four counts. The 1st count charged that the defendant, on the 16th of July, 1837, "had in his possession and custody, one hundred and thirteen blank notes engraved and printed after the similitude of notes issued by the corporation of the president, directors, and company of the Bank of the United States, with intent to use said blanks, and to cause and suffer the same to be used in forging and counterfeiting notes issued by the said corporation, with intent to defraud the said corporation, against the form of the statute," &c. The 2d count was like the first, except that it charged the intent to be "to defraud the person or persons to whom the same should be uttered and passed." The 3d count charged that the defendant "had in his custody and possession, three forged and counterfeited engraved papers, purporting to be bank-notes of the president, directors, and company of the Bank of the United States, for the payment of $10 each, after the similitude of the notes of the said corporation of the president, directors, and company of the Bank of the United States, with intent to utter and pass the said forged and counterfeited engraved papers, as and for the genuine notes of the said president, directors, and company of the Bank of the United States, with intent to defraud the said president, directors, and company of the Bank of the United States against the form of the statute," &c. The 4th count was like the third, except that the notes were said to be "after the similitude of the notes of the said bank," and "with intent to defraud the person and persons to whom the same should be uttered and passed." The other three indictments, Nos. 154, 155, and 156, were for uttering three forged notes of $10 each, purporting to be bank-notes of the Bank of the United States. These indictments were all alike, except the description of the note in each. Each indictment contained two counts. The 1st count charged that the defendant, on the 16th of July, 1837, passed as true, a certain false, forged, and counterfeited paper writing, purporting to be a bank-note of the Bank of the United States, which note, dated March 14, 1836, is set out verbatim, "to the prejudice of the right of the president, directors, and company of the Bank of the United States, he then knowing the same to be false," &c. "against the form of the statute." The 2d count states that the defendant "feloniously did falsely pass as true, a certain other false" &c. "paper writing, purporting," &c. as in the first count, "with intent to defraud one Fontaine D. Merritt, knowing," &c. against the form of the statute, &c. To all these indictments, the defendant filed a general demurrer.

By the 7th section of the charter of the bank (10 April, 1816) the corporation was to continue until the 3d day of March, 1836, and by the 21st section, it is provided, that, "notwithstanding the expiration of the term for which the said corporation is created, it shall be lawful to use the corporate name, style, and capacity, for the purposes of suits, for the final settlement and liquidation of the affairs and accounts of the corporation, and for the sale and disposition of their estate, real, personal and mixed; but not for any

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

other purpose, or in any other manner whatsoever, nor for a period exceeding two years after the expiration of the said term of incorporation." By the 18th section of the charter, "if any person shall pass, utter, or publish, or attempt to pass, utter, or publish, as true, any false, forged, or counterfeited bill or note, purporting to be a bill or note issued by order of the president, directors, and company of the said bank," "every such person shall be deemed and adjudged guilty of felony, and being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for not less than three years, nor more than ten years; or shall be imprisoned not exceeding ten years, and fined not exceeding five thousand dollars." By the 19th section, "if any person" "shall have in his custody or possession, any blank note or notes, bill or bills, engraved and printed after the similitude of any notes or bills issued by said corporation, with intent to use such blanks, or cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said corporation," "every such person, being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a term not exceeding five years; or shall be imprisoned for a term not exceeding five years, and fined in a sum not exceeding five thousand dollars."

Mr. R. J. Brent, for defendant, contended that the first count of these three indictments, was defective as a count upon the 18th section of the charter, because it did not aver that the forged note purported to be a bill or note issued by order of the president, directors, and company of the Bank of the United States. That the bank charter expired on the 3d of March, 1836, and therefore the corporation, on the 14th of March, 1836, the date of the forged note, had no power to make such a note. That it was not a good count under the 11th section of the penitentiary act, because the bank, not being in existence on the 16th of July, 1837, when the offence is charged to have been committed, could not be prejudiced; it had no right that could be prejudiced. That the 2d count was bad under the 18th section of the charter, for the same reasons; and was also bad under the penitentiary act, because it is not averred to be to the prejudice of any person or body politic, &c.

Mr. Key, contra, contended that both the counts were good under the penitentiary act, and at common law. By the 11th section of the penitentiary act for the District of Columbia "every person duly convicted of having passed, uttered, or published, or attempted to pass, utter, or publish as true, any such falsely made, uttered, forged, or counterfeited paper writing, or printed paper, to the prejudice of the right of any other person, body politic or corporate, or voluntary association, knowing the same to be falsely made," &c. "with intent to defraud such person, body politic," &c. "shall be sentenced," &c.

CRANCH, Chief Judge. It is contended that the first count of the indictments for uttering the forged notes, is not good under the eighteenth section of the charter of the bank, of the 10th of April, 1816, because it does not aver that the note purported to be a bill or note issued by order of the president, directors, and company of the Bank of the United States; and because, neither on the 14th of March, 1836, the date of the note, nor on the 16th of July, 1837, when the offence was committed, had the Bank of the United States any legal existence; its charter having been limited to the 3d of March, 1836; nor had the bank, then, any right or authority to issue any such note. And that it is not a good count under the penitentiary act for the District of Columbia, because the bank, having no legal existence, could neither be prejudiced nor injured. I am of opinion that the first count is bad under the eighteenth section of the charter, because it does not aver that the forged note purported to be a bill or note issued by order of the president, directors, and company of the said bank. But I think it a good count under the penitentiary act; because I consider the bank as still in existence for this purpose; that is, to protect itself during the period of two years from the 3d of March, 1836, given by the twenty-first section of the charter, which declares, that "notwithstanding the expiration of the term for which the said corporation is created, it shall be lawful to use the corporate name, style, and capacity, for the purpose of suits; for the final settlement and liquidation of the affairs and accounts of the corporation; and for the sale and disposition of their estate, real, personal, and mixed." It is not said by whom the corporate capacity may be used for those purposes. The use is not confined to the corporation. Their capacity to sue, and to be sued, continues. The United States may use it for the purpose of vindicating the laws of the United States, and for the punishment of offenders. The corporation may use it for all purposes necessary to the final settlement and liquidation of their affairs. In order that such settlement should be justly made, it is necessary that they should be protected from forgeries, by which they may unquestionably be injured. They have still the capacity to be injured; and, therefore, it was right and correct in this count, to aver that the passing of the forged note was to the prejudice of the right of, and with intent to defraud the president, directors, and company of the Bank of the United States.

2. The second count is not good under the eighteenth section of the bank charter, and, I presume, was not framed in reference to that section. Nor is it good under the penitentiary act, because it does not aver that

the act was done to the prejudice of the right of any person or body politic. I am inclined, however, to think that it may be supported as a count at common law; but I shall be willing to hear a motion in arrest of judgment if the verdict should be against the defendant upon that count only.

There is another indictment (No. 146), against this defendant, the two first counts of which are framed upon the nineteenth section of the bank charter, for having in his possession blank notes engraved and printed after the similitude of notes issued by the corporation of the Bank of the United States with intent to use them in forging and counterfeiting notes issued by that corporation; the first count says with intent to defraud the said corporation; the second count says, with intent to defraud the person or persons to whom the same should be uttered and passed. I do not see any valid objection to these two counts. The third and fourth are for having in his possession three forged and counterfeited engraved papers purporting to be bank notes of the president, directors, and company of the Bank of the United States for the payment of ten dollars each, after the similitude of the notes of the said corporation, with intent to utter and pass them as true with intent (in the third count) to defraud the Bank of the United States; and (in the fourth count) with intent to defraud the person or persons to whom the same should be passed, contrary to the form of the statute, &c. I do not know under what statute these third and fourth counts have been framed. They are not good at common law.

MORSELL, Circuit Judge, concurred as to the indictment No. 146, and as to the second count of the other indictment; but not as to the first count; because he thought the Bank of the United States was not in existence for this purpose, and therefore could not be prejudiced or injured. (THRUSTON, Circuit Judge, absent.)

Demurrer overruled as to the two first counts in the indictment No. 146; and sustained as to the third and fourth counts. Sentence, one week's imprisonment and one dollar fine only; MORSELL, Circuit Judge, being very doubtful as to the first count, which charged the intent to be to defraud the Bank of the United States. As to the other indictments, the demurrer was overruled, and the defendant was permitted to plead the general issue.

Upon the trial, THE COURT (nem. con.) permitted evidence to be given by the United States, that a parcel of counterfeit checks and drafts on other banks, and others printed on bank-paper, not filled up, were found in the defendant's possession. See U. S. v. Shuster [Case No. 16,287] at March term, 1835, in this court, where the court permitted the United States to give evidence that certain instruments for picking locks, &c., were found upon the prisoner.

Verdict, "guilty upon the four indictments"; and the prisoner was sentenced, in full court as follows: Upon the two first counts in the indictment No. 146, fine and imprisonment, as mentioned above. Upon the indictment No. 154, to the penitentiary for two years next after the expiration or other termination of his term of imprisonment in No. 146. Upon the indictment No. 155, for two years next after the expiration, or other termination of his term of imprisonment in No. 154; and upon the indictment No. 156, for three years next after the expiration or other termination of his term of imprisonment in No. 155; making seven years in all.

Case No. 15,896.

UNITED STATES v. NOBLOM et al.[1]

Circuit Court, D. Louisiana. Feb. 18, 1878.

CONSPIRACY TO DEFRAUD THE UNITED STATES — TERRITORIAL JURISDICTION OF CIRCUIT COURTS —PRESUMPTIONS—EVIDENCE OF GOOD CHARACTER—OVERT ACTS.

[1. A conspiracy to do an unlawful act, formed in one district, and in part executed there, is punishable in that district, though it was consummated in other parts of the United States.]

[2. In a criminal case, where the syndic of a firm is charged with a conspiracy to defraud the United States in preferring a claim under the captured and abandoned property act, there is no invincible presumption that he had acquired all the knowledge from the books of the firm which a proper execution of his trust would have required him to gain; but the question of his knowledge is one for the jury to determine, upon a consideration of the character of the books, the degree of access which defendant had to them, the magnitude of the claim, the duty defendant owed both to the estate and the government to make a satisfactory examination before making affidavit of his belief in the validity of the claim, etc.]

[3. Evidence of good character may always be considered by the jury, and should lead them to scrutinize the evidence against the defendant, and, further, should be considered as an independent fact in his favor; but if, after giving such testimony this effect, the whole evidence in the case is sufficient to warrant a conviction, the jury are not authorized to withhold from the other evidence its proper effect, or to refuse to draw from it the legitimate conclusions.]

[4. An agreement whereby a commissioner taking evidence in support of a claim against the United States is to have a contingent fee of $5,000 is open to very serious objections, but is not necessarily a guilty agreement.]

[5. Where the existence of an unlawful conspiracy is proved, an overt act by one of the parties thereto becomes the act of all, and they are all alike guilty.]

[This was an indictment against Augustus P. Noblom, Henry Peychaud, R. H. Shannon, and others, charging them with conspiring to defraud the government.]

[1] [Not previously reported.]

George S. Lacy, U. S. Dist. Atty., and John S. Blair, Asst. Atty. Gen., for the United States.

Wm. H. Hunt, for Henry Peychaud.

John E. Austin, for R. H. Shannon.

BILLINGS, District Judge (charging jury). The indictment charges that the defendants Henry Peychaud and Robert H. Shannon conspired with each other, and with the several other persons named in the indictment, and with divers other persons to the grand jury unknown, to defraud the United States of America of the sum of $296,000, the property and the moneys of the said United States; that the firm of Bellocq, Noblom & Co. had preferred a false claim against the government of the United States in the court of claims for the proceeds of 1,851 bales of cotton, upon which they alleged they had made advances, and which they had the right to reduce to possession, the same having been seized by the federal military forces as captured or abandoned property; that said cotton was situated on the plantations of various parties, planters, in the parishes of Avoyelles, St. Landry, and St. Martin, within the state of Louisiana; that the defendant Henry Peychaud subsequently became the syndic of the said firm of Bellocq, Noblom & Co., and on the 23d day of March, 1874, filed an amended petition in the court of claims as such syndic, in which he alleged that the firm of Bellocq, Noblom & Co. were the owners of the said cotton; that all of said cotton was purchased and paid for, or taken for advances on the same, during the years 1861 and 1862, and prior to the 1st day of May, 1862. This petition is sworn to in the following language: "Personally appeared, before me, Henry Peychaud, syndic aforesaid, a resident of the city of New Orleans, La., who, being first duly sworn, deposeth and saith that he is the claimant above described in the above petition; that no assignment or transfer of said claim, nor any part thereof, nor any interest thereof, has been made, except as in said petition stated; that the claimants are still entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in the said petition are true." The indictment then proceeds to allege that, by the presentation of false untruthful testimony and deposition of witnesses, and of false and untrue exhibits and prooofs presented to the judges of the said court of claims, a judgment was fraudulently obtained by the defendants for the said sum of $296,000 against the government of the United States; that said Henry Peychaud subsequently received the payment of the said money. The indictment then proceeds to allege various overt acts of the several persons charged with this conspiracy, who, it is alleged, well knew that the whole claim was a fraud upon the government; that said Peychaud appropriated, of said moneys, the sum of $50,000, to his own use; that, in furtherance of the said conspiracy, the said Henry Peychaud did unlawfully agree and contract with Theodore Vallade, one of the defendants, to give said Vallade a valuable consideration, to the grand jury unknown; that he, the said defendant Vallade, should appear as a witness in said case, and give testimony which should be used in said court of claims, in order to procure the said judgment; that the testimony of the said Vallade was in all material matters false and untrue, and was fraudulently obtained and used by the said defendant Henry Peychaud. Other overt acts are charged in the indictment to have been committed by the other alleged conspirators, which it is not necessary for me here to enumerate. The indictment alleges that the conspiracy on the part of the defendants was formed within the district of Louisiana, and was carried out and consummated in part within this district, and in part within various other districts of the United States.

So far as relates to the time at which the offense is alleged to have been committed, I charge you, as matter of law, that a conspiracy is a continuous thing; and, if you find that a conspiracy has been established in the manner and form as alleged, and that the conspiracy continued down to and after the 10th day of June, A. D. 1874, the date charged in the indictment, and that the overt acts charged were committed subsequently, and during the continuance of the conspiracy, that in that case the offense charged has been committed. As to the place of the commission of the offense the general rule, under the constitution of the United States, is that a party can be tried for an offense only within the district in which it was committed. The exception is that, where an offense has been commenced in one district and consummated in another, the venue may be laid and the trial may be had in either district. If you find, as a fact, that the conspiracy to do the unlawful act alleged in the indictment was formed within the district of Louisiana, and in part executed here, and that the offense was consummated in the United States, but in some other district than the district of Louisiana, but that all that was done, was done in pursuance of the conspiracy here formed, then, so far as relates to venue, the offense is cognizable by the United States courts within this district.

This indictment is framed under section 5440 of the Revised Statutes of the United States, which provides that, "if any two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment for not more than two years."

It was incumbent upon the prosecution, in order to establish the case against these defendants, to prove to the satisfaction of the jury that there was a conspiracy on the part of these two defendants, or one of them, with some one or more of the persons named in the indictment, to defraud the government of the United States, by means of the collection of this claim, through and by means of the judgment obtained in the court of claims, and, further, that some one or more of the overt acts charged in the indictment were committed by one or more of the persons alleged and proved to have been conspirators.

First, as to the existence of the conspiracy. I will give you the definition of the nature of a criminal conspiracy, and an exposition of the evidence which may be adduced in support of it, in the language of one of the ablest of English writers upon the subject of criminal law: "The evidence in support of an indictment for conspiracy is generally circumstantial, and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. Although the common design is the root of the charge, yet it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, because in many cases of the most clearly established conspiracies there are no means of proving any such thing. If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object." The conspiracy is set forth in the indictment with great fullness, and it is alleged that it consisted in the combination for the presentation and collection from the United States through the court of claims of a false and fraudulent claim between divers persons and these defendants. In the first place it must be shown that there was this combination for that object; that is, to effect the presentation and collection of this claim through the defendant Peychaud, as syndic of the estate of Bellocq, Noblom & Co.; (2) that this claim was false; (3) that its false character was known to the defendants.

The next question, then, for the jury to determine, is, excluding for a moment the question of lawfulness or unlawfulness, was there a combination, on the part of the defendants and others, in which each labored with the common purpose of collecting this claim? The evidence which has been put before you by the government tends to show that the defendant Peychaud, as syndic, presented the claim; that the evidence was taken before the defendant Shannon under circumstances and with an agreement upon which I shall hereafter speak. The evidence on this point is not contradicted, nor attempted to be contradicted. If, then, this combination existed to collect this claim, the next question for the jury to consider is, was this a false and fraudulent claim? In this connection I will call the attention of the jury to the statute of the United States under which all petitioners or claimants have to act in the court of claims. The act of February 26, 1853, being an act entitled "An act to prevent frauds upon the treasury of the United States" (10 Stat. 170), in section 1, provides that "all transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest therein, shall be null and void unless the same shall be made and executed after the allowance of such claims and the ascertainment of the amount due and the issuing of the warrant for the payment thereof." And the act to provide for the collection of captured and abandoned property, found in 12 Stat. 820, provides that "any person claiming to have been the owner of any such captured and abandoned property may at any time within two years, etc., prefer his claim to the proceeds thereof in the court of claims and on proof to the satisfaction of the court of his ownership of the said property and his right to the proceeds thereof, after the deduction of any expenses, may receive the proceeds."

It will thus be seen that to have enabled the defendant Peychaud to have brought the claim which he, as syndic of the firm of Bellocq, Noblom & Co., presented to the court of claims, within these statutes, the interest of Bellocq, Noblom & Co. in this cotton must have existed at the time of its seizure by the federal military forces, to wit, in March, 1862, and that any transfer of any claim against the United States, arising out of the seizure of this cotton, after that time, or the transfer of any receipt or voucher therefor, would have been in violation of the statute. There has been no evidence offered that there was any transfer of any interest in the claim, from those who held the same, at a date after the issuance of a warrant in payment of the same by the treasury department, and the statute renders void all transfer of claims unless they are made after the issuance of the warrant for their payment. It further appears, by these statutes, that any person seeking to recover the proceeds of captured or abandoned property, which had been seized by the United States and sold, and the proceeds paid into the treasury, must establish, in the first place, his ownership of said property, and his right to these proceeds. It was under these statutes that the claim of Bellocq, Noblom & Co. was presented by the defendant Peychaud, and was carried through the court of claims.

It is insisted by the prosecution that, with the exception of a few inconsiderable lots of

this cotton, the firm of Bellocq, Noblom & Co. had no right, title, or interest in or to any of this cotton at the time of its seizure by the authorities of the United States. For the purpose of supporting this view, it has brought before you the testimony of many of the persons enumerated in the tabular statement attached both to the original and amended petition, from whose plantations the cotton was taken, who testified that they owned the same, and they have in express terms denied that the firm of Bellocq, Noblom & Co., or the defendant Peychaud, as their syndic, had, at any time, any right, title, or interest in or to this property or its proceeds. There has been no contradictory testimony introduced to show any title in Bellocq, Noblom & Co., or in the defendant Peychaud as their syndic, excepting that which comes from the evidence given in the court of claims and the books of Bellocq, Noblom & Co. If the jury are satisfied that the claim of Bellocq, Noblom & Co., as presented by them, and by the defendant Peychaud as their syndic, to the whole of this 1,851 bales of cotton and its proceeds, was a valid claim, then that conclusion would end this case, and your verdict must be, "Not guilty"; for there could be no conspiracy to present and collect a fraudulent claim where the claim alleged to have been presented and collected was valid. But if, on the other hand, the jury are satisfied that the claim presented originally by Bellocq, Noblom & Co., and subsequently by Henry Peychaud, the defendant, as their syndic, was false or fraudulent, in whole or in part,—that is to say, if any portion of the 1,851 bales of cotton claimed by them, or him, the proceeds of which was recovered and received by him, did not belong to Bellocq, Noblom & Co.,—then to that extent the claim was false; and the jury will have to pass to the second question, did the defendants, at the time when they performed their several acts in the presentation or collection of this claim, know of the false and fraudulent character of the same?

First, as relates to the defendant Peychaud. I shall first present to you in a summary manner the leading facts which the government has attempted to establish in this case, and then shall present to you the leading facts which the defense has attempted to establish. The government, in the first place, has offered in evidence the amended petition of Henry Peychaud, in which he avers, not only, as in the original petition of Bellocq, Noblom & Co., that the said firm had made advances upon this cotton, with the right to reduce the same into possession, but he avers that they became the owners, and that all of the said cotton was purchased by them or taken for advances on the same, and possession taken thereof, during 1861 and 1862, prior to the 1st day of May, 1862. The second fact which the government has brought before you is an agreement between Peychaud, as syndic, and Bouchard and Bernard. In connection with this agreement, the government has offered the testimony of Bouchard. So far as his testimony is concerned, I deem it my duty to say to you that an accomplice or co-conspirator, who is called as a witness, and testifies to his own criminal acts, does not occupy the position of an ordinary witness, so far as relates to credibility. He may tell the truth in spite of his proclaimed turpitude, but, as a rule, he is not to be believed, unless and except so far as his evidence is corroborated by that of other witnesses, or by independent circumstances. It is, therefore, to the other evidence adduced by the government from other sources that your attention will be largely directed. As to this agreement between Peychaud, as syndic, and Bouchard and Bernard, it is not denied that the agreement was executed by the defendant as syndic. The agreement itself recites that it is for the services which Bouchard and Bernard were to render in this case, and Peychaud, as syndic, agrees to give them two-thirds of the amount which he should collect from the United States by means of the suit, they paying the fees of the various attorneys; that is to say, that the estate of Bellocq, Noblom & Co. was to receive one-third of the amount collected from the government, and Bouchard and Bernard the remaining two-thirds, they paying the various attorneys. It is for the jury to say what was the real purpose of this agreement, and what inference should be drawn from its execution, and whether a syndic, in a case where there were three lawyers already employed, and where he believed there was no fraud in a claim, would have engaged the services of a man of such reputation as the evidence shows Bouchard to have been, and would have left the conduct of such an important cause to him, and would have reserved to the estate only one-third of the amount recovered. There was a second agreement offered in evidence by the government, which is a mere reiteration of this one for the most part, and which seems to have been written with the view of securing to the parties named as attorneys a lien or privilege upon the judgment which should be recovered.

The next piece of evidence which the prosecution has introduced was the agreement between Bouchard and Bernard on the one part and Theodore Vallade on the other part, wherein it is recited that Vallade is the owner of 263 bales of the cotton, for the recovery of the proceeds of which suit had been brought by Bellocq, Noblom & Co., and wherein they agree that they will pay to him one-third of what may be recovered by the estate of Bellocq, Noblom & Co. on these 263 bales. This agreement is executed by Bouchard and Bernard, but is witnessed by Peychaud. The government has attempted to establish that there was an impediment as to these 263 bales of cotton arising from the claim of Vallade thereto, and that this agreement was made with him to remove that impediment; that, in pursuance of this agree-

ment, Vallade appeared and testified that the cotton which this agreement recites belonged to him was the property of Bellocq, Noblom & Co.; that Peychaud recovered the amount of the proceeds of these 263 bales; and that there was paid to Vallade one-third of this amount, being $14,848. If you are satisfied that Peychaud, the defendant, when he witnessed this agreement, or at any time before he collected the money upon the judgment which was rendered in the court of claims, knew what it contained, and knew that this cotton belonged to Vallade; that he afterwards used, or allowed to be used, in support of the claim which he as syndic preferred and collected, the testimony of Vallade, who testified in substance that the cotton belonged to Bellocq, Noblom & Co.; or if he ascertained these facts after the testimony had been used, but before he had made the collection,—then, and in either of these cases, so far at least as these 263 bales are concerned, he knew of the false and fraudulent character of the claim of Bellocq, Noblom & Co. thereto.

In connection with this, the government has urged the payment by Peychaud of $5,000 to the defendant Shannon, of which I shall speak more particularly in another place, and of his leaving in the hands of Joseph S. Bouchard, as the attorney of A. Bouchard and Bernard, $14,848, which, according to the receipt produced by the defendant Peychaud, signed by Joseph S. Bouchard as the attorney of his father, was "to meet other demands." You will, in this connection, recall the testimony of Father Subileau, and you will say, from the amount left in Bouchard's hands,—that is to say, from the numerical figures of that amount, as compared with the net proceeds of 263 bales,—and from all the circumstances in evidence before you, whether Mr. Peychaud knew that this amount was to go to Vallade. Whatever you find to be the fact as to this money being left in the hands of young Bouchard, you will consider, as reasonable men, in connection with this agreement of Vallade, witnessed by Mr. Peychaud, and with the other facts in this case. It is immaterial whether Peychaud paid the money to Vallade, or whether it was paid by Bouchard, provided Peychaud knew of Vallade's ownership of the cotton, of Vallade's testimony, and of its use in a suit against the United States wherein he was the plaintiff. It is for you to consider why the defendant Peychaud was selected to be the attesting witness to this agreement; whether he knew of the terms of the agreement which he witnessed; whether Vallade did or did not require that he should witness it, in order that, since the money was to go through the hands of Peychaud, he should have that added security that the proportion covenanted to be paid to him should reach its destination. You will observe that this paper recites that Vallade was the owner of these 263 bales of cotton to which Peychaud, as syndic, was at the time of its execution urging his claim in the court of claims, and that the agreement goes on to provide for the distribution of the proceeds in case there is a recovery by Peychaud as the property of Bellocq, Noblom & Co.

I think these are the chief circumstances which the government has attempted to establish. On the other hand, the defense has adduced evidence tending to establish that the conduct of the cause pending in the court of claims was left chiefly to Bouchard. The books of Bellocq. Noblom & Co. have been introduced before you, as well as the evidence of several experts who have examined the same. And, lastly, by the testimony of many of our most excellent citizens, has been shown the high character of the defendant Peychaud, for a life of 60 years passed in their midst previous to this transaction. So far as the defendant's knowledge from the books of Bellocq, Noblom & Co. is concerned, in a criminal case there is no invincible presumption that a man had acquired the knowledge which a proper execution of his trust would have required him to gain. It is not a matter of arbitrary presumption. You are to take the books as they existed. You are to take the degree of access which the defendant Peychaud had to them, the magnitude of the claim, the duty which the defendant Peychaud owed, alike to the estate and to the government, to have made a satisfactory examination of this claim before he proceeded to make any affidavit as to his belief of its validity, and all the circumstances which have been given in evidence, and then are to say whether the defendant Peychaud knew, directly or indirectly,—that is, of himself or through others,—what the books said on this subject, and what was his belief as to the validity of this claim, both at the time when he made the affidavit, and during all the intervening time down to the period when he collected the money. If, at any period of this time, he believed the claim, or any portion of it, was fraudulent, then all his subsequent acts would be affected by this knowledge, and from that moment he would be deemed, in law, to have joined the conspiracy to collect a fraudulent claim.

So far as relates to the proof of good character or the reputation enjoyed by the defendant Peychaud, the good character of an accused person is always a fact to be considered by the jury. It should lead the jury to scrutinize the evidence adduced in support of the commission of the crime charged, and their own process of reasoning upon that subject; and, further, should be considered as an independent fact in favor of the accused. Nevertheless, if, after this application of the testimony in favor of good character has been made, and this effect given to it, the whole evidence in the case is sufficient to warrant a conviction, the jury are not authorized to withhold from the other evidence its proper effect, or to refuse to draw from it the legiti-

mate conclusions. While good character is always an element to be considered, and there are cases in which it would furnish evidence which would create a reasonable doubt of guilt, there are also cases in which the former spotless character of the accused could not overcome the weight of testimony in support of guilt. That is to say, good character is always to be considered and weighed, but it is to be considered and weighed along with the other testimony, and must not be allowed to obscure from your observation the other testimony in the case. Again, it is urged by the defense that the defendant Peychaud was a mere syndic in his action with reference to this claim. That is to say, it is urged that he presented this claim, for the most part, as the representative of the estate of Bellocq, Noblom & Co., and those who were associated with him. If the evidence fails to show that any portion of the proceeds of this cotton was intended to be retained, or was retained, by the defendant Peychaud, beyond his commission as syndic, this fact does not obliterate the other facts you will find to have been established; but it is to be considered by you, along with all these other facts. It diminishes the strength of the motive for the commission of the crime charged, but, beyond that, leaves the other facts in the case such as you find the evidence to have established them to be.

Next, as to the defendant Shannon. If the jury find there was a combination, and that the claim was fraudulent, then, as to the defendant Shannon the same inquiry must be made as I have stated should be made with reference to the defendant Peychaud, as to his knowledge of the falsity and fraudulent character of this claim. The prosecution have introduced evidence tending to show the fact that the defendant Shannon had an agreement by which he was to receive a contingent fee of $5,000 for taking the evidence in this case. An agreement of this nature, by a commissioner, with reference to the taking of testimony is open to very serious objections; that it would expose the commissioner to severe criticism, and would open a wide door for temptation to him. But it is not, necessarily, a guilty agreement. The jury are to judge whether, in this case, the agreement was evidence of any knowledge of the falsity of the claim, or of any understanding between the defendant Shannon and those with whom he made it that there was to be anything unfair or partial in the manner of taking the testimony. Bouchard has made a statement as to what passed between him and the defendant Shannon. In connection with the evidence relating to the defendant Peychaud, I have already laid down the legal propositions which should be considered by the jury in weighing the testimony of a witness such as is Bouchard. There is the testimony of the witness Wilde, and there is a letter from the defendant Taylor, and also a letter from the defendant to J. S. Bouchard, which I think comprises all the evidence which has been urged against the defendant Shannon. On the other hand, you have heard the evidence of the younger Mr. Conrad, and of Mr. Rouse, who represented the government, and that of Judge Emerson, and you have had the manner in which the depositions were taken shown to you from the depositions themselves.

In regard to the defendant Shannon no evidence as to general character was introduced. In such a case the law assumes that the character of the accused is of ordinary fairness and respectability. The attorneys who have testified have testified that the method and manner of the defendant Shannon were, so far as they could perceive, proper and impartial, and it is for you to say, upon the whole evidence, whether you are satisfied that the defendant Shannon had a knowledge of the falsity of the claim, and fraudulently aided in establishing a false claim. If you find, from the evidence, that the defendant Shannon knew that the claim was a false one, then he had a guilty knowledge. If you find that he did not know that the claim was false or fraudulent, and that the evidence taken before him was, so far as he knew, truthful evidence, then he has not been affected with any guilty knowledge. If you find that the combination is proved, and that the fraudulent character of the claim has been established, and that either or both of these defendants had no knowledge of the false or fraudulent character of the claim, then they are, or the one that had not such a guilty knowledge is, entitled to an acquittal. If, on the other hand, you find that the conspiracy existed, and that both of these defendants, or either of them, knew of the false and fraudulent character of this claim at the time they participated and aided in presenting or collecting it, then the remaining question will be, were any of the overt acts charged in the indictment committed? Because the rule of evidence in connection with a criminal conspiracy is that, where an unlawful combination is established, the act of one of the parties is the act of all. If, for example, the conspiracy has been established, and you find that the defendant Peychaud took out of the treasury of the United States this money charged to have been taken out by him, or any portion of it, during the continuance and in furtherance of the conspiracy, then his act is the act of all those whom you find, from the evidence, to have been conspirators, and who are named in the indictment.

So far as the degree of proof is concerned, it is the duty of the prosecution to establish the case by evidence which excludes a reasonable doubt of the guilt of the accused. But the doubt which the prosecution must remove is an actual and substantial doubt, and not a mere possibility or speculation. Says one of the most eminent of the Ameri-

can jurists: "It is not a mere possible doubt, because everything relating to human affairs depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say, with a full and abiding conviction, as to the moral certainty of the truth of the charge."

The importance of the duty which you, as jurors, have been called upon to discharge, when duly considered, can scarcely be overestimated. Without trials by jury, on the one hand, would disappear much of the security of the citizen from the unjust and tyrannical forms of investigation, and the consequent imposition of undeserved punishment. On the other hand, without the fearless consideration of causes by juries, the government could not long administer its criminal laws, and its power to protect all would thus be seriously paralyzed. Much, therefore, not alone of the right of innocence to be protected, but of the efficacy of the law as a protective agency, rests in the intelligence and integrity with which jurors render their verdicts. Your verdict should not be the exponent of your sympathies, either for the government or for the accused, but should be a conscientious declaration of your judgment upon the evidence as it has been adduced before you.

[See Case No. 16,069.]

UNITED STATES (NOE v.). See Cases Nos. 10,285 and 10,286.

Case No. 15,897.

UNITED STATES v. NOLTON.

[5 Blatchf. 427.] [1]

Circuit Court, N. D. New York. July 11, 1867.

CUSTOMS DUTIES — SMUGGLING FROM CANADA — MANIFEST.

1. An indictment for smuggling goods from Canada into the United States, charging that the goods were brought in without an invoice, and without the payment of duties, cannot be maintained under the 19th section of the act of August 30, 1842 (5 Stat. 565).

2. Such importations are governed by the act of March 2, 1821 (3 Stat. 616), which requires only the delivery to the collector of the verified manifest of goods imported from an adjacent foreign territory and the payment of the duties.

This was a motion to quash an indictment [against George B. Nolton] for smuggling, founded on the 19th section of the act of August 30, 1842 (5 Stat. 565). The gravamen of the indictment was, smuggling from Canada into the collection district of Cape Vincent, in the Northern district of New York. The indictment charged, that the goods were liable to duties and should have been invoiced and the duties paid, but that they were brought in without an invoice and without the payment of duties.

NELSON, Circuit Justice. The objection to the indictment is, that the 19th section of the act of August 30, 1842, does not apply to the case of goods imported from an adjacent foreign territory; and that such importations are governed by the act of March 2, 1821 (3 Stat. 616), which requires only that a manifest of the goods, duly verified, shall be delivered to the collector, and the duties paid, and that, in case of default, the goods shall be forfeited, together with the vessel or vehicle, and the party be subject to a penalty of $400, altered and increased by the act of March 3, 1823 (3 Stat. 781), to a penalty of four times the value of the goods. The law has now been changed by the 4th section of the act of July 18, 1866 (14 Stat. 179).

As the alleged offence was committed before the act of 1866 was passed, I do not see how this indictment can be upheld, and must, therefore, grant the motion to quash it. See U. S. v. Smith [Case No. 16,319].

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

Case No. 15,898.

UNITED STATES v. The NORMENT.

[Nowhere reported; opinion not now accessible.]

Case No. 15,899.

UNITED STATES v. NORRIS.

[1 Cranch, C. C. 411.] [1]

Circuit Court, District of Columbia. June Term, 1807.

CRIMINAL LAW—PUNISHMENT.

Where a statute merely alters the punishment of a common-law offence, the statutory punishment may be inflicted, although the indictment does not conclude contra formam statuti.

The defendant [Isaac Norris] was convicted of manslaughter upon an indictment for the murder of John Doyle, on the 17th of May, 1807, and a question arose whether, on a common-law indictment, the statutory punishment can be inflicted.

The judgment of THE COURT was that he pay a fine of twenty dollars, and be imprisoned for twelve calendar months, including this day (June 26, 1807), and stand further committed until his fine and costs should be paid. This sentence was under the act of congress of 30th April, 1790 (1 Stat. 112). The court being unanimously of opinion that where the statute does not add any circumstance to the common-law description of the offence, but merely alters the punishment, it is not necessary that the indictment should conclude contra formam statuti, to authorize

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

the court to give judgment according to the statute.

The following opinion of CRANCH, Chief Judge, was prepared but not read in court, as DUCKETT, Circuit Judge, had some doubts as to some of the arguments therein used:

This is a verdict for manslaughter, on an indictment at common law for murder; and the question is, what punishment can the court inflict? (1) It is a felony by the common law, but is within the benefit of clergy by 25 Ed. III., St. 3, c. 4; and no subsequent statute having taken away the benefit, the party is entitled to it. (2) But sundry statutes have annexed certain conditions to its allowance to the secular clergy and to mere laymen. Thus by 4 Hen. VII., c. 13, a person not in orders was to be marked with a T on the brawn of the left thumb in open court. And by the 18 Eliz. c. 7, § 3, he may be imprisoned at the discretion of the court, not exceeding one year; which was in lieu of the purgation and punishment which the ecclesiastical courts were supposed formerly to inflict. These statutes were all in force at the time of the first emigration to Maryland; and there is no doubt that the statute of 25 Ed. III., c. 4, extending and confirming the benefit of clergy, was by experience found applicable to the local and other circumstances of the inhabitants. Nor is there any reason to doubt that the statutes of 4 Hen. VII. c. 13, and 18 Eliz. c. 7, § 3, were likewise found applicable. Many persons have been admitted to the benefit of clergy in Maryland, and burnt in the hand, which can only be done by virtue of the statute of 4 Hen. VII., and the subsequent statutes which explain the mode of marking to be by burning. I am therefore of opinion that the courts in Maryland may, in their discretion, by virtue of the statute of 18 Eliz. c. 7, § 3, superadd imprisonment to the burning in the hand, upon allowing the benefit of clergy. Under the act of assembly of Maryland of 1793, c. 57, §§ 10 and 28, the courts of that state had, on the 27th of February, 1801, a power either to give judgment of burning in the hand, and imprisonment under the statute of Elizabeth, or, in their discretion, to sentence the offender to labor on the public roads; and that, in cases where the indictments did not conclude against the form of the statute.

Another question arises, whether the court cannot lawfully render such judgment against the prisoner as is prescribed by the act of congress of April 30, 1790 (1 Stat. 113). Under this head the first question, which arises, is whether that act is in force within the District of Columbia. Its words are,—"If any person shall, within any fort or other place, or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars." The District of Columbia is a district of country under the sole and exclusive jurisdiction of the United States. Prima facie, therefore, the law applies; and it has never been expressly repealed. It has been said to be impliedly repealed by the act of 27th February, 1801 (2 Stat. 103), which adopts in toto the laws of Maryland. But the adoption of the law of Maryland would not have that effect unless the law of Maryland were either expressly or virtually repugnant to the act of congress of 1790. But the provisions of the two laws are not repugnant to each other. By the act of Maryland the punishment is burning in the hand and imprisonment, or hard labor. By the act of congress, fine and imprisonment. I imagine both laws may stand together, and the court may adopt either mode of punishment in their discretion. This court has often decided that larceny may be punished under this same act of congress, and such has been the constant practice ever since the change of jurisdiction. But here we are met by what is called a settled principle of criminal law, that the court cannot, upon a common-law indictment impose a statutory punishment. The authority relied upon is 2 Hawk. P. C. c. 25, § 116, who says,—"It seems that judgment on a statute shall in no case be given on an indictment which does not conclude contra formam statuti." And again he says, in the same section, "it seems to be taken as a common ground, that a judgment by statute, shall never be given on an indictment at common law." These dicta seem to be only inferences which he draws by reasoning from analogy to the case of an action upon a statute; but he cites no case of an indictment in which the principle has been decided. If he is to be understood as the counsel for the prisoner seem to understand him, he is contradicted by the English every-day practice. By 5 Anne, c. 6, a person convicted of theft or larceny may be committed to the house of correction, to be there kept at hard labor not less than six months nor more than two years; and by 4 Geo. I. c. 11, and 6 Geo. I. c. 23, felonious stealing of goods is punishable by transportation; and yet the indictments for those offences never conclude against the form of those statutes, although those punishments are generally inflicted; and there is no case in which the right of the court to inflict such punishments, upon such indictments, has been questioned. I understand Hawkins as referring only to such statutes as add some circumstance to the common-law definition of the crime. But where the statute uses only the common-law technical name or description of the offence, and declares it shall be punished in a certain manner, there the indictment need not conclude against the form of that statute to justify the infliction of the statutory punishment. The offence, in

such case, is really not against the statute, but against the common law. The statute does not create the offence, nor add any circumstance to its description. The term used by the act of congress is simply "manslaughter," the technical common-law name of the crime of felonious homicide, without malice prepense. So under the act of Maryland, of 1793, it was never supposed necessary that the indictment should conclude against the form of the statute in order to authorize the court to impose the statutory punishment of hard labor. I am therefore of opinion that the court may, in its discretion, sentence the prisoner to be burnt in the hand and imprisoned under the statute 18 Eliz. c. 7, § 3, or to hard labor upon the roads, under the Maryland law, or to fine and imprisonment under the act of congress.

Case No. 15,900.

UNITED STATES v. NOTT.

[1 McLean, 499.] [1]

Circuit Court, D. Ohio. July Term, 1839.

CRIMINAL LAW—CONFESSIONS—OFFENCES AGAINST POSTAL LAWS.

1. Confessions to be excluded from the jury, must have been made by the prisoner under some hope of advantage, or extorted by some apprehension of danger. Some of the modern cases in England, have perhaps, been carried further than the reason of the rule requires, in refusing to admit, as evidence, the confessions of the prisoner.

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

2. Each case must be governed by its own circumstances.

[Cited in U. S. v. Stone, 8 Fed. 254.]

3. Under the 21st section of the post office law of 1825 [4 Stat. 102], no one can be convicted who is not employed in the post office department.

4. Some evidence is necessary of the genuineness and value of bank notes, charged to have been stolen out of a letter.

5. Taking the notes greatly aggravates the offence, and the taking must be charged and proved, as a substantive part of the offence.

6. To constitute the offence it is not necessary that the letter stolen should have been taken out of the post office building.

7. To convict a person of stealing a letter, &c., who is employed in the department, such employment must be distinctly alleged and proved.

[This was an indictment against Leoneal C. Nott, charging him with abstracting bank notes from a letter.]

The District Attorney, for the United States.
Swayne & Miner, for prisoner.

OPINION OF THE COURT. The defendant having been indicted at the present term for stealing bank notes, out of a letter received in the post office at Akron, pleaded not guilty, and went to trial. The indictment contained twelve counts which will be more particularly noticed hereafter. Francis Dod, a witness, states John Dod wrote a letter at his request to Elizabeth Dod, directed to Akron, in which were enclosed two ten dollar bills; one on the State Bank of Indiana, and the other on the Cleveland Bank. He identifies the notes presented at the trial. The letter not being received by Elizabeth Dod, the witness went to Akron to enquire after it, about the 8th May last. On enquiry at the office, the letter was handed to him, which he opened and found that the money had been taken out. The letter had been first charged with 12½ cents postage, but had subsequently been charged 37½ cents. Witness complained to Mr. Johnson, the post master, of the loss of the money; and while they were conversing on the subject, the defendant happened to pass by. The defendant before this had been a regular assistant post master at Akron, but a short time before had left the office. He still, however, at the request of the post master, gave occasional instruction to the assistant in the office, who had little or no knowledge of the business. The post master spoke to the defendant and enquired whether he had any knowledge of the letter, the witness at the same time handing him the letter. The defendant said that the boy in the office, informed him the letter had been opened by Elizabeth Davis, supposing it was intended for her, but finding it was not, she returned it, and the letter was resealed, that the letter contained two bank notes, which induced the defendant to alter the charge of postage to thirty-seven and a half cents. The post master states, that the next day being in company with the defendant and several others, he charged the defendant with stealing the money. Some one present observed, how can this matter be settled, and the defendant observed, how can it be, seeing he, the post master, was so determined. The post master observed that he had nothing against the defendant but this, and that he had no vengeance to gratify; but that the transaction should be prosecuted and exposed. The defendant then asked the post master to walk with him. They went up to the third story of the house where the defendant lodged, and the defendant stepped into another room and soon returned with one of the notes, which the letter contained, in his hand. The other he had passed away to a person in town. He confessed that he took the money, &c. And the defendant's counsel moved the court to exclude this testimony from the jury, and also the whole evidence that has been heard, being connected with it, on the ground that the confession was made under such circumstances, as to render it inadmissible. And 19 E. C. L. 519, 533, 444; 2 Russ. 648, 645; 2 Starkie, 27, and 6 Hals. [11 N. J. Law] 183, were read to sustain the position taken.

Confessions, as has been often said, should be received with great caution, for experience has shown that they often mislead, and sometimes convict an innocent person. Under a

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

charge of a highly criminal offence, the mind must always be agitated, and may be influenced by hopes or apprehensions, which it is difficult, if not impossible sometimes to comprehend. To make a confession, therefore, evidence, it must be made, so far as can be ascertained, in the absence of any excitement which creates a hope to obtain favor, or to avoid a threatened punishment. But the court in such cases must judge of the motives which induce the confession, from the confession itself, and the circumstances under which it was made. The modern doctrine on this subject in England, seems to have been carried great lengths in favor of the prisoner. And in one of the cases read, the confession was excluded because a by-stander, unknown to the prisoner, and who had no right to interfere, observed in his hearing that he had better confess. This was going farther to exclude confessions than the reason of the rule would seem to require. And in some of the cases, all subsequent confessions are supposed to have been made under the influence which at first operated; and on this ground they have also been excluded from the jury.

It is difficult to lay down any precise form of words which, if addressed to the prisoner, shall exclude his confessions. Every case must be governed by its own circumstances. In the present case, so far as the facts are developed, there seems to have been no promise held out to induce a confession, nor any threat to extort one. On the contrary, the post master, by his remarks, guarded the defendant against any such motive. For, while he informed him that he had no vengeance to gratify, he declared that the case should be prosecuted, and the whole matter exposed. There is, therefore, no ground, under any of the cases cited, to exclude the confession. But if a promise had been made as an inducement to the confession, the facts connected with the confession could not be withdrawn from the jury. And in this case the facts connected with the confession of the defendant, unless explained, go strongly to fix the offence upon him. In company with the witness, he went to his lodgings, and there he handed to the witness one of the notes, which is proved to have been enclosed in the letter. Now unless he shall show how he came by this note, the presumption that he feloniously abstracted it from the letter is strong. But the whole confession is clearly admissible to the jury. In a subsequent part of the case, a witness, being called by the defendant, proved, that before the confession of the defendant, stated by the post master, an assurance was given him, that the whole matter, might, perhaps, be compromised, if he would confess, and that the prosecutor would, probably, be satisfied on the reimbursement of his expenses. And the court then stated to the counsel that the facts which the first witness does not contradict, change the aspect of the evidence, and render the confession inadmissible. And they remarked that in their charge to the jury they should exclude, as evidence, the confession.

The evidence being closed, the defendant's counsel prayed the court to instruct the jury that they could not find the defendant guilty, under the first, second, and twelfth counts in the indictment, unless they are satisfied from the evidence that at the time the offence is alleged to have been committed the letter in question was "intended to be conveyed by post." In the three counts specified, the letter is described as a "letter intended to be conveyed by post." By the 21st section of the act to regulate the post office, &c. it is provided "that if any person employed in any of the departments of the post office establishment shall unlawfully detain, or open, any letter, packet, or mail of letters, with which he shall be intrusted, or which shall have come to his possession, and which are intended to be conveyed by post, on conviction shall be punished, &c." And if such letter contain a bank note or any article of value, the punishment is greatly increased. This provision is only applicable to a person employed in the post office department, as a carrier, a post master or assistant post master, into whose possession letters intended to be conveyed by post, ordinarily come. It does not, therefore, apply to any one disconnected with the post office, who may steal a letter from a post office or the mail. Under the regulations of the department it is made the duty of a carrier to receive letters, between post offices, and he is required to deposit them to be mailed in the first post office on his route. Should be purloin a letter thus received, instead of depositing it in a post office, he would be guilty of violating the law. The letter was intended to be conveyed by post, and it came into his possession, in the line of his official duty. So a letter, intended to be conveyed by post, comes into the possession of a post master or assistant post master, when deposited in a post office, to be forwarded by post. And the section, undoubtedly, reaches the case, where a letter is purloined by a person employed in the department, either from the office to which it was directed or on its passage to such office. But the counts must charge the defendant, as employed in the post office department, and it must be shown that he was thus employed before he can be found guilty, under this section of the statute. The court are also requested to charge the jury that they cannot convict the defendant under the seventh, eighth, ninth and tenth counts, unless they are satisfied from the evidence, that the notes in question are genuine and are of some value. The 22nd section of the post office act, under which this indictment seems principally to have been framed, provides, that "if any person shall steal the mail, or shall steal or take from, or out of, any mail, or from, or out of, any post office, any letter or packet; or if

any person shall take the mail, or any letter or packet therefrom. or from any post office, whether with or without the consent of the person having custody thereof; and shall open, embezzle or destroy, any such mail, letter or packet, the same containing any article of value, &c., shall be punished, on conviction, as therein provided."

In a late case in England it has been decided (Rex v. Ellins, Russ. & R. 188) that the genuineness of an instrument enclosed in a letter, under a provision somewhat similar to the above, need not be proved. The statute contemplates that the article enclosed shall be of some value; and on this ground the punishment inflicted is much more severe, than where a letter is abstracted which contains no article of value. This article would seem, therefore, to constitute an important part of the offence, and some evidence of its value must, therefore, be given. It is clearly not necessary to prove the hand writing of the presidents and cashiers, whose signatures appear on the face of the notes, by one who has seen them write. Any one whose business or profession leads him to an acquaintance with such notes, may prove them to be genuine. And the jury, in the exercise of their judgment, may find them to be genuine from an inspection of them, and the acts of the defendant. The defendant passed one of the notes, as appears from the evidence, at its full nominal value, and if this and the other evidence in the case shall satisfy the jury that the notes or either of them were genuine and of some value, they can act accordingly. A counterfeit note being of no value, or a note on a bank which never existed, or is wholly insolvent, would not constitute the offence under the statute. In these cases the notes enclosed in the letter stolen, are seldom recovered, and the only evidence of their genuineness is that they appeared to be so, to the person who enclosed them; and that being on solvent banks, they were of value. This evidence has often been held sufficient, to go to the jury, and on which convictions have been had.

The court are further requested to charge the jury that they cannot find the defendant guilty under the fifth, sixth, seventh, eighth, and ninth counts, unless they are satisfied from the evidence that the letter therein mentioned was taken from and out of the office by the defendant. And an authority is cited from 19 E C. L. 533, sustaining the instruction asked. In this report the British statute is not recited, so that it can be compared with the act under consideration. The words of the act are, if any person "shall steal from, or out of any post office." And the instruction supposes that the offence is not perpetrated under this section, unless the letter shall be taken out of the post office building. That if the letter be feloniously taken and rifled of its contents, by an individual who returns it before he leaves the post office room, the offence is not committed. This would indeed be a singular construction of the statute. The words "post office," as used in this section, do not mean the building in which the post office is kept, but the case or pigeon holes, where the letters are deposited. And when a letter is feloniously taken from the place where it is ordinarily and properly deposited, the offence is consummated. And it is of no importance to enquire, whether the offender remained in the room, or went out of it. In the present case, if the prisoner opened the letter, took out the money, resealed the letter, and returned it to the place of deposit, before he left the room, he is guilty of the offence under the statute.

And the defendant's counsel further ask the court to instruct the jury that they cannot find the prisoner guilty under the first, second, third, fourth and twelfth counts, which charge the prisoner as an assistant post master, unless they shall be satisfied from the evidence, that he was at the time the offence is alleged to have been committed actually employed under a valid contract as an assistant. Where a person not employed in the post office department, shall be convicted of stealing a letter from the mail or a post office, which contains bank notes, &c. he is punishable by imprisonment not less than two nor more than ten years. But if such person be employed in the department, he is punishable by imprisonment not less than ten years, nor more than twenty-one years. This difference of punishment in the two cases, shows how much, in the opinion of the legislature, the offence is aggravated, when committed by a person employed in the department. The fact, then, of his employment must not only be stated in the indictment, but it must be distinctly proved. The employé within the law is not a casual assistant, who may occasionally be in the post office, and assist in distributing or making up the mail. But he must be a regular assistant employed by the post master, and whose duty it is to perform the various functions which appertain to the office. The prisoner, it appears, had been a regular assistant in the post office at Akron, but some time before this occurrence he had left the office, and engaged in other business. He was under no obligation to act as assistant post master, nor did he receive a compensation. The extent of his engagement was, in the absence of the post master, to give some instructions to the boy in the office respecting his duties, of which being inexperienced, he was ignorant. This, we think, is not an employment within the law. We do not say that a regular written contract would be necessary, but we are of the opinion that the person, to come within the law, must be a regular assistant.

The jury will disregard the confessions of the prisoner, because made under circumstances which ought to exclude them from

consideration. But they will give full weight to the facts connected with the confessions. The notes taken out of the letter were in possession of the prisoner, and he has wholly failed to show in what way he received them.

Much has been said, gentlemen of the jury, of the high importance of this case, and of the ruinous consequences of a conviction. The case is important, but the court and jury must be governed by the facts and the law, and are not answerable for the consequences. If these shall cover the defendant with infamy, and blight his future prospects, it is the result of his own acts. His reproaches should be against himself, and not against the law or the administrators of the law.

The jury, after a short retirement, returned a verdict of guilty. And at a subsequent day of the term, the prisoner being brought to the bar, and having nothing to allege by himself or his counsel, why sentence should not be pronounced, the court addressed him as follows:

You have been indicted, tried, and convicted of a highly penal offence. An ample opportunity has been afforded you to meet the accusation; and, you have been aided in your defence by able, experienced, and zealous counsel. Nothing has been left undone which could, with propriety be done, to shield you from the legal consequences of your own voluntary act. The court are satisfied with your conviction. The jury were bound by their oaths and the testimony in the case, to find you guilty; and no doubt can exist of your guilt. You are young. The morning of your life has not yet passed away; and how deeply is it to be lamented, that that morning is overcast, by so dark and heavy a cloud. There is but little in the future to cheer you. That future which promises so much to our hopes, and which is so well calculated to mitigate the misfortunes of life. You cannot expect to regain what you have lost. One step, one act, has fixed your destiny in this life. You had a hard struggle to overcome the upbraidings of conscience, in the perpetration of the offence; and when it was consummated, this faithful monitor, by your own confession, left you ill at ease. Truly the way of the transgressor is hard. You repented, but repentance came too late. The law had been violated and its penalty incurred. You must be cut off from society; and from your nearest and dearest connections. You must put on the badges of disgrace, and be associated with men rendered infamous by crime. There is but one resource to which you can look for consolation; but that is a source which never fails. It is found in the mercy of Him, who pardons the vilest offenders. Rest not until you shall obtain his pardon, and then you shall have a hope that strengthens and brightens, when all around you shall fade away and die. You are not hardened in vice. Your character is proved to have been good, and this, perhaps, is the first offence which has rendered you obnoxious to the laws of the country. Submit to your punishment, as the only atonement you can make to a violated law; and amidst the discouragements with which you are surrounded, thoroughly reform your life. If this shall be your determination, you need not despair. Your youth, your former good character, and the remorse which you have evinced, are taken into view by the court in fixing your punishment. The court sentence that you be confined in the penitentiary of this state, at hard labor, for two years from this time.

Case No. 15,901.

UNITED STATES v. NOURSE.

[4 Cranch, C. C. 151.] [1]

Circuit Court, District of Columbia. May Term, 1831.[2]

DISBURSING OFFICER — COMPENSATION — REGISTER OF TREASURY.

A register of the treasury of the United States is entitled to a reasonable compensation as agent for disbursing the money appropriated for the contingent expenses of the treasury department, library of congress, and other appropriations for public purposes, although, at the same time, he discharges the duties, and receives the pay, of register of the treasury, and such compensation is not barred by the statute of limitations.

[Appeal from the district court of the United States for the District of Columbia.]

This suit was commenced on the 14th of July, 1829, by a treasury warrant issued under the hand and seal of S. Pleasonton, "Agent of the Treasury," under the second section of the act of congress of the 15th of May, 1820 (3 Stat. 592), entitled "An act providing for the better organization of the treasury department;" directed to the marshal of the District of Columbia, and commanding him to proceed immediately to levy and collect the sum of $11,769.13, by distress and sale of the goods and chattels of the said Joseph Nourse, giving ten days' notice of such sale; and should there not be found sufficient goods and chattels to satisfy the said sum, he was thereby commanded to commit the body of the said Joseph Nourse to prison, there to remain until discharged by due course of law; and should the said Joseph Nourse be committed to prison as aforesaid, or should abscond, and sufficient goods and chattels should not be found to satisfy the said sum, the marshal was thereby commanded to levy upon and expose to sale, at public auction, for ready money, to the highest bidder, the lands, tenements, and hereditaments of the said Joseph Nourse, or so much thereof as might

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

[2] [Reversed in 6 Pet. (31 U. S.) 470.]

be necessary, &c., upon three weeks' notice, and to make return of the said warrant "to this office," that is, the office of the agent of the treasury.

By the 4th section of the act, any person considering himself aggrieved by such a warrant, may prefer a bill of complaint to any district judge of the United States, who may grant an injunction, upon bond and security, and the same proceeding shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States. The fifth section provides, that such injunction may be granted in, or out of, court; and the sixth section enacts, that any person aggrieved by the refusal, or the dissolution, of any injunction, may apply to a judge of the supreme court, who may grant the injunction or permit an appeal, upon which the same proceedings may be had in the circuit court, as in the district court.

This warrant having been levied by the marshal, on the lands, tenements, goods, and chattels of Mr. Nourse, he preferred his bill under the fourth section of the act, on the 25th of August, 1829, to the chief judge of the circuit court of the District of Columbia, who, by virtue of that office, is sole judge of the district court of the United States for the District of Columbia; in which bill, after stating that since his recent removal from the office of register of the treasury, (May 31, 1829), his public accounts as register and agent of the treasury department in disbursing certain funds, and settling certain accounts of contingencies, and other miscellaneous matters, and as agent for the joint library committees of congress, matters altogether distinct from, and unconnected with, his duties as such register, have been settled at the treasury, and a pretended balance found against him of $11,250.26, for which a warrant had been issued against his lands, tenements, goods, and chattels, under the act of May, 1820, and levied upon the same in his absence. He avers that the said account is unjust and illegal; and that so far from any balance being due to the United States, a considerable balance should have been struck thereon in his favor, as appears by an account filed by him, and which he declares to be just and true. That he took upon himself this distinct branch of duty at the special instance and request of the proper department of the government, having competent authority to engage him or any other agent in that capacity. That the performance of those duties devolved upon him great labor, responsibility, and risk, independent of, and apart from, his proper duties as register, and occupied a great portion of his private hours; that is, of those hours when, according to the established order and routine of his department, he was altogether discharged and free from the proper duties appertaining to his office of register, and had his time at his own disposal, but for his employment as special agent as aforesaid. And that besides the great labor and consumption of time induced by this extra employment, he was exposed to considerable pecuniary losses from the ordinary errors that occasionally occur in the accounts of the best accountants, from the multiplicity and minuteness of the various accounts and vouchers to be settled and preserved. That when he undertook this branch of public employment, the precise nature and amount of compensation therefor were not ascertained by any particular stipulation. That the usage of the treasury department, and other departments of the government, has invariably been, since the organization of the general government, to allow such commissions, or percentage, not only to unofficial persons so employed, but to official persons and clerks of the departments, when such duties were distinct from the stated duties of their offices, although such official persons were in the receipt of fixed salaries for their stated duties. That as early as the year 1800 he made out an abstract of these services, claiming to be allowed a compensation therefor; which original abstract is on file in the treasury department. That he has duly made out and presented his account to the proper accounting officer of the treasury, charging his commission at the rate of two and a half per cent. on the amount of his disbursements, which, if allowed, would, after a full and fair settlement of all his public accounts, leave the United States indebted to him in a balance of $9,886.24; which he has good reason to believe, and does believe, to be justly and equitably due to him from the United States, as stated in his annexed account. That the accounting officers of the treasury have rejected his said charge, and denied him any manner of compensation for his extra services as such special agent as aforesaid; not on the ground or pretence that his charge of commission is too high or unreasonable, if he were entitled to any compensation; but that he is not entitled to any compensation whatever for such extra services. He denies that he is within the description of persons, or officers, over whom the act gives jurisdiction to the agent of the treasury; which opinion he supports by an extended argument in his bill; wherefore he prays that the parties may be remitted to the ordinary process of law, so as to have a fair trial on the merits before execution be had of his body or estate, and an injunction to stay proceedings on the warrant altogether.

The injunction was granted, and served upon the agent of the treasury, with a citation to appear and answer the bill at the next district court at Alexandria; when and where Mr. Swann, the attorney of the United States for the District of Columbia, appeared and answered, that upon a settlement, by the proper accounting officers of the treasury, of the complainant's general account, comprehending the different agencies under which he acted as register of the treasury, he was found indebted to the United States in the

sum of $11,769.18, as appears by the account, a copy of which the complainant has exhibited with his bill, with the letter of Joseph Anderson, comptroller. which shows the grounds upon which the United States claim the balance of $11,769.18; and that the difference between that and the complainant's account consists of the commissions at two and a half per cent. claimed by him on his disbursements. The answer denies that the complainant is entitled by law to those, or any commissions, and prays that the injunction may be dissolved.

On the 20th of December, 1830, the district judge, having heard the parties by their counsel, made the following order and decree: "That the said Joseph Nourse has produced satisfactory evidence that he did, for a long course of years, render various services and disburse large sums of money for the use of the United States, and at their request, from time to time, made through the respective secretaries of the treasury, for the time being; which services and disbursements were performed and made by the said Joseph Nourse over and above the services required by the duties of his office as register of the treasury of the United States, for which said extra services and disbursements he has never been allowed any compensation in the settlement of his accounts in the treasury department; and it being deemed by the court expedient to ascertain by the report of auditors to be appointed by the court for that purpose, the value of those services, and the compensation to which the said Joseph Nourse is equitably entitled therefor, and for his disbursements as aforesaid: It is further ordered that Robert J. Taylor, Phineas Janney, and Colin Auld, be, and they are hereby appointed auditors to ascertain the said value and compensation, and to report thereon to this court without delay; and that such of the papers and evidence in this cause as relate to that subject. be submitted to the said auditors for their better information thereon."

On the 31st of December, 1830, the auditors reported: "That it appears from the documents and evidence submitted to them, that from the 10th of April, 1790, to the 31st of May, 1829, thirty-nine years, one month, and twenty-one days, the complainant, as agent for the payment of contingent expenses of the treasury department; for stationery and printing of public accounts; for payment of the superintendent and watchmen of the state and treasury departments; for miscellaneous disbursements, comprising fifteen different agencies; for advances made to sundry persons who brought from the several states the votes for presidents and vice-presidents of the United States; and on account of the congressional library; disbursed the sum of $943,308.83; the services rendered in which said agencies, and in making said disbursements, were over and above the services required of him by the duties of his office of register of the treasury of the United States. We find that for similar services, where no special provision had been made by law, a commission of two and a half per cent. has been, heretofore, in many cases, allowed at the treasury of the United States; and we are of opinion that a commission of two and a half per cent. on the said sum of $943,308.83, amounting to the sum of $23,582.72, is an equitable compensation for the services so as aforesaid rendered to the United States by the said Joseph Nourse; and that the said services are equitably worth the said last-mentioned sum."

Whereupon the following decree was made by the district judge, on the 4th of January, 1831. "And at a court continued and held for the said district on the 4th day of January, 1831, the auditors, Robert J. Taylor, Phineas Janney, and Colin Auld, to whom," &c., "having made and returned their report," &c., "and no sufficient reasons having been presented to the court against the confirmation of the said report of the said auditors, it is, therefore, this 4th day of January, 1831, ordered, adjudged, and decreed, that the said report be, and the same is hereby, in all particulars confirmed and made absolute; and the said cause now also coming on for final decision upon said report, and the bill, answer, replication, exhibits, depositions, and other evidence admitted by the parties, and upon the equity reserved under and by the said interlocutory order, it is further ordered, decreed, and adjudged, that the injunction, heretofore granted in this cause, be, and the same is hereby perpetuated; and that the said defendants be, and they are hereby perpetually enjoined from proceeding further against the said complainant upon the warrant of distress in the bill mentioned for or on account of the claim or demand for the recovery of which the said warrant of distress was issued."

The United States appealed to the circuit court of the District of Columbia, where a motion was made by Mr. R. S. Coxe, to dismiss the appeal, and contended that this was a summary proceeding in derogation of common right, and the jurisdiction must be limited to the express provisions of the act which gives the remedy. It does not give the United States any right to appeal. The district court had no jurisdiction in any suit against the United States. This proceeding is not a suit. No judgment can be rendered in it against the United States. It is not such an action as is intended by the judiciary act of 1789 (1 Stat. 73), where an appeal is given. It is a power given only to the judge, not to the court; and it is given to the judge of any district. A district judge in Georgia may enjoin a warrant levied in this district. There can be no jury to ascertain facts. It is no action. It is like the case of claimants in Missouri, &c., a special commission; and the power given to the chancellor in bankruptcy. The jurisdiction begins and ends in the statute which gives it. There can be no appeal

because none is given by the statute. In lunacy, the authority is personal in the chancellor. The appeal is to the king in council; not to the house of lords. It is to the king as parens patriæ. Sheldon v. Aland, 3 P. Wms. 107; Saul v. Wilson, 2 Vern. 118; 2 Mad. 446. In Bulloch's Case, in the district court of the United States in Georgia, the circuit court decided that no appeal lies under the act of 15th May, 1820.

Mr. Swann and Mr. Key, contra. This is a suit or action. The bill prays for an injunction, and for general relief. The judiciary act of 1789 (1 Stat. 73) gives an appeal, or writ of error, in all cases over $50. It applies to new jurisdictions as well as to the old. If the district court should dismiss the bill on final hearing, it would be hard if the debtor could not have an appeal. So it is strange if the legislature should give a right to appeal upon an interlocutory decree and not upon a final decree; and should give the complainant a right of appeal upon an interlocutory decree, and not reserve to the United States a right to appeal upon a final decree against them. The fourth section says: "The same proceedings shall be had as in other cases." An appeal is expressly given upon refusing or dissolving the injunction, because a decree of refusal or dissolution is only an interlocutory decree; and an appeal, by the former law, could only be taken to a final decree. And the allowing of such an appeal from an interlocutory decree, does not deprive the party of his appeal upon a final decree. By the act of the 3d of March, 1803 (2 Stat. 244), an appeal is given upon every final decree. A decree for a perpetual injunction is a final decree. This is the judgment or decree for a court, and being in its nature final, an appeal lies of course under the act of 1803.

THE COURT (CRANCH, Chief Judge, not sitting) was of opinion that the United States had a right to appeal; and on a subsequent day, THRUSTON, Circuit Judge, delivered the opinion of the court (CRANCH, Chief Judge, not sitting on the appeal):

The great question, in this cause, is: "Is the appellee, as agent for the disbursement of certain contingent funds of the treasury department, library of congress, and other appropriations for public purposes, entitled to compensation for those disbursements?" It is a single and a simple question; and can admit of no doubt, if the defendant be not barred by considerations connected with and growing out of his official duties as register of the treasury. The first point, then, is to examine those official duties. See the law declaring those duties. Here we see his duties as register, defined, among which we cannot discern that of receiving and paying public moneys. It is plain that he was not bound, as register, to receive or pay away public moneys, but he has, for a long course of years, received, paid away, and accounted for very large sums of public money. This must have been an extra duty, in nowise incident to his office of register. How came Mr. N. to have this duty imposed on him? We are told in the certificate of Oliver Wolcott, in the year 1801, that Mr. Nourse had been "employed" as agent for defraying the incidental and contingent expenses of the treasury department. Here we have evidence of the way in which Mr. Nourse became agent. He was "employed." This is a strong expression, and deserves consideration. It carries with it the idea, and almost the essence of a contract. What other more forcible expression would have been used if a contract had been made with any private person? If the secretary had a right to require this duty of Mr. Nourse as register, would he have used the term "employed"? Would he not rather have said, Mr. Nourse has been required, ordered, directed, or appointed? Suppose Mr. Nourse had refused the agency, would there have been any violation of his official duty? None whatever. Then one of two consequences follows. This burthensome agency, (for that it was onerous and troublesome is proved by the depositions of Mr. Michael Nourse, Mr. Charles J. Nourse, Mr. Rush, Mr. Crawford, and the certificate of Mr. Wolcott,) was undertaken gratuitously, or compensation was expected. Was it undertaken gratuitously? That it was not is proved by the intended application to congress for compensation, as far back as 1801, as appears by the memorial to congress exhibited in the argument, with Mr. Wolcott's certificate indorsed. Then it is evident Mr. N. expected compensation, and the then secretary of the treasury was apprised of it. Here was notice that Mr. N. expected compensation; and, of course, he acted neither gratuitously nor under the impression that he was, in executing this agency, discharging any duty belonging to his office of register, but an extra duty for an expected compensation.

But it is contended that if Mr. N. is entitled to compensation, it is a right founded upon no law, and dependent entirely upon the will of congress. A right not to be asserted in a court of law, is a solecism. A strange argument has been used to maintain this principle,—that because Mr. Nourse proposed to apply to congress for remuneration, he has acknowledged that he had no legal remedy. How so? Does a man forfeit his right to compensation for services rendered because he has misconceived his remedy? But how did he misconceive his remedy? He could not have sued the government; and therefore had no means to enforce his claim in a court of law. But it is asked, why did he not prefer his accounts to the treasury department at the time he thought of the memorial to congress? Because, in the first place, he might have been, and probably was ignorant of his rights, or apprehended that the secretary of the treasury had no power to allow them;

or he might have been apprehensive of giving offence to the government, and as he was a removable officer, that he might have endangered his office of register; and, moreover, as he had always large sums of public moneys in his hands, there was, in fact, but little necessity for having the legal point settled at that time. But, for none of these causes can I discern that he has waived or forfeited his right to compensation. Admitting, then, that Mr. Nourse was doubtful, at that period, of his claim to compensation, little doubt exists, at this day. The practice that has uniformly prevailed since, in transactions of this nature, has settled the point. The opinion of Mr. Wirt in Governor Cass' Case [2 Ops. Attys. Gen. 189], the allowance by Colonel Bomford for extra services of this sort rendered by army officers; of General Gratiot, by engineer officers, all go to show compensation for extra services in disbursing money by officers who receive regular pay as such; and in private transactions compensation by way of commissions to agents receiving and disbursing moneys, is too well settled to be disputed. Then if Mr. Nourse always expected compensation for this extra service, and the government was apprised of it in 1801, (see O. Wolcott's certificate,) and he has not forfeited it, as I have endeavored to show, by either ignorance of his rights, or by not asserting them sooner, because, having, as I observed, already large sums in his hands, and had, until now, no necessity to assert them, I see no reason why he is not entitled now to this compensation; and in this I am supported by Mr. Crawford, late secretary of the treasury; and as two and a half per centum is the rate of allowance established for similar services, (see Bomford and Gratiot's certificate,) and has been reported reasonable by the auditors, whose report stands unexcepted to, I am of opinion that the decree of the district judge should be affirmed by this court.

A strange argument was used to show that Mr. Nourse would have had the same duties to perform as register, had he not acted as agent, as he has had, having acted as such; that he would still have had the accounts of the agency to register and enter on the books of his office, and so as register he would have had this duty to perform let who will have been agent; and he had all this to do, although he was himself the agent. But, in fact, the concerns of the agency are entirely distinct from and independent of his functions as register. What have contracts for wood, paying superintendents of buildings, watchmen, paying drafts of the library committee for books purchased, paying painters, glaziers, carpenters, bricklayers for work done on the public offices, and the multifarious and innumerable private claims on the contingent fund, and many of these payments, and indeed most of them, not in office hours, drawing checks, &c. &c., keeping private books of these transactions, producing vouchers for every, even the smallest payment in settling his accounts, to do with his duties as register of the treasury? Nothing. They are entirely distinct. But Mr. Nourse was "employed" to do all this; and if he was employed, why should he not be paid? If no special contract was made, then he is entitled, on the principle of a quantum meruit, which creates an implied assumpsit, to pay, on the part of the government, and the quantum of two and a half per cent. is settled by the usage established by other officers of the government in similar cases; by the report of the auditors and by all the analogies to the cases of private agents.

As to the statute of limitations; in the first place, it is not pleaded; in the next place, it cannot avail against a party who could not assert his claim by law. Mr. Nourse could not sue the government; therefore could not avoid the operation of the statute. He was obliged to wait to be sued. Besides, we are bound to decide on principles of justice and equity. The statute, if otherwise available of, seems to be overruled by this directory provision. But the government would be disgraced by pleading the statute of limitations, and if so, we ought not to allow it. Moreover, the policy of the statute, however wise and wholesome as to transactions between private persons, is in nowise applicable to government concerns. The prevention of litigation, the peace and quiet of the community, and the security of the citizens against stale claims, were the objects of the statute; none of which seem at all to bear on the interests or the weal of the government; and therefore the government ought not, and cannot take shelter under it. Again, the United States are not bound by the statute, and it is not right that they should have the benefit of it; the benefit should be reciprocal.

As to the want of a replication, it appears, from the record, that a general replication was agreed to be filed, in the judge's order of the 2d of January, 1831, (see page 7, of the record; see, also, the final decree of the judge,) who says, "The cause coming on for final decision, on said report, and the bill, answer, replication," &c., "admitted by the parties," so that there appears to have been a replication.

The decree of the district court is affirmed.

NOTE. Reversed by the supreme court of the United States (6 Pet. [31 U. S.] 470), on the ground that the United States had no right to appeal from the district to the circuit court; which, in effect, affirmed the judgment of the district court.

[Subsequently the United States instituted an action of assumpsit upon a transcript from the treasury. The circuit court gave judgment for the defendant, and on error that judgment was affirmed by the supreme court. 9 Pet. (34 U. S.) 8.]

Case No. 15,901a.

UNITED STATES v. The NUESTRA SEQUORA.

[Nowhere reported: opinion not now accessible.]

UNITED STATES (NUNEZ v.). See Case No. 10,379.

Case No. 15,902.

UNITED STATES v. NUNNEMACHER et al.

[7 Biss. 111.] [1]

Circuit Court, E. D. Wisconsin. March, 1876.

INTERNAL REVENUE — REMOVING SPIRITS — CONCEALMENT—CONSPIRACY—PRINCIPAL AND AGENT.

1. It is not necessary to prove that the precise quantities were removed, in an indictment for removing distilled spirits, on which the tax had not been paid; proof of any quantity removed, less or more than is alleged, upon which the tax has not been paid is sufficient.

2. It is not indispensable to the prosecution that the removal of the spirits took place at the precise times stated; but it must be at, or about the time stated, and evidence of removals considerably anterior will be inadmissible.

3. In a count of an indictment for removal and concealment, conviction may be had if removal is proved, though concealment is not shown.

4. If a person in interest in the business of the distillery, for himself, either alone or with others, directed, prescribed, ordered or set on foot the alleged removal or removals of spirits, or aided or abetted therein, he may be convicted of such removal or removals, although he may not have been personally present at the time.

5. Where a person with unlawful purpose or intent designs the commission of a criminal act, and to carry out that purpose or effect the unlawful object, another is employed to do the act, that act becomes the act of the principal, and he as well as the agent is criminally responsible.

6. A conspiracy is formed when two or more persons agree together to do that which is unlawful, and when one or more of the parties does any act to effect the object of such conspiracy. A mere agreement or combination to effect an unlawful purpose, not followed by any act, does not constitute the offense; there must be both the corrupt agreement or combination and an act done in pursuance thereof to make the punishable offense under the statute.

7. A general discussion of the law on the question of conspiracy. Many authorities cited and commented upon.

8. Identity of conspiracy is not destroyed by the connection at a subsequent time of new parties therewith.

This was a trial on an indictment [against Jacob Nunnemacher and others] for removal of distilled spirits from a distillery to a place other than a distillery warehouse, and for conspiracy.

J C. McKinney and L. S. Dixon, for the United States.

Winfield Smith and James G. Jenkins, for defendant Nunnemacher.

DYER, District Judge (charging jury). The indictment in this case contains four counts. The substance of the first count is, that on the 18th day of December, 1874, the defendant on trial, Jacob Nunnemacher, and the other persons named in the indictment, removed and aided in the removal of 3500 proof gallons of distilled spirits, on which the tax then due and owing to the United States, and required by law to be paid, had not been paid, from the distillery of the defendant, Christian Guenther, to the place of business of the defendant, August Hauske, and to a place other than the distillery warehouse of the said Christian Guenther, and concealed and aided in the concealment of these spirits.

The second count is like the first, except that the time of alleged removal and concealment of spirits is therein named as the 21st day of December, 1874, the quantity of spirits then alleged to have been removed is stated to be 3000 proof gallons, and the place to which and where they are alleged to have been removed and concealed is stated to be a railroad car in the city of Milwaukee.

The third count is like those that precede it, except that concealment is not charged, and except that the time of alleged removal of spirits is therein named as the 23d day of April, 1875; a railway car in the city of Milwaukee is the place to which these spirits are alleged to have been removed, and the quantity of such spirits is said to be 3500 proof gallons

The fourth count charges, that on the 18th day of December, 1874, the defendants named in the indictment, including the defendant, Jacob Nunnemacher, conspired together by producing and distilling large quantities of distilled spirits at the distillery of Christian Guenther, and to transport and remove the same from the distillery out of this collection district, without payment of the taxes required by law to be paid on distilled spirits, unlawfully to defraud the United States of the tax on said spirits; and as acts charged to have been done, to carry out the purpose of the conspiracy, it is alleged that on different days named in the count, the defendants produced and distilled at the distillery of Christian Guenther various quantities of spirits which are enumerated, and did not pay the tax thereon required by law to be paid, and removed such spirits from said distillery to a place and to places other than the distillery warehouse provided by law.

This is distinguished from the other counts, as the conspiracy count, in this indictment.

The first three counts are based on section 3296 of the Revised Statutes, which provides, that "whenever any person removes or aids or abets in the removal of any dis-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

tilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed," he shall be liable to certain penalties.

The fourth count is based upon section 5440 of the Statutes, which provides, that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable" to certain penalties.

Both in the testimony and the arguments of counsel, you have been informed, not only of the different processes involved in the distillation of spirits, but also of many of the requirements of law that must be regarded in carrying on the business. Among those requirements is one to the effect that there shall be a distillery warehouse connected with every distillery, where all spirits manufactured at the distillery shall be deposited and kept under the charge of a government officer, until the tax thereon has been paid and until it may be lawfully removed therefrom for sale or other disposition; and it is, as we have seen from a statutory provision I have quoted, an offense for any person to remove or aid in the removal of any distilled spirits upon which the tax has not been paid, to a place other than the distillery warehouse provided by law.

To establish the offenses charged in the first three counts in this indictment, as against the defendant on trial, it must be shown:

As to the first count, that on the 18th day of December, 1874, or at about that time, there were spirits at the distillery in question upon which the government tax had not been paid; that they were removed to the place of business of August Hauske, or after such removal were there concealed; that this was a place other than a distillery warehouse provided for or authorized by law; and that the defendant removed or concealed after removal, or aided in or abetted the removal or concealment of such spirits.

As to the second count, the same state of facts must be shown, except that the alleged removal or concealment of spirits must be proved to have taken place on the 21st day of December, 1874, or about that time; that the alleged removal was made to a place other than a distillery warehouse in the city of Milwaukee; and that the place of concealment was a railway car.

As to the third count, again the same state of facts must be shown, except that the alleged removal of spirits must be proved to have taken place on or about the 23d day of April, 1875, and that the place to which the spirits were removed if at all, was a railway car in the city of Milwaukee. Concealment, as I have stated, is not alleged in this count. The offense here charged is simply the act of removal.

In each of these counts, particular quantities of spirits are alleged to have been removed—as in the first, 3500 proof gallons, in the second, 3000 proof gallons, and the third, 3500 proof gallons. Nevertheless, it is not necessary to prove that these precise quantities were so removed. So far as quantity is concerned, proof of any quantity removed, less or more than is alleged, upon which the tax had not been paid, is sufficient. You will bear in mind, that it is essential that it be proved that the spirits, if any, removed or concealed as alleged in the first and second counts, and removed as alleged in the third count, were spirits upon which the government tax had not been paid, that the places of removal and concealment were as alleged, and that the defendant, Jacob Nunnemacher, was a party to or aided in or abetted the commission of the acts charged.

Particular times of removal, and removal and concealment of spirits are alleged in these three counts. It is not however indispensable that the prosecution prove that these alleged transactions took place at the precise times stated. If it be shown that the removal of spirits alleged in any one of these counts or the concealment of spirits alleged in the 1st and 2d counts, were made at or about the time therein stated, this is sufficient. The time to be proved must be at, or about, or near the time stated, so that it may be plain that the proof is not of some other transaction than that alleged.

Evidence has been introduced tending to show removals of spirits from the distillery mentioned, to places other than the distillery warehouse, at periods considerably anterior and even several years prior to the times stated in either of these three counts in the indictment. Concerning this evidence, I have to say, that it was only permitted to be given in support of the fourth or conspiracy count in the indictment, and that evidence is not to be considered by you as at all bearing upon the first three counts or either of them. Evidence of removals of spirits in previous years would not support the allegations in either of those counts. To use it for such purpose, would be to accept proof of one offense to convict of a different offense, and this could not be permitted. Conviction on either of the first three counts must be of the specific offense therein charged, and the evidence to establish such offense must be of the transaction or transactions alleged and occurring at or about the time stated.

I have said that to convict this defendant on either of these counts, it must be shown that he was a party to, or aided in, or abetted the commission of one or more of the acts charged. In this connection I may say that, although the first two counts allege both removal and concealment, if it be proved

that the defendant removed, or aided in or abetted the removal from the distillery, of spirits upon which the tax had not been paid to the place or places stated, at or about the time or times alleged, conviction may be had upon the count under which removal may be proved, if at all, though concealment be not shown.

Now gentlemen, the three counts in question allege the commission of illegal acts. This defendant is charged with committing those acts. I may first state to you as a general proposition, that to establish this charge, there must be shown participation in or connection with the alleged removal or concealment of spirits on the part of the defendant, with intent to accomplish or forward the commission of the act. If he personally, with guilty knowledge or intent, did the act either for or by himself, or jointly with others, that of course ends the question. To instigate, encourage, incite, advise, procure or assist in the removal of spirits on which the tax has not been paid from the distillery to a place other than the distillery warehouse, with a design to accomplish, or promote, or facilitate such removal, is to aid in and abet the commission of the act. With these general propositions in mind, let us come to more particular statements. And what I now say, you will keep in mind when we come to consider the count for conspiracy, for the same general rules or principles apply under that count as under those we are now considering.

If this defendant was a party in interest in the business of this distillery, or was a party participating in the profits of the business, and for himself or with others, directed, prescribed, ordered or set on foot the alleged removal or removals of spirits, then he may be convicted of such removal or removals, and that, too, though he may not have been personally present at the time. U. S. v. Blaisdell [Case No. 14,608]. If he was not such a party in interest, but personally and knowingly participated in the act or acts of alleged removal, then his relation to the transaction would be the same in point of responsibility as before. If he leased his distillery or furnished for hire or otherwise, teams and teamsters for the purpose or with the intent of providing the means or affording the opportunity to facilitate or accomplish the removal of spirits upon which the tax had not been paid, from this distillery to a place other than the distillery warehouse, or with knowledge that such instrumentalities were to be so used, and with such instrumentalities so furnished and employed, the alleged removals or either of them were made, then it could be said that he was influenced by an unlawful purpose, that he derived profit or advantage from the prosecution of that purpose, and he would be in that case a guilty participant in the act or acts. In other words, gentlemen, in such case, where a person with unlawful purpose or intent designs the commission of a criminal act and to carry out that purpose or effect the unlawful object, another is employed to do the act, that act becomes the act of the principal, and he, as well as the agent is criminally accountable. This is upon the principle that "he who commands or procures a crime to be done, if it is done, is guilty of the crime." So too, if these spirits were removed as alleged, and the defendant knew them to be spirits upon which the tax had not been paid, though he had no interest in the distilling business or in the spirits alleged to have been unlawfully removed, if he intentionally aided in or abetted the removal within the meaning of those terms, as I have before stated it to you, then he offended within the meaning of the statute.

I have said that intentional participation in or connection with the alleged unlawful acts must be shown. From this it follows that proof of mere suspicion, or bare knowledge that the act is being done by others without such participation in it or connection with it, is not sufficient. If therefore the defendant leased this distillery and let his teamsters and teams, without knowledge that they were to be employed for the purpose of making or accomplishing unlawful removals of spirits, and without any purpose, intent or design of furnishing the means for such removals, but leased and let them so far as his intent was concerned, in good faith for the transaction of lawful business, and did not participate either as a party in interest, or otherwise in the alleged removals, or intentionally aid in or abet such removals, I do not think that, while such original letting of the distillery and teams and teamsters was continuing, mere subsequently acquired knowledge that the alleged unlawful transactions were in progress, would justify conviction under either of the first three counts in this indictment. Knowledge of the commission of unlawful acts may, however, be taken into consideration by the jury, in connection with whatever facts and circumstances may be proved, to aid in determining whether or not the defendant was a participant in or a party to the alleged unlawful acts, if such acts or either of them be shown.

Now it is claimed on the part of the government, that at the times stated in the first three counts of the indictment, this defendant was in fact a party in interest in the distilling business at the Kinnikinnic Distillery, although others were having the active management; that the connection of Guenther with the business as a manager was a mere cover or subterfuge adopted to facilitate the manufacture and removal of illicit spirits from the distillery, for the benefit of Jacob and Hermann Nunnemacher; that this defendant, whether directly a party in interest in the business or not, leased the distillery and furnished teamsters and teams for the purpose of removing such spirits from the distillery to places other than the distillery warehouse, and had knowledge that

they were to be and were so used, and that all the circumstances show his participation and intentional co-operation in the alleged unlawful acts charged in these counts of the indictment. This is the claim on the part of the prosecution.

On the contrary, it is claimed on the part of the defense, that he was not in any manner interested in the business of distilling; that he had leased the property, and that others operated the distillery and conducted, controlled and had the avails of the business, without any participation therein by him, except that he received, as he claims, rents for the use of the property, stipulated compensation for the employment of his teams and teamsters, and a portion of the slops of the distillery for his cattle and other stock; that he was engaged in carrying on his farm, dealing in cattle and hogs, and that his business was entirely disconnected from the manufacture of spirits, and that he had no interest therein. It is claimed further in his behalf, that there was no participation by the defendant, with guilty knowledge or intent in the removal or concealment of illicit highwines; that he knowingly rendered no aid, assistance or encouragement in the removal of such spirits, and that his attention to teams owned by him and assisting in the distillery business, was merely to see that they were not overlooked and were properly used and cared for; and it is also claimed that the testimony is wholly inadequate and insufficient to establish either of these three counts as against this defendant.

The judge then recapitulated the points under the first three counts in the indictment upon which the jury must find, and proceeded:

Upon the fourth count in the indictment, the questions requiring your attention are these: (1) Was there such a conspiracy as is alleged, and if there was, were any or either of the overt acts charged in this count committed as alleged, in execution of the conspiracy, or to carry into effect its object? (2) If such a conspiracy was formed and existed, was the defendant connected with it as one of the conspirators?

A conspiracy is formed when two or more persons agree together to do that which is unlawful—in others words, when they combine to accomplish, by their united action, a criminal or unlawful purpose; and the statutory offense is complete, when such agreement is made or such combination is entered into and one or more of the parties does any act to effect the object of such conspiracy. To illustrate, if two or more persons agree together that by fraudulent practices they will deprive or defraud the government of the tax required to be paid on distilled spirits, and one or more of these persons does any act to effect the object of such agreement, they are guilty of the offense of conspiracy.

"It is not necessary, to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly by words or in writing, state what the unlawful scheme is to be, and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." U. S. v. Babcock [Case No. 14,487].

A mere agreement or combination to effect an unlawful purpose, not followed by any act done by either of the parties to carry into execution the conspiracy, does not constitute the offense. There must be both the corrupt agreement or combination, and an act done by one or more of the parties to effect the illegal object or design agreed upon, to make the punishable offense under the statute. If the conspiracy is formed by all or some of the parties charged, and the act to effect the object of the conspiracy is done by only one of the parties, this constitutes a complete offense as to both or all of the members of the conspiracy, for in that case the act of one becomes the act of both or all. I say to you further, that such connection with or relation to a conspiracy as the law takes notice of and punishes, is not dependent upon personal, pecuniary interest in the result of the unlawful adventure. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way and from any motive work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy. In determining whether the person charged is one of the alleged conspirators, it is obviously proper and important for the jury to inquire whether any interest or motive, pecuniary or of any other character, existed, for participation in the unlawful enterprise, and this may oftentimes materially aid in a determination of the question, as to whether the person accused was or was not one of the parties to the alleged conspiracy.

To establish the commission by the defendant of the offense here charged, you must be satisfied upon the testimony, that a conspiracy was formed to defraud the United States of the tax upon distilled spirits, distilled and produced at the distillery in question; that the defendant, Jacob Nunnemacher, was a party to that conspiracy, and that to effect the object of such conspiracy, one or more of the defendants named in the indictment did one or more of the overt acts therein alleged. The overt acts charged in this count are the removals of certain quantities of distilled spirits, upon which the government tax had not been paid, to a place and places other than the distillery warehouse provided by law. It is not essential that the precise quantity of spirits named in the count should be proven, nor is it necessary that the alleged conspiracy should be shown to have been formed at the

precise time alleged. It is sufficient if it be shown that there was a quantity or were quantities of spirits distilled and produced at the distillery named, upon which the tax was unpaid, that at about the time charged in the indictment, there was a conspiracy between any two or more of the persons who are alleged to have conspired together to defraud the government of the tax on such spirits, that the defendant on trial here, was connected with, or a party to such conspiracy, and that the unlawful combination was followed by one or more of the alleged acts done by one or more of the defendants, for the purpose of accomplishing its object. There must be at least two parties to a conspiracy, and the defendant Jacob Nunnemacher, may be convicted under the allegations of the fourth count of this indictment, if it be established beyond reasonable doubt, that he either conspired with any of the defendants named in the count or with any person or persons unknown to the government and the jury, or with any of the defendants named, and any person or persons so unknown, to defraud the United States of the tax on the spirits mentioned.

To establish a conspiracy, it is not, as I have already said, necessary that there should be "an explicit or formal agreement for an unlawful scheme" between the parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. In such cases it is frequently impossible to produce such proof, because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in the terms of express stipulations. Hence it is competent to prove the alleged conspiracy by circumstances. The understanding, combination or agreement between the parties in the given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding there is no conspiracy. But as I have just said, circumstantial evidence may be resorted to, to show the agreement or conspiracy. The acts of parties, the nature of those acts, with the accompanying circumstances, the character of the transaction or series of transactions, as the evidence may disclose them, should be investigated and considered, and are sometimes the only sources from which to derive the evidence of an agreement which may be express or implied to do the act which the law condemns.

If you find the existence of the conspiracy as alleged, your inquiry upon this count will be narrowed to a single ultimate question of fact, namely: was the defendant one of the conspirators—a fellow conspirator with the officers and other persons named in the indictment. The government affirms it and must prove it by legal and satisfactory evidence in order to ask a verdict in its favor. * * *

In this connection, I say to you further, that the identity of a conspiracy is not necessarily destroyed by the connection, at a subsequent period, of new or additional parties therewith. In other words, a conspiracy may be formed between certain persons, other persons may join it in its succeeding stages, and so its existence as one prolonged conspiracy may be continued. As the defendant is indicted for conspiracy with the persons named in the indictment, it is clear that the charge implies that the defendant knew there was such a conspiracy, and, with such knowledge, knowingly aided the conspirators in their unlawful scheme, and the alleged guilty knowledge and participation must be proved by the government.

Guilty connection with a conspiracy may be established by showing association by the person accused, with others in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may perform separate and distinct acts in forwarding that design. "If two persons pursue by their acts the same object, one performing part of an act, and the other another part of the same act, so as to complete it with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object." 3 Archb. Cr. Prac. 622.

Co-operation in some form must be shown, though that co-operation need not be prompted by personal pecuniary interest. There must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose, though that participation need not be active and may be subordinate. If parties in any manner work together to advance the unlawful scheme, having its promotion in view, and "actuated by the common purpose of accomplishing the unlawful end," they are conspirators. If a person, understanding the unlawful character of the transaction, encourages, advises, counsels, or in any manner, with a view to forwarding the enterprise or scheme, assists in its prosecution, he becomes a conspirator. * * *

Mere knowledge that a conspiracy has been formed or is in progress, unaccompanied by such acts or relation to it as show intentional connection with or participation in the conspiracy, is not sufficient to charge the person with the offense; though in such case, the fact of knowledge, when proved, may be considered in connection with the conduct of the person and all the circumstances, in determining whether or not he is a party to the conspiracy.

The judge then reviewed the testimony at length and explained the character of evidence necessary to conviction.

Verdict, "Guilty under the conspiracy count, and not guilty as to the first three counts in the indictment."

[For a motion to quash the indictment under the first and second counts, see Case No. 15,903.]

Case No. 15,903.

UNITED STATES v. NUNNEMACHER et al.

[7 Biss. 129.] [1]

Circuit Court, E. D. Wisconsin. April, 1876.

INDICTMENT—DUPLICITY—CONSPIRACY—INTERNAL REVENUE.

1. Under Rev. St. U. S. § 3296, an allegation of the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, and the concealment thereof, is equivalent to alleging the concealment of spirits which have been removed, etc., and on which the tax had not been paid, and an indictment drawn as above is not bad for duplicity.

[Cited in U. S. v. Lancaster, 44 Fed. 894; U. S. v. Thomas, 69 Fed. 590.]

2. In drawing an indictment it is not necessary that the exact words of the statute be used, if their precise equivalent is expressed, and the words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of."

3. In the statement of a conspiracy, certainty to a common intent is sufficient.

4. The allegation that the tax on the spirits "had not been paid" is sufficient without an allegation that it "was still due and owing."

5. The time when the spirits were distilled is not material.

6. Many cases cited and commented upon.

Motion to quash indictment. It is alleged in the first count of the indictment that the defendants [Jacob Nunnemacher and others], on the 18th day of December, 1874, did remove and did aid and abet in the removal of 3500 proof gallons of distilled spirits on which the tax then due and owing to the United States, and required by law to be paid, had not been paid, from the distillery of Christian Guenther, where said distilled spirits had theretofore been distilled, to a place other than the distillery warehouse of the said Guenther, and did then and there conceal and aid in the concealment of said distilled spirits so removed, and on which the tax had not been paid. The second count is like the first, except that the time of the alleged removal and concealment of spirits is stated in that count to have been December 21st, 1874, and the quantity of spirits removed and concealed, to have been 3000 proof gallons.

J. C. McKinney and L. S. Dixon, for the United States.

Winfield Smith and Jas. G. Jenkins, for defendant Nunnemacher.

DYER, District Judge. The statute (Rev. St. § 3296) provides that "whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable" to certain penalties.

The two counts mentioned are based upon the first general division of this section, and a motion is made to quash these counts on the ground of duplicity, it being claimed that the removal and concealment of spirits as mentioned in the statute and according to the terms of the statute are distinct and independent offenses which cannot be properly joined in one count.

It will be noticed that the section of the statute in question contains two general divisions—1st, the removal of distilled spirits to a place other than the distillery warehouse provided by law, or the concealment of spirits so removed—2d, the removal of distilled spirits from a distillery warehouse or other warehouse authorized by law, in any manner other than is provided by law, or the concealment of spirits so removed. I have had some doubt whether each of these divisions of the section was not intended, on its face, to express substantially one offense. But I am not willing to rest the question absolutely on such a construction.

It is a general rule that a count in an indictment which charges two distinct, independent offenses is bad, and should be quashed on motion. 1 Whart. Cr. Law, § 382. A capital offense and a misdemeanor cannot be charged in the same count. U. S. v. Sharp [Case No. 16,265]. An indictment for forgery, stating two distinct offenses, as the forging of a mortgage and of a receipt indorsed thereon, and requiring different punishments, has been held bad. 1 Whart. Cr. Law, § 382. A count charging horse stealing and ordinary larceny, for which offenses different punishments are imposed, cannot be sustained. State v. Nelson, 8 N. H. 163. The general rule that the joinder of two or more distinct offenses in one count is not permitted, is elementary. The point of difficulty is what are two or more offenses within the rule.

There are certain exceptions to the rule in the case of particular offenses, as in burglary, adultery, &c., where the specific accusation includes an offense of an inferior degree. 1 Whart. Cr. Law, §§ 383, 384. But these are not material here.

Recognizing the rule on this subject as general and elementary, I find as the result of my examination of the numerous cases where the principle has been enforced, that the prevailing feature of these cases is, that the offenses charged in the same count, were either inherently repugnant, or so distinct that they could not be construed as different stages in one transaction, or involved different punishments. These I think are the main characteristics of the class of cases in which the rule is asserted. Green-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

low v. State, 4 Humph. 25, 26; Com. v. Symonds, 2 Mass. 162, 163; U. S. v. Sharp [supra]; State v. Nelson, 8 N. H. 163; Miller v. State, 5 How. (Miss.) 250.

There is a class of cases, where, although offenses appear, by the use of the disjunctive in statutes declaring the offenses to be distinct and separate, it is nevertheless held that they are in effect but one offense and may be stated conjunctively, in one count. As where a person is charged with doing the thing which constitutes an offense, and causing it to be done, it being held that it is the same in law to cause a thing to be done as to do it. Bish. Cr. Proc. § 434. For example, to charge a person with falsely making, forging and counterfeiting, and with causing and procuring to be falsely made, forged and counterfeited, is not objectionable, although each of the acts may be stated in the disjunctive in the statute, because the whole is in law one offense. Rasnick v. Com., 2 Va. Cas. 356; State v. Hauseall, 2 Rice, Dig. 346; Mackey v. State, 3 Ohio St. 363; State v. Morton, 1 Williams [27 Vt.] 310. So a charge that the defendant administered and caused to be administered poison. Ben v. State, 22 Ala. 9. Of this class of cases is Com. v. Eaton, 15 Pick. 273, where it was held that although a statute forbade a person to sell or offer for sale a lottery ticket, it was proper to charge that the defendant offered for sale and sold such a ticket, for the reason that a sale, ex vi termini, includes an offer to sell, and there is actually but one offense. So in Com. v. Twitchell, 4 Cush. 74, where the statute imposed a penalty on any person who should set up, or promote an exhibition without license, it was held that setting up and promoting, constituted one offense and could be alleged as such, conjunctively in one count. In this class of cases, the offenses though disjunctively stated in the statutes creating them, constitute essentially one offense, and as argued by counsel for defendant, they do not reach the precise point we have here.

Let us now go a step further. Mr. Bishop says (1 Cr. Proc. § 436) that if a statute declares "that the doing of this or that, or the other thing, shall subject the doer to a punishment which it specifies, plainly a man may incur the penalty by doing any one of the three things. And by doing the three things at different times and as separate transactions he incurs the penalty three times, and three times he may be punished. But suppose instead of this, he does the three things at once and as one transaction, the doctrine appears to be that he incurs the penalty but once, the same as though he had done only one of them. Whence we have the general proposition, that, subject perhaps to exceptions depending upon the peculiarities of cases and the particular language employed, if a statute forbids several things in the alternative, it thereby creates but one offense; and since the offense may be committed in different ways, distinguished in the statute from one another by the disjunctive 'or' or committed by combining more than one or all the ways in one transaction, an indictment upon the statute may, in a single count, charge the defendant with all the acts, using the copulative 'and' where the statute employs the disjunctive 'or.'"

Following this principle it has been held that a person may be indicted for the battery of two or more persons in the same count. Rex v. Benfield, 2 Burrows, 980, 984. "In felonies also, the indictment may charge the defendant in the same count with felonious acts with respect to several persons, as in robbery, with having assaulted A and B, and stolen from A one shilling and from B two shillings, if it was all one transaction." 1 Bish. Cr. Proc. § 437.

Wharton says (1 Cr. Law, § 390) "where a statute * * * makes two or more distinct acts connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count." "Setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet when both are perpetrated by the same person at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted." Hinkle v. Com., 4 Dana, 518.

In the case of State v. Murphy, 47 Mo. 275, cited on the argument, it was held that "when a statute in one clause forbids several things, or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleading as though it created but one offense, and they may be united conjunctively in one count." In the case of State v. Fletcher, 18 Mo. 425, a distinction is taken on this question between misdemeanors and felonies. A statute declared that no person should set up or use any gambling device for the purpose of gaming, &c. The count in the indictment charged that the defendant set up and used and permitted games of chance to be played on the gambling device. A motion to quash for duplicity was sustained at the circuit but overruled by the supreme court.

Our own supreme court in the case of Byrne v State, 12 Wis. 525, uses this language. "The rule is well settled where a statute makes either of two or more distinct acts, connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at

different times, they may, when committed by the same person at the same time be coupled in one count, as constituting altogether but one offense. In such case the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law; and proof of either of the acts mentioned in the statute and set forth in the indictment will sustain a conviction."

Now it is not to be denied that a person may violate the statute in question by simply removing distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse, and without concealing the spirits. From the peculiar language of the statute, it would seem that to make a case of concealment there must have been a removal. Admit that the statute provides for two distinct acts, indictable separately and as distinct crimes where each shall have been committed by different persons or at different times, the question remains whether a count is double when it charges the commission of both acts by the same person as one transaction and at the same time. The words of the statute are "removes or conceals." For both the acts the same measure and kind of punishment are imposed. Are those acts inherently repugnant to each other, especially in the light of the language of the statute, "conceals or aids in the concealment of any spirits so removed?" Are the acts of such a character, that they cannot under the allegations of the indictment be construed as different stages in one transaction? I can have no doubt upon the point. The counts in question charge, that on a certain day, the defendants removed a certain quantity of distilled spirits from a certain distillery to a place other than a distillery warehouse, and did then and there conceal the spirits so removed. Here are two things, which were done at different times, and as separate transactions involve two penalties, but, when done as one transaction, the penalty is but once incurred as for one offense. There is a combination of the acts of removing the spirits and concealing the same spirits so removed. It has been said that there may be removal without concealment, which is true. It has also been said that concealment does not involve removal. But the words of the statute are "conceals any spirits so removed," which imply a removal and then concealment. So that the charge in the indictment may be regarded, if it were necessary, as a charge of concealment. But in this view it is contended that the charge should be that the defendants concealed spirits which had been removed to a place other than the distillery warehouse, &c.; thus first affirmatively alleging the concealment. But in the reasonable use and connection of words, it would seem that an allegation of removal of spirits on which the tax had not been paid, to a place other than the distillery warehouse, and the concealment thereof is equivalent to alleging the concealment of spirits which had been removed, etc., and on which the tax had not been paid. My conclusion is that the first and second counts are not bad for duplicity.

Another objection urged to these counts is, that it is not alleged that the tax on the spirits removed was due, and owing. The allegation is, that the defendants removed certain distilled spirits on which "the tax then and there due and owing to the United States and required by law to be paid, had not been paid." It is conceded that if the words "which was" had been inserted before the words "then and there" the allegation would have been complete. It is alleged affirmatively that the tax had not been paid, and I think the reasonable construction of the sentence is that the tax was due and owing. In the case of U. S. v. Hesing [unreported] in the Northern district of Illinois, one of the overt acts charged in the indictment to have been done to effect the object of a conspiracy, was the unlawful removal of certain spirits to a place other than a distillery warehouse, upon which spirits the tax imposed by law had not been paid, and this, it would seem from the opinion of Judge Blodgett, was the whole allegation in relation to a tax due and unpaid. It was held that the indictment in all its parts, conformed to the requirements of the law in regard to what an indictment should contain.

I do not regard the objection well taken, that the time is not stated when the spirits mentioned in these counts were distilled. It is alleged that the tax on the spirits had not been paid; that they were removed from a distillery to a place other than a distillery warehouse. The time when the spirits were distilled is not material. The statute forbids the removal of any distilled spirits on which the tax has not been paid, to a place other than a distillery warehouse provided by law. It makes no allusion to the time or place when or where the spirits are distilled.

To the fourth count which is a count for conspiracy it is objected, that the overt acts charged are not alleged to have been done to effect the object of the conspiracy set forth in the count. The allegation is that the defendants "in execution and pursuance of and according to said conspiracy, combination and agreement had as aforesaid, did produce and distill," &c. The words of the statute are "and one or more of the parties do any act to effect the object of the conspiracy," &c. It is insisted that the pleader should have employed the precise words of the statute, "to effect the object of the conspiracy" instead of the words "in execution and pursuance of and according to said conspiracy," &c. A ruling upon this point such as is insisted on by counsel for defendant, would require unnecessary exact-

ness. While a particularity and clearness are required which will inform a defendant of the charge he has to meet, and the court of the offense claimed to have been committed, so that it may pronounce judgment if there be a conviction, the validity of indictments should not depend upon too great niceties of language. I do not understand that the exact words of the statute must be used, if their precise equivalent is expressed. The words "in execution and pursuance of" are equivalent in meaning to the words, "to effect the object of," as the respective definitions of the terms given by Webster, show. The case of U. S. v. Boyden [Case No. 14,632] was cited by the attorney for the United States on this point. It was there held, that "the overt acts need not be laid as having been done 'to effect the object' of the conspiracy, although these are the words of the statute; it is enough to say that they were done 'in pursuance' thereof, which are the usual words in conspiracy;" and Judge Lowell in his opinion refers to cases in New York, and a case in New Jersey, where the statutes require an act to be done to "effect the object" of the conspiracy and says indictments follow the more usual language, charging the acts as having been done "in pursuance of" the agreement.

Another, and the last objection to the fourth count is that the object of the alleged conspiracy is not stated with sufficient certainty. It is alleged in substance that the defendants intending to defraud the United States of large sums of money in respect of the taxes upon distilled spirits, on the 18th of December, 1874, conspired together by producing and distilling large quantities of distilled spirits; and to ship, transport and remove said distilled spirits from the distillery of Christian Guenther, and out of this collection district without payment of the tax and taxes required by law to be paid on distilled spirits to the United States; unlawfully to defraud the United States of the tax on said spirits; to cheat and defraud the said United States of divers large sums of money in respect of the taxes upon distilled spirits; and to commit divers offenses against the said United States and against the internal revenue laws thereof. Then followed the overt acts which relate solely to the production, distillation and removal without payment of the tax required to be paid by law, of certain quantities of distilled spirits at certain times. The objection is urged that the language of the count "to commit divers offenses against the said United States and against the internal revenue laws thereof," is too general, neither the time, place nor particular character of these offenses being stated. If this were the sole allegation in relation to the object of the conspiracy, clearly the count would be bad. For to simply allege the intent or object of a conspiracy to be to commit divers offenses, without specifying any particular offense is repugnant to the elementary principles of criminal pleading. But here it is stated as an object of the alleged conspiracy, that the defendants conspired to defraud the United States of the tax on the spirits before mentioned, and of large sums of money in respect of the taxes upon distilled spirits. Here are specific, particular objects alleged. Does the further statement "and to commit divers offenses," etc., vitiate the count?

"The general rule is, that the charge must be laid in the indictment, so as to bring the case within the description of the offense as given in the statute, alleging distinctively all the essential requisites that constitute it." U. S. v. Staats, 8 How. [49 U. S.] 44. "All matters necessary to constitute the offense must be pleaded." U. S. v. Prescott [Case No. 16,084.] An indictment must set forth the particular facts and circumstances constituting the offense charged. Allen v. State, 5 Wis. 335; Fink v. Milwaukee, 17 Wis. 26; Com. v. Hunt, 4 Metc. (Mass.) 125. These are elementary principles. The allegations of the count wherein are set forth the particular purpose or object of the alleged conspiracy, namely, to defraud the United States of the tax on the spirits described, and to cheat and defraud the United States of divers large sums of money in respect of the taxes upon distilled spirits are beyond question sufficient. This, with the alleged overt acts following the conspiracy clause, points out with sufficient clearness the offense charged, so that the defendants can be advised of the nature of the offense, and prepare for trial. In Stoughton v. State, 2 Ohio St. 562, Judge Thurman holds the true rule, "that unreasonable strictness ought not to be required, and where an indictment clearly charges a crime and fairly advises the defendant what act of his is the subject of complaint, the principal object of pleading is attained. The highest degree of certainty is not required. Certainty to a common intent is sufficient." The statement of one of the objects of the conspiracy as being "to cheat and defraud the United States of divers large sums of money," is sanctioned by the precedents and by the highest authority. Whart. Prec. Ind. 638. We have then a count containing apt allegations covering a statutory offense, and then an added allegation of a further purpose of the alleged conspiracy, namely, "to commit divers offenses" without enumerating them. Does the whole count fall because of the insufficiency of the last mentioned averment?

In the case of U. S. v. Clark [Case No. 14,804], cited by defendant's counsel, the indictment charged one offense, perjury: and the entire charge failed because the indictment did not throughout allege the offense to have been committed in any court of the United States, nor in any deposition taken pursuant to its laws. There was a failure

to allege any offense whatever within the purview of any statute.

In Rex v. Fowle, 4 Car. & P. 592, the indictment simply charged the defendants with conspiring "to cheat and defraud the just and lawful creditors of W. F." That was all. There was no further statement of the conspiracy nor of any overt act, and the case is radically dissimilar to that at bar.

Hartmann v. Com., 5 Pa. St. 65, would be an authority supporting strongly the position of defendant's counsel, if no statutory offense, as the object of the conspiracy, were particularly set forth in the indictment.

The case of U. S. v. Bettilini [Case No. 14,587], also cited, is a strong authority to the point that an indictment should embrace "a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted;" and upon this elementary principle there can be no controversy. As I have said, if this indictment simply charged a conspiracy to commit divers offenses against the United States and the internal revenue laws thereof, it would be unquestionably bad. No evidence can be permitted to be given under that allegation in this count. Why may it not be rejected as surplusage, when precise and specific offenses are previously alleged as among the purposes of the supposed conspiracy?

Mr. Bishop (1 Cr. Proc. § 497) says that "if an indictment is founded on a statute, and it contains allegations covering all the terms of the statute and making a complete offense, and then if it adds something by way of making the offense appear more enormous, the latter matter may be disregarded as mere surplusage." Again he says (section 480), "suppose there is matter in the indictment defectively alleged; yet if rejecting all this, enough remains to meet the requirements of the law, the indictment is good; the surplusage passes for naught." The case cited by counsel for the government, of Com. v. Bolkom, 3 Pick. 281, upon this question, seems to be in point. In that case, it was held that in an indictment charging an innholder with suffering persons "to play at cards and other unlawful games, the words 'unlawful games,' might be rejected as surplusage." In the case of Com. v. Arnold, 4 Pick. 251, where an indictment charged the defendant with permitting persons to play "at the game of cards," it was held that the words "the game" might be rejected. Of course where the rejection of an allegation would vitally impair the structure of an indictment, or render it meaningless, such allegation cannot be disregarded as surplusage. So where the averment is essentially descriptive of the sole offense charged, as in the case of U. S. v. Thomas [Case No. 16,473].

The motion to quash will be denied.

[For the trial on the indictment in which there was a verdict of guilty of conspiracy, and not guilty as to the first three counts in the indictment, see Case No. 15,902.]

Case No. 15,904.

UNITED STATES v. NUTT.

[6 Am. Law Rec. 302; 23 Int. Rev. Rec. 386; 10 Chi. Leg. News, 60; 1 Month. Jur. 499; 2 Cin. Law Bul. 263, 269.] [1]

District Court, N. D. Ohio. Oct. Term, 1877.

OFFENSES AGAINST POSTAL LAWS—APPROPRIATING ANOTHER'S LETTERS—INTENT—DEFENSES.

1. On an indictment under section 3892 of the Revised Statutes, for taking a letter from a post-office with intent to obstruct correspondence, the defendant may be convicted without evidence of an unlawful, clandestine or fraudulent taking.

2. In such case "correspondence" may be "obstructed" within the statute by an intentional non-delivery of the letter so taken from a post-office.

3. A party indicted for such taking of a letter with intent "to pry into the business or secrets of another," can not be convicted, if he knew the contents of the letter before he received it.

4. It is no defense for a party indicted for such taking of a letter that it related in part to his business, or business in which he was interested.

5. In such case it is no defense that the accused, in good faith, believed that the letter was of no value to the person to whom it was addressed, even if such be the fact.

6. The writer of a letter, which has passed from the office where mailed, has no right to intercept it, or authorize its delivery to a person other than the one to whom it is directed. [Quoted in United States v. McCready, 11 Fed. 231.]

7. It is no defense that the letter was voluntarily delivered to the defendant by the postmaster.

The indictment is under section 3892 of the Revised Statutes, and charges that in said district, defendant, on April 11, 1877, "did unlawfully take a certain letter, then and there directed to one Isaac Baughman, Quincy, Ohio, from the post-office at Quincy, in said district, the said letter not then and there containing any article of value, and before the same had been delivered to the person to whom it was as aforesaid directed, with a design then and there to obstruct the correspondence, and to pry into the business and secrets of another, contrary to the form of the statute," etc.

Wm. Lawrence and Wm. B. Neff, for defendant, moved to quash the indictment because the count contained three misdemeanors; did not allege that the letter was ever in the mail or care of a post-master, and did not aver whose business or secrets defendant intended to pry into. Whart. Prec. Ind. 1099; U. S. v. Mulvaney [Case No. 15,833]; U. S. v. Sander [Id. 16,219].

J. C. Lee, U. S. Dist. Atty., entered a nolle.

The grand jury immediately reported another indictment, substantially in the same form, containing three counts, one charging

[1] [10 Chi. Leg. News, 60, and 2 Cin. Law Bul. 269, contain condensed reports.]

an intent to obstruct the correspondence of Baughman; and a second charging intent to pry into business of Baughman; and a third, an intent to pry into the secrets of Baughman.

The case was tried to a jury. There was evidence tending to show that John M. Nutt, of Sidney, and Wm. A. Nutt, of Quincy, were partners as Nutt Brothers, having a warehouse, and dealing in grain at Quincy; that in June, 1876, Baughman stored 500 bushels of wheat at the warehouse, to be kept until he should elect to sell it; that in March, 1877, Baughman requested Wm. A. Nutt to inform him when the price reached $1.50 per bushel, and said that he would then sell; that on the 9th of April, John M. Nutt sent in the mail from Sidney a letter to Baughman at Quincy, signed "Nutt Brothers," offering $1.50 per bushel, and requesting Baughman to let them know; that on the 10th of April, Wm. A. Nutt went to Sidney, where John M. Nutt informed him the letter had been sent, told him its contents, and gave him a written order, signed "Nutt Brothers," to the post-master at Quincy, to deliver the letter to Wm. A. Nutt, who returned to Quincy, and on the 11th of April asked and obtained from the post-master the letter to take to Baughman, and left the order with the post-master; that on the 11th of April he took the letter two miles, to Baughman's farm, where he offered the letter to Baughman (though Baughman denies that it was so offered), and Nutt then offered to buy his wheat at $1.50; that Baughman declined to receive the letter, saying the writing of a letter would not sell his wheat; that during the interview it was agreed that Nutt Brothers should have the wheat at $1.52 per bushel; that on the 13th of April, Baughman got some mail matter from the post-master at Quincy, who informed him that he had given the letter to Nutt; that Baughman, having learned that wheat had advanced in price, had some controversy with Wm. A. Nutt as to the sale, and the cost of storage, and asked Nutt about the letter, when Nutt replied, "Oh, I forgot;" and, taking a package of about a dozen letters from his pocket, offered the letter to Baughman, who, observing that it had been opened, declined to take it. Nutt proved an unblemished reputation.

Wm. Lawrence, and for defendant on the trial, objected to the evidence that a letter was sent in the mail, because the indictment did not aver that it had been in the mail or in the care of a post-master.

WELKER, District Judge, overruled the objection because it was alleged in the indictment that the letter was "taken from the post-office," being a substantial following of the words of the statute.

Wm. Lawrence, in the argument, made the following questions of law to the court:

(1) If the post-master voluntarily and without any fraud of Nutt delivered the letter to him, this is not a "taking" within the statute. To "take" "from a post-office" is one thing—to receive from a post-master is very different. The word "take" is copied from section 22 of the post-office act of March 3, 1825 [4 Stat. 108], by which it is made an offense to "take a letter from a post-office," and another offense to take with intent to destroy, and another to take with intent to obstruct correspondence or pry into business. But in all the taking must be clandestine or fraudulent. The law now in force is copied from this, and must receive the same construction. All doubt is to be resolved for defendant in construing the statute. U. S. v. Pearce [Case No. 16,020]; 1 Bish. Cr. Law, §§ 828, 249, 133; Bish. St. Crimes, §§ 189–196; Webst. Dict. "Take"; U. S. v. Mulvany [Case No. 15,833]; U. S. v. Parsons [Id. 16,000].

(2) The words of the statute, "with a design to obstruct the correspondence," do not apply to the non-delivery of a letter, but only to a case where there is a design to prevent an answer or other correspondence. The word "correspondence" is derived from "con" and "respondere," meaning an answer to a letter sent—a response. The statute is to be strictly construed. Bish. St. Crimes, §§ 189–196; 1 Bish. Cr. Law (3d Ed.) § 249.

(3) If Nutt knew the contents of the letter before he received it, he can not be convicted of prying into the secrets or business contained in it

(4) If Nutt was a partner in the firm of Nutt Brothers, and interested in the letter, he can not be guilty of prying into the business of "another" The statute was designed to protect the privacy of correspondence against the inspection of parties having no interest in it This is the necessary meaning of the words "the business of another."

(5) If the defendant in good faith believed that the letter became of no value to Baughman, and in fact was of no value, because Wm. A. Nutt purchased the wheat for Nutt Brothers at $1.52 a bushel, when the letter only offered $1.50, and for that reason failed to deliver it, this is a complete defense.

He made and argued other propositions of law which were not controverted.

Wm. B. Neff, for defendant.

The writer of the letter had a right to control it. If defendant received it from the post-master on the written order for it, this is a defense. U. S. v. Tanner [Case No. 16,430].

J. C. Lee, U. S. Dist. Atty., and Edward S. Meyer, Asst. U. S. Dist. Atty.

WELKER, District Judge (charging jury). The defendant, William A. Nutt, is charged in the indictment with three offenses against the post-office laws. The first count charges him with having at a certain time taken out of the post-office at Quincy, Ohio, a letter addressed to Isaac Baughman, with the design to obstruct the correspondence of said Isaac Baughman. The second charges him with

having taken out of the same post-office, the same letter, with the design to pry into the business of said Baughman. The third count charges him with having taken the same letter out of the post-office, with the design to pry into the secrets of said Baughman. In the consideration of this case, you may regard the last two counts as being substantially one charge. To all of these charges the defendant has interposed a plea of not guilty. You are to start off in the investigation of these charges against the defendant with the presumption that the law, as a shield, throws around every man charged with a crime that he is innocent of the alleged charges; and to hold the government to strict proof of all the material allegations, and the charges of crime against the defendant. You are to hold the government in the proof, to the establishment of all the facts necessary to constitute a violation of the statute; not by a mere preponderance of proof, but to establish each one of the necessary facts to your satisfaction beyond a reasonable doubt; not a captious, but a fair and well founded doubt that may arise in relation to any one of the necessary facts. Holding the government to this proof, you will proceed to the investigation of this case in the light of the evidence you have had presented to you. In the first place, it is necessary that the government establish the fact of the taking of the letter out of the post-office at the place named. As to this fact, a question of law has been raised in regard to the nature of the taking, upon which it is important I should instruct you. It is not disputed that the defendant did get the letter directed to Baughman out of the post-office by the consent of the post-master, and without the consent or direction of said Baughman. You may regard that as a conceded fact. But it is claimed by the defendant, that if the letter was obtained from the post-office with the assent and consent of the post-master, it was not a taking under the provisions of the statute making it an offense. I direct you on that subject that the taking of a letter out of the post-office in which it was regularly received, by a person other than the person to whom it was addressed, and without his consent or direction, but with the consent of the post-master, who voluntarily delivers it to him to be delivered to the proper person, if taken or received by such person with the design, at the time, to obstruct the correspondence or pry into the business or secrets of the person to whom it is addressed, is a violation of the statute. The consent of the post-master in delivering the letter to the defendant does not screen him from violation of the statute, provided he took it with the design specified in the statute; or, in other words, it is not a defense to show that the post-master voluntarily delivered the letter to the defendant. It is not necessary to show that the letter was unlawfully or clandestinely taken from the office by the defendant, to make the taking, with the design specified, a violation of the statute. The principal question in this case is as to the design of the defendant at the time he took the letter out of the post-office. The evidence must satisfy you of this design and purpose at the time the letter was taken out of the post-office; for if an offense or crime was committed it must have been such at the time the defendant obtained the letter, for it consists in taking it out with the design to obstruct correspondence, or pry into the business or secrets of Baughman. Look into the evidence there, for the purpose of ascertaining whether the government has established, beyond a reasonable doubt that the defendant at the time he took the letter out of the office, did so with the design named in the statute. Evidence was presented to you showing a wheat transaction between Baughman and the defendant. You are not to try the question of fraud that may have been practiced on one side or the other in that transaction. It was allowed to go to you for the purpose of throwing light upon the design and intent of the defendant at the time he took the letter, and is to be regarded by you in no other light. It does not matter to you whether the defendant bought the wheat at a lower figure than he ought to have purchased it at, or whether he paid more than its value. Evidence has been introduced on behalf of the defendant for the purpose of showing that the proposition in the letter was for one dollar and fifty cents per bushel, and that the defendant, when he went to negotiate for the purchase of the wheat, had offered one dollar and fifty cents. Evidence has also been introduced tending to show that before the defendant went to the post-office he had been informed by his brother, the writer of the letter, what the proposition was, and what was contained in the letter. If it shall appear to your satisfaction that when the letter was taken out of the office by the defendant he knew the contents, and the proposition contained in it, it can hardly be said that he took it out with the design and intent to pry into the business or secrets, which he knew before he got the letter. Look at that branch of the case, with the evidence before you, and it is for you to say whether you are satisfied, beyond a reasonable doubt, that he took the letter with the design to pry into the business or secrets of Baughman.

The main charge in the case is the allegation that the letter was taken out of the office with the design and intent to obstruct correspondence. What is obstructing correspondence? Is it to cut it off entirely, or is it to retard or delay it? If the evidence shows that at the time the letter was received by the defendant it was his intention not to deliver it, or to delay the correspondence by keeping it in his possession for a time after it ought to have been delivered, that is a violation of the statute. It is not necessary to show that the letter was destroyed absolutely, but it is sufficient if the evidence shows obstruction or delay in the corre-

spondence. How is this intent and design to be made out? Intent in the commission of a crime must necessarily be established by a variety of facts, and gathered from circumstances. Men do not usually declare, when they perform an act, what their intent and purpose is in doing it. An intent is properly to be made out by circumstantial proof by showing what took place at the time or after the delivery of the letter to the defendant. Therefore I have allowed to go in evidence for your consideration all of the circumstances surrounding this whole transaction, to enable you to determine the intent of the taking of the letter. These various circumstances tending to show that are to be considered by you to enable you to determine the purpose, and the weight and effect of them is with you to settle. It is claimed on behalf of the defendant that the first opportunity he had he offered the letter to Baughman, and it was refused by him, because it was opened. I direct you that if at any time Baughman had been offered the letter, and refused to take it because it had been opened, you may regard that as a delivery to him, and it was his duty to have taken it. It is claimed by the defendant that such offer was made on the day of the sale of the wheat, the 11th of April, and, on the other side, that it was not done until the 13th of April. You will determine when that offer was made. In relation to the question of design and intent I direct you that if a person take a letter out of the post-office addressed to another, without the authority or direction of the person to whom it was addressed, with the declared purpose of delivering, and does not deliver it the first opportunity he has, the law raises the inference by that fact, that when he got the letter he did not intend to so deliver it. But that inference, like every other presumption of the law, may be overthrown by showing facts and circumstances that occurred between the parties afterward, showing what was the original design and purpose. The mere taking the letter out of the office is no crime unless done with the design described in the statute. Does the evidence, as a whole, satisfy you that the defendant designed and intended originally to obstruct correspondence? It does not matter whether the defendant knew it was a violation of the law or not. If he performed an act which is a violation of the law, you are to hold him to such knowledge. If it shall appear to your satisfaction, in the light of all the proof, that the defendant did intend when he took the letter out of the post-office, to deliver it, and that anything occurred between Baughman and the defendant afterward in their subsequent transactions that led the defendant to conclude not to deliver it, that change of opinion and purpose, after such receipt of the letter, does not constitute a violation of the statute. But it is for the defendant to show a reason for such change, such as will satisfy you that he did not intend originally to obstruct or delay the correspondence.

Another question was raised by counsel for the defendant. The evidence shows that the defendant's brother, the writer of the letter, gave to the defendant an order to the post-master, directing him to hand over to the defendant the letter directed to Baughman, which he took with him and presented to the post-master at the time he received the letter, which the post-master refused to recognize as authority for its delivery. It is claimed that the defendant had a right, under that order, to get possession of the letter. I direct you on that subject that where a letter is placed in the hands of the officer charged with the duty of mailing, and has been mailed and passed the mailing office into the custody of the post-office department for delivery, the writer loses control of it, and the alleged writer has no right to take it out of such custody, or prevent or delay such delivery. It is no defense in this case that the letter related in part to the business of the defendant, or business in which he was interested with Baughman. Nor is it any defense that the defendant, in good faith, believed at the time he took it out of the post-office that it was of no value to Baughman. Evidence has been given to you showing the general good character of the defendant. In all criminal prosecutions, and also for offenses, it is always competent for the defendant to give in evidence his general good character in relation to the character of the charge against him—in this case, for honesty and integrity. If there is any fair doubt in your minds as to the original criminal intent of defendant in relation to this letter, and the defendant has established in the proof a good character in relation to honesty and integrity among his neighbors and acquaintances, such doubt ought to be solved in favor of the defendant, and entitle him to an acquittal.

I am asked by counsel for defendant to say to you that a defendant can not be guilty of a crime unless he does an unlawful act and with a criminal intent. I have already said that to you substantially, and now say to you that it is a correct general proposition.

I am also asked to say to you that if it appear from the evidence that the failure to deliver the letter was through the forgetfulness and mere neglect of the defendant, that he did not violate the statute. I direct you that if through mere carelessness and neglect the defendant did not deliver the letter, and that carelessness and neglect is explained to your satisfaction, in the circumstances of the case, that would exonerate him from the criminal intent, for it must appear affirmatively that the design to obstruct correspondence was in the mind of the defendant at the time the letter was procured from the office. Take the case, gentlemen, look into all the evidence, and, in the light of all the proof and under the rules of law I have given you,

say whether the defendant is guilty or not guilty of the charges alleged against him in the indictment.

The jury returned a verdict of not guilty.

Case No. 15,905.

UNITED STATES v. NUTT.

[See Case No. 15,904.]

Case No. 15,906.

UNITED STATES v. NYE et al.

[2 Curt. 225.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

SEAMEN—ATTEMPT TO REVOLT—APPOINTMENT OF MASTER—UNSEAWORTHINESS.

1. If seamen are induced to ship by a false representation as to the person who is to command, whether they are bound by the contract, quære. But the owners may change the master after they have shipped.

2. A combination by the crew to prevent the vessel from going to sea, pursuant to the order of the master, is an attempt to commit a revolt.

[Cited in U. S. v. Huff, 13 Fed. 637.]

3. If seamen have reason to believe, and do believe a vessel is unseaworthy before the voyage is begun, they may lawfully refuse to go to sea in her. But they must prove these facts.

[Cited in The Heroe, 21 Fed. 528.]

The four defendants [Alfred Nye and three others] were put on their trial for the offence of endeavoring to make a revolt, on an indictment found under second section of the act of March 3, 1835 (4 Stat. 776). The evidence showed that they were regularly shipped for a voyage from Boston to East Florida, in the brig Leghorn. The shipping articles which they signed named one Burgess as master; but it appeared that one Rose had been spoken of to one of the men, as master, before the articles were signed. He was expected by the owners to go as master, but before the articles were drawn up, Burgess was substituted in his place. The defendants constituted the entire crew. At the appointed time, the defendants were taken on board the brig by the shipping master; but when the pilot came on board, and orders were given to get the anchor and make sail, to go to sea, they all refused to do ship's duty, and declared they would not go to sea in the brig. In answer to the order of the master to go forward and make sail, they refused; and declared they would not go to sea in the vessel. They said the brig was not seaworthy, but specified no particular defect, and did not ask for a survey. They were perfectly sober, and offered no violence. They only unitedly refused to obey the orders of the master to make sail, or get the anchor. There was evidence that the vessel was sea-worthy, and that after these men had been removed, a new crew was obtained, and the brig went to sea. There was other evidence that many of the rattlings were broken and the standing rigging required much repair; but it did not appear that it was in such a condition as to render it unsafe for the vessel to proceed on the voyage.

J. H. Prince, for the defence, contended that, the first section of this act had defined the offence of making a revolt; that mere refusal to do duty in a harbor, no force being used, or threatened, did not amount to that offence; and that the offence of endeavoring to make a revolt, described in the second section, was not committed, because the defendants attempted to do nothing but what they did, that is, refuse to do duty. He further insisted that, if the men were shipped under the belief that they were to go with Captain Rose, and this was held out to them as an inducement, without which they would not have engaged, they were not bound to go to sea with another master. He also insisted that, if the men honestly believed the brig was not sea-worthy, they were justified in refusing to go to sea in the brig.

These points were briefly spoken to by him and by Mr. Hallett, U. S. Dist. Atty.

CURTIS, Circuit Justice. Since the adjournment of the court I have looked into the authorities, and considered the points made at the bar. As to the change of master, there is no evidence that the men were induced to ship by a false representation that Rose was to go as master. If they were, it would deserve very serious consideration, whether they were bound by the contract. The evidence is, that Rose had been spoken of as master to one of the men, but not as certain to go; that Burgess had in fact been appointed, before the articles were signed, and his name is in the articles. Even if Rose had been master when the defendants shipped, the owners had power to change him for another. U. S. v. Haines [Case No. 15,275]; U. S. v. Cassedy [Id. 14,745]. This point cannot avail the defendants.

The objection arising from the alleged defect of evidence to prove the offence decribed by the act of congress, is attended with more difficulty. The crimes act of April 30, 1790, § 12 (1 Stat. 115), made it an offence to "endeavor to make a revolt." It contained no other description of the offence, and no definition of a revolt. It was under this act, the cases of U. S. v. Haines [supra], U. S. v. Gardner [Case No. 15,188], and U. S. v. Barker [Id. 14,516], were decided. In the first of these cases, it was held that, a total suspension of the command of the master, by the illegal refusal of the men to obey any and all his orders, was a revolt; and that a combination so to refuse, followed by an ac-

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

tual refusal in some one instance, was an endeavor to make a revolt. And this continued to be the law laid down by this court in subsequent cases. The act of March 3, 1835, § 1 (4 Stat. 776), has defined the offence of revolt, and among other things which may constitute it, is "unlawfully, wilfully, and with force, or by fraud, threats, or other intimidations, deprive the master of his lawful authority and command." Now the argument is—that in this case, the men used no force or fraud, and uttered no threats, and did nothing to intimidate the master. But this does not meet the point. They are not indicted for making a revolt, but for endeavoring to make one; and therefore, though they did not make one, but did in fact deprive the master of his lawful authority, and this by means of a combination which embraced the entire crew, and left the master without means to enforce his authority, the question is, if this was not an endeavor to intimidate him; or if this was not so, whether their combination to refuse to do duty, if it existed, did not also include a combination to resist the lawful commands of the master, to make sail and go to sea. In the case of U. S. v. Cassedy [supra], Mr. Justice Story, in the trial of an indictment under this act, instructed the jury that the question was, "whether there was among the defendants a common confederacy to refuse to do further duty on board the ship, and to resist the lawful commands of the officers in regard to the sailing or preparation for the voyage." This would include a confederacy to resist by force, threats, or intimidations of any kind. The proper instruction in this case, I consider to be this: if there was a confederacy and combination by the defendants, to refuse to go to sea in the brig, and to prevent the brig from sailing, pursuant to the orders of the master, while they were on board, and this determination was made known to the master, there was an endeavor to commit a revolt, within the meaning of the act of congress. Reg. v. McGregor, 1 Car. & K. 429.

The other question, of the right of the crew to refuse to go to sea in the brig, on account of alleged unseaworthiness, was considered by Mr. Justice Story, in U. S. v. Ashton [Case No. 14,470]; and also by Mr. Justice Woodbury in U. S. v. Staly [Id. 16,374]. I think the correct rule is, that after the men have rendered themselves on board, pursuant to their contract, and before the voyage is begun, they may lawfully refuse to go to sea in the vessel, if they have reasonable cause to believe, and do believe, the vessel to be unseaworthy. But the presumption is that the vessel was sea-worthy; and the seamen must prove that they acted in good faith, and upon reasonable grounds of belief that the ship was not in a fit condition to go to sea, by reason of unseaworthiness. If they prove this, they are justified in their refusal, and are not guilty of any offence in this case.

The jury found the defendants guilty.

Before sentence, the court remarked that, though satisfied with the verdict, which affirmed the seaworthiness of the vessel, the evidence showed some of the standing rigging to have been in bad order; and that it was not a proper practice to send a vessel to sea, with the rigging in such a condition, as to impose on the crew the labor of very considerable repairs at the outset of the voyage; that though the conduct of the men was unjustifiable, it found one palliating circumstance, in the state of the rigging, and another, in the fact that they came on board sober, and fit for duty, and offered no actual violence to either of the officers. In addition to the imprisonment of fifteen days, already suffered, the sentence was, a further imprisonment of fifteen days.

Case No. 15,907.

UNITED STATES v. OBERMEYER.

[5 Ben. 541;[1] 15 Int. Rev. Rec. 83.]

District Court, E. D. New York. Feb. 27, 1872.

INTERNAL REVENUE — BREWER'S BOOK — ENTRIES — PENALTY.

The forty-ninth section of the internal revenue act of July 13, 1866 (14 Stat. 164), provided that every brewer should "enter or cause to be entered, in a book to be kept by him for that purpose," the number of barrels of fermented liquor made by him on each day. The fifty-first section of the same act provided that every brewer who "shall intentionally make a false entry in said book, or in said statement, or knowingly allow or procure the same to be done, shall forfeit, for every such offence, all the liquors made by him or for him, and all the vessels, utensils, and apparatus used in making the same, and be liable to a penalty of not less than $500, nor more than $1,000, to be recovered, with costs of suit, and shall be deemed guilty of a misdemeanor, and shall be imprisoned for a term not exceeding one year. And any brewer who shall neglect to keep the books, or refuse to furnish the account and duplicate thereof, as provided by law, * * * shall, for every such neglect or refusal, forfeit and pay the sum of $300." *Held*, that the latter clause of the section did not affix the penalty of $300 to the omission to make proper entries in a book kept by him, but to the failure to keep any book at all.

This case came up on a motion in behalf of the United States, for a new trial, the court, on the trial, having directed a verdict for the defendant [David Obermeyer].

John J. Allen, Asst. U. S. Dist. Atty.

Kaufman, Frank & Pryor, for defendants.

BENEDICT, District Judge. In this case, the question reserved at the trial was, whether the omission by a brewer to enter in his brewer's book a true account of the

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

barrels of fermented liquors made by him, as required by section 49 of the internal revenue act of 1866, renders him liable to forfeit and pay $300, under the provision of the last clause of section 51 of the same act, notwithstanding it appears that the brewer had provided himself with a book in proper form, and had made and put in it what purported to be the account required by section 49, the items of which, however, were not correct.

By section 51, any fraudulent neglect or refusal to make true and exact entries in the brewer's book is made punishable by forfeiture and fine and imprisonment. The section next provides for a false entry in the book, intentionally made, which is also punishable by forfeiture, fine, and imprisonment; and then the section declares, that "any brewer who shall neglect to keep the books, or refuse to furnish the account, and duplicate thereof, as provided by law, * * * shall forfeit and pay the sum of $300." The government contends that the words in this last clause, "as provided by law," must be held to apply to the keeping of the books, as well as to the refusal to furnish the account, and that the provision must be construed to cover every case of failure to make correct entries in the book, as required by section 49. On the part of the defence, it is insisted that the clause in question was intended to provide for the case of a total omission to have any book, containing what purports to be the account required by section 49 to be entered in the brewer's book. I am of the opinion that the latter is the true construction of the clause, and that, where, as in this case, the brewer has kept a book, which contains what purports to be an account such as is required by section 49, he is not liable to an action for the $300, provided for in the fifty-first section. So construed, the section provides a punishment for any fraudulent omissions in the account, and also for any false entries intentionally made therein, but does not punish an accidental omission of an item, or an unintentional error in the account as kept, and its effect will be reasonable and just. The words, "keep the book," are elsewhere used, but not always, if ever, as equivalent to the words, "make correct entries in the book," which is what the government contends for here. Thus, in the seventh section of the act, in respect to cotton, the provision is, "if any person shall neglect to keep such book, or make false entries in such book." That the distinction indicated in the seventh section is intended to be made in section 51 is shown, I think, by the provisions of the section. Were there no provision in regard to the entries in the book, a different construction might be maintained.

The motion for new trial is accordingly denied, and judgment will be entered for the defendant.

Case No. 15,908.

UNITED STATES v. O'BRIAN.

[3 Dill. 381;[1] 19 Int. Rev. Rec. 18; 1 Cent. Law J. 11; 21 Pittsb. Leg. J. 81.]

Circuit Court, D. Kansas. Nov. Term, 1873.

CRIMINAL LAW—"FLEEING FROM JUSTICE"—LIMITATION OF PROSECUTIONS.

A "fleeing from justice" within the meaning of the act of congress limiting criminal prosecutions, is to leave one's home, residence or known place of abode, within the district, or to conceal one's self therein, with intent, in either case, to avoid detection or punishment for some public offence against the United States.

[Cited in Malme v. Handley, 81 Ala. 117, 8 South. 189.]

The defendant [Thomas M. O'Brian] was indicted under the act of February 5, 1867, § 1 (14 Stat. 383), for selling to Hines & Eaves, bankers in Leavenworth, a check drawn by the pay-master of the army of the United States, upon the assistant United States treasurer of New York, with a forged indorsement of the name of the payee thereon, with the intent by the said act prohibited. Under the plea of not guilty, the main question in the case was whether the offense was barred by the statute of limitations (1 Stat. 117, § 32; 1 Brightly, Dig. 322, § 107). To take the case out of the statute, the government relied upon the proviso that the act shall not "extend to persons fleeing from justice." In relation to this defense, the jury was charged orally as given below.

C. I. Scofield, Dist. Atty., and Thomas Ryan, for the United States.

Thos. P. Fenlon, and J. W. English, for defendant.

DILLON, Circuit Judge. The offense is charged to have been committed on the 31st day of December, 1867, and the indictment was not found until the 6th day of May, 1873, —more than five years afterwards. The indictment alleges also that the defendant is a person fleeing from justice in this district, and that he has been thus fleeing since the 1st day of December, 1869.

The limitation statutes of congress require an indictment for an offense, such as that here charged, to be found within two years from the time the offense was committed; but the statute contains a proviso, that the bar or the limitation shall not "extend to any person or persons fleeing from justice."

It becomes necessary to construe this proviso. It is in evidence that the defendant left the district of Kansas in August, 1869, and that he was afterwards publicly employed in the pay-master's department of the army in New Orleans, and that he afterwards resided for a time in Little Rock, in St. Louis, and in Colorado, where he was arrested after this indictment was found. Before August, 1869, he had resided for some years in Leavenworth, doing business as a claim agent and

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

was well known there, and evidence has been introduced by the defendant to show that after he left Leavenworth, he was seen by different citizens of that place, in the cities above named, and that his whereabouts was generally known in Leavenworth and among all his acquaintances.

There is also evidence that there was a criminal proceeding pending against him when he left Kansas, in the state court at Leavenworth for a violation of the laws of the state. There is no evidence that the defendant voluntarily returned to the district of Kansas, or had been therein since his departure in 1869.

It is necessary to determine upon the evidence, the motives of the defendant in leaving the state in the summer of 1869,—or more specifically to determine whether he at that time fled from justice.

What is "fleeing from justice," within the meaning of the statute? Having reference to the facts in this case, my answer is, it means to leave one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offense against the United States. It results from, or is implied in this definition, that if the defendant left his home in Leavenworth solely to avoid the criminal justice of the state of Kansas, and not to avoid the criminal justice of the United States, this will not deprive him of the two years limitation.

The criminal codes of the general government and of the states are entirely distinct, as was held by this court in U. S. v. Hawthorne [Case No. 15,332], and in my opinion it cannot be supposed that congress intended to make any provision in respect to persons fleeing from the justice of the states.

It is implied also in the definition above given, that mere departure by the defendant from the limits of the district of Kansas, irrespective of the motives and purposes of such departure, is not a fleeing from justice. An offender may flee from justice, within the meaning of the statute under consideration, though he never left the limits of the district; as for example, by secretly concealing himself, or by not being usually and publicly known as being within it. If the defendant, after his departure from Kansas, publicly resided in various places in the United States, did not conceal his whereabouts, and kept up an open correspondence with his friends in Kansas, these facts may be properly taken into view by the jury in connection with other circumstances in evidence, in forming their opinion of his intent and purpose in leaving the state in August, 1869.

The jury found for the defendant, on the ground that the prosecution for the offense was barred.

NOTE. The decisions upon the proviso of the act of April 30, 1790, as to "fleeing from justice," are not numerous. It was decided by Chief Justice Ellsworth, in Williams's Case [Case No. 17,708], that it need not be a fleeing from prosecution already begun,—so stated by Mr. District Judge Edwards in U. S. v. Smith [Id. 16,332], which was a case in the circuit court for the district of Connecticut, 1809, and where the same view was taken. Nor need it be fleeing from process issued. U. S. v. White [Cases Nos. 16,675, 16,678, and 16,679].

Whether mere departure from the United States is a fleeing from justice, or whether if the defendant fled the district, but within two years openly returned to it, he can avail himself of the statute—see the cases above cited. The Case of O'Brian seems to be the first one which has ruled the point that the fleeing must have been from the criminal justice of the United States—and that is not sufficient if the sole motive of the defendant in leaving his known place of abode was to avoid the criminal justice of the state. The point, however, is not free from difficulty.

Although the indictment in O'Brian's Case alleged that the defendant had fled from justice, this is not necessary. The defendant may avail himself of the statute of limitations, either by special plea or under the general issue. If he pleads specially, the government may reply that he fled from justice. And under the general issue, the prosecutor may introduce evidence to bring the defendant within the exception of the statute. U. S. v. Cook, 17 Wall. [84 U. S.] 168, decided at the December term, 1872, of the United States supreme court, where the subject is fully examined by Mr. Justice Clifford; same case with valuable note, 12 Am. Law Reg. (N. S.) 682.

Case No. 15,909.

UNITED STATES v. O'BRIEN et al.

[7 Int. Rev. Rec. 61.]

District Court, D. New Jersey. 1868.

INTERNAL REVENUE ACT—FRAUDULENT DISTILLER'S BOND.

[1. On a prosecution for executing and signing a false and fraudulent bond, it is no defense that defendant knew nothing of his sureties, but hired a man to obtain them, and that they swore to all that was required by law.]

[2. Testimony, by a subscribing witness to the bond, that three of the signers thereof signed in his presence, but that the bond was taken away for the other party to sign, and that it was returned with his signature, which the witness proved, having seen him write his name to another bond, is sufficient proof of the execution of the bond by such absent party.]

This was an indictment under section 42 of the internal revenue act of July 13, 1866 [14 Stat. 98], against Luke O'Brien, William H. Hooper, and others, charging the defendants with executing and signing a false and fraudulent distillers' bond.

A. Q. Keasbey, U. S. Dist. Atty., and Henry Young, Asst. U. S. Atty.

Jonathan Dixon, Jr., and Isaac W. Scudder, for defendant.

When the case was called, the defendant's counsel who appeared only for the principals, moved for a separate trial as to them, which was consented to on the part of the government. Mr. Dixon then asked leave to withdraw the plea of not guilty, for the purpose of moving to quash the indictment, which was granted.

The motion to quash was urged on the following grounds: (1) Because the alleged

fraudulent bond was not set out at length in words and figures. (2) Because the allegations in the indictment that the bond was required by the internal revenue laws and regulations, and was attempted to be used in fraud of the internal revenue laws, were made in general terms, without showing how it was required, or in what manner it was attempted to be used. (3) Because the allegations of the false and fraudulent character of the bond were not made with sufficient certainty. (4) Because the statute does not declare the act to be a crime or misdemeanor, and therefore an indictment will not lie.

After argument the judge overruled the motion, stating that the quashing of an indictment was entirely a matter of discretion, and that it would never be done where the defendant had pleaded, and had ample time to make the objection, but had delayed until the witnesses were summoned and the case ready for trial, unless in a case entirely clear of doubt. The court would leave the defendants to their motion in arrest of judgment. The judge went on to discuss the objections made to the indictment, and stated that he was satisfied that none of them could be maintained, and ordered the case to proceed.

FIELD, District Judge (charging jury). This is an indictment for executing and signing a false and fraudulent bond, attempted to be used in fraud of the internal revenue laws. The case is important from the fact of its being the first indictment for this offence that has ever been tried, at least in this district. The whole country is ringing with reports of enormous frauds committed against the revenue laws. They have reached a magnitude perfectly appalling, and unless checked, they threaten to sap the foundations of public credit, to rob the government of its means of support, to bring the law into contempt, and load with reproach our national character. A prolific source of these frauds, the machinery by means of which many of them are effected, is the use of false and fraudulent bonds. Prevent the use of such bonds, and you nip these frauds in the bud.

Let me explain this to you, for it is a matter that may be unfamiliar to most of you. Before a man can engage in the business of distilling whiskey or oil, he must give a bond to the United States, with good and sufficient sureties, to be approved by the collector, with a condition that he will comply with the requirements of law; that he will keep books in the form prescribed, and make true entries of his business, and make faithful returns of his production, and pay all the taxes due thereon, so that, before whiskey could be withdrawn from a bonded warehouse for exportation, re-distillation, or transportation (before the recent change in the law), a bond must be given in like manner; and if these bonds be really good and sufficient, they afford protection to the government against frauds by the distiller, and stand in the place of spirits removed from bonded warehouses. Thus, you perceive, that an easy mode of committing frauds is by palming off upon the collectors false and fraudulent bonds. It is an alarming fact, that many of all such bonds given in relation to the immense trade in whiskey within the last year or two, have been found to be absolutely worthless, and the treasury has thus been defrauded of millions.

But this case is also important from the character of the defense set up. If it is good in this case, it will be good in every indictment for a similar offence. It was admitted that this bond was false and fraudulent. It could not be denied. The testimony of Mr. Vanwinkle, deputy collector, and Mr. Merwin, an inspector, detailed for the special duty of examining revenue bonds, leaves no doubt on this point. Mr. Vanwinkle proves the execution of the bond, and that the sureties, Wm. L. Thomas and Joseph Gregory, were brought to him by O'Brien, and represented by him to be good; that they testified before the collector, on what is known as form 33, in which Thomas swore he lived at 165 Schermerhorn street, Brooklyn, and Gregory, that he was a commission merchant at 27 South street, New York, and owned a house and lot No. 162 West Twenty-seventh street, on the corner of Tenth avenue; and both swore that they were worth $5,000 after all their debts were paid. Mr. Merwin testifies that he went to 165 Schermerhorn street, and found indeed, a Mr. Thomas living there, but not Wm. L. Thomas; it was Wm. M. Thomas, a man of respectability and property, who is also called as a witness, and swears that he never saw or heard of the bond. Mr. Merwin also swears, that he ascertained that Gregory had no place of business, and no business at all but what little he picked up about the wharves, and that there was no such house as 162 West Twenty-Seventh street, near the corner of Tenth avenue, or owned by Gregory.

Having shown the execution of the bond by the defendants, their representations that the sureties were good, and the false and fraudulent character of the bond, the government rested. Now, upon this evidence, the defendant's counsel might have gone before the jury, and with some plausibility have contended that the defendants did not know that the bond was false; that they might themselves have been deceived; that there was nothing to show fraud or guilty knowledge, and that the most that could have been charged was culpable carelessness. But they did not take this course; they asked the court, indeed, to arrest the further progress of the case, and say to the jury that there was no evidence of fraud. This the court could not do. And then they

opened their defence, and called one witness to prove it. And it is the nature of that defence, as I said, that gives the case its chief importance. It seems to me an extraordinary defence. Am I mistaken in my view of it, or is it true, that this tide of demoralization has risen so high and spread so widely, that it has swept away all our old-fashioned notions of honesty, blunted our perceptions of truth, and confounded all our distinctions between right and wrong? What is this defence, and what is the testimony by which it is sustained? The character of the defence is revealed by the evidence of their only witness, Edmund Kimball. He lives in Brooklyn, and calls himself a commission merchant. He was employed by an oil inspector named Elisha W. Hinman, on behalf of the defendants, to get sureties on an oil bond. Not, so far as appears, upon any particular bond, but upon an oil bond generally. Not one word said as to the party for whom the surety was to be given—no explanations as to amount, or place, or business, or the means of the principal. He was simply to get sureties on an oil bond. He was to get $90, and pay the sureties out of this fund. He did get two sureties, Fernald and Van Ness, not for this bond, but the first bond given the week before. He paid them $20 each. They were rejected. I will say nothing now about this bond; I wish, for the present, to keep out of view the testimony of Fernald. But the first bond was rejected, and he had to get new sureties. He told Van Ness he must procure them. Van Ness did so. Kimball knew nothing about them. He met them for the first time when he took them to Jersey City. He there introduced them to the defendants as their sureties. They took the required oaths, which, as has been seen, were false in every particular. The bond was taken by the collector and sent to the revenue board.

This is the only evidence offered by the defendants, and this, their counsel say, is a good defence. It is shown that the defendants knew nothing of these men, and had never seen them before. It did not seem to enter into the minds of the defendants' counsel that there was any impropriety in this course of procedure. They insist, and with sincerity I have no doubt that this was a perfectly fair business transaction, that all business is now done by brokers, that a man may sell his credit as he may sell any other commodity, and they ask what harm is there in doing this kind of business through a broker. Gentlemen, did these men sell their credit, and had they any credit to sell? Did they sell credit worth $5,000 to a stranger for $20? Ought not the defendants to have known that they had no credit? The offering of such testimony shows the extent to which the public mind has become debauched on the subject of frauds on the revenue. This is a kind of brokerage which does not seem to have been recognized by the framers of the United States revenue laws. They have taxed every calling they could imagine, and brokers of all kinds and classes but surety brokers seem to have escaped. I know that there are men who haunt the purlieus of the criminal courts, and are paid for getting bail for persons charged with crime, but it is the first time I ever heard such employment called a fair business transaction. If this defence is good, all a man has to do is to prove he knew nothing of his sureties, but hired a man to get them, and that they swore to all that was required. It will be a good defence to every indictment under this law. A man need only fold his arms and shut his eyes, and hire two vagabonds to swear that they are worth the amount named in his bond. It cannot be that this is a good defence. A man who resorts to these practices is bound to know the sureties are good. He takes the very steps to get bad ones. I do not say a man may not pay another to become his surety, but it must be under circumstances showing an honest effort to procure a good one. These defendants took the very course that made it certain that their bond would be false and fraudulent.

I have said nothing as to Fernald's testimony. If the defendants ought not to be convicted without it, you might very properly disregard it. He was one of the sureties on the first bond. He says that he came over with Van Ness at Kimball's request, and went with the defendants to the collector's office to sign the bond. That he asked if he ought not to give his residence in New Jersey, and that one of the defendants told him it would be better to do so, and asked him if he had it ready. That he inquired if the collector was fixed, and was told that he was a friend of the defendant O'Brien, and was all right; that he and Van Ness swore to false residences, and that they owned property which had no existence. All this, so far as you may give it credit, tends to show more clearly the intent of the defendants, and that they did not mean to give a good bond so long as a false one would answer. Fernald is loaded with vituperative eloquence by counsel, but it must be remembered that he is the man whom these defendants offered as their surety, a good and sufficient freeholder residing in Hoboken. You must judge which is the worse, the poor wretch who is picked up in the streets of New York, perhaps suffering for bread for his family, and tempted by a surety-broker to sell his worthless credit for $20, or the business man who hires him for twenty dollars to do it, and stands beside him when he takes the oath for his benefit.

As to the proof of the execution of the bond by Hooper, I think it is sufficient. One subscribing witness was called, and proved that three of the parties signed in

his presence, but that the bond was taken away for Hooper to sign, and returned with his signature, which the witness proves, having seen him write his name to the other bond. It must be treated as having been signed in the presence of a witness, and is properly proved.

The questions for you are, whether the bond was false and fraudulent, whether it was executed by the defendants, and whether they had not such knowledge of its character as to make them responsible in justice, in reason, and in morality, for the execution of it, in violation of the statute.

The jury retired, and after an absence of about fifteen minutes returned with a verdict of guilty. The defendants were thereupon immediately sentenced to one year's imprisonment.

Case No. 15,910.

UNITED STATES v. O'CALLAHAN.

[6 McLean, 596.] [1]

Circuit Court, N. D. Ohio. July Term, 1855.

INDICTMENT—JOINDER—OFFENCES OF SAME CLASS—COMMON LAW—STATUTE.

1. Offences of the same class may be included in the same indictment.

[Cited in U S. v. Brent, Case No. 14,640; U. S. v. Nye, 4 Fed. 891; Pointer v. U. S., 151 U. S. 401, 14 Sup. Ct. 412.]

[Cited in Hall v. State (Tex. Cr. App.) 24 S. W. 407; People v. Sweeney, 55 Mich. 588, 22 N. W. 51; State v. Smalley, 50 Vt. 741.]

2. Though offences of different classes may not be joined. This is the English rule.

[Cited in Ex parte Hibbs, 26 Fed. 427.]

3. Offences of the same class, under a statute and at common law in England, may be united in the same indictment.

4. But a late act of congress, requires offences which may be joined, to be included in the same indictment.

5. Offences committed by substantially the same act, it would seem, ought not to be punished as acts committed at different times and under circumstances wholly disconnected.

[Cited in Pointer v. U. S., 151 U. S. 401, 14 Sup. Ct. 412.]

[Cited in Hall v. State (Tex. Cr. App.) 24 S. W. 407.]

[This was an indictment against Timothy O'Callahan for passing counterfeit money. Heard on motion to quash.]

Mr. Morton, U. S. Dist. Atty.

Mr. Backus, for defendant.

OPINION OF THE COURT. The defendant's counsel move to quash this indictment, on the ground that it contains several charges of distinct offences. In point of law there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender, and it is no ground either of demurrer or arrest of judgment. Upon this ground it has been holden, that an indictment on 37 Geo. III. c. 70, may, without any repugnancy, charge the double act, that the defendant endeavored to incite a soldier to commit mutiny, and also to incite him in traitorous practices. Thus, too, in arson, counts at common law, and on the statute may be joined, without danger; a count for a robbery may be joined with another for stealing privately from the person; and burglary and theft, forcible entry and detainer, have been frequently united in the same proceeding. A count for embezzlement on 39 Geo. III. c. 35, may be joined with a count for a larceny on 2 Geo. II. c. 25, because these offences are felonies; and a count for embezzling bank notes upon 39 Geo. II. c. 85, may be joined with a count for larceny at common law. 2 Hale, P. C. 173; 2 Leach, 1103; 12 Ward, Just. 425; 8 East, 41; 3 Term R. 2, 106; Croke, 6 c. 41; 8 Ward, Just. 211; 1 Bos. & P. 180; 2 Leach, 799; 1 Leach, 473; 2 East, P. C. 935, 936; 2 Leach, 1108; 3 Maule & S. 539. In Archb. Cr. Pl. pp. 55, 56, he says, if a defendant be charged with two or more offences in the same count of an indictment, the count will be bad for duplicity, except in one or two excepted cases. But he remarks, "as to charging a defendant with different offences in different counts, it admits of a different consideration." A defendant, he says, ought not to be charged with different felonies in different counts of an indictment; as for instance, a murder in one count, and a burglary in another.

But a late act of congress has a bearing upon this question and settles it. In the first section of the act "to regulate the fees and costs to be allowed clerks, marshals and attorneys of the circuit and district courts of the United States," &c. [10 Stat. 161], it is declared, "That whenever there are or shall be several charges against any person or persons for the same act, or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments shall be found in such cases the court may order them consolidated."

The distinct offences, charged in the indictment before us, belong to the same class; it being a charge for passing counterfeit coin, purporting to be gold and silver pieces, at different times, and on different occasions. This may, perhaps, have been done to meet the proofs. But, however this may be, the act of congress referred to, with the view of saving costs, authorizes the charges as they are made; and if distinct indictments had been found, on the separate charges, the act of congress would authorize the court to consolidate them.

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

I should be extremely reluctant, where an offence was committed, under a law, in several distinct ways. by the same transactions, to hold the defendant punishable under each. This would be contrary, it seems to me, to the genius of our laws, and to the humanity which characterizes them. Still it must be admitted, where offences of the same class may be charged in the same indictment, committed at different times and under different circumstances, that the punishment, appropriate to each, must be inflicted.

The motion to quash is overruled.

UNITED STATES v. The ODD FELLOW.
See Case No. 10,425.

Case No. 15,911.

UNITED STATES v. O'FALLON et al.

[15 Blatchf. 298.] [1]

Circuit Court, S. D. New York. Sept. 28, 1878.

VERDICT—PARTIES—NEW TRIAL—CONDITIONS.

In an action of assumpsit by the United States against O. and K. and B., K. pleaded the general issue severally, and O. and B. joined in their plea. The cause of action was joint and several. At the trial, the plaintiffs made no claim against B. The jury were instructed by the court that B. was entitled to a verdict. The jury found a verdict against O. and K., but made no finding as to B. Before judgment was entered, all the defendants moved in arrest, and to set aside the verdict, and for a new trial, on the ground that the verdict was irregular because the issue as to B. was not found: *Held*, that if the plaintiffs should discontinue the suit as to B., judgment would be entered against O. and K.; that, on such discontinuance, the motion would be overruled; and that, if a discontinuance was not entered, or an amendment not made, B. would be entitled to a new trial, but not the other defendants.

At law.

E. C. Ingersoll and A. B. Herrick, Asst. Dist. Atty., for the United States.

Sullivan, Kobbé & Fowler, for defendants.

SHIPMAN, District Judge. This is an action of assumpsit against James J. O'Fallon, Eugene Kelly, W. D. W. Barnard and one Pride. Pride was not served. The other defendants appeared and pleaded the general issue. Kelly pleaded severally. O'Fallon and Barnard joined in their plea. The alleged cause of action was joint and several. The evident theory of the government, in joining the defendants, was, that they were all partners. Upon the trial, it plainly appeared that O'Fallon and Kelly only were partners, and that Barnard was merely an agent of their firm. The counsel for the government told the jury, in his closing argument, that the plaintiffs made no claim against Barnard. The court charged the jury that Barnard was entitled to a verdict, and that the other two defendants were the real defendants in the case. The jury returned a verdict for the plaintiffs against O'Fallon and Kelly, and made no finding in regard to Barnard. Before the entry of judgment, the three defendants moved in arrest, and to set aside the verdict, and for a venire facias de novo, upon the ground that the verdict was fatally irregular, in that the issue in regard to Barnard was not found.

It is true, as a general rule, that a verdict is bad if it finds only a part of that which was in issue. Patterson v. U. S., 2 Wheat. [15 U. S.] 221; Cattle v. Andrews, 3 Salk. 372; Jenkins v. Parkhill, 25 Ind. 473. The present case presents, however, but the merest technical omission on the part of the jury. The counsel for the plaintiffs had abandoned their suit against Barnard. The court instructed the jury that he was entitled to a verdict, and, in effect, withdrew the case as to him from their deliberations. The question of Barnard's liability was not actually in issue before them. They did not pass upon it, probably because they were told that Kelly and O'Fallon were the only real defendants.

Notwithstanding the general rule, "if it appears that the whole question in the case between the parties is settled by the verdict," the verdict is not to be set aside "unless the omission to find the other issues can in some way prejudice the party complaining." White v. Bailey, 14 Conn. 271. The defendants Kelly and O'Fallon are not harmed by the omission, because all the issues between them and the United States have been found, and, whatever their liability, as partners, to the government, may be, it is not in dispute that Barnard was not a member of their firm. Barnard will not be practically harmed by the omission, if the United States formally enter upon the record the discontinuance as to him which they verbally announced to the jury upon the trial. It is true, that a nolle prosequi or a discontinuance does not operate as a full release and discharge, but is an agreement not to proceed further in the suit as to the person to whom it is applied, and, therefore, if a nolle is entered, Barnard is not technically released; but there is, under the circumstances of this case, no danger to Barnard that he will be called upon to respond to any suit upon this cause of action.

The subject of a discontinuance or a nolle prosequi in a civil action was fully considered by the supreme court in Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46. The court held, that, in an action of assumpsit upon a joint and several cause of action, against several defendants, where the defendants plead severally, whether the pleas are to the merits, or set up merely a personal discharge, the plaintiff can enter a nolle prosequi against one defendant whose case had not been tried, either before or after judgment against the other defendants. The rule in regard to a nolle prosequi is not necessarily controlled by

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

the fact that the defendants have pleaded severally. The more important requisite to the right of discontinuance is the several character of the alleged cause of action. In this case, inasmuch as Barnard is manifestly not liable, the mere fact that he had united in the plea of the general issue with another defendant, is not sufficient to affect the question of discontinuance. "In the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice." Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46.

A discontinuance as to the defendant in regard to whose liability the jury has not found, and an entry of judgment upon the verdict against the defendant who is found liable, if the court is satisfied with the verdict, is in accordance with the practice of the supreme court of the state of New York. Porter v. Mount, 45 Barb. 422. So, also, in a criminal case, where the jury had omitted to find on one of the counts, the court permitted such count to be discontinued, and rendered sentence in accordance with the verdict, upon the other counts. U. S. v. Keen [Case No. 15,510].

Section 723 of the New Code of Procedure of the State of New York provides, that "the court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading or other proceeding, by adding or striking out the name of a person as a party," &c.

If the plaintiffs enter, within fourteen days, a discontinuance as to Barnard, judgment will thereafter, and after the expiration of the stay already directed, be entered upon the verdict, against the other defendants. Upon such discontinuance, the motion for a venire facias de novo will be overruled. If a discontinuance is not entered, or an amendment is not made, Barnard will be entitled to a new trial, but not the other defendants.

Case No. 15,912.

UNITED STATES v. OGDEN.

[Nowhere reported; opinion not now accessible.]

Case No. 15,913.

UNITED STATES v. OGDEN.

[See Cases Nos. 16,341a and 16,342b.]

Case No. 15,914.

UNITED STATES v. The OHIO.

[Newb. 409.] [1]

District Court, E. D. Louisiana. Nov., 1849.

SLAVERY—IMPORTATION—PRESUMPTION OF FREEDOM—FORFEITURE.

1. The United States district attorney for this district, filed a libel in rem against the bark Ohio, to have her declared forfeited, for having brought into the United States a colored person from a foreign port or place, in violation of the 1st section of the act of congress of the 20th April, 1818 (3 Stat. 450).

2. The provisions of this act were not intended to apply to a case where a colored person, born and reared within the United States, sails to a foreign port or place on board of an American ship and returns to a port of the United States.

3. And where it appears from evidence, that the negro boy came on board of the vessel in the port of Baltimore in the capacity of a servant, and that he had for several years resided in New Jersey or New York, in the family of the master of the ship, the presumption is that he was free, notwithstanding the declaration of the custom officer, that the master claimed him as his slave.

4. In no event can this libel in rem for a forfeiture be sustained, since it does not appear from evidence, that the master, even if he brought the colored boy in question from a foreign port or place, did so on board this particular vessel.

In admiralty.

Mr. Durant, for the United States.

Mr. Bradford, for respondent.

McCALEB, District Judge. This action is brought against the vessel to have her declared forfeited in consequence, as it is alleged, of her having brought into this port a colored person from a foreign port or place.

It is shown by two officers of the customhouse in this city, that when they went on board the vessel shortly after her arrival in port, that the master declared that the negro boy on board was his slave. This declaration unexplained would doubtless raise a strong presumption against the master, as to his intention of holding the negro in involuntary servitude. But all the evidence must be taken together. Two of the crew of the vessel were examined, and testified that the boy came on board the vessel at Baltimore as a servant, and had continued on board in that capacity during the voyage to several foreign ports and back to this port. Another witness testifies that he knew the boy as long ago as 1842 in the city of New York, where he was then employed as a servant in the family of the master. He also testifies that he was the son of a free woman in Rio Janeiro, who was herself employed in the family of the American consul at that port.

Without taking into consideration the testimony of the master or his wife, which was received subject to objection upon the ground of interest, I am unable to discover any violation of law so far as this vessel is concerned. It is not shown that this master while in command of this vessel, brought the negro boy from a foreign port or place. It is clearly shown, on the contrary, that the boy came on board in the capacity of a servant before the vessel sailed from the port of Baltimore. It is also shown that he was several years before that time residing

[1] [Reported by John S. Newberry, Esq.]

in New Jersey or New York in the family of the master. The fair presumption on the mind of the court, notwithstanding the declaration of the custom-house officer, that the master claimed him as his slave, is, that he was free before he ever sailed on the last voyage of this vessel. There is nothing in the acts of congress to prohibit the employment of colored people on board of an American vessel, and in this case, the master, at the earliest opportunity, gave bond to take this negro boy away with the vessel according to the requisitions of the state law.

Let us suppose that this boy was a slave when he left Baltimore; still, in the absence of all proof that he had been imported from a foreign port or place on board of this vessel, there would be no ground for forfeiture. If, by this master he were really imported in another vessel, there is no principle in law or justice which would justify the forfeiture of the property of the present innocent owners. Even regarding the boy as a slave when he sailed from Baltimore, the case before the court cannot be distinguished from that of U. S. v. The Garonne, 11 Pet. [36 U. S.] 73.

In that case certain persons, who were slaves in Louisiana, were by their owners taken to France as servants, and after some time, were by their own consent, sent back to New Orleans. The ships in which these persons were passengers, were libeled for alleged breaches of the act of congress of April 20th, 1818, prohibiting the importation of slaves into the United States. It was held by the supreme court of the United States, that the provisions of the act of congress do not apply to such cases. The object of the law was to put an end to the slave trade, and to prevent the introduction of slaves from foreign countries. The language of the statute cannot be properly applied to persons of color who were domiciled in the United States, and who were brought back to the United States—to their place of residence—after a temporary absence.

In view of the law and evidence of this case, I am of opinion that no decree of forfeiture can be given against this vessel.

Case No. 15,915.

UNITED STATES v. The OHIO.

[29 Leg. Int. 252;[1] 9 Phila. 448.]

District Court, E. D. Pennsylvania. Aug. 9, 1872.

SHIPPING — PUBLIC REGULATIONS — CANAL BOAT.

1. A laden boat, which, having no sail, oars, or other motive power of its own, is drawn, by horses, through a canal, and from thence, through navigable waters of the United States, by a steamer, to a market, is not within the description of a ship or vessel in the act of congress of February 18, 1793 [1 Stat. 305], "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

[Approved in U. S. v. Pennsylvania Canal Boat Nos. 68 and 69, Case No. 16,027.]

2. The applicability of the act is not, in this respect, enlarged or altered by the act of July 20, 1846 [9 Stat. 38], exempting such canal boats without masts or steam power as were then by law required to be registered, licensed, or enrolled and licensed, from hospital dues, and from official fees, &c., or by the tonnage measurement act of May 6, 1864 [13 Stat. 69], or by any other legislation of congress in which the phrase vessel, or ships and vessels, may have been variously defined or applied.

The following are the principal sections of the act of congress of February 8, 1793 (1 Stat. 305), which have been cited with reference to the proceedings in this suit:

Section 1: "That ships or vessels, enrolled by virtue of 'An act for registering and clearing vessels, regulating the coasting trade, and for other purposes,' and those of twenty tons and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a license in force, or if less than twenty tons, not being enrolled, shall have a license in force as is hereinafter required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries."

Section 37: "That nothing in this act shall be construed to extend to any boat or lighter not being masted, or, if masted and not decked, employed in the harbor of any town or city."

Section 6: "That after the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, or if less than twenty tons, and not less than five tons, without a license, in manner as is provided by this act, such ship or vessel, if laden with goods, the growth or manufacture of the United States only, (distilled spirits excepted,) or in ballast, shall pay the same fees and tonnage in every port of the United States at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the United States; and if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, the ship or vessel, together with her tackle, apparel and furniture, and the lading found on board, shall be forfeited. Provided, however, if such ship or vessel be at sea, at the expiration of the time for which the license was given, and the master of such ship or vessel shall swear or affirm that such was the case, and shall within forty-eight hours after his arrival deliver to

[1] [Reprinted from 29 Leg. Int. 252, by permission.]

the collector of the district in which he shall first arrive, the license which shall have expired, the forfeiture aforesaid shall not be incurred, nor shall the ship or vessel be liable to pay the fees and tonnage aforesaid."

The boat libelled was not registered, or enrolled and licensed, or licensed. The purpose of the libel was to enforce the payment of the fees and tonnage dues which would have been payable if the boat were a foreign vessel. This boat was of a kind, which, in one of the opinions quoted below, was described as follows: "The boats in question are of peculiar character, not corresponding closely, or in any other than a most general way, with any other description of water-borne vessel. They are vessels in one sense, because they are things which can and do contain coal, and are moved upon the water; but for substantive and independent use, they do not come within the popular notion of a ship or vessel, any more than any other water-tight box would do. They are a mere capacity of holding and floating, and being pulled by an external power, and nothing more. When the boat is passing through a lock, it is a box about 42 feet long, 10 feet wide, and 4½ to 5 feet deep: A running board of about one foot wide extends along each side and across one end, to form a passage-way for the hands. At the other end there is a platform planked over for about eight feet in extent, to furnish accommodation to persons employed aboard, and to strengthen the work. The coal within is exposed to view, there being no deck, nor hatches, constituting a temporary or occasional deck. When two or more sections of the same description have passed the lock and come into the canal or river, they are connected end to end by hinges, and are moved in this connection together. On a canal they are moved by one or more horses or mules on the towing path of the canal. In a river they are moved by a steam tug. A man and two boys, or a woman in the place of one of the boys, are the working hands, the horse or mule being ridden or driven by a boy, and the man and woman or the other boy remaining on board. When attached to the steam tug, the horses or mules are commonly taken on board the tug, and the operatives are without employment until the horse or mule begins the work of towing, in the canal. The vessel or boat, call it by what name is thought best, has no moving power within itself, nor can it be moved otherwise than in the mode thus described. On a canal, a horse or mule, or some other animal power, is indispensable, to give it the capacity to transport anything. On a river, a steam tug, or a vessel that has a moving power within itself, is as necessary to give the boat the capacity to transport anything, as the animal power is on the towing path of a canal. The boat has, from its being water-tight, capacity to contain coal or anything else on the water without sinking; but of itself, or by virtue of any machinery, whether mast and sail, or anything else, it has no capacity whatever to carry or transport anything; and when it is on a river or open water, it must be attached to a vessel that has a mast and sail, or machinery for motion, and it is only as an appurtenance to such a vessel for the time being, that it has any practical use in transportation."

Such boats, having first come into use long after the commencement of the present century, a question which arose in 1845, and has never been decided, was, whether they were vessels within the meaning and application of the act of 1793. In May, 1845, the president of the Lehigh Coal & Navigation Company, and certain officers of other canal companies, addressed letters to the Honorable Robert J. Walker, then secretary of the treasury, saying that their business was threatened with serious interruption from the proposed application to their scow-boats employed in the transportation of coal of the provisions of the act of 1793. They contended that the act did not apply to their boats, which could not with any propriety be considered as "ships or vessels" within the meaning of the act; which are navigated by persons without the slightest pretensions to the character of "seamen;" which are not engaged in the "coasting trade;" which are incapable of being employed without immediate detection in any attempt to evade the revenue laws; which have no masts, and were not in existence or use at the time of the passage of the act.

Accompanying these communications were the following opinions of counsel. The first of them, after giving the description of the boats as above, proceeded:

"If the question, whether such a boat is within the act of 18th of February, 1793, were to be decided by the fact of there having, or not having, been a particular intention to include it, there could be no doubt that it is not within the act, because there could have been no particular intention to include a description of vessel, which, at the date of the law had no existence. Neither canals, nor canal boats, were at that time, or for many years afterwards, known in the country. The boats and the mode of pulling them in an open river or bay, are altogether of subsequent invention or adoption. But this consideration is by no means decisive of their not being embraced by the enrolment act of 1793. No new variety of structure of boat or vessel can be deemed exempt from the operation of the law, if the general intent and provisions of the law embrace it, merely upon the ground that there was no particular intention to comprehend it. If such boats are within the general scope of the enrolment and license act, they will be comprehended by it, notwithstanding they are of recent invention and use. The

general scope of the act is first to be ascertained. If that is so broad as to comprehend every species of vessel that is water borne, and is capable of holding cargo, and of being moved by the power of another boat, then there is no ground for exempting from its operation the boats or vessels above described, since they are water borne, and are capable of containing cargo, and are so moved. But if the scope of the act is narrower than this, and only comprehends ships or vessels of certain characteristics, then the inquiry will be, whether these canal boats have the requisite characteristics.

"The first head of inquiry then is, whether such boats are entitled to be enrolled and licensed under that act, and to enjoy the privileges of ships and vessels employed in the coasting trade and fisheries. The act of 1793 does not expressly require that ships and vessels to be included within it, shall have a particular character, and that if they have not, they shall be excluded. It requires affirmative qualifications, and if any kind of water borne vessel is excluded, it is by implication, and not by express terms. Its first provision in its first section is, that ships and vessels enrolled and licensed, or if less than twenty tons, having a license in force, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. There is nothing in any subsequent part of the act, which repeals or impairs the force of this enactment in regard to any description of vessel whatever. If a vessel is not enrolled and licensed, or if of less than twenty tons, is not licensed, she is not a ship or vessel entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. What the consequences are which arise from her not having those privileges, must be ascertained from other parts of the act; but it is clear that enrolment and license are indispensable to confer those privileges. No ship or vessel indeed is, by force of anything in the act, compelled to take out an enrolment and license. She is free to go without it, or without any papers at all, if she does not claim to exercise the privileges of an enrolled and licensed vessel. But if she is found doing certain things mentioned in the 6th section, without an enrolment and license, then she is acting in violation of the law, and the penalty prescribed by the law attaches, if she and her acts and doings come within the description in that section.

"Although there is no express exclusion by the act of any vessel from the benefit of enrolment, it is nevertheless true that the second section of the act does prescribe certain qualifications and requisites, without which a ship or vessel cannot be enrolled or licensed. That section is explicit in requiring that for the enrolment of any ship or vessel, she shall have the same qualifications, and the same requisites in all respects shall be complied with, which are made necessary by the act entitled, 'An act concerning the registering and recording ships or vessels, passed the 31st December, 1793'; and without enumerating all of them, there are some which may be referred to as being necessarily confined to vessels of a certain description, and not applicable to such a kind of boat as is used for the transportation of coal upon canals, and is hereinbefore described. The carpenter's certificate may first be referred to as setting out what the law regards as the general or rather universal description of every ship or vessel that is entitled to enrolment and license. It must set forth besides other particulars, the number of her decks and masts, her length, breadth, depth and tonnage. There are others, but these are the only qualifications stated in the carpenter's certificate, which it is necessary to refer to. They may be regarded as descriptive merely, or required only for the purpose of identification; and doubtless they are so in part; but as regards one of these qualifications, that of a deck, not only does it necessarily enter into the character of a sea-boat, without which it is wholly out of the question to speak of her as a coaster or as engaged in the sea-fisheries, but it is also a fundamental part of an enrolled ship or vessel, without which the act of congress cannot be executed in regard to her.

"The rule prescribed for ascertaining her tonnage, necessarily implies that she has at least one deck; for an element in the admeasurement of the tonnage, is the depth of the vessel from the under side of the deck plank to the ceiling in the hold; and if she has no deck, she has no certain tonnage within the law, either to be inserted in the enrolment or to be the basis on which her duties are to be estimated under the law. It is quite possible that an arbitrary line may be taken from where the under side of the deck plank would probably be if the boat had one; but that is not within the enactment of the law, nor will it give the tonnage which is the lawful tonnage by which duties are estimated. The lawful tonnage is the tonnage under deck, and if the vessel has no deck, she has no such tonnage. Her tonnage may be what she will carry without sinking the boat, or falling overboard; but that is not the tonnage contemplated by the act of congress. In fine, the law does not recognise an enrolled vessel without a deck; and there is no matter of surprise in this, seeing that it would be preposterous to suppose that the owner of a vessel without a deck, would ask for the privileges of the coasting trade, fisheries, &c., which she could not enjoy. Such a vessel wants qualifications that are indispensable to a registry, and they are equally so to enrolment and license.

"The certificate of enrolment, a form of which is given, descriptive in general terms of all vessels that are within the law, and which is accompanied in the act by directions for filling the blanks in the printed form with

words descriptive of every vessel that can be properly enrolled, in like manner implies, if it does not more than imply, that the vessel is a decked vessel. It purports that the surveyor has certified that she has at least one deck, for it directs the number of decks to be inserted in a particular blank, and sets forth that the owner or person acting in his behalf has agreed to the description. It is possible that in practice a carpenter may certify that the vessel has no deck, and the custom house may fill the blank in the certificate of enrolment accordingly. But if they do, they deviate from the act of congress, and reject what the act expressly requires, giving the privilege of enrolment to a vessel that congress has made no provision for, but the contrary. When a deck is wanting, and her tonnage measurement is certified, it is impossible that it should be any thing more than conjectural tonnage. It cannot be ascertained according to the rule prescribed by congress, which is the only rule, and is the effective rule by which, and by which only, her tonnage duty is ascertained.

"Not only the objects of the enrolment law, but its language in many parts do so describe the ships and vessels comprehended by the act, as to show that open boats without the power of navigation in themselves, are not within its provisions, and have not the qualifications necessary for enrolment. When forfeiture is inflicted for trading without a license, or using a forged or altered license, or the license of another vessel, it is inflicted on the ship or vessel with her tackle, apparel and furniture. Forfeiture is never inflicted without this description of accompaniments of a ship or vessel, in the commercial sense, being annexed; and it is known that in the law of insurance, these words comprehend and cover the sails, yards, rigging, cables and the like, the accompaniment of not only a decked, but a masted vessel. Such is the general commercial import of the words. The words 'ship or vessel,' of themselves, imply, in the ordinary acceptation of merchants and mariners, a vessel competent for the sea. And in an act concerning the coasting trade and the fisheries, this must emphatically be their signification. It is wholly inadmissible to extend them to a scow, or to a boat, without a deck, that would be swamped by the ordinary waves of the sea. Such things do not rise to the dignity even of a barge or row boat.

"After a careful examination of all parts of the act, I entertain the opinion that such a boat as is described in the first part of this opinion is not entitled to enrolment. She wants the requisite qualifications. She cannot be measured according to law. Her tonnage, which means tonnage under deck, cannot be ascertained, for she has no deck. She can carry whatever can be put into her without sinking her; but though she has a tonnage capacity, she has no tonnage measurement. She has no mast and no deck, no power to avail herself of the privileges granted, and it would be preposterous to claim the privileges for her, because, without the aid of another vessel that is also enrolled, she could not exercise any of them.

"The thirty-seventh section of the act of February 18, 1793, may be thought to militate against this view. That section enacts that nothing in the act shall be construed to extend to any boat or lighter not being masted, or, if masted and not decked, employed in the harbor of a town or city. It exempts from the operation of every part of the law, a decked boat without masts, and a masted boat without decks, however employed in the harbor of a town or city. From which it may be inferred that a boat without masts or deck is within the law, and may be enrolled. But I regard this as a misapprehension of the design of that section. Within the harbor of a town or city, such as New York for instance, and Philadelphia, boats and lighters are necessary for the transportation of merchandise, foreign as well as domestic, from place to place, within the same district, and possibly from one district to another. In a large sense, such boats may be regarded as performing an act of trading, as often as they are so employed, and as going from place to place in the same district when they go from New York to Brooklyn or Staten Island, or from Southwark to Kensington. To prohibit their use in this way, would be to deprive the trade of a city of an essential accommodation: and it would be prohibition if they were exposed either to forfeiture or to foreign duties, if found so trading without enrolment and license. The section means therefore, to exempt boats so employed with masts only, or with decks only, from the operation of the act altogether. It does not imply, that such boats, and still less that boats without either masts or decks are entitled to certificates of enrolment, but it exempts boats with one only of the qualifications, from the penalties of the law, if their employment be thus limited. It implies rather that boats without either masts or decks, are not within the act, by excepting boats that are only masted or decked, and not both, as not being within the operation of any part of the act.

"It being clear then, according to my opinion, that a canal boat such as I have described, is not within the act entitled to enrolment, as wanting the essential qualifications required by law, the next inquiry is, whether such a boat is made incapable by law of the use to which it is applied in the carrying of coal in the manner stated from district to district, or from place to place within the same district. And this, it will readily be seen, is a question of great importance; for if such boats have not the legal qualifications for enrolment and license, they cannot be enrolled and licensed; and if without enrolment and license they cannot be used in the manner described, the carrying of

coal from Bristol to Philadelphia, or to New York, through the Delaware and Raritan Canal, is almost necessarily destroyed, for it can hardly be carried in any other boats. If they cannot carry it, there must be transhipment into an enrolled vessel at Bristol, and if the enrolled vessel cannot pass through the Delaware and Raritan Canal, there must be another transhipment at Bordentown, and again at Brunswick. Canals for the transportation of coal may be regarded as almost superseded by the interpretation. The impediment to the use of these boats in the manner stated, if found anywhere in the act, is to be found in the sixth section, which enacts that every ship or vessel of twenty tons and upwards found trading between district and district, or betweeen different places in the same district, without being enrolled or licensed, or if less than twenty and not less than five tons, without a license, if laden with goods the growth or manufacture of the United States, distilled spirits excepted, shall pay the same fees and tonnage in every port of the United States where she may arrive, as ships or vessels not belonging to citizens of the United States; and if she has on board foreign goods, &c., or distilled spirits, the ship or vessel, together with her tackle, apparel and furniture, and the lading found on board, shall be forfeited.

"The force and effect of the prohibition, lie in the words, 'every ship or vessel found trading,' &c. The penalty can attach only to such a boat as is a ship or vessel, within the meaning of the act, and is found trading in the manner restrained or prohibited by the act. Now I apprehend, in the first place, that such a canal boat as has been described, is not a ship or vessel in the sense of the act. She has hardly any more of the attributes of a ship or vessel, in either commercial or common language, than a raft of logs on the water. Boards might be placed upon such logs, and coal might be placed upon the boards—and the whole might be moved by the same power that moves such canal boats. The circumstance of the raft's containing or holding coal, and being moved upon the water, would not make it a ship or vessel in the sense of the act, though in a very general sense, it might be regarded as a vessel. The canal boat described, is a series or succession of connected boxes, which, whether separate or united at the hinges, is incapable of coasting, either on the sea or in a river, or of being moved by any power within itself. It has no independent or internal capacity whatever, except that of holding the coal. Its practical use, its practical existence indeed, is as an adjunct to something else. It cannot be conceived of as a practical instrument of any kind, except in connection with something external, that is to say, some external animal power, on the shore, or some external wind or steam power on the water. The act cannot be understood by its general language to comprehend such a thing. The policy of the law in regard either to ships or seamen, cannot be understood to embrace such machines as these, or such persons as are employed to drive the horses or mules, or to attend to mere laborers' duty on board. No one interest of either shipping or seamen, can be considered as involved in them.

"But the material consideration remains; and that is a consideration which opens a view of the subject which shows both practically and legally that these boats are never in the predicament which brings on the penalty of the law. While they are within the canal, and are towed by a horse, it is understood that, whatever may have been the doubt at one time, it has long been the settled understanding, that the enrolment law takes no cognizance of them. It is only when they become an adjunct to a steam tug, that the lawfulness of their employment is questioned.

"It is obvious that the act of congress, in all its provisions, has reference to separate, unconnected, independent ships or vessels, moved or propelled by a power within themselves, and trading from district to district, or between different places by their own capacity. The ship or vessel is always spoken of in this character. She is represented as the acting, moving, trading, and transgressing body; and no one can doubt that this was the only acceptation in which the words 'ship or vessel found trading, from district to district,' could have been received at the passage of the act. A scow or boat drawn by another boat, and depending wholly upon it for motion and change of place, is not such a ship or vessel. For all purposes of trading, as well as for change of place, the acting, moving, trading, and transgressing body, is the vessel that moves, and the canal boats only as part of her. If the moving or propelling boat is moving, and trading in violation of law, the penalty is incurred; but if her moving and trading are lawful, the manner in which she transports cargo does not make her trading unlawful. If the steam tug herself is not qualified to carry on such trade from district to district, or between different places in the same district, the law is violated by her. But if she is so qualified, then no offence is committed, for in fact, as well as in law, it is the steam tug that is found trading, and not the boxes or boats that contain the coal. The law regards the ship or vessel as an offending agent—as a body that by her own capacity carries on the trade—and if she is a mere scow or floating box, attached to another vessel that pulls or moves her, her character is lost in that of the moving and acting vessel that carries her along.

"Put the case that a steam boat has a constant attachment to her sides, of two such boats carrying coal or other merchandize; can it be doubted that the steam tug

is the trader, and that her papers protect the trade? If unlawful trade is carried on with, or from, the boats, can it be doubted that the bond given upon the enrolment of the steam boat, to secure the United States against her being employed in an unlawful trade, is forfeited? And it is this that constitutes the security of the government against unlawful trading by such boats; that they are a part, or adjunct of the vessel that navigates them, and as much a part of her, as her own boats during the whole voyage from beginning to end—for they are connected with her from the moment they are attached to her, and are incapable of motion to or from different districts, or different places in the same district, without her. If the steam tug is not the vessel found trading, then she would not be so, if she placed merchandize in her own boat, and towed it at her own stern; and if such canal boats are to be regarded as found trading, then the boat of the steam tug, if laden, would be so regarded, and the bond of the steam boat would not be answerable for any unlawful trading with or from the boat. Such a view of the act cannot be defended. There is no law that compels a coaster to carry her cargo in her hold. She may carry it on her deck. She may stow it in her boats on deck. If necessary, or convenient, she may tow her boat with cargo in it. Whatever she tows and moves from district to district, or between different places in the same district, is her trading. If lawful to her, it is lawful to the goods she carries, and to the boats in which they are carried. If unlawful to her, her bond is forfeited.

"Again, unless some distinction is made in behalf of open boats, not decked, in carrying coal from district to district, when drawn by another boat, I know not how the most ordinary intercourse between different districts on the same river is to be carried on. From Bristol, in Pennsylvania, to Burlington, in New Jersey, coal must be transhipped at Bristol, into an enrolled coaster, and carried under deck to Burlington, on the opposite side of the river. I think it cannot be protected in the open boat, under the section which exempts from forfeiture boats employed in the harbor of a city or town. The coal boats are not so employed; and the harbor of Bristol is not the harbor of Burlington, nor vice versa. The evils of the contrary construction seem to be immense.

"After careful consideration of the case, under the acts of congress, I am of the opinion that the boats in question cannot be legally enrolled and licensed; and that, whether in a canal, pulled by horse or mule, or on tide water, or in an open river or bay, attached to a steam tug which draws them with their loading of coal, they are not in violation of law, nor is the law violated in any way, in their being drawn from district to district, or between different places in the same district, by a steam tug, if the steam tug herself is enrolled and licensed to carry on the coasting trade.

"Hor. Binney.

"Philada., May 13, 1845."

"A suggestion has been made by one of the managers of the company, which, as an illustration of part of the preceding opinion, appears to have great force. The penalty under the sixth section for trading with domestic produce, is the payment of the same fees and tonnage as ships or vessels not belonging to the United States. But the tonnage is matter of admeasurement depending on a deck. How then can the penalty be applied to an undecked boat? This also shows that congress did not mean to include such a boat within the prohibition.

"Hor. Binney.

"Philada., May 14, 1845."

"Philada., May 14, 1845. I fully concur in the foregoing opinion of Mr. Binney.

"J. K. Kane."

"I do not doubt that the floating coal chests or boxes used on the Lehigh and Delaware Canals, and particularly described in the opinion of Mr. Binney, would be embraced by the general phrase 'vessel' employed in the repealed act of congress of the 1st of September, 1789, and in the subsisting act of the 18th of February, 1793, relating to the coasting trade. Their rough and primitive character, and their being without masts, or decks, or keels, or rudders, could not withdraw them from the comprehensiveness of that term. Nor do I doubt that such vessels, although unprovided with a motive power within themselves, being without sails, or steam, or even oars or pushing poles, might, nevertheless, if dragged from one side of a river in one collection district, to the other side, and into a different collection district, by means of open wherries or batteaux, or by long ropes, as it is still common with ferry boats or scows, fall within the general scope of those acts of congress, if otherwise liable to do so. Yet, I am clear in the opinion, that by these laws, the enrolment and licensing are mere modes of receiving particular privileges and immunities to certain descriptions of American vessels—not to all American vessels—and that these floating coal chests or boxes do not, and really cannot, come up to the requirements on which only they could be entitled to enrolment and license, or be held subject to the fees and tonnage of foreign vessels. These requirements are fully adverted to by Mr. Binney, or I would repeat them.

"G. M. Dallas.

"May 17, 1845."

Before and after the date of these opinions, canal boats of other kinds, with motive power of their own,—sails, oars, or steam,—were also used for transporting coal and other cargoes through canals, and from thence,

through navigable waters, to market. In the Delaware and Raritan Canal, in 1843, four canal boats with sails, and four others propelled by steam, were thus in use. In the slack water and canal navigation of the Connecticut, small steamers had been previously, and were afterwards used; and on the state canals of New York, steamers have since been used. Some of the boats, large and small, drawn by horses through canals, have always been provided with oars for use after leaving the canals. The number of such boats with oars has been reduced since the commencement of the use of steam tugs.

An act of July 20, 1846 (9 Stat. 39), "to exempt canal boats from the payment of fees and hospital money," was in the words, "The owner or owners, master or captain, or other persons employed in navigating canal boats without masts or steam power, now by law required to be registered, licensed, or enrolled and licensed, shall not be required to pay any marine hospital tax or money; nor shall the persons employed to navigate such boats receive any benefit or advantage from the marine hospital fund; nor shall such owner or owners, master or captain, or other persons, be required to pay fees or make any compensation for such register, license, or enrolment and license; nor shall any such boat be subject to be libelled in any court of the United States for the wages of any person or persons, who may be employed on board thereof, or in navigating the same." And all acts, &c., repugnant to this act, were thereby repealed.

"An act to regulate the admeasurement of tonnage of ships and vessels of the United States," was passed on May 6, 1864 (13 Stat. 69). In section 3 of this act, the phrase "open vessel," is used to designate a vessel without a deck. The section prescribes the manner of ascertaining by admeasurement, the register tonnage of vessels with a deck or decks, and also provides for ascertaining the tonnage of open vessels by admeasurement. Section 4 limits the charge for the measurement and certifying of tonnage, so that it shall not exceed one dollar and fifty cents for each transverse section under the tonnage deck, and three dollars for measuring each between decks above the tonnage deck, and one dollar and fifty cents for each poop, or closed in space, available for cargo or stores, or for the berthing or accommodation of passengers, or officers and crew, above the upper or spar deck. The act contains no express provision for any charge or compensation whatever, as to open vessels. Section 5 is in the words: "The provisions of this act shall not be deemed to apply to any vessel not required by law to be registered, or enrolled or licensed, and all acts, or parts of acts, inconsistent with the provisions of this act, are hereby repealed."

The concluding clause of the act of March 3, 1851, limiting the liability of ship owners (9 Stat. 635, 636), provides, that the act shall not apply to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation. The revenue act of July, 1862, § 15 (12 Stat. 558), imposed an additional tonnage duty on all ships, vessels, or steamers, entered at any custom house in the United States, from any foreign port or place, or from any port or place in the United States, or belonging wholly, or in part, to subjects of foreign powers, provided, that the tax or duty should not be collected more than once in each year on any ship, vessel, or steamer, having a license to trade between different districts of the United States. The internal revenue act of June 30, 1864, § 103 (13 Stat. 275), imposed a duty of 2½ per cent upon the gross receipts of every railroad, canal, steamboat, ship, barge, canal boat, or other vessel, or any stage coach, or other vehicle engaged or employed in transporting passengers, or property for hire. The amendatory act of March 3, 1865, § 4 (Id. 493), increased the tonnage duty still further; and exempted the receipts of vessels paying tonnage duty from the tax of 2½ per cent. The ninth section of the internal revenue act of 13th of July, 1866 (14 Stat. 136), amended the 103d section of the act of 1864, by striking out all after the enacting clause, and substituting enactments imposing a tax of 2½ per cent on the gross receipts from passengers and mail carried by railroad, canal, steamboat, ship, barge, canal boat, or other vessel or stage, coach or other vehicle, with incidental regulations, and with certain exceptions and qualifications. It was further provided, that all boats, barges, and flats, not used for carrying passengers, nor propelled by steam or sails, which are floated or towed by tug boats or horses, and used exclusively for carrying coal, oil, minerals, or agricultural products to market, should be required hereafter, in lieu of enrolment fees or tonnage tax, to pay an annual special tax of five dollars, for each boat of a capacity exceeding twenty-five, and not exceeding one hundred tons, and ten dollars for each boat of greater capacity. This proviso is repealed by the act of July 14, 1870. Section 33 of an amendatory act of March 3, 1867 (14 Stat. 484, 485), was in the words: "The tonnage duty now imposed on all ships, vessels, or steamers, engaged in foreign or domestic commerce, shall be levied but once within one year; and, when paid by such ship, vessel, or steamer, no further tonnage tax shall be collected within one year from the date of such payment."

An act further to prevent smuggling, &c., passed July 18, 1866 (14 Stat. 178), § 1, enacts that, for the purposes of the act, the term vessel, whenever therein used, shall be held to include every description of water-craft, raft, vehicle, and contrivance, used, or capable of being used, as a means or auxiliary of transportation, on or by water; and the term vehicle, to include every description of car-

riage, wagon, engine, car, sleigh, sled, sledge, hurdle, cart, and other artificial contrivance used, or capable of being used, as a means or auxiliary of transportation on land. Section 28 enacted, that all vessels, which, under the provisions of the above mentioned fifteenth section of the act of July 14, 1862, and fourth section of the amendatory act, of March 3, 1865, were exempted from paying tonnage duties more than once in a year, should pay the same at their first clearance in each calendar year; provided, that all licensed, and enrolled and licensed vessels, should pay the duty when taking out their respective enrolments or licenses, if the same had not been previously paid; and provided further, that nothing in the act should be construed to prevent customs officers from collecting such tonnage duty at the entry of any vessel during the year, if not previously paid; and provided further, that all vessels, which were subject to enrolment or license, should thereafter, be liable to the payment of the fees established by law, for services of customs officers incident thereto.

The twenty-fifth section of the act of July 14, 1870, to reduce internal taxes, &c. (16 Stat. 269), so amended section 15 of the act of July 14, 1862, and section 4 of the amendatory act of March 3, 1865, that no ship, vessel, steamer, barge, or flat, belonging to any citizen of the United States, trading from one port or point within the United States, to another port or point in the United States, or employed in the bank, whale, or other fisheries, should thereafter, be subject to the tonnage tax or duty provided for in those acts; "and the proviso in section 103" of the act of June 30, 1864, "requiring an annual special tax to be paid by boats, barges, and flats," was repealed. The intended subject of this repeal, was obviously the proviso contained in that part of the ninth section of the act of July 13, 1866, which had been thereby substituted for the 103d section of the act of June 30, 1864. The effect of the act of 1870, was to exclude wholly the application of previous and existing internal revenue laws to the boats in question.

The district attorney, Mr. A. H. Smith, and the assistant district attorney, Mr. Valentine, contended that the act of 1846, and the tonnage register act of 1864, were in effect legislative declarations that the act of 1793 was applicable to such boats, that the enactment in the revenue law of 1866, imposing a special tax, in lieu of enrolment fees or tonnage tax, was a legislative declaration, that such boats had been liable to such fees and tonnage tax, and that the repeal of the latter act in 1870, revived this two-fold liability. They contended, therefore, that if there had otherwise been doubt of the applicability of the act of 1793, the doubt was removed by the subsequent legislation.

Mr. Gibbons, for the claimant [Boyle], denied the applicability of the act of 1793, to such boats. He relied upon reasons and arguments contained in the above opinions of counsel. He also contended that the act could not be understood as applicable to vessels of a kind unknown when it was passed; that the transportation of coal in these boats, was not a trading within the meaning of the act; that the act of 1846, left open to future decision the question of the effect of the former act, exempting the boats from fees and charges, whether otherwise liable to them or not; that the tonnage act of 1864 did not annul the exemption, or create any new liability of such boats.

CADWALADER, District Judge. The word "trading" may have meanings which vary with its different applications. In laws concerning navigation, every vessel carrying a cargo or passengers may in general be considered as trading. Boats of the kind in question, though, in the language of the repealed proviso of the internal revenue act of 1866, "used exclusively for carrying coal, oil, minerals or agricultural products to market," would be considered as trading, within the meaning of the act of 1793, if it were otherwise applicable. See [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 215–219. I think that the act of 1793, if the thirty-seventh section had been omitted, would have been applicable to everything afloat, navigable by motive power of its own, and transporting a cargo, whether the motive power were that of oars, that of sails, or that of steam, whether the vessel were of a kind which was known at the date of the act or not, and whether she had a deck or was open. If a more limited meaning were attributed to the phrase ship or vessel, purposes of the act might be frustrated. The thirty-seventh section shows, that an express exception was considered necessary, in order to prevent the act from being applicable to boats of more than five tons, moved only by oars. If the section had been omitted, there would be no more reason to exclude steamers from the application of the act of 1793, than to exclude vessels propelled, in the primitive manner, by oars, of whose use the frequency has been diminished by the innovation of steam tugs. See [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 219, 220.

Here, two alternative, and very different interpretations of the thirty-seventh section, must be considered. The section, according to one interpretation, excludes from the operation of every part of the act, all boats or lighters whatsoever, which are not masted; and, of boats and lighters which are masted and not decked, excludes only such as are employed in the harbor of any town or city. According to the other interpretation, the qualification of being employed in the harbor of a town or city, extends to all the subjects of the section; so that the exception from the operation of the act includes no boat or lighter not masted, unless it is employed in such a harbor. According to the former interpretation, the boats in question, as they

have no mast, could not be subjects of the act of 1793, for any purpose. According to the latter interpretation, the question of the applicability of the act, cannot thus be summarily disposed of. In deciding between the two interpretations of the thirty-seventh section, it must be remembered, that punctuation of a statute forms no part of it, and is not recognizable as controlling its interpretation. 4 Durn. & E. [4 Term R.] 65, 66; L. R. 3 C. P. 519, 521, 522; 9 Gray, 385. And see [Ewing v. Burnet] 11 Pet. [36 U. S.] 54. But it is necessary to find, if possible, a meaning and purpose for every word of the section.

If the first of the interpretations be adopted, every word will have its fair and full effect. "Nothing in the act" will then "be construed to extend to any boat or lighter not being masted—or, if masted, and not decked, employed in the harbor of any town or city." But, according to the second interpretation, the word "and" has no effect, which is not repugnant or embarrassing. Therefore, if the question were new, I would have no difficulty in deciding that the thirty-seventh section of the act of 1793, excluded the boats in question from the application of the act of 1793, if it would otherwise have been applicable to them. But the second interpretation of the section, appears to have been so generally adopted, though I do not see for what sufficient reason, that I am constrained to doubt the correctness of my opinion upon the point. Therefore, as I am also of opinion that, although the second interpretation were the correct one, the conclusion would nevertheless be the same, I will, in what follows, consider the question of the applicability of the act of 1793 to these boats upon the assumption, which seems to have been so general, that the thirty-seventh section does not apply to them, but applies to such boats only as are employed in the harbor of a town or city. I think the act inapplicable to the boats in question, because they are without oars, or masts, or steam, or motive power of any kind which can be called their own. For this reason, they are not included in the ordinary general description, of ships or vessels, which is the only designation contained in the act.

A vessel of private ownership represents an organization which is part of the social system of the country to which she belongs. In this representative character, she has legal attributes, and legal rights, and may incur legal responsibilities, however and by whomsoever she may be navigated. [The China v. Walsh] 7 Wall. [74 U. S.] 53. And see [The James Gray v. The John Fraser] 21 How. [62 U. S.] 191, 192. The sole purpose of this organization is her navigation, and its incidents. That which cannot be made navigable through any internal command of a propelling force, cannot, in a strict sense, be, nautically speaking, a vessel, though she may be called such for the convenience of identifying her with what was once navigable, and may, in some cases, become so again. This remark applies variously under different circumstances. It may apply to a vessel when she is laid up in a port, at home or abroad, or when she is an absolute wreck, whether stranded or afloat; and may have a qualified applicability to a vessel's own boat when it is towed astern. The case of a sailing vessel which is lashed to the side of a steam-tug, is also temporarily an example. The supreme court have said, that "whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessarily, or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage, through the fault of those in charge of the vessels, must, under such circumstances, look to the tug, her master or owners, for any injuries that vessels or cargo may receive by such means." [Sturgis v. Boyer] 24 How. [65 U. S.] 122. When the towage is by a hawser, the vessel towed is not liable except so far only as her movements are at her own command, and she is in fault, or negligent in respect of them. [The James Gray v. The John Fraser] 21 How. [62 U. S.] 193, 194.

The reason is much stronger, and its application more simple, in the case of the boats in question. They are absolutely, at all times, without motive power at their command. Though ordinarily called boats, they have been also more properly designated as floating trunks or boxes. They are not subject to admiralty and maritime jurisdiction. Judge Nelson was inclined to this opinion. He thought that they were not ships or vessels, when upon public navigable waters, because they had no power as respects navigation upon such waters. The Ann Arbor [Case No. 408], A. D. 1858. The intimation was extrajudicial, the decision upon the merits being against the libellant. There had, however, been a previous decision of Judge Grier against the admiralty jurisdiction. He said that such boats were not ships or vessels in the maritime sense of the term; and added, that they do not take out a coasting license. Jones v. The Coal Barges [Id. 7,458], A. D. 1855. This dictum is in point upon the present question. But it will be necessary to consider the question upon original grounds, because the case before Judge Grier was that of one of the canal boats on the Monongahela, which are described in the report somewhat differently from the description of the boats in question here; and also because laws concerning navigation may apply incidentally to what are not subjects of admiralty and maritime jurisdiction.

Certainly, however, such a boat as is here in question is not a vessel in any sense in which the word is ordinarily used in laws concerning navigation. In the act of 1851, limiting the

liability of ship owners, the general phrase, "ship or vessel," must be understood as applicable only to a vessel responsibly navigated. Therefore, if the concluding provision, that the act shall not apply to the owner of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation, had been omitted, the former general phrase, if applicable to canal boats, would not have included any others than such as have sails, oars, or steam power of their own. To make the word vessel, or boat, in an act of legislation of any kind, applicable to the boats in question, superadded words of special description have been considered necessary. Thus, in the repealed proviso of the internal revenue act of 1866, they were described as boats not propelled by steam or sail, which are floated or towed by tug-boats or horses. In the first section of the act of the same year against smuggling, it was thought necessary to provide expressly that for the purposes of that act the term vessel should be held to include every description of watercraft, raft, vehicle and contrivance used, or capable of being used, as a means or auxiliary of transportation, on or by water. This amplified form of description would not have been adopted, if the word "vessel," unexplained, had been deemed of coextensive import. If the description, thus amplified, includes the boats in question for the purposes of that act, they are so included by force of the phrase "means or auxiliary of transportation on or by water."

Vessels to which the act of 1793 applies, and which, on compliance with its requirements, are entitled to the privileges and exemptions conferred by it, must be owned and commanded by citizens of the United States. Before any boats like those in question were known, an act of congress of March 12, 1812 (2 Stat. 694), allowed steamboats employed only in rivers or bays of the United States, owned wholly or in part, by resident aliens, to be enrolled and licensed as if they belonged to citizens of the United States, according to, and subject to, all the conditions, limitations and provisions contained in the act of 1793. The tugs which tow the boats in question may thus be owned by resident foreigners. The enactment of 1812 was not mentioned in the argument of this case. But my attention was drawn to the act by an observation of counsel, that a great many of the boats in question are owned, or in the charge of resident aliens. If such a fact has been wholly disregarded for the greater part of half a century, the most rational explanation is, that the exemption of the steam tug, which alone has the motive power, has been regarded as including that of the tow which has no independent navigability. The suggestion that the character and amount of the fees and charges for transporting coal, or any thing else, from the interior of the country to a domestic market by towage, may vary as the Irishman, German or Englishman owning the tow or having charge of it, has, or has not, become a naturalized citizen, seems absurd.

If the foregoing views are correct, the words of the act of 1793 do not apply to canal boats having no motive power of their own, but, according to the second interpretation of the thirty-seventh section, apply to canal boats of a certain tonnage, which, though without masts or steam-power, have oars. That the latter boats, when in rivers and bays, have the command of their own movements, with consequent responsibilities, might be a sufficient reason, that they should be requirable to be licensed, or enrolled and licensed. But that they should incur the incidental burdens of coastwise maritime navigation was nevertheless very incongruous to the nature of inland navigation. This may explain the purpose, or one of the purposes, of the act of July 20, 1846. It may have been a reconciling purpose to remove this incongruity, and yet fulfil the exigency of the act of 1793, by relieving canal boats with oars of all maritime burdens without dispensing with the requirement of a license or enrolment and license. Another purpose of the act of 1846 may have been to meet provisionally in like manner, any future decision of the case of canal boats like those now in question, which had then been a disputed case. If this two-fold purpose existed it would have been attained by defining in the act, the subjects of it as "canal boats without masts or steam-power," and exempting them from the peculiarly maritime burdens of hospital dues, fees and charges of registering, enrolling or licensing, and subjection to libels for wages. The boats thus exempted, whether provided with oars or not, were according to this interpretation, such boats only as were then, "by law, required to be registered, licensed, or enrolled and licensed."

The opinions of counsel which have been mentioned in the course of the argument, and the accompanying letters from the officers of canal companies, were filed in 1845, in the treasury department, where they now remain. There can be little doubt, if any, that these papers were before the eyes of the framer of the act of 1846. It is, therefore, extremely probable that he had in view the two-fold purpose which has been suggested. But, unless the words of the act sustain the consequently suggested interpretation, it cannot be adopted. The intention of a law maker is to be legally deduced, not from what may thus have been his probable purpose, but from the meaning of the words which he has used. Here I doubt greatly whether the meaning of the words authorize the suggested interpretation of the act of 1846. In the contexts of this act, wherever the phrase canal boats without masts or steam power occurs, it is never used otherwise than in connection with persons employed to navigate them. It is true that the former expression is once used with a disjunctive relation to the owners. But it is also twice used without any possi-

bility of such an alternative relation. The words, "nor shall the persons employed to navigate such boats receive any benefit or advantage from the marine hospital fund," and the provision against libelling any such boat for the wages of any person or persons employed on board or in navigating her, are thus applicable to such canal boats only as have oars. Therefore, I incline to the opinion that the application of the words of the act is limited to such as have oars. The provision against libeling for wages would otherwise be insensible, as well as the provisions concerning persons navigating the boats. The only doubt is, whether the act applied likewise to the boats in question. This doubt is, to say the least, very great.

The point is quite immaterial, if I am right in thinking as I do, that there is no intention apparent in the act of 1846, to determine to what boats the act of 1793, applied. It was, however, in the argument, assumed that the act of 1846 indicates a belief on the part of congress, that all canal boats without masts or steam power, including the boats in question, were, by law, required to be registered or licensed, or enrolled and licensed; in other words, a belief that the act of 1793 applied to all such boats. Though I think the assumption erroneous, it will not be amiss to consider whether, if the words of the act of 1846 imported such a legislative belief, they would affect the decision. If such were the meaning of the words they would, as we have seen, misconstrue the act of 1793. Words of legislation importing an erroneous construction of a pre-existing statute have not the effect of a law establishing the construction as valid for the future, unless they also import a declaratory or other enactment. This rule, however well established, is very seldom applied, because there is no invariable form of a declaratory statute, and the legislature may at present enact how a prior one shall be construed in future. We have also constant experience that successive statutes on the same subject may be read in connection with one another and harmonized, as if they together constituted one and the same law. These explanations and qualifications of the rule do not abrogate it. My predecessor, Judge Hopkinson, stated the rule too broadly perhaps, when he denied that a legislature had a right to impose upon a court their construction of their statutes previously passed. He said that it was for the court to construe the law; but added that it was the right and duty of a judge to look into all the statutes made upon the same subject to discover what was the intention of any of their provisions, thus to ascertain the true meaning and construction by his own judgment, and not by any subsequent legislative declaration of intention or construction. 8 Pet. [33 U. S.] Append. 734. The rule, and a proper qualification of it, were stated with precision by Chief Justice Marshall. He said that a mistaken opinion of the legislature concerning the law, does not make the law, but that if the mistake is manifested in words competent to make the law in future, there is no principle which can deny them this effect, and that a law, not in form declaratory, though inoperative on the past, may act in future, by expressing the sense of the legislature on the existing law as plainly as a declaratory act. [Postmaster-General v. Early] 12 Wheat. [25 U. S.] 148, 149. In an English case, Le Blanc, J., said, that a court if clear in their construction of a statute, would be bound to give it effect, though they should be of opinion that an erroneous construction had been put upon it by subsequent statutes. 16 East, 326. In that case, the framers of a statute had, in reciting a prior statute, misconstrued it. Lord Ellenborough said that he might be under a compulsion, through subsequent statutes, to put a perverse and unnatural interpretation on the original statute, but that he would endeavor as far as he could, without violating the fair rules of construction, to maintain the integrity of the original text, unvitiated by subsequent construction, if he might so say. Id. 319, 320. After stating and explaining the misconstruction, which consisted in misreciting the effect of the original statute, he asked whether the framers of the misconstruing statute had imposed upon the court, by any enactment, the necessity of adopting that which he must assume to be their error if the words of the prior act were intelligible in themselves. In his opinion the recital in the subsequent act could not overrule the plain intelligible sense of the prior one. Id. 324, 325. Where a perpetual statute, English or colonial, was, through legislative inadvertence, continued in force by the words of a subsequent statute, until the end of the legislative session, or for two years, the perpetual statute was not abrogated, but continued in force after either period limited. Hobart, 215; T. Raym. 397. An act of the legislature of Pennsylvania subjected all real estate within one of the corporate municipalities of a county to a lien for assessments, to which all real estate in the county had, by a former act, been made subject The supreme court of the state said that the passing of the subsequent act, at most, only proved that the legislature were not then aware that the assessments had been made liens by the previous act; and added that it could not be sustained for a moment, that the legislature's mistake or misapprehension of the law in this respect would make it different from what it really was. 5 Rawle, 317. A series of English statutes prohibiting and restricting commerce, &c., with enemies were forensically reviewed in 1794. 6 Durn. & E. [6 Term R.] 38–44, 47–50. Many of these enactments indicated that the parliament received the prohibitions necessary in order to make such trading and intercourse illegal.

Most of the legislative provisions on the subject were otherwise unnecessary. But they were wholly disregarded in this respect by decisions of the king's bench, (6 Durn. & E. [6 Term R.] 23, 35; 8 Durn. & E. [8 Term R.] 548, 561), and had previously been so disregarded by the court of admiralty (1 C. Rob. Adm. 196, 220).

If the law of 1846 had contained words of equivalent effect with a recital that the boats in question were included in the law of 1793, the only enactment in the law of 1846 would be the concession of an exemption from certain supposed liabilities. Such a legislative concession would not constitute an enactment including the boats in that description, or otherwise enlarging the effect of the act of 1793. The authorities which have been cited therefore, show that the decision of this case cannot be affected by the act of 1846. It is not necessary to consider the tonnage measurement act of 1864, because the fifth section excludes the application of the act to any vessel not required by the law to be registered, or enrolled or licensed.

As to every question in this case, the act of 1870 has excluded wholly the application of the internal revenue laws of 1862, 1864, 1865, and 1866. If they had continued in force, the only question which would have required attention, has, in principle, been disposed of in considering the act of 1846. This question would have arisen upon the words "in lieu of enrolment fees or tonnage tax," in the proviso contained in that part of the ninth section of the revenue act of 1866, which was thereby substituted for the 103d section of the revenue act of 1864. If these words indicated a legislative belief that the boats in question were subject to the payment of enrolment fees or tonnage tax, they were words not of enactment, but recital, and misrecited the existing law. But the repeal of the proviso deprives the question of any importance which might otherwise have been attributable to it. The only act of congress, which has not been sufficiently considered, is a provision of the twenty-eighth section of the act of 1866, against smuggling. The provision is, that all vessels, which were subject to enrolment or license, should thereafter be liable to the payment of the fees for services of customs officers, incident thereto. This provision, considered as an isolated enactment, would be of no significance in the case. If, as to those canal boats which are included in the description of vessels, in the act of 1793, the provision repealed the exemption from certain maritime charges, of which such canal boats had been relieved by the act of 1846, the process of legislation to deprive them of the exemption, was indirect, and the exposition of the purpose to do so was obscure. But, if such was the legislative intention, it could not extend beyond the subjects of the former exemption; and, if I have rightly interpreted the act of 1846, which conceded the exemption, the act applied only to such canal boats, without masts or steam power, as have oars.

The point of inquiry is, however, different. The question is upon the effect of the 1st section of the act against smuggling on this provision of the twenty-eighth section. The first section, which has already been quoted, extends, for the purposes of the act, the meaning of the word vessel, so as to make it, for such purposes, include every description of watercraft and means or auxiliary of transportation on or by water. The title of the act is "An act further to prevent smuggling and for other purposes." The provision of the twenty-eighth section applies to all vessels subject to enrolment or license; and the argument for the United States, if I rightly understand it, is, that the provision must be read as if its words were: "All vessels, including every description of watercraft and contrivance used or capable of being used as a means or auxiliary of transportation on or by water, which are subject to the enrolment or license, shall hereafter be liable to the payment of the fees established by law for services of customs officers incident thereto." If this were the actual phraseology of the twenty-eighth section, it would have no effect beyond subjecting to payment of the fees, all such watercraft, &c., as were already subject to enrolment or license. Whether it would be wise or unwise to abrogate thus far the exemption conceded in 1846, the purpose to do so would be intelligible. But the phrase, "purposes of this act," in the act of 1866, would be extravagantly extended beyond its fair import, if made to enlarge inferentially the purposes of other statutes whose provisions may be supposed incidentally in question.

To effectuate the legitimate purposes of the act against smuggling, boats, trunks or boxes, like those in question, may in certain cases, be forfeitable, as appendages of the tug which tows them, for her violations of penal enactments. Whether, in other cases, they may, when themselves peccant receptacles of smuggled property, or when otherwise used unlawfully, be forfeitable independently of such tug, is an inquiry foreign to the question whether they are, when towed by her, subject to distinct enrolment or licensing under the act of 1793. The purpose of the first section of the act of 1866, was merely to prevent its own provisions in subsequent sections, from being liable to evasion through any mis-description, or doubtful description of watercraft. It was no purpose of the act to duplicate requirements of the act of 1793, by requiring enrolment or license of the tows which are without motive power, and of whose tug a license was already required. As these tows, though innavigable, float when detached from their tug, legislation requiring

them to be named, and enrolled, or licensed, might be useful to prevent smuggling, or facilitate its detection. But the inference of such a motive of legislation, from words of enactment imposing charges which are properly incidental to such navigation only, as whether coast-wise or foreign, is peculiarly maritime, would seem irrational.

Libel dismissed.

Case No. 15,916.

UNITED STATES v. OKIE.

[5 Blatchf. 516.] [1]

Circuit Court, S. D. New York. Nov. 19, 1867.

OFFENCES AGAINST POSTAL LAWS—EMBEZZLEMENT—INDICTMENT.

1. An averment, in an indictment, under the 12th section of the act of July 1, 1864 (13 Stat. 337), for embezzling and destroying a letter containing money, which had come into the possession of the defendant as dead-letter clerk in the post-office at New York, that the letter was intended to be conveyed by post, and that it was a letter addressed and directed to a person named, at Philadelphia, is not an averment that the letter was intended to be conveyed by post from New York to Philadelphia.

2. It is not necessary to aver, in such indictment, that the letter embezzled was intended to be conveyed to any particular place, an averment that it was intended to be conveyed by post being sufficient.

[Approved in U. S. v. Laws, Case No. 15,579.]

3. Nor is any averment as to the ownership of the money necessary, in such indictment.

This was a motion in arrest of judgment, and for a new trial. The defendant [Benjamin F. Okie] was indicted, under the 12th section of the act of July 1st, 1864 (13 Stat. 337), for embezzling and destroying a letter containing money, which had come into his possession as dead-letter clerk in the post-office at the city of New York, and was found guilty.

Benjamin K. Phelps, Asst. U. S. Dist. Atty.

Robert D. Holmes and Edward D. McCarthy, for defendant.

BENEDICT, District Judge. The first point taken is, that the indictment charges the embezzlement of a letter intended to be conveyed by post from New York to Philadelphia, whereas the evidence showed that the letter, although mailed in New York, and addressed and directed to Francis Keyser at Philadelphia, was deposited without prepayment of postage, with the intention of having it go through the hands of the defendant, on its way to the dead-letter office in Washington, where it must by law be sent, because the postage was not prepaid. This position is based upon an erroneous reading of the indictment. There is no averment in the indictment that the letter in question was intended to be conveyed from New York to Philadelphia. The averment is, that the letter was intended to be conveyed by post, without fixing the termini of the conveyance. In the latter part of the indictment, it is averred, that the letter "was addressed, directed to one Francis Keyser, at the city of Philadelphia." This is, however, a mere description of the letter, not of the intent as to its conveyance.

But it is urged, that, if this be so, then the indictment must be held defective for omitting to designate any place to which the letter was to be conveyed; and the case of U. S. v. Foye [Case No. 15,157], is cited as authority. The decision in that case does not sustain the position. All that was decided in that case was, that, when the indictment does designate the place to which the letter is to be conveyed, the proof must conform to the averment. In that case, the averment was, that "a letter addressed to John Blake, Ipswich, was mailed, to be conveyed by post to the town of Ipswich aforesaid"—a very different averment from that in the present case. Furthermore, that case arose under the act of March 3d, 1825 (4 Stat. 102), while this case is under the act of July 1st, 1864 (13 Stat. 337), which differs from the former act in this, that it provides, that "the fact that any such letter * * * shall have been deposited in any post-office * * * or in charge of any postmaster, assistant postmaster, clerk, carrier, agent or messenger, employed in the post-office establishment of the United States, shall be taken and held as evidence that the same was intended to be conveyed by post, within the meaning of this statute." Whatever may have been necessary under the act of 1825, it is quite clear, under this provision of the act of 1864, that, inasmuch as it is not necessary to prove more than the fact of the deposit of the letter in a post-office, or in charge of a post-office agent, it cannot be necessary to aver that it was intended to be conveyed to any particular place. The averment, in the words of the statute, that the letter was "intended to be conveyed by post," is sufficient, if indeed it was necessary to state more than that it was a letter deposited in the post-office, or in charge of a post-office clerk.

The only remaining point urged in behalf of the prisoner is, that the indictment is fatally defective in omitting to lay the ownership of the money in the letter, as being in some other person than the accused. As to this, it is sufficient to say, that the offence created by the act and charged in the indictment, is the embezzlement and destruction of a letter of a certain description, to wit, containing money. The gist of the offence is the taking and destroying the letter, not the converting of the money in the letter. Larceny of money in a letter is elsewhere in the statute made a separate offence, but that is not the charge made here. In this provision of the statute, the taking of the money is not made

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

an element of the crime, and, therefore, no averment as to its ownership is necessary.

The motion must, accordingly, be denied, and judgment be entered on the verdict.

Case No. 15,917.

UNITED STATES v. OLIVER.

[4 Law Rep. 197.]

District Court, D. Massachusetts. Aug. 6, 1841.

OFFENCES AGAINST POSTAL LAWS — ILLEGALLY OPENING LETTER—ANONYMOUS LETTERS.

1. Under the circumstances of this case, it was *held*, that the defendant in breaking open a letter, deposited in the post office had not violated the act of congress of 1825, c. 275, § 21 [3 Story's Laws, 1991; 4 Stat. 107, c. 64].

2. Whether anonymous letters were intended to be protected by that act,—quære.

This was a complaint against the defendant, as postmaster of Lynn, for opening a letter, which contained only scrawls and incoherent nonsense, without signature, and was addressed to one Barker, of Lynn, who, it appeared, lived in that place. The letter was dropped into the Lynn post office. It appeared, that the prisoner had been informed that many letters of this description had been in the post office, and that this bore the same appearance and handwriting; that he thereupon opened it, and when Barker called at the office, he delivered it to him, saying that he had taken the responsibility of opening it.

Mr. Dexter, U. S. Dist. Atty., stated that the complaint was founded upon the 21st section of the post office act of 1825, which makes it criminal for any person employed in any of the departments of the post office establishment, to open any letters "with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post." The allegation in the complaint was, that the defendant, being postmaster, had opened a letter which had come to his possession and was intended to be conveyed by post.

Mr. Ward, for defendant, contended that the words "intended to be conveyed by post," in the 21st section, were to have some meaning; that they qualify what precedes, and show that there were some letters contemplated to come into the post office establishment, not to be conveyed by post; which could be no other than box letters, so called, that is, letters to be delivered in the place where they were lodged. He cited the 36th section, which provides that "for every letter lodged at any post office, not to be carried by post, but to be delivered at the place, where it is so lodged, the post master shall receive one cent of the person to whom it shall be delivered," and he contended that box letters were here expressly described as letters "not to be carried by post." He further contended, that this was the only provision in the act for box letters being received into the post office; that no postage was imposed on them; that the 13th section, which prescribes the rates of postage, does not extend to them, and that the one cent received by the postmaster, under the 36th section, goes to his own use alone. He insisted further, that there was no evil intent in this case.

Mr. Dexter replied, that he did not contend there was any bad intention on the part of the prisoner; but he insisted that such intent was not necessary; that by the 21st section, the opening a letter was made criminal without reference to the intent or design; that opening a letter with intent to pry into business or secrets, or obstruct correspondence, was a distinct offence, so made by the 22d section, which he cited, and which makes it criminal, if any person "shall open any letter or packet which shall have been in a post office or in custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets." As to the other point, he argued that box letters came within the mischief intended to be guarded against in the 21st section, and ought, therefore, to come within the remedy and the sanction; that great evils would arise, if they were not thus included; and that they might be deemed letters intended to be conveyed by post, although the 36th section describes them as letters, not to be carried by post, because there was a distinction between "conveyed" by post and "carried" by post.

SPRAGUE, District Judge, delivered his opinion very briefly, observing that the complaint was founded wholly upon the 21st section. No offence under the 22d section was charged, or presented for his consideration. The complaint alleged, that the letter in question was intended to be conveyed by post: this allegation followed the language of the statute, and was admitted to be essential to constitute the offence charged. It would seem, that the language was intended, as some qualification of the terms which preceded it, and contemplated two classes of letters as coming to the possession of the post master; one to be conveyed by post, and the other not to be so conveyed. What letters were embraced in the latter class? The same statute in the 36th section said, that letters to be delivered in the place where they were lodged, were letters "not to be carried by post." Thus the law itself defined and described certain letters as not to be carried by post; but it was insisted, that there was a distinction between the words "carried" and "conveyed," and that box letters were to be "conveyed" by post, although not to be "carried" by post within the meaning of the law. The whole question, then, presented for the consideration of the court, was, whether there was such a distinction, between "conveyed" by post,

and "carried" by post, as to be the foundation of a crime; for it was only on this distinction, that the complaint was attempted to be maintained. He thought, as the law itself had placed box letters in the class not to be carried by post, it would be refining too much to consider them still as belonging to the class to be conveyed by post, that he could not build up a crime upon a distinction so nice and critical, and he must, therefore, discharge the defendant. He suggested further, that a doubt might arise, whether such a missive as this, being mere scrawls and incoherent nonsense, without signature, would be within the protection of the penalties of the law, it being really no communication, but a fraud upon the person to whom addressed and upon the post office department, tending to prejudice the government. But he suggested this point only as a matter of inquiry, upon which he had formed no opinion.

Case No. 15,918.

UNITED STATES v. OLNEY.

[1 Abb. (U. S.) 275; Deady, 461; 1 Am. Law T. Rep. U. S. Cts. 119; 8 Int. Rev. Rec. 177.] [1]

District Court, D. Oregon. Nov. 2, 1868.

LOTTERIES—TAX—TOWN LOT SCHEME.

1. A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved or prize lots forms a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a "lottery" within the operation of a law imposing a tax on lotteries, for purposes of revenue.

[Cited in Hudelson v. State, 94 Ind. 429; State v. Moren, 48 Minn. 559, 51 N. W. 618; State v. Mumford, 73 Mo. 651; Yellow-Stone Kit v. State (Ala.) 7 South. 338.]

2. Various definitions of the term lottery,—collected.

[Cited in Yellow-Stone Kit v. State (Ala.) 7 South. 339.]

3. A revenue law ought to be liberally construed, with a view to attain the object for which it is enacted,—viz: the raising a revenue.

[2] [This action was brought to recover the sum of $100, alleged to be due the United States from the defendant, as a special tax for engaging in the business of a lottery dealer. It was commenced October 17, 1867, and tried by the court, without the intervention of a jury. The facts of the case are stated in the findings of the court, as follows: (1) That the defendant, on March 15, 1867, at Astoria, in the district aforesaid, being the owner of a large number of town lots in such town of Astoria, did then and there divide the greater portion of the same into six hundred parcels, for distribution by lot among the persons who should become the purchasers thereof, as hereinafter stated. (2) That three hundred of such parcels consisted of one lot each, of not less than fifty dollars value; and the other three hundred of such parcels, in and by such division and the scheme hereinafter stated, were denominated prize parcels, and consisted of two, four, and six lots each, of the value of fifty dollars each, and single lots varying in value from one hundred to six hundred dollars, and one house and lot of the value of one thousand dollars; and also, one cottage and three lots of the value of five thousand dollars. (3) That afterwards the defendant prepared a scheme for the sale and distribution of such parcels of lots and presented the same to the public by advertisements in different newspapers in general circulation, and by a descriptive pamphlet, widely circulated, for the purpose of inducing the public to purchase tickets or shares, representing parcels in such scheme. (4) That by the scheme aforesaid, each of the parcels of property aforesaid, were offered for sale at an uniform price of fifty dollars; and that on and before May 15, 1867, the defendant sold all the tickets or shares aforesaid, at the uniform price aforesaid, and thereupon in pursuance of the scheme aforesaid, the number of the lot or lots constituting each parcel was written on separate ballots and sealed up and placed in a box, and the name of each purchaser was written on as many separate ballots as he had purchased tickets or shares, and sealed up and placed in another box; and thereafter, on the day last aforesaid, under the supervision of a committee of three persons, selected in pursuance of such scheme, a ballot was drawn from each of the boxes aforesaid, and the name of the purchaser and the description of the property thus drawn were recorded by a clerk, and then another ballot was so drawn from each of such boxes, and recorded by the clerk as aforesaid, until all ballots were drawn from each box, and recorded as aforesaid; and thereupon the persons whose names were thus drawn; were, in pursuance of such scheme, declared to be the purchasers of the parcel or parcels of property so drawn by them, and the defendant executed deeds to them, therefor, accordingly. (5) That about one third of the contracts for the purchase and sale of the tickets or shares in the scheme aforesaid, were in writing, in two parts, one of which was signed by the defendant, and in these words: "Astoria, May 1, 1867. This certifies that Paul Corno has subscribed for twenty shares in my scheme for the sale and distribution of town lots in Astoria, Oregon, and will be entitled to a warranty deed for the property, which shall be drawn

[1] [Reported by Benjamin Vaughan Abbott, Esq., and by Hon. Matthew P. Deady, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 1 Abb. (U. S.) 275, and the statement is from Deady, 461.]

[2] [From Deady, 461.]

to him according to the prospectus, on payment of the note given for the purchase money. (Signed.) Cyrus Olney." And the other of which was signed by the subscriber, and in these words: "$1,000. Astoria, May 1, 1867. For value received, I promise to pay to the order of Cyrus Olney, one thousand dollars, in gold coin. This note is given for twenty shares in the Astoria town lot distribution, and is payable when the deed is ready for delivery, according to the prospectus. (Signed.) Paul Corno." (6) That the defendant during the period and between the dates aforesaid, or at any time thereafter, on account of the scheme and drawing aforesaid, did not pay to the United States the special tax, or any part thereof, by law imposed upon lottery ticket dealers. And, as a conclusion of law from the premises, the court finds that the defendant on and between the dates aforesaid, in selling the tickets or shares as aforesaid, in the scheme aforesaid, was engaged in the business of a lottery ticket dealer; and that thereby such defendant became and still is liable to pay to the United States a special tax of one hundred dollars.] [2]

DEADY, District Judge. This action is brought to recover the sum of one hundred dollars, alleged to be due the United States from the defendant, as a special tax for engaging in the business of lottery dealer. It was commenced October 17, 1867, and tried by the court without the intervention of a jury, on November 13 thereafter, and has since been continued from term to term for deliberation and advisement. The facts of the case are stated in the findings of the court.

The law imposing this tax is found in subdivision 6 of section 79 of the internal revenue act of June 30, 1864, as amended by the act of July 13, 1866 (14 Stat. 116), which reads as follows: "Lottery ticket dealers shall pay one hundred dollars. Every person, association, firm, or corporation which shall make, sell, or offer to sell lottery tickets or fractional parts thereof, or any token, certificate, or device representing or intending to represent a lottery ticket or any fractional part thereof, or any policy of numbers in any lottery, or shall manage any lottery, or prepare schemes of lotteries, or superintend the drawing of any lottery, shall be deemed a lottery ticket dealer."

The statute imposes a tax upon a dealer in lottery tickets, and also declares who shall be deemed such dealer, but it does not define or limit the signification of the word "lottery." A person to be liable as a dealer in lottery tickets must, in some of the modes or instances mentioned in the statute, be engaged in the preparation, conduct, or management of a lottery, so that the liability of the defendant turns upon the question, what is a lottery? The answer to this question must be found in the meaning of the word, as established by usage and authority. I assume, with the argument for the defendant, that the legal and popular meaning of the term coincides, and that it is used in the statute according to its primary and general acceptation. Indeed, I am not aware that the word has any technical or peculiar significance.

The word "lottery" is defined and used as follows by lexicographers and writers: "A distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value either in money or other articles." Worcest. Dict. "A disposition of prizes by lot or chance." Webst. Dict. "A scheme for the distribution of prizes by chance." Bouv. Dict. "A kind of game of hazard, wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate." Rees. Cyclopædia. "A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks." Am. Cyclopædia. "That the chance of gain is naturally over-valued, we may learn from the universal success of lotteries." Smith, Wealth Nat. bk. 1, c. 10.

All these authorities agree that where there is a distribution of prizes—something valuable—by chance or lot, that this constitutes a lottery. But the definitions from Worcester and the American Cyclopædia are the most complete. From each of these it expressly appears that a valuable consideration must be given for the chance to draw the prize.

Tried by this standard, it is manifest that the scheme prepared and carried out by the defendant for the sale and distribution of these town lots was a lottery. True, the purchasers of tickets or shares were in any event to get something—at the least, a lot, for the purposes of this scheme estimated to be worth fifty dollars. But it is not probable that any one would have purchased a ticket if it was certain that he would have received nothing in return but one of these so-called fifty dollar lots. If the first three hundred lots could have been sold for fifty dollars each on account of their market value, certainly the defendant would not have been improvident enough to put the other three hundred prize parcels into market at the same price, while their actual value was from one hundred dollars to five thousand dollars each. This is neither reasonable nor probable.

The chance of obtaining five thousand dollars for fifty dollars was the enticing object which the scheme held up to the public as an inducement to purchase the shares, and this "chance of gain," upon which depends "the universal success of lotteries," was to be determined by lot. This scheme has all the attributes and elements of a lottery. It is a distribution by lot of a certain number of prizes among twice the number of persons; and

[2] [From Deady, 461.]

that, too, of prizes very unequal in value. The certificate of purchase issued by the defendant to each purchaser is a ticket which entitled the holder to the chance of drawing a prize of from two to one hundred times the value of the price of the ticket. It is evident that the first three hundred lots could not have been sold by any ordinary method at fifty dollars each, if at all. This is also probably true of many of the prize parcels. Whatever may have been their intrinsic or future value, the evident aim of the scheme was to sell them for more than their market value, and this was to be accomplished by an appeal to the universal passion for playing at games of chance. The purchase of the ticket and the payment of fifty dollars was made for the chance of obtaining one of the prize parcels, represented to be worth many times that sum. This was a lottery according to the common acceptation of the word. It was a lottery within the definitions in the dictionaries.

It matters not, even if the purchaser was to receive the full value of his money in any event. As a matter of fact, the money was paid for the chance of the prize also, and would not have been paid without this inducement. The sale of the ticket by the defendant gave the purchaser this chance to obtain something more than he paid for. This was dealing in lottery tickets within the purview of the revenue act.

The argument of the defendant assumes that the purchasers of the property bought six hundred parcels in common, and after thus becoming the owners of the same, adopted this method of distributing or dividing it among themselves.

If persons already owning family plate, pictures, or other property, not susceptible of division, or even equal division, choose to distribute by an appeal to lot what has thus come to them before they had any scheme of so distributing it, they are not within the definition of a lottery, nor liable to this special tax. They have not given a valuable consideration for the chance of obtaining something of much greater value—a prize.

The argument of the defendant is ingenious and plausible, but it is based upon an incorrect assumption. It ignores the fact—the mainspring of the whole transaction—that the tickets were sold and purchased for the avowed purpose of giving to each of the purchasers a chance to obtain a prize parcel by means of this subsequent allotment. The division by lot was not an afterthought of the purchasers, but a prominent part of the original scheme of sale and distribution as prepared by defendant. No purchaser bought any particular lot or parcel, or any undivided interest in the whole property. Each purchaser bought the right to have, by allotment, one of the three hundred lots, estimated to be worth fifty dollars each, and the chance of obtaining instead of such lot one of the three hundred prize parcels, represented to be worth from one hundred dollars to five thousand dollars. The chance of obtaining one of these prizes, and even the most valuable one, rather than the fifty-dollar lot, induced the purchaser to buy, and enable the defendant to sell the certificate of purchase. Indeed, the sale of the first three hundred lots, in three hundred parcels, for fifty dollars each, upon the condition that they should be distributed among the purchasers by lot, would itself be a lottery, unless the lots were in fact of equal value, which is very improbable.

The case is in almost every respect the counterpart of the celebrated case of the American Art Union, decided in New York in 1852. The scheme of the art union was that by paying five dollars, any person could become a subscriber, and entitled to an engraving and certain numbers of The Bulletin containing the proceedings of the society, and the chance of obtaining one of a number of valuable paintings which in December of each year were to be distributed by lot among the members. The drawing was to be conducted precisely as in this case, by placing the name of the subscriber in one box and the name of the painting in another. A number being drawn from the latter box, a name was drawn from the former one, and the person whose name was thus drawn was to be the owner of the prize represented by that number.

The supreme court decided that this was a lottery. 13 Barb. 577. The case was then taken to the court of appeals, and argued on behalf of the art union with great ability. The court of appeals affirmed the decision of the supreme court that the scheme was a lottery. 7 N. Y. 228. The proceeding in the New York courts was to enforce the forfeiture of the property proposed to be distributed by this scheme, and the case turned upon the construction or interpretation of the word "lottery" in the prohibition contained in the constitution of the state: "No lottery shall hereafter be authorized in this state."

This action is simply to enforce the collection of a tax imposed by the United States upon all lotteries. A revenue law is not to be strictly construed, but rather the contrary, so as to attain the ends for which it was enacted. With the policy or impolicy of allowing lotteries the revenue act does not interfere. It simply provides for taxing them, whenever and wherever they in fact take place. They are specially and heavily taxed, not for the purpose of encouraging or prohibiting them, but upon the same ground that many other special taxes are laid; because, as a rule, it is well known that their owners and managers receive from the public large gains, without giving any equivalent therefor.

Keeping this end in view, it is apparent that the revenue act ought to be so construed as to include every case of the distribution of property or money which contains the essential elements of a lottery—the payment of a valuable consideration for a chance of ob-

taining by lot something more valuable in return.

It is true, the defendant may have engaged in this scheme without any thoughts of becoming a dealer in what the law deems lottery tickets. Indeed, other motives than actual gain may have induced him to make the sale and distribution that he did. In the prospectus of the scheme, published by him, he asks the question: "Why is this property put into a raffle at prices which average less than half the selling rates?" and answers it as follows: "Only because the sale to citizens, for actual improvement, at full prices, at the rate of three to five thousand dollars a year, on time, as heretofore, is no longer adapted to the circumstances of the proprietor, who has become an invalid, and must hasten to complete the improvements and enterprise which he has in hand."

But even upon this mild view of the scheme, for the purpose of taxation it must be considered, or rather is, a lottery. By it many persons are induced to buy property which has no present market value, and which they otherwise would not purchase at any price, because there is set before them the chance of obtaining by lot a certain prize or piece of property of much greater value than the consideration advanced.

Let judgment be given for the plaintiff for the sum demanded in the complaint, and the costs and expenses of the action. Judgment accordingly.

Case No. 15,919.

UNITED STATES v. OMEARA.

[1 Cranch, C. C. 165.] [1]

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

CRIMINAL EVIDENCE—INTENT—ARREST.

1. Words accompanying actions may be given in evidence to show the intent.

2. An officer having a warrant against a person in his custody, may hold him under it, without informing him that he is arrested upon it.

Indictment [against Francis Omeara] for rescue of W. Aubrey, and assault and battery upon Abercrombie, the constable.

Under the act of assembly of Virginia of December 26, 1792 (Old Revised Code 287), disturbers of religious worship may be restrained by a justice present. Abercrombie was ordered by Mr. Hoffman, a justice who was present, to take Aubrey into custody. He had also a warrant from Mr. Faw, another of the justices.

THE COURT decided, that the words which the defendant spoke accompanying his actions, should be given in evidence against him, to show the intention of the defendant in his interference and in aggravation of the penalty.

Mr. Mason prayed the court to instruct the jury that Omeara, being in custody of Abercrombie, under the order of Mr. Hoffman, was also in his custody under the warrant of Mr. Faw, although he did not inform the prisoner that he arrested him on that warrant.

Mr. Taylor, for defendant, cited Countess of Rutland's Case, 6 Coke, 54, that it is necessary to inform the person arrested that he is arrested under a particular warrant, or he cannot be held under it.

THE COURT gave the instruction as prayed by Mr. Mason.

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

Case No. 15,919a.

UNITED STATES v. The ONACHITA.

[New York Times, Jan. 19, 1863.]

District Court, S. D. New York. Dec., 1862.

PRIZE — SPOLIATION OF PAPERS — VIOLATION OF BLOCKADE—CAPTURE BY UNAUTHORIZED VESSEL.

[1. Absence of log book, invoice, and bill of lading of a vessel captured off a blockaded coast, far out of the route of her ostensible voyage, after a long chase, and with a contraband cargo, furnishes a vehement presumption of the intentional destruction of the papers by the ship's company.]

[2. It cannot avail the claimant that the capturing vessel was herself a prize which had been placed in the service of the government before condemnation; for, if the captured vessel was violating the law, she is subject to trial and condemnation, whether the persons or means employed in making the seizure were authorized or not.]

[This was a libel against the steamer Onachita for an attempt to violate the blockade, etc.]

This vessel was captured, at sea, by the United States steamer Memphis, on Oct. 14, 1862. She was chased from 6 a. m. to 3 p. m., and in the chase threw overboard her entire cargo. Thomas S. Bagbie intervened in the cause, and alleged that he was a British subject, resident in London, and that the vessel was no prize, because the Memphis, which seized her, was a British merchant vessel, of which he himself was a part owner, and was unlawfully placed in the use of the United States before her condemnation, and is not yet finally condemned, the sentence against her being appealed to the circuit court. The vessel had on board a register to Bagbie, dated at London, Jan. 14, 1862, and an agreement, dated Aug. 4, 1862, with her master and crew, for a voyage from London to British North America, the American States, &c., &c., to final discharge in the United Kingdom. A letter to the master was also found on board, from Benj. W. Hart, giving instructions how to conduct his vessel to avoid the Yankee cruisers, and another letter to Bagbie, without signature or address, giving cautions about United States cruisers. There was also a memorandum of cargo on board, consisting wholly of contraband of war, dated Oct. 30, 1862, but without signature or place of execu-

tion. These papers were all that were found on board, but the master testified that when she left Bermuda she had on board a register, clearance, invoice of cargo, one bill of lading, and the letter of Hart, and the mate speaks of keeping a log. The vessel cleared at St. George's, Bermuda, on Sept. 30, 1862, bound for Havana. She was captured about 32° north lat. The master did not know the longitude, but supposed she was 150 to 200 miles off the coast. The mate supposed that the vessel was 50 or 100 miles off the coast.

HELD BY THE COURT [BETTS, District Judge]: That the vessel must have been wide of any reasonable route from Nassau to Havana. That the suspicion is impressive and cogent that the representation on her clearance that she was bound to Havana was simulated and false, and that she was so immediately in the course towards blockaded ports as to justify the presumption that she was attempting to enter one of them. That the absence of the log-book, invoice, and bill of lading, unexplained, furnishes vehement presumption of their intentional destruction or suppression by the ship's company. That her cargo was contraband of war, and her owner was part owner of the Memphis, recently condemned for violating the blockade. That the objection raised by the claimant to the right of the capturing vessel to make the seizure is of no weight. If the vessel arrested was acting in violation of public law, she was amenable to trial and condemnation therefor in behalf of the United States, whether the persons or means employed in making the seizure were authorized or not. It is enough that the government comes into a national court demanding the condemnation of an offender, and the court never inquires whether the party or thing proceeded against has been regularly or irregularly brought under attachment or complaint. The government is entitled to have the violated laws vindicated by the punishment of the offender, without questions as to the propriety of the acts or agencies used in bringing the offence to judgment. Vessel condemned and forfeited.

THE COURT also ordered the master's nautical instruments be not delivered to him, he being actively engaged in acts of hostility against the rights of the United States and against public law.

Case No. 15,920.

UNITED STATES v. O'NEALE et al.

[2 Cranch, C. C. 183.] [1]

Circuit Court, District of Columbia. Nov. Term, 1819.

CRIMINAL LAW — OPPOSING EXECUTION OF WARRANT.

It is an indictable offence to combine to oppose the execution of a warrant issued by a justice of the peace, without knowing the nature of it, and assaulting one of the parties attempting to execute it. Upon the validity of the warrant the court expressed no opinion.

Indictment [against O'Neale, Desmukes, and others] for assault and battery on one Murray, a constable. It appeared in evidence that Mr. Faw, a justice of the peace, issued his warrant against A. Locke and B. Locke for an assault upon one James Middleton, and a battery on a negro, the execution of which warrant was prevented by force; whereupon Mr. Hoffman, another justice of the peace, issued his warrant to Murray, the constable, to summon a posse, and to take the said A. and B. Locke, "and all others who had obstructed or should obstruct the execution of Mr. Faw's warrant." After the jury had retired, they came into court, and prayed the instruction of the court as to the legality of the warrant.

Mr. Jones, for the United States, admitted that the warrant of Mr. Hoffman was illegal, so far as it required the arrest of "all persons as had obstructed," &c., without naming them, or describing them, or stating that their names were unknown. But he contended that it was immaterial whether the warrant was legal or not, because the defendants had made the first assault. The warrant, however, was not wholly void; it was good as to the arrest of A. and B. Locke. Besides, the warrant was altogether unnecessary; it was the duty of all persons to aid in the execution of the former warrant, and to suppress the riot.

Mr. Hewett, for defendants, contended that the warrant could not be good in part and void in part.

THE COURT (nem. con.), at the prayer of Mr. Jones, instructed the jury, that if they should be satisfied by the evidence, that the traversers and others were combined to oppose the execution of the warrant, without knowing the nature of it, and actually assaulted one of the constable's party before any assault had been made by any one of the constable's party in attempting to execute the warrant, the traversers were guilty.

The jury found some of the traversers guilty, and others not guilty.

Case No. 15,921.

UNITED STATES v. ONE BARREL OF WHISKEY.

[4 Int. Rev. Rec. 146.]

District Court, D. Wisconsin. 1866.

INTERNAL REVENUE—SEIZURE—FORFEITURE.

Section 68 of the excise act of June 30, 1864 [13 Stat. 218], confers no authority for the seizure of distillery and lot on which situate or for subjecting such real estate to decree of forfeiture.

MILLER, District Judge. This information is brought under the act to provide ways and means for the support of the gov-

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

ernment, approved June 30, 1864, c. 172 (13 Stat. 218). The alleged causes of seizure by the collector are for neglect of the owner and superintendent of the distillery to keep books, and make daily entries therein, and to make returns, and pay the duties as required by section 57 of the act. The information is against the whiskey distilled, and the distilling apparatus, and also against the distillery, and the lot of ground whereon it is situated. By section 68, the owner, agent, or superintendent of any still, boiler, or other vessel used in the distillation of spirits on which duty is payable, who shall neglect or refuse to make true and exact entry and report of the same, or to do or cause to be done any of the things by law required to be done as aforesaid shall forfeit for every such neglect or refusal all the liquors and spirits made by or for him and all the stills, boilers and other vessels used in distillation, together with the sum of five hundred dollars, to be recovered with costs of suit, which said liquors or spirits with the vessels containing the same, with all the vessels used in making the same, may be seized by any collector or deputy collector of internal duties, and held by him until a decision shall be had thereon according to law. It will be observed that the stills and boilers are expressly subjected to forfeiture with other vessels used in distillation; but there is no express authority for the seizure by the collector of the stills and boilers. The articles made subject to seizure being loose and easily carried away, the collector is required to hold them until a decision shall be had. The stills and boilers, usually of a more permanent nature, from being built into or composing part of the distillery, it may be that the authority to seize and hold them was not considered necessary. But of this I give no opinion. At all events, the stills and boilers are subject to forfeiture. There is no authority in that section for the seizure of the distillery and lot by the collector, or for subjecting such real estate to a decree of forfeiture. It is contended by the district attorney, that for the non-payment of duties with ten per cent added in pursuance of section 69, a lien is created on the distillery and lot, and thereby a decree of forfeiture and sale is the appropriate remedy. The section provides that until such duties with such addition shall be paid, they shall be and remain a lien upon the distillery where such liquors have been distilled, and upon the stills, boilers, vats, and all other implements thereto belonging, and upon the lot or tract of land whereon the distillery is situated, until the same shall have been paid. And in case of refusal or neglect to pay said duties with the addition, within ten days after the same shall have become payable, the amount thereof may be recovered by distraint and sale of the goods, chattels and effects of the delinquent. There is clearly no express authority given by this section, for this proceeding against the distillery and lot. The section provides that the duties with the addition of ten per cent. shall remain a lien upon the distillery until paid. And the remedy is given for nonpayment for the recovery of the amount thereof by distraint and sale of the goods, chattels, and effects of the delinquent. The distraint is not confined to the distillery, apparatus or utensils, but may be generally of the goods, chattels, and effects of the delinquent. The rule is that when a statute creates a duty, and prescribes a remedy, the proceeding directed must be followed. The distillery and lot will not be entered in the decree.

Case No. 15,922.

UNITED STATES v. ONE CASE.

[6 Ben. 493; [1] 17 Int. Rev. Rec. 181.]

District Court, S. D. New York. May, 1873.

INTERNAL REVENUE—IMITATION SPARKLING WINE MADE FROM DOMESTIC GRAPES.

The 48th section of the internal revenue act of July 20th, 1868 [15 Stat. 125], as amended by the 12th section of the act of June 6th, 1872 (17 Stat. 240), imposes a tax, to be collected by affixing a stamp on each bottle, "on all wines, &c., made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States." An information was filed against certain wines, alleging that they were imitation sparkling wines, made "by the direct injection of carbonic acid gas, by a wholly mechanical process, into wines made from grapes grown in the United States, not in and as a part of the process of fermentation and manufacture of said last mentioned wines, but as a new and additional process of manufacture, by using such wines (the same being already the completely fermented juice of said grapes) with said carbonic acid gas injected therein as aforesaid, to make a new product known as and being an imitation sparkling wine or champagne." The claimant of the wine demurred to the information. *Held*, that the article was none the less free from tax, as being "made from grapes grown in the United States," notwithstanding the carbonic acid gas was injected by a separate process of manufacture.

Thomas Simons, Asst. U. S. Dist. Atty.

Edwards Pierrepont, for claimant.

BLATCHFORD, District Judge. This suit is brought by the United States against a case containing certain "bottles of imitation sparkling wine," seized as forfeited under the internal revenue laws. The information sets forth, "that the contents of the said bottles contained in the said case of imitation sparkling wine, were then and there wines, liquors or compounds, known or denominated as wine, and were made by a certain manufacturer of imitation sparkling wine or champagne, to wit, by J. N. Blum, at his manufactory of such wines in the city of New York, by the direct injection of carbonic acid gas, by a wholly me-

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

chanical process, into wines made from grapes grown in the United States, not in and as a part of the process of fermentation and manufacture of said last mentioned wines, but as a new and additional process of manufacture, by using such wines (the same being already the completely fermented juice of said grapes), with said carbonic acid gas injected therein as aforesaid, to make a new product known as and being an imitation sparkling wine or champagne;" and "that the said wines, liquors or compounds, known or denominated as wine, and made in imitation of sparkling wine or champagne, as aforesaid, and found and seized as aforesaid, were subject then and there, and when made as aforesaid, to tax, by the statute of the United States in such case made and provided and, when found and seized as aforesaid, the same had been sold by the said manufacturer thereof, and had been removed from his said manufactory, without having on the said bottles containing the same any stamps affixed denoting the tax thereon, nor has any tax in any manner ever been paid on said wines, liquors or compounds, contrary to the form of the statute of the United States in such case provided, whereby, and by force of the statute of the United States in such case provided, the said contents of the said bottles, and the said bottles and case, became and are forfeited to the United States." The claimant demurs generally to the information.

The 48th section of the act of July 20th, 1868, as amended by the 12th section of the act of June 6th, 1872 (17 Stat. 240), imposes a tax, per bottle or package (to be collected by affixing a stamp on each bottle or package containing the article, by the person manufacturing it, before removal from the place of manufacture), "on all wines, liquors or compounds known or denominated as wine, and made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States."

The information in this case states that the article seized is known or denominated as wine, and is made in imitation of sparkling wine or champagne. The information does not state that the article is not made from grapes grown in the United States. The tax is not imposed on an article made from grapes grown in the United States. The information aims to aver, argumentatively, that, inasmuch as the article was made in imitation of sparkling wine or champagne, "by the direct injection of carbonic acid gas, by a wholly mechanical process, into wines made from grapes grown in the United States not in and as a part of the process of fermentation and manufacture of said last mentioned wines, but as a new and additional process of manufacture, by using such wines (the same being already the completely fermented juice of said grapes), with said carbonic acid gas injected therein as aforesaid, to make a new product known as, and being, an imitation sparkling wine or champagne," it was, therefore, not made from grapes grown in the United States. But, the information avers that grapes grown in the United States were made into wines, and that such wines were the completely fermented juice of said grapes, and that the wines so made were afterwards converted into an imitation of sparkling wine by the additional mechanical process of directly injecting carbonic acid gas into them. It further says that, by such process, the article seized was "made," and that such process was a process of "manufacture," and was used to "make" a new product, being the article in question, and that the article, when so made, is an imitation sparkling wine, and is "made" in imitation of sparkling wine. The information, therefore, substantially avers, that the article in question was made from grapes grown in the United States. If so made, it was not taxable.

It is urged, that the expression, in the statute, "made from grapes grown in the United States," means, made by the natural process of fermentation, and that the article is not, in the sense of the statute, "made in imitation of sparkling wine or champagne," "from grapes grown in the United States," if the carbonic acid gas is injected into the wine directly by mechanical means, instead of being created in the wine by the process of fermentation taking place therein. The word "made" occurs, in the clause in question, in two places. But there is no warrant for saying that that word can have a different meaning attached to it, where it occurs in the one place, from what it has where it occurs in the other. The tax is imposed, in terms, "on all wines, liquors or compounds, known and denominated as wine, and made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States." When the article is put into such a condition as to imitate sparkling wine, it is spoken of as "made" and as "made in imitation." Whatever the process by which the imitation is produced, the article is not "made in imitation" until the process is finished. If, therefore, it is an article made from grapes grown in the United States, it cannot be any the less an article made from such grapes because the process of making it into an article in imitation of sparkling wine was performed upon it after it was in a condition to be already called an article made from grapes grown in the United States, though not yet in a condition to be called an imitation of sparkling wine. The word used in both instances is "made." I understand the information in this case to aver that the claimant took an article which was properly nothing but a wine made from grapes grown in the United States, and was not otherwise a liquor or

compound, and was a completely fermented juice of such grapes, and was nothing else, and that he did nothing to it but directly inject into it carbonic acid gas by a wholly mechanical process; and I cannot come to any other conclusion than that, within the words of the clause in question, the product, when made, by such process, to be an imitation of sparkling wine, must be regarded as made from grapes grown in the United States.

The section in question evinces a clear design to relieve from taxation certain articles made from grapes grown in the United States, and to impose a tax on certain articles not made from grapes grown in the United States. All that is intended now to be decided is, that the article described in the information, as above understood, is not taxable. The article is not understood to be a compound, otherwise than as it is a compound of a wine which is the completely fermented juice of the grape, with carbonic acid gas. What other compounds, known as wine, and made in imitation of sparkling wine, could be considered as made from grapes grown in the United States, and so not taxable, it will be sufficient to decide, as the cases arise.

There must be judgment for the claimant on the demurrer, with leave to the informants to amend their information.

Case No. 15,923.

UNITED STATES v. ONE CASE OF CASHMERE SHAWLS.

[5 N. Y. Leg. Obs. 247.]

District Court, S. D. New York. April 12, 1847.

CUSTOMS DUTIES — FRAUDULENT INVOICES — RULE AS TO VALUATION—INDICTMENT—EVIDENCE.

[1. The act of August 30, 1842 (5 Stat. 548), so far changes and modifies the provisions of section 66 of the act of March 2, 1799 (1 Stat. 677), section 4 of the act of May 28, 1830 (4 Stat. 410), and section 14 of the act of July 14, 1832 (4 Stat. 593), in respect to the nature and contents of invoices, that the price or value of the goods must be stated according to the actual market value or wholesale price at the time of purchase in the principal markets of the country from which the imports are made; otherwise, these sections remain in full force and operation.]

[2. Therefore, to support an information for a fraudulent purchase, under the 14th section of the act of July 14, 1832, it is not enough that the jury have found that an invoice of merchandise imported from Lyons, France, does not contain the true market value thereof at Lyons, and that the undervaluation was fraudulent and with intent to evade payment of the duties; there being no evidence or finding as to whether Lyons was one of the principal markets of France, or as to the value of the goods in such markets.]

[3. A false and fraudulent valuation in an invoice not demanded by the statutes, and which can be of no avail at the custom-house, is not, of itself, sufficient to justify condemnation of the goods.]

This was a libel of information by the United States, upon a seizure by the officers of the customs, for an alleged fraudulent importation from France. The information contained six counts, the first averring that the package and invoice were made up with intent, by false valuation, extension, and otherwise, to evade and defraud the revenue, in this, that the goods, having been procured otherwise than by purchase, were charged in the invoice at a less price than the actual value thereof at the time and place where and when procured, contrary to the 4th section of the duties act of May 28, 1830; the second, that the invoice was made up with like fraudulent intent, in this, that the goods were not invoiced at the actual cost thereof at the place of exportation, contrary to the same act and section; the third, that the goods were invoiced at a less price than the actual cost thereof at the place of exportation, with design to evade the duties contrary to the 66th section of the act of March 2, 1799; the fourth, that the package was made up with like fraudulent intent, in this, that the goods, having been procured otherwise than by purchase, were falsely valued in the invoice, and charged therein, at a less price than the market value of the goods, at the place when and where procured, against the 4th section of the act of May 2, 1830; the fifth, that the package was made up with intent to evade and defraud the revenue, in this, that the goods were falsely valued in the invoice, and charged therein at a less price than the actual cost of the goods, at the place when and where procured, contrary to the same act and section; and the sixth, that, the goods being composed wholly or in part of wool or cotton, the package was made up with intent to evade and defraud the revenue, contrary to the 14th section of the act of July 14, 1832, without specifying the manner in which it was made up, or the particulars showing the intent. Charles Pages and Blein, of Lyons, having put in a claim, the cause was tried on the 28th and 29th of September, 1846. The questions of law were reserved, and the case was submitted to the jury, upon the questions of fact, whether the invoice contained the true market value at Lyons, and if not, whether the undervaluation was made with intent to evade the payment of duties. The jury found a verdict for the United States.

A motion in arrest of judgment was then made, and was argued on the 10th of October, 1846, and the 23d and 24th of February, 1847, by

D. D. Field, for claimants, who relied upon the following points.

1. The libel of information contains six counts; the 1st, 2d, 4th and 5th, on the 4th section of the act of May 28, 1830; the 3d on the 66th section of the act of March 2, 1799; and the 6th on the 14th section of the act of July 14, 1832. These sections are

all repealed by the act of August 30, 1842, §§ 16–19, 21, 23, 26. The act of 1799 forfeits the goods not invoiced "according to the actual cost thereof at the place of exportation, with design to evade the duties." The act of 1830 forfeits the package or invoice, if "made up, with intent by a false valuation, extension or otherwise, to evade or defraud the revenue." The act of 1832 forfeits the package, if made up "with intent to evade or defraud the revenue." In the act of 1842, the 26th section declares, "that all provisions of any former law, inconsistent with this act, shall be, and the same are hereby, repealed." The foregoing provisions of the acts of 1799, 1830, and 1832, are inconsistent with this act, in the following respects: (1) This act imposes new and different penalties for false or fraudulent invoices; by the 17th section a penalty of 50 per cent. added to the duty, and by the 19th section, fine and imprisonment. If these penalties are held to be cumulative to the former, then it follows, that for a false or fraudulent invoice, the goods may be made to pay a penalty of 50 per cent., and be forfeited besides, and the party also fined and imprisoned; a consequence impossible to uphold. (2) It also declares, that the appraisement shall "be final, and deemed and taken to be the true value of said goods, and the duties shall be levied thereon accordingly, any act of congress to the contrary notwithstanding." This imports that the goods are not to be forfeited, but to be admitted to entry and passed. The rest of the section declares what is to be done, if they are undervalued. (3) The act of 1842 covers the same ground as the other acts. It is in fact a revision of them. It is another declaration of the will of congress upon the same subject. The old will and the new cannot both stand. On comparing the act with the previous ones, it will be seen, that sections 16 and 17 are a revision of sections 7 and 8 of the act of 1832, with the addition of much that is new. The 16th section directs an appraisement in all cases of ad valorem duties. The 17th authorizes the appraisers to inform themselves by an examination of the importer and the production of papers. If the importer is dissatisfied he may, as he did in this case, appeal, and then two merchants are to decide. The appraisement thus made is final, and to be deemed the true value, and the duties levied accordingly. Whenever the value thus ascertained exceeds by 10 per cent. the invoice value, then in addition to the duty, there shall be levied 50 per cent. of the duty imposed on the same when fairly invoiced. Section 18 assigns the collectors to take the duty in the article itself—a new provision. Section 19 declares, that any person making out a false or fraudulent invoice shall be deemed guilty of a misdemeanor, and liable to fine and imprisonment—also a new provision. Section 21 is a revision of such parts of the 4th section of the act of 1830, and the 14th section of the act of 1832, as are not within the purview of the previous sections of this act. It provides for the case of a package containing an article not specified in the invoice, and applies to all goods, whether subject to ad valorem duty or not. Section 23 is like the 9th section of the act of 1832, except by the insertion of the words "or wholesale price thereof." Section 26 is like the 12th section of the act of 1832, except that it is more full and explicit. But the provisions in the act of 1842 that "the appraisement thus determined shall be final, and deemed and taken to be the true value of said goods, and the duties shall be levied thereon accordingly, any act of congress to the contrary notwithstanding;" that in case of undervaluation a penalty of 50 per cent. be imposed; and that the making out of a false or fraudulent invoice shall be punished by fine and imprisonment—are in neither of the three other acts. Moreover under the act of 1842, ad valorem duties are in all cases to be calculated on the market value or wholesale price, in the principal markets of the country whence imported. Whereas by the 66th section of the act of 1799, they were to be calculated on the actual cost; and by the 4th section of the act of 1830, on the actual cost or value, in the place where purchased or procured.

2. Even if the sections, upon which the information is filed, were all in force, it would still be insufficient to sustain a judgment of forfeiture. All the counts are defective, in not averring that the entry was made according to the invoice. The offence enacted by the sections consisted, in making an entry upon an invoice below the value, with design to defraud. For aught that is charged, the entry may have been according to the true value, even if the invoice was fraudulent. The law punishes, not the intention, but the attempt, to defraud the revenue.

B. F. Butler, U. S. Dist. Atty., contra.

The 66th section of the act of March 2, 1799; the 4th section of the act of May 28, 1830; and the 14th section of the act of 14th July, 1832 (the provisions counted on the information), are, each of them, in force, neither of them being inconsistent with the act of 30th August, 1842. The title of the act of 1842 shows that it was not intended to repeal the former laws, except so far as they were expressly changed. It retains the pre-existing system, but with certain changes and modifications. The 26th section accordingly expressly retains in force the laws existing on the 1st day of June, 1842, for the collection of the duties imposed by this act on goods imported into the United States; thus recognizing the continuance of the laws of 1830 and 1832, excepting so far as those laws were in conflict with the law of 1842. The sections of the act of 1842, to which the former laws are said to be inconsistent, are the 16th, 17th, 18th, 19th, 21st, 23d, and 26th, but

these sections contain nothing to abrogate those parts of the acts of 1793 [1 Stat. 836], 1830, and 1832, on which the information counts. The 16th is substantially the same as the 7th section of the act of 1832, except that it requires the appraisement to be made according to the "market value or wholesale price, in the principal markets of the country from which the same shall have been imported," instead of the "actual value at the place of exportation," as prescribed by the act of 1832, or the actual cost at such place, as prescribed by the act of 1799, § 66. This alteration does not affect the present question.

The first part of section 17 is substantially the same as section 8 of the act of 1832. The latter part is a substitute for the 3d section of the act of 1830, from which it differs by providing: 1st. A different mode of making the re-appraisement. This alteration does not affect the present question. 2d. That the re-appraisement shall be conclusive. But this is only declaring in express terms, what had been determined to be the effect of the former laws of 1830 and 1832. See Rankin v. Hoyt, 4 How. [45 U. S.] 327. This clause has reference merely to the payment of duties, and does not affect the question of forfeiture. 3d. By directing, that if the goods be appraised 10 per cent. above the invoice value, there shall be collected, in addition, 50 per cent. on the duty when fairly invoiced. This additional 50 per cent. is entirely irrespective of fraudulent intent on the part of the importer. It was not intended, by its framers, that it should be substituted in lieu of forfeiture in case of fraudulent undervaluation. On the contrary, they intended to make the law more stringent and severe.

It is perfectly consistent with the continued existence and application of the forfeitures, prescribed by the former laws, and is conclusively shown by the fact, that the tariff act of 1823 [3 Stat. 729], along with various provisions forfeiting goods in case of undervaluation, contained a provision like the one in question (section 13 of the act of 1823). The tariff act of 1828 [4 Stat. 274] contained the like provision (section 9). Whether it was politic or liberal to return to this system, was a question for the congress of 1842, which with the judiciary cannot interfere. Section 18 empowers the collector to take the duties in the article itself—a new provision, but one that has no bearing on the point in question. Section 19 declares (1) that any person who shall knowingly, &c., smuggle or clandestinely introduce into the United States, goods subject to duty, and which should be invoiced, without paying or accounting for the duty, or (2) make out, pass, or attempt to pass through the custom-house, any false, forged, or fraudulent invoice: shall be deemed guilty of a misdemeanor, and punished by fine or imprisonment, or both. The first of these provisions is not contained, in hæc verba, in either of the foregoing laws; but it is not entirely new, for the 50th section of the act of 1799 forfeits goods unladen without permit, and subjects all persons concerned therein to indictment, and on conviction, to a penalty of $400, and to disability to hold office for seven years. The second clause making the use of false, forged or fraudulent invoices, an indictable offence, is new; but it is evidently cumulative, and in addition to other penalties. That congress had the power to make this addition to the other penalties, cannot be doubted. That they intended to do so may be inferred from the character of the law of 1842, the guarded language of the repealing statute (section 26), and from the omission in section 19 to say that it should be in lieu of the forfeiture of the goods provided for by prior laws.

There are many such cases in the acts of congress, in which, in addition to the forfeiture of the goods, fines and penalties are imposed on the person; and whether it should be done in this case or not, was a matter for the decision of the legislature. It would be against the evident scope of the whole act of 1842, to suppose, that in the case of a fraudulent invoice, the only redress left to the government, beyond the increase of 50 per cent. on the duty, was the very uncertain remedy of indictment under the 19th section.

Section 21 differs from section 4 of the act of 1830, and section 14 of the act of 1832, in the following particulars: 1st. One package out of every 10, instead of 20, to be designated by the collector. This alteration does not affect the present question. 2d. It introduces new provisions in regard to articles not specified in the invoice. This alteration affects, very materially, cases of that sort, but does not bear on the present question.

Section 23 is a re-enactment of section 9 of the act of 1832, authorizing the secretary of the treasury to establish rules and regulations. The words "market value" and "wholesale price" introduced. This section has no bearing on the present question. Section 26, as already remarked, shows most conclusively, that the pre-existing laws, as to fines, penalties and forfeitures, were intended, as a general system, to be retained in force, and it forms, therefore, a decisive objection to the argument of the other side. Repeals of the former laws, thus retained, or of any portion of them, by implication, are not to be favored; and the repugnance must be positive and insuperable, before the court will pronounce in favor of the alleged repeal. That there is no such repugnance here, has been shown by the foregoing analysis of the statutes, and will be illustrated by reference to the decisions of the courts of the United States in the cases of U. S. v. Blackburn, in the Pennsylvania district, before Judge Hopkins [Case No. 14,603], and U. S. v. Wood, in the supreme court, 16 Pet. [41 U. S.] 262, in which it was held that forfeitures given by the 66th section of the act of 1799, and the 4th section of the act of 1830, are left in force by the act of 1832.

Each count in the information is good and sufficient, although it is not averred that the entry was made according to the invoice. Neither of the statutory provisions counted on, makes the offence to consist, or the forfeiture to depend, on the fact of entering the goods below their value; on the contrary, the offences denounced in the statutes, counted on, are "the not invoicing the goods according to the actual cost thereof, with design to evade the duties" (66th section of act of 1799), "the making up of the package or invoice, with intent, by a false valuation, &c., to evade or defraud the revenue" (4th section of act of 1830), and "the making up of the package with intent to evade or defraud the revenue" (14th section of the act of 1832). The different counts follow the language of the statutes on which they are founded; and the terms employed in the description of the offence have the same meaning and force in the pleading which they have in the statutes. No greater particularity is required. The suggestions of the claimant's counsel, that "the entry may have been according to the true value, even if the invoice was fraudulent, and that in such case, the goods would not be forfeitable, is erroneous both in its premises and conclusion. The jury have found by their verdict that the invoice was fraudulent, and the averment being, that on the entry being made, the fraudulent invoice was produced and left with the collector, the fair inference is, that the entry conformed to the invoice; and even if it were necessary, in order to obtain a forfeiture, that the information should aver that the entry was made according to the invoice, still, after verdict, it is too late to take the objection. The forfeiture will take place notwithstanding the entry be made according to the true value, provided the invoice which is produced and left with the collector, at the time of such entry, be false, and fraudulently made up. The production of the false and fraudulent invoice at the time of the entry, is not a mere intention to defraud, but an actual attempt to defraud, whatever may be the character of the entry.

On the 23d of March, THE COURT made the following decree:

This cause having been heard on a motion in behalf of the claimants to arrest judgment on the verdict rendered in the cause, and argued by the counsel for the respective parties, and due deliberation being had in the premises, it is considered by the court, that the provisions of the act of congress, entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842, so far change and modify the provisions of the then existing laws in respect to the nature and contents of invoices required by them to be produced, on the importation of goods, wares, and merchandise, into the United States, as that the prices or value of such goods, wares and merchandise, must be stated therein according to the actual market value, or wholesale price thereof, at the time when purchased, in the principal markets of the country from which the same shall have been imported into the United States. Wherefore, it is considered by the court that the first, second, third, fourth and fifth counts of the information filed in this case are insufficient in law to support the verdict rendered in behalf of the United States in this cause. It is further considered by the court, that the sections of the various acts of congress, counted upon by the plaintiffs in the said information are in other respects in full force and operation, not being repealed by or repugnant to the provisions of the said act of August 30, 1842. It is therefore considered by the court, that the sixth count in the said information is sufficient in substance to support the verdict rendered upon the pleadings in this case in favor of the plaintiffs. Wherefore, it is ordered and adjudged by the court, that the motion in behalf of the claimants in this cause to arrest judgment on the verdict aforesaid, be overruled and denied.

Thereupon, a motion was made for a new trial in respect to the issue upon the sixth count on the following point:

As to the sixth count, the only one now to be regarded, the claimants are clearly entitled to a new trial. The case was put to the jury upon two questions, which in this respect were immaterial. Whether or not the invoice contained the true market value at Lyons, has nothing to do with the issue whether the package was fraudulently made up, and much less decided such issue—and so of the other question put to the jury, whether, if the invoice did not contain the true market value at Lyons, the undervaluation was made with intent to evade the payment of duties.

BETTS, District Judge. The motion for a new trial rests on the want of evidence on the part of the United States to support the sixth count, the only one admitted by the court to be legally sufficient; and because the matter of fact submitted by the court to be found by the jury, was immaterial to the issue upon that count. The sixth count charges the forfeiture of the goods to have accrued on its being found on examination and inspection at the custom-house, that the package was made up with intent to evade and defraud the revenue. The count is framed upon the provisions of the 14th section of the act of July 14, 1832, and embraces all the allegations necessary to bring the case within that section. [Clifton v. U. S.] 4 How. [45 U. S.] 242. It seems conceded that all the evidence offered on the trial which could be applied to this

count, consisted in the invoice representing the value of the goods at Lyons, and testimony conducing to show that the goods were not stated at their true market value in Lyons at the time the invoice was made up. There can be no question but that an invoice falsely varying from what the statute requires, would be evidence proper to be submitted to the jury in support of the averments of the sixth count. It is not necessary in this case to assert the principle, but I see no ground to doubt its correctness, that the jury might be justified on evidence clearly establishing the fraud of such invoice, in finding that the package it purported to represent and describe, was prepared and made up to evade and defraud the revenue, and consequently subject to forfeiture under the act of 1832. But the invoice could not produce such consequences, unless it was made up in plain violation of the statute; a false valuation or description of the goods in a paper not demanded by the statute, and of no avail at the custom-house, could not, of itself, subject the goods to condemnation under any existing provisions of the revenue laws. The invoice the importer is required to present, since the act of August 30, 1842, is one representing the true market value of the goods at the time of purchase in the principal markets of the country from which they were imported, and if it was not indispensable to aver in the information, that Lyons was such market of France, it was necessary to prove it before the invoice made up with reference to that place, could be made evidence to the jury on this issue. But even if this piece of testimony was allowably admitted, it is clear that the facts agreed between the counsel to be submitted to the jury, had no legal relation to the averments of the sixth count. There must be evidence in the case to show that an invoice being false, it necessarily violates the law in relation to it, to render it available in support of the information. The case states, "It was agreed that all the questions of law in this case should be reserved, and that the cause should be submitted to the jury upon questions of fact, whether the invoice contained the true market value at Lyons, and if not, whether the undervaluation was made with intent to evade the payment of duties." The jury found a verdict for the United States, thus negativing the first, and affirming the second, inquiry. There being no other representation of value than the invoice, the verdict of the jury cannot be taken on the case as presented, to have found the fact of a general false representation with intent to evade the payment of duties, if that could be regarded a fact involving the forfeiture of the goods under this count. The verdict asserts that the invoice does not contain the true market value of the goods at Lyons, and that the undervaluation was fraudulent, with intent to evade the payment of duties. It is not a presumption of law to be raised by the court, that the true prices and value of goods at Lyons, are those of the general markets of France, and thus by inference pronounce the claimants guilty of a violation of the law. Nor would the jury be authorized to adopt that as a presumption or inference of fact. There was accordingly no testimony before the jury pertinent to the special facts required to be found, which can justify the verdict rendered. Therefore, both because of the want of proofs to sustain the issue on the part of the United States, and because the facts the jury were required to find were not, of themselves, a cause of forfeiture under the act of 1832, nor without the aid of other facts or circumstances, evidence from which the fraudulent act charged in the sixth count, could be legitimately inferred, the verdict must be set aside.

It is accordingly ordered that the verdict of the jury given in this case be set aside, and that a new trial be had therein.

Case No. 15,924.

UNITED STATES v. ONE CASE OF HAIR PENCILS.

[1 Paine, 400.] [1]

Circuit Court, N. D. New York. April Term, 1825.

DEPOSITION—OBJECTIONS TO COMPETENCY OF WITNESS—CUSTOMS SEIZURE—INQUIRY AS TO ACCIDENT OR MISTAKE.

1. Objections to the competency of the witness should be made at the time of taking a deposition under the 30th section of the judiciary act [1 Stat. 88], if the party attend, and the objections are known to him, in order that they may be removed. Otherwise, he will be presumed to have intended to waive them.

[Cited in Shutte v. Thompson, 15 Wall. (82 U. S.) 160.]

2. But the objection may be made at the time of reading the deposition, if the facts constituting the objection were not known to the party when it was taken.

3. Where goods are seized as forfeited, under the act of the 20th of April, 1818 [3 Stat. 433], for being entered at the custom house differently from the invoice, the inquiry cannot be made at the trial, whether such difference proceeded from accident or mistake, the question being referred exclusively to the secretary of the treasury.

[Cited in U. S. v. Platt, Case No. 16,054a.]

[Cited in People v. Bussell, 59 Mich. 111, 26 N. W. 310. Cited in brief in Wood v. Helmer, 10 Neb. 65, 4 N. W. 968.]

4. Nor has the collector a right to make such inquiry on the seizure of goods under this act.

5. The provision in the act of the 2d of March, 1799 [1 Stat. 627], allowing such inquiry to be made by the court or collector, is impliedly repealed by the act of 1818, rules of construction as to the repeal of statutes by implication.

[Cited in U. S. v. Twenty-Five Cases of Cloth, Case No. 16,563; U. S. v. Gates, Id. 15,191; U. S. v. The Cuba, Id. 14,898.]

[1] [Reported by Elijah Paine, Jr., Esq.]

[Error to the district court of the United States for the Northern district of New York.]

R. Tillotson, U. S. Dist. Atty.

G. Griffen, for defendants.

THOMPSON, Circuit Justice. The libel filed in this case in the court below, alleges a forfeiture of the merchandise therein set forth, by reason of a false entry of the goods at the custom-house. [Case unreported.] It is founded upon the 22d section of the act of the 20th April, 1818 [6 Bior. & D. Laws, 306; 3 Stat. 433]. Upon the trial a bill of exceptions was taken, and the case comes before this court upon a writ of error. And the questions presented by the bill of exceptions are: (1) Whether the deposition of John S. Cornell, whose name appeared on the bond as one of the sureties for the appraised value of the goods in question, was admissible in evidence. And, (2) whether the judge erred in submitting to the jury to determine, whether the false entry was by mistake and accident, and not with an intention to defraud the revenue.

1. It has not been denied, but that Cornell was interested, and that his testimony ought to have been excluded, if the objection had been made in due time. But it is said, that the objection is waived by the plaintiff's counsel appearing and cross-examining the witness when his deposition was taken. This deposition was taken de bene esse, under the provisions of the 30th section of the judiciary act. 2 Bior. & D. Laws, 68 [1 Stat. 88]. And the absence of the witness out of the district, and at a greater distance than one hundred miles from the place of trial, was duly proved. So that the sole question is, whether the cross-examination of the witness precluded the party from making the objection at that time?

The rule by which courts of justice have been governed, as to the time when the objection is required to be made to an interested witness, has undergone a considerable change. It was at one period considered, that the objection came too late, after the witness had been sworn in chief, and examined and cross-examined. And this strictness seemed to meet the approbation of Lord Mansfield, in the case of Abrahams v. Bunn, 4 Burrows, 2252, although he did not so expressly rule. But this rule has been relaxed, and it is now well settled in trials at law, that a witness who, in any stage of his examination, discovers himself interested, is to be rejected, and his evidence entirely set aside. Phil. Ev. 96; 1 Term R. 719; 6 Johns. 538. And the same rule prevails as to the depositions of witnesses in chancery proceedings, and to which the present case is more analogous. The examination of witnesses there, is always de bene esse, and with a saving of all just exceptions; and whether so expressed in the rule or order for examination, or not, it is always so understood. 1 Har. Ch. Prac. 589; Phil. Ev. 97, note; 3 Johns. 593, 607; 6 Johns. 538; 2 Vern. 463.

It is not pretended, that the district attorney had any personal knowledge or actual notice that Cornell was security in the bond, or that any objection would be made to his testimony when he attended the examination; and I cannot think that the United States are to be concluded by any presumed knowledge of the fact by the district attorney. He is not officially charged with the business and duty of taking such bonds, and it would be carrying the doctrine of constructive notice to an unreasonable length, to bind the United States thereby, in a case like the present. I have no difficulty in saying, as a general rule, that when the objection is known at the time of taking the deposition, it should be then made. It is no more than just and reasonable to presume, in such case, that the party intended to waive the objection.

But there can be no presumption of a waiver, where the party is ignorant of the fact from which it is to be presumed, and where the law does not cast upon him any such knowledge. Good faith and fair dealing require the objection to be made at the time of the examination of the witness, when known, in order to give the party an opportunity of removing the objection. This, in ordinary cases, might be done by a release; but in the present case it was not in the power of the party to discharge the interest. Nor could this have been done by the commissioner; he had no authority to substitute any other security. The objection, therefore, in this case could have only had the effect of giving notice to the party, so as to enable him to apply to the proper authority to change the security, and have the deposition afterwards taken. The claimant knew of the interest, and he ought not to be permitted to speculate upon the event of such knowledge by the opposite party, but should have called upon him to know whether the objection would be insisted upon.

To preclude the objection at the trial, when the fact upon which it is founded is discovered, without imputing any negligence to the paty from whom the objection comes, would, I think, be unjust, and against the sound and wholesome rules of evidence, and would be going beyond what has been sanctioned by any of the cases cited on the argument, or which have fallen under my observation.

In the case of Bland v. Archbishop of Armagh, 3 Brown, Parl. Cas. 622, the evidence was voluntary affidavits taken at the commencement of the suit by the consent of parties. The objection was not on the ground of interest, but bias or partiality growing out of circumstances well known to the party at the time the affidavits were taken, and he had also consented to a hearing in the cause after publication, without taking an objection to the evidence. If the objection would, therefore, at any time have gone to the competency of the testimony, it was a strong case of waiver, with full knowledge of the circumstances. So also in the case of Corporation of Sutton

Coldfield v. Wilson, 1 Vern. 254. The objection was, that the witness was a member of the corporation, and he had been cross-examined, not only as to his being a member of the corporation, but on the merits. Here then was full knowledge of the interest, when the cross-examination was gone into. And when the court, therefore, say the cross-examination makes a witness competent, though otherwise liable to exception, it must be taken in reference to the circumstances appearing in that case, and which brings the case within the rule I have laid down.

The same remarks are applicable to the case of Ogle v. Paleski, Holt, N. P. 485, which was much relied upon on the argument. The action was against the defendant as owner of a ship, which by negligence in the management had injured the plaintiff's brig. The cause had been put off on a former occasion at the instance of the defendant, with liberty reserved to the plaintiff to examine witnesses on interrogatories. And the evidence offered was the answers of the captain of the plaintiff's ship; and the first answer discloses the fact, that the witness was on board the ship at the time of the accident. The objection was, that his examination could not be read without showing a release before it was taken. The answer was, that the objection was apparent on the examination, and should then have been made, before cross-examining the witness; that the objection might be waived, and that it had been waived, by not taking it at the time when it might have been disposed of by a release. And Chief Justice Gibbs said, the objection ought to have been made in a former stage of the cause, and not having been thus made, when it might have been cured, it ought not to prevail. This was a decision in perfect harmony with the rule which governed the other cases I have referred to, and to which I yield my full assent. But the present case does not fall within it. There is an essential, and, I think, a controlling fact which distinguishes it; the want of either actual or constructive notice of the interest of the witness, when the deposition was taken. The judgment must, therefore, be reversed, which would supersede the necessity of examining the other question. But as it has been fully argued, and will doubtless arise, should the cause be again tried, it may not be amiss for me to express my opinion upon it.

2. By the 22d section of the act of the 20th of April, 1818 (6 Bior. & D. Laws, 306 [3 Stat. 433]), upon which the libel is founded, the collectors are required "to cause at least one package out of every invoice, and one package at least out of every fifty packages, of every invoice of goods, wares, or merchandise imported into their respective districts, to be opened and examined; and if the same be found not to correspond with the invoice thereof, or to be falsely charged in such invoice, a full inspection of all such goods, wares or merchandise, as may be included in the same entry, shall be made; and if any package is found to contain any article not described in the invoice, the whole package shall be forfeited." It is necessarily implied in the bill of exceptions, from the statement of the objection, that in point of fact, the entry at the custom-house did not correspond with the invoice. And the point of inquiry is, whether the judge erred in submitting to the jury the question, whether such difference proceeded from accident or mistake, and not from an intention to defraud the revenue?

I did not understand the counsel for the claimant as contending that, under the provisions of the act of 1818, this would be a proper inquiry for the jury. But it is said, that the proviso to the 67th section of the act of the 2d of March, 1799, is still in force, and applicable to the case. The enacting clause in this section authorizes the collector, after entry made of any goods, &c. on suspicion of fraud, to open and examine, in the presence of two or more respectable merchants, any package or packages, and if found to differ in their contents from the entry, then the goods, wares, or merchandise contained in such package or packages shall be forfeited. Provided, that the said forfeiture shall not be incurred, if it shall be made to appear to the satisfaction of the collector, &c. or of the court in which a prosecution for the forfeiture shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. If this proviso is to be considered in force, the question was properly submitted to the jury. For although the proviso in terms refers the question to the court, yet at the time this act was passed it was generally understood, that seizures upon land as well as upon the water were to be tried by the court. And as under the decision of the supreme court seizures on land are now to be tried by a jury, it would be no more than a reasonable construction of this proviso to consider the jury as substituted in the place of the court to try the question of mistake or accident.

But I think this proviso cannot be considered in force, but is repealed by implication by the act of 1818. It is true, this latter act purports to be supplementary to the act of 1799. And it is admitted, that a repeal by implication of a former by a latter statute, is not to be favoured. But such effect and operation is indispensable in some cases. As when the subsequent statute is inconsistent with the former, and the two cannot be reconciled. So where the latter is on the same subject matter with the former, and introduces some new qualifications, or modifications; the former must necessarily be repealed, the two cannot stand together. And in most cases the question resolves itself into the inquiry, what was the intention of the legislature? Did it mean to repeal or take away the former law, or was the new statute intended as merely cumulative? Affirmatives in stat-

utes that introduce new laws, imply a negative of all that is not in the purview. So that a law directing a thing to be done in a certain manner, implies that it shall not be done in any other manner. 6 Dane, Abr. 591, 593, cases there cited.

Let us test the present case by these rules. The subject matter of the 22d section, of the act of 1818, is the same with that of the 67th section of the act of 1799, viz.: To ascertain whether the contents of the packages corresponded with the entries made at the custom-house, and to declare the whole package forfeited when they disagree. But the mode and manner in which this is to be ascertained, and the duty imposed upon the collectors of the customs in relation thereto, differ in the two acts. In the act of 1799, it is left discretionary in the custom-house officers, to make the examination or not. It is made lawful for them so to do when fraud is suspected; and this examination is to be made in the presence of two or more respectable merchants. The examination in this case is bottomed on the suspicion of fraud. And under the proviso the collector and naval officer, as well as the court, are authorized to judge whether the difference proceeded from accident or mistake; and not from an intention to defraud the revenue. Under the act of 1818, it is made the duty of the collectors in all cases, whether fraud is suspected or not, to cause to be opened and examined, at least one package out of every invoice, and one package at least out of every fifty packages of every invoice; and the only inquiry he is authorized to make on a full inspection of the goods, is whether the packages contain any articles not described in the invoice; nothing is said about fraud or accident. The forfeiture is declared to have been incurred, when the fact of such difference between the entry and the invoice is found to exist. Would the collector be authorized under the act of 1818, to inquire whether the difference arose from mistake or accident, and to relinquish the seizure if it should be so found? I apprehend not. But if the proviso remains in full force, it preserves the power and authority of the collector in this respect, as well as that of the court; both are coupled together, and must stand or fall together. Under the act of 1818, a different tribunal is expressly substituted, to determine whether the difference arose from mistake or accident, and not from fraud. By the 25th section it is enacted, "that all penalties and forfeitures incurred by force of this act, may be mitigated or remitted in the manner prescribed by the act of the 3d of March, 1797." (2 Bior. & D. Laws, 585 [1 Stat. 506]). By which power is given to the secretary of the treasury, "to mitigate or remit, fines, forfeitures, or penalties, or any part thereof, if in his opinion the same shall have been incurred without wilful negligence, or any intention of fraud in the persons incurring the same." This is the very inquiry authorized by the act of 1799, to be made by the collector or by the court. And when the act of 1818, submits this question to the decision of another tribunal, it is, within the authorities I have referred to, an implied repeal of the former provision on the same subject.

This was undoubtedly a question resting in the sound discretion of congress; and many weighty considerations might be suggested as affording reasonable grounds for the substituted provisions on this subject. Under the law of 1799, when the court decided the question, there must have been either an entire acquittal, or a total forfeiture. Under the authority given to the secretary of the treasury, he may remit in whole or in part, so as to meet the equity of the various cases that may occur. He is entrusted with equitable powers to grant relief, when by the letter of the law a penalty, or forfeiture, had been incurred. It is not an unlimited discretion, however, with which he is intrusted; he can only grant relief when the forfeiture has in his opinion been incurred, without wilful negligence or any intention of fraud.

That it was intended by the act of 1818, to repeal or do away the proviso to the 67th section of the act of 1799, as well as the enacting clause, is strongly corroborated by the 15th section of the act of 1st March, 1823 (2d Sess. 17th Cong. c. 20 [3 Stat. 729]). The enacting clause here, is substantially the same as the 22d section of the act of 1818; but to which is added a proviso, "that the secretary of the treasury be, and he is hereby authorized, to remit the said forfeiture, if in his opinion the said article was put in by mistake or without any intention to defraud the revenue." This is no more than incorporating by way of proviso to this section, what was contained in the act of 1818, by reference to the act of 1797, where general power is given to the secretary of the treasury to grant relief in such cases. Should a seizure be made under the 15th section of the act of 1823, for want of a correspondence between the invoice and the package, it would not I presume be contended, that upon a trial for the forfeiture, it would be a question for the jury to decide, whether this arose from mistake, and without an intention to defraud the revenue. And if not under this act, I am unable to discover why it would be proper under the act of 1818; which contains the same provision, although in a little different form and shape. Under both acts, I consider the secretary of the treasury the only proper authority to decide, whether the want of correspondence between the package and invoice, arose from mistake and not design; and that the court below erred in submitting this question to the jury. If such variance did in point of fact exist, the law has pronounced the forfeiture, and relief is only to be had through the secretary of the treasury.

The judgment of the district court must therefore be reversed.

Case No. 15,925.

UNITED STATES v. ONE CASE OF SILK.

[4 Ben. 526; [1] 13 Int. Rev. Rec. 58.]

District Court, S. D. New York. Feb., 1871.

CUSTOMS DUTIES — PROCESS — SEIZURE — ATTACHMENT OF PROPERTY IN CUSTODY OF COLLECTOR.

1. A libel of information was filed against goods, to forfeit them for alleged violation of the revenue laws, and process was issued to the marshal, commanding him to attach the property and detain it in his custody. The marshal returned, that he had been unable to attach the property and to detain it in his custody, and an alias monition was issued to him. On the record in the cause, and an affidavit showing that the goods had been, previous to the filing of the libel, seized by the collector of the port of New York, and remained in his custody, and that a certificate to that effect had been issued to the marshal, an application was made, on behalf of the United States, for an order that the alias monition be modified, so as to conform to the provisions of the 31st section of the act of July 18, 1866 (14 Stat. 186). *Held*, that the provisions of the 4th section of the act of May 8, 1792 (1 Stat. 277), requiring the marshal to take custody of all goods seized by any officer of the revenue, were abrogated by the 31st section of the act of July 18, 1866 (14 Stat. 186).

[Cited in Re Two Hundred and Fifty Tons of Salt, 5 Fed. 220.]

2. The 9th admiralty rule of the supreme court, in view of the provision of the act of 1866, was not applicable to the case, it being a case, in the language of that rule, "otherwise provided for by statute."

3. The alias monition would, therefore, be modified, so that it should command the marshal to attach the property by leaving with the collector, or other person having the property in custody, a copy of the monition and a notice requiring such collector or other person to detain such property in custody until the further order of the court respecting it.

T. Simons, Asst. U. S. Dist. Atty.

John Sedgwick, for the marshal.

BLATCHFORD, District Judge. The libel of information in this case avers that the property proceeded against was "seized on waters navigable from the sea by vessels of ten or more tons burthen," by the collector of customs for the port and collection district of the city of New York, as forfeited to the United States for violations of the 24th and 68th sections of the act of March 2d, 1799, in relation to duties on imports and tonnage. The prayer of the information is, "that due process issue in that behalf, as well of attachment, to bring the said property within the custody of the court, as of monition, to all parties in interest, to appear on the return of such process and duly intervene herein, by claim and plea to the premises," and that the property be condemned, by decree of forfeiture, to the use of the United States.

On the filing of the libel of information, a writ was issued to the marshal of the Southern district of New York, commanding him to attach the property and to detain it in his custody until the further order of the court respecting it, and to give due notice, &c. The writ was returnable September 27th, 1870. The return to it made by the marshal on that day was as follows: "I certify, that, after due diligence, I have been unable to attach the property described in the within monition and to detain the same in my custody. George H. Sharpe, U. S. Marshal."

An affidavit is now presented to the court, on the part of the United States, made by a deputy collector of the customs at the port of New York. It sets forth, that such deputy collector has, under the collector, the care and custody of all goods seized within this district, on account of alleged violations of the customs revenue laws, and of the institution of proceedings for the recovery and enforcement of fines, forfeitures and penalties under such laws; that there has been ever since April, 1869, and was for a long time prior thereto, in the custom-house at the port of New York, a room specially assigned for the storage of seized goods; that there are employed in said room a storekeeper, an opener and packer, and a laborer, all under salary; that, until recently, ever since April, 1869, and for a long time prior thereto, it was the custom, where goods had been seized and placed in the seizure room, and a suit had been instituted for their condemnation, for the marshal of the district to call at the custom-house and make inquiry if the goods were in the possession of the collector, and, thereupon, to make return upon the monition, of the attachment of the goods proceeded against; that, some few months since, the marshal made claim to remove from the seizure room, and from the custody of the collector, goods against which he held a monition; that, thereupon, such deputy collector was led to investigate the law, and to consult with the district attorney of the United States; that such investigation and consultation resulted in the collector's deciding to retain possession of the goods until final adjudication, unless otherwise ordered by the court; that, after some time had elapsed, and after various attempts to procure a submission of the question to the decision of the court, the marshal, on the presentation of a monition, and, in one or two instances of an alias monition, demanded the possession of the goods therein described; that, thereupon, such deputy collector gave to the marshal a certificate signed by him, in substance, as follows: "This may certify, that the goods" (giving marks, &c.,) "described in the monition now exhibited to me by the United States marshal, dated, are in the seizure room of the custom-house, and in the custody of the collector of the port of New York. In accordance with section 31 of the act of July 18th, 1866, and acting under the advice of the United States district attorney, the collector de-

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

clines to deliver the same to the order of the United States marshal, but holds the same to abide adjudication, subject to the order of the court;" that a certificate the same in substance as the foregoing was given in the present case to the marshal or his deputy, upon his presenting the monition and demanding the goods proceeded against; that a like certificate has been given, under like circumstances, in other cases which have been instituted since this question was first raised; that the custom-house is a fire-proof building, and under the care of watchmen during the night; that the place assigned for the storage of seized goods, and known as the seizure room, is immediately underneath the rotunda in said building, and is not accessible from the street, and is securely locked and barred at night; that all seized goods are kept therein, without any expense chargeable upon the goods for storage or insurance; that the only expenses charged upon goods coming into the seizure room, are the incidental expenses for cartage to the seizure room from the place of seizure, and occasional small sums for labor, such as the cooperage of leaking casks; that it has been the practice of such deputy collector to require, in all cases where goods against which a suit has been commenced, have been, for any cause, released, a direction for their release, from the marshal; that such was the practice when such deputy collector assumed the duties of his office, in April, 1869; that he has continued to require such direction, as being evidence of the direction of the court in the premises, and also evidence that the marshal has received all fees and costs to which he is entitled; and that it has been the practice to deliver goods which have been condemned, to the marshal, or his order, for sale.

An alias monition, with directions like those in the original monition, as to the attachment and detention of the property, has been issued, in the case, to the marshal. On the records in the cause, and the foregoing affidavit, a motion is now made to the court, on the part of the United States, for an order that such alias monition be so modified in respect to the clause therein contained, commanding the marshal to attach the property, and to detain it in his custody until the further order of the court respecting it, as to conform to the provisions of the 31st section of the act of July 18, 1866 (14 Stat. 186), or that he make return thereto, stating the fact that such property was found in the custody of the collector, and is left in his custody, under the provisions of said act. Such motion is made on notice to the marshal, and is opposed by the marshal.

In order to understand fully the question presented on this motion, it will be necessary to refer to the course of legislation and judicial decision on the subject involved. By the first statute passed by congress to regulate the collection of customs duties, that of July 31, 1789 (1 Stat. 29), provision was made for the seizure of vessels, goods, wares and merchandise by officers of the revenue, as forfeited, for violations of that act. The 25th section of that act (page 43) contained the following provision: "All goods, wares and merchandise which shall be seized by virtue of this act, shall be put into, and remain in, the custody of the collector, until such proceedings shall be had, as by this act are required, to ascertain whether the same have been forfeited or not; and, if it shall be adjudged that they are not forfeited, they shall be forthwith restored to the owner or owners, claimant or claimants thereof." This act of 1789 was repealed from and after October 1, 1790 by the 74th section of the act of August 4, 1790 (1 Stat. 178), but the 49th section (page 170) of such act of 1790 was a re-enactment, verbatim, of the provision above cited from the 25th section of the act of 1789, except that, after the word "collector" were added the words, "or such other person as he shall appoint for that purpose."

Then followed the 4th section of the act of May 8, 1792 (1 Stat. 277), entitled, "An act for regulating processes in the courts of the United States, and providing compensation for the officers of the said courts, and for jurors and witnesses," which provides, that "the marshal shall have the custody of all vessels and goods seized by any officer of the revenue, and shall be allowed such compensation therefor as the court may judge reasonable." That provision has never been expressly repealed.

The act of August 4, 1790, was repealed from and after June 30, 1800, by the 112th section of the act of March 2, 1799 (1 Stat. 704), but the 69th section (page 678) of such act of 1799 is a re-enactment, verbatim, of the provision so found in the 49th section of the act of 1790, except that the words, "goods, wares and merchandise," are changed to "goods, wares or merchandise." This provision of the act of 1799 has never been expressly repealed.

The first time that these provisions of law appear to have come under judicial cognizance was in the case of Burke v. Trevitt [Case No. 9,163], in 1816, where Mr. Justice Story remarked, that, where property is seized as forfeited under the revenue laws, it is the duty of the seizing officers immediately to institute the proper process to ascertain the forfeiture; that, as soon as the process is commenced, the property is in the custody of the law; that it is a general rule, in all proceedings in rem, that the custody of the thing in controversy belongs to the court in which the suit is pending; that the provision in the 4th section of the act of May 8, 1792, directing that the marshal should have the custody of all vessels and goods seized by the revenue officers, was altered, as to goods, by

the provision of the 69th section of the act of March 2, 1799, declaring that all goods seized under that act should be put into, and remain in, the custody of the collector or his agent. He added: "This act, however, does not change the legal custody, after process is served upon the property. It is still, in contemplation of law, in the custody of the court; and the collector remains as much responsible to the court for the property, and as much bound to obey its decrees and orders, as the marshal is, as to property confided to his care. The collector is, in fact, quoad hoc, the mere official keeper for the court."

The question thus discussed by Mr. Justice Story came before Judge Betts, in this court, in 1831, for direct adjudication, in the case of the jewels stolen from the Princess of Orange, which were libelled in rem, by the United States, after being seized for a violation of the customs laws. Process was issued to the marshal, to attach the property. The collector claimed, under the act of 1799, the right to retain the property, and the marshal claimed the right to take the custody of it, under the process, and the act of 1792. The question in controversy was brought before Judge Betts, and he decided that the custody of the goods seized belonged to the marshal, as soon as proceedings were instituted to ascertain whether they were forfeited. The minister of the king of the Netherlands having requested from the president the delivery to him of the jewels, as the property of the Princess of Orange, the secretary of state, in November, 1831, submitted the opinion of Judge Betts, a copy of which does not now seem to be accessible, to the attorney general, Mr. Taney, (afterwards Chief Justice Taney,) for his consideration. He came to the conclusion (2 Op. Attys. Gen. U. S. 477), that Judge Betts was wrong and Judge Story was right; that, under the act of 1799, the custody of goods seized belonged to the collector, not only until the libel was filed, but also until the question of forfeiture was adjudicated; that so much of the act of 1792 as gave the custody to the marshal was repealed, and intended to be repealed, by the act of 1799; that, in legal contemplation, the goods were in the custody of the court as soon as the process was issued; that, although the actual possession and care of them was committed to the collector, he held them as the official keeper of the court, and was bound to obey its order and direction, whether conveyed to him through the marshal or in any other form; and that, whether the custody was in the collector or the marshal, the goods would be under the control and power of the court, and subject to its direction. Mr. Taney concluded his opinion by saying, that he thought the point decided by Judge Betts ought to be subjected to revision or put at rest by an explanatory act of congress.

Neither course was taken, and the question remained in this shape until December, 1838. At that time, certain goods which had been seized by the collector of New York, as forfeited for a violation of the customs laws, were libelled in rem, by the United States, in this court. Thereupon, a monition and warrant was issued to the marshal, directing him to attach the goods, and to detain the same in his custody until the further order of the court respecting the same, and to give notice, &c. The collector then made a motion to this court, that the clause in the monition, by which the marshal was directed to detain the goods attached in his custody until the further order of the court respecting the same, might be stricken out on the ground that it was repugnant to the 69th section of the act of 1799, and was, therefore, illegal and void, or that the monition should be so amended, that the goods should remain in the custody of the collector, or such person as he should appoint for that purpose, until the proceedings commenced for the forfeiture of the goods should be determined, and it should be judicially ascertained whether the same had been forfeited or not. This court denied the motion of the collector. Thereupon, the collector made a motion to the supreme court (Ex parte Hoyt, 13 Pet. [38 U. S.] 279), at the January term, 1839, for a mandamus to be directed to the district judge, commanding him to vacate the order denying the motion of the collector, and to grant the motion, or so much of it, and in such form, as the supreme court should direct. The question was elaborately argued on the merits by counsel for the collector and the marshal, Chief Justice Taney and Mr. Justice Story being members of the court. The statutes on the subject were commented on, and the views expressed by Mr. Justice Story, in Burke v. Trevitt, and by Chief Justice Taney, in his opinion in the case of the jewels, were urged by the counsel for the collector. Mr. Justice Story delivered the opinion of the court, and refers to the decision of Judge Betts in the case (which is not now to be found) as an elaborate opinion, reviewing the whole series of laws on the subject. The supreme court held that the case was not one in which it had the power to issue the writ asked for. But it nevertheless went on, through Mr. Justice Story, to say: "As there appears to have been some diversity of construction, in the different districts of the United States, of the laws on this subject, and as it is a matter of general concern throughout all the commercial districts, and applicable to the daily practice of the courts, and the point has been fully argued, we think it right to say, that we are of opinion, that the construction of the laws of the United States, maintained by the district judge in his opinion, is the correct one, to wit, that, by the sixty-ninth section of the collection act of 1799, the goods, wares and merchandise seized under that act are to be put into, and remain in, the custody of the collector, or such other persons as he shall appoint for that purpose, no longer than until the proper proceedings are had, under the

eighty-ninth section of the same act, to ascertain whether they are forfeited or not; and that, as soon as the marshal seizes the same goods under the proper process of the court, the marshal is entitled to the sole and exclusive custody thereof, subject to the future orders of the court." These views, though not of binding force as an adjudication on the merits involved, are those of all the judges except Mr Justice Baldwin, who concurred in the view that the case was not one for a mandamus, but declined to give any opinion on the merits. It is quite apparent, that both Chief Justice Taney and Mr. Justice Story no longer adhered to the opinions they had before expressed, as to the proper construction of the acts of congress on the subject, and had come to concur with Judge Betts.

From that time the question remained at rest. Congress passed no further act on the subject, until 1866. On the 18th of July, 1866, an act was passed, the 31st section of which (14 Stat. 186) provides, that "all goods, wares, merchandise, or property of any kind, seized under the provisions of this act, or any other law of the United States relating to the customs, shall, unless otherwise provided for by law, be placed and remain in the custody of the collector, or other principal officer of the customs of the district in which the seizure shall be made, to abide adjudication by the proper tribunal, or other disposition according to law." It is insisted, on the part of the United States, in advocacy of the motion now made by them, that this provision of the 31st section of the act of 1866 has the effect to require that the custody of all property seized under the customs laws shall remain in the custody of the collector, notwithstanding it is libelled in a suit in rem, in this court, and process is issued to the marshal to attach it, and that it shall so remain until it is adjudicated upon finally in the suit.

It can hardly be necessary to vindicate the correctness of the construction put by Judge Betts, and by the justices of the supreme court, upon the provisions of law on this subject, as they stood before the act of 1866. No decision to the contrary of such construction can now be cited; and I am satisfied it was the correct view. The custody in the marshal, intended by the 4th section of the act of 1792, and the custody in the collector, intended by the 69th section of the act of 1799, were two different descriptions of custody. The custody in the marshal was a custody obtained through the process of the court. When such custody was given, in 1792, the provision of the 49th section of the act of 1790, before referred to, still remained in force, and it never could have been supposed, for a moment, that the general provision of the 4th section of the act of 1792, giving to the marshal the custody of all vessels and goods seized by any officer of the revenue, intended that he should have such custody in any case except where he was called upon to take such custody by the process of the court. As to custody after seizure by the collector, and before the issuing of the process of the court to the marshal, such custody remained in the collector, under the act of 1790. But, when such process was issued, the collector was to yield the custody to the marshal. The two enactments were to stand together. The act of 1792 was an act to regulate processes in the courts, and to provide compensation for its officers, and for jurors and witnesses. For the custody which, under it, the marshal was to have, he was to be allowed such compensation as the court might judge reasonable—that is, the court issuing the process under which such custody should be taken. The court had nothing to do with adjudging a compensation to the collector, or a compensation for any custody except a custody taken and held under process. The custody of the collector was a custody obtained through the power of seizure given to him by law, outside of process issued on a direct proceeding in rem. When the 69th section of the act of 1799 replaced, in substantially the same terms, the 49th section of the act of 1790, the 4th section of the act of 1792 was left in force, and the custody of the collector, spoken of in the act of 1799, was as distinct from the custody of the marshal, spoken of in the act of 1792, as the latter custody was distinct from the custody of the collector, spoken of in the act of 1790. When, under the act of 1799, such proceedings were had as were required by that act, to ascertain whether the goods had been forfeited, then the custody of the collector was to be given up to the marshal. The proceedings referred to were those prescribed by the 89th section of the act of 1799—libelling and prosecution in the proper court. These proceedings were, the filing of a libel or information against the forfeited property, the issuing of a writ to the marshal, commanding him to attach the property, and to give the notice required by the 89th section, and the execution of the writ by the marshal. Conk. Prac. (Ed. 1842) pp. 120, 361, note a.

Such was the law from 1799 to 1866. The practice under it was well defined. The writ, generally called a monition, commanded the marshal to attach the property, and detain the same in his custody until the further order of the court respecting the same, and to give due notice, &c. Conk. Prac. (Ed. 1842) p. 590. Under such a monition, the practice has been for the marshal to arrest the property so previously seized, by taking it into his custody. Id. p. 361. Judge Conkling, in his treatise (Ed. 1842, p. 120, note a), says, that, under the 4th section of the act of 1792, and the 69th section of the act of 1799, the marshal is, by virtue of the monition and attachment, to take into his custody all other descriptions of property, as well as vessels. Judge Betts, in his Admiralty Practice (Ed. 1838, p. 68, § 12), says, in regard to

property seized as forfeited for violations of the laws of the United States, that, after being seized, it is to be proceeded against by libel, as in ordinary cases. He adds: "It seems to be considered, in some of the United States courts, that the collector, on his seizures, holds the property until final condemnation and sale, and, during the pendency of proceedings in court respecting it, becomes virtually the officer of the court in regard to the property seized. A different interpretation is put upon the various acts of congress, in this court, and the collector, like the master of the public ship, is considered as holding the property under his seizure only until 'seized, libelled and prosecuted in the proper court,' pursuant to the directions of the statute, his custody thus becoming qualified, and being superseded and discharged when the process of the court acts upon the property. The act of May 8th, 1792 (section 4), applies to the case after the property is 'seized, libelled and prosecuted,' as directed by the act of March 2d, 1799 (section 89)." He also says (page 69) that the attachment against the property is served by the marshal, by his taking the property into his own custody. By rules 181 and 13 of this court, adopted in 1838, the proper process, on an information in rem, was defined to be an attachment in rem, united with a monition. By rules 183 and 32, the return of the marshal, in case of process in rem, must express the day of the seizure of the property. Rules 49 and 50 prescribe fees to the marshal for the custody of vessels and goods "seized by any officer of the revenue, and seized, libelled and prosecuted for forfeiture."

In regard to the provision of rule 172 of this court, that, in summary proceedings in rem, in behalf of the United States, where the matter in demand does not exceed fifty dollars, and the goods are under seizure by the collector, and in his possession, the clerk may, at the instance of the district attorney, omit the attachment clause in the monition issued, and the provision of rule 173, that if, in such case, the monition also contains an attachment, and the marshal returns that the goods are in the custody of the collector, he shall stand acquitted of all responsibility for their safe keeping or production to answer the decree, and the provision of rule 174, that, in such case, the service of the monition shall be by leaving a copy or notice thereof with the collector or person having the goods in keeping, and also making like service on the owner or his agents, if known to the marshal and resident in the city, which rules apply to process on informations on seizures both upon land and water (rules 179, 183), Judge Betts states, in his Admiralty Practice (page 81), that the court, under those rules, proceeds upon the assumption, that the collector, by his own assent and that of the district attorney, or by the presumption of law, becomes, quoad hoc, the officer of the court, subject to its jurisdiction, respecting the detention and disposal of the property seized, but that such practice is contrary to the usual procedure of the court, and that such authority over the collector would be cautiously exercised, if objected to by the collector. In view of what had been held to be the law as to the custody, under the act of 1792, after process, of goods seized for forfeiture, and libelled and prosecuted in rem, it seems very doubtful whether the practice thus prescribed in respect to summary proceedings in rem, in behalf of the United States, was warranted by law, and whether the power assumed, under the 7th section of the act of March 2, 1793 (1 Stat. 335), to prescribe such practice, as a regulation of the practice of the court, was not outside of the authority granted by that section, because "repugnant to the laws of the United States." At all events, such practice could not stand, consistently with the provisions of the admiralty rules of December term, 1844, prescribed by the supreme court, hereafter referred to.

By the 9th section of the judiciary act of September 24, 1789 (1 Stat. 77), exclusive original cognizance is given to the district courts, of "all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas," and also of "all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States." Prosecutions following such seizures on waters so navigable, are held to be civil causes of admiralty and maritime jurisdiction, and, therefore, triable without the intervention of a jury; but prosecutions following other seizures are held to be suits at common law, within the 7th amendment to the constitution, and, therefore, not triable otherwise than by a jury. In the case of a seizure on the high seas or on waters so navigable, the case being then strictly a case of admiralty jurisdiction, the first pleading filed by the prosecution is properly known as a libel of information; and, in the case of a seizure on land or on waters not so navigable, the case being one not strictly of admiralty jurisdiction, such first pleading is properly known as an information. Conk. Prac. (Ed. 1842) p. 350. Rules 1 and 5 of this court speak of libels and informations, and rule 179 speaks of "informations on seizures upon land or water." Judge Betts, in his Admiralty Practice (Ed. 1838, p. 69), speaks of libels or informations filed against property seized as forfeited. An examination of text books and decisions shows that the pleadings filed to forfeit property seized have been generally called, indifferently, libels of information and informations, whether the seizures were on land or on water.

The 6th section of the act of August 23, 1842 (5 Stat. 518), provides, that the supreme court shall have power, among other things, to prescribe and regulate and alter the forms and modes of framing libels and other pleadings, in suits at common law or in admiralty pending in the circuit and district courts of the United States, and generally the forms and modes of proceeding to obtain relief, and generally to regulate the whole practice of the said courts. Under this authority, the supreme court, at its December term, 1844, promulgated certain rules, which took effect from and after September 1st, 1845, as rules "for the regulation and government of the practice of the circuit and district courts of the United States in suits in admiralty on the instance side of the courts." The 1st rule shows that the rules cover all civil causes of admiralty and maritime jurisdiction commenced by libel or libel of information. The 22d rule provides, that "all informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States." All of those rules, unless altered by the act of 1866, apply to the present case, because, this being a seizure on waters navigable from the sea by vessels of ten or more tons burthen, is, within all the decisions, from the case of La Vengeance, 3 Dall. [3 U. S.] 297, to the present time, a civil cause of admiralty and maritime jurisdiction, and it is a case on the instance side of the court, and not a case in prize. The 9th of those rules provides, that, "in all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned," &c., to be given. This rule provides for process of arrest, "unless otherwise provided for by statute," and prescribes, that, on such process, the marshal must take the property into his possession, for safe custody. His right and duty, therefore, prior to the passage of the act of July 18th, 1866, to take custody of property under process from the court, in cases of seizures cognizable in the admiralty, were clearly provided for, not only by the act of 1792, notwithstanding the act of 1799, but also by the 9th rule in admiralty; and his right and duty, prior to the passage of such act of 1866, to take custody of property, under process from the court, in cases of seizures not cognizable in the admiralty, were clearly provided for by the act of 1792, giving him the custody, under and after process, of "all vessels and goods seized by any officer of the revenue."

The question, then, is—What effect has the 31st section of the act of 1866 on the prior legislation, and on the 9th rule in admiralty, in respect to this case? The 43d section of that act (page 188) repeals all acts and parts of acts "conflicting with or supplied by" that act. The 31st section relates to all seizures under any law relating to the customs—to seizures of vessels as well as to seizures of other property—to seizures on land as well as to seizures on the water. The 69th section of the act of 1799 only related to seizures of goods, wares and merchandise. It did not include vessels. Vessels and goods both were named in the 4th section of the act of 1792, but the collector never claimed the custody of vessels, under the act of 1799. The act of 1866, however, covers "all goods, wares, merchandise or property of any kind," seized under any law relating to customs. It declares, that such property shall, "unless otherwise provided for by law," be placed and remain in the custody of the collector or other principal officer of the customs of the district in which the seizure shall be made, "to abide adjudication by the proper tribunal, or other disposition according to law." When congress made this enactment, provision by law existed for the custody of property after its seizure by officers of the customs and before prosecution. In respect to a vessel, it would necessarily remain in the custody of the customs officer seizing and securing it under section 70 of the act of 1799, until a suit to enforce the forfeiture should be commenced against the vessel, under section 89 of that act. In respect to goods, wares and merchandise, they would, under section 69 of that act, be put by the seizor into, and remain in, the custody of the collector or his appointee, until the commencement of a suit against them to enforce the forfeiture of them. In respect to both classes of property, the marshal would, under the act of 1792, take custody of the property, under process in the suit. Now, certainly, on this state of facts, it must be held, that congress intended, by the act of 1866, to make some change in respect to the custody of property seized. Was the change intended only a change of the custody of vessels, so that, before and until suit, they should go into and remain in the custody of the collector or his appointee, instead of remaining in the custody of their seizor? I think not. Yet that is the only change made, if the marshal is to take custody, as before the act of 1866, of all seized property, after process. The act of 1799, as construed, gave custody of goods to the collector only until the institution of proceedings against them by suit. The act of 1866 gives to the collector custody of all seized property—vessels and goods—"to abide adjudication by the proper tribunal, or other disposition according to law." The words, "to abide adjudication by the proper tribunal" mean, to abide or await a determination by such tribunal as to whether the thing seized is forfeited or not—to remain in the custody of the collector until such tribunal makes such

determination, and while the proceedings are going on in the suit brought to obtain such determination. When we speak of an adjudication, we mean a judgment determining the right; and congress must be regarded as having intended that meaning.

But, it is claimed, under the words, "other disposition according to law," that the custody of the property is to remain in the collector only to abide some lawful disposition of the property, and that the taking of the property by the marshal under process in the suit was a disposition of it according to law, provided for at the time the act of 1866 was passed, and, therefore, such taking of it must, under the act of 1866, be regarded as a disposition of it according to law. What is the meaning of the word "disposition," as used in the act of 1866? There were in existence, at that time, several modes of finally disposing of seized property, both before and after suit. The forfeiture of it might be remitted by the secretary of the treasury, under the 1st section of the act of March 3d, 1797 (1 Stat. 506), or under the 16th section of the act of July 18th, 1866. It might be delivered to the claimant on appraisement and bond, under the 89th section of the act of 1799. It might, if not over $500 in value, be sold by the collector, under the 12th and 15th sections of the act of July 18th, 1866. These dispositions of it would be dispositions of the same character with a disposition of it by the court by a sale of it after condemnation, as provided for by the 90th section of the act of 1799. They would finally dispose of the property as a res, as between it and the United States. I think these and these only are the dispositions intended by the word "disposition" in the act of 1866—dispositions ejusdem generis with a disposition by adjudication—final dispositions of the res—not a mere change of its custody before final disposition.

Then comes the phrase, "unless otherwise provided for by law." Property seized is, "unless otherwise provided for by law," to remain in the custody of the collector, to abide adjudication, &c. If it be held, that the phrase, "unless otherwise provided for by law," has the effect to leave in force the provision as to custody by the marshal after process, then the provision of the act of 1866 makes no change except to put vessels into the custody of the collector before and until process. These words, "unless otherwise provided for by law," must be construed in connection with the provision of section 43 of the same act, repealing all "parts of acts conflicting with or supplied by this act." Custody until adjudication, and after as well as before process, is supplied by the act of 1866. It was supplied by previous legislation. Custody after process was, by previous legislation, given to the marshal. It is, by the act of 1866, given to the collector. The former provision for such custody by the marshal after process conflicts with the new provision as to custody by the collector after process. "Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto." Dwar. St. 673. The words, "unless otherwise provided for by law," cannot be held to embrace the prior provisions of law which are thus in conflict with and supplied by the act of 1866. On the contrary, such prior provisions must be held to be superseded and repealed.

Nor is the question one which involves the jurisdiction or authority of the court over the res that is prosecuted, or its jurisdiction over the suit in rem. The property having been seized as forfeited, and the seizure having been adopted by the United States, by bringing the suit in rem to enforce the forfeiture, the court has jurisdiction to decree such forfeiture, and jurisdiction and authority to order the property, under the 89th section of the act of 1799, to be delivered to the claimant on appraisement and bond and the payment of duties, and to cause the property, under the 90th section of the same act, if not bonded, to be, when condemned, sold by the marshal or other proper officer of the court, even though the property remains in the custody of the collector until adjudication. The views of Mr. Justice Story and of Chief Justice Taney, before cited, are sound in reference to a case where in fact the collector and not the marshal is to have custody after process. The property is, in contemplation of law, after process, in the custody of the court, although the marshal does not take it into his custody, provided it remains in custody, under a seizure for forfeiture, while the proceedings in court against it are pending. The collector is its official keeper, for the court, after process, and the court has, after process, as full control over it in the hands of the collector, and as full power to compel obedience by the collector to all orders of the court respecting it, as if it were in the hands of the marshal, under process. Such appears to have been the view of Judge Betts in respect to custody by the collector after process, under the rules of this court in regard to summary proceedings in rem in behalf of the United States, where the matter in demand did not exceed fifty dollars; and it is a necessary view in respect to all property prosecuted for forfeiture, where the custody after process is given by statute to the collector.

It follows, that not only is the provision of the 4th section of the act of 1792 abrogated by the act of 1866, but the 9th rule in admiralty, in view of the provision of the act of 1866, does not apply to cases like the present one. Such cases are, in the language of that rule, "otherwise provided for by statute."

Such being the interpretation of the act of 1866, what relief is to be granted on the

motion in this case? I think the proper course is, to amend the alias monition, so that it shall command the marshal to attach the property by leaving with the collector or other person having the property in custody a copy of the monition, and also a notice requiring such collector or other person to detain such property in custody until the further order of the court respecting it, and to give due notice, &c. This will be the proper form of monition to be issued in all cases where property is under seizure as forfeited for violations of the customs laws, and is in the custody of the collector or other principal officer of the customs.

UNITED STATES v. ONE CASE OF SILK. See Case No. 15,951.

Case No. 15,926.

UNITED STATES v. ONE CASE OF SPARKLING WINE.

[See Case No. 14,614.]

Case No. 15,927.

UNITED STATES v. ONE CASE STEREOSCOPIC SLIDES.

[1 Spr. 467;[1] 22 Law Rep. 79.]

District Court, D. Massachusetts. March, 1859.

CUSTOMS DUTIES—IMPORTATION OF INDECENT ARTICLES—VERDICT—PACKAGE.

1. If a verdict finds facts not put in issue by the pleadings, it is so far nugatory.

2. By Statute 1857, c. 63 [11 Stat. 168], if an invoice or package of imported goods contains some articles which are indecent, or obscene, and others which are not, the whole are liable to forfeiture. The indecent or obscene articles are to be destroyed, and the others to be sold.

[Cited in U. S. v. Males, 51 Fed. 43.]

3. An information was filed against one case of stereoscopic slides, alleging them to be indecent and obscene, and praying that they might be condemned and destroyed, and the general issue was pleaded. The jury found that a part of the slides imported in the case were indecent, and that the rest were neither indecent nor obscene.

4. Under such pleadings, only those found to be indecent can be condemned, and the residue must be acquitted.

5. If a verdict find that two kinds of slides were in the same case, it is not a finding that they were in the same package.

C. L. Woodbury, U. S. Dist. Atty.

B. F. Hallett, for claimant.

SPRAGUE, District Judge. This prosecution is founded on Statute 1857, c. 63, prohibiting the importation of indecent or obscene articles, prints, paintings, lithographs, &c. The seizure was made on land. A trial has been had by a jury, who have returned their verdict, and the question now is, what judgment shall be entered.

The information sets forth, that "on the 30th of December, 1858, Arthur W. Austin then and now collector of the customs for the revenue district of Boston and Charlestown, in said district of Massachusetts, did, at said port of Boston and Charlestown, and on land, seize as forfeited to the use of the said United States of America, one case of stereoscopic slides, marked J. B. 111, imported into the United States from a foreign port or place, in the steamship Arabia, and now hath the same in his possession, as being forfeited and subject to destruction, for that the said stereoscopic slides are indecent and obscene articles."

The information concludes with praying, "that the said case of stereoscopic slides be condemned by the definitive sentence and decree of the said judge, as forfeited and subject to destruction, and that the same may be destroyed after condemnation."

Walter P. Cottle appeared and put in a claim, as owner, to all the stereoscopic slides, excepting fifty-nine. Those fifty-nine are admitted to be indecent, and subject to condemnation. The residue, being 1924 in number, the claimant defends, and has put in a plea denying the truth of the allegations in the information, that is, amounting to the general issue. Upon this plea, the jury have returned the following verdict: "The jury find that the case of stereoscopic slides, named in the said information, was imported by the said W. P. Cottle, and said case did contain fifty-nine stereoscopic slides that are indecent, and that as to all the other stereoscopic slides contained in said case, and claimed by said W. P. Cottle, the same are not indecent or obscene."

The district attorney now moves that judgment be rendered against all the stereoscopic slides, as forfeited, and that the fifty-nine which have not been claimed or defended, and are admitted to be indecent, be ordered to be destroyed, and that the residue be ordered to be sold for the benefit of the United States.

As to the fifty-nine, there is no controversy. They were a part of the contents of the case proceeded against, in the information, as indecent, and being found to be such, must be condemned and destroyed. But as to the 1924 which have been claimed and defended, the motion of the district attorney encounters two difficulties. 1st. The only allegation against them in the information is that they are indecent and obscene, but the verdict finds that they are neither indecent nor obscene. It is urged, however, that they were imported in the same package with others that were indecent, and for that reason are subject to forfeiture. But this ground of forfeiture is nowhere

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

alleged in the information. The charge in the information is quite different. They are charged not with being merely in bad company, but with being themselves corrupt, and the sentence denounced by the law for these two offences is by no means the same; for the one they are to be forfeited and sold, for the other they are to be condemned and destroyed. The information asks only for this latter judgment, and presents a case warranting only that judgment. How, then, can I make a decision upon grounds not set up in the pleadings, and render a judgment not called for, or warranted by them? It is urged that I may do so, because the verdict finds sufficient to authorize condemnation. But this position is untenable. The verdict can legitimately find no fact that has not been put in issue, and so far as it goes beyond the allegations of the pleadings, it is inoperative and void. The jury can decide only the questions which have been submitted to their determination by the pleadings. If, therefore, it were true, as assumed in the argument, that the verdict contains enough to warrant a judgment of forfeiture, still such judgment could not be pronounced upon this information, and the plea of general issue.

But there is still a further difficulty. The verdict does not find facts enough to warrant condemnation. It finds, indeed, that the 1924 stereoscopic slides which were not indecent, were imported in the same case with the fifty-nine which were indecent. The statute prohibits the importation of indecent or obscene articles, and says, that "all invoices and packages, whereof any such articles shall compose a part, are hereby declared to be liable to be proceeded against, seized and forfeited." The verdict does not find that the stereoscopic slides, claimed and defended in this case, were in any invoice or package of which the fifty-nine which were indecent composed a part. It is only found that they were in the same case. Now although a package is not always a case, yet it may be true that a case of goods, in the language of importers, is always a package; but this I cannot judicially know. It is a question of the meaning of a term used in a particular trade or business. The statute relates to importation from abroad, and the names which it uses, in describing articles of importation, have the meaning which has been given to them by those engaged in that business. What is the meaning of such terms, or of technical words in any art or science, is a question of fact to be submitted to the jury. Thus, under the revenue laws, whether a certain article imported was loaf sugar (U. S. v. Breed [Case No. 14,638]) and in another case whether the article was hemp; and in another whether it was crude saltpetre, was submitted to the jury. Indeed, this has been done in a great many cases, and as to a great variety of goods. The jury not having found that the case in which all these stereoscopic slides were imported was a package, I do not know and cannot assume it to be so. The verdict, therefore, does not show that the 1924 slides claimed by Mr. Cottle were imported contrary to law, and as to them, on both grounds of objection, the judgment must be that the United States take nothing by their information, and that the bond which was given by the claimant to obtain a delivery of those articles, be cancelled.

Case No. 15,927a.

UNITED STATES v. ONE CASE OF WATCHES, MARKED U. H. B. D.

[New York Times, Dec. 19, 1861.]

District Court, N. D. New York. Dec. 19, 1861.

CUSTOMS DUTIES—UNDERVALUATION—FORFEITURES.

This was an action brought to forfeit the goods on the ground of undervaluation with intent to evade the payment of duties. The goods were imported in October, 1860, on board the Vanderbilt, by the claimant, Bernard Daws. The government gave testimony to show that the watches were undervalued in the invoice some 330 francs, or over ten per cent. The claimant gave evidence tending to show the accuracy of the invoice. The amount of difference in the duty between the invoice value and that put upon the goods by the appraisers, was less than five dollars. The jury went out at the adjournment of the court.

[Before HALL, District Judge.]

The jury this morning brought in a sealed verdict in this case. The verdict was for the United States condemning the goods for undervaluation.

Case No. 15,928.

UNITED STATES v. ONE COPPER STILL.

[8 Biss. 270;[1] 11 Chi. Leg. News, 9; 24 Int. Rev. Rec. 317.]

District Court, E. D. Wisconsin. Sept., 1878.

INTERNAL REVENUE — FORFEITURE — PERSONAL PROPERTY—KNOWLEDGE OF FRAUD—OWNERSHIP.

1. Personal property situated upon distillery premises and used in the business of illicit distilling is subject to forfeiture by the government, irrespective of its ownership.

2. Neither the owner of personal property, nor his mortgagee, though innocent of any knowledge of its fraudulent use, can maintain a claim thereto paramount to the rights of the United States, in proceedings for the condemnation of the same for use in illicit distillation.

3. Where a statute in direct terms denounces a forfeiture of property as a penalty, the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the government.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

This was an information against certain property described as one copper still, one copper column, one mixing tub, one dumping tub, one alcohol tub, and other property of a similar character, seized at the rectifying house of the South Side Re-distilling Company, on July 2, 1877. The information alleged:

[2] [That on the 2d July, 1877, and during the months of November and December, 1876, and January, February, March, April, May and June, 1877, Richard Hatzfeld was carrying on the business of a distiller at the said rectifying house with intent to defraud the United States of the tax on the spirits distilled by him; that is to say, that he distilled spirits from molasses during the period before mentioned, at said rectifying house, and in such business used and employed the property before mentioned, and that all of said property was found on the day of seizure in the rectifying house, or in the building, room, yard and inclosure connected therewith, and used with or constituting part of the premises on which the rectifying house was situated. That at the date of the seizure and for six months previous, Hatzfeld carried on the business of a distiller at the rectifying house, without having given the bond required by law. That after having given a notice to engage in the business of rectifying spirits at said rectifying house, Hatzfeld, on or about November 1st, 1876, entered into a conspiracy with other parties, by means of which molasses was purchased and conveyed to the rectifying house to be manufactured into alcoholic spirits, and which were so manufactured and distilled by Hatzfeld at said place, in violation of law.

[It was then averred that by reason of the premises, and of the statutes of the United States, the property mentioned became forfeited to the United States, and the information, in suitable terms, prays for the usual process, and that the property may be condemned as forfeited.

[On the 7th day of August, 1877, and previous to decree and sale, the present petitioners claiming to have a mortgage upon a portion of the property described in the information, intervened by petition which alleged the following state of facts: That the property was seized by the collector July 2d, 1877, and turned over to the marshal July 7, for the purpose of condemnation under the provisions of section 3281 of the Revised Statutes. That on the 10th April, 1877, one Carl Delmanzo was the owner of a portion of said property, and to secure to one Hugh P. Reynolds the payment of $800, executed to Reynolds his promissory note for that amount, payable in one year, with interest at ten per cent., and also executed to him a chattel mortgage upon the undivided half of so much of said property as is described as one copper still, one boiler pipe, rectifying tubs, one steam pump and all tools, pipes, and fixtures upon the premises described, which mortgage was given to secure the payment of the note. That prior to the 2d July, 1877, Reynolds indorsed and transferred the note and mortgage to petitioners, who have since been the bona fide holders of the same. That the mortgage was not recorded, but was given to secure a bona fide indebtedness, and that the property covered by it forms part of the property claimed to have been forfeited to the United States. The petition then alleged that neither the petitioners nor Reynolds were parties to any attempt to commit a fraud upon the revenue laws, or to violate any law, and were not cognizant of any fraud or attempt to defraud the United States until after the information was filed, and were without knowledge as to whether Hatzfeld had violated any law as charged in the information. That the note and mortgage remain unpaid, and that there is due to petitioners thereon, $800, as principal, except the sum of $185 paid thereon with interest. The prayer of the petition was that in case the property should be condemned and sold, such condemnation and sale might be made subject to petitioners' rights and alleged lien which were claimed to be paramount, and that upon sale the petitioners might be paid from the proceeds, the amount claimed to be due them as a first lien upon the property. This petition having been filed before decree and sale, the court was asked by petitioners' counsel to then adjudicate their rights, but it was the view of the court that decree should be entered, and that the sale had better proceed, and that thereafter the rights of the parties should be passed upon and with the same force and effect as if adjudicated when the petition was filed. Objections having been filed by the attorney for the United States to the petition, the petitioners' case was to be determined as if heard before sale, their rights, if any, being unprejudiced thereby. The objections to the petition were, that under the statute applicable to the case, the petitioners could not acquire any rights in the property in question, in the manner set forth in the petition, and that it appeared from the petition that Delmanzo did not claim to have any title to said property until after the same had been forfeited to the United States, and at a time when he could not acquire any title thereto as against the United States.] [3]

G. W. Hazelton, U. S. Dist. Atty.

Murphey & Goodwin, for petitioner.

DYER, District Judge. Considering the case precisely as it stood before condemnation and sale, what were and are the rights

[2] [From 11 Chi. Leg. News, 9. 8 Biss. 270, gives only a condensed statement of the allegations.

[3] [From 11 Chi. Leg. News, 9.]

of the parties? The information charged violations of law by Hatzfeld, who was in possession of the property. By non-appearance and default, he confessed the allegations of the information. The property was therefore liable to forfeiture, and was forfeited to the United States, so far as he and his interests were concerned. The offenses producing the forfeiture were committed in the several months between November 1, 1876, and July 2, 1877. On the 10th of April, 1877, admitting the allegations of the petition to be true, Delmanzo was the owner of a portion of the property used by Hatzfeld in the business, and on the premises, and on that day made the mortgage thereon, now claimed to be a lien paramount to the interest of the United States. Neither the petitioner, nor Reynolds the mortgagee, was a party to the alleged illicit manufacture of spirits, or had any knowledge thereof, but both were innocent parties holding the mortgage in good faith to secure a bona fide indebtedness.

[3] [It was contended on the argument by counsel for petitioners, that in analogy to proceedings in admiralty as authorized by the 34th rule in admiralty, petitioners should be permitted to contest the existence of the alleged causes of forfeiture; i. e. the existence of the alleged facts which rendered the property liable to seizure. The claimant, Hatzfeld, was the distiller possessing and using the property; as before remarked, he made no defense to the information. He confessed its allegations. By non-appearance and default he admitted the illicit transactions charged against him which made the property liable to seizure. And not only is this so, but no issue is made upon the merits by the present petitioners. They merely aver their own innocence of any fraud, and the innocence of the mortgagee. It is not in any manner denied that Hatzfeld committed the offense charged in the information. How, then, when no issue is made upon the question can these intervenors be heard upon such an issue? Admitting that under the rules and practice in admiralty, a person having either a proprietary interest or a mere lien, might "according to the course of admiralty proceedings," contest a forfeiture by seeking to show that no original causes of forfeiture existed, it could only be done upon suitable allegations propounding that issue. As the case is presented, we must then accept as facts the possession by Hatzfeld, at the time alleged, of the property in question; its use by him in the illicit distillation of spirits, as charged, and therefore that the alleged grounds of forfeiture existed. Further, that the mortgage lien set up by the intervenors was attempted to be created by Delmanzo, as the owner of an undivided interest in the property, that petitioners are the holders in good faith by assignment from Reynolds of the mortgage in question, and that both Reynolds the mortgagee, and the petitioners were ignorant of the alleged violations of law by Hatzfeld, and in their relations to the property and to the alleged mortgage lien, are innocent parties. Upon this state of facts, is the mortgage to be recognized as a lien paramount to the claim of the United States, and should the forfeiture and condemnation of the property be held subject to the mortgage interest of the intervenors? The bona fides of the mortgage being shown, it is claimed by the learned counsel for the intervenors, that the government can only forfeit and have condemned the interest of Hatzfeld in the property, and as he did not own the interest of the mortgagee, that interest is not and cannot be forfeited by reason of illegal transactions on the part of Hatzfeld.] [4]

Upon this state of facts, is the mortgage to be recognized as a lien paramount to the claim of the United States, and should the forfeiture and condemnation of the property be held subject to the mortgage interest of the intervenor?

The good faith of the mortgage being shown, it is claimed by the learned counsel for the intervenor, that the government can only forfeit and condemn the interest of Hatzfeld in the property, and as he did not own the interest of the mortgagee, that interest is not and cannot be forfeited by reason of illegal transactions on the part of Hatzfeld.

Section 3281, Rev. St., provides, that "every person who carries on the business of a distiller, without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined * * * and imprisoned. * * * And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation * * * of spirits * * * owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or who has connived at the same, and all personal property owned by or in possession of any person who has permitted or suffered any building, yard or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such

[3] [From 11 Chi. Leg. News, 9.]

[4] [From 11 Chi. Leg. News, 9.]

building, yard or inclosure, and all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

By this section, a forfeiture is denounced, first of spirits, wines, stills and other apparatus owned by the distiller, wherever found; second, of all distilled spirits, wines and personal property found in the distillery, or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises; third, of all the right, title and interest of the distiller in the lot or tract of land on which such distillery is situated; fourth, all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or who has connived at the same; fifth, all personal property owned by or in the possession of any person who has permitted or suffered any building, yard or inclosure, or any part thereof, to be used for the purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard or inclosure; and, sixth, all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress.

Thus it will be seen, a distinction is made in some respects between real estate and personal property. As was said by Judge Woodruff in U. S. v. Distillery at Spring Valley [Case No. 14,963]: "In this section, congress seems to have anticipated a possible discussion, whether it was intended to forfeit property found upon the premises, or used for the purposes of distillation, not belonging to the distiller, and to have purposely been so explicit as to preclude inquiry into mere questions of title, and at the same time, in respect to the real estate, to protect one whose land, under lease or out of possession may, without his knowledge and consent, or perhaps even against his will, when he has no power to prevent, be used in or for the purposes of a distillery."

Further, in the same opinion it is said, that the second of the foreitures enumerated, "is declared irrespective of ownership. It plainly includes property not owned by the distiller. All spirits, wines, stills and other apparatus owned by the distiller, had already been declared forfeited, whether found on the distillery premises or not. It would have been meaningless to declare again, that the same should be forfeited when found there. Spirits, etc., owned by the distiller are brought into distinct contrast with the other spirits, etc., named. The latter are only forfeited when found on the distillery premises; the former are forfeited wherever found."

Such is the construction that has been placed upon this statute, and in view of its plain provisions, no other, in my opinion, is sound. Now, applying the law, as so construed, to the present case, the following conclusions necessarily result. Taking the averments of the information as undenied, the alleged infractions of law were committed, both before and after the making of the mortgage in question. Where a statute in direct terms denounces a forfeiture of property as a penalty, the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the government. U. S. v. 56 Barrels of Whiskey [Case No. 15,095]. And in the case just cited it was so held against persons who had in good faith purchased the property before the commencement of suit for condemnation. The property in question was therefore already forfeited to the United States when the mortgage was made. It was so forfeited as to both Hatzfeld and Delmanzo, because, as we have seen, the forfeiture of such property occurs irrespective of ownership. If Delmanzo's ownership could not avail against the forfeiture, then he could create no lien that would be operative against it, and his mortgagee and the assignee of the mortgage occupy no better position than does the owner and mortgagor. These conclusions are only to be avoided by showing that no grounds of forfeiture existed, and upon this question no issue is made. The objections to the intervenor's petition must be sustained.

Case No. 15,929.

UNITED STATES v. ONE DISTILLERY.

[4 Biss. 26.] [1]

District Court, D. Indiana. May Term, 1865.

FORFEITURES—INFORMATION—AVERMENTS—ILLICIT DISTILLATION.

1. An information under the Internal Revenue Law claiming a forfeiture of a distillery, and things connected with it, for a violation of that law, must describe with reasonable certainty the things on which a judgment of forfeiture is asked. It is not sufficient to describe them as "all the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits—being about twelve barrels—now in the distillery owned by Samuel W. Walts."

[Cited in U. S. v. Fifteen Barrels of Distilled Spirits, 51 Fed. 423.]

2. A pleading on a statute is not required to negative an exception in a proviso to it.

3. An information of this kind must aver that the property sought to be adjudged forfeited, was used in the illicit distillation charged, or (being spirit) was the product of such distillation.

John Hanna, U. S. Dist. Atty.

McDONALD, District Judge. This is a proceeding in rem, for the forfeiture of "all

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

the boilers, stills, and other vessels used in the distillation of spirits," and twelve barrels of distilled spirits, the property of Samuel W. Walts. The forfeiture is claimed on the ground that Walts has failed to comply with certain provisions of the internal revenue law concerning distillers of spirits.

The information contains four counts, attempting to charge four distinct violations of the revenue law. Walts appears and files two separate demurrers—one to the whole information, and one to each of its counts severally.

Without inquiring whether a demurrer is the proper method of testing the validity of an information in the nature of a libel in rem, we will proceed to inquire whether the objections urged against this information are valid.

1. Under the general demurrer to the whole information, it is objected that the property proposed to be forfeited is not sufficiently described. It is described thus: "All the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits —being about twelve barrels—now in the distillery, owned by and (until seized) in the possession of Samuel W. Walts, and situated in the township of Greenville, county of Floyd, and state of Indiana."

The rules of pleading in this kind of cases are very lax as to matters of form. As to matters of substance, however, the better opinion is that "every fact and circumstance material in law to the maintenance of the suit must be set forth with precision, clearness, and reasonable certainty." Conk. Treat. 516; The Hoppet v. U. S., 7 Cranch [11 U. S.] 389; The Caroline v. U. S., Id. 496; The Anne v. U. S., Id. 570. There is no good reason why an information of this kind should not be as clear and certain as a declaration in an action at common law. At common law, the declaration must describe goods and chattels, when they are subjects of the suit, with reasonable particularity and certainty; and it must generally state their quantity and number. Steph. Pl. 296. A declaration in trover or replevin, for divers horses or cattle, without stating their number, would doubtless be bad. In the present case the information does not state how many boilers, stills, or other vessels are claimed to have been forfeited. It, indeed, describes the spirits which it claims have been forfeited as being "about twelve barrels." But this is too loose a description either of the quantity or number. For these reasons I think that the whole information is defective.

2. It is objected that the information does not, by proper averments, take the case out of the operation of the statute of limitations. The act on which this prosecution is founded, after declaring the offense and forfeiture, adds this proviso: "Provided, that such seizure be made within thirty days after the cause for the same shall have come to the knowledge of the collector or deputy collector; and that proceedings to enforce said forfeiture shall have (been) commenced by such collector within twenty days after the seizure thereof." 13 Stat. 248. The rule is, that if the exception is contained in the enacting clause, the pleading must negative it; but that if it is superadded, by way of proviso, the party who would avail himself of it, must do so by a pleading setting up the proviso. 1 Chit. Pl. 223; Teel v. Fonda, 4 Johns. 304; Smith v. Moore, 6 Greenl. 278. Therefore, if Walts would avail himself of this proviso, he must do it by pleading, not by demurring.

3. The first count of the information charges that, from the first of May till the fifteenth of July, 1864, said Walts was "engaged in distilling spirits" without having procured from the proper collector any license authorizing him to do so, and without having made any application to the proper assessor for such license. There are several fatal objections to this count. It is bad for not stating that the distilling charged was done in the use of the property sought to be adjudged forfeited. The count, indeed, avers that Walts "was engaged in distilling spirits"; but it fails to inform us whether in doing so he used the implements sought to be forfeited, and whether the twelve barrels of spirits claimed to have been forfeited were the product of the illicit distillation charged. All the other counts of the information are equally defective for the same reasons. And a particular examination of them would, therefore, serve no good purpose.

The demurrers are sustained.

NOTE. That, in pleading, it is not necessary to negative a proviso in the statute, consult The Mary Merritt [Case No. 9,222], opinion by Drummond, J. Com. v. Fitchburg Railroad Co., 10 Allen, 189; Matthews v. State, 24 Ark. 484; Kline v. State, 44 Miss. 317. As to particularity, consult U. S. v. Scott [Case No. 16,241], and U. S. v. Prescott [Id. 16,084].

Case No. 15,930.

UNITED STATES v. ONE DISTILLERY.

[2 Bond, 399.] [1]

District Court, S. D. Ohio. Oct. Term, 1871.

INTERNAL REVENUE—FORFEITURE—EVIDENCE—RECORD—TESTIMONY OF ACCOMPLICE.

1. Where in a proceeding for the forfeiture of property, under the internal revenue statutes, on the ground of fraud, the information in different counts avers several frauds, under different sections of the statute, a verdict of forfeiture will be sustained, if there is one count setting forth a fraud, within the words of any one of the sections.

2. An accomplice in the commission of the frauds charged, is a competent witness, but his testimony is to be received with great caution; and a jury should hesitate to base a verdict upon it, unless corroborated by other reliable testimony.

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

3. The record of a court of competent jurisdiction in a case between the same parties, involving the same property, and prosecuted for the same object as the second suit, is conclusive of the facts appearing in it.

4. But where, as in this case, the proceeding is for the forfeiture of a distillery, and numerous articles of property pertaining to it, specified in the information, for fraudulent distillation, a record proving the forfeiture of spirits from the same distillery, for alleged frauds, by the decree of another court, is not conclusive evidence of the frauds charged in this information.

5. But such record is admissible to the jury as a circumstance strengthening the presumption of the frauds charged in this case; and also as corroborative of the witnesses testifying for the United States, who were accomplices in the commission of the frauds.

Warner M. Bateman, Dist. Atty., and Lewis H. Bond, for the United States.

Burnett, Follett & Wright, for claimant.

LEAVITT, District Judge (charging jury). Under the authority of the proper officer of the government, a distillery and the other property connected with it have been seized for an alleged violation of the revenue laws. The information in the case asserts various frauds in the conduct and management of the distillery, subjecting it, with all its appurtenances, to forfeiture, under several provisions of law, among others section 44 of the act of July 20, 1868 [15 Stat. 125]. I will not detain you by a special notice of the different counts, or articles, in the information, or an analysis of the sections of the statute on which they are based. Many legal propositions and points have been presented, touching the sufficiency of some of the counts or charges set forth in the information. It will, however, be obvious to the jury that the main inquiry is, whether there has been illicit and unlawful distillation of spirits at this distillery, and such frauds committed, as by law will justify a verdict of forfeiture. And, if there is but one count or charge in the information, meeting the provisions of but one section of the statute, as a ground of forfeiture, it will justify a verdict against the claimant, if the evidence, in the judgment of the jury, sustains the charge. It will probably simplify the inquiries of the jury, and make their duty more plain, to state that whatever doubts or difficulties may exist in the mind of the court, as to the sufficiency of some of the counts or charges in the information, or the true construction of the sections of law, on which they are framed, the court is clear in saying that the fifth count or charge is good, as describing and setting forth an act of illegal and illicit distillation within the words and meaning of section 41 of the statute. This section, in plain and comprehensive language, strikes at and prohibits all frauds in the business of the distillation of spirits. And it may be proper here to suggest to the jury, if satisfied from the evidence that the frauds charged in the fifth count are proved, they may base their verdict on that count.

Joseph R. Huston is the claimant of the distillery and other property sought to be forfeited in this proceeding. He has filed his answer, admitting the ownership of the distillery, as a lessee, but denying all the allegations of fraud charged by the United States.

The theory on which the attorneys for the United States claim the forfeiture of the property in question is, that in August, 1868, certain parties—Hoffman, Musson, Huston, the claimant, and one Schelberger—rented a rectifying distillery owned by William Harries, in the city of Dayton, and were to carry on business as rectifiers, as a firm, under the name of Musson & Co. By the agreement, which was verbal, it is claimed by the government, Huston was to furnish the spirits to be rectified, and the profits of the business were to be divided in the proportions agreed upon. There is some conflict in the testimony as to the persons constituting the firm of Musson & Co. This, however, is not a material inquiry, if the testimony proves that Huston, as the owner of the distillery at which the spirits were manufactured, was connected with the frauds charged. It is claimed by the United States that seven different lots of spirits, of fifty barrels each, manufactured at Huston's distillery, were sent, in the fall of 1868, to the rectifying establishment, and passed into the market and were sold, without the payment of the full legal tax, with the knowledge of Huston, who participated in the fraud, and shared in the pecuniary profits arising therefrom.

The method by which, as claimed by the government, the alleged frauds were perpetrated, was by falsely branding and marking the barrels at the distillery below the real proof, and paying the tax according to such false branding and gauging, whereby the government was defrauded to the amount of tax at $2 the gallon, on from ten to fifteen gallons on every barrel. The aggregate of the sum of which the United States was thus defrauded, on the three hundred and fifty barrels alleged to have been furnished by Huston to the rectifier, would be very considerable, and would be clear profit to the parties concerned. If the jury are satisfied that this ingenious device was practiced with the knowledge of Huston, and that he participated in the fraud, there can be no question that it affords a sufficient basis for a verdict of forfeiture, as claimed by the district attorney. It was a palpable fraud, and clearly within section 44 of the act of 1868, and other provisions of that statute. It takes nothing from the repulsive character of the fraud, that it must have been committed with the knowledge of a government official, acting under the obligation of an oath. If the false branding charged was practiced, it could not have

been done without the corrupt connivance of the revenue official, whose sworn duty it was to see that the barrels were correctly branded, as to the quantity and proof of the spirits distilled.

The case, so far as the jury are concerned, resolves itself into the single inquiry, whether the alleged frauds are proved to their satisfaction. I shall not detain the jury by any attempt to recite or even advert specially to the evidence adduced. This is wholly unnecessary, if it were proper. It will doubtless be obvious to the jury, that their verdict depends mainly on the credibility of the witnesses. If the jury give credit to the testimony of Hoffman and Musson, the principal witnesses for the government, they can not hesitate to find that the frauds charged are proved. On the other hand, if their testimony is rejected as unworthy of belief, and the testimony of the claimant, Huston, and other witnesses in his behalf, is received by the jury as entitled to credit, the allegations of fraud are not substantiated. The witnesses, Hoffman and Musson, occupy a somewhat peculiar position before you. They admit that they were cognizant of, and parties to, the frauds charged in this information. They were what the law terms accomplices in the commission of the fraudulent acts charged. Hoffman had obtained an assurance in writing from the commissioner of the internal revenue department, that upon his making a full disclosure of these alleged frauds, he should be protected from prosecutions for his complicity in them. As to the witness, Musson, it does not appear that any such promise was made, but it is proved that he is the informer in this case, and has a direct interest in the result. As the question of the credit to be given to the testimony of these witnesses may have a decisive influence with the jury in making their verdict, it is proper for the court to state the law applicable to it. And I may remark, that it is obvious that the fact that a witness has been an accomplice in a crime, or a fraud charged upon others, is suited to impair confidence in his testimony. He testifies with a taint in his moral character, which naturally induces a suspicion of his veracity. But the law, except after a conviction for an infamous crime, does not deprive him of the right of being a witness. He may be used as such, and his credibility left to the jury. It is well settled, however, that his testimony should be received with great caution, and where the accusation is for a felony, involving great moral turpitude in its commission, it is unsafe to return a verdict of guilty upon the sole evidence of an accomplice. If, however, an accomplice, used as a witness, is sustained and corroborated by credible testimony, in the material facts sworn to, there is, of course, no reason why he should be deemed unworthy of credit as to such facts.

The attorneys for the United States claim that the witnesses, Hoffman and Musson, are substantially corroborated by other reliable testimony, and that they are to be accredited as truthful witnesses of the gross frauds charged; and, also, that Huston, the claimant, is directly implicated in those frauds. It is insisted that the books of the rectifying establishment clearly prove the receipt of large quantities of spirits directly from Huston's distillery, with his knowledge, and that these spirits passed from the rectifier, and were sold by Huston and those associated with him, in the fraudulent manner to which the court has before adverted. These books are before the jury, and will be for their inspection. If they find, as claimed by the attorneys for the United States, that Huston received the payment for any part of the spirits sent from the rectifier, or that any of the entries made in the books were made by him, such proof would certainly be corroborative of the testimony of the witnesses, Hoffman and Musson.

Another fact relied on by the counsel for the United States, as evidence of the frauds charged, and as sustaining the testimony of the two witnesses named, is a record of the trial and condemnation, in November, 1870, of fifty barrels of spirits, shipped from the rectifier by Huston to Baltimore, and there seized by the collector. Huston filed a claim to the fifty barrels, and in his answer denied all the allegations of fraud. He also testified as a witness in the case. The trial was in the district court of the United States for the district of Maryland. The jury found, by their verdict, that the frauds charged were proved, and there was a judgment of forfeiture. All these facts appear from the record of the court. The jury will, doubtless, remember that this record, when offered in evidence by the counsel for the United States, was objected to by the counsel for the claimant, as not being legally admissible in this case. The court overruled the objection, and permitted the record to go to the jury. The attorneys for the United States claimed that it was conclusive to prove the frauds charged in this case. The court, however, on this point, instruct the jury that it has not this far-reaching effect. There is no question that the record of a court of competent jurisdiction is conclusive as to all facts which appear to have been passed upon in a case between the same parties, involving the same property, and where the second suit is brought for the same object or purpose as the first. The record is conclusive to prove that fifty barrels of whisky, claimed by Huston, were fraudulent, and were forfeited by the judgment or decree of the court; but it is not conclusive to prove that the distillery of Huston, and all the other property specified in this information, are subject to forfeiture for the frauds charged in this case. But the record in question may be taken into consideration by the jury; first, as tend-

ing to corroborate the testimony of Hoffman and Musson, in proving the fact that the fifty barrels of spirits shipped by Huston to Baltimore were infected with fraud; and, secondly, as a fact or circumstance bearing on the question of the frauds charged in this case. In either of these aspects, this record is competent testimony, and may be considered by the jury.

I will not further detain the jury, except to remind them of what has been before suggested, that the case turns, as it seems to the court, wholly on the credit to be given to the witnesses for the opposing parties. There is direct conflict in their testimony, in reference to material facts, involving the merits of the case. And the jury will probably find it impossible to reconcile these conflicts consistently with the integrity and truthfulness of the witnesses on both sides. They will be forced to the unpleasant conclusion that the sworn statements of the opposing witnesses can not both be true, and that from the character of the facts to which they have testified, there is too much reason to conclude there has been willful falsification. But it is the exclusive province of the jury, in the exercise of their best judgment, to decide upon the credit due to the evidence.

The jury returned a verdict for the United States.

Case No. 15,931.

UNITED STATES v. ONE-HALF BARREL BRANDY.[1]

District Court, D. California. Sept. 1, 1879.

INTERNAL REVENUE — REFILLING FOREIGN CASKS WITH DOMESTIC SPIRITS.

[Section 12 of the act of March 1, 1879 [20 Stat. 342], when read in connection with sections 11 and 13, shows a plain intention that the exterior of the package shall in all cases unmistakably indicate the nature of the contents; and therefore it is unlawful to refill with domestic tax-paid spirits any casks in which foreign spirits have been imported, even where the brands, stamps, and marks required by law have been removed.]

HOFFMAN, District Judge. This is an amicable suit brought to procure the decision of this court upon the question whether a cask in which foreign distilled spirits have been imported, and from which, after being emptied, the brands, stamps, and marks required by law have been removed, can lawfully be refilled with tax-paid domestic distilled spirits. Section 12 of the act of March, 1879, amongst other things, provides that "no cask or other package, such as is hereinbefore mentioned, in which distilled spirits, wines, or malt liquors have been imported, shall be used to contain domestic distilled spirits, under penalty of the forfeiture of such reused casks or packages and the contents thereof." The phrase, "cask or other package, such as is hereinbefore mentioned," obviously refers to the "pipes, hogsheads, tierces, barrels, casks, or other similar packages" mentioned in the preceding section of the act, and is employed to obviate the necessity of re-enumeration. The language of section 12, above cited, is so plain, precise and peremptory as to leave no room for misconstruction or evasion. If, therefore, this provision stood alone, I should be compelled to hold that the use of foreign casks to contain domestic distilled spirits is prohibited by law. An examination, however, of the other section of the act, which relates to the subject of imported liquors, will disclose that the provision in question is a part of a system deliberately adopted by congress, and enforced by appropriate legislation in the other section of the act. Section 11, among other things, enacts that: "Whenever any cask or package of imported distilled spirits of not less than five wine-gallons is filled for shipment, sale or delivery, on the premises of any wholesale liquor-dealer, the same shall be stamped with a special stamp for imported spirits under such rules and regulations as the commissioner of internal revenue has prescribed or may hereafter prescribe, in the case of domestic distilled spirits." The object of this provision is evident. It is that every package of not less than five wine gallons, with which imported distilled spirits have been transported, shall bear a stamp indicating the nature of its contents. Section 13, in its first clause, forbids "the purchase or sale with the imported liquor stamp herein required remaining thereon, or any of the marks or brands which shall be placed thereon, in accordance with the laws or regulations concerning imported liquors remaining thereon, of any cask or other package, after the same has been once used to contain imported liquors, and has been emptied." The second clause of the same section forbids the use, or having in one's possession, of such cask or package, with any imitation of such marks or brands, for the purpose of placing domestic distilled spirits therein for sale. The third clause prohibits "the manufacture, use, or having in possession for the purpose of placing domestic distilled spirits therein, for sale, of any cask or package made in imitation of or intended to be in the similitude of such imported casks or packages, with any imitation of such marks or brands thereon." It will be seen from these provisions that not only is the use of foreign packages to contain domestic spirits forbidden, but the use of any packages, whether domestic or foreign, made in imitation of such packages, and bearing the imitations of the marks and brands required by law to be on such packages of foreign spirits. Whether the object of these provisions was to protect the revenue against frauds, or the public against imposition, or both, it is unnecessary to inquire. The intention is plain that the exterior of the package shall in all cases unmistakably indicate the nature of the contents, and that a casual inspection of a cask of spirits should at once disclose whether its con-

[1] [Not previously reported.]

tents are foreign or domestic. The meaning and object of the law being thus plain, the court has no alternative but to enforce its provisions.

[NOTE. An application was subsequently made for a reconsideration of the above decision. Judge Hoffman expressed his belief in the correctness of the above opinion. Case No. 15,280.]

Case No. 15,931a.

UNITED STATES v. ONE HEMPEN CABLE AND ONE HEMPEN HAWSER.

[41 Niles' Reg. 273.]

District Court, D. Massachusetts. Oct. 24, 1831.

CUSTOMS DUTIES—VIOLATION OF COLLECTION LAWS — OMISSIONS FROM MANIFEST — LIBEL OF FORFEITURE — CERTIFICATE OF PROBABLE CAUSE OF SEIZURE.

[1. Articles, such as cables and hawsers, purchased abroad, in the course of the voyage, for the bona fide purpose of substituting them, as part of the ship's equipment, for articles lost or deteriorated by use, are not subject to duty, and need not be entered in the manifest.]

[2. Hempen cables and hawsers are not "vessel and cabin stores," within the meaning of the twenty-third section of the collection law (1 Stat. 644); nor are they "sea stores," within the meaning of the forty-fifth section. These expressions mean stores or provisions laid in for cabin or steerage, for officers, passengers, or crew; or, if capable of further extension, can only be applicable to articles of consumption which perish in the using, and not to the tackle and apparel of a ship, the sails, rigging, cable, or anchors.]

[3. The court will grant to the collector a certificate of probable cause of seizure where it appears that the seizure was made in good faith, in the belief that the law was being violated, and after consultation with the surveyor, naval officer, and district attorney, and recurrence to instruction from the treasury department in cases considered analogous.]

[This was a libel of forfeiture against one hempen cable and one hempen hawser, which were seized by the collector because they were not entered on the manifest of the vessel.]

A. Dunlap, U. S. Dist. Atty.
Charles G. Loring, for claimants.

DAVIS, District Judge. These articles, brought into the port of Boston, in the brig Moscow, from Cronstadt, were seized on the 14th of September last by the collector of the district of Boston and Charlestown, on the ground, as the libel alleges, that they belonged to, or were consigned to the master, mate or crew of that vessel, and were not described or included in the manifest or manifests of the cargo, by which, and by force of the statute of the United States in such case made and provided, it is alleged that they have become forfeited to the uses specified in the statute.

The claimants in their answer on oath declare that they are the lawful owners of the brig Moscow; that she arrived at Boston on the 5th of September last, from Cronstadt, having in her outward voyage, first proceeded to Matanzas, in the Island of Cuba, the said John Norris, one of the joint owners, being the master; that, on the passage to Matanzas, by a casualty which they particularly describe, part of the stream cable—about twenty-five fathoms—was necessarily cut away and lost, with the anchor to which it was attached, and that, from this circumstance, as well as from the age, long-continued use and decay of that cable, it became necessary to procure a substitute, which was accordingly done by the master of the brig, at Cronstadt, for the necessary use of the vessel, and for no other purpose; that, in like manner, a substitute was there provided for the hawser, belonging to the brig—the old hawser, it is averred, being strained, weak and unfit for use; that said new stream cable and hawser were taken on board said brig at Cronstadt, as part of her ground tackle and equipment, and solely for the purpose of being used as such; that they were purchased in the ordinary manner for immediate use, were stowed in that part of the vessel, where the stream cable and hawser, in actual service, are always stowed and kept; that during the passage from Cronstadt to Boston there was no other stream cable nor hawser on board of said vessel, used or intended to be used, as a part of her ground tackle, or equipment, nor kept nor stowed in the place where such cable and hawser are or ought to be stowed and kept, and that in all particulars the same were intended to be, and were kept to be used, as being the ordinary tackle and furniture of the vessel; the stream cable and hawser, thus purchased, intended and applied, they aver to be the same that are mentioned in the libel; they deny that those articles belonged to, or were consigned to the master, mate or crew of the vessel, saving the interest of the master as part owner, or that they were brought or imported in said vessel as merchandise, or contrary to law; and in answer to an interrogatory propounded with the libel, the respondents further declare, that said cable and hawser were purchased by said Norris, in his capacity as master and part owner of said brig, on the 14th of June last, at Cronstadt, and that they belonged to the claimants, as owners of that vessel, being, as they aver, part of her necessary tackle and equipment.

Numerous witnesses were examined, at the hearing, as to that portion of the claimants' averments respecting the insufficiency of the old stream cable and hawser, and as to the necessity or expediency of procuring new substitutes for the proper use of the vessel in the accomplishment of her voyage; and I am fully satisfied, from that examination, and from the testimony of the mate, contained in his deposition, that the claimants' averments in their defence are true. The loss of so considerable a portion of the stream cable would alone, in my opinion, justify the

purchase of a new one, and entitle such substitute to be considered as part of the tackle and furniture of the vessel, and as such, free of duties, and the decided testimony given of the condition of the hawser, leaves no doubt of the propriety of procuring a substitute for that article also. The articles libelled being of this character, truly and fairly part of the ship's furniture or equipment, it was not requisite to insert them in the manifest. It is argued, on the part of the government, that, in the true construction of the statute, those articles would come under the denomination of sea stores. This would appear to me a strained interpretation of the statute, and the uniform practice, from the earliest date of our maritime and fiscal regulations, gives no support to such construction. "Vessel and cabin stores," is the expression in the 23d section of the collection law; in the 45th section, it is, "sea stores of a ship or vessel." These expressions are understood to mean, and naturally do mean the stores or provisions laid in for cabin or steerage, for officers, passengers or crews, or if further extended, can only be applicable to articles of consumption, perishing in the using, and not to the tackle and apparel of the ship, the sails, rigging, cables or anchors. These are to be considered as attached to the ship, and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself. The sails and tackle, says Lord Holt, in the case of Edmonson v. Walker, are part of the ship—and under the circumstances of that case, were so considered, though they were on the shore. 1 Show. 177. It may be remarked, that if the articles, in question in this libel, are to be considered as falling under the denomination of vessel's stores, the prosecution could not properly be founded on the 24th section of the collection law which it recites, but on the 45th section. It being satisfactorily proved, that these articles were purchased and intended for the vessel, by the master, they became thereby the property of the owners; and even if they constitute an unnecessary supply, under the circumstances in which the vessel was placed, and so to be considered as merchandise imported, still, being the claimants' property, they would not be liable to forfeiture by the section of the act, unless it were for the master's proportion, he being likewise a part owner of the vessel, it is unnecessary, in this case, to express or form an opinion. On other distinct ground, already expressed, from the suitable and proper connection of the stream cable and hawser with the vessel, as part of her tackle and apparel, I have no hesitation in decreeing that they be restored to the claimants.

It remains to be considered whether the certificate of reasonable cause shall be entered for the collector's protection, who may be otherwise exposed to a prosecution for an exercise of official duty. There were, it appears, some circumstances attending this transaction, producing a degree of excitement which had not entirely subsided in the interval between the seizure and the hearing; and counsel for the claimants has made a strong appeal to the court, urging a denial of the certificate; at the same time, the generous eulogy which he bestows on the collector, in which he is understood to express the prevailing sentiment of the commercial community, would seem to render the apprehension of unworthy or improper motive in this seizure, improbable, and not to be imputed to the collector without the fullest evidence. That mutual courtesy between the officers and the merchant, without relinquishment of right on one side, or dereliction of duty on the other, which commenced in this collection district, with the venerable General Lincoln, has been laudably continued with his successors, and the present collector is understood fully to estimate the high considerations which recommend such dispositions and deportment, and to exhibit the influence of such sentiments in official transactions, interesting from their magnitude, and often perplexing in their character, have proceeded to a satisfactory conclusion, in a manner, and with a temper, which it is gratifying to contemplate. I may ask allowance for grateful indulgence in these recognitions. The duties of the situation in which I have been placed, through a greater part of the period to which I have adverted, have been greatly relieved by the dispositions which have prevailed in this highly commercial district, in which a great portion of the business of this court usually originates. The incident controversies and concerns of trade and revenue would have been rendered particularly irksome, but from a manifestation of a liberal spirit, which looked at objects in their substantial character and relations, and seldom gave to the legal arena any discomposing features.

It seems to have been intimated, or imagined, that the collector was influenced by some improper feeling or suspicion in reference to the owners of the Moscow or some one of them. I see no evidence of this. Capt. Rich, the senior owner, and who had the principal agency in the intercourse with the collector, on this subject, doubtless, fully believed that the Moscow was no more than suitably and reasonably supplied with articles which were necessary or important for her use, and for her safe navigation, on her homeward voyage. The collector, it should be supposed, was equally honest and sincere in the belief, that the vessel was sufficiently well found, for the purpose of her voyage, in what is called ground tackle, without the supply of the new stream cable and hawser; and indirect or unworthy motives, on either side, should not be hasitly adopted and entertained. While the addition of necessary articles of ship's furniture,

abroad, free of duty, from their attachment to the ship, is admitted, it is apparent that the practice is liable to abuse. In England, we find it became necessary to guard against such abuses by statute provisions. A law imposing duties on foreign sails or sailcloth was only applicable, in terms, to such as should be brought into the kingdom by way of merchandise. "But this act was evaded," says the authority (Parker, Rev. Cas.) to which I refer, "for it requiring foreign sails or sailcloth to be brought in by way of merchandise, British ships used to go upon voyages with old worn-out sets of sails, and buy sets of sails abroad; and to put a stop to this evasion, the act 19 Geo. II. c. 27, enacts that every master of a ship, belonging to any of his majesty's subjects, navigated with any foreign made sails on board, shall make an entry and report of them, and that every ship built in Great Britain, or his majesty's plantations in America, on her first setting out, should be furnished with a set of sails manufactured in Great Britain." We have no statute provisions expressly framed or calculated for keeping an admitted practice, of liberal and indulgent character, within fit and reasonable limits; and an excess in procuring, abroad, articles professedly for vessel's use, and introducing them free of duty, can only be obviated or prevented by proper notice on the part of officers, of cases which may occur, falling under their cognizance.

In the present instance there was no sudden movement on the part of the collector. The ground tackle of the Moscow, on her departure from the United States, consisted of a chain cable, a hempen bower, and stream cable, and hawser. She returned with the addition of a new hempen bower cable, a stream cable and hawser, and the old articles of corresponding description still remained on board. The collector was of opinion that there was an excess in this additional supply, and that all the articles, thus purchased and taken on board at Cronstadt, should be entered, as liable to duty. The ultimate seizure of the stream cable and hawser, was the result of several days' deliberation, and after consultation with the surveyor and naval officer and the district attorney, and recurrence to instructions from the treasury department, in cases considered analogous. In finally determining on the seizure the bower cable was omitted, because it appeared it had been bent for use, as occasion should require, in the passage from Cronstadt. In the seizure of the articles, which will now be decreed to be restored, there was mistake in fact or in law. If the facts had sustained the collector's opinion, that the articles were not necessary for the vessel's use, and it still should have clearly appeared that they belong not to the master, mate or crew, they were not liable to condemnation and seizure. In such case, the seizure would be under a mistake as to the law, unless it should be thought maintainable for the proportion belonging to one of the part owners, who was master of the vessel. But it is of little importance to inquire, particularly, whether the mistake were in fact or in law, according to the rule of law on this subject by which we are governed. Chief Justice Marshall, in delivering the opinion of the supreme court of the United States, in the case referred to by the district attorney (U. S. v. Riddle, 5 Cranch [9 U. S.] 311), observes that as the construction of the law was liable to some question, the court would suffer the certificate of probable cause to remain. "A doubt," it is added, "as to the true construction of the law, is as reasonable a cause for seizure as a doubt respecting the fact." In the present case, the collector, as appears to me, acted with a sincere conviction that he was in the correct and requisite performance of his official duty, without any culpable or unworthy motive. I shall therefore accompany the decree of restoration, with a certificate of reasonable cause.

Case No. 15,932.

UNITED STATES v. ONE HORSE.

[7 Ben. 405; [1] 20 Int. Rev. Rec. 63; 22 Pittsb. Leg. J. 9.]

District Court, S. D. New York. Aug., 1874.

INTERNAL REVENUE — COSTS OF DISTRICT ATTORNEYS AND CLERKS.

In suits brought to enforce forfeitures under the customs revenue acts, the district attorney of the United States is entitled to tax, as costs, two per cent. on the amount of proceeds realized under execution, in accordance with the 11th section of the act of March 3, 1863 (12 Stat. 741), and the clerk is entitled to tax the one per cent. on such proceeds allowed him by the 1st section of the act of February 26, 1853 (10 Stat. 161), notwithstanding the passage of the 2d section of the act of June 22, 1874 (18 Stat. 186), repealing all provisions of law under which moieties of fines, penalties or forfeitures under the customs revenue laws, or commission thereon, are paid to officers of the United States.

BLATCHFORD, District Judge. The sum of $444 37 is in the registry of this court, as the gross proceeds of an execution issued in this suit against stipulators for the value of the property seized and proceeded against therein, which was seized and condemned as forfeited for a violation of the laws relating to the revenue from customs duties. The district attorney presents, for taxation, an allowance claimed by him to be payable to him out of such proceeds, amounting to $8 88, being two per centum on the amount of such proceeds. The clerk presents for taxation a bill of costs in this suit, one item of which is the sum of $4 44, being one per cent. on the amount of such proceeds, claimed by

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

him to be payable to him as a fee for receiving, keeping and paying out the amount of such proceeds. Questions are raised as to whether such two items are now taxable, in view of the provisions of the act of June 22, 1874, entitled "An act to amend the customs revenue laws and to repeal moieties."

The 2d section of the said act of 1874 provides, "that all provisions of law under which moieties of any fines, penalties or forfeitures under the customs revenue laws, or any share therein, or commission thereon, are paid to informers, or officers of customs, or other officers of the United States, are hereby repealed, and, from and after the date of the passage of this act, the proceeds of all such fines, penalties and forfeitures shall be paid into the treasury of the United States." The provision of law existing when the act of 1874 was passed, for distributing the proceeds of fines, penalties and forfeitures incurred under the customs revenue laws, was the 1st section of the act of March 2, 1867 (14 Stat. 546), and was in these words: "From the proceeds of fines, penalties and forfeitures incurred under the provisions of the laws relating to the customs, there shall be deducted such charges and expenses as are, by law, in each case, authorized to be deducted, * * * and the residue of the proceeds aforesaid shall be paid into the treasury of the United States, and distributed under the direction of the secretary of the treasury, in the manner following, to wit, one half to the United States, one fourth to the person giving the information which has led to the seizure, or to the recovery of the fine or penalty; and, if there be no informer other than the collector, naval officer or surveyor, then to the officer making the seizure, and the remaining one-fourth to be equally divided between the collector, naval officer and surveyor; * * * but, where any fine, penalty or forfeiture incurred by virtue of the laws relating to customs shall be recovered in consequence of any information given by an officer of a revenue cutter, the proceeds thereof shall, after the legal deductions, including the deductions herein authorized, have been made, be disposed of as follows, one-fourth to the United States, one-fourth to the officers of the customs, as hereinbefore provided, and the remainder to the officers of such revenue cutter, to be divided among them in proportion to their pay."

The item claimed by the district attorney to be taxable and payable to him, is claimed under the provisions of the 11th section of the act of March 3, 1863 (12 Stat. 741), which is as follows: "There shall be taxed and paid to district attorneys two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, conducted by them, in which the United States is a party. The act in relation to costs, approved February twenty-sixth, one thousand eight hundred and fifty-three, shall not apply to such allowances, and the same shall be in lieu of all costs and fees in such suit or proceedings." The act of February 26, 1853 (10 Stat. 161), thus referred to, was a bill prescribing what costs and fees should be allowed to various officers, and among them, district attorneys and all other attorneys and clerks of courts, and its 1st section provided, that, "in lieu of the compensation now allowed by law" to such officers, "the following and no other compensation shall be taxed and allowed." One item under the head of "clerks' fees," in said act, is this: "For receiving, keeping and paying out money, in pursuance of the requirements of any statute or order of court, one per cent. on the amount so received, kept and paid." Under this provision the clerk claims the allowance in question.

It may be suggested, that, as the district attorney and clerk are officers of the United States, the two per cent. to the district attorney, and the one per cent. to the clerk, constitute a share in the forfeiture in this case, or, at least, a commission thereon, and that, therefore, the act of 1874 repeals the provision for the two per cent. to the district attorney, in the 11th section of the act of 1863, and the provision for the one per cent. to the clerk, in the act of 1853. Do the two per cent. and the one per cent., under the statutes which allow them, constitute shares in, or commissions on, moneys received for forfeitures, in the sense of the act of 1874? I think they do not. The act of 1863 gives the two per cent. to the district attorney in lieu of costs and fees in the suit, and, manifestly, as a compensation to him for conducting the suit on behalf of the United States. It expressly declares that he shall have no other costs or fees in the suit, and none under the act of 1853. It substantially repeals the act of 1853, as regards the suits mentioned in the act of 1863. If the act of 1874 repeals the 11th section of the act of 1863, then the district attorney is left without any compensation allowed him by law in the suits named in such 11th section; because, the 3d section of the act of February 25, 1871 (16 Stat. 431), provides, that, "whenever an act shall be repealed which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided." Thus, all provision for costs and fees to the district attorney in such suits would be repealed, while he would still receive the two per cent. as costs and fees in suits under the revenue laws in which the United States is a party, other than suits for fines, penalties or forfeitures under the customs revenue laws, and the fee bill in the act of 1853 would give him costs and fees in suits not within the purview of the acts of 1863 and 1874.

So, in regard to the clerk, the act of 1853 gives the one per cent. to him as fees for receiving, keeping and paying out the money. If he is deprived, by the act of 1874, of such one per cent. for receiving, keeping and pay-

ing out moneys which are the proceeds of fines, penalties or forfeitures under the customs revenue laws, there is no provision of law under which he can receive any fees or compensation for receiving, keeping or paying out such moneys, while he will still be entitled to receive the one per cent. for receiving, keeping and paying out all other moneys.

It is not to be inferred that any construction of the act of 1874 was intended by congress, which will work such a result, when there is a plain and reasonable construction of it which will avoid such a result. The act of 1874 has no relation to the subject of costs or fees, either generally or specifically. It relates to the customs revenue laws alone. The provisions of the 1st section of the act of 1867 answer fully the description, in the 2d section of the act of 1874, of provisions of law under which moieties of fines, penalties and forfeitures under the customs revenue laws, or shares therein, or commissions thereon, are paid to informers, and to officers of the customs, and to other officers of the United States. Under the provisions of the 1st section of the act of 1867, shares of fines, penalties and forfeitures under the customs revenue laws are paid to informers, and other shares thereof are paid to collectors, naval officers and surveyors, who are officers of the customs, and other shares thereof are paid to the officers of revenue cutters, who are "other officers of the United States." These shares are paid specifically as shares of the fines, penalties and forfeitures, and because the moneys shared in are the proceeds of the fines, penalties and forfeitures, and the persons receiving the shares have not, under any statute, any share in any other moneys. The district attorney and the clerk do not receive their percentages because the moneys are the proceeds of fines, penalties and forfeitures, and they receive the same percentage on other moneys. The statutes which give the percentages do not, in either case, call the percentage a "commission." Nor does the act of 1867 call the one-half or the one-fourth which it names a "commission." Yet, it is no less proper to call such one-half or one-fourth a "commission" than it is to call the percentages named, "commissions." The word "commission," in the act of 1874, is, therefore, satisfied by referring it to the act of 1867. Certainly, the words "moieties" and "share" are thus satisfied.

The district attorney is an officer of the United States, and, if the percentage given to him by the act of 1863 be regarded as a commission, it may be suggested that the mischief intended to be reached by the 2d section of the act of 1874 extends to him, because he is concerned directly in prosecuting for and recovering the fines, penalties and forfeitures, and can influence the prosecution by his conduct of it, and that the act of 1874 must have been intended to apply to him as well as to informers and officers of the customs. But this suggestion loses its force when it is considered that the same construction which would include the district attorney would include the clerk. Yet the clerk has no concern in the conduct of the suit, and his duty and services for which the percentage is given commence with the receipt of the money when the suit is practically at an end.

The act of 1874 declares, that, from and after the date of its passage, the proceeds of all fines, penalties and forfeitures under the customs revenue laws shall be paid into the treasury of the United States. This is no new provision in that act. The 1st section of the act of 1867, as before cited, provided, that, from the proceeds should be deducted the charges and expenses authorized by law to be deducted, and that the residue of the proceeds should be paid into the treasury of the United States, and then be distributed. There is nothing in the act of 1874 which indicates that the word "proceeds," in its 2d section, is intended to mean other than the net sum remaining to be disposed of by the officers of the treasury, after paying the proper costs and fees incidental to, and lawfully chargeable for, the collection of the moneys. That is what was paid into the treasury under the act of 1867, and that is what is to be paid into the treasury under the act of 1874.

In an abstract sense, detached from all context, the acts of 1853 and 1863 are provisions of law under which the district attorney and the clerk, in receiving percentages on moneys collected for fines, penalties and forfeitures under the customs revenue laws, receive shares in such moneys, because they receive portions of such moneys measured out as aliquot parts thereof, and because, but for the existence of such acts, they would not receive such percentages. But, as before shown, the act of 1874 is satisfied fully by holding it to repeal only such provisions of law as give shares in the proceeds of fines, penalties and forfeitures, eo nomine, to informers and officers of customs and other officers of the United States.

As respects the clerk, it is to be observed, that the item in this case, if allowed, does not enure to his personal benefit, but enures solely to the benefit of the United States, and goes to meet the expenses of his office, as regulated by the proper accounting officers. The percentages in question must, therefore, be taxed, allowed and paid to the district attorney and the clerk.

Case No. 15,932a.

UNITED STATES v. ONE HUNDRED FIFTY BALES UNWASHED WOOL.

[N. Y. Times, Feb. 21, 1862.]

District Court, S. D. New York. Feb. 20, 1862.

CUSTOMS DUTIES—UNDERVALUATION—FORFEITURES.

[If goods imported are invoiced at their actual purchase price, they cannot be forfeited for un-

dervaluation, although in fact the price stated was below the market value at the place of exportation.]

This was an action to forfeit the goods on the ground that they were fraudulently undervalued on entry at the custom-house here with intent to evade the payment of duties. The wool was imported from Cape Town, in March, 1860, by the firm of Siffken and Ironsides. It was invoiced by them at 10 per cent. sterling, per Dutch pound, making about 20 cents per pound English. On appraisal here the appraisers raised the price of one bale to 18 per cent. sterling and the rest to various amounts, down to 11 pence, raising the whole invoice from £2,374. 11s. 10d. to £3,052. 12s. 5d., and therefore this action was brought. Evidence was given on both sides as to the market value of wool at Cape Town, which was entirely contradictory, but the claimants proved that they bought the wool at the price at which they invoiced it. It appearing on the trial that one bale of the wool was washed, while it was all invoiced as unwashed, the district attorney sought to make this a distinct ground of forfeiture; but the court declined to allow it, as no such ground of forfeiture had been set up in the information.

Judge Roosevelt, for the United States.

Platt, Gerard & Buckey and Mr. Craig, for claimants.

SHIPMAN, District Judge, charged, among other things, that if the jury were satisfied that the claimants had purchased the wool and invoiced it at the purchase price, they must find for the claimants, though that price were below the market value.

The jury found a verdict for the claimants, and against the government.

[See Case No. 15,932b.]

Case No. 15,932b.

UNITED STATES v. ONE HUNDRED FIFTY BALES UNWASHED WOOL.

[New York Times, April 12, 1861.]

District Court, S. D. New York. April, 1861.

CUSTOMS DUTIES—FORFEITURE FOR UNDERVALUATION—REPEAL OF STATUTES—CRIMINAL INTENT.

[1. Section 66 of the act of March 2, 1799 (1 Stat. 677), and section 4 of the act of May 28, 1830 (4 Stat. 409), which provide for the forfeiture of goods invoiced below their actual "cost," are still in force (1861), and have not been modified by subsequent legislation so as to require the invoice to be according to the "value" in the place of purchase, instead of actual cost. The cases, however, in which the actual cost is to be stated, are perhaps limited to purchases in the open market in the ordinary course of trade, thus excluding cases of purchase under circumstances calculated to depress the price below the market value.]

[2. To entail a forfeiture for undervaluation, under these sections, there must be a concurrence of undervaluation, and intent to evade the payment of duties; and hence there can be no forfeiture of a bale of wool of superior grade and value, which was included, by mistake, with a shipment of bales of a lower grade, and invoiced at the same price with them.]

Judge Roosevelt, for the United States.

Gerard & Craig, for defendants.

Before SHIPMAN, District Judge. This is a libel of information in rem, founded upon the seizure of 150 bales containing unwashed wool, imported into the United States from Cape of Good Hope about the 27th of March, 1860, in the ship Tartar. The seizure was upon land, within this district. The cause having been tried by the jury, and a verdict rendered for the claimants [Case No. 15,932a], the libellants move for a new trial on the grounds, 1. That the verdict is against the evidence. 2. For a misdirection of the judge to the jury. The act of congress, March 3, 1857 [11 Stat. 192], among other articles, exempts from duty unmanufactured wool of the value of 20 cents per pound, or less, at the place of exportation. This wool in question was invoiced and entered at the custom-house at a little less than 20 cents per pound, and, if that was its true value at the place of exportation, it would of course be exempt from duty. If its value at the place of exportation was over 20 cents, then it was subject to a duty of 24 per cent. ad valorem. The collector had the wool appraised, and, the value fixed by the appraisers being over 20 cents, the wool was seized on the ground that it had been invoiced and entered at less than its value at the Cape, with intent to evade the payment of duties thereon, and was therefore forfeited. The libel is founded upon the 66th section of the act of March 2, 1799, and the 4th section of the act of May 28, 1830. The section of the former relied on provides that "if any goods, wares or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced at the actual cost thereof at the place of exportation, with a design to evade the duties thereon, or any part thereof, all such goods, wares and merchandise, or the value thereof, shall be forfeited." The 4th section of the act of 1830, after providing for the examination of packages by the collector, enacts that if such goods be subject to ad valorem duty, the same shall be appraised; and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by false valuation, or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited.

So far as this motion for a new trial is founded upon the claim that the verdict was against the evidence, I am clear that it should be overruled. The evidence for the claimants was full and explicit, and, moreover, was that kind of evidence which the supreme court of the United States, in

the case of Clifton v. U. S., 4 How. [45 U. S.] 242, held to be the best in such cases. It was that kind of evidence which the libellants in this case failed to produce, although an open commission was sent to the Cape of Good Hope to take testimony, where they had a consul residing, and where the value of this wool could have been shown to be above 20 cents per lb., if such had been the fact.

It appeared on the trial, that one of the hundred and fifty bales seized, contained washed wool, of a fine quality, and that this bale was greatly undervalued, and it is insisted by the government, that this bale, at least, should have been forfeited by the jury, and that to that extent their verdict was clearly against the evidence, if the statute forfeited the merchandise solely on the ground of undervaluation. But the statute is explicit on this point. There must concur with the act of undervaluation, the "intent to evade and defraud the revenue." The tendency of the evidence went to show that this bale of washed wool was included in the consignment and in the invoice and entry by inadvertence and mistake. The testimony of the consignees is that they never knew that there was any such article in the consignment, until informed by the custom-house officers long after the seizure; that they offered the whole one hundred and fifty bales (including the washed bale) at the same price, supposing it all to be unwashed wool. It was conceded on the trial, or at least assumed by the court, upon the evidence, that this bale of washed wool was greatly undervalued in the invoice and entry, and the jury were instructed that if any such undervaluation was with intent to evade the payment of duties, they should forfeit it. The jury must have found that there was no fraudulent or illegal intent, and I see no reason for disturbing the verdict on that point. This motion, therefore, for a new trial, on the ground that the verdict was against the evidence, must be denied.

But it is claimed as another ground for a new trial, that the construction given by the court in the charge to the jury, of the two acts of congress referred to, and especially that given to the 66th section of the act of 1799, was erroneous. This was the main point of controversy on the trial.

The first count of the libel or information is founded upon the 66th section of the act of 1799, and the jury were instructed that if they should find that the wool was purchased bona fide at the Cape, in open market, in the ordinary course of trade, and that the invoice and entry truly stated the actual cost of the same at the place of exportation, it could not be forfeited, and their verdict must be for the claimants. But if the wool was obtained by the consignors in any other mode than by such bona fide purchase, they must then inquire what was its true value at the Cape, and if the price at which it was invoiced and entered truly stated such value, then their verdict must be for the claimants. But, if the price on the invoice and entry was below the true value, and was inserted with intent to evade the duty, then their verdict must be for the government. It is strenuously insisted that this instruction to the jury, so far as it relates to the invoicing and entry of goods at their actual cost, under the act of 1799, is erroneous, although no case is cited in support of this claim. I am referred by the attorney for the government to the frequent use of the word "value" in the act of 1799, and in subsequent acts relating to the same subject, and it is urged that the only just and consistent construction is that which reads the words "actual cost" as meaning "actual value." A brief examination of the authorities will show that this claim is not well founded. This 66th section has been frequently subjected to judicial construction. In the case of U. S. v. Sixteen Packages [Case No. 16,303], decided in 1819, which was an information founded on this section, Mr. Justice Story held that forfeiture was not inflicted if the goods were invoiced and entered at the actual cost of a bona fide purchase, although that might be below the actual value. In Ninety-Five Bales of Paper v. U. S. [Id. 10,274], decided in 1829, it was held, on appeal, by Livingston, C. J., that the term "actual cost" applied also to goods manufactured abroad by the importer, and by him exported to the United States. In that case it was decided that all that was to be added to the cost of the raw material was the price or value of the labor employed in the manufacture, and the expense of transportation to the seaport whence it was shipped to the United States, and that the sum of these three items was the proper one to be entered in the invoice and entry as the actual cost. From the remark of the secretary of the treasury, in his report to the house of representatives, 17th January, 1817, this would seem to be the view entertained by the collectors, and in accordance with their practice under it. As the law then stood it worked injustice to the merchant who purchased his goods in the foreign market, paying the market price for them; for it is obvious that the cost price of purchased goods, upon which cost price duties were to be assessed, would ordinarily be enhanced by an amount equal to the profit of the manufacturer, and thus, in effect, the purchaser of foreign goods who imported them would be compelled to pay a higher rate of duty than the foreign manufacturer who sent to the United States the goods to be manufactured. The act of April 20, 1818 [3 Stat. 433], and especially the act of March 1, 1823 [Id. 729], remedied the unequal operation of the law in some particulars. But the test of forfeiture of goods purchased in the foreign market, as

fixed by the 66th section of the act of 1799, still remained in full force. Indeed, the basis of valuation upon which duties were to be assessed remained unchanged notwithstanding the 5th section of the act of 1818 provided that the owner or importer should declare on oath that the invoice exhibited the true value of the goods in their then state of manufacture. In Tappan v. U. S. [Case No. 13,749], decided in 1822, Mr. Justice Story held, after a thorough discussion of the subject, that the cost price and not the real value was still the basis of valuation for the assessment of duties. A fortiori goods entered at their cost price in a bona fide purchase could not be forfeited because entered at cost. The same construction was given to the statutes as they then stood, by the supreme court of the United States, in U. S. v. Tappan, 11 Wheat. [24 U. S.] 419. The latter case was argued by eminent counsel, and an elaborate opinion given by the court. In U. S. v. 12 Casks [Case No. 16,553], which was an information on the 4th section of the act of 1830, decided in 1834, Mr. Justice Hopkinson held that, "Two tests of value are given by the revenue laws: 1. In case of the purchase of goods in a foreign place, exported to the United States, the true value at which they must be invoiced and entered is the actual cost and price at which they were sold and purchased. 2. In case of goods sent to this country by the manufacturer, on his own account, the true value at which they must be invoiced and entered, is the market price or value at the place of exportation." These are the precise tests submitted to the jury in the case now under consideration, with the liberal qualification for the government added that the purchase must be in the open market, in the ordinary course of trade, thus excluding such purchases as might be made under circumstances calculated to depress the price paid below that of the general market. This rule is believed to be not only warranted by the statute, but eminently just and reasonable in itself. No better or safer standard of value can be found than that which is fixed by the scale of prices paid in the market, in the course of bona fide sales. In Alfonso v. U. S. [Case No. 188], decided in 1843, which was a libel of information on this 66th section of the act of 1799, while deploring the endless embarrassments arising out of any attempt to fully harmonize and reconcile all the various separate acts of congress relating to the collection of the revenue, Judge Story still adhered to the construction of the act of 1799, as laid down by him in the cases in Mason, already cited. The supreme court of the United States have repeatedly held that the 66th section was not repealed, but remained in full force. This was either assumed or directly decided in Woods v. U. S., 16 Pet. [41 U. S.] 342; Clinton v. U. S., 4 How. [45 U. S.] 242; Buckley v. U. S., Id. 251. The controversy has been renewed from time to time, and as late as 1854 reappeared in the supreme court. In the case of U. S. v. Sixteen Packages, 17 How. [58 U. S.] 85, and in the three cases that follow in the same volume, it was held that the 66th section of the act of 1799 was still in full force. I judge from an examination of that case that the information was founded solely upon that section. And it was argued that it was repugnant to and repealed by the 13th and 15th section of the act of 1823, and by the 17th section of the act of 1842, and the court below so held. But the supreme court held that the latter acts had no such effect, and that the 66th section was still in force, reversing the judgment below. But the government concedes that this 66th section is not repealed, in the strict sense of that term. One of the counts in this information is founded upon it. Still it is earnestly urged that it is modified; that the word "cost" therein has lost its original signification, and by subsequent legislation has been transformed in meaning into "value." In other words that congress has, in effect, struck out of the section the "cost," and inserted that of "value." We have already shown that this claim is not warranted by the decided cases, and we think it has no foundation in reason, or in any sound rule of construction. Such an interpretation would be calculated to mislead the unwary, and would convert a highly penal statute into a trap for the honest importer.

It is hardly necessary to add that the grounds upon which this case is disposed of do not reach the question as to the present basis of valuation, upon which duties are to be assessed. This is quite another and different subject. The penalties for mere undervaluation, whether in form of fines or additional duties, rest upon their own ground. In the case of this wool, if its value at the place of exportation was over 20 cents per pound, then it was liable to a duty of 24 per cent. But that is not the question now before the court, nor the one presented to the jury. The only question disposed of is, can this wool, having been purchased at the Cape of Good Hope, bona fide, in the open market, in the ordinary course of trade, and invoiced and entered at its cost truly stated, be forfeited? I think it cannot. The motion for a new trial must therefore be overruled, and judgment be entered for the claimants, discharging the goods from the custody of the marshal.

Case No. 15,933.

UNITED STATES v. ONE HUNDRED AND FIFTY-SIX PACKAGES OF TEA.

[2 Int. Rev. Rec. 22.]

District Court, S. D. New York. July, 1865.

NON-INTERCOURSE ACT—CONFISCATION OF GOODS.

[Merchandise ordered from China by merchants of Richmond, Va., and originally consigned to them, but for which, three days before the president's proclamation of August 16, 1861, declaring that part of Virginia in a

state of insurrection, and prohibiting intercourse with the inhabitants thereof, such merchants executed an assignment to New York creditors to cover advances previously made by the latter, and which merchandise, on its arrival at the port of New York, passed into the care and custody of such assignees, and was discharged under a general order by which the rest of the cargo was discharged, and was then placed in the public stores, was not liable to confiscation, under such proclamation and the act on which it was based, as "proceeding" to a hostile state.]

The facts of the case were substantially as follows: The tea was shipped in May, 1861, by Russell & Co., of Shanghae, on board the ship Dora, bound to New York, and was consigned to Edmund Davenport & Co., of Richmond, Virginia. In October, 1861, the vessel arrived in this city, and the tea was seized here by the collector of the customs. Messrs. Paxson's Son & Co., the New York agents of Davenport & Co., put in their claim for the tea, under an assignment of Davenport & Co., made to them a day or two before the issuing of the proclamation under the non-intercourse act. The letter containing the assignment reached the postmaster-general, but not Paxson's, Son & Co. They did nothing in relation to the property, except put in this claim. The questions which arose were very interesting and complicated, but after thorough argument upon the verdict originally obtained for the government, the tea was awarded to the claimants.

SHIPMAN, District Judge. In the spring of 1861, one hundred and fifty-six packages of tea were shipped from China to the port of New York, consigned to and owned by Edmund Davenport & Co. This firm was located in Richmond, Virginia, where its members resided, and were large dealers in groceries, including teas. Samuel C. Paxson's Son & Co. were merchants in and resided at the city of New York, and had for a long time been correspondents of Davenport & Co., had taken charge of the goods consigned to the latter at New York, and when proper forwarded the same to them at Richmond, Va. The latter also acted generally as the agents of the former in New York, purchased goods for them, and received consignments for them from different parts of the world. Prior to the 13th of August, 1861, Paxson's Son & Co. had purchased for Davenport & Co. a large quantity of flour, which had been shipped abroad, and had made advances on the same, for which the latter firm were indebted to them in the sum of $16,158.20. On the 13th of July, 1861, congress passed an act entitled "An act further to provide for the collection of duties on imports, and for other purposes," the fifth section of which provides "that whenever the president, in pursuance of the provisions of the second section of the act entitled 'An act to provide for the calling forth of the militia to execute the laws of the Union, suppress insurrections and repel invasions, and to repeal the acts now in force for that purpose, approved February 28, 1795,' shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the president, and when said insurgents claim to act under the authority of any state or states, and such claim is not disdained or repudiated by the persons exercising the functions of government in such state or states, or in the parts thereof in which such combination exists, nor such insurrection be suppressed by said state or states, then in such case it shall be lawful for the president by proclamation to declare the inhabitants of such state or any section or part thereof where such insurrection exists, are in a state of insurrection against the laws of the United States, and thereupon all commercial intercourse by and between the same, and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue, and all goods, chattels, wares and merchandise coming from said state or section, into the ports of the United States, and all proceeding to such state or section by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States." There are provisions to this section, but they have no material bearing upon the case now under consideration. The contingency contemplated by this act having arisen, the president, in pursuance thereof, on the 16th day of August, 1861 [12 Stat. 1262], issued a proclamation declaring certain states and sections, including that part of Virginia in which Richmond is situated, in a state of insurrection, declaring unlawful and prohibiting commercial intercourse between the inhabitants thereof and other parts of the United States, and forfeiting to the United States all goods, chattels, wares and merchandise coming from or proceeding to said hostile states or section, from other parts of the United States, without the special license and permission of the president. On the 13th of August, 1861, three days before the issuing of this proclamation, Edmund Davenport & Co. at Richmond executed an assignment of the teas in question to Samuel Paxson's Son & Co., of New York, directing the latter to hold the same to cover advances made by them for the Richmond firm, and for which there was then due to Paxson's Son & Co. the sum of $16,158.20. This assignment was endorsed in a letter directed to S. C. Paxson's Son & Co., New York, with a United States three cent postage stamp on the envelope, and was no doubt immediately despatched on its way to New York. It, however, never reached the parties to whom it was directed, but in some way came into the hands of one of the assistant postmas-

ters-general of the United States, and was by him transmitted to the custom house authorities at New York. Subsequently, on the 12th of October, 1861, the teas arrived at New York by the British ship Dora. The discharging of the ship was proceeded with under a general order, under the supervision of an inspector of customs. These teas, were, however, kept on board by the direction of Deputy Surveyor Brown, until the balance of the cargo was nearly or quite all discharged, when they were finally taken to the public stores Nos. 56 and 58 Greenwich street, where they remained until the 12th of November, 1861; when they were seized and forfeited to the United States. A libel of information was filed in the district court for the Southern district of New York, alleging a forfeiture on the ground that the goods were, at the time of the seizure, proceeding to the state of Virginia, in violation of the act of congress and the proclamation of the president heretofore cited; and also on the further ground that they were intended to be used for insurrectionary purposes contrary to the 1st section of the act of August 6, 1861 [12 Stat. 319], entitled "An act to confiscate property used for insurrectionary purposes." Samuel C. Paxson's Son & Co. have filed a claim for the teas, alleging that at the time of the seizure they were the lawful owners thereof and entitled to possession of the same; and also a plea denying that they were forfeited to the United States. The case was tried by the jury, and as there was no dispute about the material facts, by request and assent of counsel on both sides, the court directed a verdict for the United States, subject to the opinion of the court on the questions of law arising on the conceded or proved and undisputed facts. The question now is, shall the verdict stand, or be set aside, and the libel dismissed?

These goods must have been ordered by Davenport & Co. long before the commencement of hostilities. They were one of the ordinary classes of merchandise in which the firm had long dealt, and there is no fact in the case from which an inference can be drawn that they were intended for insurrectionary purposes. No plausible ground has been shown for confiscating these goods under the act of the 6th of August, 1861. The only other question is, were they "proceeding" to Richmond in any sense of the word, at the time of their seizure? They had come by sea from China, in due course of trade, to New York; and though originally owned by and consigned to Edmund Davenport & Co., of Richmond, when they arrived at New York they passed, under an established arrangement entered into long before, into the care and custody of Paxson's Son & Co., and were discharged under the general order, by which the rest of the cargo was discharged. They were discharged and placed in the public stores, where they remained some two or three weeks, when they were seized as forfeited to the United States on the ground that they were proceeding to Virginia, in violation of the act of July 13, 1861, and the proclamation of the president in pursuance thereof. What is the undisputed evidence on this point? The goods were not in fact proceeding to Virginia, but were lying in the public stores in New York. Now, in view of the undisputed evidence can they be said to have been in construction of law, in transit to Richmond? As they were not in fact being transported, whether they were constructively so or not, must depend on the intention of the parties who had the disposition of them. The uncontradicted proof is that the New York firm whose duty it was to take the care and custody of these goods here, did not intend that they should proceed to Richmond, but on the other hand they intended to retain the goods, subject to the order of Davenport & Co. The latter were heavily indebted to them, and their interest was strongly in favor of retaining the goods in New York. The ports of Virginia were already, and for a long time had been blockaded by the United States, and there is nothing in the case which throws the remotest suspicion upon the loyalty of Paxson's Son & Co., or can authorize the court to infer that they were intending to ship these goods to Virginia, in violation of the blockade, the statute, and the president's proclamation. Their whole interest was to keep the goods here, and I think the undisputed evidence conclusively shows that such was their intention. These teas, then, resting in the storehouses at New York, subject to the control of no one there except the authorities of the custom house and Paxson's Son & Co., were not by any intendment of either, either in fact or constructively, proceeding to Richmond. On the other hand, what was their status, so far as Edmund Davenport & Co. were concerned? On the 13th of August, three days prior to the proclamation of the president, Davenport & Co. executed and sent forward the assignment and order already referred to directing Paxson's Son & Co. to hold these teas in New York, as an offset to the debt due the latter from the former firm for advances. True, this paper did not reach Paxson's Son & Co., but did reach the custom house authorities, and they had it in their hands when they seized the teas. This document, whether valid as an assignment or not, clearly rebuts the presumption of any intention on the part of Davenport & Co., to have these teas proceed to Richmond. On the contrary, it is the most cogent evidence of their intention that they should not proceed to Richmond, but should be held in New York and applied in the discharge of the debt due their New York correspondents. These goods, then, were neither in fact nor constructively, through the intendment of any party, "proceeding" to Richmond or any other hostile section, in violation of any law of congress or proclamation of the president. They were, both by Davenport & Co., and Paxson's Son & Co., intended to remain in New York. The or-

der from the former to that effect was made before the proclamation interdicting commercial intercourse between the two sections, and was lawfully made, and the transmission of it by mail or otherwise contravened no statute or proclamation. Nay, more, it was an act which Davenport & Co. were in duty bound to perform, both to prevent an infraction of law and to protect their New York creditors, and was, therefore, in compliance with, and furtherance of, the very object of the statute and proclamation upon which this prosecution is founded. It follows from these views that the verdict must be set aside, and that the libel should be dismissed.

Case No. 15,934.

UNITED STATES v. ONE HUNDRED AND FIFTY-THREE BARRELS OF DISTILLED SPIRITS.

[6 Int. Rev. Rec. 203.]

District Court, S. D. New York. Dec., 1867.

INTERNAL REVENUE—FORFEITURE—ILLEGAL DISTILLATION.

In the case of the United States against 153 barrels distilled spirits and the distillery, and all property therein, at 136 Cedar street, BLATCHFORD, District Judge, directed the jury to the 26th, 48th, and 45th sections of the internal revenue law [13 Stat. 223], which applied to this case. The jury, after a short absence came into court and asked to have the 48th section explained. The judge read the section, by which it is provided that by a violation of the section, not only the whiskey, but the entire stock of property of whatsoever kind, became forfeited to the government. The jury again retired, and after an absence of five minutes returned with a verdict for the government, under the three sections referred to.

D. C. Birdsall, for claimants, moved for a stay of judgment for twenty days.

S. G. Courtney, Dist. Atty., opposed the motion, and said he would oppose motions for postponement of judgment in all cases where juries find for the forfeiture of the spirits, and further, that he would, on Saturday next, move the court that the stay of twenty days granted in two cases last week should be vacated.

Case No. 15,935.

UNITED STATES v. ONE HUNDRED AND FORTY-SIX THOUSAND SIX HUNDRED AND FIFTY CLAPBOARDS.

[4 Cliff. 301;[1] 20 Int. Rev. Rec. 98.]

Circuit Court, D. Rhode Island. June Term, 1874.

CUSTOMS DUTIES — FALSE VALUATION — INTENT — COLLATERAL FACTS.

1. In cases of false valuation of goods in the invoice, legal evidence of other fraudulent acts of a similar nature committed at about the same time, and when the same motive may be supposed to exist, is admissible to show the intent of the actor with respect to the matter charged against him in the information.

2. Positive proof of fraudulent acts is not generally to be expected, and the law allows a resort to circumstantial proof to ascertain the truth.

3. When the intent or guilty knowledge of a party is material to the issue, collateral facts tending to establish such intent or knowledge, are properly admissible in evidence.

4. In this case it was proper to show that the value given in the invoice was less than the actual market value of the merchandise, and that the party making the entry knew that fact. Therefore proof of correct entries made about the same time, of the same kind of goods, by the claimant, was admissible to show that he knew the real value of the merchandise.

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

Libel of information in rem, by the United States attorney, against 146,650 clapboards [Israel Meritt, claimant], seized by James Shaw, Jr., collector of the port of Providence, in this district. Trial in the district court by jury. Verdict for claimant. [Case unreported.] Error to the district court. Due seizure on land was made of the merchandise described in the record, and the district attorney on the 10th of June, 1871, filed in the district court for this district an information against the same, claiming that it was forfeited to the United States, for the reason therein set forth, as follows: (1) That the merchandise was falsely valued, in the invoice presented to the collector, at a less price than the actual market value thereof, at the time and place when and where the same was procured or manufactured; that the said invoice was then and there made up, with intent, by the said false valuation, to evade and defraud the revenue. (2) That the said owner, consignee, or agent, then and there knowingly entered, or attempted to enter, the merchandise by means of a false invoice, or by a false certificate of a consul, vice-consul, or commercial agent, or by means of an invoice which then and there did not contain a true statement of all the particulars required by the act to prevent and punish frauds upon the revenue. 12 Stat. 738. Service was made, and the claimant appeared and filed an answer, denying all the material allegations of the information. Issue was duly joined upon the allegations set forth in the information, as denied in the answer, and the parties went to trial. Evidence was introduced by both parties, and the jury returned their verdict for the claimant. Exceptions were taken by the United States to the ruling of the court, in the progress of the trial, and to the instructions given by the court to the jury. Two errors were assigned by the United States: (1) That the court erred in refusing to admit the invoice dated June 6, 1870, offered by the district attorney, as tending to show that the claimant shipped from the same port,

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

about that time, a cargo of clapboards of a quality inferior to that of the cargo seized, and entered the same at the port of Providence, at a much higher valuation than the invoice value of the cargo seized, it appearing that the market value of such lumber at the two periods was substantially the same. (2) That the district judge erred in the instruction given to the jury that they could not return a verdict for the United States, even if they found that the invoice value of the merchandise, as given in the invoice presented to the collector, did not conform to the value of such goods in the actual markets of the country of production, unless that they should also find that such discrepancy was not the result of honest error on the part of the owner, consignee, or agent, in respect to matters of law or fact; but that it was made knowingly, and with design to evade the payment of the duty which he knew was legally chargeable on the said merchndise.

John A. Gardner, U. S. Atty.

Samuel Currey and Wingate Hayes, for claimant.

CLIFFORD, Circuit Justice. Goods imported into the United States, subject to ad valorem duty, could not be admitted to entry under the act of March 1, 1823, unless a true invoice of the same was presented to the collector at the time of the entry, except as provided in section 2 of that act; and section 4 of the act of May 28, 1830, provided that if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited. 3 Stat. 729; 4 Stat. 410. Regulations of a similar nature, but much more minute in their character are contained in section 1 of the act of March 3, 1863, and the same section provides that if the owner, consignee, or agent shall knowingly make or attempt to make an entry thereof by means of any false invoice or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which shall not contain a true statement of all the particulars required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, said goods or their value shall be forfeited and disposed of as other forfeitures, for violation of the revenue laws. 12 Stat. 738.

Cases of fraud like the one charged in the information are among the well-recognized exceptions to the general rule, that other wrongful acts of the respondent are not admissible in evidence on the trial of the particular charge immediately involved in the issue. Legal evidence of other fraudulent acts of a similar nature, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, are admissible in cases of this description, with a view to establish the intent of the actor in respect to the matter charged against him in the information. Decided cases may be found which go further, and hold that such evidence is admissible as affording a ground of presumption to prove the agency of the respondent in the matter charged; but whether so or not, it is clearly competent to show the intent or guilty knowledge of the actor in respect to the matters immediately involved in the issue on trial. Cary v. Hotailing, 1 Hill, 311; Irving v. Motley, 7 Bing. 543; Rowley v. Bigelow, 12 Pick. 307; Castle v. Bullard, 23 How. [64 U. S.] 186. Intent and knowledge were distinctly put in issue by the pleadings, and in such cases it is allowable, as well in civil as in criminal cases, to introduce evidence of other acts and doings of the respondent, of a kindred character, in order to illustrate or establish his intent, knowledge, or motive in the particular act directly in judgment. All experience shows that such must be the rule, as in no other way would it be practicable, in many cases, to establish the real intent or motive of the actor, especially in transactions where the single act, if taken by itself, would not be decisive either way.

Guilty knowledge is in many cases an essential ingredient of crime, and in the trial of such cases, evidence of the commission of other kindred offences about the same time is always admitted as tending to prove that ingredient of the charge. Many cases of fraud also require the application of the same principle, as the charge of fraud usually involves the motive and intent of the party charged, which can only be deduced from a great variety of circumstances, no one of which is absolutely decisive. Positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, as the force and effect of circumstantial facts, usually and almost necessarily, depend upon their connection with each other. Circumstances altogether inconclusive if separately considered, may, by their number and joint operation, especially if corroborated by moral coincidences, be sufficient to constitute conclusive proof. Wood v. U. S., 16 Pet. [41 U. S.] 360. Hence, it is held, that whenever the intent or guilty knowledge of a party is material to the issue, collateral facts, tending to establish such intent or knowledge are properly admissible in evidence. U. S. v. Four Cases Printed Merinoes [Case No. 15,146]; Bottomley v. U. S. [Id. 1,688]; Alfonso v. U. S. [Id. 188]; Taylor v. U. S., 3 How. [44 U. S.] 207; Buckley v. U. S., 4 How. [45 U. S.] 259. Concede all that, and still it is contended that the

evidence offered was properly rejected because the entry of the merchandise described in the invoice offered in evidence was not made about the time of the supposed fraudulent act charged in the information, and the argument is, that the evidence of other fraudulent acts is never properly admissible, even to show a criminal or fraudulent intent or guilty knowledge of the respondent, unless the acts were of a kindred nature, and were done and committed about the time of the alleged criminal or fraudulent act, for which the accused or respondent is on trial. But the evidence rejected in this case was not offered to prove a prior criminal or fraudulent act, nor does the offer of proof, as disclosed in the bill of exceptions, assume that the prior entry was made to defraud the revenue, or to evade the payment of the lawful duties. On the contrary, the offer of proof assumes that the prior entry was made in good faith, and that the merchandise described in the invoice was correctly valued. Plainly the evidence was not offered for any such purpose, but to show that the importer well knew that the merchandise imported was of much greater value in the markets of the country where it was produced than the price given in the invoice presented to the collector. Beyond all doubt, it was proper to show that the value as given in the invoice was less than the actual market value of the merchandise, and that the party making the entry knew that fact.

Direct proof of those allegations could hardly be expected, and it follows that the prosecutor might properly resort to circumstances to support the charge. Great latitude is justly allowed by the law to the reception of circumstantial evidence, whenever a resort to it becomes necessary, either from the nature of the inquiry or the failure of direct proof. Collateral facts may be proved in such a case, though, when considered separately, they are quite insufficient to establish the given hypothesis, if it appears that by their joint operation they tend to support the theory they are offered to sustain. Tested by that rule, it is clear that the evidence offered and rejected had some tendency to prove that the invoice value of the merchandise was less than the market value of the same, and that the importer knew that fact at the time he made the entry, and it is equally clear that if the importer knew what the market value of the merchandise was, it is wholly immaterial when or by what means be acquired such knowledge. It was assumed by the United States, that the price of such merchandise was substantially the same at the two periods, and if such was the fact, it is difficult to see why the evidence was not admissible. They offered to prove that fact, and the ruling having been made with the understanding that, if the evidence was admitted, it would be followed up by proof to that effect, I am of the opinion that the ruling was erroneous and that the objection to its admissibility should have been overruled. 2 Grah. & W. New Trials, 665; Hill. New Trials, 310. Suppose it were otherwise, still I am of the opinion that the judgment must be reversed, for the reason given in the second error assigned. Much discussion of that proposition is unnecessary, as the instruction given to the jury is directly opposed to the rule adopted by the unanimous decision of the supreme court. Barlow v. U. S., 7 Pet. [32 U. S.] 410; Cambioso v. Maffet [Case No. 2,330]; U. S. v. Eighty-Five Hogsheads of Sugar [Id. 15,037]. Mistake of law in such a case is no defence to an information for a forfeiture, nor is there any thing in the act of congress under which the information in this case was drawn, to take the case out of the general rule established by the authorities cited by the United States.

Judgment reversed, and the case remanded for a new trial.

Case No. 15,935a.

UNITED STATES v. ONE HUNDRED AND NINETY-ONE CASKS OF GLASSWARE.

[Betts, D. C. MS. 1.]

District Court, S. D. New York. 1836.

FOREIGN STATUTES—HOW PROVEN.

[The statutes of England may be proven by the printed publications thereof obtained from the queen's printer.]

On the trial of this cause now before the court and a jury, the district attorney offered to read in evidence printed acts of parliament 5 & 6 Wm. IV. and 1 & 2 Vict., in relation to exportation and the drawback duty on glass, and called a witness who testified that he was in London in 1838, and went to the parliament printing house, to procure the said acts of parliament, but was referred to the queen's private printer as the only one who could furnish them; that he accordingly went to the store of the queen's printer, and there purchased the acts in question.

Mr. Patterson, for claimants [Booth & Co.], objected to the admissibility of the statutes as evidence, contending that the district attorney must prove them by producing exemplifications under the general seal of England, authenticated by the secretary of state for foreign affairs, or by a sworn copy compared with the rolls of parliament. Mr. Patterson cited many cases to show that such was the rule of evidence.

BETTS, District Judge, remarked that the ancient strictness of the rule respecting proof of foreign laws had been much relaxed in England, and more so in the United States, of late years. That the cases cited by counsel showed what the law had been on the subject, and also indicated some of the modifications of its former rigor, which had become incorporated in the modern practice; and it might have been added that in this state, un-

til comparatively a recent period, not only was such strictness of proof exacted in respect to the laws of foreign nations, and of our sister states, as foreign laws, but even the statutes of our own legislature could not be read, of right from the statute book. At this day, it is believed that in most of the states, and in the courts of the United States, the public laws are read from the printed statute books of the respective states and such publications are accepted as at least prima facie evidence of the law.

I am not aware of any higher authority than a like usage and general acquiescence in it, for reading the acts of congress in this court from the statute book, nor why, if the rule adverted to is to be administered as it was formerly laid down, the district attorney should not be driven to produce exemplifications of every statute of congress offered in evidence here. In whatever terms the rule may be sometimes expressed, it seems to me, such cannot be its spirit; and if executed according to the letter, clearly the highest or best evidence would not be an exemplification under a foreign seal, but the oath of the king himself, perhaps, who sanctioned the law, or of the public functionaries who were present when it was enacted or passed through all the forms rendering it completely a law.

The cases speak of foreign law as facts to be proved by the best evidence; but certainly the spirit of cases, particularly in the courts of the United States, regard the promulgation or publication of the foreign laws as the fact to be proved, and not the formula of its enactment or registration. It is no less the law if the law-giver declares it by proclamation or insertion in a newspaper, than if inscribed in the roll of the tower, and accordingly it would seem that the only essential matter to be proved is, whether it has been published and promulgated as the law of the country. The fact of publication may be proved by evidence competent to establish any other fact en pais. The act being that of a sovereign, does not necessarily demand a different order of proof, than if it was the declaration or notification of a private person.

In this point of view, I think the evidence is admissible. But, in my opinion, foreign statutes in relation to the navigation, exports, and imports of a country may be read in evidence as history of its policy, and upon the same principle that its annals are read to prove changes of succession, changes of dynasty, or other political events, and facts of a public and notorious character. If the offer of the proof rested upon the statutes only, I should receive it as sufficient prima facie evidence, because, if the rule in this behalf is yet unsettled and dubious, it is time that the highest tribunal of this land should declare and determine it. And I may add, I should regret to see the United States behind England in recognising and administering this rule of evidence, upon liberal and philosophical principles, and that, whilst the public laws of this country are read there, in the first instance, without question, we should exclude from our courts like proof of the laws of England.

The judge accordingly decided that the statutes should be read. Counsel for claimants excepted to the decision.

Case No. 15,936.

UNITED STATES v. ONE HUNDRED AND SEVENTEEN PACKAGES OF PLUG TOBACCO.

[10 Ben. 343.] [1]

District Court, S. D. New York. March, 1879.

NEW TRIAL — VERDICT AGAINST EVIDENCE — FORFEITURE FOR VIOLATION OF INTERNAL REVENUE LAWS.

A verdict in favor of the defendant, in a suit for forfeiture of goods for violation of the internal revenue laws, will not be set aside as against the evidence, though as to a small part of the goods proceeded against, the court entertains no doubt that upon the evidence the verdict is wrong.

Edward B. Hill, Asst. U. S. Dist. Atty.
Thos. Harland, for claimant.

CHOATE, District Judge. In this case, which is a suit by information against 117 boxes of tobacco, the forfeiture of the goods is sought for on the grounds that the stamps on the boxes were old stamps used a second time, and also that the stamps were not cancelled by the government die. The tobacco was manufactured in North Carolina, and consigned for sale to a commission merchant in New York, where it was seized. The jury have found a verdict for the defendant. The trial occupied three days. No exceptions were taken on the trial and the jury were out several hours. The plaintiff now moves for a new trial, on the ground that the verdict is against the weight of evidence. The evidence relied on by the government was the appearance of the stamps themselves, and the opinions of experts, upon which it is claimed to have been demonstrated that the stamps were old stamps and also that they were not and could not have been cancelled by the government die. On the part of the defence the claimant who manufactured and shipped the tobacco was called as a witness, and he swore positively that all the stamps used by him were new stamps, and that they were all cancelled by the government die. The deposition of his foreman was read to the same effect.

As to the evidence on the question whether the stamps were old stamps or not, it is clear that it cannot be claimed that the proofs of the government were so overwhelming that they proved the point beyond all doubt. The testimony of the claimant, as to the mode in

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

which they were attached, and as to their being occasionally torn and re-pasted and re-varnished, and the evidence as to the usage the boxes had received, was such as to make it clearly improper, against the positive testimony of the claimant and his foreman, to disturb the verdict, however confident was the opinion of the experts on this question, and however suspicious the appearance of the stamps themselves.

On the other question, there is more ground for the motion. The testimony of the manufacturer of the government dies, and other testimony, as well as the inspection of the cancellations themselves, on two or three of the boxes, leave no doubt in my mind that the cancellations on these boxes were made by some other instrument than a government die. On the claimant's part, it is proved that during a part of the time, during which the tobacco was shipped, and, so far as anything positively appears to the contrary, during the time these two or three boxes were shipped, he had a government die which was injured, and which he afterwards surrendered to the internal revenue officers. This die, though in the possession of the government officers in North Carolina, was not produced on the trial, although the United States district attorney for North Carolina attended the taking of depositions in that state, and the fact of the imperfection in that die was then testified to by the witnesses examined. One of the points made by the claimant's counsel upon the trial, was that the injury to that die would account for the alleged irregularities in the appearance of these cancellations. I am not able to say that from any evidence in the case these irregularities could have been so caused. Indeed, they are of a character quite distinct from any effect which the injury shown to have been sustained by that die would have produced. Upon the whole testimony, I think the verdict on this point, as to the two or three boxes referred to, is so decidedly against the weight of the evidence that, were this an ordinary case between parties to a controversy for the recovery of money or property, it would be the duty of the court to grant a new trial, that the question might be submitted to another jury.

But the case is of such a character that it would not be proper, nor in accordance with the decisions of the courts, to disturb the verdict. The proof above referred to extended to but two or three out of one hundred and seventeen boxes. It is true that the testimony of the government's witnesses was to the general effect that all the stamps showed more or less of the same suspicious appearances that were observed and pointed out on the seven or eight boxes exhibited to the jury, in respect to the re-use or unlawful cancellation of the stamps; and it is true that as the tobacco was all held in the same store for sale, on account of the claimant, it was sufficient to prove the charge against one box to ensure the forfeiture of the whole. But nevertheless, the forfeiture of goods not proved to have been unlawfully stamped or unlawfully cancelled, because found with other guilty goods, is a proceeding highly penal in its character, though doubtless justified by good reasons of public policy. Even if the proof were equally strong against all the boxes, the decided weight of authority is that the court should not grant a new trial in an action for a forfeiture, where the verdict is for the defendant. Within the meaning of the rules relating to new trials, I think an action of this character is clearly a penal action. And no precedent is cited which justifies the granting of this motion. On the contrary, it has been often held that the court will not disturb a verdict for the defendant, where there has been no misdirection, in an action where the effect of the verdict is to shield the defendant from a penalty. Ranston v. Etteridge, 2 Chit. 273; Rex v. Mann, 4 Maule & S. 337; Brook v. Middleton, 10 East, 268; Brooke v. Middleton, 1 Camp. 450; Comfort v. Thompson, 10 Johns. 101; Baker v. Richardson, 1 Cow. 77; Hall v. Green, 24 Eng. Law & Eq. 453. And especially where, as in this case, the government might have made a stronger case by the production of evidence in its possession, and the value of the goods actually inculpated is very trifling, and the cost and expense incurred by the claimant in defence of the action has been large, and he can in no event recover his costs, the impropriety of disturbing the verdict is obvious.

A motion is also made on the part of the plaintiff, for a certificate of probable cause. This is opposed on the part of the claimant. But I think it clear that the appearance of the stamps on these boxes was such as to justify the seizure, as one based on probable cause for forfeiture.

Motion for new trial denied. Motion for certificate of probable cause granted.

Case No.15,937.

UNITED STATES v. ONE HUNDRED AND SIXTY-THREE, ETC., BARRELS OF WHISKEY.

[5 West. Jur. 150.]

District Court, E. D. Missouri. April, 1871.

INTERNAL REVENUE — INFORMERS — JUDGMENT — POWER OF COURT TO MODIFY AFTER TERM.

1. Where upon an information of forfeiture for violation of the internal revenue laws, a judgment has been entered, distributing the proceeds in the registry in accordance with the rights of different parties, as found by the court, the judgment cannot be modified or altered by the court after the close of the term. Any errors in the proceedings, not merely formal, must be corrected by proceedings in the appellate tribunal; and even at the suggestion of the treasury department, the court cannot alter or change its records.

2. Informations were filed against several lots of whiskey for violations of the internal revenue acts. By order of court the several cases were consolidated, and upon the trial a verdict was found in favor of the government, Feb. 28, 1870, for the value of the whiskey for which the claimant had given bond. Pending a motion for a new trial, the claimant by an arrangement with the department, paid into the registry the sum of $12,221.07, instead of the value assessed at $27,781.31, and on May 27, 1870, the motion for new trial was overruled and judgment entered. In one of the cases the former collector was entered as informer, and in another, one Hunter was found to be the first informer, and the order was made for the payment of the money in the registry of the court to the collector, to be by him distributed in conformity with the judgment of the court on Sept. 28, 1870.

[This was a motion made by the collector for leave to return into the registry money paid to him under a final judgment rendered in a proceeding for the forfeiture of 163, 143, and 163 barrels of whiskey, Matteson and others claimants.]

TREAT, District Judge. A motion was made by the collector of internal revenue for the First Missouri district, pursuant to instructions received by him from the acting commissioner, for leave to return into the registry money paid to him under a final judgment rendered by this court at a prior term in case 1476. Said motion was filed January 9, 1871, and a rule entered the same day on the informer to show cause on the 19th of said month why said leave should not be granted. On said 19th, the informer filed these objections; and the legal propositions arising were presented by his counsel and the district attorney respectively.

By the judgment of this court at a former term it was ascertained that Barton Able was the "first to inform in the cause whereby judgment of forfeiture," was rendered in case No. 1476, and John A. Hunter in case No. 1477. Pursuant to the final judgment then rendered the money to which the United States and the informer in No. 1476 were respectively entitled, was paid to the collector to be by him distributed accordingly. Thus the judgment of a former term was not only rendered, but duly executed so far as the records of this court are concerned. The acting commissioner at the time being of opinion that the case of Dorsheimer v. U. S., 7 Wall. [74 U. S.] 166, ought to have controlled the former action of this court, and consequently that its judgment was erroneous, instructed the collector to dispose of the money paid to him out of the registry under that judgment, differently from the terms of the judgment. It is obvious that the collector was thus placed in an embarrassing position. The only money that passed into his hand was received by him pursuant to that judgment and subject to its requirements. On further representation of the matter to the commissioner he was required to make the pending application. The informer was cited in, not because the court supposed it had any further control over the judgment, but that if he chose to agree to a surrender of his legal rights he might do so of record. As he insists upon his rights as fixed by that judgment which this court has now no power to alter, modify or annul, no action can be had to disturb or affect it. If error was committed the law indicates the proper mode and time for correcting the same, and does not permit this court to vacate or change its judgments after the expiration of the term at which they were rendered. That doctrine is too well settled to admit of question; and this court can detect no possible object in view by this motion, except such as would practically violate said well established and essential rule of law. If said money were returned to the registry, it would still be subject to said judgment; otherwise the repeated decisions of the United States supreme court in like cases are of no obligatory force. It certainly is desirable that uniformity of action should exist between the courts and revenue officers; but the courts must construe the statutes for themselves and enforce their provisions in all cases before them, subject to review only by the proper appellate tribunals, even if perchance their judgments do not accord with the views or rulings of said executive officer. In this case there was no exception or writ of errors, and therefore the power of this court over such has ceased, only so far as may be necessary to enforce the judgment. The case referred to in the 7th Wallace is for many reasons deemed inapplicable to the case here. The power to remit so far as informers are concerned is somewhat different before and after judgment. When a suit in rem results in a judgment of forfeiture that judgment is ordinarily enforced by a sale of the res the proceeds of which pass into the registry to be distributed according to the terms of the final order. If a remission as to a part of said proceeds is had the residue remains to be paid over. If the proceeds were $28,000 for instance, and $18,000 were remitted, there would remain $10,000 for division between the informer and the United States. The reasons inducing the remission of a part are not considered by the court, for the power to remit is exclusive of its authority. The fact that the res was released on stipulation at the appraised value does not change the legal principle. It was the res that was condemned, and that, on remission in whole or part, was to be restored or after the sale the whole or part of the proceeds thereof. Under the stipulation the principal and sureties were to pay into the registry the value of the property. Of that sum a part was remitted, leaving the residue to be distributed between the United States and the informer. The court in its judgment of the forfeiture of the res had nothing to do with the collection of taxes in New Orleans or outside propositions. If before the trial the suits had been dismissed after compromise, on payment to

the collector of specified sums for taxes, penalties, &c., then the secretary of the treasury would, under section 179 of the internal revenue law (July 13, 1866 [14 Stat. 98]), and subsequent acts, determine what part, if any, of the compromise fund should be paid to one claiming to be informer; but where a trial is had, and the informer is ascertained by the court, and the money passes through the registry, it is apprehended that a different rule obtains. However that may be, this court cannot change its judgment of a prior term, whereby an essentially new judgment will be substituted, prejudicial to the rights of informers, or others in interest.

This motion has been entertained and is now formally passed upon, in order that the action of the court may, if practicable, be reviewed by the appropriate judicial tribunal. Whether the requirements of the law concerning informers, are politic or impolitic, congress must decide. The courts can only enforce the law as it exists. Under the practice here established, informers are compelled to give security for costs, and thus make themselves directly answerable, therefore, if the suits fail. Consequently they are expected to render efficient aid, not only in the detection of officers, but in their successful prosecution. In the case under consideration, there was protracted litigation, advances of money by the informers, testimony taken in New Orleans and elsewhere at great expense, and under difficult circumstances, and a final judgment, together with the decision of the court determining that Barton Able was the legal informer. If there had been no partial remissions, the amount paid would have been three times the amount actually received. The legal power to remit, caused a corresponding reduction of the amount to be received by the United States and the informer, respectively. The object in view by this motion, as disclosed by the letters of the late acting-commissioner, is to so far alter, or cause to be altered, the former judgment of this court, as to deprive the informer of a large portion of what, under an ordinary remission, he would still be legally entitled to. The mode proposed to effect that purpose is to have the money which has been actually paid over under the judgment, returned to the registry, so that the court may make a different distribution thereof, from what its former judgment required—an indirect mode, it seems, of having this court do what the law forbids, viz.: to alter a judgment of a former term to the prejudice of rights thus judicially determined. It is not necessary to review the terms of the original letter announcing the conditions of the compromise, further than to state that if its purpose was to have a definite sum paid to the proper officer, as taxes due, and another sum as a specific penalty contra-distinguished from a forfeiture, then it left no sum whatever for the court to distribute through the registry for the benefit either of the United States or the informer in the case tried; for the suit and judgment here was not for unpaid taxes, nor for the enforcement of any one of the many penalties in personam. Other suits might have been instituted and possibly have been successful to that end; but voluntary payments to revenue officers by way of compromise for alleged liabilities in personam without the institution of suits for the recovery thereof, are entirely outside the cognizance of courts, as they have and can have no jurisdiction over other than judicial proceedings. Hence if the claimants were supposed to rest under liabilities other than what this court had judically determined, payments made to compromise them were purely executive questions, to be settled without reference to the judgment of forfeiture in this case, were questions with which this court had nothing to do, and for the details of which its registry could not be used. Money once in the registry can be removed therefrom only on the order of the court; and the court can make no orders except in cases pending before it. What revenue officers should collect taxes on spirits distilled in New Orleans, and not removed in bond, and what officers should receive payment for specific penalties, made without suit for violation of the internal revenue law, where said spirits were distilled, it is not necessary to inquire. The question is partly one of law and partly one of treasury modes of accounting among its officers. It suffices that in this case no such question is here for solution. But, it is said the intention was that after the compromise payments had been made (to whom to be made no intimation was given directly by the commissioner) the district attorney was to discontinue further proceedings. That suggestion omits due regard to the state of the record here. There had been no new trial granted, and no stay of proceedings or of execution. This court could at any moment, in conformity with law, at the suggestion of the informers or any other party in interest, have enforced judgment upon the verdict rendered. And further, after judgment, the usual modes of discontinuing proceedings would have been satisfaction thereof duly entered, or a perpetual stay of proceedings thereunder. If the perpetual stay had been sought, with or without terms, the action of the court would have been required, and its records of the case disclosed the final determination thereof. If satisfaction were entered, the amount of the original judgment would remain to be accounted for.

Without pursuing the inquiry further, it must suffice that this court did not consider originally, that the Case of Dorsheimer in the 7th Wallace was at all applicable to the facts and circumstances before it, especially as one of the consolidated cases had been to the United States circuit court whose mandate this court was bound to obey; and further that whether it committed error or not,

its power over the judgment then rendered is at an end.

It may not be improper to add that if any informality exists or error was committed, it probably was in not insisting rigidly upon compliance with the literal terms of the statutes. On examination of the papers on file in this case, and those with which it was consolidated, it appears that the terms of the compromise were received by this court as if legally determined upon the strength of a letter signed only by the late acting commissioner, in which he recites that the secretary of the treasury and the attorney-general had agreed thereto. There is nowhere on file in these cases duly authenticated evidence of a compromise with the permission in writing of the secretary of the treasury and of the attorney-general, nor of the opinion of the solicitor, first filed in the office of the commissioner. And as a suit in court had been commenced, and even a verdict had, it may be that duly authenticated evidence ought to have been submitted to the showing that the terms of the several acts of congress on which the power to compromise depends had been complied with. Section 7 of act of March 31, 1868 [15 Stat. 60], and section 102 of act of July 20, 1868 [Id. 166]. If the judgment could be now opened, the informer would have a just right to insist upon the enforcement of the original judgment for the full amount thereof, unless duly authenticated evidence was given that the power to compromise had been exercised according to the conditions prescribed, and on compliance with which the power alone lawfully can be used.

All of the many suggestions which would arise if this court could now review its original action in the premises need not be considered. It has entertained this motion that, if practicable, the district attorney may procure from the circuit court a correction of errors here, if any exist. Hence the motion will be overruled and the district attorney can except thereto: taking such action in the premises as he may deem the law permits, for securing a review by the United States circuit court if such review can be had.

Case No. 15,938.

UNITED STATES v. ONE HUNDRED AND THIRTY BARRELS OF WHISKY.

[1 Bond, 587.] [1]

District Court, S. D. Ohio. April Term, 1865.

INTERNAL REVENUE—FORFEITURE—TRIAL BY JURY—PROCEEDING IN REM.

1. In a proceeding in the district court of the United States against property seized as forfeited under the internal revenue laws, to which a claim is interposed, the claimant has a constitutional right to a trial by a jury.

2. Congress has no power by legislation to provide for any other mode of trying a case, in which the right of trial by jury is secured by the constitution.

3. The provision of the statute, declaring that "the proceeding to enforce said forfeiture of said property shall be in the nature of a proceeding in rem," is not to be construed as authorizing a trial on strict admiralty rules, and without the intervention of a jury.

Flamen Ball, Dist. Atty., and H. C. Whitman, for the United States.

J. B. Stallo, for claimant.

LEAVITT, District Judge. The motion before the court is for a trial by jury in four distinct informations, prosecuted in behalf of the United States, for the forfeiture of about one hundred and thirty barrels of whisky, alleged to have been manufactured and sold in violation of the internal revenue act of June 30, 1864 [13 Stat. 223]. The whisky was seized in this district, and is now in the custody of the law. Claimants have intervened in each of the four cases, and in the answer and claim of each the reasons and ground of forfeiture alleged in the several informations are denied. The question is, whether these claimants are entitled, in the trial of the issues made, to the intervention of a jury.

It is insisted by the counsel for the United States, that these informations are before this court as cases in admiralty jurisdiction, and must be tried according to the known and settled usages of courts of admiralty, in which the trial by jury is unknown. On the other hand, it is claimed, that as the seizures of the property in question were on the land, they must be tried as cases at law, in which the right of a jury trial is secured by the constitution of the United States. The seventh amendment to the constitution declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." And it is too clear to admit of doubt, that if these are cases at common law, they are within this clause of the constitution, and the parties are entitled to a trial by jury. It is equally clear that congress has no power under the constitution to deprive a suitor of this right, by declaring that a case not properly within the jurisdiction of the admiralty, shall be treated and dealt with according to the known principles of courts of admiralty. In defining the judicial power of the national government, the constitution declares (article 3, § 7), among other things, that it shall extend "to all cases of admiralty and maritime jurisdiction." The congress of the United States, in giving effect to this constitutional provision, have enacted that the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures made under the laws of import, trade, or navigation, on waters navigable from the

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

sea by vessels of ten or more tons burden. These courts are also vested with exclusive original cognizance of all seizures on land, or other waters than as aforesaid. Section 9, Act Sept. 24, 1789 (1 Stat. 73). The same section reserves to suitors the right of a common law remedy, where the common law is competent to give it; and also provides "that the trial of issues of fact in the district courts in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury."

It is obvious that in this legislation congress had in view the distinction between cases of proper admiralty jurisdiction and cases of seizure on land, or on water-courses, not properly within the scope of that jurisdiction. And in the latter class of cases, jurisdiction is vested in the district courts, not because they are courts of admiralty, but because they are courts created under the constitution. But in confining this jurisdiction, the statute is careful to reserve to suitors the right of trial by jury, in all cases of seizures which are not of admiralty cognizance. Now the cases before the court arise under section 68 of the act of June 30, 1864, which imposes the penalty of a forfeiture for any refusal or neglect to comply with the law regulating the duties payable by the distiller of spirits. By such neglect or refusal, not only the vessels and machinery used in distillation, but the liquor manufactured, are subject to forfeiture. And at the close of the section it is provided, that "the proceedings to enforce said forfeiture of said property shall be in the nature of a proceeding in rem, in the circuit or district courts of the United States for the district where such seizure is made, or in any court of competent jurisdiction."

It is so clear as scarcely to need a word of argument, that congress have not conferred, and did not intend to confer, on the courts named, admiralty jurisdiction in the sense of requiring that cases arising under section 68 should be tried as cases of strict admiralty jurisdiction. It would be an impeachment of the intelligence of that body to suppose they intended a seizure on land should be considered as one within the scope of such jurisdiction. In declaring that the proceedings should be in the nature of a proceeding in rem, nothing more was intended than to provide for a summary and effective mode of enforcing the act of congress. The thing—the property subject to forfeiture is to be seized and held in possession subject to the action of the court. And this for the obvious reason, that a proceeding against the person merely would not give an available remedy for a fraudulent attempt to evade the law. It is true the right to a forfeiture of the property in question is set forth in the form of a libel, a term used as appropriate to proceedings in admiralty. But this can not change the character of the suit, nor bring the subject of it within the range of the admiralty jurisdiction of this court. It might as well have been presented by a petition or declaration, or any other convenient mode. The sole question is, are the facts such as to show that the party proceeded against has a right to a trial by jury. And on this subject, the case of Parsons v. Bedford, 3 Pet. [28 U. S.] 433, is an authority in point. The opinion of the supreme court of the United States in that case was prepared by the learned Judge Story, in which he holds: "That the amendment to the constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form they may assume to settle legal rights." To the same effect is the decision of the supreme court in the case of The Sarah, 8 Wheat. [21 U. S.] 391. It was a case prosecuted for a forfeiture under the revenue laws of the United States then in force. Although the property seized was a ship, it appears the seizure was made on land. And the court say: "In cases of seizure on land under the revenue laws, the district court proceeds as a court of common law, according to the course of exchequer informations in rem; and the trial of issues of fact is to be by jury." [U. S. v. Four Hundred and Twenty-two Casks of Wine] 1 Pet. [26 U. S.] 547.

The motion for a jury is granted.

Case No. 15,939.

UNITED STATES v. ONE HUNDRED AND THIRTY-SEVEN BALES OF COTTON.

[See Case No. 15,689.]

Case No. 15,940.

UNITED STATES v. ONE HUNDRED AND THIRTY-THREE CASKS OF DISTILLED SPIRITS.

UNITED STATES v. TWO PACKAGES OF DISTILLED SPIRITS.

[1 Sawy. 188;[1] 11 Int. Rev. Rec. 191.]

District Court, D. California. June 7, 1870.

INTERNAL REVENUE—WHOLESALE LIQUOR DEALER—FORFEITURE.

1. The knowing and willful omission, neglect and refusal of the wholesale liquor dealer to cause packages of distilled spirits to be gauged, inspected and stamped, as required by section 25 of the act of July 20, 1868 [15 Stat. 136], expose the distilled spirits and liquors owned by the wholesale liquor dealer to the forfeiture denounced in the 96th section of the act.

[Cited in U. S. v. Four Thousand Eight Hundred Gallons of Spirits, Case No. 15,153; U. S. v. One Thousand Four Hundred and Twelve Gallons of Distilled Spirits, Id.

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

15,960; U. S. v. Two Hundred Barrels of Whiskey, 95 U. S. 575.]

2. The language of section 96 of the act of July 20, 1868, denouncing the forfeiture is not uncertain. "All distilled spirits or liquors owned by him shall be forfeited," is to be construed to mean all distilled spirits and liquors. It was not intended to discriminate between distilled spirits and liquors, and to create an alternative forfeiture of one exclusive of the other, but to include within the general term "liquors," whatever the more special term "distilled spirits" might not embrace.

3. The provisions of the 69th section of the act of July 20, 1868, do not apply to infractions of the provisions of the 45th section.

[These were libels of information against one hundred and thirty-three casks of distilled spirits, and two packages of distilled spirits; Funkenstein & Co., claimants.]

W. W. Morrow, Asst. U. S. Dist. Atty.
Robert Harrison, for claimants.

HOFFMAN, District Judge. The demurrer to the informations in these cases, present two questions: 1st. Does the 25th section of the act of July 20, 1868, make it the duty of the wholesale liquor dealer, whenever any cask or package of distilled spirits shall be filled for shipment, sale or delivery, on the premises of any wholesale liquor dealer, to cause the same to be gauged, inspected and stamped, as provided for in that section; and does the knowing and willful omission, neglect and refusal, to do so expose the spirits and liquors owned by the wholesale liquor dealer to the forfeiture denounced in the 96th section of the act? 2d. Do the provisions of the 96th section apply to infractions of the provisions of the 45th section?

1. The clause of the 25th section under which the forfeiture in these cases is supposed to have been incurred, is as follows: "Whenever any cask or package of distilled spirits shall be filled for shipment, sale, or delivery, on the premises of any wholesale liquor dealer, or compounder, it shall be the duty of a United States gauger, to gauge and inspect the same and place thereon an engraved stamp signed by the collector," etc., etc.

The 96th section provided, "that if any distiller, etc., shall knowingly and willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited * * * all distilled spirits or liquors owned by him, or in which he has any interest as owner, * * * shall be forfeited to the United States."

The question thus arises: Has the liquor dealer in this case knowingly and willfully omitted, neglected, or refused to do, or cause to be done, any of the things required by law in the carrying on or conducting his business?

The duty of inspecting, gauging, and stamping, is that of the gauger. But the inspecting, gauging, and stamping, are clearly "things required by law in the carrying on of the business."

These it was the duty of the liquor dealer to cause to be done, by calling on the gauger to perform his duty, and the information charges that the liquor dealer has knowingly and willfully neglected to cause them to be done. When the statute makes the neglect to cause a thing to be done an offense, it is clear that the thing is to be done by some other person than the offender, and that the guilt of the latter consists in his neglecting to procure the services of the former.

If, then, this clause of the 96th section is to have any operation, it must apply to a case like the present, where the liquor dealer has neglected to cause to be done one of the most important things required by law in the conducting, and carrying on of his business, viz: the inspection, gauging, and stamping of his casks.

If the 96th section is to be construed as applying only to omissions to do any of those things which the law expressly makes it the duty of the offender to do, the phrase "or cause to be done" would be inoperative. The insertion of that phrase seems to indicate the intention of congress to make the omission to cause to be done any of the things required by law, an offense in cases where it is not the duty of the offender himself to do them; and in this view, the words "knowingly and willfully" find an appropriate place in the statute; for they restrict the operation of the statute to those cases where the offender, knowing what is required by law in the carrying on of his business, and what are the duties to be performed by the gauger, willfully neglects to call upon or notify him to perform them, and thus "omits to cause to be done the things required by law in the carrying on of his business."

I am aware that on this question there is a conflict of authority.

A construction similar to that adopted above, was given to the statute by Judge Hall, of the United States district court for the Northern district of Mississippi,—U. S. v. One Rectifying Establishment [Case No. 15,952],—while an opposite view was taken by Judge Ballard, of the United States district court for the district of Kentucky.

It is, therefore, not without doubt that I announce my conclusion.

It is also objected, that the ninety-sixth section is inoperative for uncertainty, the language being, "all distilled spirits or liquors owned by him shall be forfeited."

I do not find that the objection has been taken in any reported case. The meaning of the statute is unmistakable, and the word "or" is to be construed to mean "and," or the phrase is to be taken to be one of those pleonasms so common in legal phraseology, where a second and more general word is introduced, out of abundant caution to cover and include whatever by possibility may not be embraced by the first.

It was not intended to discriminate between "distilled spirits" and "liquors" and to create an alternative forfeiture of one exclusive of the other, but to include within the general term "liquor" whatever the more special term "distilled spirits" might not embrace. But all the articles under either denomination are to be forfeited.

The demurrers to the first and second counts of each of the informations are therefore overruled.

The third count in each of the informations is admitted to be defective, and the demurrers are sustained.

The objection to the fourth count in each information is also well taken.

The informations are based upon the idea, that the provisions of the ninety-sixth section can be applied to infractions of the provisions of the forty-fifth section.

The penalties and forfeitures imposed by the ninety-sixth section are, by its terms, limited to those cases "where no specific penalty or punishment is imposed by any other section of the act for the neglecting, omitting, or refusing to do, or for the doing, or causing to be done, the things required or prohibited."

But the forty-fifth section does provide a specific penalty and punishment for the violation of its provisions. The ninety-sixth section can, therefore, have no application to cases arising under that section.

On this point I have nothing to add to the very clear and conclusive argument contained in the opinion of Mr. J. Hall, already cited.

It is further objected to the information against two packages of distilled spirits, that they are not averred to be liquor or distilled spirits. But the seizure of two packages of distilled spirits is distinctly alleged, and the goods are described as such throughout the information. The averments seem to me sufficient, as are also those relating to the ownership of the property, and the time of the commission of the offenses.

Case No. 15,941.

UNITED STATES v. ONE HUNDRED AND TWENTY-NINE PACKAGES.

[2 Am. Law Reg. (N. S.) 419.]

District Court, E. D. Missouri. Sept., 1862.

FORFEITURE—INTERCOURSE WITH INSURRECTIONARY STATES—INTERDICT—STATUS OF TERRITORY —HOW DETERMINED.

1. The act of congress of July 13, 1861 [12 Stat. 255], is not a penal but a revenue statute, and is to be construed liberally, so as to accomplish its proposed object.

2. Where a party for fraudulent purposes mixes up goods prohibited by a revenue act with those not prohibited, the whole will be forfeited.

3. A citizen may be forbidden by a municipal law to do what would be lawful for a neutral to do on the high seas.

4. A sale of contraband property to a belligerent in a neutral territory is a violation of neutrality, and, à fortiori, such sale in one belligerent country by a citizen or domiciled person thereof, is a breach of allegiance.

5. Hence the act of July 13, 1861, prohibits every act done towards the execution of a design to carry on, without a "permit," commercial intercourse between the interdicted and other states, and it is violated not only when a vessel has actually sailed with the goods on board, but the moment the goods are started, even on land, towards the forbidden destination. The application for a "permit" is evidence of the intention to proceed, and the use of fraudulent invoices to procure the "permit," shows the intention to be fraudulent. The shipment of goods under color of that permit, is a step taken in execution of that fraudulent intent—is an overt act. Such goods are "proceeding to" the interdicted port within the meaning of the act of July 13, 1861, and the shipper, under the act of May 20, 1862 [12 Stat. 404], is guilty of an "attempt" to transport them in violation of law.

6. The condition of peace or war, public or civil, in a legal sense, must be determined by the political department of the government, and the courts are bound by that decision.

[Cited in Perkins v. Rogers, 35 Ind. 155.]

7. By the act of July 13, 1861, the prohibition of commercial intercourse is to be in force "so long as such condition of hostility shall continue." The same power which determines the existence of war or insurrection, must also decide when "the condition of hostility" ceases. In a legal sense the state of war or peace is not a question in pais for courts to determine. It is a legal fact ascertainable only from the decision of the political department.

8. Hence, when the president has proclaimed a state to be in insurrection, the courts must hold that this condition continues until he decides to the contrary.

9. The same rules apply as to the exceptions from the interdict, of such parts of the insurrectionary states "as may maintain a loyal adhesion to the Union and the constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents." Such exceptions, and the legal status of such parts of the said states, are to be determined by the president.

Libel of information under the act of congress, July 13, 1861 [against one hundred and twenty-nine packages, W. H. Probasco, claimant].

W. W. Edwards and C. S. Hayden, for the United States.

J. K. Knight, for claimant.

TREAT, District Judge. The facts submitted in this case are substantially these: The claimant, proposing to make a shipment of merchandise to Memphis in the state of Tennessee, applied to the surveyor of the port of St. Louis for a permit, under the regulations of the secretary of the treasury, pursuant to the act of July 13, 1861 [12 Stat. 255]. He represented that the proposed shipment contained, among other things, 100 barrels of cement. A "permit" having been granted for the specified goods, the claimant sent on board of a steamer, bound for Memphis, said 100 barrels and the 129 packages now in litigation. The surveyor caused said shipment to be examined after it was on board of said steamer, and whilst she still lay at the wharf here, and detected, that instead of 100 barrels of cement, there were 100 barrels of whiskey

packed in cement for the purpose of concealing the same. Thereupon the whole shipment was seized.

The agreement of the facts, as filed, states that Memphis, the port of destination, is not now "in a condition of hostilities" against the United States, and that it is "occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents." The claimant does not interpose a claim for the 100 barrels of cement and the whiskey packed therein, but solely for the 129 packages which contain no prohibited goods.

The first proposition urged by his proctor is that the statute of July 13, 1861, is a penal statute, in derogation of common right, and consequently it is to be strictly construed. Common right, it must be observed, requires the bonds of society to be preserved so as to prevent anarchy, and the consequent destruction of all safeguards for persons and property. Every member of society is directly interested in its preservation. Governments are instituted for the common good; and when a blow is aimed thereat, every citizen's rights are assailed. Measures adopted for the common safety are therefore, generally construed liberally, or so as to effect the proposed object. The theory upon which that rule depends was fully considered in this court in the cases of U. S. v. The Hannibal [Case No. 15,298]; Same v. Champion [Id. 14,779], decided at the November term, 1861. The statute of July 13, 1861, being a revenue statute, is to be construed according to the rules governing such acts, and not as a mere penal enactment. In the case of Taylor v. U. S. 3 How, [44 U. S.] 210, the supreme court of the United States held: "In one sense every law imposing a penalty or forfeiture may be deemed a penal law; in another sense such laws are often deemed, and truly deserve to be called, remedial. The judge was, therefore, strictly accurate when he stated (in the court below) that 'it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law—that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not in the strict sense penal acts, although they may inflict a penalty for violating them.' And he added: 'It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them.' The same distinction will be found recognized in the elementary writers; as, for example, in Blackstone's Commentaries (1 Bl. Comm. 88); Bac. Abr. 'Statutes' 1, 7, 8; Com. Dig. 'Parliament' R. 13, 19, 20; and it is also abundantly supported by authorities." Similar decisions may be found in The Harmony [Case No. 6,081]; [Sundry Goods v. U. S.] 2 Pet. [27 U. S.] 358; [Wilkinson v. Leland] Id. 627; [Wood v. U. S.] 16 Pet. [41 U. S.] 342. The justice of that rule was, in the cases referred to as decided November term, 1861, fully discussed by this court in the light of right reason, of the nature, objects, and necessity of social and governmental organization, and also of the essential elements of individual safety and happiness. Surely such statutes, adopted for the existence of government against armed efforts for its overthrow, upon the faithful observance of which the peace of society depends, should receive such a construction as will according to their scope and object effect the public end designed. Hence, in the interpretation of the act of July 13, 1861, courts are bound to give to it no such narrow and technical construction as may defeat its salutary purposes. Allegiance is a primary tie, and treason the greatest of crimes; for inasmuch as allegiance is the bond by which society exists, so the breach of that allegiance by direct overt acts, is an attempt to dissolve social and governmental organization, reducing society to chaos—a condition in which moral, as well as political, obligations give way to physical force and blind passion. The right of each and all, or "common right," is not assailed when constitutional and remedial measures are adopted for the common good. The history of the existing Rebellion fully illustrates the doctrine. The untold calamities it has devolved upon all citizens of the republic, are too keenly felt to need exposition.

But whatever rule of interpretation is adopted in this case, the same result will follow. The claimant admits that he undertook a fraud upon the law. If the act of July 13, 1861, was either an ordinary revenue act, or a simple penal act, he would still fall within its provisions. He chose for fraudulent purposes to mix up with unprohibited goods, those directly prohibited. He knew that the vast interests at stake, civil and military, would admit of no relaxation of the interdict against intercourse under the act of congress and the president's proclamation, so far at least as the shipping of whiskey to the insurrectionary states, and to our camps there, was concerned; yet for his individual gain he was willing, not only to jeopardize those public interests, but to do so by a resort to falsehood and fraud. There can be no pretence that he was actuated by any higher motive than a sordid lust of gain, which ignored all considerations of law or justice. He knew that he was violating the law; and he attempted to defraud the government, not in the matter of dollars and cents alone. Still he appears before the court with the strange request, to have it unravel for him the tangled skein of fraud which he has deliberately woven, and then restore to his possession such parts as would have been untainted if he had not wound them into one promiscuous mass. No principle known to law or equity tolerates such

a procedure. He has mixed up the good with the bad, and the mass must be treated as he has voluntarily made it. Neither at common law, nor in equity, would a court aid in such unclean work. In international law, as illustrated in prize cases, the owner of a contraband cargo never receives restitution of any portion of it, when thus tainted with fraud against the belligerent. It is a universal maxim, in every department of jurisprudence, "ex turpi causa, aut ex dolo malo, aut ex maleficio, non oritur actio;" and in admiralty every claimant is an actor. If he cannot establish his claim, except through fraud, he is left in the position he assumed. [La Nereyda] 8 Wheat. [21 U. S.] 147; [The Venus] 8 Cranch [12 U. S.] 276, [The Sally] Id. 382; [U. S. v. One Thousand Nine Hundred and Sixty Bags of Coffee] Id. 398; [The Bello Corrunes] 6 Wheat. [19 U. S.] 169; [U. S. v. Four Hundred and Twenty Two Casks of Wine] 1 Pet. [26 U. S.] 547; [The Palmyra] 12 Wheat. [25 U. S.] 1; [U. S. v. Three Hundred and Fifty Chests of Tea] Id. 486; [Murray v. The Charming Betsy] 2 Cranch [6 U. S.] 72; 3 Phil. Ins. § 276; 1 Duer, Ins. 594, 625; 6 C. Rob. Adm. 125; 1 C. Rob. Adm. 238, 329; 16 East, 13; 3 C. Rob. Adm. 178, 221, 295; 2 C. Rob. Adm. 6; 4 C. Rob. Adm. 68. The intermixture of fraudulent goods with those not prohibited may, or may not, in some cases be designed to conceal the fraudulent from detection; but the law pronounces the whole mass tainted. The purpose, however, in this case, is transparent. The design was fraudulent, and the act fraudulent. The whole shipment was one transaction. If the goods had not been included in one "permit," yet, if they were shipped by the same owner, on the same voyage, and in the same vessel, they would have shared the same fate. By the law of prize the concealment of spoliation of papers, or defective papers, call for explanation from the claimant. An assertion of a false claim, in whole or part, is a substantive cause of condemnation. A vehement presumption of bad faith, or gross prevarication or fraud, or gross misconduct, or illegality, will cause forfeiture. A party must act in entire good faith, or restitution is not awarded. The rule extends so far, that if a shipowner lends his name to cover a fraud with respect to cargo, that circumstance alone will subject the vessel to condemnation. The fraud taints all it touches. The Pizarro, 2 Wheat. [15 U. S.] 241; The Fortuna, 3 Wheat. [16 U. S.] 236; The Venus, 5 Wheat. [18 U. S.] 127; The London Packet, Id. 132; The Amiable Isabella, 6 Wheat. [19 U. S.] 1; The Dos Hermanos, Id. 76.

But as the vessel had not left port, or started on the voyage, it is contended that there has been no violation of the statute; the language of which is "all goods and chattels, wares and merchandise, &c.. proceeding to such state or section, by land or water * * * shall be forfeited." Were the goods in question "proceeding to" the interdicted section, within the meaning of the act? It is a well-established rule, that sailing with an intention to evade a blockade is a beginning to execute that intention, and an overt act constituting the offence. From that moment the blockade is fraudulently invaded. The Columbia, 1 C. Rob. Adm. 156; The Frederick Molke, 1 C. Rob. Adm. 86; The Hoffnung, 6 C. Rob. Adm. 112, 117; The Vrow Johanna, 2 C. Rob. Adm. 109; The Abby, 5 C. Rob. Adm. 256; Fitzsimmons v. Newport Ins. Co., 4 Cranch [8 U. S.] 199; Yeaten v. Fry, 5 Cranch [9 U. S.] 343; The Nereide, 9 Cranch [13 U. S.] 440, 446; The Rugen, 1 Wheat. [14 U. S.] 62. A concealed illegal destination is proof of a real intention to break a blockade. The James Cook, Edw. Adm. 261. So a sale in a neutral country of contraband articles to a belligerent is a violation of neutrality. 3 Phillim. Int. Law, 321. These rules spring from the inflexible duty of neutrals to observe strict impartiality. There must be no fraudulent act against belligerent rights—no attempt to depart from rigid neutrality. An intermixture or combination of neutral and hostile operations by the same person, taints the whole transaction. [The Fortuna] 3 Wheat. [16 U. S.] 236; [The Pizarro] 2 Wheat. [15 U. S.] 241. The loading of a contraband cargo in a neutral port, or the preparation of a vessel to run a blockade, though violative of international law, will not enable a belligerent to enter, lawfully, into such a port and capture the contraband cargo or vessel; for such an act would be a violation of neutral territory. [The Santissima Trinidad] 7 Wheat. [20 U. S.] 283. Besides, a breach of blockade requires some movement towards the blockaded port. It may be far away from the neutral country; yet the sailing of the vessel with intent to enter that far-off port, is always considered an overt act. The belligerent cannot trespass upon neutral sovereignty, by entering the neutral port itself, or making a capture within the marine league; for belligerent jurisdiction does not attach until the vessel is on the high seas, or within the municipal control of the belligerent captor. When, however, a government in the exercise of its municipal sovereignty passes a law of non-intercourse, there can be no question of neutral rights raised within its territorial jurisdiction; that is, its municipal laws are supreme within its own territory. Congress has passed penal laws against fitting out vessels in American ports for the slave trade, and it has, also, for the preservation of peace, and as an act of good faith towards other nations, forbidden the fitting out of hostile expeditions, and the enlistment of soldiers, to act against other powers with which the United States are in amity. Any act done within this country in violation of those statutes, by foreign subjects or our own citizens, is a direct breach of our mu-

nicipal laws, subjecting the offender to the prescribed penalties. The act of July 13, 1861, is a municipal and revenue statute.

Waiving all discussion of the constitutional question (which is purely municipal or intra-territorial), and looking only to the international laws of blockade, neutrals cannot sail on a voyage, with the intent to enter a blockaded port, without becoming lawful prize under the law of nations. A citizen of the United States, subject to the municipal law, may be forbidden by that law to do what a neutral would have a right to do on the high seas. A neutral, for instance, may lawfully enter any unblockaded port of the adverse belligerent, with a cargo not contraband, and depart therefrom; but if an American citizen (the United States being the other belligerent), should attempt to do so, the United States might subject him to severe penalties personally and confiscate his vessel and cargo, if thus found "adherent to the enemy," as was done by the act of July 6, 1812 [2 Stat. 778]. He is subject both to the law of nations and to the municipal law of his own domicil. It is competent for the United States, as has been judicially determined, to adopt embargo or non-intercourse acts with reference to foreign nations, and the existence of a similar power with respect to any part of this country in rebellion, has also been judicially maintained by several United States courts, since the present civil war commenced. If, then, a sale of contraband property, in a neutral country, to a belligerent, is a violation of neutrality under the law of nations (which law attempts to reconcile the rights of neutrals with the rights of belligerents), how under a municipal statute, which forbids all commercial intercourse, should a clearance of a vessel for an interdicted port, with or without contraband cargo, be considered? The allegiance of the citizen is due to his country, and he is bound by its laws. He is forbidden to trade with an insurrectionary district; "all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States, shall cease and be unlawful;" "and all goods and chattels, wares and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section by land or water, shall, together with the vessel or vehicle, &c., be forfeited to the United States." The overt act is not confined to actual entrance into the interdicted district —the success of the fraudulent voyage. If the offence was not complete until success crowned the enterprise, the object of the law would be defeated. The design of the statute is to prevent supplies from reaching the foe. Any movement towards aiding him —any act in furtherance of such a purpose, whether on land or water, is within the spirit of the statute. "Proceeding to" is a comprehensive phrase. If the prohibited intercourse is attempted on land, and a person loads a wagon and starts in furtherance of his illegal design, is he not proceeding in his fraudulent scheme—"proceeding to" violate his duty to the government? At what point on the journey will the offence become complete, if not at the first start? Is the rule different if the contemplated intercourse is through the agency of a vessel—to be by transportation on water instead of land? The goods are within the territorial jurisdiction of the United States, and owned by a United States citizen, and consequently are subject to the intra-territorial law. Every act done intra-territorially is subject to that law. If a sale of contraband property to a belligerent, in a neutral territory, is a violation of neutrality, à fortiori, such a sale in one belligerent country by any citizen or domiciled person thereof, is a breach of allegiance. This is not left to mere deduction from general principles. The act of August 6, 1861 [12 Stat. 319], provides that all property, of whatsoever kind, purchased or acquired, sold or given, with intent to use the same or suffer the same to be used, in promoting the insurrection, shall be confiscated. The act of May 20, 1862, supplementary to the act of July 13, 1861, after making provision for clearances in specified cases, and directing a refusal of clearances in others, whether the transportation is to be by land or water, imposes the penalty of forfeiture for an attempt to transport goods, &c., in violation of that act, or the regulations of the secretary of the treasury in pursuance thereof. The alleged offence in this case was subsequent to that act, and in violation of its provisions and of the regulations of the secretary of the treasury. The claimant had so far "proceeded" in his fraudulent operations as to procure a permit and actually to ship his goods. He had entered upon the interdicted enterprise. It was an "attempt" by which the penalty was incurred under the act of May 20, 1862, if not under the act of July 13, 1861. But there seems to be no difference in the true meaning of the terms employed between an "attempt" to transport and "proceeding to" transport. The scope and object of the two acts are the same, viz.: to prevent the interdicted intercourse. If such, however, is not the true construction of the act of July 13th, the goods in question would be held under the act of May 20th, and the necessary amendment of the libel allowed. The act of July 13th, properly construed, forbids each and every act done towards the execution of a design to carry on, without a license or permit, commercial intercourse between the interdicted and other states. It is violated not only when a vessel has actually sailed on the voyage with the goods on board, but the moment the goods are started, even on land, towards the forbidden destination. The application for the "permit" is evidence of the intention to proceed, and the exhibition of

fraudulent invoices in order to procure the needed permit, shows the intention to be fraudulent. The shipment of the goods under color of that permit is a step taken in execution of that fraudulent intent—is an overt act. Such goods, within the meaning of said statute, are "proceeding to" the interdicted port; and the shipper, under the act of May 20th, is guilty of an "attempt" to transport them in violation of the law. The act of July 6, 1812 (2 Stat. 778), was entitled "An act to prohibit American vessels from proceeding to, or trading with, the enemies of the United States, and for other purposes." It imposed forfeiture on every vessel that should depart from a United States port for a foreign port; and fine and imprisonment upon the master guilty of violating the act. Like penalties were provided against "an attempt to transport" by land. The decisions with reference to that and other statutes for non-intercourse and embargoes, indicate that the phrase "proceeding to" has received the construction given above. A departure, under one of its sections, and an attempt to transport, under another section, were respectively overt acts of "proceeding to" the interdicted port or district. The William and Grace, Hay & M. 76; The Rebecca, Id. 197; The Julia [Case No. 7,573]; The Friendship [Id. 5,124]; [The Penobscot v. U. S.] 7 Cranch [11 U. S.] 356; [The Richmond v. U. S.] 9 Cranch [13 U. S.] 102; [The Active v. U. S.] 7 Cranch [11 U. S.] 100; [The William King] 2 Wheat. [15 U. S.] 148.

The next two points as presented depend for solution upon the same principles. By the language of said act of July 13th, the prohibition is to be in force only "so long as such condition of hostility shall continue," and the president's proclamation of August 16, 1861, excepts from the interdict such of the states therein named (including Tennessee), and such parts of said states "as may maintain a loyal adhesion to the Union and the constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents." The claimant's proctor contends that "the condition of hostility," &c., is matter in pais, upon which the court is to hear the testimony of witnesses. He offers to prove by such witnesses that no such condition existed at Memphis when his shipment was made; also, the loyalty of that city, and that it was then occupied and controlled by United States forces. Indeed, for the purposes of this trial, the district attorney admits, as a matter in pais, that Memphis was so occupied and controlled at the time, and that hostilities were not flagrante bello, actually raging in that city at the time; submitting to the court, however, the question as to the competency of such modes of proof. The doctrine involved has been fully discussed in several cases decided by this court during the last fifteen months, and was virtually settled long ago by the United States supreme court. The judiciary, under the constitution, cannot declare war or make peace. It is clothed with no such power, and cannot be clothed with it. Whatever power is vested by the constitution in one department of the government cannot be usurped by another. If one should wholly refuse to act, or should undertake to divest itself of, or abdicate, its legitimate functions, it would by no means follow that another department, expressly limited to specified duties, would thereby acquire ungranted powers. The abdication of executive functions by the executive, for instance, would not constitute the judicial the executive department of the country; nor would a failure or refusal of the legislative to pass needed statutes constitute the executive the law-making power. Each department has its true boundaries prescribed by the constitution, and it cannot travel beyond them. U. S. v. Ferrera, 13 How. [54 U. S.] 40; Little v. Bareme, 2 Cranch [6 U. S.] 170. The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made. The act of 1795 and the act of July 13, 1861, vest the president with the power to determine when insurrection exists, and to what extent it exists. The United States constitution vests congress with the power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion;" "to declare war, * * * and make rules concerning captures on land and water." In the execution of that power, congress passed the acts cited above.

By the act of 1795 [1 Stat. 424], the supreme court says: "The power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the president. * * * After the president has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? * * * If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy and not of order. Yet if this right does not reside in the courts when the conflict is raging; if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. * * * At all events it (the power to decide) is conferred upon him (the president) by the constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals." [Luther v. Borden] 7 How. [48 U. S.] 43, 44; also, see Martin v. Mott, 12 Wheat. [25 U. S.] 29–31. The same doctrine has been uniformly maintained from

the commencement of the government. The absurdity of any other rule is manifest. If during the actual clash of arms, courts were rightfully hearing evidence as to the fact of war, and either with or without the aid of juries, determining the question, they should have power to enforce their decisions. In case of foreign conflicts neither belligerent would be likely to yield to the decision: and in case of insurrection, the insurgents already in arms against the constitution and laws, would not cease their rebellion in obedience to a judicial decree. In short, the status of the country as to peace or war, is legally determined by the political and not the judicial department. When the decision is made the courts are concluded thereby, and bound to apply the legal rules which belong to that condition. The same power which determines the existence of war or insurrection, must also decide when hostilities have ceased,—that is, when peace is restored. In a legal sense, the state of war or peace is not a question in pais for courts to determine. It is a legal fact ascertainable only from the decision of the political department. [The Fortuna] 3 Wheat. [16 U. S.] 246; [U. S. v. Palmer] Id. 610; [The Divina Pastora] 4 Wheat. [17 U. S.] 52; [The Neustra Senora De La Caridad] Id. 497; [The Santissima Trinidad] 7 Wheat. [20 U. S.] 283; [Martin v. Mott] 12 Wheat. [25 U. S.] 19; [Rose v. Himely] 4 Cranch [8 U. S.] 241; [Foster v. Neilson] 2 Pet. [27 U. S.] 253; [Garcia v. Lee] 12 Pet. [37 U. S.] 511; [M'Elmoyle v. Cohen] 13 Pet. [38 U. S.] 315; [Luther v. Borden] 7 How. [48 U. S.] 1; [Kennett v. Chambers] 14 How. [55 U. S.] 46; [Christy v. Scott] Id. 283.

Under the act of July 13th, the president, on the 16th of August, 1861, proclaimed Tennessee in a state of insurrection. The legal status thus determined must remain so long as the condition of hostility continues. He has never made a counter proclamation, nor has peace been officially announced. As a legal condition that status is independent of actual daily strife in arms. A legal condition of hostilities may exist between this and a foreign nation, long after the last battle has been fought between the opposing armies. That condition ceases when peace is concluded through competent authority; not before. The distinction is between war flagrante, and nondum cessante. So far, however, is it from being true that the condition of hostilities does not still exist, that it is evident, even as a matter in pais, that Tennessee is still in an insurrectionary position. The presence of the United States armies in Memphis and elsewhere within that state, for the purpose of maintaining federal authority against armed insurgents, is a well-known necessity. There has been as yet no return of that state to a peaceful status under the constitution and laws; enabling the civil tribunals, by ordinary process, to enforce United States authority. Within any construction which could be fairly given to the president's proclamation, no "part of that state maintains as yet a loyal adhesion to the Union and constitution." It is the duty of the president, however, to decide that point. Until he decides to the contrary, the court must hold that the legal condition of hostility continues. The exceptions in the proclamation, so far as made by the president, courts can and must enforce. But, if it be correct that by the terms of that proclamation the president intended to devolve on the courts the duty of determining judicially the status of a state, or part of a state, by an inquiry into its loyalty, or its occupation from time to time by United States forces, irrespective of a decision thereon by the executive; still courts could not thus acquire the power. The limits upon their constitutional and legal functions could not thus be enlarged. Political power could not be so delegated to them. They cannot be charged with any duties not judicial; "judicial power" alone is vested in them under the constitution; and the cases to which it extends are clearly defined. U. S. v. Ferreira, 13 How. [54 U. S.] 40. They cannot go beyond that well-defined limit. But the act of July 13th gives the conditions on which the proclamation issues, and declares its effect. It must pronounce what states or part of a state are in insurrection; for it is the official promulgation of the fact as found by the president. The exception quoted above does not change the rule. At the date of that document (August 16, 1861), Tennessee was proclaimed to be in insurrection, except as to such parts thereof where a certain condition of affairs existed, or might from time to time exist. How can any part of that state be brought within the exception for judicial cognizance? Only by the action of competent authority. The status of the part can be determined by the president alone. Has he officially decided the status by force of which the exception would operate, or courts can judicially ascertain Memphis to be no longer in hostile condition? Or, was not that language used solely with a view to the proviso in the 5th section of the act? It can hardly be supposed that he contemplated opening to unrestricted intercourse every town or district of an insurrectionary state, which the United States armies might occupy from time to time, on their march, irrespective of further action; thus leaving a town open to trade to-day and closed to-morrow, according to the shifting exigencies or convenience of military operations and without any treasury regulations therefor. It is evident, however, that the language used in that exception was not designed to leave so important a question open to doubt, uncertainty, or the contingencies of military movements from day to day. It was employed, perhaps, out of abundant caution, so as to announce that from time to time, exceptions would be put into practical effect by him according to the rules stated; or to bring such parts of those states within the terms of the proviso, so that the secretary of the treasury might make the

needed regulations therefor. A practical exemplification thereof is found in the case of South Carolina and Louisiana. Those states were included in the proclamation of August 16, 1861, and also in the previous proclamation of blockade; yet by another proclamation dated May 12, 1862, the president declares, that, by virtue of the powers vested in him by said act of July 13, the blockade of the ports of Beaufort, Port Royal, and New Orleans, should cease after the first day of June following, except as to contraband "persons, things, and information," and commercial intercourse be thereafter restored subject to the treasury regulations made for the purpose. Those ports had been for some time "occupied and controlled by United States forces." Again, under the act of June 7, 1862 [12 Stat. 422], the president once more (July 1, 1862) proclaimed Tennessee and the other states named therein, to be "in insurrection and rebellion," and there was no such exception as that quoted from the prior proclamation of August 16, 1861. True, the proclamation of July 1, 1862, had reference to the act of June preceding; but it serves to indicate the status of Tennessee as then officially recognised.

Under the proviso of the 5th section of the act of July 13, 1861, and by virtue of the act of May 20, 1862, the secretary of the treasury has made regulations, by compliance with which persons may trade with Memphis. The claimant sought a "permit" as required, so that he might have the benefit of the exception. He succeeded by fraud in procuring the desired paper, and then undertook, in further fraud of the law, to take contraband or prohibited articles to that port. Tennessee is interdicted to commercial intercourse, except on the specified conditions, and by special permit. The claimant must bring himself within the exceptions. [Murray v. The Charming Betsy] 2 Cranch [6 U. S.] 72; The Harmony [Case No. 6,081]. He not only has failed to do so; but on the contrary admits that he exhibited fraudulent invoices to the surveyor of the port, and violated the conditions on which alone a permit could be procured. The statute pronounces the penalty of forfeiture against his whole shipment. The packages in question are therefore declared forfeited, and costs and expenses awarded against the claimant.

Case No. 15,942.

UNITED STATES v. ONE HUNDRED AND TWENTY-SIX BALES OF PADDING.

[43 Hunt, Mer. Mag. 585.]

District Court, S. D. New York. 1860.

FRAUD ON THE REVENUE — UNDERVALUATION OF IMPORTED GOODS.

The libel in this case alleged that Collector Schell, in September last, at the city of New York, seized as forfeited to the United States, the 126 bales of padding imported into the port of New York, subject to duties and entered; that an invoice was produced and left with the collector; that upon an examination and appraisement the packages and invoice were found to have been made up with intent, by false valuation, extension and otherwise, to evade and defraud the revenue of the United States in this, that the goods contained in the packages were valued in the said invoice at a less price than the actual market value or wholesale price abroad of the goods at the period of exportation to the United States, thereby intending to defraud the United States by paying less duty on said goods than the amount which the same were required to pay by law on the importation thereof into the United States. Also that the goods were invoiced at a much less price than the actual costs thereof, with intent to evade and defraud the revenue; and that the goods, by reason aforesaid, became forfeited to the government. The libel prayed for a decree of the court condemning the goods. George Brown, of the firm of Smieton and Brown, intervening for James Smieton and others, of Dundee, in Scotland, appeared and claimed the merchandise, averring that the said firm were in the possession thereof, at the time of the seizure by the marshal, as agents of James Smieton and others, the owners. The claimant, George Brown, also put in an answer by James B. Craig, Esq., his proctor, claiming that the merchandise did not become forfeited, as alleged. A consent was given by the proctor for the claimant that a decree of condemnation and forfeiture be entered, and the merchandise be delivered to the claimants, upon payment by them of $18,300 25—the appraised value—into the registry of the court. The United States district attorney consented that the merchandise be discharged from custody, upon the claimants filing sworn claim, paying into the registry of the court $18,300 25—being the appraised value of the same—and consenting to a decree of condemnation and forfeiture.

THE COURT [BETTS, District Judge] entered a decree, which, after reciting that the goods having been attached by the marshal, and no defence to the libel of information having been interposed, and the claimants having paid into the registry of the court $18,300.25, as the appraised value of the goods, on filing consents of United States district attorney and proctor for claimants, ordered that the goods be condemned as forfeited to the United States, and that out of the proceeds paid by the claimants into court the clerk pay the taxed costs, and pay the balance of the money to the collector, to be by him distributed according to law. Amount paid to collector $17,962.75.

Case No. 15,943.

UNITED STATES v. ONE HUNDRED AND TWENTY-THREE CASKS OF DISTILLED SPIRITS.

[1 Abb. U. S. 573.] [1]

District Court, N. D. Ohio. 1870.

INTERNAL REVENUE—PRACTICE—AMENDMENT TO INFORMATION.

1. The district courts have an undoubted power, in the exercise of a sound judicial discretion, to permit a libel to be amended.

2. If an application to amend a libel proposes to introduce a new cause of action, it is usual to allow the amendment when the new cause of action corresponds in character and is kindred in nature to that presented in the original libel; but if the amendment introduces a new substantive cause of action and a new charge against the defendant, it is disallowed. [Cited in U. S. v. Cigars, 18 Fed. 150.]

3. A libel of information was filed under a section of statute imposing punishment for disposing of property subject to internal revenue tax, in fraud of the revenue laws. The government applied for leave to amend by adding a count founded on another section of the statute, which imposed punishment on a manufacturer, &c. who should neglect to make returns of his manufactures to the proper revenue officer. *Held*, that this was a substantially new charge, and that the leave must be refused.

Motion to strike out a count from a libel of information.

R. F. Paine and R. P. Ranney, for the motion.

B. White and B. T. Dickman, opposed.

SHERMAN, District Judge. The libel of information was filed on February 19, 1866. The property was duly seized, but no further proceedings were had until February 12, 1869, when the claim and answer were filed, when a motion was made by the district-attorney and granted, for leave to amend the information. On the same day a new information was filed.

The first information was founded on section 48 of the internal revenue act of June 30, 1864 [13 Stat. 223]. The first count of the new and amended one was founded on the same section, and is a copy of the original libel; but the second count was founded on section 68 of the same law.

A motion was made to strike off the amended and second count. It is claimed by the defendants that section 68 defines a new and different cause of forfeiture, the prosecution of which is limited by the proviso to the section to twenty days after the seizure.

Section 48 provides that all goods, wares, &c. &c., on which duties are imposed by law, which shall be found in the possession or custody of any person, for the purpose of being sold or removed, in fraud of the internal revenue laws, or with the design to evade the payment of any tax, shall be forfeited to the United States, and the forfeiture shall be enforced by proceedings in rem; but there is no limitation when the seizure shall be made, or the prosecution commenced.

Section 68 provides that the owner of any vessel, still, or boiler, used in the manufacturing of any distilled spirits or fermented liquors, on which duty is payable, who shall neglect or refuse to make entry and report of the same, or to do the things required by law to be done, shall be subject to a seizure and forfeiture of such vessels, stills, and boilers, besides being subject to a penalty: provided that such seizure be made within thirty days after the cause thereof came to the knowledge of the collector, and that proceedings to enforce the forfeiture be commenced within twenty days thereafter.

That the court has a right to allow amendments at any stage of the case, is undoubted; and this is applicable in revenue cases as in cases at common law. The motion is addressed to the sound legal discretion of the court. If the amendment, as in this case, adds a new count, which introduces a new cause of action, corresponding in character with the original count, and kindred in its nature, these courts have always allowed it; but if the amendment introduces a new substantive cause of action, and a new charge against the defendant, it is disallowed.

This principle of law is well illustrated in the two cases cited by the counsel,—the one Tiernan v. Woodruff [Case No. 14,027], cited to support the government to its right to file this new count, and in The Harmony [Id. 6,081], cited by defendant to support this motion. The case of Tiernan v. Woodruff [supra], was an action at law, where in effect the plaintiff asked leave to amend his declaration by adding a third count on a note given to the plaintiff by the defendant, of the same character and founded on the same transaction as the other two notes declared on. The court permitted the amendment. The case of The Harmony [supra], was a libel for the forfeiture of a vessel for a violation of the custom laws. The first and original libel charged the vessel with landing goods without a permit; the second count in the libel, offered as an amendment, charged the vessel with receiving goods on board from another vessel. Both charges were violations of different sections of the same act. The amendment was refused.

Apply these principles to this case. If the charge in the second count is a new substantive charge, then the amendment is improper.

The original information, founded on section 48, punishes a party having property in his possession subject to a tax, who sells and disposes of it in fraud of the internal revenue laws, or with intent to avoid the payment of tax. The second and amended

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

count on section 68, punishes the party being a distiller or manufacturer, who neglects or refuses to make a daily or tri-monthly report and return to the collector of the liquors and spirits made by him. One provides against fraudulent acts, and with fraudulent intents. The other is against neglect to keep proper books, and making proper returns. The one is generally against fraudulent acts, purposely committed. The other is against the omission or neglect to do certain acts. The two offenses are distinct in their nature and character. One is a general crime, and the offender may be proceeded against at any time, and upon the complaint of any person. The other is special; and seemingly the seizure and proceedings must be made by the collector, and within a limited time.

I therefore think that the second count contains a charge that is a new substantive cause of action; that it does not correspond in character, and is not kindred in its nature with the original information, and, therefore, should be stricken off.

Motion denied.

Case No. 15,944.

UNITED STATES v. ONE HUNDRED AND TWO PACKAGES DISTILLED SPIRITS.

[22 Int. Rev. Rec. 187.]

District Court, S. D. New York. June, 1876.

INTERNAL REVENUE — DISTILLERY FRAUDS — COMMISSIONER'S REGULATIONS.

A common device in connection with the great whiskey ring frauds in the West to procure stamps for rectified spirits, was the false return by rectifiers to the collector of internal revenue, of spirits as emptied for rectification, the spirits being actually shipped to other markets, and their place supplied in the rectifying houses by illicit spirits from some "crooked" distillery, run in complicity with the rectifying houses. The issue of stamps for rectified spirits is regulated by these returns of spirits "dumped," which returns are known as "dumpers," or "Form 122."

Demurrer to the information. The second count of the information based upon section 3451, Rev. St. U. S., alleged that Bensberg, a rectifier at St. Louis, in the First collection district of Missouri, had owned these spirits, and had then and there made a return to the collector of internal revenue upon a form prescribed by the commissioner of internal revenue, known as "Form 122"; that he had emptied these packages of spirits for rectification, and that he had procured a United States gauger's return, to be made to that effect; while in fact Bensberg had shipped these spirits to New York, and had conveyed to the claimant [Thomas Thatcher, 72 Courtlandt street] all the title to them which, in view of these facts, he could convey. The demurrer rested upon the want of power in the commissioner to make the regulations, requiring Form 122, and upon the point that the false Form 122 did not forfeit the spirits described therein, but those which could be unlawfully placed upon the market, by means of its false character.

Roger M. Sherman, Asst. U. S. Atty.
Thomas Harland, for claimant.

BLATCHFORD, District Judge, held that the regulations requiring Form 122, were made in the reasonable and lawful exercise of the authority conferred by several sections of the Revised Statutes upon the commissioner of internal revenue, and that Form 122 was covered by the language in section 3451, "any document required by regulation made in pursuance of the provisions of the internal revenue laws," and that the property to which, in this case, the Form 122 relates is that described in the instrument itself.

Judgment for the United States.

Case No. 15,945.

UNITED STATES v. ONE HUNDRED BARRELS OF CEMENT.

[3 Am. Law Reg. (N. S.) 735.]

District Court, E. D. Missouri. Sept., 1862.

FORFEITURE—INTERCOURSE WITH INSURRECTIONARY STATES—STATUS OF CITIZENS OF REBELLIOUS STATES—LICENSE—REGULATIONS.

1. By the act of congress of 13th July, 1861 [12 Stat. 255], and the president's proclamation in pursuance thereof, citizens of the rebellious states have prima facie become, for purposes of commerce, quasi enemies, and cannot sue in the United States courts.

[Cited in Brown v. Hiatt, Case No. 2,011.]
[Cited in Perkins v. Rogers, 35 Ind. 138.]

2. But the president having power, through the secretary of the treasury, to make regulations permitting trade in certain cases, the granting of a license, in pursuance of this power, restores the standing of the grantee, so as to enable him to be heard in the United States courts.

3. The act of foreign nations in recognizing the so-called Confederate States as a belligerent, estops their subjects from disputing the lawfulness of captures on the high seas by the United States forces. But such recognition has no influence on the courts of the United States, who are guided solely by the action of the political department of their own government.

4. Therefore, in determining the status of Rebel persons and property, the courts are guided by municipal and not by international law.

5. The acts of congress of 13th July, 1861, and 20th May, 1862 [12 Stat. 404], are prohibitory acts, and the forfeiture under them of goods "proceeding to" rebellious states can only be avoided by the production of such a license as is provided in the acts. Therefore, a license obtained through error or mistake or fraud will not prevent the forfeiture.

Libel of information [against one hundred barrels of cement; Hicks & Cocke, claimants] for violation of the 5th section of the act of congress approved July 13th, 1861.

W. W. Edwards and C. S. Hayden, for the United States.

J. K. Knight, for claimants.

TREAT, District Judge. The material facts are substantially as follows: In July last, Messrs. Hicks & Cocke, copartners in a hotel business at Jackson, Tennessee, were residents and citizens of that state, and loyal to the United States. Messrs. Harman & Daily, of the same place, were copartners in a saloon. Early in that month Messrs. Harman & Daily, with Mr. Cocke, visited St. Louis, Missouri, and purchased respectively the goods contained in lot No. 41. Messrs. Harman & Daily bought twenty-one half-barrels of whiskey, had the same packed in barrels of salt for concealment, and caused the same to be shipped on the steamer G. W. Graham, consigned to Messrs. Hicks & Cocke, at Jackson. Mr. Cocke bought the other goods in said lot No. 41, and had the same shipped on said steamer also. Mr. Harman applied at the custom-house, in the name of Hicks & Cocke, for the necessary permit for all the goods, filed what purported to be copies of the invoices, made the required oath, and received a permit for Hicks & Cocke to ship to Jackson the whole lot named, to be delivered to them at the latter place. After said goods were on board the steamer, they were seized, the whiskey concealed in the salt having been detected; all of the goods were included in the same permit, and shipped on the same steamer for the same destination, and consigned to the same persons. The regulations of the treasury department for such shipments contained at that time the following provisions: "All applicants for permits to ship and trade, shall make and file with the officer granting the permit, an affidavit that the values of all merchandise are correctly stated in the invoices, true copies of which shall be annexed to the affidavit, and that the packages contain nothing except as stated in the invoices; . . . and furthermore, that the applicant is loyal to the government of the United States, and will in all things so deport himself." "No permits shall be granted to ship merchandise to states, or parts of states, heretofore declared to be in insurrection, except for delivery to such persons residing or doing business therein, as shall be recommended therefor by an officer of government, duly authorized to make such recommendation." "No permits shall be granted to ship intoxicating drinks," &c. The object of these conditions is obvious, viz., to prevent from being forwarded to the insurrectionary states, any merchandise which may be used in aid of the insurgents, or for the demoralization of the United States army there.

All commercial intercourse with Tennessee was interdicted from the date of the president's proclamation of August 16th, 1861 [12 Stat. 262], except so far as the president had relaxed, or might relax, such interdict with respect to any particular part of the state, or with respect to specified persons. The rule is similar to that recognised by publicists, as in force during foreign wars, viz., that "all intercourse by a citizen of one nation with the adverse belligerent, except by special license of the sovereign, is unlawful, subjecting vessel and cargo to forfeiture; and a licensed vessel is to be treated as belonging to the country under whose license she sails." Every citizen therefore who, during a war, carries on intercourse with the enemy's country without such special license, is faithless to his allegiance, and subjects himself personally to such punishment as his sovereign may impose, and the property shipped, to confiscation as lawful prize. The Liverpool Packet [Case No. 8,406]; The Emulous [Id. 4,479]; The Joseph, 8 Cranch [12 U. S.] 461; The Rugen, 1 Wheat. [14 U. S.] 62; Scholefield v. Eichelberger, 7 Pet. [32 U. S.] 586; The Hoop, 1 C. Rob. Adm. 196; The Rapid, 8 Cranch [12 U. S.] 155; Wheat. Mar. Capt. pp. 209, 212, 219, c. 7; Jecker v. Montgomery, 18 How. [59 U. S.] 110; Griswold v. Waddington, 16 Johns. 438. As then all commercial intercourse with Tennessee was legally interdicted, all goods shipped to that state without a license were forfeited to the United States. By the terms of said act, the president was authorized to grant special licenses for trade, under such regulations as might be prescribed therefor by the secretary of the treasury. The political department alone has the power to decide the status of a state, or rather of its inhabitants, as to "a condition of hostilities" or "insurrection" against the United States government; and when its decision is made, the courts must apply the rules applicable thereto. That status must remain, in a legal sense, until the same authority decides it to be at an end. Such is the true interpretation of the statute and proclamation. U. S. v. One Hundred and Twenty-Nine Packages [Case No. 15,941], decided by this court at this term; [Rose v. Humly] 4 Cranch [8 U. S.] 241; [Fosker v. Neilson] 2 Pet. [27 U. S.] 253; [Martin v. Mott] 12 Wheat. [25 U. S.] 19; [Luther v. Borden] 7 How. [48 U. S.] 1; [Kennett v. Chambers] 14 How. [55 U. S.] 46; [The Fortuna] 3 Wheat. [16 U. S.] 246; [U. S. v. Palmer] Id. 610; [The Divina Paskora] 4 Wheat. [17 U. S.] 52; [The Neustra De La Caridad] Id. 497; [The Santissima Trinidad] 7 Wheat. [20 U. S.] 283. The goods in question having been seized for "proceeding to" an insurrectionary state, and the fact that they were so proceeding having been established, the onus is on the claimant to show that he had the required license or permit. If he were before the court, in a formal manner, prior to default taken, contesting by claim and answer the question of forfeiture, the United States district attorney could only by an exceptive allegation, or by a plea of abatement, dispute his right to be heard, or his persona standi in

judicio. U. S. v. Four Hundred and Twenty-Two Casks of Wine, 1 Pet. [26 U. S.] 547; Adm. Rule Sup. Ct. 26; Adm. Rule Dist. Ct. 45. By consent, the default in this case was set aside, and these claimants permitted to put in their claim and answer.

The first proposition presented to the court relates to the legal standing of the claimant. "An alien enemy cannot sue, nor can he be heard as claimant in the courts of the belligerent captors." [The Adventure] 8 Cranch [12 U. S.] 226; [The Anne] 3 Wheat. [16 U. S.] 446; 6 C. Rob. Adm. 24, 138, 199; 1 Dod. 244, 451; 3 Phil. §§ 461–466; 3 C. Rob. Adm. 143; 5 C. Rob. Adm. 199, 218; 2 C. Rob. Adm. 1; [The Frances] 8 Cranch [12 U. S.] 355, 418; [Bolchos v. Darrell, Case No. 1,607]; [Rapalje v. Emory] 2 Dall. [2 U. S.] 54; [Ware v. Hylton] 3 Dall. [3 U. S.] 231; 1 C. Rob. Adm. 196; The Rapid [Case No. 11,576]; [Jecker v. Montgomery] 18 How. [59 U. S.] 110; 16 Johns. 438. The position of the insurrectionists towards the United States government, at this time, is one of open hostility, and all the inhabitants are quasi enemies, but not alien enemies. Like American citizens domiciled in England during the war of 1812, although they still owe paramount allegiance to the United States, and are, therefore, neither aliens nor enemies, technically, yet their personal property follows their domicil,—"mobilia sequuntur personam,"—and is, when afloat on the high seas, pronounced in law, "adherent to the enemy;" for they are under the dominion of the insurrectionary forces, and within the territory over which hostile sway is maintained. [Ennis v. Smith] 14 How. [55 U. S.] 424; [Black v. Zacharie] 3 How. [44 U. S.] 483; [The Venus] 8 Cranch [12 U. S.] 253; [U. S. v. Guillem] 11 How. [52 U. S.] 47; 1 C. Rob. Adm. 86, 102; U. S. v. Hayward [Case No. 15,336]; [Thirty Hogsheads of Sugar v. Boyle] 9 Cranch [13 U. S.] 191; [U. S. v. Rice] 4 Wheat. [17 U. S.] 246, 254; [Inglis v. Sailor's Snug Harbor] 3 Pet. [28 U. S.] 99; [Shanks v. Dupont] Id. 242; [Fleming v. Page] 9 How. [50 U. S.] 603; The Rapid [Case No. 11,576]; 1 C. Rob. Adm. 198. The act of 1861 and the proclamation recognize this as an organized insurrection, extending over the states and parts of states named; and the so-called Confederate government, at an early day, ordered all who did not adhere thereto, to leave those states within a prescribed period, under the penalty of being treated as alien enemies. The same general principles which regulate the status of persons, as to their personal property during foreign wars, were incorporated into this act of congress, so far as commercial intercourse is concerned. The reasons of the rule, therefore, forbidding alien enemies to sue, are just as applicable to resident citizens of the insurrectionary states now, as to the subjects of an adverse belligerent during a foreign war, viz., the necessity of stopping intercourse with the insurgents, and of preventing them from drawing supplies from the loyal states. Two countries cannot carry on war against each other whilst the citizens of each maintain and pursue all the conditions and relations of peace. Two nations cannot, in other words, be at war, and their citizens at peace. The fact of war makes all the citizens of each belligerent power, in law, the enemies respectively of each other. So in an insurrection, every loyal citizen is, in a certain sense, in a legal condition of hostility towards every insurgent. He is bound, when duly called upon, to aid in suppressing the insurrection; just as, in times of peace, he must become part of the posse, when summoned therefor, to assist in the arrest of an offender, and in the dispersion of those who obstruct the officer whilst attempting to enforce process. Indeed, every citizen not only may arrest, but ought to arrest, a criminal, flagrante delicto; and as an insurgent is a traitor, why is not every citizen clothed with power to arrest him when caught in the act of treason? In every such case, the offender, when so arrested, would be turned over to the civil magistrate. But in belligerent operations the government, for essential and universally recognised reasons, commissions officers, and musters forces under their command, to conduct its military affairs, and confines the conduct of war to them. Were this not done, gross irregularities, pillage, and general lawlessness might ensue, the policy of the government in prosecuting the contest be defeated, and each citizen, by assuming the attributes of sovereignty, thwart at will the great public purposes in view. Independent of the necessities of discipline, modern warfare forbids all private and irregular warfare, which is apt to degenerate into mere freebooting. War is the act of the state, and can be carried on lawfully only by the state.

Whether the war, or military operations, be carried on against a foreign nation, or revolted colony, or insurrectionary district, the inhabitants of such nation, colony, or district, may, in a legal point of view, be treated as occupying similar relations of hostility, so far as commercial transactions are to be affected. Such evidently is the scope and object of the act of July 13th, 1861, and such the relation in which the citizens of the insurrectionary states now stand towards the United States government. Their property afloat on the high seas, or being transported by land or water, for interdicted purposes, or unlawful commerce, is being used in violation of a positive prohibitory statute. So, whether viewed by the rules of public or municipal law, the same result would follow. As citizens, however, owing allegiance to the United States, the inhabitants of Tennessee are bound by that prohibitory statute. If quasi enemies, or even if treated as citizens of an adverse belligerent, they would be held to the same rules. In accordance

with these doctrines, the United States circuit court for Missouri has held that, pending the insurrection, the resident citizens of the insurrectionary states cannot maintain suits in that court. But in the case now before this court, it is not necessary to decide all incidental propositions connected with such a rule. If the claimants, as citizens of Tennessee, have no personæ standi at this time, by force of the general rule which would treat them as quasi enemies, are they not entitled to be heard on producing a license to trade? During a foreign war, a sovereign may license one of his own subjects to trade with the enemy, and such license would exempt the latter and his licensed property from the ordinary penalties. But if, in the course of such licensed trade, a controversy should arise as to the right of property in a cargo, between him and a subject of the adverse belligerent, with whom he had negotiated the purchase thereof; and if that cargo should be the subject of adjudication before the courts of his sovereign, whether such an alien enemy would be permitted to contest the matter, or be treated as capable of having a standing in the court, by the implications resulting from the license, it is not now necessary to discuss. The reasons of the rule, viz., that all intercourse should cease, and that no property or proceeds thereof should be transferred from or to the adverse belligerent country, must, in such a case, have been decided by the sovereign to be inapplicable to that particular transaction, otherwise the license would not have been granted. The licensed person is permitted to trade, and as a necessary consequence to complete his sales and purchases. No sale or purchase could be made without two parties thereto. Whatever might be decided in such a case, or with respect to an alien enemy under license to trade, the proposition before this court has distinguishing features, which it may be well to first consider. The citizens of Tennessee are, as to their trade, quasi enemies. The Rapid [Case No. 11,576]. They are not enemies in the full legal signification of the term; for no citizen or subject is technically an enemy. In the law of treason, a subject may be a traitor, but never an "enemy," for the moment he is pronounced an enemy, he owes no allegiance, and cannot therefore be guilty of a breach of a nonexistent obligation. "Enemy," in a legal sense, is the equivalent of the Latin word "hostis," which implies that the person is a stranger to the country—a foreigner, an alien. Hence the rule, as laid down by publicists, that an alien enemy cannot sue, is so phrased because an alien may be in a state of amity as well as of enmity. As his persona standi depends on his friendly or hostile status, the term "enemy" is used in connection with the word "alien," to designate that hostile status. The claimants here are not aliens; they are not technically enemies; they are only "enemies in a qualified sense," as Justice Nelson has correctly said. They still owe paramount allegiance to the United States—are not citizens of any other recognised power. They are de jure subject to the United States laws. Those laws forbid them to carry on commercial intercourse with the loyal states, except on the conditions named. The prohibition rests not on the law of nations, but on a municipal statute or act of sovereignty, and the exception to the general prohibition is created by the same act. It probably was the intent of congress to allow such discriminations to be made between the loyal and disloyal in the insurrectionary states, as the exigencies of the government would from time to time permit. Hence the power lodged in the president by the terms of the proviso to the 5th section, under which the permit in this case was obtained; also the terms of section 8, as to remission of forfeitures. The condition of quasi enmity, under which all inhabitants of Tennessee were placed by the proclamation, was subject therefore to those exceptions, as to districts and persons, which the president might make from time to time. The temporary disqualification covering all its inhabitants, is removed as to those who have special exemptions granted to them, which exemptions are evidenced by licenses duly obtained. Alienage, the president could not remove if it existed; but the legal status of quasi enmity or hostility as to districts, or individuals thereof, he is especially empowered to remove. Hence, the simple fact that the claimants are citizens of Tennessee, might, in the absence of any other fact, deprive them temporarily of the right to sue, or appear as claimants here; but when the other fact is proved, that they have been relieved of that temporary disability, their persona standi in judicio must be considered as fully restored. Such is the rule under this statute, and such is also the rule, as will be shown, in analogous cases during foreign wars. But was said license or "permit" lawfully or fraudulently procured? This question has a double aspect. If it were not valid, then have the claimants personæ standi? Are they exempt from the general rule of disability or disqualification? And on the other hand, if it is fraudulent or invalid, then the goods were forfeited, wholly irrespective of the citizenship or personal status of the claimants. It is impossible, therefore, to decide that question without reaching a conclusion covering both points; that is, without ascertaining a fact which, if found, would be at the same time good, both in abatement and in bar. In some stages of a case it might be important to treat the question distinctively, in reference to one or the other of those pleas; but as the formal plea in abatement, or exceptive allegation, raises the question only in an inconclusive form, it is better to consider the case upon the merits rather

than on the mere technical plea or exceptive allegation. The regulations of the secretary of the treasury require, among other things, that the applicants for a permit shall submit true copies of the invoices, shall swear to their accuracy, shall take the oath of loyalty, and, if residents of a state heretofore proclaimed in insurrection, shall produce a recommendation from some duly authorized officer. In order, then, to receive such a permit, an affidavit had to be made, complying with those requirements; and as all shipments of whiskey were forbidden, except under special circumstances (the existence of which is not pretended in this case), it is evident that there was no disclosure of the real facts,—indeed, that there was a false affidavit filed at the custom-house. Harman made the application in the name of Hicks & Cocke, but the application, affidavit, invoices, recommendation, and oath of loyalty, are not produced in evidence here, nor is any one of those documents shown to the court. If the permit carries with it the usual presumption, that whatever is done by a public officer, is presumed to have been rightly done (omnia rite acta), then is not that presumption repelled by the proof that twenty-one half-barrels of whiskey were included in the permit, in direct violation of the regulations? The whiskey was concealed in barrels of salt, manifesting a design to defraud the government. Is it not also to be presumed, that if the invoice had mentioned whiskey, the officer would have done his duty by refusing a permit therefor? The claimants must bring themselves within the exceptions—the onus is on them—and when the permit is shown to have been, as to part of the goods included in it, obtained through fraud and false swearing, what credit is to be given to that paper?

Without stopping here to inquire whether such a permit, based on fraud, would be received as good for any purpose?—whether a person who has to make good his claim through such a document, will receive the aid of the court, under any circumstances, in unravelling the same, so as to separate the false from the true?—whether a false documentation is not always fatal, unless used merely to save property from the enemy?—or whether a person, acting through an agent who perpetrates a fraud, is not bound by the acts of that agent when he avails himself of what was done?—or, in other words, whether a principal is permitted to hold on to all the benefits of a fraudulent act, and at the same time escape from all the disadvantages thereof?—without going into those general inquiries, or determining whether the fraudulent act must not be repudiated or affirmed as a whole, it may be sufficient for this case to look at the testimony closely, so far as the same touches the claimants personally and directly. There is no dispute that the permit was made by fraud and false swearing, to cover the packages in which the whiskey was concealed. It appears that Cocke, who was in St. Louis at the time, did not visit the custom-house at all. Harman acted for himself and for the claimants. He used the names of the latter to cover the prohibited articles, and procured a permit in their names, in which they are licensed both as the shippers and the persons to whom, in Jackson, the goods were to be delivered. Did the claimants know of the fraudulent use to which their names were put, and assent thereto? Independent of direct testimony, it would seem probable that persons coming here under the circumstances, and knowing the necessity of procuring a permit, and the consequence of not complying with the law, would ascertain first, whether a permit had been obtained, and secondly, whether it was correct. If Harman had caused his own goods and those of the claimants to be included in one permit, then there must have been some reason therefor. If he had not been previously empowered to use their names, why, before affirming his act or adopting it, did they not ascertain the truth? Their names had been used to cover a fraud; their goods were included in the same document with contraband goods; the whole lot, honest and fraudulent, was consigned to them; they were represented as the owners of the whole, yet they rested content therewith, without inquiry or precaution. The regulations required an oath of loyalty from the applicant himself, and a recommendation from some public officer as to his fitness to receive the goods. By looking at the permit, they must have seen that some one had evidently personated them, and represented them to be the shippers of fifty-eight packages, instead of only twenty-nine. They knew whether they had made the required affidavit; whether they had produced the needed recommendation, or furnished true copies of their invoices, and whether their invoices covered fifty-eight packages. If they did not make the application in person, did they intrust Harman with their papers, and constitute him their agent for the purpose? The testimony throws no light upon the subject. Harman swears "that neither said Hicks nor Cocke knew anything of the contraband nature of the goods shipped (the whiskey) under the same license or permit issued to said firm of Hicks & Cocke." That is very vague. When did they not know?—and why did Harman venture to make a fraudulent use of their names and papers? He could have explained the whole transaction by his testimony, and why did he not do so? His silence is suggestive. He is the only witness produced to clear up the triple fraud, and he stands before the court confessedly guilty of fraud and false swearing in this very transaction. True, Haskell swears that neither Hicks nor Cocke was present at the purchase or shipment of the whiskey, and states that Harman & Daily said to him their goods were consigned to Hicks & Cocke to save expense. That statement was evidently false; at least to the ex-

tent of creating the false impression that no other purpose induced that consignment. It is obvious that the design of Harman & Daily was fraudulent, and that their acts were equally so. As to their conduct no dispute exists. No claim is interposed for the whiskey. The simple inquiry under this head is concerning the part which these claimants took in the transaction; whether they were cognisant thereof, and suffered their names to be used for the contraband purpose. "Noscitur a sociis." Does their failure to take the proper steps to procure for themselves the necessary permit, and their adoption of that obtained by Harman for them, place them in the dilemma of either having no permit at all, or of having a fraudulent one? either alternative being fatal to their claim. [The Adeline] 9 Cranch [13 U. S.] 244; [The Fortuna] 3 Wheat. [16 U. S.] 236; [Weightman v. Caldwell] 4 Wheat. [17 U. S.] 84; [La Amistad De Rues] 5 Wheat. [18 U. S.] 385; [The Venus] Id. 127; [The Bello Corrunes] 6 Wheat. [19 U. S.] 169; 1 Wheat. Mar. Capt. 225; [The Anna Maria] 2 Wheat. [15 U. S.] 328; [McCluny v. Silliman] Id. 371; 3 C. Rob. Adm. 109; 2 C. Rob. Adm. 154, 251; Id. 1-9; [The Grand Para] 7 Wheat. [20 U. S.] 483; 1 C. Rob. Adm. 252; 5 C. Rob. Adm. 277; 1 Duer, Ins. 534, 574; 2 Wildm. Int. Law, 21; The San Jose Indiano [Case No. 12,322]; The London Packet [Id. 8,474]; The Sally [Id. 12,258]; The Alexander [Id. 164]; The Rapid [Id. 11,576]; The Betsey [Id. 1,364]; [The Fortuna] 3 Wheat. [16 U. S.] 245; [The St. Nicholas] 1 Wheat. [14 U. S.] 417; [Jones v. Shore] Id. 462; 1 Duer, Ins. 567; 1 Rob. Adm. 196, 219; 4 C. Rob. Adm. 251; 1 Dod. 387; 3 C. Rob. Adm. 9; 6 C. Rob. Adm. 127; The Joseph [Case No. 7,533]; s. c. 8 Cranch [12 U. S.] 451; 16 Johns. 438; [Scholefield v. Eichelberger] 7 Pet. [32 U. S.] 586; 1 C. Rob. Adm. 84; 2 Brown, Civ. & Adm. Law, 313, 314; 1 Kent, Comm. 143. Justice Story held in such cases that nothing but the most explicit proofs by the claimants could relieve the transaction of the presumption of illegality which arises from the fraudulent character of the papers. The Emulous [Case No. 4,479]. Similar views were expressed in The Rugen, 1 Wheat. [14 U. S.] 62; The Pizarro, 2 Wheat. [15 U. S.] 241; The Dos Hermanos, Id. 76; The Venus, 5 Wheat. [18 U. S.] 127; The London Packet, Id. 132. Indeed, that principle is a clear one, in the light of sound morals, right reason, and settled adjudications. A claimant, as actor in a cause, appears before a court to make out his right to restitution. When the documents on which he relies are fraudulent, he must certainly clear himself of the taint before his claim can be established. Doubtful or unsatisfactory testimony will not suffice. Nothing but a legal permit would entitle him to restitution. These claimants produce an illegal and fraudulent paper, and offer an excuse, personal to themselves, for the fraudulent character of that document, which, if legally permissible, they must sustain by the clearest evidence. Considering the statute, however, as the exercise of municipal or intra-territorial sovereignty, prohibiting certain commercial operations, the claimants, no matter where residing within the territorial jurisdiction of the United States, were bound thereby, irrespective of state citizenship or residence. All citizens, loyal or disloyal, are alike subject to the law. Hence, a decision of the question as to such citizenship or residence, on the one hand, or as to the loyalty or disloyalty of claimants, on the other, is not necessary in this case. The analogies drawn from the laws of war, as laid down by publicists, may assist in solving the constitutional questions which arise concerning the powers of the federal government in suppressing insurrections, and may aid also in the interpretation of the statutes passed concerning such a condition of hostilities; but the case before the court is not one to be decided by international law, but by municipal statutes. The voyage was not between this and a foreign country during a foreign war, does not affect any supposed neutral right, and necessarily involves, therefore, no doctrine of international law regulating warlike operations between foreign belligerents. The questions are intra-territorial entirely, and relate solely to the powers and duties of the federal government, intra-territorially, under the constitution. As the power of that government to pass the act in question and to enforce the same, is conceded, or if not conceded, was satisfactorily demonstrated and decided in this court last November, the views expressed now might have been confined exclusively to the interpretation of the statute itself, and the application of its provisions to the case presented. The position of foreign nations with respect to this insurrection, it must be remembered, does not determine its status in American courts. The latter follow exclusively the decision of the political department of the United States government on that question. Even if other nations had recognised the so-called Confederate government as an independent power, their recognition would bind themselves and their subjects alone—not the United States. Those foreign nations which have recognised a state of belligerency, and assumed the position of neutrals, estop their subjects from disputing the lawfulness of captures on the high seas, according to the laws of maritime warfare. The ships and cargoes of their subjects are to be judged accordingly. But rebel property thus captured is amenable to municipal authority. All American courts are bound to treat the insurrectionary states as integral parts of the Union, and subject to its constitution and laws. In the adjudication of all such questions arising here, the United States statutes would furnish the rules of decisions. In other words, as to all foreign nations, the United States government is absolutely sovereign within its own territorial limits, and over its

own subjects. Its internal constitution is a subject with which foreign powers have no right to intermeddle. The equality and independence of nations could not otherwise exist. However much the great powers of Europe have, in times past, violated that rule, they have so far recognised its rightfulness, as to offer, always, in excuse for their violations of it some real or supposed emergency, which they claimed worked a legitimate exception to its otherwise universal application—thus doing homage to the principle even when practically assailing it.

To what extent, therefore, sovereignty is lodged in any department of our government, is an intra-territorial question exclusively. It is not to be solved by the law of nations, but by constitutional law. Each nation must settle for itself the policy of its municipal code. True, in modern civilization, the so-called public opinion of the world is not to be despised, but it is no more the law of nations than is popular opinion at home the municipal law. Public opinion, ever shifting, cannot be substituted by courts for constitutions and statute books. "Misera est servitus, ubi jus est vagum aut incertum." The statute of July 13th, 1861, is a prohibitory statute. As an act of prohibition, its violation is not necessarily or generally dependent on questions of intent. As a measure of great public policy, congress determined that all commercial intercourse mentioned therein should be stopped, except on prescribed conditions. Mistakes, accidents, or absence of evil intentions, form no exceptions. There must be no commercial intercourse, except on the conditions named—"Ita lex scripta est." If, however, a case arises calling for a relaxation of its rigor, the 8th section of the act provides a mode for securing a remission of the penalty. [The Friendschaft] 4 Wheat. [17 U. S.] 107; [Scholefield v. Eichelberger] 7 Pet. [32 U. S.] 586; The Joseph [Case No. 7,533]; s. c. 8 Cranch [12 U. S.] 451; 5 C. Rob. Adm. 283; 4 C. Rob. Adm. 118, 121; 2 C. Rob. Adm. 25; 3 C. Rob. Adm. 41; 2 Wildm. Int. Law, 48; 1 Duer, Ins. 523, 577. In the absence of a license, then, whatever goods, wares, or merchandise are seized whilst "proceeding to" an interdicted state, must be condemned. But, as in this case a license existed, it is proper to consider more fully the rules governing such transactions.

It has been clearly settled, that a license granted to an alien enemy removes all his disabilities; that the trade as to him becomes lawful, and his persona standi is restored. 1 Duer, Ins. 606; 3 Taunt. 555; 13 East, 332; 5 Taunt. 674; 15 East, 419, 525. As the license is an act of sovereignty, it is to be construed, as to the grantee, stricti juris. In some cases it has been treated strictissimi juris, and in others liberally. It is apprehended, however, that the apparent contradictions and confusion referred to in text-books, concerning the rule of construction, have no real existence. This fundamental rule of construction is adhered to in all the adjudicated cases, viz., that whilst private grants are to be construed most strictly against the grantor, public grants are interpreted most strictly against the grantee. The design or intent of the sovereign granting the license cannot be ignored, and the licensee must confine himself strictly within the terms of his license. Whenever a liberal construction is given to its terms, it is for the purpose of effecting the object for which it was granted; of carrying out the intent of the sovereign, and not of the grantee. Its validity depends on the good faith with which it was procured. If terms or conditions precedent are named, they must be complied with. Any fraudulent conduct, misrepresentation, or suppression of material facts renders it void, ab initio. 2 Wildm. Int. Law, 250; 1 Duer, Ins. 594, 602; 5 C. Rob. Adm. 269; 6 C. Rob. Adm. 69; 14 East, 484. The intent of the grantor must be observed, in entire good faith, both in the mode of procuring and of using it. 2 Wildm. Int. Law, 245; 1 Duer, Ins. 598; 4 C. Rob. Adm. 11, 96, 263. Its use must be confined to the specified person, merchandise, voyage, modes of trade, and other particulars contained in it. It is not negotiable, and cannot be used to cover the property of other persons than those named, or any property not named. The licensee cannot use it to cover even the property of those for whom he sees fit to act as agent. 2 Dod. 48; 1 Dod. 508; 1 Taunt. 122; 16 East, 3; 2 Wildm. Int. Law, 254; 4 C. Rob. Adm. 263, 267. A slight deviation as to quantity, when not attributable to design, or involving fraud, will not be held fatal; but no deviation as to quality of goods is permissible. Each case will be scrutinized so as to reach the bona fides of the transaction, and effect the sovereign's intent. Quantity may not always be of importance, but quality; that is, a difference in kind, or as to the contraband character of goods, may be of serious import. 1 Edw. 363, 365, 371, 336, 337; 1 Dod. 241; 4 C. Rob. Adm. 11, 96; 5 C. Rob. Adm. 141. A fraudulent application always vitiates the license, and exposes to confiscation all goods embraced within it, whether innocent or contraband in quality; nor in all cases is the fraudulent applicant the only party who suffers. A person whose goods are included in the terms of the license, may be deprived of its protection, although he was not a party to the fraud. 1 Duer. Ins. 618. The grantee, when named, must be truly described, and the privilege granted must be exercised by him in the character which the licensee attributes to him. 14 East, 484; 4 Taunt, 605; 1 Bing. 473. If it requires the goods to belong to him, he must prove property, absolute or special, to be in him, and a consignment to him by a general bill of lading is not sufficient. 1 Duer Ins. 606. Similar doctrines run through the cases in all

branches of this department of law. Thus all goods on a vessel, belonging to the same owner, share the fate of the contraband portion. 3 Phil. Ev. § 275; 1 Duer, Ins. 625; 4 C. Rob. Adm. 199, 260; 5 C. Rob. Adm. 275, 325, and cases cited in U. S. v. One Hundred and Twenty-Nine Packages, supra. By the ancient rule, a ship with contraband cargo on board was lawful prize, but by the modern, she is not condemned therefor, although she always suffers the loss of freight and expenses. If her destination, however, was false, or her owner was in privity with the contraband shipper, or was guilty of concealment, or of misconduct, or was owner of any part of the contraband cargo, or in any manner tainted with the contraband transaction, then his interest in the ship is confiscable. 3 Phil. Ev. § 276; 1 Duer, Ins. 625; 1 Act. 25; 1 C. Rob. Adm. 288, 329; 16 East, 13; 3 C. Rob. Adm. 178, 221, 295; 2 C. Rob. Adm. 6; 6 C. Rob. Adm. 125; 4 C. Rob. Adm. 68; 1 Duer, Ins. 594 et seq. It is thus seen that the doctrine of licenses, as laid down by publicists and courts, requires the licensee to act in entire good faith; first in procuring the license, and next in the use made of it. He is always held to the terms of the grant. If it is confined in its privileges to a particular person, or to that person as acting in a specified capacity, or to particular kinds of goods, or to trade between named ports, or to specified voyages, or routes of travel, it cannot be used otherwise. If the modes of procuring it are specifically defined, there must be no material deviation therefrom. It is, in short, a special privilege granted by the sovereign, not for the benefit of the grantee, but for the good of the state. The sovereign, therefore, determines on what conditions the grant is to be made, and in what manner the privilege may be used. Every one of his subjects, and every subject of the adverse belligerent, having been placed in a condition of legal hostility by the sovereign act of declaring war, no one can be excepted therefrom without another exercise of the same sovereign power. To what extent and under what circumstances the rigors of war, as to a particular person or place, may be relaxed, the sovereign alone can determine. His decision is based on grave reasons of state policy, connected with the objects for which the war is waged, or with its successful prosecution. If he deems it wise, in furtherance of the national design, to permit one of his own subjects, or even an alien enemy, to carry on a particular trade, or prosecute a particular voyage, or hold prescribed intercourse between the adverse belligerents, he can grant the necessary license therefor, on such conditions, and subject to such restrictions or limitations, as he deems the public good demands. The paramount consideration in all such cases is the public good, and the licensee must, in no respect, lose sight thereof, or fail to act in entire good faith with respect to any of the conditions or terms of the license granted to him.

The act of July 13th, 1861, the supplementary act of May 20th, 1862, and the regulations for permits, are based on similar legal principles. All commercial intercourse with Tennessee is prohibited, except in such cases as are licensed, and the licensees must always confine themselves strictly to the terms of the grant, and be in nowise guilty of thwarting the national objects for which such grants are made. As the leading object of the government is the suppression of the existing insurrection, and consequent restoration of constitutional supremacy over all the insurrectionary states, its policy in the furtherance of that object, as the competent authorities have decided, demands temporary suspension of all commercial intercourse with the insurrectionary districts, except under specified circumstances. What those circumstances may justify, from time to time, is to be ascertained from the regulations as made. The application of these rules to the case under consideration leaves no room for doubt. The claimants, in person, complied with none of the required conditions. Harman was their agent, or he was not. If he was their agent, by authority previously derived from them, or by their subsequent ratification, they are bound by his acts. The permit which he procured was obtained by false invoices and false swearing. He evidently was furnished with copies of their invoices, either by themselves or by their vendors; and from the evidence it is manifest that the copies must have been obtained from them. That permit is therefore fraudulent and void. But whether he was their agent or not, it is the only permit under which the goods were shipped. From the evidence in the cause, they have not satisfactorily explained their connection therewith. It was for them, by clear and explicit proofs, to establish their case. They have not done so. Their goods stand affected by the fraud, and must share the fate of the contraband articles. If Harman was not their agent in this transaction, then they shipped the goods in dispute without any permit whatever, and the same legal consequence follows. Independent of the apparent fraud, the permit covered none of Harman & Daily's goods, and could not be lawfully used for such a purpose. They were not named in the permit as applicants or consignees. The license was personal to Hicks & Cocke; it covered only their shipments; it was not negotiable or transferable; it could not be made to include anything not specified in it. The attempt to use it otherwise, worked a forfeiture of the whole shipment. The claim is dismissed, with costs, and the property declared forfeited.

Case No. 15,946.

UNITED STATES v. ONE HUNDRED BARRELS OF DISTILLED SPIRITS. SAME v. FIFTY BARRELS OF DISTILLED SPIRITS. SAME v. THIRTY BARRELS OF DISTILLED SPIRITS. SAME v. TWENTY BARRELS OF DISTILLED SPIRITS.

[1 Lowell, 244;[1] 8 Int. Rev. Rec. 20.]

District Court, D. Massachusetts. June, 1868.

INTERNAL REVENUE—INFORMERS—WHO ARE—OFFICERS.

1. Under section 179 of the act of 1864 [13 Stat. 305], as amended by that of July 13, 1866 (14 Stat. 145), officers of internal revenue may, in many cases, be informers.

2. The informer, under that statute, is he who first gives to some officer authorized to act upon it information which leads, in fact, to the seizure and forfeiture.

[Cited in U. S. v. Card, Case No. 14,720a.]

3. An officer who obtains such information through the examination of witnesses compelled to testify before the grand jury, or one who acts on information furnished him as an officer, and intended by his informant to be given the government, and does not discover new facts by his own diligence, or who merely makes certain what was suspected, is not the informer.

[Disapproved in U. S. v. Chassell, Case No. 14,789. Cited in Four Cutting Machines, Id. 4,987; U. S. v. Simons, 7 Fed. 714.]

[Cited in brief in Reif v. Paige, 55 Wis. 499, 13 N. W. 473.]

[4. Cited in Rice v. Thayer, 105 Mass. 261, to the point that it is only when the amount of the penalty has been recovered by judgment of the court that an informer is entitled to a moiety thereof.]

These four lots of whiskey, amounting in all to two hundred barrels, were seized in Boston and informed against under section 45 of the statute of July 13, 1866, c. 184 (14 Stat. 163), and, after default, were condemned and sold. Against the proceeds of sale seven persons filed petitions as informers.

It appeared, in evidence, that in August, 1867, three hundred barrels of whiskey were taken from a warehouse (class A) attached to Perry's distillery in Buffalo, upon bonds for transportation to a certain warehouse in Boston. The bonds were not in evidence; but it was said to be the course of business, that goods so taken might be sent to any lawful warehouse in the designated district, and that thirty days were usually allowed for the transportation, and that the bonds gave thirty days' time for the transportation. When such goods reach the warehouse, the collector and certain other officers of the district should examine the goods, and compare them with the permits, and certify that they had been received in warehouse, and their gauge, &c., and when this certificate was produced to the collector of the former district, and payment had been made for any loss by leakage or otherwise beyond what is allowed by law, the transportation bonds would be cancelled. In this case, certificates in due form were produced to Mr. Root, the collector at Buffalo; and Mr. Sprague, a deputy collector there, examined them, and discovered errors and discrepancies in carrying out or adding some of the figures, and the collector, at his request, sent them back to General McCartney, the collector here, for correction. Mr. McCartney at once discovered that the certificates were forged, and so telegraphed to Mr. Root, who, in reply, asked that the facts might be kept secret for a time, until he could make further investigation. Some days after, Mr. Root sent Mr. Hawley, a special revenue agent, to Boston, with instructions to investigate the fraud. Mr. Hawley found that General McCartney had gone to Washington, but he consulted with the assessor and with the district attorney, and some other officers, and then went with Mr. Sanderson, an inspector, to the station of the Albany Railroad Company, where they examined books and made other inquiries, and discovered that the whiskey had been brought to Boston and delivered at a certain storehouse. Here they lost trace of it; but they obtained the names of some of the teamsters who had carried it either to or from the storehouse. These facts and names they reported to Mr. Hyde, assistant district attorney, who summoned the teamsters before the grand jury, then in session, and by his inquiries thus prosecuted—but how immediately or remotely his results depended on Hawley's information did not at all appear—he was led to suspect that some of the whiskey had been carried to certain places in Boston. Many searches were made, and many of the conjectures proved to be unfounded; others were more fortunate. Among other things, Mr. Hyde told Mr. Horton, an inspector, that some contraband whiskey would probably be found in some warehouse in Lowell street; and Mr. Horton proceeded to examine the warehouses in that street, and in one of them found one hundred barrels, part of the goods which were seized and condemned. There were no inspection marks whatever upon these barrels; and whether or not they were a part of the Perry whiskey was disputed, and there was but little evidence upon the subject. Mr. Hyde afterwards received some information of a vague character, which led him to suspect that some of the whiskey would be found in the warehouse of a Mr. Johnson, on or near Northampton street, if Mr. Johnson had any such warehouse, which was only suspected. He asked Mr. Hayes, an inspector, to search; and Hayes found such a warehouse, and the fifty barrels proceeded against in one of these suits. By their marks they appeared to be a part of the Perry whiskey. Again, Mr. Hyde traced, as he thought, a part of the spirits to the shop of certain persons on Worcester street, and there lost the clew, and he told Mr. King, who keeps a stable near that shop, that if he

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

would find the goods he would be entitled as informer; Mr. King succeeded in finding the twenty barrels. These had no inspection marks. The remaining thirty barrels were seized by Mr. Hayes, upon information given him by W. H. Swift that certain barrels were stored in a cellar, hired by the informant's brother, in Federal street, under suspicious circumstances. The marks upon these barrels warranted the inference that they were from Perry's distillery. Swift testified that he had no knowledge of the search for Perry's whiskey, or of any facts excepting those which he himself discovered. Mr. Sprague, the deputy collector in Buffalo, alleged himself to be the first informer in all the cases, because he discovered the clerical errors which led to the discovery of the forgery; General McCartney did the like, because he first discovered the forgery which rendered it certain or highly probable that some fraud had been committed; and Mr. Hawley, likewise, because he discovered some facts which enabled Mr. Hyde to discover others which led to the seizure of much of the whiskey; Mr. Horton claimed against the hundred barrels which he seized in Lowell street; Mr. Hayes against the fifty found by him in Johnson's warehouse; and Mr. King and Mr. Swift against the twenty and thirty barrels discovered by them respectively.

W. A. Field, Asst. U. S. Dist. Atty.
W. Curtis, for W. H. McCartney.
J. A. Loring, for N. P. Sprague.
F. A. Prescott, for L. Hawley.
T. M. Hayes, for J. K. Hayes and C. M. Horton.
L. S. Dabney, for G. M. King and W. H. Swift.

LOWELL, District Judge. The statute under which the petitioners proceed is section 179 of the statute of 1864, as amended by that of July 13, 1866 (14 Stat. 145, 146), which declares that all fines, penalties, and forfeitures which may be imposed or incurred (under the act), may be sued for, &c., and that a certain part shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred.

A good deal of stress was laid, in the argument, upon this language; and it was contended that no one was included in its terms who did not give information of the precise fraud, by the commission of which the goods became liable to forfeiture. My opinion is, that the meaning of this law is not substantially different from that of the customs act of 1799, § 91 (1 Stat. 697), which gives the share in one clause to the person in pursuance of whose information the forfeiture, &c., are recovered, and in another, to any officer of a revenue cutter in consequence of whose information they are recovered. "Fines, penalties, and disabilities are not incurred," says Mr. Justice Thompson, "and do not accrue in the technical sense of the terms until judgment. U. S. v. Morris, 10 Wheat. [23 U. S.] 299. In the ninth section of the act of 1866 (14 Stat. 101), the share of the fine therein referred to is for the person who shall give the information whereby it is imposed; and in still another section, the share is to go to the informer, if there be any, without further description. Under this statute, as under the other, and under the ordinary offers of reward for detection of a criminal or discovery of lost property, the first informer is he who first gives to a person authorized to receive it important information, which, in fact, leads to the desired result. And the offer is not necessarily confined to persons who shall expose the details of the fraud. Thus, if the government officers were already aware of the offence, but were unable to trace the goods, and the informer supplied the necessary facts; or if the informer, without knowing precisely what fraud had been perpetrated, knew of suspicious circumstances sufficient to justify a seizure, &c.; in these and similar cases, the person who gave the information by which the forfeiture was in fact decreed or imposed, would be within the fair intent of the act.

Accordingly, I have no hesitation in deciding that W. H. Swift is the first informer in respect to the thirty barrels found in his brother's warehouse in Federal street. It was in consequence of his information that they were seized and forfeited, and it does not appear that any facts of importance were furnished by any one else; and whether he was fully cognizant of the cause which rendered them liable to forfeiture or not, he was sufficiently so for all the practical purposes of the government. All the information it already had would have been useless without him, and his was sufficient, independently of what they possessed. It is not essential that an informer should act as prosecutor or be called as a witness; it is enough that the result is in fact reached primarily through his means. Sawyer v. Steele [Case No. 12,406]; Besse v. Dyer, 9 Allen, 151; Crawshaw v. Roxbury, 7 Gray, 374; Smith v. Moore, 1 C. B. 438.

Similar considerations govern the case of King. The officers had exhausted their clew, and had traced the whiskey as far as they could, and abandoned the search, and the assistant district attorney, who gave King some information, makes no claim. It is clear that one who does not choose to be an informer may enable another to become so, even as against his own subsequent demand. Fallick v. Barber, 1 Maule & S. 108. And it appears to me that Mr. King is entitled to the benefit of whatever knowledge he derived from Mr. Hyde, and is the informer in respect to the twenty barrels which he

discovered. I do not mean to say that Mr. Hyde could himself be the informer.

The cases of the several officers of the revenue service present more difficulty. If the point were new, it might perhaps be open to argument that an inspector or other officer owes his whole time to the government, and that there is no consideration for a promise to pay him a further reward for the zealous discharge of his duty. But the treasury department and the courts have acquiesced in the decision of Judge Ware, in Hooper v. 51 Casks of Brandy [Case No. 6,674], and it must be taken as settled that an officer of the revenue may, in some cases, be an informer. And the practice has been similar under the internal revenue laws, and rightly, as the statutes themselves show. Still it is clear that an officer cannot always be considered an informer merely because he as an officer acquires information useful to the government. If this knowledge is acquired in the ordinary discharge of his duty touching the very subject-matter, or under a special retainer to investigate that matter, I cannot hold him entitled to a gratuity.

I may take an illustration from the case of Mr. Hyde, whose information appears to have been of great use to the government, but who, in pursuance of a settled policy adopted in the district attorney's office, makes no claim as informer. His knowledge was obtained by the examination before the grand jury on oath of witnesses whom he compelled to attend; in other words, it was obtained by virtue of the great powers which the government confides to its prosecuting officers; but it is evident that the information obtained by the exercise of such a power must be for the use of the government in whose name and behalf it is demanded of the witnesses, and not for that of the prosecuting officer, the jury, or the witnesses themselves.

Similar considerations apply to all officers who are clothed with the duty of making an investigation on behalf of the government, whether with more or less ample powers. In my view the cases in which an officer may be an informer are, where he incidentally and not in the direct prosecution or course of his duty or of any special retainer for that purpose, makes a discovery; as if an inspector put on board a vessel merely to keep the cargo safely, discovers smuggled goods concealed; or where an officer sent to inquire into a particular charge discovers something entirely different and before unsuspected; or where he is told by some one, as a friend and not as an officer, of facts which his informant, not wishing to be known, refuses to bring forward himself, but tells him for the very purpose of enabling him to give information in his own name; in these cases an officer may be informer. I do not at present think of any others.

Mr. Hawley's case, which has given me more trouble than any other, must be governed by these considerations. In my judgment his retainer as a revenue agent, under pay, to investigate these frauds, makes his time the time of the government, and his information the information of the government, and he cannot justly lay claim to any share of this reward.

And so of General McCartney and Mr. Sprague. They merely in the course of their duty pointed out to the persons to whom they were bound to point them out, the mistake in figures and the forgery which they respectively discovered; they had no choice to give or withhold the information, and their action had no reference to any forfeiture. I doubt if the fact in either case was of sufficient importance to entitle them as informers; but if it were, its bearing on the forfeiture was only incidental; the act was a mere statement of a fact occurring in the course of their business, which they could not but state if they did their duty, and the mere stating of which cannot make them informers in the sense of the law.

Mr. Horton and Mr. Hayes were merely the seizing officers, and I have held before, and shall continue to hold until otherwise instructed by superior authority, that an officer who has merely followed instructions and made a seizure which he was asked to make, although he may have exercised great skill and ingenuity, is not an informer. A recent customs act gives the seizing officer a share of forfeitures in cases where there is no informer, and I dare say this law may be wise and expedient so long as the policy of paying informers is adhered to, but it only confirms the view that a seizing officer, as such, is not an informer. It is strongly urged that the barrels seized by Mr. Horton are not proved to be a part of the Perry whiskey, and that if they are not he is the sole discoverer, because Mr. Hyde sent him to find only Perry's whiskey. But in such a case the burden is very strongly upon the officer to show that they are different. He was asked to look in Lowell street for contraband whiskey, without any particular description of it; he looked there and found some, and there is very little evidence either way concerning the article found. The presumption is almost irresistible that it is the same whiskey he was looking for. The argument that this whiskey, if Perry's, ought to have been condemned under a different section of the statute, proves too much; for eighty of the barrels were Perry's, and were condemned under this section. That argument might have availed a claimant; but as it is admitted that Perry's whiskey was liable to forfeiture under another clause, and as there was no defence, it may well be that the court did not inquire as carefully as it otherwise might have done, whether the evidence pointed more strongly to one or another violation of the act. I do not mean to say, however, that there was not sufficient

prima facie evidence to entitle the government, in a defaulted action, to a condemnation under section 45.

Upon the whole, I grant the petitions of King and Swift, and deny the others. Ordered accordingly.

Case No. 15,947.

UNITED STATES v. ONE HUNDRED BARRELS OF HIGH WINES.

[23 Int. Rev. Rec. 10.]

Circuit Court, D. Maryland. Dec. 17, 1876.

INTERNAL REVENUE—FORFEITURE—INNOCENT PURCHASER.

[1. Cited in Boyd v. U. S., Case No. 1,749, to the point that ownership, at the time of the seizure, by the guilty party, was necessary to bring the property within the operation of the clause of forfeiture of section 44 of the act of July 20, 1868 (15 Stat. 142).]

[2. Cited in U. S. v. Feigelstock, Case No. 15,084, to the point that the forfeiture operates not when the statute is violated, but at the time of the seizure of the property.]

This case was instituted by the United States to forfeit one hundred barrels of high wines found in the possession of Ulman and Co., of Baltimore. The information alleged that the liquor was "distilled spirits owned by one G. G. Russell, who carried on the business of distiller in the First internal revenue district of Illinois, with the intent to defraud the United States out of the tax on the spirits by him distilled, and who, whilst so carrying on his business with such intent, distilled the high wines aforesaid, contrary to section 3281 of the Revised Statutes." Ulman and Co. pleaded in defence that at the time of the seizure they were the owners of the liquor and not Russell, and that they were bona fide purchasers for valuable consideration, without knowledge of fraud. The United States demurred to their plea, and the case was tried before GILES, District Judge, in the district court last March.

It was maintained by the government that said Russell, at the time the high wines were sold, was carrying on an illicit distillery. The spirits in question were fraudulent, and could be followed into the hands of innocent purchasers and seized wherever found; that forfeiture took place at the time of distillation and not at the time of finding and the fact of the tax being paid and the barrels being properly marked, branded and stamped, which was the present case, made no difference.

The court decided that if this view was correct it would destroy the whole liquor trade, and that no purchaser would be safe; that the law applied to spirits owned by the illicit distiller, and not to those in the possession of bona fide purchasers, when the tax had been paid and all the requirements of the law had been complied with, and therefore overruled the demurrer and decreed in favor of Messrs. Ulman and Co. [Case unreported.] The United States took an appeal to the circuit court, and Dec. 17th, BOND, Circuit Judge, affirmed the decision of the district court.

The government has an appeal to the supreme court at Washington, the amount involved being over $7,000.

A. Stirling, Jr., for the United States.

Geo. C. Maund and Talbot J. Albert, for Ulman and Co.

Case No. 15,948.

UNITED STATES v. ONE HUNDRED BARRELS OF SPIRITS.

[2 Abb. U. S. 305;[1] 1 Dill. 49; 12 Int. Rev. Rec. 153; 3 Chi. Leg. News, 25.]

Circuit Court, E. D. Missouri. Oct. Term, 1870.[2]

INTERNAL REVENUE—TAX ON DISTILLERIES—FORFEITURES—INNOCENT PURCHASER.

1. The courts will not construe a law imposing a forfeiture, as extending to property which, before seizure, has been sold to a person innocent of the offense by which the forfeiture is incurred, and who has purchased in good faith, unless the intention of congress that the forfeiture should be absolute and instantaneous on the commission of the offense, be manifest and unmistakable.

[Cited in Corbett v. Woodward, Case No. 3,223.]

[See U. S. v. Fifty-Six Barrels of Whisky, Case No. 15,095.]

2. Revenue laws inflicting penalties for their violation, are not to be construed strictly, nor with excess of liberality; but in such a manner, looking at their policy, purpose, spirit, and language, as will best effectuate the legislative intention.

3. Under the internal revenue act of July 13, 1866 (14 Stat. 98), a removal by a distiller, of spirits distilled by him, from the place of distillation to a bonded warehouse, is a legal act; and it cannot be predicated of such a removal, where this is the only overt act charged, that it was done to defraud the United States of the tax thereon, so as to bring the case within those contemplated by section 14 of the act.

4. Under the internal revenue act of July 13, 1866, as amended March 2, 1867 (14 Stat. 483), distilled spirits purchased in good faith by the claimant, while they were in a bonded warehouse of the United States, to whose collector he paid the taxes due thereon, cannot afterwards be seized in his hands and condemned as forfeited by reason of the previous failure of the distiller in the course of the manufacture thereof, to keep the books and to make the tri-monthly reports required of him by law.

5. Repeals by implication are not favored, particularly in revenue laws, and will only be held to exist when the repugnance is positive, and then only to the extent of such repugnance.

[Cited in brief in U. S. v. Crawford, 6 Mackey, 323.]

---

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[2] [Reversed in 14 Wall. (81 U. S.) 44.]

6. Section 5 of the act of March 31, 1868 (15 Stat. 58), is not a repeal of that part of section 25 of the act of March 2, 1867 (14 Stat. 483), which denounces penalties against distillers, for failing to make the entries and reports required of them by law.

7. The legislation of congress respecting forfeitures against distillers,—reviewed; and the conclusion reached that it shows a uniform policy, from the beginning, not to extend forfeitures to property in the hands of innocent third persons.

[Cited in Corbett v. Woodward, Case No. 3,223.]

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

Hearing upon a writ of error.

This cause was a proceeding in rem commenced in the United States district court for the Eastern district of Missouri, against one hundred barrels of distilled spirits, to enforce a forfeiture for violations of internal revenue laws.

It was alleged in the information, and admitted by the claimant in his answer, that seizure was made on land, in St. Louis, by the collector, September 1, 1868.

The fourth count of the information was in these words: "Fourth. That the said one hundred barrels of spirits were manufactured at some place within the United States to the said district-attorney unknown, and between the first day of September, A. D. 1866, and the date of said seizure, by some person or persons to the said attorney unknown, and were there and then goods and commodities on which tax was there and then imposed by provisions of law, and the same were removed from the place where distilled, with intent to defraud the United States of such tax, the same being then and there unpaid, contrary to the form of the statutes in such case made and provided."

The fifth count in the information was as follows: "Fifth. That said spirits were manufactured at some place within the United States to said attorney unknown, between September 1, 1866, and the date of the seizure, September 1, 1868, by the use of certain boilers, stills, and other vessels, of which said unknown person or persons there and then had the superintendence, and that during the time said unknown person or persons carried on the business aforesaid, and both before said spirits were distilled, and while they were in his or their possession, said unknown person or persons neglected and refused from day to day to make or cause to be made a true and exact entry in a book kept in such form as the commissioner of internal revenue has prescribed, of the number of pounds and gallons of materials used for the purpose of producing spirits distilled, the number of gallons of spirits placed in warehouse, and the proof thereof, the number of gallons sold, with the proof thereof, and the name, &c., of the person to whom sold, contrary," &c.

The sixth count was the same as the fifth, just quoted, as to the manufacture of the spirits, and charged that the person having superintendence of the distillery: "Both before said spirits were distilled and afterward, and while the same were in his possession, did neglect and refuse on the 1st, 11th, and 21st days of each and every month, or within five days thereafter, to render the assessor, or assistant assessor, an account in duplicate, taken from his books in the particulars hereinbefore (in the fifth count of the information) mentioned of all the facts occurring after the last day of account preceding, contrary, &c., whereby and by force of said statutes the said property became and is forfeited to the uses in said statutes specified." One Henderson, of New Orleans, appeared as claimant, and filed an answer denying the material averments of the information as to grounds of forfeiture, and alleging "that said one hundred barrels of spirits were purchased by him while the same were in a bonded warehouse, and that he, the claimant, paid the tax imposed thereon by law before he moved the same from said bonded warehouse," &c.

The parties waived a jury, and submitted the cause to the court upon the following agreed statement of facts: "It is stipulated and agreed as follows: First. That John Henderson, claimant, purchased said spirits while in a bonded warehouse in New Orleans, after the same had been placed therein by the owner of the distillery at which they were made; that the claimant paid to the United States collector the taxes due on the said spirits, and moved the same from the said warehouse according to law, without knowledge on the part of Henderson, at any time before seizure, of any fraud on the part of the distiller, either actual or alleged; that he was an innocent and bona fide purchaser, and himself paid the tax on the spirits. Second. That Henderson shipped them to St. Louis, and had constructive possession thereof when they were seized. Third. That said spirits were manufactured and distilled in Louisiana in May and June, 1868, in a distillery run in the name of N. Johnson, by the use of boilers, stills, &c., of which Johnson was superintendent and owner; and that each and all the facts averred in the fifth and sixth counts of the information (above copied), averred as to a certain unknown person, are true as to said Johnson and the said spirits. Fourth. That the fourth count in the information (above copied) is true; but that the said Henderson, claimant, subsequently to the removal from the distillery, and before the removal from the bonded warehouse, and before the seizure, paid the tax on said spirits, and was a bona fide and innocent purchaser thereof. Fifth. That said Henderson was not a purchaser from the United States, and the United States at no time sold said spirits."

[No evidence was produced, and on the facts above stipulated the court adjudged

that the property in question was not forfeited. To reverse this judgment the United States sued out the writ of error which brings the case into this court.][3]

The attorney for the United States founded his claim for a forfeiture upon the facts alleged in the fourth count of the information above copied, under section 14 of the act of July 10, 1866 (14 Stat. 151), which is as follows: "That in case of goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods and commodities shall be removed, or shall be deposited or concealed in any place, with the intention to defraud the United States of such tax or any part thereof, all such goods and commodities and all such materials, utensils, and vessels respectively, shall be forfeited," together with casks, vessels, cases, &c., containing such goods; and every person guilty of or concerned in such removal, deposit, or concealment, with intent to defraud the United States of such tax, shall be liable to a fine or penalty not exceeding five hundred dollars.

[It is proper here to notice that section 45 of the same act (14 Stat. 163) relates specifically to the removal of spirits from places where distilled, and is in substance as follows:][3]

Section 45 of the same act (14 Stat. 163) relates specifically to the removal of spirits from places where distilled, and is in substance as follows: "That any person who shall remove any distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law, shall be liable to a fine of double the amount of tax thereon, or to imprisonment for not less than three months. All distilled spirits so removed, and all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may, immediately upon discovery, be seized, and after the assessment of the tax thereon, may be sold by the collector for the tax and expenses of seizure and sale." After providing for mode of procedure and burden of proofs, the section continues thus: "And any person who shall aid or abet in the removal of distilled spirits from any distillery otherwise than to a bonded warehouse as provided by law, or shall aid in the concealment of spirits so removed, shall be liable, on conviction thereof, to a fine of not less than two hundred nor more than one thousand dollars, or to imprisonment for not less than three nor more than twelve months." The only other sentence in the section provides for the punishment of illegal removal of spirits from any bonded warehouse.

The fifth count of the information, above recited, which alleged the failure of the distiller of the res to keep the book and make the entries prescribed by the commissioners, and the sixth count, which averred the failure of the distiller to make certain returns, were founded by the district-attorney upon section 31 of the act of July 13, 1866 (14 Stat. 157), and section 25 of the act of March 2, 1867 (14 Stat. 483), which are claimed by the district-attorney to be in substance the same as sections 57 and 68 of the act of June 30, 1864 (13 Stat. 243, 248). Section 31 in the act of 1866, is of the same general character as section 57 in the act of 1864; section 68 in the act of 1864 was the one which denounced the penalty for the acts or omissions made illegal by section 57, but no section corresponding to section 68 was contained in the act of July 13, 1866. This omission was supplied by the act of March 2, 1867, section 25, which is of the same general character with said section 68 of the act of 1864; but it contains some additions, particularly in relation "to materials fit for use in distillation found on the premises," which are regarded by the claimant as being very material, as showing the intention of congress not to forfeit spirits unless found upon the premises of the distiller.

To sustain the fifth and sixth counts in the information, the district-attorney relied upon section 31 of the act of July 13, 1866, and section 25 of the act of March 2, 1867. Section 31 requires the distiller to keep a certain book, and to make true and exact entries of certain facts therein, and also to make trimonthly accounts, taken from the books, &c. It was admitted that the distiller of the liquor seized did not comply with the abovementioned requirements of the law.

Section 25 of the act of March 2, 1867, before mentioned, was also cited as material in the controversy, and is in these words: "That the owner, agent, or superintendent of any still, ... who shall neglect or refuse to make true and exact entry and report of the same, or do or cause to be done any of the things by law required to be done concerning distilled spirits, shall, in addition to other fines and penalties now by law provided, forfeit, for every such neglect or refusal, all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, and all materials fit for use in distillation, found on the premises, together with the sum of five hundred dollars for each offense, with costs, and shall be deemed guilty of a misdemeanor, and be subject to imprisonment for a term not exceeding one year," &c. 14 Stat. 483.

It was admitted that the spirits which are now in controversy were manufactured in May and June, 1868, at which time the act

[3] [From 12 Int. Rev. Rec. 153.]

of March 31, 1868 (15 Stat. 58), had gone into effect, and was in force; and it was contended by the claimant that section 5 of this act repeals, by implication, the penalties denounced by previous acts, or that, being the later expression of the legislative will, it is the one which fixes the rights of the parties. This section is as follows: "That every person engaged in carrying on the business of a distiller, who shall defraud or attempt to defraud the United States of the tax on spirits distilled by him, or any part thereof, shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits, found in the distillery and on the distillery premises, and shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years." 15 Stat. 50.

The judge of the district court was of opinion that section 25 of the act of March 2, 1867, taken in connection with the act of 1866, did not work a forfeiture eo instanti; that the language of those sections being in futuro, they did not apply to property which, prior to the seizure, had passed into the hands of a bona fide purchaser. The court accordingly gave judgment that the property in question was not forfeited. [Case unreported.] To reverse this judgment, the United States sued out the present writ of error.

Chester H. Krum, U. S. Dist. Atty.

Edmund T. Allen, for defendant in error.

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

DILLON, Circuit Judge. The property in controversy between the United States and the claimant consists of one hundred barrels of distilled spirits. The seizure was made September 1, 1868, in the city of St. Louis. It is admitted by the written stipulation of the parties, that these spirits were manufactured by one Nimrod Johnson, in the state of Louisiana, in the months of May and June, A. D. 1868; and that the claimant, Henderson, purchased them while they were in a bonded warehouse in New Orleans, after the same had been placed there by the owner of the distillery; that the claimant paid the United States collector the taxes due thereon, and moved the same from the warehouse according to law, without knowledge on his part, at any time before seizure, of any fraud on the part of the distiller, either actual or alleged. And it is distinctly admitted by the government that the claimant is a bona fide purchaser of the property. Judgment of forfeiture is sought, not for any violation of the law by the claimant, but for the violation of it by the distiller without the knowledge of the claimant, and at a period prior to the time when the res was placed in the government warehouse, and when the government collector received from the claimant the amount of taxes due on the property.

If the government is right, the claimant loses not only the spirits, but the large amount of taxes which he paid thereon—loses these entirely, or as to one is thrown on an uncertain resort upon his vendor, and as to the other, upon the sense of justice of the government. Where it is claimed that a law works such results, against which it is almost impossible for a purchaser to guard, the intention that it should do so ought to be unmistakable.

Before proceeding to examine the several grounds of forfeiture relied on by the United States, it may be advisable to notice two general propositions of law adverted to by counsel, and which bear upon the question to be determined.

The first is, that after the repeated decisions of the supreme court of the United States, it is to be taken as settled doctrine, that when a statute in terms denounces a forfeiture of property as penalty for violation of law, without alternative of value, or other qualifications or provisions, or language showing a different intent, the forfeiture takes place absolutely and instantaneously on the commission of the offense; title vests in the government from that moment, and it is not within the power of the offender or former owner to defeat the forfeiture by a subsequent transfer even to a bona fide purchaser. U. S. v. Nineteen Hundred and Sixty Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Grundy, 3 Cranch [7 U. S.] 338; Wood v. U. S., 16 Pet. [41 U. S.] 342; Caldwell v. U. S., 8 How. [49 U. S.] 366; Clifton v. U. S., 4 How. [45 U. S.] 242, 248.

Another undisputed principle of law is, that penalties annexed to violations of general revenue laws do not make such laws penal in the sense which requires them to be construed strictly. Nor, on the other hand, are they to be construed with an excess of liberality. But it is the duty of the court to study the whole statute, its policy, its spirit, its purpose, its language, and, giving to the words used their obvious and natural import, to read the act with these aids in such ways as will best effectuate the intention of the legislature. Legislative intention is the guide to true judicial interpretation. Taylor v. U. S., 3 How. [44 U. S.] 197, 210; Cliquot's Champagne, 3 Wall. [70 U. S.] 114.

The way is now cleared for a consideration of the several grounds of forfeiture insisted upon by the government. We shall notice first that which is set out in the fourth count of the information, the words of which are given above. The substance of this is, that these spirits, being subject to a tax imposed by the internal revenue law, were removed from the place where distilled with intent to defraud the United States of such tax. By whom removed, or to what place removed, is not alleged in the information. But on the

agreed statement of facts it is admitted that the spirits were "placed in a bonded warehouse at New Orleans, by the owners of the distillery at which they were made; that the claimant paid the taxes thereon," &c. It is also admitted "that the fourth count in the information is true; but that Henderson, claimant, subsequently to the removal from the distillery, and before removal from the bonded warehouse, paid the tax on the spirits, and was a bona fide purchaser."

Thus, the facts admitted by the parties are, that the spirits were removed by the distiller to and placed by him within the bonded warehouse of the government, and it is charged in the fourth count of the information, that the removal therein alleged was made with intent to defraud the United States of the tax imposed by law upon such spirits. And, as noticed above, the written stipulation admits that the fourth count in the information is true.

The attorney for the United States maintains the sufficiency of this ground of forfeiture under the facts thus alleged and admitted, and relies upon section 14 of the act of July 13, 1866, which, together with the substance of section 45 of the same act, is set out in the statement of the case preceding this opinion. 14 Stat. 151.

Section 14 is general and broad enough in its terms to embrace the removal of spirits, on which there is a tax, when this is done with intent to defraud the United States of the tax, but section 45 is the one specifically relating to the removal of spirits from the place where they are distilled. By this section, the removal of "distilled spirits, from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law," is prohibited, and is made punishable by penalties differing from those provided in section 14. It is, then, not an illegal act to remove spirits from the distillery to the bonded warehouse. It is to secure the government the tax, that they are thus allowed to be removed. How it can reasonably be predicated of a removal of spirits by the distiller into a bonded warehouse of the government, which is under the custody of its own officer, that it was done with intent to defraud the United States of the tax thereon, is not readily perceived, and is not explained in the pleadings, in the admission of facts, nor in the argument of counsel.

Without putting a strained or nice construction upon the language of the fourth count, and of the written admission respecting it, it is our opinion that the case, as made, does not fall within those contemplated by the abovementioned section 14 of the act of July 13, 1866. The removal is the overt, illegal act alleged, and this was rightful; all that is left of the count under consideration is the intent with which the removal was made. We have said above, that it is difficult to see how it could have been made to defraud the United States of the tax; and a mere intent to defraud, formed or existing in the mind of the distiller, which intention has never been executed, or attempted to be, is not made a ground of forfeiture. The only execution, or attempt to execute the unlawful intent alleged, viz: to defraud the United States of the tax on the spirits, is the removal of the spirits by the distiller to the warehouse of the United States, which removal was legal, and not an illegal act.

For these reasons, our opinion is that the spirits in controversy were not forfeited by reason of the facts set forth in the fourth count of the information, and in the written admissions of the parties.

The other grounds of forfeiture relied on by the government are those set forth in the fifth and sixth counts of the information, which allege the failure of the distiller of the spirits in question to make the entries required by law in the book prescribed by the commissioner, and to make tri-monthly reports from the said book. It is admitted that the allegations of the information in this respect are true.

By examining critically the language of the information and of the written stipulation, it will be seen to admit of doubt whether the distiller, Johnson, was guilty of the aforementioned neglects at and during the period when the spirits in controversy were distilled, or whether his neglect was before or after the distillation of these spirits; but it is clear that the neglect of the distiller in this respect existed at a time when these spirits were in his possession.

Suppose, as the government contends, that section 25 of the act of March 2, 1867, applies to the case, and that the distiller was not in default as to entries and reports at the time the spirits in question were made, but that he made default in these respects while these spirits remained in his possession, are they forfeited by this section, which includes "all spirits made by or for him," or is this language limited to such spirits as are made by or for him while the neglect or refusal to make the required entries or reports continues?

As the counsel for the claimant has not rested his case upon any such ground, we waive its consideration, and proceed to examine the questions made by the respective counsel, so far as it is deemed necessary to do so.

The attorney for the government bases the claim to condemn the property as forfeited, by reason of the facts alleged in the fifth and sixth counts of the information, upon section 31 of the act of July 13, 1866 (14 Stat. 157), which imposes upon the distiller the duty of making the entries and tri-monthly report, and upon section 25 of the act of March 2, 1867 (14 Stat. 483), which denounces the penalty of forfeiture for the

neglect or refusal of the distiller to perform this duty. But to what the forfeiture extends, or when it is worked, are disputed questions in the case. The attorney for the claimant contends that the above-mentioned section 25, as to penalties, is repealed or superseded by section 5 of the act of March 31, 1868 (15 Stat. 58), which was in force when these spirits were made, and by which the forfeiture is limited to spirits found on the premises, or, at most, to those owned by the fraudulent distiller, if found elsewhere.

If the act of March 31, 1868, could be considered as entirely repealing the previous act, the conclusion of the claimant's counsel would be correct, viz: that under the act of 1868, spirits which before seizure had passed through a bonded warehouse, from the hands of the distiller into those of the bona fide purchaser, would not be forfeited for the previous frauds or acts of the manufacturer. But the law does not favor repeals by implication, particularly in revenue statutes, the provisions of which, to prevent fraud, are complicated, and enacted frequently at different times to meet special exigencies or defects in previous enactments. To operate a repeal by implication, the repugnance must be clear and positive, so as to leave no doubt as to the intent of congress. U. S. v. Sixty-seven Packages of Books, 17 How. [58 U. S.] 85, 93.

By recurring to section 5 of the act of 1868, it will be seen that it is limited to punishing distillers for defrauding, or attempting to defraud the United States of the tax on spirits distilled by them; and to convict the distiller, or to condemn property as forfeited under this statute, an intent to defraud must exist in the mind of the distiller, and be established by evidence. Whereas, under the act of 1866, section 31, and of 1867, section 25, an intent to defraud existing in the mind of the distiller is not made essential; if he neglect to make the entries or report required, the forfeiture in law attaches, although he may be able to show, as matter of fact, that his neglect was innocent of any fraudulent design. The penalties in section 5 of the act of 1868 being different from those in the former act, it is a repeal by implication, so far as it and the provisions of former acts provide for the same offense but no further. Norris v. Crocker, 13 How. [54 U. S.] 439; Sedg. St. & Const. Law, 125; Nichols v. Squire, 5 Pick. 168; State v. Whitworth, 8 Port. (Ala.) 434.

Being of opinion that the act of 1868 is not a repeal of that part of section 25 of the act of 1867, which denounces penalties against distillers for failing to make the entries and reports required of them, it is necessary now to consider another position taken by the claimant's counsel, viz: Admitting that section 25 of the act of 1867 is yet in force, and is the one applicable to this case, still, the spirits in controversy are not, under the agreed facts, forfeited by virtue of its provisions, because they were not found on the premises of the distiller, but in the possession of an innocent purchaser. The argument is, that the words, "found on the premises" relate to, and qualify the whole list of forfeited articles, including distilled spirits.

Upon an examination of the language of this section in the light of its legislative history adverted to in the statement of the case, and in the light of other provisions of the statutes relating to forfeitures denounced against distillers, it is our opinion that his position is substantially correct; in other words, that it was not the intention of congress to denounce an absolute and instantaneous forfeiture on the commission of the offense, of all spirits, but only those either found on the premises at the time of seizure or information given, or, if found elsewhere, still owned by the party guilty of the wrongful act or omission.

This conclusion, reached, it must be confessed, after some hesitation, and adopted with some lingering distrust of its soundness, rests full more upon the general spirit and purpose of the legislation of congress respecting the rights of third persons, than upon the particular words of section 25 of the act of 1867, if these stood alone with nothing beyond to aid in their interpretation. This conclusion is fortified by supposing congress in its legislation to have been regardful of the ordinary sense of justice, and not to have designed to make the innocent suffer for the acts of the guilty, and to visit the laches of officers of the revenue upon those guilty of no wrong and no neglect. And it is still further strengthened if we have regard alone to considerations of mere policy. Revenue is the sole purpose of all the complicated official machinery pertaining to the manufacture of spirits. The duty levied is high, the temptation to fraud correspondingly great. Congress will be presumed to have seen, unless the contrary clearly appears, that revenue would be promoted by making it safe to buy manufactured spirits, and would be injured by legislation of a contrary character, by which a "secret taint of forfeiture is indissolubly attached to the property, so that at any time, and under any circumstances, within the limitations of law, the United States might enforce their rights against innocent purchasers." Per Story, J., U. S. v. Nineteen Hundred and Sixty Bags of Coffee, 8 Cranch [12 U. S.] 398, 406.

The policy of congress to confine the forfeiture to the property of the guilty, at least not to extend it to innocent persons, may be seen by section 130 of the act of 1864 (13 Stat. 306), which protects bona fide purchasers from forfeitures by frauds. The fraudulent vendor forfeits value, but the article bought bona fide and paid for cannot

be pursued in the hands of the purchaser. So in the act of July 13, 1866 (14 Stat. 153), if the distiller fails to pay the tax for carrying on his business (section 23), or fails to give bond, or gives a false or fraudulent notice (section 24), he forfeits only such liquors as are owned by him, or found upon the premises; which evidently means owned by him at the time of seizure or date of information given. So in section 5 of the act of March 31, 1868 (15 Stat. 58), so often mentioned, it is provided that the distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, shall forfeit, among other things, "all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises."

This section, as above observed, does not repeal all prior laws inflicting penalties and forfeitures upon distillers, but repeals them only so far as they relate to the same offense. But being in pari materia with section 25 of the act of March 2, 1867, relied on by the district-attorney, and which governs this case, it may be properly resorted to when endeavoring to discover the meaning of that section. Under the act of 1868, spirits, which had passed into the hands of a bona fide purchaser, and not found in the distillery building or premises, would not be liable to be condemned as forfeited. So by the act of July 20, 1868 (15 Stat. 142, § 44), passed soon after the spirits in controversy were made and before they were seized, but which saves forfeitures already incurred (Id. 166, § 105), all obscurity as to extent of forfeiture is removed, and the forfeiture is in terms limited to "distilled spirits owned by such person (the offending distiller), wherever found, and all distilled spirits and personal property found in the distillery," &c. (Id. 142, § 44); and see sections 5, 7, and 19 of same act. This legislation shows quite satisfactorily a uniform policy on the part of congress from the beginning not to extend the forfeiture to innocent third persons.

In the light of these considerations, and of this legislative policy, we may now recur to section 25 of the act of March 2, 1867, which is the one relied on by the government, and we repeat it as our opinion that, under it, a neglect or refusal by a distiller to make entries and reports as required by law, does not forfeit spirits not "found" on the premises, and not, at the time when "found," the property of the offending distiller. It would, indeed, be strange if such a neglect or refusal, which is not necessarily fraudulent in fact, as we have before stated, should have the effect to forfeit spirits in the hands of bona fide purchasers, when by other provisions of the statutes, as, for example, that of March 31, 1868, an actual fraud, accompanied with a fraudulent intent, would not have that effect.

The judgment of the court is, that under section 25 of the act of March 2, 1867, a forfeiture eo instanti is not worked for omissions of the distiller to make the entries and reports required of him.

This view, if correct, results in affirming the judgment of the district court, and renders it unnecessary to consider the other proposition of the claimant's counsel, which is, that if forfeiture attached to these spirits, eo instanti with the commission by Johnson, the distiller, of the offenses charged, the United States waived any right of property acquired of such forfeiture, when they accepted from Henderson, the claimant, the amount of the taxes due on these spirits, and surrendered them into his possession, he being innocent of fraud. We content ourselves with remarking, that the proposition, as stated, is of questionable correctness, for waiver would imply a power in the revenue officers which they do not possess, and perhaps, also, a knowledge of the forfeiture, which it is not shown they had, when the taxes were received from the claimant and the spirits were surrendered to him. If any proposition could be maintained, it would be the one, that in view of the peculiar provisions of the law for detecting frauds, the ample facilities it supplies its officers, its system of bonded warehouses, the government, by accepting and retaining the taxes paid to it by the claimant is estopped to say the property all the time belonged to it by reason of a previous forfeiture of title by the vendor of the claimant. Whether the view is correct, or whether the case could be successfully distinguished from those in which the supreme court has held, under the customs revenue acts, that the forfeiture might be enforced against the property in the absence of innocent and subsequent purchasers, we pass without deciding, resting our determination of this case upon the grounds before stated.

The judgment of the district court must be affirmed. Judgment affirmed.

[The above judgment was reversed by the supreme court, where the cause was carried on writ of error. 14 Wall. (81 U. S.) 44.]

UNITED STATES v. ONE HUNDRED BARRELS OF WHISKEY. See Case No. 10,526.

Case No. 15,949.

UNITED STATES v. O'NEILL.

[2 Sawy. 481; [1] 6 Chi. Leg. News, 224.]

District Court, D. Oregon. Dec. 20, 1873.

BRIBERY—INDICTMENT—SCIENTER.

An allegation that the defendant knowingly offered to give O. a bribe to vote, the said O. being then under twenty-one years of age, held to mean that the defendant knew O. was under age when he offered him the bribe.

[This was an indictment for bribery against Nicholas O'Neill. Heard on demurrer.]

Addison C. Gibbs, for the United States.

John F. Caples and Julius C. Moreland, for defendant.

DEADY, District Judge. The indictment in this case contains but one count, and that is similar to the first one in U. S. v. Hendric [Case No. 15,347]. The demurrer alleges that it does not state facts sufficient to constitute a crime, but no particular cause of demurrer is stated. On the argument the same objections to the sufficiency of the indictment were urged as in U. S. v. Hendric, aforesaid, and also that it does not appear from the indictment that the defendant knew Ollar, to whom it is alleged he offered the $2.50, to be a minor. The indictment alleges that the defendant knowingly offered to give Ollar this bribe to vote, the said Ollar being then under twenty-one years of age. Now it is not necessary to allege that he offered the money knowingly, because he could not have done that simple act unknowingly—without knowledge of the fact. The term "knowingly" was evidently intended by the pleader to apply to the whole allegation of offering to give the money to Ollar, a minor. There was no occasion to use it, except to qualify that part of the allegation which related to the non-age of Ollar. Doubtless the scienter might have been stated more artistically, and certainly, as, for instance, that Ollar not being qualified to vote, etc., because of his non-age, the defendant, well knowing the premises, did offer to give, etc. My impression is that the allegation is sufficient.

The demurrer must be overruled for the reasons here given, and in U. S. v. Hendric, aforesaid.

UNITED STATES v. ONE LARGE WATER TUB. See Case No. 10,532.

Case No. 15,950.

UNITED STATES v. ONE PACKAGE OF READY-MADE CLOTHING.

[16 Law Rep. 284.]

District Court, S. D. New York. July, 1853.

COSTS—TO WHAT LIMITED.

1. The act of February 26, 1853 [10 Stat. 161], repealed all antecedent legislation of congress on the subject of costs, and changed the existing usages and practice of courts therein, and limited costs to the specific appointments of that statute.

2. The taxation of costs according to former statutes, and the former usage and practice of the court for services not mentioned in the statute, disallowed. The opinion of the attorney general of the United States, contra, not followed.

BETTS, District Judge. This is an appeal from the taxation of the bill of costs of the United States attorney, made by the clerk, and has been brought before the court and submitted to its decision upon arguments, in writing, in behalf of the respective parties. The goods were seized by the collector, as forfeited to the United States, and a libel of information in the usual form was filed to procure their condemnation. The claimant petitioned the secretary of the treasury for a remission of the forfeiture, which was granted upon the condition that the claimant pay the taxable costs in the cause. The United States attorney submitted to the clerk a bill of costs, containing the following items: Retaining fee, $8; drawing information, fol. 12, $3.16; engrossing, $1.58; copy of same, $1.58; counsel perusing and amending, $2.50; drawing, engrossing and copy of report to solicitor of the treasury, $1; motion that marshal return monition, $3; attending on return of monition, $1; drawing, engrossing, and copy of additional report to solicitor of the treasury, $3.62½; drawing, engrossing, and copy report to solicitor of suit pending, $1; drawing costs and attending taxation, $1.25; copy taxed bill to file, $1; drawing, engrossing and copy report of suit decided, $1; drawing and engrossing consent for time to answer, 50c.; proctor's and advocate's fee on motion to bond, $3.62½; discontinuing cause, $5; filing remission, with certificate, $1; two depositions taken and admitted as evidence in the cause, $5. The attorney claimed that by the law as it now stands he was entitled to their taxation to that amount. The claimant of the goods objects to the allowance of any fee or taxation other than $5 for discontinuance of the cause. The clerk taxed $5 for discontinuance and $5 for taking the two depositions, and rejected all the other items of the bill, amounting to $35.82.

The counsel for the claimants insist that the act of February 26, 1853, is peremptory, and excludes the allowance of any costs not specifically given by the statute. The United States' attorney maintains that the act should be interpreted as fixing a compensation only in respect to the particular services designated, and that all other services necessarily performed in a cause are to be compensated according to the law of costs as it stood previous to the enactment of the statute. He offers, in support of this construction of the act of 1853, the official opinion of the attorney-general of the United States, given to the secretary of the interior, on the very point. That opinion is as follows:

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

"Attorney-General's Office, 16th June, 1853. Sir: In answer to the inquiry of the marshal of the Southern district of the state of New York, referred to me by your note of the 13th ult., I state as follows: The act of congress of February 26, 1853, to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the courts of the United States, provides as marshal's fee 'for transporting criminals, ten cents per mile for himself, each necessary guard and each prisoner.' If the language were 'for transporting prisoners,' it would have disposed of the case presented as a subject of inquiry, namely, that of a witness in custody for safe-keeping; but it does not, and this case is not provided for by the act. It is a casus omissus. I think for such duty—that is, the transportation of a witness in custody—the marshal is entitled to charge the fee of the nearest analogous case, that of transportation of a criminal as allowed by the act of congress, or actual expenses to be certified by the court. The act, it is true, declares at the outset that in lieu of the present compensation of clerks, attorneys, marshals, and others, 'the following and no other compensation shall be allowed.' But this must be understood as the following and no other compensation 'for any services mentioned in this act.' If the attorney, clerk or marshal, is compelled by law to perform a service, or incur a charge, in a matter not specified by the act he is to receive a reasonable allowance therefor, notwithstanding the above-cited phrase of general conclusion. I have the honor to be your obedient servant, [Signed] C. Cushing. Hon. Robert McClelland, Secretary of the Interior."

Although the subject was considered by the court in March term last, and a decision was then made which gave to the act of February, 1853, the effect of excluding all costs to the officers of court which are not specifically appointed by the statute, (Thorne v. The Victoria [Case No. 13,988]), yet I willingly review the point, under the aid of the able argument of the respective counsel, and with the benefit of the opinion of the first law-officer of the government. The exposition put upon the statute by the attorney-general, and which is claimed to be the correct one by the United States attorney, is that it is exclusive or restrictive in respect to the allowance of fees or compensation, only in cases in which a fee or compensation is mentioned in the act; and that, where a service required by law is performed, or a charge is incurred, by an officer of court, in a matter not specified by the act, he is entitled to receive a reasonable allowance therefor, and the measure of compensation pointed out is 'the fee of the nearest analogous case.' In the case of no other officer of court can the justness, and, indeed, necessity, of the principle recognised by the attorney be more strongly illustrated than in respect to the compensation of the United States attorney, and of which the bill of costs now under consideration is one of the feeblest instances. The only items of charge named in the statute, are "for discontinuing the cause," and "depositions taken and admitted as evidence," neither of them requiring the personal action or even attendance of the United States attorney, and which are acts ordinarily done by others upon his mere assent, whilst the examination and study of the invoices and entries, the statutes and decisions applicable to the subject, the preparation and settling the libel of information, matters all requiring deep professional learning and careful personal attention and labor, as also for attending court and taking measures to speed the cause and resist delays on the part of the claimants of the property seized, and to protect the interests of the United States against the admission of inadequate or incompetent bail, all involving his official and professional responsibility as well as the occupation of his time, are not specified in the act as services to be compensated, and if any fee is allowed for them it must be under the exposition given the statute by the attorney-general.

This case, it is stated, affords a weak instance of the operation of the law, because there is no reason to presume that the services of the attorney, out of court, in presenting and protecting the laws and interests of the government, were special or beyond those of the most ordinary classes of litigation. But it is to be remarked, that the rule governing the taxation of costs in this case must be applied to those of the highest magnitude, often falling under the management of the United States attorneys, in which the revenue is implicated to vast amounts of money, and which present the most intricate and perplexing questions of law and fact which the courts, on the law and equity side, are called upon to determine. For drawing and revising pleadings and proceedings in such cases, and advising and attending upon the various applications and motions made necessary out of court, the United States attorney can receive no compensation, unless the act of 1853 admits the construction put upon it by the attorney-general.

Feeling the impressive justice of the claims of the United States attorney in this case, and being also persuaded that the public interests are intimately concerned in providing a reasonable compensation to so important an officer in the position he occupies, for the services imposed upon him by law, I have reconsidered my former judgment in the matter, with a strong desire (I am conscious of no judicial impropriety in acknowledging the bias) to coincide with the opinion of the attorney-general, and to regard the failure of the act to make provision, in a case so manifestly important and just as a casus omissus, which it is competent to the court to supply by intendment and construction. The re-examination of the subject under such prepossession has failed to con-

vince me that the act admits the interpretation proposed. On the contrary, it appears to me that, carrying out the reasoning upon which the construction contended for is based, it not only in effect nullifies the statute, but enacts and re-establishes a law in its place which congress by this act expressly repudiated. The act of March 3, 1842 (5 Stat. 484), fixed the tariff of compensation to the officers of the United States in both districts of New York at the fees and emoluments allowed by the laws of the state of New York to like state officers in the highest court of original jurisdiction of the state, according to the nature of the proceedings, for like services therein. Those provisions congress declares by the act of February 26, 1853, confine these officers to the fees allowed by the state law, and then repeals the provisions themselves in express terms. 10 Stat. 167.

Taking the view of the subject most favorable to the claims of the United States attorney, this explicit abrogation of the law of 1842 placed the officers of the New York courts under the law of costs applicable to all other courts of the United States, or pre-existing usages and practices, particularly in reference to the courts of this state.

The act of March 3, 1841 (5 Stat. 427), had established a special law of costs for officers of the United States courts, to the following effect: "In lieu of all fees, emoluments, and receipts now allowed in districts where the present entire compensation of any of the officers hereinafter named shall exceed the sum of fifteen hundred dollars per annum, it shall and may be lawful for the United States clerks, attorneys, counsel, and marshals, in the district and circuit courts of the United States, in the several states, to demand and receive the same fees that now or hereafter may be allowed by the laws of the said states, respectively, where said courts are held to the clerks, attorneys, and counsel and sheriffs in the highest court of the said states, in which like services are rendered; and no other fees or emoluments, except that the marshals shall receive in full for summoning all the jurors for any one court, $30; and shall receive for every day's actual attendance at any court, $5 per day; and for any services, including the compensation for mileage performed by said officers in the discharge of their official duty, for which no compensation is provided by the laws of the said states, respectively, the said officers may receive such fees as are now allowed by law, according to the existing usage and practice of said courts of the United States,"—and limited the amount of fees and compensation to be retained by such officers. This law was in force in this state, in common with the rest of the Union, until modified and restricted in relation to the New York courts by the now repealed act of 1842. I apprehend there can be no ground to question that the act of February 26, 1853, operated a repeal of the act of 1841 not less effectually than that of 1842, both by the declared purpose and effect of the act of 1853, and also by force of the repealing enactment of section fifth.

It is to be remarked that the act of 1841 sanctioned the costs established by the long-established usage and practice of the United States courts, by declaring that in cases where no appropriate fee was provided by the state law in compensation of services rendered, "the said officers may receive such fees as are now allowed by law according to the existing usage and practice of said courts of the United States." The act of 1853 removes the distinction before existing between the officers of the United States courts in this state and those in other states, and then establishes a new law of costs governing the entire Union, declared to be "in lieu of the compensation now allowed by law" to those officers. To make this declaration more efficacious, congress not only introduces a general repealing clause in section 5, in the emphatic words "that all laws and regulations heretofore made, which are incompatible with the provisions of this act, are hereby repealed and abrogated;" but an enactment is superadded to the two above-stated methods of rescinding all antecedent laws on the subject, that "no district attorney, marshal or clerk, or their deputies, shall receive any other or greater compensation for any services rendered by him, than is provided in this act; and all acts and parts of acts, allowing to either of them any other or greater fees than is herein provided, are hereby repealed, and to receive any other or greater compensation is hereby declared to be a misdemeanor." 10 Stat. 169. The intention of congress to displace any authority in force by statute or usage, or discretion of courts, giving fees or costs to the officers named, and to establish the provisions of the act of 1853 as the exclusive law of costs to the United States' courts, it seems to me cannot be matter of doubt, under the declarations and interdictions of that act. The act signifies plainly that congress had in contemplation all antecedent legislation on the subject, and the existing usages and practice of the courts, from which was derived authority to award costs to the officers of court, and meant by direct and strong language to repudiate all of them, and, in lieu of every such power, to limit and confine costs to the specific appointments of the statute.

Only two items in the bill of costs now under consideration are named in the act of 1853. The others are taken from the state statutes and the usages and practice of the United States' courts in this district. To sanction their allowance would be, in my opinion, to reinstate the act of 1841, and to hold by judicial construction that the legislature intended to give those officers a suitable compensation for every service they are

required to perform, in contradiction to the positive assertions of the statute. It is not the province of the court to meet any equity, however urgent, by enacting a new law to satisfy it. The wisdom of congress deemed it expedient in this case to deny all fees and compensation to the United States attorney for instituting and managing a litigation, in support of the interests of the government, and to give him a reward only for discontinuing the cause. It is my duty to carry that will of the legislature into effect without consideration of the operation of the rule upon the rights of the officer or the interests of the public.

If the views of the attorney-general were to be adopted, there would be embarrassment, if not an utter impracticability, in attempting to bring this case within the principle announced by him, for I can find no service specified and compensated by the act, which bears an analogy to those charged for in this bill of costs, other than in this: that the services named in the statute have relation to conducting a suit in court, and those charged in this bill have that character, and in our system of practice are necessary to that end. With all respect for the judgment of the eminent public officer, I am compelled to say that it does not appear to me within the competency of the courts or accounting officers to introduce into this particular statute a method of compensation not designated and directly sanctioned by it. The taxation of the clerk is accordingly affirmed. This includes the charge of $5 for taking two depositions. The charge is in the words of the act, and the court must assume that the services have been rendered. The attorney is accordingly entitled to receive $5 for discontinuance of the cause, and $5 for two depositions taken and admitted as evidence in the cause, and the residue of charges for services appropriate to the case, and allowable under the laws as they existed prior to this statute, amounting to $35, must be disallowed.

Case No. 15,951.

UNITED STATES v. ONE PIECE OF SILK.

[See Case No 15,925.]

Case No. 15,952.

UNITED STATES v. ONE RECTIFYING ESTABLISHMENT.

[11 Int. Rev. Rec. 45.]

District Court, N. D. Mississippi. Dec. Term, 1869.

INTERNAL REVENUE—ACT OF 1868, § 96—PENALTY—KNOWLEDGE AND INTENT.

1. The penalties prescribed in section 96 of the internal revenue act of 1868 [15 Stat. 164], *held* to apply to those who knowingly and wilfully do or omit to do the thing forbidden or required only when there is no specific penalty imposed by any other section of the act.

[Cited in U. S. v. 4,800 Gallons of Spirits, Case No. 15,153; U. S. v. 95 Barrels of Distilled Spirits, Id. 15,889; U. S. v. 95 Barrels of Distilled Spirits, Id. 15,890; U. S. v. 1,412 Gallons of Distilled Spirits, Id. 15,960; U. S. v. 200 Barrels of Whisky, 95 U. S. 575.]

2. And to incur the penalties under section 96 the violator of the law must have a knowledge that he is doing or omitting to do the act forbidden or required, and intends so to do.

The questions presented for the decision of the court arise upon the demurrer of claimants [Bowling & Reed] to the information filed by the district attorney upon the part of the United States. The first count in the information alleges, in substance, that the property seized and sought to be forfeited was found in a building which was then, and had for a long time before that time been used as a rectifying establishment of liquors, compounders of liquors, and wholesale liquor dealers, and that all the property seized was then being used for that purpose; that the said liquors had been removed from a distillery warehouse without being gauged, stamped, and branded, as required by the 25th section of the act of 1868, imposing taxes on distilled spirits, and for other purposes, approved the 20th of July of that year. This count also contains an allegation that said claimants as such rectifiers of distilled spirits on said premises, filled for shipment and sale rectified spirituous liquors in casks and packages without having the same inspected, gauged and stamped, as required by law; also as wholesale liquor dealers, they filled in casks and packages, on said premises, spirituous liquors for the shipment, sale and delivery, without having the same gauged, inspected, and stamped, as required by the 25th section of said act; all of which omissions were knowingly and wilfully omitted and neglected. The grounds of demurrer to this count are: 1. That section 25 imposes no penalty on the owner of the spirits. 2. That the number of gallons is not stated. 3. That the number of gallons placed in each cask is not stated. 4. That the number of gallons placed in each cask filled for shipment, sale, or delivery, is not stated.

Edwin Hill, U. S. Dist. Atty.

H. W. Walters and W. S. Featherston, for claimants.

HILL, District Judge. After a most careful examination of the question raised upon the first ground of demurrer, I am satisfied that the law does impose a duty upon the rectifier or wholesale liquor dealer in the 25th section, the knowingly and wilfully omitting and neglecting of which, under section 96, does forfeit all the spirituous liquors owned by such party. The second clause in section 25 provides that whenever any cask or package of rectified spirits shall be filled for shipment, sale, or delivery, on the premises of any

rectifier who shall have paid the special tax required by law, it shall be the duty of the United States gauger to gauge, inspect, and stamp the same as therein directed. The third clause makes the same provisions in relation to wholesale dealers. It is true that the gauging, inspecting, and stamping is to be done by the United States gauger, but it is equally true that the rectifier or dealer, when he does have his casks filled, is to call upon the gauger to perform his duty, and he is not permitted to fill his casks without causing the same to be gauged, inspected, and stamped, as required by law. The object of the law is that the revenue officers, upon an inspection of the casks in such establishments, may know whether or not the law has been complied with. This section does not impose any penalty on the rectifier or dealer; hence the application of the 96th section. The case provided for in section 47 is where distilled spirits are drawn from one cask and placed in another cask, containing not less than ten gallons, intended for sale, no matter by whom done, or where done, the spirits filled shall be again inspected and gauged, and the cask into which they are placed shall be marked or branded, etc. Section 25 is confined to rectifiers and wholesale dealers, and is not limited to the quantity, as in section 47. Wholesale liquor dealers are those who sell in a quantity not less than five gallons; consequently all sales of five gallons or more must be inspected, gauged, and stamped; and, as to rectifiers, all casks filled by them for shipment, sale, or delivery, no matter in what quantities, must be inspected, gauged, and stamped. But to render the party liable to the penalties under section 96, the filling of the casks, and the omission to cause the same to be so inspected, gauged, and stamped, must be alleged and proved to be knowingly and wilfully done, or neglected to be done, as the case may be; all of which is averred in this count. so that this ground of demurrer is not well taken. The second, third, and fourth causes of demurrer are substantially the same; the allegations as to quantity are sufficient. There is however a cause of demurrer, which in argument was not insisted on, or set down as a cause of demurrer, but which as a general demurrer does apply to this count; and that is, it contains two distinct offences, for which a different penalty is imposed by way of forfeiture. First, it is charged that the spirits were removed from a distillery warehouse, without having been inspected, gauged, and stamped, as required by law; this is in substance a charge that they were so removed without having been removed according to law. The spirits so removed, and only such spirits, became, under section 36, forfeited. The forfeiture under section 96, as above stated, forfeits not only the spirits filled up, but all the spirits owned by the rectifier or dealer. These two charges, therefore, should have been embraced in separate counts, and for this cause the demurrer to this count is sustained. The second count avers that said spirits so seized were removed from a distillery warehouse without being removed according to law. The cause of demurrer thereto is that neither the quality nor number of casks is designated. This is unnecessary. The demurrer to this count is therefore overruled.

The third count avers that claimants knowingly and wilfully omitted to make the entries required by section 45 in relation to the spirits seized. The forfeiture under this count is claimed under section 96 of the act of 1868. It is insisted for claimants that section 96 does not apply to this offence, the penalty for the omission stated being fixed in section 45. Thus a construction of the true intent and meaning of section 96 becomes important, not only in this case, but in numerous others of like character. Upon the original argument of this question, in this and other cases of a similar character, the district attorney, with both zeal and ability, insisted that the penalties imposed by this section apply to acts or omissions knowingly and wilfully done or omitted to be done, which were forbidden or required by any other section of the act, although there is a penalty specifically imposed for the mere act or omission without more. The converse of this proposition was also zealously and ably argued by counsel for the respective claimants. The question was then a new one, without any judicial construction upon it, so far as I knew. After a most laborious examination of the question I came to the conclusion that the construction claimed by the district attorney was not the correct one, but that congress only intended this section to apply to violations by commission or omission for which no specific penalties were imposed by any other section of the act, and not then unless the thing forbidden was both knowingly and wilfully done, or if the offence was by omission, that it was both knowingly and wilfully omitted. And with this conclusion I was satisfied, until I met with Judge Blatchford's opinion in which he maintains fully the position claimed by the district attorney. Quantity of Distilled Spirits [Case No. 11,495]. Finding myself opposed in my construction by so able a jurist, and one for whose judicial opinions I entertain the highest regard, I at once questioned the correctness of my own conclusions, and requested a re-argument, with such additional light as might be thrown upon the question by the opinion of the learned judge. I have listened with deep interest to the able re-argument, and have examined closely the opinion mentioned, and with these aids have re-examined the questions, with a desire to at least satisfy my own mind as to a correct construction of the intention of congress in reference to this section, and also desirous to agree, as far as possible, with the distinguished jurist who had already given it his construction, and thereby preserve uniformity in the enforcement of this law; but instead of coming to that agreement in opin-

ion, I find myself unable to change the conclusions to which I had before arrived. In many of the conclusions of the learned judge in the case mentioned I fully concur; the only point of difference is that he believes the act throughout makes a distinction between an act knowingly and wilfully done or omitted, and one in which such knowledge and intention is wanting; that to the former the 96th section applies, and to the latter the specific penalties enumerated. In this I cannot concur. It is clear to my mind that when a specific penalty is imposed, whether the act or omission was a knowing or wilful one or not, such specified penalties alone are imposed, and that the 96th section was only intended to apply to such acts or omissions mentioned in the different sections, for which no specific penalties are imposed, and only then when such act or omission was both knowing and wilful. By reference to sections 9, 11, 15, 16, 17, 23, 25, 48, and other sections, it will be found that many things are required or forbidden, for which no specific penalty is imposed; and when omitted or done knowingly and wilfully, the penalties imposed by this important section will be enforced. The section reads as follows: "That if any distiller, rectifier, wholesale liquor dealer, compounder of liquors, or manufacturer of tobacco or cigars, shall knowingly and wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a distiller, rectifier, wholesale liquor dealer, or compounder of liquors, all distilled spirits or liquors owned by him, or in which he has an interest as owner; and if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States." It will be seen that after the imposition of the penalty of one thousand dollars, it further provides, that if the person so offending be a distiller, etc. It is clear to my mind that that language was intended to apply to those who knowingly and wilfully do, or omit to do, the thing forbidden or required, and for which no specific penalty is imposed by any other section of the act. Had the section read, "he shall, in addition to the other penalties imposed, pay a penalty," etc., then the construction contended for by the district attorney would have been the correct one; but this sentence is not to be found in the section, and is not necessarily implied to give full meaning and effect to it; and language should not be interpolated into a penal act, which will change its meaning from its ordinary construction and sense. The position contended for by counsel that the violator must know that the thing done or omitted is a violation of law, and that he purposely intends a violation of law, before he can be held a violator of the law, is incorrect. No man is under obligation to engage in these pursuits; but if he does, he is under obligation to inform himself of what the law requires or forbids, and if he fails so to do, must bear the consequences of his acts and the requirements of the law violated; but to incur the penalties under this section, he must have a knowledge that he is doing or omitting to do the act forbidden or required, and intend to do it. It is to be hoped that this important question will be speedily settled by the supreme court, so that the law may be uniformly enforced in every part of the Union. The result of the conclusion to which I have again arrived requires that the demurrer to this count be sustained.

The fourth count charges the claimants with having been the owners of a distillery in the town of Holly Springs, which they carried on and operated without having given the bond required by said act of July 20, 1868; also that they carried on said distillery with intent to defraud the United States out of the tax on the spirits so distilled, or some part of it; also that they carried on said distillery without having the same with its appurtenances constructed, painted, arranged, etc., according to the requirements of section 17 of said act, which omission was knowingly and wilfully done. The objection to this count is that it embraces three distinct offences, the first and second of which work a forfeiture of not only the spirits, but the wines, stills, and appurtenances fit to be used, or intended to be used, in the distillation, rectification, or compounding of liquors; the latter forfeits only the spirits owned by the claimants, if the facts alleged should be proved. When separate offences are alleged requiring a different judgment of forfeiture, they should be charged in different counts. For the reason that these separate and distinct offences are charged in the same count, the demurrer to this count is sustained, but with leave to the district attorney to amend the first and fourth counts by striking out such of the charges as he may desire, and adding new counts.

Case No. 15,953.

UNITED STATES v. ONE SORREL HORSE.

[22 Vt. 655.]

District Court, D. Vermont. May Term, 1847.

CUSTOMS DUTIES—ACT OF 1821—IMPORTATION OF HORSE—SALE—USE OF OWNERS.

1. A horse, brought from an adjacent foreign territory into the United States for the purpose of sale, or of being kept here, either for use or sale, is within the sense and object of the first section of the statute of 1821 [3 Stat. 616], which provides, that every person, coming into the United States from an adjacent foreign territory, with "merchandize" subject to duty, shall deliver at the office of the collector of customs a manifest of the merchandize.

But a horse brought in, not for any such purpose, but as a mere instrument of conveyance in the prosecution of a temporary journey on business, or a visit, is not brought in as merchandize, and is therefore not within the purview of the statute.

2. Reasonable cause, sufficient to justify seizure, means probable cause; it imports a seizure under circumstances which warrant suspicion.

[Cited in Averill v. Smith, 17 Wall. (84 U. S.) 93.]

This was an information against a horse, seized as forfeited for having been imported or brought from Canada into the United States in violation of the revenue laws thereof. The facts constituting the alleged importation, as specially found by the jury, under the direction of the court, were, that the horse was driven by the claimant, harnessed before another horse, in a single sleigh containing no goods, wares, or merchandize subject to duty, from Canada into the district of Vermont, not for sale or to be kept in the country for use, but in the prosecution of a journey to the state of Maine, on business of a temporary nature, with the intention of returning with the horses and sleigh to the claimant's place of residence in Canada, immediately after the accomplishment of his business. The question was, whether, upon the facts so found, there having been no report or entry made, manifest delivered, or duties paid, the horse was liable to seizure and forfeiture.

C. Linsley, U. S. Dist. Atty.

L. B. Peck, for claimant.

PRENTISS, District Judge. The forfeiture claimed in this case, if it can be claimed under any of the provisions of the revenue laws, must be claimed under the provisions of the act of 1821. The ninety-fourth section of the act of 1799 [1 Stat. 699] is confined, by its terms, to importations of "horses, cattle, sheep, swine, or other beasts," by water, in vessels or boats; and the one hundred and sixth section of the same act is applicable only to cases of "vessels, boats, rafts, and carriages," arriving in districts on the northern and northwestern boundaries of the United States, "containing goods, wares, or merchandise subject to duty." The first section of the act of 1821 is broad enough to embrace, and undoubtedly does embrace, every mode whatever of importing or bringing into the United States, from an adjacent foreign territory, merchandize subject to duty, either by land or by water. It provides, that every person, coming into the United States from an adjacent foreign country, with merchandize subject to duty, shall deliver at the office of the collector of customs a manifest of the merchandize; and, on neglect to do so, the merchandize, imported or brought in, shall be forfeited. Horses may not be usually included in the term "merchandize;" but being objects of trade and commerce, they may be called merchandize, within the meaning and intention of the act, whenever they are imported or brought into the country as such. A horse brought from an adjacent foreign territory into the United States for the purpose of sale, or of being kept here either for use or sale, horses being subject to duty, is within the sense and object of the act. But a horse brought in, not for any such purpose, but as a mere instrument of conveyance in the prosecution of a temporary journey on business, or a visit, is not brought in as merchandize, and is therefore not within the purview of the act. To hold otherwise would be to adopt a construction, which would not only be particularly embarrassing and vexatious in its effects upon the ordinary intercourse between the residents on the opposite sides of the frontier line, but would be productive of much inconvenience in its more general operation. The case under consideration, then, on the facts found by the jury, being not within the meaning, intention, or policy of the act, the horse in question was not subject to seizure and forfeiture. It was said in argument, that this construction of the act would open the way to fraudulent evasions of the law, and exposes the officers of the customs to peril in the execution of their duties. To be sure, it may be difficult always to know what the intention of a traveller is, in regard to the horse he is riding or driving. The real purpose may be different from the ostensible or professed purpose; but in every case the officers will act as the circumstances may require. If they make a seizure, exercising reasonable discretion in the matter, they will incur no hazard; for they will be protected from an action by a certificate of reasonable cause. The objection of fraud or evasion, then, supposing a different construction of the act not absolutely precluded by the considerations which have been presented, is of little weight, since the officers of the customs are at liberty to make seizure, and will be protected in doing so, in very case where there is reasonable cause of suspicion. There must be judgment therefore on the verdict for the claimant.

A motion for a certificate of probable cause was subsequently filed.

PRENTISS, District Judge. The motion for a certificate of reasonable cause for the seizure has been in some measure anticipated in the remarks made upon the merits of the case. Reasonable cause must be understood to mean the same as probable cause. "Probable cause," says Marshall, C. J., "does not mean prima facie evidence, or evidence which, in the absence of exculpatory proof, would justify condemnation. It means less than evidence which would justify condemnation. It imports a seizure made under circumstances, which warrant suspicion. This is its legal sense." Locke

v. U. S., 7 Cranch [11 U. S.] 339. Again he says: "A doubt as to the true construction of the law is as reasonable a cause for seizure, as a doubt respecting the fact." U. S. v. Riddle, 5 Cranch [9 U. S.] 311. Adopting the definition of reasonable cause thus given, the facts attending the case, supposing there to have been no ground for doubt as to the law, afforded reasonable cause for the seizure. The seizing officer had such information beforehand, from Canada, of the design to bring the horse, which was a valuable and saleable horse, into the United States, as would naturally induce a belief, that an evasion of the revenue laws was intended; and, when brought in, the horse was driven before another horse in a single sleigh, with a harness upon him made of the cheapest materials, appearing to have been put together to answer a temporary purpose, with one person only, and no loading in the sleigh, in a manner to warrant suspicion. A certificate, therefore, ought to be granted.

Case No. 15,954.

UNITED STATES v. ONE STILL.

[5 Blatchf. 403;[1] 5 Int. Rev. Rec. 189.]

Circuit Court, E. D. New York. June 10, 1867.

INTERNAL REVENUE—ACT JUNE 30, 1864—GROUND OF FORFEITURE—FRAUDULENT INTENT—BURDEN OF PROOF—EVIDENCE—SUBMISSION TO JURY.

1. Under the 48th section of the internal revenue act of June 30, 1864 (13 Stat. 240), as amended by the 9th section of the act of July 13, 1866 (14 Stat. 111), where personal property is seized, because it is found in the place or building, or within the yard or enclosure, where the articles or raw materials previously mentioned in that section are found, the fraudulent intent or purpose of the person in the possession, or having the control, of such personal property, does not constitute an element of the ground of forfeiture.

[Cited in U. S. v. Quantity of Tobacco, Case No. 16,106.]

2. Where personal property is found in the condition specified in such 48th section, the onus is on the claimant of it, to make out that its situation was consistent with his entire innocence of complicity with the offences for which such articles or raw materials were seized.

[Cited in U. S. v. Two Hundred and Seventy-Eight Barrels of Distilled Spirits, Case No. 16,580.]

3. Such 48th section embraces the article of distilled spirits.

4. Where the evidence on a question is all one way, the court is justified in not submitting the question as one of fact to the jury.

[Cited in Weil v. Nevitt, 18 Colo. 10, 31 Pac. 488.]

This was an information against certain personal property seized for a violation of the internal revenue laws. The property consisted of two stills and their appurtenances and some whiskey, and also of a dwelling-house and a lager beer saloon and a brewery and its appurtenances, the whole being enclosed in one enclosure by a high board fence. The stills and their appurtenances and the whiskey were condemned by default. On a trial as to the brewery and its appurtenances, a verdict was rendered for the government, and the claimant now moved for a new trial.

Benjamin F. Tracy, U. S. Dist. Atty.

William H. Hollis, for claimant.

Before NELSON, Circuit Justice, and BENEDICT, District Judge.

NELSON, Circuit Justice. The seizure, in this case, was made during the night of the 13th of January, 1867. Barrels of whiskey were found in several of the different rooms or apartments of the buildings on the premises, including the brewery. One of the stills, a copper one, was in operation, and the other, a wooden one, in an upper loft, had recently stopped, as was apparent from the heat of it. This last was heated by the same engine and boiler that were used to supply steam to the brewery, and the engine and boiler occupied a part of the same room in which was the copper still that was in operation. There was, also, a communication between this room and the brewery. The claimant insists that he was engaged exclusively in making lager beer, and occupied only a portion of the premises, consisting of the brewery, the engine and boiler room, and the malt room, stable and hay loft, and that he had no connection with the other parts of the building, occupied for the distillation of whiskey; and he produces a lease of the particular part occupied by himself. The revenue officers seized not only the stills, and the property connected therewith, and the whiskey, but also the brewery and all the personal property appurtenant thereto. No one appeared to claim the stills, &c., which it is said were occupied by one Smith, under a lease from the father of the claimant, who owned the premises, and had leased to the latter the portion he occupied. The question is, whether or not the officer was justified in the seizure of the property connected with the brewery.

Section 48 of the act of June 30, 1864 (13 Stat. 240), as amended by the ninth section of the act of July 13, 1866 (14 Stat. 111), is as follows, so far as relates to the present case: "All goods, wares and merchandise, articles or objects on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons, in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the commissioner of internal revenue for that purpose, and the same shall be forfeited to the Unit-

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

ed States; and also all raw materials found in possession of any person or persons intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and also all tools, implements, instruments and personal property whatsoever, in the place or building, or within any yard or enclosure, where such articles or such raw materials shall be found, may also be seized by any collector or deputy collector, as aforesaid; and the same shall be forfeited as aforesaid; and the proceedings to enforce said forfeiture shall be in the nature of a proceeding in rem, in the circuit or district court of the United States," &c. This section is very comprehensive, and, as is obvious, was so designed. It embraces, first, all goods, articles, or objects on which taxes are imposed by law, found in the possession or within the control of any person, for the purpose of being sold or removed in fraud of the internal revenue laws, or with intent to avoid payment of the taxes; second, all raw materials found in like possession or control, intended to be manufactured into articles of a kind subject to tax, with the intent to sell the same in fraud of the revenue, or to evade the payment of the tax; and third, all personal property whatsoever found in the place or building, or within the yard or enclosure, where the articles or raw materials previously referred to were found or seized. The reason for the seizure of the articles enumerated in the first and second class, is obvious enough. It is for the fraudulent intent of the person in the possession or control of them, that is, an intent to defraud the public revenue by evading the tax. The seizure of the articles in the third class stands on different grounds, namely, association with the guilty classes or articles. The fraudulent intent or purpose of the person in the possession, or having the control, of the articles does not constitute an element of the offence or ground of forfeiture. The reason for embracing this latter class is said to be, that personal property thus situated was frequently used to facilitate the accomplishment of the frauds provided against in the fore part of the section—for example, it is said, that distilleries were established in the rear of a livery stable, the latter being used not only as a blind, but being conveniently employed in the fraudulent removal of the distilled products.

The seizure of the property connected with the brewery in the present case was made under this section, the government claiming that it was within the same building and enclosure within which were found the guilty articles, namely, the stills, whiskey, &c. The evidence in this case leaves no doubt of the fact; and hence, prima facie, at least, this property fell within the clause in section 48, and called for explanation on the part of the claimant. This he undertook by attempting to establish that his business was wholly independent of the business of distilling whiskey, and that he occupied premises distinct and separate from those occupied by Smith the distiller. But the testimony is conclusive to show that, in respect to several parts of the premises, they were occupied in common, and that the engine and boiler of the claimant, for carrying on his brewery, were used for working a still in an upper loft to which access could be had only through apartments which it is admitted he occupied.

This provision of the law concerning articles of themselves innocent, but associated with guilty articles, is so specific and unqualified, that it might with great plausibility be contended that, if the former articles are found in the building, yard or enclosure, no explanation is admissible. We do not, however, concur in this conclusion. The provision is penal, and necessarily implies some degree of guilt in the condition of the property subjected to forfeiture. If the condition, however, in which it is found brings it within the words of the clause in the section, the onus is upon the claimant to make out, to the satisfaction of the court and jury, that the situation of the property was consistent with his entire innocence.

It is very strongly argued, that the forty-eighth section does not embrace the article of distilled spirits, and that other portions of the act, from section 23 onward, provide for that article. But we find nothing in those sections inconsistent with or repugnant to the section in question; and the article falls directly within its words.

It was also argued, that the court should have submitted the question, as one of fact, to the jury, whether the articles claimed were in the place, or within the building, yard or enclosure, where the distilled spirits, and the raw materials for making them, were found and seized. But the evidence was all one way on this point, and no question of fact could be raised upon it. The court rightfully disposed of it. We perceive no ground for granting a new trial, either upon the law or the evidence. New trial denied.

Case No. 15,955.

UNITED STATES v. ONE STILL.

[6 Int. Rev. Rec. 67.]

District Court, S. D. New York. Aug., 1867.

INTERNAL REVENUE — FORFEITURES — INFORMER'S SHARE.

[An informer's share, under section 179 of the act of June 30, 1864, as amended by the act of July 13, 1866, and under the regulations of the secretary of the treasury of August 4, 1866, is to be calculated upon the gross proceeds of the forfeitures, without deducting the costs. Reaffirming Case No. 10,534.]

[This was an information of forfeiture, under the internal revenue laws, against one still boiler, etc.]

It was heretofore decided in this case that the informer's share should be calculated on the gross proceeds of the forfeiture and not on the net proceeds after payment of costs, according to the practice that has hitherto obtained. See One Still [Case No. 10,534]. The district attorney obtained leave to re-argue the question, and the judge has now rendered his decision on the re-argument.

S. G. Courtney, Dist. Atty., for the United States.

Henry & Clarkson, for the informers.

BLATCHFORD, District Judge, after setting forth the law as fixed by the 9th section of the internal revenue act of July 13, 1866 [14 Stat. 98], and the regulations of the secretary of the treasury made in pursuance of that section, proceeded:

It is contended on the part of the government that it is the meaning of the statute that the informer's share, whatever it may be, shall be estimated on the sum actually received by the government; that until recently the marshal, on the sale of forfeited property, paid its proceeds into the registry of the court, and the clerk then paid out of such proceeds the costs and expenses of the suit, and paid over the remainder to the collector of internal revenue for distribution; that in such case the sum received by the government was the sum received by the collector, and not the sum paid into the registry of the court, the clerk receiving the money from the marshal, not as the agent of the United States, but as the officer of the court; that where, as now, the practice is for the clerk to pay the informer's share directly to him, and the balance directly to the proper government officer, the government does not, any more than in the other case, receive that portion of the proceeds which have been consumed in the payment of costs; that this view is supported by the decision made by Judge Benedict, in the case in the Eastern district of New York, of U. S. v. Seven Large Fermenting Tubs [Case No. 16,254], who, while holding that under the statute and the general regulations made by the treasury department, the percentage of the informer is to be calculated upon the gross proceeds of the forfeited property, also held that the costs of the proceedings, through which the fund in court is realized, are a charge upon the whole fund, and must, in the distribution, be paid out of the proceeds of sale before the share of the informer can be distributed to him; that in this view the government cannot be said in any proper sense to receive the costs so as to distribute a portion of them to the informer, and that the informer has nothing to do with anything but what the government actually receives.

The whole argument on the part of the government is based on a fallacy. The share given to the informer by the statute is such share of the fine, penalty or forfeiture, whether it is recovered with or without judgment or decree (but not exceeding one moiety nor more than $5,000 in any one case) as the secretary of the treasury shall prescribe by general regulations. The statute confides the whole matter of the amount of the informer's share to the discretion of the secretary, to be exercised by general regulations, subject to the limitation fixed by the statute. In the case of a fine, penalty or forfeiture recovered by suit, the statute requires that the court decreeing the recovery shall ascertain who was the first informer, and in the case of any sum paid without suit or before judgment in lieu of fine, penalty or forfeiture, the statute requires the secretary to determine under general regulations to be made by him, who was the first informer. * * * The statute contemplates that the general regulations shall assign to an informer, one and the same share of a fine, penalty or forfeiture, whether it is recovered by suit or whether a sum is paid in lieu of it, by way of compromise; and the secretary has so interpreted the law. The shares he prescribes are for shares of all proceeds and moneys whether recovered by judgment or paid without suit or before judgment, and are applicable to all fines, all penalties and all forfeitures received under the internal revenue laws. The fallacy of the view taken by the government is in the idea that under the statute or the general regulations, the informer's share is to be estimated on the sum received by the government. There is in the first place, nothing in the statute to uphold this view. That portion of the section which speaks of the vesting of a right in the informer, has reference solely to the time when the right shall vest in the informer, and says that no right shall accrue to or be vested in the informer until the fine, penalty or forfeiture is fixed by judgment or compromise, and the proceeds or amount shall have been paid, and that then the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received. There is nothing in this provision which necessarily restricts the informer's share to a share of the proceeds or amount paid to or received by the government. The provision has no reference to amount, but concerns only the question of time, and was intended to guard against all claim by an informer to a vested right in a fine, penalty or forfeiture incurred; nor, in any view, can the word paid or the word received, in this provision, mean paid to the government or received by the government. The provision, so far as the import of the words paid and received is concerned, means that until, in the case of a recovery by judgment, the fine, penalty or forfeiture is fixed by the judgment, and the amount or proceeds shall have been paid thereunder, and until, in the case of the payment of a sum without suit or before judg-

ment, in lieu of fine, penalty or forfeiture, the sum is fixed by compromise and paid, the informer shall have no right, or title, or vested interest to or in any share of it. The words paid and received have no reference whatever to the payment to. or the receipt by, the government of its share of the amount or proceeds of the recovery, or of its share of the sum paid by way of compromise. In the present case, under the decree of condemnation, the right of the informer did not vest until the payment to the marshal of the proceeds of the sale of the condemned property; but where those proceeds were paid to the marshal, then the informer became entitled to his legal share of those proceeds. That share is a percentage, to be calculated, according to the general regulations, on the gross amount of the proceeds so paid to the marshal. Those gross proceeds are the forfeiture, or in other words, the property condemned as forfeited and ordered by the decree to be sold by the marshal; and the general regulations give to the informer, as his share, a percentage, to be calculated on the amount of the forfeiture, that is, on the amount of the gross proceeds of the sale of the property condemned as forfeited. If any interpretation were to be given to the provision of the statute which says that the informer shall be entitled to his legal share of the sum adjudged or agreed upon and received, as in any way defining the amount of the share, such interpretation would be that the informer is entitled to a share of the sum adjudged, or the proceeds of the property adjudged, to be the forfeiture or the sum agreed upon in lieu of the forfeiture and received, and thus to a share in the present case of the gross proceeds of the sale of the property condemned as forfeited. But the whole question of the amount of the share, within the limits fixed by the statute, is left to the secretary. He may, by general regulations, make it greater or less. He might have followed the example set by the 91st section of the tariff act of March 2, 1799 [1 Stat. 697], which says that all fines, penalties and forfeitures recovered by virtue of that act shall, "after deducting all proper costs and charges," be disposed of in a certain way. He might have directed that the costs and expenses of the suit should be first deducted, and that the informer should then have a certain percentage of the net proceeds remaining. But he has not seen fit to do so. He has said, as strongly as negative language can say it, that the costs and expenses of the suit shall not be first deducted, but that the informer shall receive a percentage, to be calculated on the amount paid as a fine or penalty by the person on whom the fine or penalty is imposed, or on the proceeds of the sale of the property condemned as forfeited, and that no part of the costs or expenses shall be charged upon the share of the informer. The secretary had a right to say this. He had a right to give to the informer such share, within the limits fixed, as in the exercise of his discretion he thought calculated to promote the objects aimed at by the statute. The statute was intended to encourage persons to inform as to causes of forfeiture, and the presumption is that the secretary deemed it wise on the whole to hold out to informers the inducements offered by his regulations, by saying to them that no part of the costs or expenses should be charged upon the share resulting from the percentage affixed to a given case. And in this connection I am free to say that I do not concur with Judge Benedict in his view that the costs and expenses of the proceedings through which the fund in court is realized are a charge on the whole fund, and must be paid out of the proceeds of sale before the share of the informer can be distributed to him, if the conclusion from that view is that the informer's share, ascertained by computing his percentage on the gross proceeds, can be made liable for a portion of the costs and expenses, if the residue beyond the informer's share is not sufficient to defray those costs and expenses.. The result is that I am confirmed in the conclusion at which I before arrived, and that an order must be entered in this case, declaring William H. Craig to be the person who first informed of the cause, matter or thing whereby the forfeiture of the property condemned in this suit was incurred, and that he is entitled to have the share or percentage of such forfeiture to which as such person he is entitled, computed on the gross amount of the proceeds of the sale by the marshal under the decree herein of such property.

Case No. 15,956.

UNITED STATES v. ONE STILL.

[6 Int. Rev. Rec. 220.]

District Court, D. Kentucky. Dec., 1867.

INTERNAL REVENUE—WHO ARE DISTILLERS.

[Persons who make, by the same process and machinery which distillers use, alcoholic vapor, but do not condense this vapor into spirits or alcohol, and have no machinery adapted to that purpose, but who, on the contrary, conduct it into a large vessel containing a mixture of water, vinegar, and yeast, with which it instantly mingled, are not "distillers," either within the meaning of the 21st or 23d sections of the act of July 13, 1866, or the 16th section of the act of March 2, 1867; nor are they subject to the special tax under the joint resolution of February 5, 1867.]

[This was an information of forfeiture against one still, etc., for alleged violation of the revenue laws.]

BALLARD, District Judge. This is a proceeding by information in which the plaintiffs seek to have one still and one mash tub adjudged forfeited on account of certain violations of the internal revenue laws. The first count in the information is founded on the

23d section of the act approved July 13, 1866 (14 Stat. 153), and the second is founded on the 25th section of the same act. The first count alleges, that on the first day of July, 1867, at the district of Kentucky, the said still and mash tub were used by, and found on the premises of R. T. Durrett, John S. Cain, and D. C. Freeman, who were then and there carrying on the business of distillers, and who had not then and there made payment of the special tax as in that behalf required. The second count alleges, that on the day aforesaid the persons above named did use the said still and mash tub for the purpose of distilling on the premises where vinegar was then and there manufactured. The offenses here charged are certainly embraced by the sections above mentioned, and, therefore, it is unnecessary to quote the sections themselves.

The claimants, in their answer, admit that they own the still and tub seized, and that they have not paid any special tax as distillers, but they deny that they have carried on the business of distillers, as alleged in the first count, or that they have at any time used said still and tub for the purpose of distilling on the premises where vinegar was manufactured, as is alleged in the second count. By agreement of parties a jury was dispensed with, and the cause tried by the court, as provided in the act of March 3, 1865, entitled "An act regulating proceedings in criminal cases, and for other purposes" (13 Stat. 501). All the facts were agreed by the parties, and such of them as are deemed material by me are as follows: "It is further admitted that the process used by claimants conforms to the plan proposed by the specifications annexed to Freeman's patent (paper A), submitted to the commissioner of internal revenue as aforesaid. As to the process used by claimants, it is admitted that the mashing of the grain, the making of the beer, and the generation of the alcoholic vapor is substantially the same as that used by the distiller. But from that point forward the apparatus differs essentially in this; the alcoholic vapor, when produced, is not passed through any worm or cooling medium; nor is any machinery attached or used calculated to condense the vapor into alcoholic spirits. On the contrary the alcoholic vapor passes by pipes into a tank containing vinegar ferment (composed of a mixture of water, vinegar and yeast), and there instantly mingles with and forms part of the ferment, producing at once an aldehydrous liquid, and not alcohol or spirits. The amount of alcohol which enters into the aldehydrous liquid is not exceeding from 5 to 8 per cent. of the liquid produced. The tank in which the alcoholic vapor is mingled with the vinegar ferment has a movable top which renders it unfit for use for the purpose of condensing alcoholic vapor into spirits. If any portion of the alcoholic vapor is condensed into liquid before its contact with the vinegar ferment it is incidental and not intended, as what is claimed as chiefly valuable in Freeman's process is the immediate and intimate mingling of particles produced by the contact of the alcoholic vapor with the vinegar ferment, and the machinery is constructed with the view of producing this result at a temperature as nearly as 80° (the most favorable for oxidization) as can be obtained. The aldehydrous liquid produced is drawn off into vats for further fermentation into vinegar, and is not valuable for any other purpose. There is no complication in the machinery, and it is not furnished with the necessary apparatus for the most indifferent distillery of alcohol or spirits. A fluid produced by distillation containing less than thirty per cent. of alcohol is not a commercial article. Fifty per cent. of alcohol is called 'proof.' The presence of yeast in the liquid would destroy the commercial value as alcohol. It is further agreed that a mixture in any proportions whatever of alcohol or spirits with water will not produce vinegar by mere exposure to the atmospheric air, and that the aldehydrous liquid produced by claimants will turn to vinegar by mere exposure to atmospheric air. It is further agreed that in practice by claimants that they pour into their inner tank about twenty gallons of vinegar and a half gallon of yeast produced on the premises, and then run the vapor into that compound for two and a half hours, when water is added to make the compound measure about five barrels, sometimes the water is added with the vinegar and yeast before the vapor is run in. The latter is claimed by defendants to be the better plan, when they ascertain by practice the proper quantity, but either mode may be used. It is also agreed that the diagram marked section of vinegar apparatus is a fair, substantial representation of claimants' tank and pipes in which the aldehydrous liquid is produced. It is further agreed that either party may read in argument such scientific works as they may deem material to a proper understanding of the subject."

I do not deem it necessary to insert here the specifications of Freeman's patent, because his invention and the method of using it sufficiently appear in the agreed facts already set forth.

The question then arises on the first count. Are the claimants distillers within the meaning of the act of congress? If they are, the property seized must be condemned. If they are not, it must be restored to the claimants. The act of June 30, 1864 (13 Stat. 253), defines a distiller to be "any person, firm, or corporation who distills or manufactures spirits for sale." The similar act of July 13, 1866, contains two definitions—the first on page 117, and the second on page 153, 14 Stat. By the first it is declared "that every person, firm or corporation, who distills or manufactures spirits, or who brews or makes mash, wort or wash for distillation, or the production of spirits, shall be deemed a distiller." By the second, "that every person,

firm or corporation, who distills or manufactures spirits or alcohol by continuous distillation from grain, who brews or makes mash, wort or wash for distillation or the production of spirits, shall be deemed a distiller." The act of March 2, 1867 (14 Stat. 481), contains still another definition. It declares that "every person, firm, or corporation who distills spirits or alcohol, or who brews or makes wort or wash for distillation, or the production of sprits, shall be deemed a distiller."

It is unnecessary to point out the differences between these several definitions, because a proper decision of the present question does not in any respect depend upon such difference. To constitute one a distiller, under any one of the definitions, he must distil or manufacture spirits or alcohol, or he must brew or make mash, wort, or wash for the distillation or production of spirits. It matters not that he brews or makes mash, wort or wash for other purposes, if he does not brew or make them for the distillation or production of spirits, he is not a distiller. True, the act provides "that the making or keeping of grain, mash, wash, wort or beer prepared or fit for distillation, together with the possession of a still, boiler or other apparatus capable of use for distilling upon the same premises, shall be deemed and taken as presumptive evidence that such person is a distiller;" but this, like every other presumption, is of course, liable to be rebutted or repelled by proof of the actual facts.

Now, the agreed facts show that the claimants do not distil or manufacture spirits or alcohol. They make, by exactly the same process and machinery which distillers use, the alcoholic vapor, but they do not condense this vapor into spirits or alcohol, nor have they any machinery adapted to such a purpose. The vapor is not passed through any worm or condenser, such as is used by distillers, but it is taken directly into a large vessel, having a loose cover and containing a mixture of water, vinegar and yeast, when it instantly mingles with and forms part of the ferment, producing at once an aldehydrous liquid and not alcohol or spirits. If it produces neither alcohol nor spirits, what ground is there for contending that the claimants are distillers within the meaning of the acts? They do, it is true, brew or make mash, wash or wort fit for distillation, and they do, by the ordinary apparatus used by distillers, convert this wort, or some of it, into vapor; but they have no apparatus, such as distillers use, to condense this vapor, nor is it in fact so condensed as to form either alcohol or spirits. The facts, then, which would, under the statute, presumptively constitute the claimants distillers, do not exist, or, if such a presumption could be indulged from some of the facts admitted, it is completely repelled by the further admitted fact that neither spirits nor alcohol is produced.

But the plaintiffs insist that the alcoholic vapor which claimants produce, is made by the process of distillation, that it is alcohol, though in the form of vapor, and therefore that the claimants are distillers. In support they refer to Ure's dictionary of the manufactures and arts, title "Distillation." They quote Dr. Ure as saying that "distillation comprehends the four processes of mashing the vegetable material, cooling the worts, exciting the vinous fermentation, and separating by a peculiar vessel called a still the alcohol combined with more or less water." They assume that Dr. Ure here means by the term "still," that part of the machinery used by a distiller which is called a "still' in common parlance, and is employed only to vaporize the worts; hence they conclude that when the vapor is formed the process of distilling is complete. This argument is based on a misapprehension of Dr. Ure's real meaning. That he does not mean by the term "still" what counsel supposes, that is, simply that part of the machinery by which vapor is generated, is tolerably manifest from his statement "That it is the vessel by which the alcohol is separated," for the machinery by which the vapor is condensed into a liquid is as essential a part of the separating apparatus as that by which it is generated. That Dr. Ure means to comprehend under the term "still" the vapor-condensing as well as the vapor-generating apparatus is, I say, tolerably manifest from what he here says, but it is made absolutely certain if we turn to his definition of "still." He defines "still" to be "a chemical apparatus for vaporizing liquids in one part called the 'cucurbit' and condensing the vapors into liquids in another part called the 'refrigeratory,' the general purpose of both combined being to separate the more volatile fluid particles from the less volatile." That is, if possible, made still more certain if we look to the definition of "distillation" to be found in his supplement, page 454. He there says: "Distillation consists in the conversion of any substance into vapor in a vessel so arranged that the vapors are condensed and collected again in a vessel apart." "The word is derived from the Latin 'dis,' and 'stillo,' 'I drop,' meaning originally to drop or fall in drops, and is very applicable to the process since the condensation generally takes place dropwise." This definition accords with that which I find in every dictionary and scientific work which I have consulted. See Webster, Worcester, New American Encyclopedia (volume 7), and Stockhardt's Principles of Chemistry (page 42). See also the report of Commissioner Rollins to the present congress (page 24), where the process of distillation is, I think, more accurately stated than it is by Dr. Ure. "Distillation," then, according to its scientific as well as its popular sense, embraces "condensation." It is its primary meaning, and more nearly expresses the full sense of the term as it is used in

scientific works, and in the statutes of the United States, than the mere generation of vapor. The generation of vapor is not distillation, else every old woman who boils her teakettle is a distiller, and every steamboat is a distillery—not of spirits, it is true, but of water. The chemist or other person who boils sea or other water and thus vaporizes the more volatile parts, and then condenses the vapor into water, is, in truth and in fact, a distiller, and the product is distilled water; but if the vapor be never condensed and collected there is no distillation. The vapor which escapes into the air from every boiling vessel is, in fact, condensed or distilled in nature's laboratory, and falls in the shape of rain or dewdrops; but he who caused the vessel to boil is not in a popular or scientific sense a distiller, because he neither condenses the vapor nor collects the product. Surely, then, if as we have seen, condensation be a part of distillation, the claimants do not make themselves distillers by merely generating alcoholic vapor, for, if they should allow all their vapor to escape into the open air, and never condense or collect it in any form, I imagine plaintiffs themselves would not gravely insist that they would be distillers of alcohol.

The plaintiffs, however, insist that the alcoholic vapor generated by claimants is condensed into alcohol when it comes in contact with the colder liquid in the tank, and, therefore, that claimants are distillers; but they have agreed that it is not condensed into alcohol or spirits, and they cannot be heard to argue against the agreed facts. They have agreed that the liquor in the tank, after the infusion of the alcoholic vapor, is an aldehydrous liquid, and "not alcohol or spirits." Nor does it appear that the alcoholic vapor is first condensed and then mingled with the other liquid; the agreed facts state "that it passes by pipes into a tank containing vinegar ferment, composed of a mixture of water, vinegar and yeast, and then instantly mingles with and forms part of the ferment, producing an aldehydrous liquid, and not alcohol or spirits." Even were it otherwise—were it admitted that the alcoholic vapor, after permeating the vinegar ferment, and before mingling with it, is condensed into alcohol, and that it is there mixed with it mechanically, not chemically—I should hesitate long before pronouncing the process a distillation of alcohol, because the alcohol so produced being, before it is formed, mixed with a large quantity of water and vinegar is not alcohol in the commercial sense, and cannot be made so, if at all, without redistilling the whole compound, and thus separating the alcohol from the other liquid. If, however, the facts were still different, if it were shown that the vapor is condensed into spirits in the pipes leading to the tank which contains the vinegar ferment, and thus it is converted into alcohol before it is mixed with the ferment, the question would be quite different. But I cannot decide either of these questions, and I do not wish to be understood as even intimating an opinion respecting them. They are not presented. The agreed facts exclude all idea that the alcoholic vapor is ever condensed into alcohol or spirits, and I only decide on these facts: that the claimants are not distillers within the meaning of either the 21st or 23d section of the act of July 13, 1866, or the 16th section of the act of March 2, 1867.

This disposition of the question arising on the first count, and under the 23d section of the act of 1866, also disposes of the question arising on the second count and under the 25th section. For nothing is plainer than that the term "distilling," used in this section, means a distilling of alcohol or spirits, and, as claimants distilled neither the one nor the other, they are also acquitted of the charge contained in this count. I understand the plaintiffs to substantially concede, that this decision is right if the questions are to be resolved solely by the acts of 1866 and 1867, but they insist, with much apparent confidence, that the decision must be otherwise if reference be had to the joint resolution approved February 5, 1867 (14 Stat. 566). This resolution provides "that alcohol made or manufactured of distilled spirits upon which the taxes imposed by law shall have been paid, and burning fluid made or manufactured from alcohol, or spirits of turpentine, or camphene upon which the taxes imposed by law shall have been paid, shall be and hereby are exempt from tax and so much of section ninety-six of the act of June 30, 1864, as relates to alcohol and burning fluid is hereby repealed, and all products of distillation, by whatever name known, which contain distilled spirits, or alcohol on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits."

The argument is, that claimants' vinegar ferment does contain alcohol on which the tax has not been paid, and therefore the whole ferment is to be considered "distilled spirits" by virtue of this resolution. But plaintiffs here again forget that by the "agreed facts" the alcoholic vapor manufactured by claimants is never converted into alcohol, and that no assertion contrary to such fact can be received by the court. The agreed facts, however, do state that "the amount of alcohol which enters into the aldehydrous liquid is not exceeding from 5 to 8 per cent. of the liquid produced;" but this statement must be taken in connection with the other fact admitted, to wit, "that no alcohol is produced," and so taken, it only means, that the infusion of the alcoholic vapor into the vinegar ferment, consisting of water, vinegar and yeast, adds to the volume from 5 to 8 per cent. It cannot mean that the alcoholic vapor is converted into alcohol, for it had just been admitted that it, with the water, vinegar and yeast, is converted into an aldehydrous liquid

and not spirits or alcohol. Supposing, however, the vinegar ferment does contain 5 or 8 per cent. of alcohol, which might, by distillation or chemical process, be separated, it never yet has had separate existence as alcohol in the commercial sense, which is the sense in which I understand the term is used in the statute. But surely the whole vinegar ferment is not a "product of distillation." It is not pretended that more than eight per cent. is such product, and even this pretense, we have seen, when considering the question arising on the first count of the information, is dispelled. And if the vinegar ferment is not a product of distillation, how is it to be considered or taxed as distilled spirits under this resolution? It is only "products of distillation" which, by the terms of the resolution, are to be so considered and taxed. It is not enough that an article contains spirits or alcohol it must itself be a "product of distillation."

The suggestion here made by the plaintiffs, that the spirits contained in the vinegar ferment is a product of distillation, and that it should be considered and taxed as distilled spirits, is only a reproduction of the same matter which we have already noticed in the first part of this opinion. Of course, if the spirits contained in the vinegar ferment is distilled spirits, it is a product of distillation, and is taxable under the statute quite independently of this resolution, but if it is not distilled spirits, which is the fact, as I have before shown, then it is not a "product" of distillation, and I see not how this resolution can apply to it. I am not sure that I know the meaning of the resolution; but I think it means (so far as it relates to alcohol and spirits) this and this only: that alcohol made of distilled spirits on which the tax has been paid shall be exempt from the tax, but that alcohol or other article distilled (thus making it a "product of distillation") from alcohol or distilled spirits on which the tax has not been paid, shall be considered and taxed as distilled spirits. This is all I can make out of it. No other construction, it seems to me, is warranted by the words, or by any supposed mischief intended to be remedied. That it can receive a construction so wide as to hold that vinegar shall be considered and taxed as distilled spirits, if it happen to contain a small portion of alcohol bought regularly in the market, on which the tax has not been paid, is, I think, impossible; and yet this is the construction which must be adopted if plaintiffs' argument have any force. Construing the joint resolution as I do, it has no application to the case before me.

The views here presented are fully supported by the opinion of the learned district judge of the district of Wisconsin in the case of U. S. v. Two Barrels Containing Liquor [Case No. 16,575]. If I were even more doubtful then I am of the correctness of my own conclusions, I would be inclined, for the sake of uniformity, to follow his decision. Upon the whole it is adjudged that the claimants have supported their claim, and are entitled to restitution.

UNITED STATES v. ONE STILL. See Case No. 10,534.

Case No. 15,957.

UNITED STATES v. ONE THOUSAND FIVE HUNDRED BALES OF COTTON.

[10 Int. Rev. Rec. 52; 16 Pittsb. Leg. J. 130.]

District Court, E. D. Tennessee. Aug., 1869.[1]

CONFISCATION ACTS—WAR OF THE REBELLION—SEIZURE OF COTTON—PROCLAMATION OF AMNESTY—JUDICIAL NOTICE — CESSATION OF HOSTILITIES.

1. The president's proclamation of pardon and amnesty issued Dec. 25, 1868, removed the guilt from parties who had sold, given, purchased, or acquired cotton with intent that the same should be used in aiding or abetting the insurrection, and thereby relieved the property itself from being a lawful subject of prize and capture under the act of August 6, 1861 (12 Stat. 319).

2. The courts will take judicial notice of the fact that the hostilities of the late Civil War ceased and peace was restored by the surrender of the last armies of the Confederacy west of the Mississippi in May, 1865.

[This was an information of forfeiture against 1,500 bales of cotton, under the confiscation act of August 6, 1861.]

TRIGG, District Judge. The information charged, first, that the cotton (1,500 bales) had been sold or given, purchased or acquired, with the intent to be used in aiding, abetting and promoting the late insurrection, and that the same was used by the owners, or by their consent, in aiding, abetting and promoting said insurrection, in violation of the act of congress approved the 6th day of August, 1861 [12 Stat. 319], and thereby became a lawful subject of prize and capture; second, it was charged that the cotton had been purchased in and was being transported from a state or district in insurrection against the United States, into some one of the loyal states, and that the same became thereby forfeited to the United States, being in violation of the act of congress approved July 13, 1861 [Id. 255]. The issues were made upon these two charges in the information, and a vast amount of testimony, oral and written, was given to the jury. The verdict of the jury in favor of the claimant upon the first charge in the information, I think, resulted mainly from the charge of the court as to the effect of the proclamation of pardon and amnesty issued by the president on the 25th day of December, 1868.

The court charged the jury, substantially, that if the cotton in controversy had been sold or given, purchased or acquired, with the intent that the same should be used in aid-

[1] [Reversed in Case No. 15,958.]

ing, abetting or promoting the insurrection in the spring of 1865, or if the owners consented that the same might be so used; that the proclamation aforesaid, of the 25th of December, 1868, had the effect to remove the guilt of the party thus selling or giving the cotton to be used, and also the guilt of the owner consenting to such use, and thereby relieved the property itself from being a lawful subject of prize, and capture under and by virtue of the said act of August 6, 1861. The second charge in the information —to wit, that the cotton had been purchased in a state or district in insurrection, and was being thence transported into some one of the loyal states, in violation of the act of July 13, 1861—was decided in favor of the claimant, mainly, I think, upon the charge of the court to the effect, substantially, as follows: That the act last mentioned, commonly termed the "Non-Intercourse Act," prohibited all commercial intercourse between the inhabitants of the states or parts of states declared in insurrection and the rest of the United States, and such commercial intercourse should be unlawful as long "as such condition of hostility should continue." That the act, by its own limitation, would cease to be operative whenever the insurrectionary forces threw down their arms, surrendered to the authority of the United States, and their hostile demonstrations had ceased.

It was contended on behalf of the government that the court could not judicially know that hostilities had ceased unless that fact had been brought to its attention by plea or motion, and not until the president had issued his proclamation so declaring. But the court being of the opinion that, inasmuch as no formal declaration was necessary in a domestic war, the courts would take judicial cognizance of the fact that war existed, so likewise when the war was ended and peace restored would the courts take judicial cognizance of the fact that it was ended. It could hardly be supposed that this court should affect ignorance of a great fact in the history of the country, which was known to every man, woman and child throughout the length and breadth of the land, and keep its eyes closed until they should be opened by the formality of a plea and the proclamation of the president. The court accordingly instructed the jury that the Rebel forces on the west side of the Mississippi river, being the last to do so, having surrendered to the authority of the United States on the 24th or 25th of May, 1865, if they should believe from the evidence that the cotton in controversy was not shipped from within the Rebel lines until after that time, that then the "Non-Intercourse Act," as it is called, had ceased by its own limitation to be operative, and the cotton was not forfeited under said act by coming from an insurrectionary state or district into a loyal state or part of a state not declared in insurrection.

There were other points in the instructions given to the jury, such as permits claimed to have been issued by the secretary of the treasury and Mr. President Lincoln, which may have had some weight with the jury, but as those stated doubtless mainly influenced the decision of the case in favor of the claimant of the cotton, I deem it needless at this time to recur to any other questions of law stated in the charge of the court.

[This cause was carried, on writ of error, to the circuit court, where the decree of this court was reversed, and a venire de novo awarded. Case No. 15,958.]

Case No. 15,958.

UNITED STATES v. ONE THOUSAND FIVE HUNDRED BALES OF COTTON.

[15 Int. Rev. Rec. 137; 4 Chi. Leg. News, 245; 1 Am. Law Rec. 93; 6 Am. Law Rev. 766.] [1]

Circuit Court, W. D. Tennessee. May, 1872.[2]

JUDICIAL NOTICE—MATTERS OF HISTORY—DATE OF MILITARY SURRENDER—CESSATION OF HOSTILITIES—SALE TO THE CONFEDERACY UNDER COMPULSION—LAWS OF CONFEDERACY—COERCION.

1. Courts will take judicial cognizance of the public history of the country, and in the modes of its ascertainment it is treated like a question of law, and investigated in the same manner in its own proper sources; thus public documents and histories are to be consulted.

2. Without deciding whether the court below should have taken judicial cognizance of the precise date when the surrender of the rebel general Kirby Smith occurred, or whether, when such accuracy becomes material, the proofs which the parties desire to present must be submitted to a jury, this is certainly clear that if the court assumes the duty of its determination it must decide it correctly; and it is as much an error for a court to mistake an historical fact of which it has taken cognizance as to mistake a principle of law. Thus the charge to the jury that the rebel general Kirby Smith surrendered on the 24th of May, 1865, was error. The common histories of the country, the Annual Encyclopedia, and repeated judgments of the courts show it to have taken place on the 26th of May, 1865.

3. It was conceded by the court below that if the cotton in question—which had been laden on the steamboat on the Red and other rivers in that portion of the state of Louisiana, then proclaimed to be in insurrection, and which was in the actual military occupation of the rebel military forces, commanded by General Kirby Smith—had started upon said steamboat, before the actual surrender of General Smith, for transportation to Memphis, Tenn., which was within the lines of federal military occupation, then the same would be forfeited under section 5, Act July 13, 1861 [12 Stat. 257], and amendatory acts prohibiting commercial intercourse between citizens of states in insurrection and citizens of the rest of the United States. Thus, upon the theory of the learned judge himself, said cotton was forfeited, because it had started on its transit before said surrender, it having left on May 25, and said surrender taking place on the 26th of May, 1865.

4. The legal consequence deduced from the erroneous assumption as to the time of the sur-

[1] [6 Am. Law Rev. 766, and 4 Chi. Leg. News, 245, contain only partial reports.]

[2] [Reversing Case No. 15,957.]

render of General Kirby Smith, that trade and intercourse became lawful between Louisiana and Tennessee and hostilities ceased upon the said surrender was no better grounded in the law than was the fact itself in the history of the country. The proclamation of the president, or other political recognition of the return of peace, was necessary to work such a consequence. The conditions of war and peace, the political status of governments and people in our system, are purely of political, and not judicial determination. The entire legislative history and public action of the country in reference to the late Rebellion conclusively show that such has been the theory upon which our courts and the government have proceeded in its suppression, and dealing with its consequences. The supreme court of the United States in repeated and literally applicable judgments have so decided, and thus have set the matter wholly at rest.

5. It was error to suppose that the cessation of hostilities was synonymous with the surrender of organized armies, and that peace meant the disbanding of military forces, instead of a full return of the masses of the people to loyalty and good citizenship.

6. Where cotton had been sold to the Confederate government upon the understanding that it should sell and divide the proceeds, no forfeiture of such cotton will be incurred under section 1, Act Aug. 6, 1861 [12 Stat. 319], to confiscate property used for insurrectionary purposes, where it appears that the owners of the same were compelled by force or bodily fear to make such sales; but the mere existence of a law prescribed by an insurrectionary government in itself is insufficient to justify those who owe allegiance to a lawful sovereignty. And therefore the charge to the jury that a mere law without more was an excuse for obeying it was erroneous.

7. The Confederate government could make no law. Its prescriptions imposed no obligations, political or moral, and the only justification for obedience which the citizen could make to his rightful sovereign was deadly coercion by violence or threats.

[Error to the circuit court of the United States for the Western district of Tennessee.]

[The information in this cause charged—First, that the cotton had been sold or given with the intent of aiding in the insurrection; and second, that the cotton had been purchased in and was being transported from, a state in insurrection, to a loyal state, thus forfeiting the cotton to the United States, according to act of congress of July 13, 1861 (12 Stat. 255). Verdict was rendered in favor of claimants (Case No. 15,957), and this writ of error was brought.]

H. E. Hudson, U. S. Dist. Atty.

Haynes & Stockton, Henry Croft and Thomas R. Smith, for defendants in error.

EMMONS, Circuit Judge. This was a writ of error to reverse the judgment in the district court. The forfeiture was claimed upon two grounds. That the cotton had been voluntarily sold and delivered to the Confederate government in aid of the rebellion—and that it had been unlawfully removed from a district within the rebel lines to one within the lines of federal occupation. The writ of error brings up a written record of very voluminous character. We cannot but presume that it in some degree fails to represent the actual history of the trial. Nothing is more common than for a written record, by omissions overlooked by court and counsel when it is made up, to misrepresent most substantially the real judgment of the court. The decision here must necessarily be upon the bill of exceptions as it is, but our respect for the learned judge who tried this cause—our knowledge of his other judgments and rulings, so clearly evincive of opinions at war with some of those contained in this record—induce the belief that there must be a failure in some degree to reproduce the trial just as it occurred. The cause was argued many months since, and the court entertained no doubt whatever that manifest errors appeared. Upon inquiry of counsel, they were at the moment unable to find in the record the exceptions which were necessary to bring them here for consideration. The character of the charge and rulings were immaterial unless they were excepted to by the party aggrieved. The cause stood over for counsel to prepare their briefs, referring to the record for the facts material to the judgment, and especially to the exceptions—if any there were. The government's counsel aver they have long been ready, but from courtesy the counsel of the defendant in error, who were not so, the cause although several times referred to from the bench, was not again called to our attention until a few days since. A full, satisfactory and learned written argument is now before us for the plaintiff in error. The exceptions are ample to bring in review the faults complained of in the charge.

A single fault renders reversal as necessary as though there were many. As the cause will stand for a new trial in the circuit court, no opinion will be expressed upon questions not necessary for the decision, although they may be involved in a rehearing of the cause. There are, too, quite a number of points discussed and decided adversely to our opinions, which will, in all probability, not again arise in another trial.

A single question will be considered, and upon its answer alone the reversal of the judgment will rest. Did his honor the district judge correctly lay down the law in the following portion of his charge? It was made in disregard of a carefully drawn request to give contrary instructions. After remarking that the courts without any congressional resolution or law, or presidential proclamation, or other governmental action, must take judicial notice, without proofs, that civil war existed, he said:

"If the court will take judicial cognizance of the existence of the war, then they ought also to take cognizance of the fact of peace being restored. Will the court not take cognizance of the proof that Kirby Smith's surrender took place on the 24th of May, 1865? The war was then over. There were then no

organized bodies of men arrayed against the government. Prisoners were paroled and sent to their homes. Everybody knew this, and will it be said that this court will close its eyes to the fact and not know it until told so by the president?

"The jury having returned into court asked 'if the opinion of his honor as to the time when hostilities ceased, was binding upon the jury?' His honor replied that it was—that hostilities ceased on the 24th or 25th of May, 1865, and that fact he took judicial notice of. A juror then said, 'Your honor did not charge us in relation to the count in the information in regard to gold and foreign bills of exchange.' His honor stated that there was no proof to show that gold was used to pay for the cargo of the Decatur, and that he did not consider it necessary to charge in regard to that count, as the cessation of hostilities covered the case, and virtually repealed those laws."

We do not consider the erroneous assumption here that there was no proof of a fact which was largely contested before the jury. It is noticed only to say it is not impliedly sanctioned. This charge embodies several substantial errors. The court will take judicial cognizance of the public history of the country. It is treated, in its modes of ascertainment, like a question of law, to be investigated in the same manner, in its own proper sources. Public documents and histories are to be consulted without deciding whether the court should have taken judicial cognizance of the precise date when the surrender occurred, or whether, when such accuracy becomes material, the documentary, historical, and other proof which parties chose to present must not be submitted to a jury, it is of course clear that if the judge assumes the duty of its determination, he must decide it correctly. It is as much an error for the court to mistake an historical fact of which it has taken cognizance, as to mistake a principle of law. That his honor was in error when he told the jury that General Kirby Smith surrendered on the 24th of May, 1865, is now conceded. It is unnecessary to refer to the original documentary proof which demonstrates his mistake. The common histories of the country and repeated judgments in the books show it. The Annual Encyclopædia for 1865, p. 84, states it to be upon May 26. Phillips v. Hatch [Case No. 11,094] states it the same date. There is no difference of opinion anywhere. This was a turning point in the case below. The vessel left upon the 25th. It was conceded by his honor that if the surrender had not been until the 26th, so that within his own theories hostilities continued until that time, the cotton was forfeited to the government because it started on its transit before. The legal consequence which the learned judge deduced from this fact, thus erroneously assumed as taking place on the 24th, was no better grounded in the law than was the fact itself in the history of the country. Both were alike untrue. Trade and intercourse did not become lawful between Louisiana and Tennessee, and hostilities did not cease, upon the surrender of General Smith. The proclamation of the president, or other political recognition of the return of peace, was necessary to work such a consequence.

It has not been seriously argued that this part of the charge is law. The conditions of war and peace, the political status of governments and people, is in our system one purely of political and not judicial determination. If there were, as there is not, any doubt of this necessary rule of general law, the entire legislative history and public action of the country in reference to the late rebellion conclusively shows such has been the theory upon which our courts and the government have proceeded in its suppression and in dealing with its consequences. In reference to a subject where repeated and literally applicable judgments of the supreme court of the United States set the matter wholly at rest, it could not "be useful or even in good taste to go behind them for reasons to justify what they so plainly say." In U. S. v. Anderson, 9 Wall. [76 U. S.] 56, the statute limited prosecutions in the court of claims to two years after the suppression of the rebellion. It was held that the limitation did not begin to run, and that the rebellion was not in a legal sense suppressed until the final proclamation of the president, August 20, 1866. The argument of the court shows most clearly that we must rely upon the action of the political department as the criterion in this class of cases. At page 70 it is said, "In a domestic war, like the late one, some proclamation or legislation would seem to be required to inform those whose private rights were to be affected by it of the time when it terminated." We do not understand by this that as matter of law necessarily in all cases that legislation or proclamations are indispensable to terminate the legal condition of public political hostility. Nor do we in this judgment suggest even that such is the law. In reference to the point in judgment, it was natural for the court to say, especially where such definite action had in fact been had, that "it would seem to be required." Nothing more is meant, I apprehend, than that it was required by good government, in order to remove uncertainty in reference to private action. The government has thus far carefully pursued this manifest policy. It has from time to time declared the cessation of hostilities and the return of peace, and restored intercourse and trade, as state after state assumed the condition which, in the governmental judgment, rendered safe and politic such action. But if, on the contrary, without legislation or proclamations of any kind, it had suffered all these interests to assume their old channels, the courts would look to and accept this acquiescence as an implied recognition of a changed political status, as fully as though

it were testified in more direct modes and more fixed forms. The principle is alike in both cases. The courts would in all instances await the public action, in none anticipating the decision of the government. Before any such question can arise, time must elapse, public sufferance must be unquestioned, and such a condition exist as manifests an undoubted public consent to the new peaceful relations. No such situation existed here, and the ruling had no reference to such a principle. In Mrs. Alexander's Cotton, 2 Wall. [69 U. S.] 404, at page 419, in deciding that Mrs. Alexander's cotton was subject to seizure, because she resided in the enemy's country after taking the oath under the amnesty proclamation, Chief Justice Chase says that the belligerent relation having once been recognized by the political power, that "all the people of each state or district in insurrection must be regarded as enemies until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed." In Levy v. Stewart, 11 Wall. [78 U. S.] 244, deciding that the statutes of limitation were suspended during the Civil War, the court rely upon the legislation of congress and the proclamations of the president, as fixing the period when it commenced and closed. Stewart v. Kahn, 11 Wall. [78 U. S.] 493. The act of 1864, providing that a period during which a defendant could not be served with process should be deducted from statutes of limitations being under consideration, Justice Swayne, speaking of the duration of this condition in a legal sense and the effect of the several presidential proclamations, at page 506 says, "The decision of all such questions rests wholly in the discretion of those in whom the substantial powers involved are confided by the constitution." Speaking of the continuance of hostilities, and the power of suppressing them, at page 507, he adds: "In the latter case the power is not limited to victories in the field and the dispersion of insurgent forces. It carries with it inherently the right to guard against the renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act (that of restraining the effect of the statutes of limitations) falls within the latter category." The whole judgment is a clear assertion of the federal political right to regulate the conditions of peace, and the duty of the courts to accept, when they are constitutional, the action of the government as entirely conclusive. U. S. v. One Hundred and Twenty-Nine Packages [Case No. 15,941]: In violation of the act of July 13, 1861, goods were laden on board a vessel in Missouri with the intention of transporting them to Memphis before the proclamation of the president declared the cessation of hostilities. Memphis at that time was in the occupation of the federal forces. It was held that the goods were forfeited for violation of the statute. Judge Treat announces that this is a political question and says, "The absurdity of any other rule is manifest. The state of the country as to peace or war is legally determined by the political and not the judiciary department. The same power which determines the existence of war or insurrection must also decide when hostilities shall cease." He cites the following cases as sustaining principles from which this doctrine is deduced: [Gelston v. Hoyt] 3 Wheat. [16 U. S.] 246; [U. S. v. Palmer] Id. 610; [The Divina Pastora] 4 Wheat. [17 U. S.] 52; [The Neustra Senora De La Caridad] Id. 497; [The Santissima Trinidad] 7 Wheat. [20 U. S.] 283; [Martin v. Mott] 12 Wheat. [25 U. S.] 19; [Rose v. Himely] 4 Cranch [8 U. S.] 241; [Foster v. Neilson] 2 Pet. [27 U. S.] 253; [Garcia v. Lee] 12 Pet. [37 U. S.] 511; [McElmoyle v. Cohen] 13 Pet. [38 U. S.] 315; [Luther v. Borden] 7 How. [48 U. S.] 1; [Kennett v. Chambers] 14 How. [55 U. S.] 46; [Christy v. Scott] Id. 283. All these judgments, save those in 12 Wheat. and 7 How., relate to the recognition by political power of foreign governments, or the belligerent status of revolted foreign provinces. It is not perceived that the doctrines they lay down are not directly applicable, as they have in fact been applied by the same court to cases of domestic violence. In 12 Wheat., it was said the statute devolved upon the president the political duty of determining when armed force should be called out to put down insurrection in the states. It was for him to decide when the exigency occurred. The courts had no concern with it. In 7 How., it was said, whether this rebel government of Dorr, or that under the old constitution of Rhode Island was in force, was one wholly for the government to decide. In an action of trespass, the courts, it was said, could hear no testimony whatsoever upon such a point. What the government recognized, the courts must conclusively deed the lawful power. Chief Justice Taney, in this case, fully illustrates the incompatibility of such a power in the courts with the conditions and consequences of the inquiry. If one jury should upon evidence decide that the government was supreme, another might decide differently. The court's judgments must be enforced by the political power, and its decision that it did not exist would be nugatory, and it was of necessity that it confined its decisions to the meaning and force of laws made by, and not the determination of the lawfulness of the government itself. Whether there was any necessity of the exercise of the power of the president to call out the militia, it said the court could not determine. His decision was final. The court could not call witnesses to prove which party represented a majority of the people. If the judicial power were thus extended, he said, the guaranty in the constitution of a republican form of government was a guaranty of anarchy, not of order. Equally incongruous results would follow if courts, instead of the government, were to de-

cide when hostilities are ended, and when trade and intercourse should be resumed. In a case under the same act (U. S. v. One Hundred Bbls. Cement [Case No. 15,945]), the same judge (Treat), after saying that a condition of hostilities is to be determined by the political department, adds, "that the status must remain in a legal sense until the same authority decides it to be at an end. Such is the true interpretation of the statute and proclamations." Phillips v. Hatch [Id. 11,094]: 1871 A note was made in Texas, after the surrender of Kirby Smith on the 26th of May, 1865, but before the proclamation of the president in August of that year, declaring that hostilities had ceased. In deciding that the note was void, because made between belligerents, Dillon, J., says: "From the nature of the question, from the fair implication of the act of July 13, 1861 (the one here in question), from the confusion which would ensue from any other rule, it is the opinion of the court that the Rebellion must be considered as in existence until the president declared it at an end in the proclamation of August 20, 1865." Judge Dillon adds an instructive review on the statutes, proclamations, and judgments in full justification of his ruling. In a note to Brown v. Hiatt [Case No. 2,011], it is said that Judges Dillon and Caldwell decided that the Rebellion in Arkansas did not end until the proclamation of the president so declaring.

These unquestioned doctrines have not been extemporized for the modern and exceptional exigencies of the late Rebellion. They belong to the jurisprudence of all countries, and were adopted as part of that of our own from its earliest history. Our most conservative judges—Marshall, Story, and Taney—have been foremost in announcing them. No citizen would challenge the justness and the necessity of this rule. Judges have their peculiar duties, which, if faithfully and learnedly studied, have little tendency to make them familiar with current and rapidly changing conditions, upon which depend the important political questions of whether it is safe to relax on the instant military rule and restore intercourse and trade. In possible exigencies it may be true, as the learned judge said, that we know when peace is restored "without being told by the president." But all will concede that the safe depositary for this power is with a president and cabinet, and the congress, all of whom being specifically charged with the duty, constantly engage in ascertaining the facts upon which the policy of political action depends, and in full official communication with all the best sources of information, must necessarily be better informed in reference to situations, and better qualified to determine when peaceful relations should be reinstated with public enemies than a single judge. The mistake of his honor consisted in supposing that the cessation of hostilities was synonymous with the surrender of organized armies; that peace meant the disbanding of military forces, instead of a full return of the masses of the people to loyalty and good citizenship. If armies disband only to disseminate their violence in private force or individual wrongs, governmental military rule may be necessarily continued, or restored after its discontinuance. The history of the country has shown that, in political opinion, this has been often necessary, and, whatever the judiciary may think, as citizens, of the policy of its exercise, the fact of its existence and duration must even be accepted by it as inexorably as it accepts any other political condition. The only resort for a tribunal, in any case, is that sad one, of which we have had too much experience, when violence renders impossible the longer recognition of the sovereignty which created it.

For the purpose of this reversal it is necessary to look further into the record. There is one other portion of the charge, however, which we desire briefly to notice. It appeared that the cotton had been sold to the Confederate government upon the understanding that it should sell and divide the proceeds. In order to produce a forfeiture it must appear that the owners of the property were not compelled, by force or bodily fear, to make the sale. In reference to this subject, the district judge said: "If this property was the property of the Confederate States authorities by any law, or was received by the agents of these Confederate States authorities acting under any military order requiring the citizens to furnish it as a tax or exaction, that should not be considered a voluntary act on the part of the original owners of the property, and would not subject it to seizure. The war was a civil war, as declared by the United States government, and the Confederates were accorded their rights, and treated as belligerents, and therefore they had the right to make rules and laws for the government of all within their lines. They had the right to levy taxes and perform other functions. The military commanders had the same rights as other military commanders under the government with which they were at war. They had the right to make exactions to carry on the war. They had the right to raise taxes, and to have the citizens comply, and give up their property on such terms as levied or ordered by the government." It is not for the purpose of saying that the accident of a pretended government, and laws, and officials, may not in any circumstances affect the question of the citizens' intent. There may be such wholesome fear of force and injury as to induce acquiescence in unlawful demands, without its actual infliction. This is fully conceded. These facts may not be without their force upon retrial to show the absence of a voluntary sale by the owners of this cotton. But that the mere existence of a law prescribed by an insurrectionary government is sufficient to bind the conscience or justify the ac-

tion of those who owe allegiance to a lawful sovereignty is a doctrine finding no warrant in the history of any government in the world. U. S. v. Keehler, 9 Wall. [76 U. S.] 83. The defendant was postmaster before the war, and gave bond as such. In virtue of a Confederate statute he paid over to a mail contractor, whom the federal government owed for services, the money in his hands. It was held this pretended law was no justification for such payment. At page 86, Justice Miller, for the court, says: "It certainly cannot be admitted for a moment that a statute of the Confederate States, or the order of its postmaster-general, could have any effect in making the payment to Clemmens valid. The whole Confederate power must be regarded as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an act of its congress, or an order of one of its departments, any right or property of the United States. Whatever weight may be given under some circumstances to its acts of force on the ground of irresistible power, or whatever effect may be allowed in proper cases to the legislatures of the states while in insurrection, we propose to decide only when they arise. The acts of the Confederate congress can have no force as law in divesting or transferring rights, or as authority for any act opposed to the just authority of the federal government." The act now before the court was a sale in order to aid the overthrow and promote the destruction of that government. It being further urged in Keehler's Case that the Confederate government had ample military forces at the place where the defendant resided to compel obedience to its laws, and it did so enforce it like other governments, this position is answered as follows at page 87: "It will be observed that this statement falls far short of showing the application of any physical force to compel the defendant to pay the money to Clemmens. Nor is it in the least inconsistent with the fact that he might have been desirous and willing to make the payment. It shows no effort or endeavor to secure the funds in his hands to the government to which he owed both the money and his allegiance. Nor does it prove that he would have suffered any inconvenience, or been punished by the Confederate authorities, if he had refused to pay the draft of the insurrectionary post-office department upon him. We cannot see that it makes out any such loss of money by inevitable overpowering force, as could even on the mere principle of bailment discharge a bailer. We cannot concede that a man who, as a citizen, owes allegiance to the United States, and as an officer of its government holds its money or property, is at liberty to turn over the latter to an insurrectionary government, which only demands it by ordinances and drafts drawn on the bailer, but which exercises no force or threat of personal violence to himself or property in the enforcement of its illegal orders." Hickman v. Jones, 9 Wall. [76 U. S.] 197. During the Rebellion the plaintiff in this action was arrested and tried for treason against the Confederate government. He now brought suit against the members of the court and all the officers in any way connected with the arrest and trial. The supreme court held that every act of the defendants was to be treated as if they were ordinary trespassers—that the Confederate constitution, government, and laws afforded no warrant whatever for their action. On page 200 Justice Swayne, for the court, said, "The rebellion out of which the war grew was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the state to which it belonged. The proportions and duration of the struggle did not affect its character, nor was there a rebel government de facto in such a sense as to give any legal efficacy to its acts. It was not recognized by the national nor by any foreign government. It was not at any time in possession of the capital of the nation. It did not for a moment displace the rightful government. The government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary states. The union of the states for all the purposes of the constitution is as perfect and indissoluble as the union of the integral parts of the states themselves, and nothing but revolutionary violence can in either case destroy the ties which hold the parts together. For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. But the recognition did not extend to the pretended government of the Confederacy. The intercourse was confined to its military authorities. In no instance was there intercourse otherwise than of this character. The Rebellion was simply an armed resistance to the rightful authority of the sovereign. Such was its character in its rise, progress, and downfall. The act of the Confederate congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted." It is unnecessary to quote from the numerous other judgments in the supreme and circuit courts, expressly and impliedly sustaining this undoubted position. This subject has been referred to only because an elaborate charge, so wholly disregarding them, had been delivered to a jury in an important and exciting case; it was thought a duty to reproduce a few of the many concurring judgments which so fully demonstrated the error of the learned district judge. The case of

Smith v. Brazelton, decided by the supreme court of Tennessee [1 Heisk. 44], is supposed by counsel to assert a contrary doctrine. We do not stop to reconsider that case. It was before us in Riddle v. Pillow [unreported]. We then said the question was one depending upon the constitution and laws of the United States, and in reference to which the rulings in the federal courts were mandatory; and, although we very confidently disapproved what we deemed its manifest errors in according to the Confederate government equally belligerent rights, we took pains to say no judgment was passed upon the peculiar facts in contest in that case; we said "hostilities existed and armies were on the march; the general commanding took what he did to warm and shelter his soldiers;" and, without deciding whether physical necessity, and to prevent suffering and want would constitute, in any possible case, a justification for the forcible appropriation of property, we denied then, as we do now, that it would derive the slightest additional support from the immaterial accident that the claim to do so was predicated upon any pretended authority derived from a rebel government. In reference to a question about which there is not a conflict in tribunals whose judgment we have any right to regard, it is unnecessary to follow the frequent repetitions which have applied it in so many different exigencies. All, without exception, say the Confederate government could make no law. Its prescriptions imposed no obligations, political or moral, and the only justification for obedience which the citizen could make to his rightful sovereign was deadly coercion by violence or threats. No such proof appears upon this record. The charge which informed a jury that a mere law, without more, was an excuse for obeying it, was erroneous.

The judgment is reversed, and a venire de novo will issue, returnable to this court.

Case No. 15,959.

UNITED STATES v. ONE THOUSAND FOUR HUNDRED AND SIX BOXES OF SUGAR.[1]

District Court, S. D. New York. Feb. 25, 1862.

CUSTOMS DUTIES—CLASSIFICATION OF SUGARS.

This was an action brought to forfeit the sugar for alleged violation of the revenue laws. The sugar was shipped in Havana, by Sama Sotolongo & Co., consigned to L. Van Horn & Co., by the ship Kerelan, and arrived here December 23, 1861. In the invoice all the sugars, except 14 boxes, were described as Quebrado sugars. The 14 boxes were described as Cucuruchos. Van Horn & Co., the claimant, entered all the sugars, using this invoice; and in the entry they described all the sugars as raw sugars, and paid duty thereon, at the rate of two cents a pound. By the then existing tariff, of August 5, 1861, § 1 [12 Stat. 292], a duty was imposed "on raw sugar, commonly called 'Muscovado' or brown sugars, and on sugar not advanced above No. 12, Dutch standard, by clarifying or other processes, and not yet refined, 2½ cts. a lb." The sugars were examined at the custom house, and on examination, it was reported to the collector, that all of them, except the fourteen boxes, were advanced by boiling, clarifying, or other processes, above No. 12 Dutch standard. The sugars were accordingly seized, and the information in this case filed against them, under the 67th sections of the act of 1799 [1 Stat. 677], and the 4th section of the act of 1830 [4 Stat. 410]. The counts under the act of 1799 alleged the forfeiture of the goods, by reason of false description in the entry, and the counts under the act of 1830 alleged that the invoice was made up, with the intent to evade the payment of duties by calling the sugar "Quebrado" sugar, when it was not such.

The testimony for the government, given mainly by sugar refiners, tended to show that there were four lots of the sugars, and that three of them, amounting to about 1,100 boxes, were partially refined, and belonged to the three highest of the four grades into which sugars are distinguished. That the term "Quebrado," is applied to sugars between the grades of No. 10 and Nos. 12 & 14, Dutch standard, and that all these sugars were above No. 12, except the 14 boxes. It also appeared that these sugars were made by what is known as the "De Rosue" process, by which the sugar is clarified, as it is made from the cane, and that the mode was similar to that of refining sugars here. Merchants were called to testify for the claimants, and their testimony tended to show that in Cuba, as well as in New York, all sugars were known as "raw" sugars, except sugars manufactured from sugar, and that no sugars, known in commerce as "refined" sugars were ever imported from Cuba; and that the term "Quebrado" applied to all grades of sugar from No. 10 to No. 20, Dutch standard, and that none of these sugars were above No. 20.

Webster & Craig, for the United States.
Mr. Evarts, for claimants.

The jury (BETTS, District Judge) brought in a sealed verdict for the claimants, releasing the goods.

[1] [Not previously reported.]

Case No. 15,960.

UNITED STATES v. ONE THOUSAND FOUR HUNDRED AND TWELVE GALLONS OF DISTILLED SPIRITS.

[10 Blatchf. 428; [1] 17 Int. Rev. Rec. 86.]

Circuit Court, S. D. New York. Feb. 24, 1873.

INTERNAL REVENUE LAWS — FORFEITURES — CONSTRUCTION OF STATUTES.

1. The provision of the 96th section of the internal revenue act of July 20, 1868 (15 Stat. 164), "that, if any distiller, rectifier, wholesale liquor dealer, compounder of liquors, or manufacturer of tobacco or cigars, shall knowingly and wilfully omit, neglect or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act, for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of $1,000, and, if the person so offending be a distiller, rectifier, wholesale liquor dealer, or compounder of liquors, all distilled spirits or liquors owned by him, or in which he has any interest, as owner, * * * shall be forfeited to the United States," does not authorize such forfeiture of spirits or liquors to be imposed for a violation of the 45th section of the same act, for the reason that a specific penalty or punishment is imposed by the 45th section for a violation of the 45th section.

2. A statute which is of doubtful or double meaning, should not be construed in its harshest possible sense, when persons to whom it applies may have been led to trust in a less severe construction of it, but one equally satisfying its terms.

3. Apart from the consideration last stated, the construction of the act, above stated, is deemed the most natural and to best conform to the intention of congress and the design of the act.

Thomas Simons, Asst. U. S. Dist. Atty.
Harland & Rollins, for claimant.

WOODRUFF, Circuit Judge. The information herein alleges a violation of section 45 of the internal revenue act of July 20, 1868 (15 Stat. 143), and claims, that, for such violation, the spirits in question became forfeited to the United States, under and by force of the 96th section of the same act (Id. 164). Section 45 requires rectifiers, wholesale liquor dealers, and compounders of liquors, to keep certain books, make certain prescribed entries therein, and keep such books open for inspection, with other special requirements designed to enable the revenue officers to learn various particulars, in order to prevent frauds upon the revenue; and, for refusal, neglect, or violation of its provisions, the section declares, that the rectifier, wholesale dealer, or compounder, shall pay a penalty of one hundred dollars, and, on conviction, shall be fined not less than one hundred dollars nor more than five thousand dollars, and be imprisoned not less than three months nor more than three years.

From the passage of the internal revenue law of 1862 down, the legislation of congress manifestly looked to distilled spirits and distillers, and to tobacco and its manufacturers, for a considerable revenue; and the provisions of the several enactments to provide internal revenue were very stringent in their requirements tending to secure the payment of the taxes imposed. The law was amended, from time to time, as experience showed to be necessary, to prevent frauds and evasions of the tax. Fines, penalties, and punishment by imprisonment were annexed to various sections of the law, and new provisions, as well as amendments, were devised, to the same end. In 1868, the law, so far as related to distillers and distilled spirits, and to tobacco and tobacco manufacturers, was revised, and the act of that year prescribed the duties of distillers, rectifiers, compounders of liquors, and tobacco manufacturers, with great particularity, and, as to a large extent was true of previous laws, annexed to most of the sections both prohibitory and prescriptive penalties, fines, forfeitures, or punishment by imprisonment, as the consequence of a violation of its commands, apparently measuring the severity of the infliction by the estimate the legislature had of the magnitude of the evil contemplated in the several sections; and yet, some few sections were left without any specific prescribed penalty for their violation. The former laws, however, relating to the same subjects, were not, in terms, repealed, but only so far as the act of 1868 was inconsistent therewith. In some sections, a pecuniary penalty alone was prescribed; in others, a fine; in others, a fine and imprisonment; in others, forfeiture of property, such as forfeiture of the spirits seized, or forfeiture of the tools and instruments, also; while, in two sections (22 and 44), relating to distillers, rectifiers, &c., for a violation thereof, the forfeiture was, not only of all distilled spirits owned by them, wherever found, but, also, the stills and apparatus, and all personal property found in the distillery, store or other place of business, or in the building or enclosure, and all the right, title and interest of the party in the lot of ground, &c. After a very full specification of such cases and particulars as the experience of years had shown to be necessary, the 96th section further provided as follows: "And be it further enacted, that, if any distiller, rectifier, wholesale liquor dealer, compounder of liquors, or manufacturer of tobacco or cigars, shall knowingly and wilfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act, for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and, if the person so offending be a distiller, rectifier,

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

wholesale liquor dealer, or compounder of liquors, all distilled spirits or liquors owned by him, or in which he has any interest, as owner, and, if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States." This would seem to be a section added to the other provisions, in order to fully cover the subject, and to punish all violators of the law, whether by knowing and wilful omission, or by actual transgression, not in terms required to be knowing or wilful.

The demurrer in this case is urged on the ground, that this 96th section does not apply to a violation of the 45th section above recited, because there is a specific penalty prescribed in the 45th section itself, namely, a penalty of $100, a fine of not less than $100 nor more than $5,000, and imprisonment for not less than three months nor more than three years. The question depends solely upon the true construction of the 96th section; and that construction alone has been discussed by the counsel for the government and the counsel for the claimant.

On behalf of the government, it is insisted, that former acts had prescribed forfeiture of all the spirits, in general terms, for any violation of their requirements; that this section is a modified re-enactment of such general provisions; that this section was intended to provide, and does provide, a specific penalty of one thousand dollars, for all knowing and wilful omissions, and all active violations, for which no specific penalty or punishment was imposed by any other section, but the residue of the section applies to all persons who knowingly and wilfully omit, neglect or refuse compliance with the act, or do anything by the act prohibited, whether specific penalties or punishment have, in other sections, been imposed or not; that, in short, it was a part of the intent and purpose of this section (whatever punishments had in other sections been provided) that whoever, of the persons named, should knowingly and wilfully omit, neglect or refuse to do, or cause to be done, anything whatever required by law in the business of distilling, &c., and whoever should do anything by the act prohibited, should forfeit all distilled spirits and liquors owned by him, or in which he has any interest, as owner.

On behalf of the claimant, it is insisted that the sole object of this 96th section was to provide for cases not otherwise fully provided for, by imposing a penalty, and declaring a forfeiture, if, and only when, no specific penalty or punishment was imposed by any other section. Who is "the person so offending," or, rather, what is the meaning of "so offending?" It was argued by counsel, and it seems quite clear, that, if this be determined, it decides the controversy. The person "so offending" forfeits his spirits to the United States. Is he one, and every one, who is guilty of the knowing and wilful omission, neglect and refusal, or who does the thing prohibited by the act; or is he one, and only one, who is guilty of a knowing and wilful omission, neglect or refusal to do what is required, or does something which is prohibited, for which no specific penalty or punishment is imposed by any other section of the act? It cannot, I think, be denied, that either construction would satisfy the words used in the section; and the question is one upon which intelligent and fair minds, studying the section with single purpose to ascertain its just meaning, may differ. Such a difference has arisen in the district courts. Quantity of Distilled Spirits [Case No. 11,495]; U. S. v. One Rectifying Establishment [Id. 15,952]; U. S. v. Thirty-Seven Barrels of Apple Brandy [Id. 16,466]; U. S. v. One Hundred and Thirty-Three Casks of Distilled Spirits; [Id. 15,940]; U. S. v. Ninety-Five Barrels of Distilled Spirits [Id. 15,889]; U. S. v. Four Thousand Eight Hundred Gallons of Spirits [Id. 15,153]; U. S. v. Thirty-Four Barrels of Distilled Spirits [Id. 16,461]. I concur with those who hold that the forfeiture here declared applies only to cases for which no specific penalty or punishment is imposed by other sections. The 96th section clearly admits of that interpretation. The fact that intelligent and fair minds have been in doubt, and have differed on the subject, and an examination of the section itself, both concur to show, that, at most, the construction claimed by the government, though it be possible, is doubtful. In construing a severe statute, declaring a heavy forfeiture, (and, according to one construction claimed, for small offences,) it is just to say, that those who are called upon to conduct their business affairs in view of all its provisions, ought to be fairly apprised of its requirements, and of its penalties, of whatever kind. They are bound to know the law, but lawmakers owe to them the duty to make the law intelligible; and those whose business it is to construe or expound a law which is of doubtful or double meaning, should not incline to the harshest possible meaning, when it is obvious that those to whom it is to be applied may well have been led to trust in another which is less severe, but equally satisfying its terms. This is not saying that laws of the kind in question are to be strictly construed in favor of the subject and against the state, but, only, that they should be construed with reasonable fairness to the citizen.

But, independent of this consideration, I am of opinion, that the most natural construction of the language of the section is that which confines its operation to cases for which no penalty or punishment is imposed by other sections; that the person "so offending" is one who has offended under the conditions previously stated; and that the immediate connection between the penalty and the forfeiture, expressed by the conjunction "and," expresses and shows an intent to express an addition to the penalty, wherever

the penalty of one thousand dollars has been incurred, and nothing more. Had the section declared, that the person first described as omitting, neglecting, or refusing compliance with the law, or doing what is prohibited, should, if no specific penalty or punishment was elsewhere imposed, pay a penalty of one thousand dollars, and that all distilled spirits or liquors owned by him should be forfeited, it would be entirely plain, that the forfeiture could only apply to cases not otherwise specifically provided for, that is, to persons who incurred the penalty of one thousand dollars. Obviously, I think, it would have so read, had the section embraced, in its description of offenders, only distillers, rectifiers and compounders of liquors; but, manufacturers of tobacco were included in the description of the offenders. It was necessary that such forfeitures should be distributively declared, so as to forfeit tobacco in the case of the tobacco manufacturers, and spirits and liquors in the case of distillers, &c. Hence, the terms of distribution employed when the forfeiture was added to the penalty.

I am aware, that it is of little use to multiply words, in discussing the meaning of the language of the section. It is possible to say much in support of either view, if attention be confined to the mere phraseology. The section may be paraphrased, its form changed, its parts transposed, and either meaning made more apparent. For example, if the word "also" had followed "and"—"and, also, if the person so offending be a distiller, &c., all distilled spirits, &c., shall be forfeited, &c."—the meaning would have been plain; and yet, the word "and" alone may properly be deemed to have that precise import. But, without too rigid attention to mere word criticism, the meaning must be declared according to the impression left upon an intelligent mind, after bringing into view the subject matter, the previous provisions of the act, the design of the statute, and the whole language of the section itself. My own conviction conforms to that insisted upon by the claimant in this case.

Without attaching too great importance to the argument, that congress will not be presumed to intend to accumulate penalties or forfeitures, upon penalties, forfeitures and punishments previously annexed to specific acts or defaults, graduated as the latter are by the importance or gravity of the several specified offences, the construction insisted on by the claimant gains much support in the fact, that there are two previous sections which impose forfeiture, not only of the spirits owned by the offender, wherever it may be, but, of the tools, implements and all personal property found on the premises, and the lot of land, also (sections 22 and 44). Now, to suppose that congress, by the 96th section, meant to declare, that those who violated the law in any particular should, notwithstanding the specific penalty or forfeiture previously declared in any other section, forfeit, also, all spirits owned by them, is to impute to them little less than an absurdity. In the sections referred to, forfeiture of all spirits, and much more than that, was already imposed. It is not to be supposed, that, by the 96th section, those previously declared forfeitures were made less. Besides, the argument, that the 96th section spreads forfeiture of all spirits, &c., over the whole act, including those two prior sections, and some others containing similar forfeitures, involves incongruity between parts of the statute, and would raise the question of law, whether the 96th section did not operate as a quasi repeal, or revocation, of the prior forfeitures specifically declared.

Without prolonging discussion upon the question, I must hold, that the forfeiture of spirits declared by the 96th section does not apply to cases or offences described in other sections, wherein a specific penalty or punishment therefor is imposed for the offence. The demurrer is, therefore, sustained.

Case No. 15,960a.

UNITED STATES v. ONE THOUSAND SEVEN HUNDRED AND FIFTY-SIX SHARES.

[Betts' Pr. Cas.]

District Court, S. D. New York. Nov. 12, 1863.

WAR — ALIEN ENEMIES — INHABITANT OF REBELLIOUS STATE—INABILITY TO SUE.

[The rebellion and open hostility of Alabama against the United States from 1861 to 1865 rendered every inhabitant of that state an alien enemy, incapable, during such hostilities, of appearing in a United States court as a claimant of property libeled therein.]

[Libel of information by the United States to condemn 1,756 shares of the capital stock of the Great Western Railroad Company of Illinois. Heard on motion by the United States to strike the answer, claim, and appearance interposed on behalf of Leroy M. Wiley, on the ground that said claimant was at the time of the making of the motion, and ever since the breaking out of the Rebellion had been, residing in Alabama.]

E. Delafield Smith, U S. Dist. Atty.

Bowdoin, Larocques & Barlow, for Leroy M. Wiley.

BETTS, District Judge. The court assumes, upon the face of the pleadings presented in this suit, that an actual and earnest contestation in law is contemplated between the parties seeking to be heard, respecting the real ownership and disposition of the considerable property involved in the pending action. Aside of the interests sought to be guarded or enforced, in respect to Leroy M. Wiley, individually, the Great Western Railroad Company of 1859 have also intervened, by their agent, and put in an answer and claim, in opposition to the libel of information filed by the United

States, setting up a legal authority or interest in themselves to the property prosecuted, which claim, if properly made, is entitled to be heard and adjudged upon, according to the principles of law and justice; but it cannot be permitted that a party, without having a lawful standing in court, shall intercept or intermeddle with the orderly action of the law in its due processes, if he be destitute of a capacity to act as a suitor before the court. The present motion proceeds upon that doctrine. The gist of the application of the libellants is that Leroy M. Wiley has no personal standing in a court of the United States, in respect to claims, property, interests, or trusts of any description, in suit or prosecution before that court, he being an alien enemy of the United States, and thus disqualified from being a volunteer party in respect to civil suits before those tribunals, resting upon contracts or legal liabilities; unless, perhaps, ransom bills, or bills of exchange for personal subsistence, drawn by prisoners of war, and held by alien enemies (1 Kent. Comm. 68, passim; 2 Wildm. Int. Law, 274, 275), may be exceptions. No such privilege attends the demand of the claimant in this instance. Wiley, by intervening and attempting to enforce a supposed title or lien in respect to the railroad shares and dividends, would become a party actor in the suit, equally as if prominent in its inception. This, in a judicial sense, is the legal relation of both parties to the suit in actions in rem, as each side acts affirmatively in carrying on the processes and remedies imparted to them respectively by the action, and seeks positive adjudication in his favor in the disposal of effects and interests within the jurisdiction of the court.

The answer and claim interposed and placed on file in this suit declares upon its face that the claimant, "Leroy M. Wiley, is of Eufaula, in the state of Alabama," and that fact is also asserted and attested to in the test oath accompanying the claim when filed. The court must take judicial notice that Alabama is an insurrectionary state, having been, at the commencement of this suit, and yet continuing, in a condition of rebellion and actual hostility against the United States. That condition constitutes all the inhabitants of that state alien enemies of this country. This is indisputably so on the principles of international law, in regard to residents in countries foreign to each other. 3 Phillim. Int. Law, c. 6, § 82; Halleck, Int. Law, c. 29, § 6; 1 Kent, Comm. 76. In Jecker v. Montgomery, 18 How. [59 U. S.] 112, the supreme court say: "In a state of war between two nations, declared by the authority in whom the municipal constitution vests the power of making war, the two nations, and all their citizens or subjects, are enemies to each other." Still more emphatically and pertinently, in respect to the existing Rebellion in this country, the same court declares that the residents of the several states in war with the United States are enemies to this country, to the same effect as if citizens or subjects of a foreign nation. Cranshaw v. U. S. [unreported], decided March, 1863.

It is unimportant to determine on this motion whether the right of Wiley in the subject-matter of the suit before the court is determined definitely by the subsisting state of hostilities between the place of his residence and the United States, or only suspended during such war; this decision goes no further than to rule that he is disqualified and inhibited from becoming a party to the pending action. I do not in this decision discuss the regularity of practice pursued in making appearance and answer for Wiley. I consider him effectively barred by law of all powers to intervene in court. The application of the libellants is therefore granted, and it is ordered that the answer and claim interposed in this suit on behalf of Leroy M. Wiley has been irregularly and improperly admitted on file in the cause, and that the same be stricken therefrom.

[NOTE. A motion by the United States to strike out an answer filed in behalf of the Great Western Railroad Company was subsequently granted (Case No. 15,960b), and a decree was thereafter given for libellants. On appeal this was reversed by the circuit court, and the libel dismissed. Id. 15,961.]

Case No. 15,960b.

UNITED STATES v. ONE THOUSAND SEVEN HUNDRED AND FIFTY-SIX SHARES.

[Betts' Pr. Cas.]

District Court, S. D. New York. Feb. 24, 1864.

WAR — ALIEN ENEMY — CONDEMNATION OF PROPERTY—OWNERSHIP—PARTIES.

[Upon a libel of information by the United States to condemn property of an alien enemy consisting of certain railway shares, the railway company cannot become a party without showing, as provided by admiralty rule 12, that it is the true and bona fide owner, and that no other person is the owner of the property in dispute.]

[Libel of information by the United States to condemn 1,756 shares of the capital stock of the Great Western Railroad Company of Illinois. A motion by the United States to strike out the answer, claim, and appearance interposed in behalf of Leroy M. Wiley was granted. U. S. v. One Thousand Seven Hundred and Fifty-Six Shares, Case No. 15,960a. Heard on motion by the United States to strike out the answer and claim interposed in behalf of the Great Western Railroad Company.]

The District Attorney, for the United States.

Mr. Lord, for the Great Western Railroad Company.

BETTS, District Judge. The information demanding the forfeiture of the effects prose-

cuted in rem in this suit was filed August 25, 1863. Process of attachment and monition in due form of law was issued to the marshal, under the seal of the court, the same day, against the property named in the information, returnable in court the 15th of September thereafter. On that day it was returned by the marshal, with a certificate endorsed thereon, officially, that he had, on the 25th day of August, 1863, attached the above described 1,756 shares of stock, and given due notice to all persons claiming the same, &c.

It is unnecessary to detail the intermediate steps taken by parties attempting to intervene and make defenses in the suit, or all the past proceedings before the court, in respect to the same. It is sufficient to say, that in November term, 1863, the court, on motion of the United States attorney, and after hearing the respective parties, ordered the answer and claim interposed in the case, in defence of the suit in favor and support of the alleged ownership or interest of Leroy M. Wiley in the stocks and property seized in the suit, to be stricken or withdrawn from the case, because he was a resident in one of the Confederate States, and an enemy of the United States, and as such incapacitated to maintain an action, or become a party litigant in his own right, in a civil cause of action in a court of the United States, during such disability. October 17, 1863, an answer and claim were put on file in the cause in the name of the "Great Western Railroad Company of 1859, intervening for the benefit of themselves, and as trustees of such other persons as may be entitled to 1,756 shares of the capital stock of the said company, and to $53,000, or thereabouts, alleged to be due, owing, and unpaid upon certain coupons or certificates of indebtedness and promises to pay, belonging to, and alleged to be cut off and detached from certain bonds of the said corporation." [The suit was discontinued as to everything but the stock, and dividends thereon.] Under the representation of title or right vested in themselves, that corporation attempts to claim a legal right to intervene and contest the subject-matter involved in the suit initiated in this information, and defend the suit, as against (1) the act of forfeiture charged therein; (2) the jurisdiction of the court in the case; (3) the liability of the property seized for any culpability of Wiley, the party charged. On the 14th of November thereafter, the United States attorney obtained an order from the court, for four days' further time, to file exceptions to the above claim and answer, but such proceedings seem to have been taken by mutual understanding between the respective counsel, that ultimate action was not perfected by the submission to the court of their differences in regard to the pleadings for consideration, until the 16th of February, 1864.

The points for determination on the merits accordingly now are, whether the railroad company has perfected a lawful appearance in the cause upon any rights of their own, in relation to the subject in litigation, or whether there is on the evidence any lawful right of representation in the suit, with Leroy M. Wiley individually, or independent of his personal appearance, through the instrumentality of the railroad company or its agents.

I perceive no reason for reviewing the ground taken in the previous appearances in defence of Wiley himself, under this same prosecution, that he has no standing in court as a volunteer party. The rule seems to be unequivocally determined both in the English and American practice, that an alien enemy is incapable of maintaining a suit while he retains that character. Story, Eq. Pl. § 51. As an enemy in rebellion or insurrection in open hostility against his own country, he is stamped with all the disabilities of an alien. Jecker v. Montgomery, 18 How. [59 U. S.] 112; The Prize Cases, 2 Black [67 U. S.] 635. I think the fair import of the intervention of the railroad company, although nominally in a corporate form, is virtually based upon no other interests than those resting personally in Wiley, and consequently cannot be sustained in an American judicatory. Palpably it is only because he cannot vindicate an individual interest in this property by force of law, that an impalpable interest is surmised and put forward as possessing vitality enough to retain for his benefit, directly or circuitously, through the assumption of equities resting in his agents or creditors, the property which would, under the laws of his just allegiance, be doomed to the expiation of his crimes against his country. That property is returned in court as under actual seizure by the marshal on the process issued against it. Its situs was at the time accordingly within the jurisdiction of the court, whether placed in charge of a foreign or alien, natural or political person. If technically there might be ordinarily impediments to carrying on suits for private debts or claims against property held out of the regular scope and action of the machinery of the law, that consideration cannot avail against confiscation statutes, which remove all limitations and restrictions of the government in that respect, and authorize the arrest of the inculpated property and its forfeiture wherever it may be found, or however it may be represented. Act July 17, 1862 (12 Stat. 591, § 7). The statute places the captured property, subject to all the liabilities if arrested here, in the actual keeping of a remote corporation, as if it was within the authority and vaults of a bank or railroad corporation of the city of New York.

Independently of these general principles which subject the effects of traitors to confiscation by means of summary actions ap-

pointed by statutory provisions free of the common law formalities, the parties attempting to intervene in this suit and litigate the rights of the government in prosecution, do not qualify themselves to intermeddle in the matter. The 26th rule in admiralty of the supreme court requires every person, in order to be received as a defendant, entitled to controvert the right to property of any kind seized in rem by another, "to verify his own claim on oath, stating that the claimant, by whom or on whose behalf the claim is made, is the true and bona fide owner, and that no other person is the owner thereof." No such proof is affixed to the claim in this instance; nothing beyond a hypothetical and equivocal intervention is furnished at all, and that is by a person having no personal interest in the matter, and not being a legal representative of the corporation attempting to appear, and who is supposed to apprehend it may incur a contingent liability in respect to the effects seized. No adequate evidence is therefore before the court, authorizing the railroad to appear in this cause to resist its progress, or question the full right of the informants to press the same to a legal decision. The case of Brown v. U. S., 8 Cranch [12 U. S.] 110, cited by the claimant's counsel, fortifies the principle of this decision. The seizure of the property was there adjudged illegal, because there was no authority of law justifying its condemnation, whilst this proceeding is sanctioned by express statute. Acts Aug. 6, 1861 [12 Stat. 319], July 17, 1862 [12 Stat. 591]. The motion on the part of the United States attorney to strike the claim and answer from the files of the court in this suit is granted.

[Thereafter a decree was rendered for libellants, but was reversed, and the libel dismissed by the circuit court in Case No. 15,961.]

Case No. 15,961.

UNITED STATES v. ONE THOUSAND SEVEN HUNDRED AND FIFTY-SIX SHARES OF CAPITAL STOCK.

[5 Blatchf. 231.] [1]

Circuit Court, S. D. New York. May 29, 1865.

CONFISCATION—CIVIL WAR—PROPERTY EMPLOYED IN AID OF REBELLION — INFORMER'S SHARE — JURISDICTION — SEIZURES ON LAND — INTERNATIONAL LAW—PRACTICE—PARTIES.

1. Under the act of August 6, 1861 (12 Stat. 319), a forfeiture of property is provided for only in case the property is employed, with the knowledge or consent of its owner, in aid of insurrection.

2. By that act, one-half of the proceeds of a forfeiture under that act goes to the informer.

3. The whole of the proceeds of a forfeiture under the act of July 17, 1862 (12 Stat. 589), goes to the United States.

4. A district court of the United States in New York cannot acquire jurisdiction in rem, to declare a forfeiture, under those acts, of shares in the capital stock of an Illinois corporation.

5. The seizure of enemy property, by the United States, as prize of war, on land, jure belli, is not authorized by the law of nations, and can be upheld only by an act of congress.

[Cited in U. S. v. Stevenson, Case No. 16,396.]

6. Under the said acts of August 6, 1861, and July 17, 1862, the proceedings to condemn enemy property, when seized, must conform to the proceedings in admiralty and revenue cases.

[Cited in U. S. v. Stevenson, Case No. 16,396.]

7. An alien enemy has, under those acts, a right to appear as claimant of his property sought to be condemned, as forfeited, by a prosecution in rem under those acts, and to answer and defend the suit.

[Cited in De Jarnett v. De Giverville, 56 Mo. 445.]

[Appeal from the district court of the United States for the Southern district of New York.]

This was a libel of information, filed in the district court, by the United States, against 1,756 shares of the capital stock of the Great Western Railroad Company of Illinois, a corporation created under the laws of the state of Illinois, praying its condemnation, as having been the property of one Leroy M. Wiley, and as being forfeited to the United States. The district court decreed in favor of the libellants. The decree ordered the stock to be sold, and the proceeds, after the payment of a private debt of Wiley's, and of the costs of the suit, to be paid, one-half to the United States and the other half to the informer mentioned in the libel. Wiley and the company, who appeared and put in claims and answers, appealed to this court.

William M. Evarts and Charles Donohue, for the United States.

Daniel Lord and Jeremiah Larocque, for claimants.

NELSON, Circuit Justice. The libel in this case is founded upon two acts of congress, one passed on the 6th of August, 1861 (12 Stat. 319), and the other passed on the 17th of July, 1862 (Id. 589).

The 1st section of the act of August 6, 1861, declares, that if any person or persons, &c., shall purchase or acquire, sell or give, any property of whatsoever kind or description, with the intent to use or employ the same, or suffer the same to be used or employed, in aiding or abetting such insurrection or resistance to the laws, or any person or persons engaged therein, or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same, as aforesaid, all such property is declared to be lawful subject of prize and capture, wherever found, &c. The 2d section declares, that such prizes and capture shall be condemned in the district or circuit court of

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

the United States, &c., or, in admiralty, in any district in which the same may be seized, or into which they may be taken and proceedings first instituted. The 3d section provides, that the attorney-general, or any district attorney of the United States, may institute the proceedings of condemnation, and, in such case, wholly for the benefit of the United States, or, any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts.

The 6th section of the act of July 17, 1862, declares, that if any person, &c., being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, &c., all the estate and property, moneys, stocks, and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the president to seize and use them as aforesaid, or the proceeds thereof. The 7th section declares, that proceedings in rem shall be instituted in the name of the United States, in any district court thereof, &c., within which the property or any part thereof may be found, or into which the same, if movable, may first be brought, which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases; and, if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property, and become the property of the United States, and may be disposed of as the court shall decree, and the proceeds thereof paid into the treasury of the United States.

Leroy M. Wiley appeared by his proctors, and put in a claim to the stock in question, and also his answer to the libel of information, which were afterwards stricken, by order of the court, from the files. [Case No. 15,960a.] The Great Western Railroad Company also appeared by its proctors, and filed a claim and answer, which also were subsequently stricken from the files, by like order. [Id. 15,960b.] Afterwards, a decree of default was entered against the parties claimants. Proofs were then taken, ex parte, of the facts charged in the libel of information, and a decree of condemnation of the stock was entered, directing a sale of it by the marshal, and that the proceeds, after the payment of the costs and charges, be distributed to the United States and the informer in equal parts. The claim and answer of Wiley were stricken from the files, as appears from the papers and the opinion of the court, upon the ground that it was shown that he was a resident of the state of Alabama, a state declared to be in insurrection against the United States, and hence an alien enemy, and that he had no persona standi in court. The claim and the answer of the railroad company were stricken out, upon the ground, substantially, that they had intervened for the benefit of Wiley, a stockholder in the company.

It will be observed, that the principle or ground of proceeding, with a view to the condemnation and forfeiture of the property under the two acts of congress, is different. The first act places the forfeiture upon the fact of the use or employment of the property in aiding, abetting or promoting the insurrection or resistance to the laws. All such property is declared to be lawful prize, and liable to confiscation. The real issue under that act is, whether or not the property seized has been so used or employed with the knowledge and consent of the owner. The owner may or may not be an alien enemy; and, even if he be an alien enemy, his property is not the subject of a proceeding under the act, unless it can be shown to have been used or employed for the purpose mentioned. This particular use or employment lies at the foundation of the forfeiture. Now, the property sought to be confiscated in the present proceedings, is stock in an incorporated company, in the state of Illinois. Its situs is in that state; and there is great difficulty in perceiving how such an interest or species of property is capable of being used or employed in contravention of the provisions of the statute. But, waiving this, although the court required proof of the fact of the use or employment of the stock in aiding or abetting the insurrection, within the meaning of the act of congress, before condemnation, we find no evidence whatever in the record on the subject; and yet the forfeiture is declared under the act of August 6, 1861, as one moiety of the proceeds is directed to be paid to the informer. Under the act of July 17, 1862, the whole of the proceeds go to the government. This decree must have been an oversight, as all the proofs on the record apply exclusively to the offence charged in the latter act. There is some confusion of ideas in the libel of information, which, probably, misled the court in the decree; for, while the libel embraces both acts of congress, which, as we have seen, are different in principle and ground of proceeding, it concludes by praying that the proceeds, after condemnation and sale of the stock, be distributed to the government and the informer in equal parts; and the decree is in conformity with the prayer. The libel of information and the decree are under the act of August 6, 1861, while the proofs are all under the act of July 17, 1862.

Besides the irregularities in the proceedings, already stated, it is quite clear that the court below never acquired jurisdiction of the res, by any lawful seizure of the stock in question. The property consisted of an interest in the capital stock and dividends of an incorporated company in the state of Illinois, and which, as respects the legal proceedings in the Southern district of New York, is, in judgment of law, to be regarded as a foreign corporation, as much so as a corporation in London. The process of the court could not reach it. The situs of the property was beyond this district, and out of the jurisdiction of the court. It appears that the company had an

agent in the city of New York, in charge of a transfer book of their stock, and who was simply authorized to receive and enter transfers of stock; and the seizure attempted and sought to be maintained was made through this agent. The act of August 6, 1861, provides, that the prizes and captures shall be condemned in the district or circuit court of the United States in any district in which the same may be seized, or into which they may be taken, and the proceedings be first instituted. By the act of July 17, 1862, proceedings in rem may be instituted in any district court within which the property may be found, or into which the same, if movable, may first be brought. Now this stock of the Illinois corporation belonging to Wiley, and which is the subject of condemnation by the decree of the court, could be seized only in the district in which the corporation is situated. It could neither be seized in this district nor be brought into it. Nor could it be seized or condemned without instituting proceedings against the corporation, the stock of which is sought to be condemned. It may be that a suit might be instituted against the owner in personam, and such proceedings be had as would lead to condemnation and forfeiture. But, in the absence of the owner, and in a proceeding in rem against the stock itself, which is the present case, the seizure and condemnation could take place only in the district in which the corporation is situated.

We come now to what I regard as the most important question in the case, and that is, whether or not the court below was right in striking from the files the claim and answer of Wiley, and in entering his default, on the ground that he was an alien enemy, and could have no standing in court. The act of July 17, 1862, provides, "that, to secure the condemnation and sale of any such property, after the same shall have been seized, &c., proceedings in rem shall be instituted, in the name of the United States, in any district court, &c., which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases; and, if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or, who has given aid or comfort thereto, the same shall be condemned as enemies' property, and become the property of the United States," &c. The act of August 6, 1861, speaks of the seizures, as prizes and captures to be condemned either in the circuit court. or in admiralty, in the district court. These acts provide for the seizure of enemies' property, as prize of war, on land, jure belli, which, according to the case of Brown v. U. S., 8 Cranch [12 U. S.] 110, is not authorized by the law of nations, and can be upheld only by an act of congress; in other words, by the municipal law of the nation seeking to enforce the forfeiture. The law of nations authorizes captures, as prize of war, on the high seas—these acts of congress, on the land; and, in the latter case, the acts expressly provide that the proceedings shall conform to the proceedings in admiralty and revenue cases, and that, if the property is found to belong to a person engaged in the rebellion, it shall be condemned as enemies' property. These acts of congress are but an extension of the rule which, according to international law, has always been applied, jure belli, to enemies' property at sea. Now, the principle that an alien enemy has no standing in court, and cannot appear and defend his property seized as prize of war on the high seas, does not appear to have ever been applied to a claimant in the admiralty. On the contrary, the books are full of cases in which the very question involved was the national character of the claimant—whether he was a neutral or an enemy. I need refer to only a few of them: The Indian Chief, 3 C. Rob. Adm. 12; La Virginie, 5 C. Rob. Adm. 98; The Fama, Id. 106; The Boedes Lust, Id. 234; The President, Id. 277; The Gerasimo, 11 Moore, P. C. 88; The Baltica, Id. 141. In many of the prize cases growing out of the recent Rebellion, the main point involved turned upon the fact whether or not the claimant was a neutral, or a loyal citizen, or an enemy. Indeed, at the very last term of the supreme court, these questions were before it and were fully discussed and decided. All of these cases are applicable to and control the question in the present case. The two proceedings—the one a capture on the high seas, the other a capture on land—are analogous, not merely in their nature and purpose, but are made so by the acts of congress.

I have not deemed it necessary to discuss the question raised, whether or not the claimant can be regarded as an alien enemy, he having been a citizen of the United States at the breaking out of the war, and being still a resident of one of the states, inasmuch as, according to the cases already referred to, even if he be an alien enemy, he is entitled to appear as a claimant, and contest the allegations in the libel.

Several other questions of great interest and importance have been discussed in the course of the argument, going to the merits; but, as the views already expressed dispose of the case, I forbear to notice them.

The decree of the court below must be reversed, and the libel of information be dismissed.

Case No. 15,962.

UNITED STATES v. ONE THOUSAND THREE HUNDRED AND EIGHTY-TWO HOGSHEADS OF SUGAR.

[New York Times, March 23, 1862.]

District Court, S. D. New York. March 22, 1862.

CUSTOMS LAWS—SEIZURE FOR UNDERVALUATION—AMOUNT OF BOND.

[In bonding merchandise seized by the collector for alleged undervaluation, the amount of the bond should equal the appraised value of the goods, and the collector cannot require a bond covering the appraised value plus the amount of the duties.]

Sidney Webster, for claimants.

Ethan Allen, Asst. U. S. Dist. Atty.

Before BETTS, District Judge.

The collector lately seized 1,382 hogsheads of sugar, claimed by F. Luling & Co., on the ground that they were undervalued. The appraised value of the goods was $28,000. The duties on the same were $15,000. The collector of the port instructed the district attorney in bonding the goods to demand a bond for $43,000, covering both the duties and the appraised value. To this the claimant demurred, and came before the court for its order in the premises. The attorney for the claimants contended the government could demand a bond for $28,000 only, that being the appraised value; that upon withdrawing the goods under the bond, the claimants were bound in any event to pay $15,000 duties, and that if this $15,000 should also be included in the bond, and the bond should be forfeited, that then the $15,000 would be necessarily paid by the claimants the second time, which would be unjust. Upon hearing argument on the other side, the judge said "that this matter had been decided before." He had previously given his decision that the government could claim for only the appraised value, and directed the entry of the following order:

"On motion of Sidney Webster, Esq., for the claimants, for bonding the merchandise in this suit, and upon hearing said proctor in support of said motion, and upon hearing Ethan Allen, Esq., assistant United States district attorney, in opposition thereto, it is hereby ordered that the merchandise in question be bonded at their appraised value, exclusive of the duties; and if the parties do not agree as to the appraised value, that an appraiser or appraisers will be appointed by this court to determine the value thereof."

The goods were bonded for $28,000, accordingly.

Case No. 15,963.

UNITED STATES v. ONE THOUSAND THREE HUNDRED AND EIGHTY-TWO HOGSHEADS OF SUGAR.

[Cited in Four Cases Silk Ribbons, Case No. 4,986. An opinion was delivered by SMALLEY, District Judge, but it has never been reported, and is not now accessible.]

Case No. 15,964.

UNITED STATES v. ONE THOUSAND THREE HUNDRED AND SIXTY-THREE BAGS OF MERCHANDISE.

[2 Spr. 85;[1] 25 Law Rep. 600.]

District Court, D. Massachusetts. Aug., 1863.

NEW TRIAL — CUSTOMS LAWS — EXAMINATION OF GOODS.

1. Grounds upon which a court of common law may grant a new trial.

2. It seems that the proper construction of the act of 1799, c. 22, § 67 (1 Stat. 677), requires that each package shall be examined by a custom-house officer in the presence of two merchants, and that, to constitute such presence, the merchants must be in such a situation as to be able to witness such examination, and to see and testify to a part at least of the contents of each package.

R. H. Dana, Jr., U. S. Dist. Atty., and T. K. Lothrop, Asst. U. S. Dist. Atty.

C. L. Woodbury, for claimants.

SPRAGUE, District Judge. In this case there has been a verdict for the United States, and the claimants of the property move for a new trial.

The question how far the power of the court extends in granting new trials has been elaborately discussed by the counsel for the United States.

It is admitted that if the verdict rests on wrong instructions, or if, with correct instructions, it rests on a mistake or disregard of the law by the jury, or if it is the result of bias, or mistake of facts,—in short, if the verdict is not the result of the judgment of the jury on the facts in evidence with a correct application of the law,—the court may order a new trial; but it is contended that if the result is a verdict of the jury, in the sense of law,—that is, a result of the judgment of the jury upon a correct application of the law,—the verdict must stand; and it is urged that to grant a new trial for other reasons is to infringe upon the constitutional right of trial by jury.

It is to be remembered that a new trial does not remove the cause from the jury to the court, but from one jury to another. The question is not which tribunal, the court or the jury, shall decide the case, but how far a verdict of one jury is conclusive against a motion for a re-trial before another jury.

The idea that the constitution renders a first verdict sacred, so as to interfere with the allowance of a second trial, is of recent origin. Formerly, in Massachusetts, the losing party could have a second trial as of right by merely claiming an appeal. If the second verdict was the same as the first, it was conclusive unless the court, in its discretion, should see fit to set it aside. If the result of the second trial was different from that of the first, the losing party had a right, by a process of review, to have another trial. The losing party in this third

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

trial, having had two verdicts against him, was concluded thereby, unless the court should grant him a new trial. By this system it was not thought safe to rely upon the finding of a single jury. A party could claim a re-trial as matter of right until two verdicts had gone against him, and even then the court had the power to grant another trial if in their discretion they should deem it proper. This system commenced at an early period, and was in operation for a long time. It continued for some years after Maine became a separate state. I had there some agency in bringing about a change.

The first step was to take away the right of a third trial, that is, the process of review. Those in favor of this change did not contend that the constitutional right to trial by jury was infringed or impaired by allowing a second and third trial. That idea was never suggested. Their arguments rested wholly upon expediency. It was insisted that such protracted litigation was unnecessary, and created great expense, vexation, and danger of perjury. No one contended that a single verdict ought to be conclusive. On the contrary, the advocates for the abrogation of the old system urged that the known power of the court to grant new trials would be a sufficient safeguard against erroneous and improper verdicts, and that it should be left to an impartial tribunal to determine whether justice required a re-investigation, rather than to the will of a biased, perhaps heated and vindictive party.

The constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial. The question really is, what is the extent of the superintending power? The court was undoubtedly authorized to exercise a supervision over verdicts, and to sustain them or set them aside. This power was given for the furtherance of justice. But the law did not specify the cases in which verdicts should be set aside and new trials granted. That was left to the judgment of the court. It rested wholly in the discretion of the judge to determine under what circumstances and for what causes a verdict should be set aside. And his decision was final, being subject to no revision by appeal or writ of error. Yet, as in other cases of discretion, it was not intended to be an arbitrary or capricious, but a judicial discretion, to be exercised for good reasons. But each judge must determine for himself the sufficiency of the reasons. He should indeed welcome all the light that could be thrown upon his path, and carefully examine the decisions of his predecessors, to see how far the practice of the courts has gone, and what rules or principles could be deduced therefrom. These rules could not indeed bind his own judgment; but, having been practically adopted by enlightened jurists, they would, to some extent, aid and influence the formation of his own opinions. Prior decisions were examined, not because they could make or authoritatively declare the law prescribing the circumstances under which a new trial should be granted, but as tending to show how a discretionary power could be most wisely exercised.

It appears, then, that at the time of the adoption of the constitution, it was a part of the system of trial by jury in civil causes that the court might, in its discretion, set aside a verdict. This power had for a long time been frequently and freely exercised without question; and if a judge does not go further in granting new trials than the known practice of the courts at the time of the adoption of the constitution he cannot be justly charged with encroaching upon the trial by jury. On the contrary, he may be said to uphold it, because each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the constitution was adopted. As to the practice in our own courts, we have no reports of decisions prior to the Revolution, but it is known that they were founded upon and followed those of the common-law courts in England. Mr. Dane, who was an eminent public man and a learned lawyer during the Revolution and at the time of the adoption of the constitution, lays it down without qualification in his great work on American Law, that the granting of new trials rests in the discretion of the court, and that it is a maxim that a new trial should be granted when justice requires it. He refers to some of the English decisions to show in what cases this power had been exercised. Those decisions are very numerous, and show that the court had little hesitation in granting a second trial where the result of the first had not been satisfactory. The mere certificate of the judge who tried the case that he was not satisfied with the verdict, was sometimes sufficient cause for setting it aside. I shall not attempt an enumeration of the English decisions, but refer to one which took place just previous to our Revolution, and which more than covers the case now before me. It is Norris v. Freeman, 3 Wils. 38, decided in 1769.

The question for the jury in that case was whether the signature to a release was genuine. There were two attesting witnesses, one of whom was called and testified to the signature, and said that the release was signed at the plaintiff's house. The same party called witnesses acquainted with the handwriting of the supposed signer who testified to their belief that it was genuine. The other side called witnesses who testi-

fied that the parties to the instrument were not, and could not have been, at the place of signature at the time of the date of the instrument. It did not, however, appear positively that the date was not inserted prior to the time of the alleged signing. They also called persons familiar with the handwriting, who testified against its genuineness. The other attesting witness was not called by the party relying upon the release, nor was any reason given for not calling him. The verdict established the release. It was set aside, not on the ground that it was unjustifiable on the evidence before the jury, but because the party setting up the release might have called the other attesting witness; and, in such a state of the evidence, there ought to be a new trial in order that the available direct testimony might be produced. Yet in that case the jury might and should have weighed the fact of the non-production of that witness as bearing against the party setting up the release.

In the case now before me, one question put in issue was whether the goods had been examined as prescribed in the 67th section of the statute of 1799, c. 22 [1 Stat. 677]. The government held the affirmative, and to maintain it called four witnesses, a custom-house officer and three merchants. The officer and one of the merchants testified in general terms that they all four went to the place where these bags were deposited, and there made an examination of them, but they did not describe the manner of that examination. The next merchant called went one step further and said that the bags were laid out in rows, and that the examination was made by passing along by the several rows. The other merchant, being the one last called, testified that there were twelve or thirteen rows of bags, and that he examined only a part of them. And thus the evidence was left without particular inquiry or description of the mode in which the examination was made. The fair inference to be drawn from this testimony was that there had been a division of labor, by each merchant taking a separate row, and examining the contents of every bag in that row; and thus every bag was examined by some one of the merchants, but not by two of them. This seemed to be the necessary conclusion from the testimony of the last two merchants, and entirely consistent with that of the other merchant and the officer, who both testified in general terms that all the bags were examined, without stating that any one of them was examined by two persons, or by the officer when any two of the merchants were in a situation to see any part of the contents thereof.

Upon recurring to the statute, I was of opinion that it required that each package should be examined by a custom-house officer in the presence of two merchants, and that, to constitute such presence, the merchants must be in such a situation as to be able to witness such examination, and to see and testify to a part at least of the contents of each package. In this view of the law, it seemed to me that the evidence of the examination was incomplete, and that a further statement as to the manner in which it was made was desirable. I thereupon stated my view of the requirements of the statute, and suggested to the counsel for the government that he might, if he saw fit, recall his witnesses to state fully the manner in which the examination of the packages was made But neither of them was recalled. In charging the jury, I laid down the law as to the construction of the statute, as I have above stated it, and endeavored to make them comprehend it. I recapitulated the evidence respecting the examination, but did not deem it necessary to make any remarks upon it.

The jury returned a verdict for the government. This was unexpected. It seemed to me that they must have misunderstood or disregarded either the law or the evidence. There was no conflict of testimony. All the evidence came from the four witnesses introduced by the government, the custom-house officer, and three merchants selected by him. No one of them had detailed the manner of the examination so as to make it clear that it was such as the statute required, while one of them, at least, had made a statement from which it was to be inferred that it was not. All doubts and difficulties might have been removed by recalling these witnesses or a part of them. They must have well known their own mode of proceeding. It was not known to the claimants, they not being present. I think that this case not only comes within the authorities already cited, and the practice of courts previous to and at the time of the adoption of the constitution, but within the most restricted exercise of the power of granting new trials which has ever been known in our courts.

The question whether the examination of this merchandise was such as the statute requires, must be submitted to another jury. Under the second plea, the jury have found that the contents of the packages differed from the entry. I do not think it necessary that this or the other matters embraced by the verdict should again be tried; and the new trial will be granted upon such conditions that the contestation before the jury shall be confined to the mode in which the examination of this merchandise was made, saving, however, to the claimants the benefit of all exceptions which were taken to the rulings and instructions of the court.

Case No. 15,965.

UNITED STATES v. ONE THOUSAND TWO HUNDRED AND NINETY-ONE BALES OF TOBACCO.

[2 Lowell, 107;[1] 14 Int. Rev. Rec. 172.]

District Court, D. Massachusetts. March, 1872.

CUSTOMS DUTIES—FORFEITURES—FORFEITABLE VALUE—RELEASE BOND.

1. An importer who, for illegality, has forfeited his goods to the United States, loses the whole value of the goods in the home market; this, whether the goods are seized before or after entry.

2. The forfeiture is the same whether the importer has given a warehousing bond, or has paid the duties, or has neglected to enter them.

3. When goods are seized in bond, the importer who wishes to have them released must stipulate for the value after the duties are paid, and not merely for their value in bond.

[This was an information containing several counts against 1,291 bales of tobacco seized while on storage in an United States bonded warehouse, and alleged to be forfeited to the government because entered by means of a false invoice, and other false and fraudulent practices and appliances, under section 1, act March 3, 1863, c. 76 (12 Stat. 737). Samuel A. Way appeared as claimant, and filed a petition that said goods might be delivered to him upon filing a bond for their appraised value, and that the appraisers might be ordered to appraise said goods at their value in the bonded warehouse, less the amount of duties payable thereon.][2]

F. W. Hurd, for the United States.

H. D. Hyde, for claimant.

LOWELL, District Judge. Imported goods having been seized in the bonded warehouse for an alleged violation of section 3 of the act of 3d March, 1863 (12 Stat. 738), the claimant applies to have them delivered to him in the warehouse, upon his filing a stipulation for value, and that the appraisers be instructed to estimate them at their market price, less the duties. The district attorney maintains that the value should be the full market price. The question has been decided differently by district judges of learning and ability, and this want of agreement will necessitate a new examination of the question. Judge Blatchford's opinion is in favor of the claimant's position. Four Cases of Silk Ribbons [Case No. 4,986]. Judges Hoffman and Cadwalader have required the bond to be for the full market value. U. S. v. Twelve Thousand Three Hundred and Forty-seven Bags of Sugar [Id. 16,555]; U. S. v. Segars [Id. 16,249].

Leaving out of view the question of a possible re-exportation of the goods, which I shall speak of later, it is very clear that an importer who has committed some fraud or illegality, by which his goods are forfeited to the United States, loses the full value of his goods at the home market, and not their value less the duties, which is a compromise between the home and the foreign value. This is admitted to be so if he has paid the duties; and he is not to be benefited by having smuggled them. The duties form part of the value here; and whether the goods are seized before or after entry, the importer is personally liable to pay the duties; and, to avoid circuity of action, section 89, Rev. St. 1799 (1 Stat. 696), requires, that, upon his giving a bond for value, he must also pay or secure the duties before receiving delivery of his goods. That section is scarcely more than declaratory of the common law; because the duties are a debt, and the government has a lien on the goods for it, and there would be an action for the amount, whichever way the suit was decided. It has, therefore, been the usual, as it is the proper, practice to appraise goods seized before entry, or before the duties are paid, at their full market value, and to require the duties to be paid besides. It is an entire fallacy to say that the importer is thus made to pay the duties twice; for they are a part of the original price, and he does not lose the goods and their price too. Take this case, where the duties are sixty per cent of the whole value. If the importer gives a stipulation for $40,000, as he asks leave to do, and then forfeits it and pays the duties, he will have lost $40,000, and not $100,000, nor $140,000; because he has received goods worth $100,000, and out of this he has paid his duties, and the forfeiture, which together are exactly that amount, and his loss is the original $40,000, which represents the prime cost abroad, and the freight and charges, but not the duties; and the government has received the duties, which it was entitled to in any event, and has then remitted an equivalent amount in favor of a fraudulent importer. The mode of appraisement which I uphold follows inevitably from the principle that the goods are subject to a duty for which the importer is personally liable, and are also subject to forfeiture if illegally imported.

No reason has been given, nor can I find any, why the importer's position should be different, if he has given a bond for the duties, from what it is if he has paid them, or neglected to enter them. Whenever they happen to be seized, his position is the same,—he must pay the duties, if he has not already done so; and if he has committed the fraud, he loses the goods, and, if not, he saves them, neither more nor less.

It is admitted that if the government holds these goods, and they are forfeited, the government will receive the full value, and collect the duties besides; but it is insisted that in that event the claimant will lose but $40,000, though the government will have gained $100,000. This is a mistake. It is impossible that the government should gain by the

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

[2] [From 14 Int. Rev. Rec. 172.]

forfeiture itself more than the claimant will lose by it, or that the claimant's loss, if he is able to pay his bond for the duties, will be any less than the value of the goods which he forfeits, or that the loss will vary, excepting so far as interest on his payments is concerned, whether the duties are paid before or after the suit is decided, or before or after seizure. The value of these goods in the warehouse, as the district attorney has well shown, is $100,000, and not $40,000. A purchaser at the latter price must give satisfactory indemnity against the importer's liability for the duties; and this is, in fact, a part of the price, whatever the form of the sale may be. Such a purchaser, if the goods were forfeited, would lose $100,000, if the importer could enforce his obligation to pay the duties; but if the fraud of the importer absolved the purchaser from this, then he would lose $40,000, and the importer would lose $60,000, which together make up the $100,000. Neither more nor less, in any event, and by whomsoever borne, will be lost by the forfeiture of these goods than their exact value, unless, indeed, they are now released on a stipulation for less than their value.

If it were true in fact that the value of these goods to the owner is less than their value to the government, it would by no means follow that he should have them by giving bond for the lesser value. It is never a question in judicial controversies of value to the one party or to the other, when there is a market price; but even granting that it were, yet the government, or any one else having possession of property, and being asked to give it up, must have an equivalent. It is nothing to the plaintiff that the defendant does not estimate the property at its full market value, or that it has not cost him so much: he is entitled to that value before he surrenders it; "melior conditio possidentis."

I have considered the case thus far as if the goods were intended for home consumption; and I apprehend that they must be bonded as if they were so intended, and this for several reasons. 1. Goods that are warehoused are in fact almost always so disposed of. 2. Goods really intended for re-exportation will not be fraudulently imported, unless in connection with some allied domestic fraud; because there is no motive to commit any fraud in that case. 3. If the rare and improbable case should happen of a fraud, real or suspected, in the importation of such goods, the rule still holds that the owner should give an equivalent for what he receives; and, theoretically, he loses nothing by the application of the rule, because he obtains goods for their exact value. Practically, he may be obliged to make a larger investment than he had intended. But we must have a general rule; and the only safe and reasonable rule is the market value here. [It is agreed by both parties that the goods should properly be delivered to the claimant in the bonded warehouse, and subject to the bond to pay the duties or re-export the goods, that bond being a sufficient security for the duties within section 89 of the act of 1799, c. 22 (1 Stat. 696), if that section applies to this case. It probably does not apply; but the common law reaches the same conclusion, and requires the claimant to become bound in court for the full home value of the goods, besides remaining bound to the government for the duties. The application to bond is granted, but the appraisers are to be instructed to ascertain the true cash value of the tobacco in the market.] [3]

Bond to be given for full value.

Case No. 15,966.

UNITED STATES v. ONE WATER CASK.

[10 Int. Rev. Rec. 93.]

District Court, D. Kentucky. Sept., 1869.

INTERNAL REVENUE LAWS—FORFEITURES—RECTIFIERS AND WHOLESALE DEALERS—BOOK ENTRIES.

1. Where a rectifier and wholesale liquor dealer, acting under section 26 of the revenue act of July 13, 1866 [14 Stat. 98], entered in the prescribed books certain spirits bought and received by him, and the names of the manufacturers or rectifiers thereof marked on the barrels, as the persons from whom purchased, instead of the names of the actual vendors—*held*, he had not complied with the requirements of the law in so doing, and had incurred the forfeiture denounced by said section, from which the court had no power to relieve.

2. The forfeiture denounced by said section applies only to the spirits, apparatus, and articles in the possession of the offender at the time of the act or neglect whereby forfeited, and not to such as he might thereafter acquire and be found in his possession.

BALLARD, District Judge. This is a proceeding for the condemnation of one water cask, thirty-four barrels of spirits and other articles, as forfeited to the United States. The information is founded on the 26th section of the internal revenue act of 1866 (14 Stat. 98), and contains three counts. The first count alleges in substance, that said water cask, spirits, &c., were, on the 5th of May, 1868, the day of the seizure, found in the possession of one W. L. Weller, who was then and there a rectifier, and as such purchased and received and sold and delivered a large quantity of spirits, and used said water cask and other apparatus, tools and implements, in rectifying spirits, but neglected and refused to enter daily in a book kept for that purpose, the number of proof gallons of spirits purchased and received, of whom purchased and received, and the number of proof gallons sold and delivered. The second count alleges that said Weller was a wholesale dealer in distilled spirits, and it also alleges the same acts of neglect set out in the first count. The third count alleges that said Weller was a rectifier and wholesale dealer, and then it proceeds substantially with the same allegations contained in the

[3] [From 14 Int. Rev. Rec. 172.]

first and second counts, except that it sets out with more particularity the form of book prescribed by the commissioner of internal revenue to be kept by rectifiers and wholesale dealers in spirits.

The whole of the property seized is claimed by W. L. Weller. In his answer claimant says he did keep the book, and did make all the entries therein required to be made as he understands the statutes and the regulations of the commissioner; that on the 17th of December, 1867, he purchased of one Sherman, 50 barrels, 2,251 gallons of spirits, that he entered said spirits in his books as purchased of Eastman & Warner, that the entry was made on the proper day, and was in every particular correct, unless the entry of the names of Eastman & Warner as the vendors, and not the name of Sherman, the actual vendor, was incorrect; that the names of Eastman & Warner were entered as the vendors because they were on the barrels as the manufacturers or rectifiers, and his habit was to copy into his book the brands on barrels purchased by him as a compliance with what he understood to be the requirements of the statute and the regulations of the commissioner, and as furnishing the best means of identifying and tracing the spirits so purchased. The answer further states that the claimant, on the 8th of January, 1868, purchased of one Begen, 50 barrels of whisky, containing 2,208½ gallons, which were entered as purchased of Eastman and Warner for the same reason assigned in respect to the entry of the 50 barrels purchased on the 17th December. The answer further states that on the 24th December, 1867, he purchased 50 bbls. of spirits, which through inadvertence entirely he failed altogether to enter in his books. To this answer the district attorney has demurred.

The 26th section of the statute above mentioned provides "that every rectifier or wholesale dealer in distilled spirits shall enter daily in a book or books kept for the purpose, under such rules and regulations as the commissioner of internal revenue may prescribe, the number of proof gallons of spirits purchased or received, of whom purchased or received, and the number of proof gallons sold or delivered, and every rectifier or wholesale dealer who shall neglect or refuse to keep such record, shall forfeit all the spirits in his possession, together with the apparatus, tools and implements used." As the claimant, by his own admission, failed to enter in his book of whom he purchased or received the spirits purchased and received on 17th December, 1867, and 8th January, 1868, respectively, and especially as he failed altogether to make any entry of the spirits purchased and received on the 24th December, 1867, it follows that he did not comply with the terms of the statute, and that the forfeiture denounced by it has been incurred, unless the court can relieve the parties from the consequence of inadvertent omissions. It is not, however, seriously insisted, that the court has any such power, and it is substantially conceded that a technical forfeiture has taken place, especially for failure to make the proper entries on the 24th of December. The demurrer must therefore be sustained.

After the demurrer was sustained as above indicated, the claimant filed an amended answer in which he alleges that at the several times mentioned in his original answer, he did not own nor have in his possession several of the articles seized; but that he subsequently acquired them. The amended answer then sets out in detail the articles so subsequently acquired, and it appears that they consist entirely of whisky and other distilled spirits, and in no part of "apparatus, tools or implements used." To this amended answer the district attorney has also demurred.

It will be seen that the amended answer does not purport to be an answer to the whole action. It purports to support the claim, not to the whole of the property alleged to be forfeited, but to a part of it. Now, if upon the facts set out in it, the articles enumerated are not forfeited to the United States, but belong to the claimant, the demurrer cannot be sustained. Thus, the interesting and important question is presented, whether the rectifier or wholesale dealer in distilled spirits, for a neglect or refusal to keep the record required to be kept by the 26th section of the act of July 13, 1866, forfeits all the spirits found in his possession at the time of the seizure, or only the spirits in his possession at the time the delinquency takes place. It will be observed that no question is made respecting the "apparatus, tools, and implements used." The only question raised, I repeat, respects "distilled spirits."

The general rule, under the internal revenue statutes and other statutes relating to revenue, unquestionably is, that whenever a forfeiture is denounced it attaches to the thing which has offended, or to it and other things connected with it. The forfeiture takes place at the time the offence is committed, and operates at that moment as a statutory transfer of the rights of property to the government. U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. The Mars, Id. 417; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311; Caldwell v. U. S., 8 How. [49 U. S.] 381; U. S. v. 56 Barrels of Whisky [Case No. 15,095]. The decision in the last case was rendered by this court, and was founded on the 57th and 68th sections of the internal revenue act of 1864 [13 Stat. 223]. The 57th section of the act of 1864 corresponds substantially with the 31st section of the act of 1866, and the 68th section substantially with the 25th section of the act of 1867 [14 Stat. 471], and the two combined substantially with the 26th section of the

act of 1866, under which this proceeding is had. Now if the forfeiture under the 68th section of the act of 1864 takes place the moment any distiller fails to make the entry required to be made by the 57th section as was decided in the case of U. S. v. 56 Barrels of Whisky, supra, it is manifest that the forfeiture under the 26th section of the act of 1866 takes place at the time the rectifier or wholesale dealer fails to make the entry required by it. The statute does not, as the information seems to assume, forfeit the spirits &c., found in the possession of the rectifier or wholesale dealer. If this were its language the forfeiture might refer to the time of the finding of the spirits &c., in the possession of the delinquent. The forfeiture is of the spirits in his possession and by necessary intendment attaches only to the spirits in his possession at the time the act of neglect which causes the forfeiture is committed. If it attaches to other spirits subsequently acquired, and which at some subsequent period are found in the rectifier's possession, it is difficult to perceive that such forfeiture would cease to operate as a transfer of all spirits acquired by him at any time whilst he should continue in business. I cannot believe that the statute should receive a construction so harsh and so opposed to the whole tenor and spirit of revenue laws. The 26th section does not, like the 68th section of the act of 1864, in terms denounce a forfeiture for neglecting or refusing to make the entry, &c., but for neglecting or refusing to "keep such record," still, I think, there is no substantial difference. In either case the party is required to enter daily, in a book kept for the purpose, certain matters, and the offense in each case consists in neglecting or refusing to make the entries at the time specified in the "books kept for the purpose." I do not think that the offense was, as the district attorney contends, a continuing one. It was complete when the entry was not made in the proper book on the day the spirits were purchased and received. No entry on a subsequent day could condone or wipe out the offense already committed, nor would the failure to make the entry on such subsequent day be a new offense or a repetition of the old one.

The demurrer to the amended answer must therefore be overruled.

Case No. 15,967.

UNITED STATES v. OPEN BOAT.

[5 Mason, 120.] [1]

Circuit Court, D. Maine. Oct. Term, 1828.[2]

NONINTERCOURSE LAWS — OPEN BOATS — VESSELS OWNED BY DOMICILED BRITISH SUBJECTS.

1. An open boat is not a ship or vessel within the purview of the statutes of 1820, c. 122 [3 Stat. 602], and 1823, c. 150 [3 Story's Laws, 1893 (3 Stat. 740, c. 22)], which prohibit commercial intercourse from the British colonies. [Followed in U. S. v. Open Boat, Case No. 15,968.]

2. It seems, that, notwithstanding those statutes, open British boats may visit the United States, if not destined for trade.

3. British ships or vessels excluded from our ports by those statutes, are such as are owned by British subjects, having a British domicil, and sailing under the British flag, and not ships or vessels owned by British subjects domiciled in the United States.

[Appeal from the district court of the United States for the district of Maine.]

Libel of seizure for violation of the navigation and intercourse acts of 15th of May, 1820, c. 122, and of 1st of March, 1823, c. 150 [3 Story's Laws, 1893 (3 Stat. 740, c. 22)] against an open boat and her tackle and lading. The information alleged, (1) that this was a boat or vessel, owned wholly, or in part, by British subjects, and that she came and arrived by sea, from some part of the province of New Brunswick, within the port of Eastport; (2) that sundry goods, not of the growth and manufacture of the United States, comprising the boat load, were shipped and waterborne on the waters of the Bay of Passamaquoddy, for the purpose of being exported into New Brunswick in said boat, &c. not being a vessel of the United States. The facts, as proved, were as follows. The boat was under five tons in burthen, and was without a deck, and had on board, at the time of the seizure, 28 barrels of tar and pitch, with which she was bound from Eastport to St. Andrews, in New Brunswick. She had no custom-house papers on board at the time of the seizure, and it did not appear, that such papers had at any time been taken out for her. She was owned by British born subjects, who, with their families, had resided and been domiciled at Eastport for several years; and her home was admitted to be at Eastport. The goods on board were claimed by Joseph C. Noyes, a citizen of the United States, residing at Eastport. [The district court decreed a restoration of the goods. Case No. 10,549.]

Mr. Shepley, U. S. Dist. Atty.

The first inquiry is, whether this boat is included within the class of vessels excluded from the United States by the act of May 15, 1820. The word "vessel," as applied to maritime affairs, is understood to mean any vehicle used for transportation on the water; and if the word is used in the act according to its common acceptation, the act clearly excludes boats owned by British subjects, from our waters. And if such is the sense in which the word is used in the laws of the United States generally, it may safely be concluded to have been so used in this act. In the first registry act of September 1, 1789, c. 11 (Brozen's Ed.) [1 Stat. 55], the language used is, "ship or vessel," to designate all

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

[2] [Affirming Case No. 10,549.]

water-craft; and when it is intended to exclude any of the small craft, a limitation is made by stating the tonnage. In section 22, it is provided, that "the master or owner of every vessel of less than twenty tons and not less than five tons"—"shall cause the name of such vessel to be painted," &c. In the coasting act of February 18, 1793, c. 52 [1 Story's Laws, 285 (1 Stat. 305, c. 8)], §§ 1, 4, 6, "ships or vessels," of less than twenty tons, are spoken of; and in section 26, "ships or vessels" of more than five tons; and in the 37th section is a provision, that the act shall not extend to boats or lighters of a specific class, thereby implying, that it does extend to other boats and lighters. In the collection act of March 2, 1799, c. 128, § 92 [1 Story's Laws, 656 (1 Stat. 697, c. 22)], foreign merchandise is required to be imported on "ships or vessels" of less than thirty tons, except in certain districts, thereby implying, that such importation in those districts may be made in "ships or vessels" of less tonnage without limitation. In the act of July 29, 1813 [3 Stat. 49], granting "allowances to certain vessels employed in the fishery," section 5, "ship or vessel" is used, and the limitation established by the tonnage. In the 6th section, "boat or vessel" is used, and the limitation is made by the tonnage. And so in sections 7 and 8, "vessel" and "ship or vessel" are the terms used. It is believed the term "vessel" is used in the laws of the United States, as including all water-craft, and that a limitation is expressed where one is intended. Where the language of a statute is plain, courts will never look after the motives of the lawgiver, or the objects intended to be effected; they do so only where the language is obscure or contradictory, or where from some other cause the mind is left in doubt, whether the statute embraces the case. Believing that this statute is neither doubtful nor obscure, but that it determines clearly, that vessels of all classes from New Brunswick, owned by British subjects, are excluded from our waters under penalty of forfeiture; the propriety of arguing whether a particular class, to wit, boats, come within the evils intended to be remedied by the statute, is not admitted; but while it is not admitted, such an inquiry is not to be feared. The object of Great Britain seems to have been, to give to her own subjects the navigation and trade to her colonies in the West Indies. The object on our part, to counteract that policy and prevent the intended effect of it. The British, by excluding us from the West Indies, hoped to secure for themselves "the long voyage" from these provinces, or from our country to the West Indies. The United States hoped, by excluding all these provincial vessels from our ports, to operate as strongly against their navigation, as their own laws were calculated to operate in its favour. Whatever, therefore, would tend to depress and injure their shipping interest, and to deprive them of the fruits they intended to reap, would be in furtherance of the policy of this government. Hence we should expect to find our government extending the exclusion as far as it might lawfully do. It could not extend the exclusion beyond the provincial vessels, without a violation of the commercial convention of 1815. And it has done what would be expected of it. It has not stopped at the exclusion of British West India vessels, but has excluded all her provincial vessels without discrimination. To limit the exclusion to a particular class of these vessels, would be doing less than this government had a right to do, and less than her counteracting policy required should be done. And just so far as a limitation of the exclusive system is made, so far the British shipping remains uninjured, in the enjoyment of the advantages intended to be extended to it by the British laws. If a distinction is to be made in the classes of vessels excluded, and not excluded, by what rule is the court to be guided in making it? What shall be the tonnage of those not excluded? Will the court look into a foreign statute book to fix this rule, and so make the rule change, as foreign legislation varies? Can any limitation be adopted, confining the operation of the statute to British subjects domiciled abroad? Such a construction would be contrary to our whole system of navigation as exhibited in the registry and coasting acts; and would give all the trade to British built vessels, changing only the domicil of the owners. Suppose at the passage of the act of 1820, amendments had been offered, limiting the act to vessels navigating according to the regulations of the British plantation trade; or to vessels documented as British vessels; or to vessels with decks; can one doubt that each of these propositions would have made a material alteration in the act, and would have required and received very grave deliberation before it had been adopted? "De minimis non curat lex" cannot be applied to the boat navigation; it would be out of place.

On what is believed to be another erroneous construction of the statute, is founded an objection to the sufficiency of the first allegation in the libel. The words "shall enter or attempt to enter" the ports of the United States, are supposed to mean something more than coming within those ports. It is not perceived what other meaning can be attached to them, unless they require an entry at the custom-house. Such a construction would make congress declare, that British vessels should be excluded from our ports, and yet might come within them and do as they pleased, if they would avoid the custom-house. On a careful examination of the act it will be perceived, that the coming "by sea" is applied to the vessels of Lower Canada only, and the reason of it is obvious; Lower Canada being the only place mentioned in the act where arrivals in any other mode, to any extent, could be expected.

In relation to the second allegation in the libel it may be remarked, that the exports by the act of March 1, 1823, § 5, are limited to "any vessel of the United States or any British vessel," navigated, as prescribed, to the enumerated ports. By the 6th section, the act "so far as the same shall apply" to the intercourse "in British vessels, shall cease to operate in their favour," on the president's issuing his proclamation,—and by the proclamation it has so far ceased to be operative, and no farther. The act, then, remains in force to require exports "in any vessel of the United States" to be made to the enumerated ports; and to prohibit exportation in vessels, not vessels of the United States, by confining the exports to vessels of the United States. To adopt any other construction, is to erase the words "in any vessel of the United States," and read the act as if those words had never had place in it. But why is there such language used in the other section, that the president's proclamation shall cause the act to cease so far as respects British vessels, if nothing was intended to be regulated but British vessels? Why was not the act in terms suspended entirely, if such was the intention? Why such pains-taking, in the language of the act, to exclude the very result now contended for, if nothing was intended by it? Although the policy of confining exports to our own vessels, and in those, to certain enumerated ports, may not be seen; the inquiry is not whether the policy is wise, but whether congress has so enacted. Judicial tribunals do not assume the responsibility of erasing certain parts of a statute, because the wisdom of its provisions is not seen. Great might be the alterations in statutes, if such a rule were adopted.

C. S. Davies, for claimant.

The navigation of the United States, in the sense in which it comes into view by international regulations, is defined by the early acts of congress. What shall be deemed vessels of the United States, is determined by the provisions of our registry and coasting laws; settling how they shall be constructed, documented, owned, and manned, to entitle them to privileges of that national description, and discriminating the rates of tonnage established in their favour against foreign vessels. The lowest scale of tonnage, coming within the description of vessels of the United States, in the terms of their navigation acts, is five tons. Nothing in the provisions of the act for regulating the coasting trade and fisheries (section 37) extends to any boat or lighter not masted, or not decked (open), employed in the harbour of any town or city. The colonial intercourse, sought for by the government of the United States, is not capable of being carried on in vessels of a description inferior to what are legally denominated "vessels of the United States," and against which the measures of British legislation are directed. The act of 1820 is only pointed against British vessels arriving by sea. There is nothing in any of the respective provisions of Great Britain or the United States, that looks to a conflict of boat navigation. There has been no controversy on that subject; no measure for retaliation on our part existed in the English system. Such light boats are not recognized in the respective registry or enrolment acts, and navigation laws, of either power, more than birch canoes or timber rafts. They are not required to be built, owned, or navigated in any particular manner; they are not subject to tonnage duties; nor reached by any provisions of national policy. The allegation in the first article in the information certainly is, that this boat was a British vessel, within the meaning of the act of 1820. What sort of British vessel was contemplated by the policy of the acts of 1818 and 1820? The answer is, those that were protected and set apart, by the policy of the English navigation and plantation system, for the engrossment of the commercial intercourse between her American dependencies, and the United States. The act of 1818 touched, if I may so say, the very pupils of the British system. It bore immediately on British vessels, which had directly "cleared out" from, or circuitously touched at, any port or place in the British dominions, from which our navigation was excluded. It forbid their entering or attempting to enter the ports of the United States, under forfeiture of vessel and cargo. And every British vessel which should duly "enter" our ports, and take on board productions of the United States, was required to "give bond" (pursuing the pattern of the English plantation provision,—28 Geo. III. c. 6, § 3), also (act of navigation,—St. 12 Car. II. c. 18, § 19), to land them without any part of the British dominions from which our vessels were debarred by the British laws of navigation. There is nothing in all these provisions, that relates to the regulation of boats. The act of 1818 is defined to be a "non-intercourse, in British vessels, with ports closed, by British laws, against the vessels of the United States." Documents 19th Cong. (2d Sess. 1826) No. 2, p. 43; Letter of Mr. Adams to Mr. Rush, June 23. 1823. The supplementary act of 1820, was intended to arm and invigorate the act of 1818. It applied a special interdict to British vessels; vessels owned wholly or in part by British subjects; coming or arriving by sea from any part of the British dominions in this hemisphere. It prohibited their entry, or attempting to "enter," under pain of forfeiture, as before; and bonds were again required of British vessels duly entered, not to discharge articles of the produce of the United States shipped on board, for exportation, in any of the prohibited places. The 3d section prohibited importation into the United States from any of the foregoing

British dependencies, of any articles not produced therein, specially. This act established "a non-intercourse in British vessels with all the British American colonies, and a prohibition of all articles" except the produce of each colony respectively imported directly from itself. Documents of Congress, ut supra.

By the act of 1823, congress suspended the provisions of the acts of 1818 and 1820, in respect to certain British colonial and provincial ports, and authorized importation in certain British vessels, coming directly therefrom, of colonial produce, on one condition, that the same might be exported therefrom to this country, on equal terms, in vessels of the United States, the British vessels thereby admitted "being navigated by a master and three fourths of the mariners, at least, British subjects." The next section (section 3) provided for equalizing the duties on tonnage. The act of 1823, was apparently designed as a counterpart to St. 3 Geo. IV. c. 44 (1822). That statute allowed American built vessels, lawfully navigated, to import certain goods directly to the West Indies, and export colonial produce in their own bottoms. The trade authorized by this statute (like that secured by the commercial convention to be carried on with the East Indies) was to be conducted in ships built in the United States, whereof the master and three fourths of the mariners, were American. This act established the free ports enumerated in our act of 1823, and authorized the importation of certain specified articles, either in British built vessels, owned and navigated according to law, or in vessels of the build and ownership of the country, in which the articles imported had their origin, and authorized exportation, in the same description of vessels, direct to the country where the vessel belongs. By St. 3 Geo. IV. c. 45, the national commerce of the colonies, in exports and imports, is limited to British vessels, owned and navigated according to law The act of congress of 1823, corresponding to these provisions (section 5), enacted, that it should be lawful to export to any enumerated British port, in any vessel of the United States, or in any British vessel, navigated as required by the 2d section, and having come directly from any of the enumerated ports, articles of the growth, produce, or manufacture of the United States, or imported therein, under the restriction therein provided. The proviso to the section relates exclusively to exportation in British vessels, and requires, that when exported in any such British vessel, bond shall be taken by the collector of the port, at which she shall have entered, for the due landing of the goods at the enumerated port, for which she shall have cleared out. The bond was to be given before shipment. No goods were allowed to be exported to any other than one of the enumerated ports, nor to be shipped on board any British vessel, except one coming direct from such port. And it was further enacted by the proviso, that "in case any such articles should be shipped or waterborne for the purpose of being exported contrary to the act, they should be forfeited." This act of 1823, was intended to meet and reciprocate the act of parliament of 3 Geo. IV. c. 44, establishing the free ports enumerated by our law. The regulations respecting exports and imports are understood to have been, in a legislative sense and measure, squared with the provisions of that act. The intercourse which was opened to our vessels in direct voyages to the free ports by the act of parliament, was opened also to British vessels, coming directly from, and returning directly to, the same ports, by the act of congress. British vessels, such as are privileged in the "trade and intercourse" before mentioned, were the subjects of this reciprocal measure; and the original retaliatory interdict was left to operate upon the same privileged vessels, either coming from, or going to, any other than one of the free and enumerated ports. And the previous interdict was further armed by the clause condemning goods either shipped, or waterborne, for the purpose of shipment, contrary to the force of this determined regulation. The whole measure seems to have had a final relation to the West India trade and intercourse; and the object appears to have been, to prevent exportation directly on board such British vessels, or indirectly and clandestinely by intermediate conveyance. British and American vessels, the respective objects of national protection, are thus brought into opposition by the principles and terms of the two corresponding acts; and the act of congress makes a special provision to prevent the liberty allowed to British vessels, from exceeding the measure granted to ours. The two acts of parliament and congress, taken together, constituted a sort of legislative convention, for the time being. Hence the language of the 5th section of the act of 1823, that "it shall be lawful to export from the United States, directly to any of the British colonial ports enumerated, in any vessel of the United States, or in any British vessel navigated," as the 2d section prescribed, &c. The terms employed are mutual; but the power of the act does not operate on vessels of the United States. So far as our laws were concerned, our vessels were at liberty before; and the only obstruction was from British legislation. After this act of 1823, was passed, there was nothing else, besides the act of parliament, to limit our vessels to the free or enumerated ports. Our act did not extend to prevent them from going to any other ports. In regard to them, viz. "vessels of the United States," its words had no legal meaning. The restrictive terms of the act of 1823, apply emphatically to British vessels, "being navigated by a master and three fourths at least, of the mariners, British subjects." Its force is ex-

pended on them. The prohibition is not put upon export. The qualification or disqualification, is only fixed upon the character and quality of the carrier. The prohibition does not extend beyond the class of vessels, that were privileged by Great Britain.

The inference, which the attorney for the government is understood to draw from the evidence in this case, is that the boat was going to St. Andrews, which was one of the enumerated ports; and to which it would have been lawful, under the act, to export in a British vessel, coming directly from that port. And the employment of the boat is contended, by the attorney, to have been between Eastport and St. Andrews. This is supposition,—but if the defence rested on that point, there is no positive proof of that fact (viz. arriving from St. Andrews), in favour of the boat. But the operation of the act is annulled by the contingency provided for in the 6th section; the trade and intercourse between the United States and the British colonial ports having been subsequently prohibited by a British order in council, and the provisions of that act thereupon ceasing to operate in favour of British vessels, so far as it extended to them, as announced by the president's proclamation of 17th March, 1827; and the acts of 1818 and 1820 are thereby revived in full force. That the act of 1823 was thereby in effect repealed, was decided by the district judge in the case of The Atlantic (Dec. Term, 1827) [Case No. 621]. Erasing from the act the regulation in regard to British vessels, it is emphatically asked, what is left? The idea of an implied prohibition, a penalty by implication, raised constructively from the mention of "vessels of the United States," in the terms of the act, will not stand the test of legal principles. Although within the permissive words of the act, there was nothing within the terms of the prohibition but British vessels of the privileged class; nor is there anything else upon which they can act. It may be very true, that the present boat was not a proper "vessel of the United States;" but there can be no pretence for considering it a British vessel within the contemplation and meaning of the act; and although it be not the one, it is no matter, as long as it be not the other. The allegation, that this was not "a vessel of the United States," may be, technically, true enough, but it draws no consequence after it; but it will be difficult to sustain the allegation of its being a British vessel, to bring it within the act of 1820. It may be granted, that the persons represented as owners do not come within the requirements of our registry act. Neither is it a British built, owned, and navigated vessel, within the intendment of the act of 1820. The boat does not come within the scope, policy, and provisions of the act in reference to entry, bonding, tonnage. It is not a vessel "coming and arriving by sea within the sense of the statute." The allegation in the first article of the information is defective. It does not state any entry, or attempt to enter. The coming and arriving by sea do not constitute the offence. It is only a sort of inducement to its taking place, or more properly, perhaps, an indication of its character. The vessel so coming and arriving, being British, is excluded. It is the vessel entering or attempting to enter, that is forfeited; and the language of the act has reference only to the class of vessels capable of coming to entry. It is submitted, therefore, with great deference, that a decree of forfeiture cannot be sustained on either allegation. It is not questioned that such a boat, in proceeding to discharge its lading on the opposite shore, might come in contact with some law there established, to prevent importation in other than their own privileged shipping; but the exportation supposed to be intended in the present case, was an American enterprize entirely.

STORY, Circuit Justice. This is a libel of seizure founded on the acts, prohibiting commercial intercourse with the British colonial possessions, of the fifteenth of May, 1820, [3 Story's Laws, p. 1800 (3 Stat. 602, c. 122)], and the first of March, 1823, c. 150 [3 Story's Laws, 1893 (3 Stat. 740, c. 22)], as put into operation by the president's proclamation of the 17th of March, 1827. The questions raised in the case depend upon the true construction of these acts, and upon the conformity of the libel thereto, so as to present the point of forfeiture. The act of 1820 provides, that "after the 30th of September, then next, the ports of the United States shall be and remain closed against every vessel, owned wholly, or in part, by a subject or subjects of his Britannic majesty, coming or arriving by sea from any port or place in the province of Lower Canada, or coming or arriving from any port or place in the province of New Brunswick," &c. And it then proceeds to declare, that "every such vessel so excluded from the ports of the United States, that shall enter or attempt to enter the same, in violation of this act, shall, with the cargo on board such vessel, be forfeited to the United States."

The first remark, which I would make on this clause is, that it inflicts no forfeiture upon an excluded vessel, unless she enters, or attempts to enter some port of the United States; and it is, therefore, necessary that the libel should, in substance, contain an allegation of such entry, or attempt, before the court can pronounce a decree of condemnation, however clearly the facts may be made out. Now, the first count in the libel, which alone touches this statute, contains no such allegation. It merely affirms, that "the vessel or boat aforesaid was a vessel, owned wholly or in part by a subject or subjects of his Britannic majesty, and came and arrived by sea from some port or place in the province of New Brunswick, to the at-

torney unknown, within the port of Eastport aforesaid, contrary to the form of the statutes," &c. This is not an allegation in strict conformity with the words of the statute. The words "arrive" and "enter" are not always synonymous, and there certainly may be an arrival, without an actual entry, or an attempt to enter. Perhaps an arrival within a port, cannot be without an entry into the port. But still, it seems to me, that courts of law are not to inflict forfeitures, without the substantial phrases of the statute being used. And I am by no means sure, that the court would be warranted in giving judgment, where the words departed so widely from those of the statute. It would seem inconsistent with the rules usually adopted in the administration of penal laws. This point, however, is less important, because the libel is open to amendment; though the strong inclination of my opinion is, that without an amendment no condemnation could be pronounced, if the case were ever so clearly in favour of the government. The coming or arriving by sea is confined, by the immediately succeeding words, to Lower Canada, and any coming or arriving is prohibited from New Brunswick, whether by sea or otherwise. In this respect, I adopt the criticism of the district attorney as well founded. This informality in the allegation is no otherwise important, than that it ties up the case to narrower evidence, than the act itself requires.

The important question however is, whether the facts present a case within the real scope and operation of the statute. The facts are these. The owners of the boat are, and have been for several years inhabitants of Eastport, and have with their families a bonâ fide domicil there. The boat itself is less than five tons in burthen, is open and without any deck, and her home also is admitted to be Eastport. The owners are British born subjects, and have not, so far as any evidence exists in the record, changed their national allegiance. At the time of the seizure, the boat had on board 28 barrels of tar and pitch, and was bound with them from Eastport to St. Andrews, in New Brunswick. She had no custom-house papers on board, and none appear to have been taken out at any time for her. There is no proof that she ever came from New Brunswick and entered, or attempted to enter, any port of the United States. Strictly speaking, then, the facts do not, upon this general view, come up to a case of forfeiture. The intention of the parties, however, is not, as I understand it, to place the cause on this ground. Their wish is to settle a general question of great concern to the navigation with small craft, in that part of the country. And as the point has been fully argued, and a decision may save much future litigation, I am not indisposed to meet it upon the merits.

The question is, whether the navigation from the province of New Brunswick to a port of the United States by an open boat, owned as the present is, is interdicted by the act of 1820. The libel does not charge, that she was employed in trade; and therefore, if the interdiction applies at all, it applies (as has been very correctly remarked by the district judge) as well to cases, where the boat is employed as a ferry boat, or to make a visit, as to cases, where the object is the transportation of merchandise. The argument of the district attorney is, that the boat falls within the general description of the statutes, and is a "vessel" within its terms and meaning; and that she is owned "by a subject or subjects of his Britannic majesty." And if so, she is excluded from entry into our ports. There can be no doubt, that in a general sense a boat is a vessel, for it is a "vehicle in which men or goods are carried on the water," which is one of the definitions of a "vessel" given in our lexicographies; and one of the definitions of a "boat," given in like manner, is, that it is "a vessel to pass the water in," or "a ship of a small size." In a nautical sense, it more usually designates an open vessel, without decks. Whether the word is used in the one sense or the other in a particular statute, must depend upon the context and objects of the statute itself, which may and often do narrow down the general import to specific classes of cases. The object of the act of 1818, c. 65 [3 Story's Laws, 1677 (3 Stat. 432, c. 70)], to which the act of 1820 is an explanatory supplement, is to exclude British navigation from our ports, which should come from any of the British colonies, which were closed against the navigation of the United States. Both acts were in their nature retaliatory; and the subsequent acts of 1822, c. 56 [3 Stat. 681], and of 1823, c. 150 [3 Story's Laws, 1893 (3 Stat. 740, c. 22)], confirm this view in the most ample manner. The doctrine of reciprocity lies at the bottom of all of them, and this principally in regard to the islands and colonies in the West Indies. That the intention of the act of 1820 was to cut off trade and commerce in British ships from New Brunswick to the United States cannot be doubted; that it went farther, and meant to prohibit all intercourse by water with that province in any British craft, is not so clear. If the words of the act would cover such cases, it is by no means as certain, that the policy of the legislature reached to the same extent. It is well known, that the ordinary mode of communication between that province and northeastern frontier ports is by boat navigation; and there does not seem to be any ground to suppose that congress intended to prevent the common travel of visitors, or passengers, to and from that province. The second section of the act is manifestly confined to British vessels, which are allowed and required to enter at the custom-house in the course of trade. But boats

of the present description do not fall within this class. The third section applies to cases of the importation of goods from the colonies, and is necessarily confined to commercial intercourse. The same intention is still more completely demonstrated in the act of 1823, which suspends the acts of 1818 and 1820 as to certain colonial ports, and opens trade with them in British vessels. Every provision in this act looks to cases of trade and importation; and to vessels, which by our general laws are allowed to enter and clear at our custom-houses. By the general revenue collection act of 1799, c. 128, § 92 [1 Story's Laws, 656 (1 Stat. 697, c. 22)], no foreign dutiable goods are allowed to be imported from any foreign ports by sea in any vessel, foreign or domestic, of less than thirty tons burthen. And the navigation act of 1817, c. 204 [3 Story's Laws, 1622 (3 Stat. 351, c. 31)], is still more restrictive. I am not aware, that in any of our laws respecting shipping the word "vessel" is applied to any description of boats, like the present. The registry act (Acts 1792, c. 45 [1 Story's Laws, 268; 1 Stat. 287, c. 1]), invariably uses the words "ship or vessel," as descriptive of the class of shipping, which it includes. It contains no limitation by tonnage of the size of the ship or vessel; but the form of the certificate of registry (section 9) supposes, that such ship or vessel has a deck, mast, &c. And the regulations, prescribed by our laws, for ascertaining the tonnage of ships or vessels for the payment of tonnage duty, and for other purposes of admeasurement, refer to such only as have one or more decks. Acts 1799, c. 128, § 64 [1 Story's Laws, 630]. The fair inference deducible from these provisions is, that the registry act was not meant to apply to ships or vessels without any deck. In respect to the coasting trade and fisheries, the same phrase, "ship or vessel," is used in the act of 1793, c. 52 [1 Story's Laws, 285 (1 Stat. 305, c. 8)], for enrolling or licensing them for such business; but no ship or vessel less than five tons in burthen seems within the purview of the act. Sections 1, 4, 26. The form of enrolment, too, presupposes, that the ship or vessel has a deck, mast, &c; and her tonnage is to be ascertained in the same manner, as in case of registered ships. There is a provision also (section 3) that registered ships may be enrolled, and enrolled or licensed ships may be registered, which seems, by implication, to limit their sizes reciprocally to tonnage above five tons, and to such as have a deck or mast. This construction is fortified by the language of the 37th section, which declares, "that nothing in this act shall be construed to extend to any boat, or lighter, not being masted, or if masted, and not decked, employed in the harbour of any town or city." It is plain, from this clause, that boats without masts or decks were not allowed to be enrolled or licensed for the coasting trade or fisheries. And the fishing bounty is confined to "boats or vessels" of more than five tons burthen. See Acts 1813, c. 34, §§ 5, 6 [3 Stat. 49].

There are, also, provisions in our laws, which contemplate importations from foreign countries in vessels of a smaller description. But in such cases, the general term "vessel," is not alone employed, but a more specific description is added. Thus, by the 105th section of the act of 1799, c. 128 [1 Story's Laws, 661 (1 Stat. 702, c. 22)], importations are allowed on the northern and northwestern boundaries of the United States, "in vessels or boats of any burthen;" and the next section (section 106) goes on to provide, "that all vessels, boats, rafts, and carriages of what kind or nature soever, arriving in the district aforesaid, containing goods, &c. shall be reported to the collector," &c. A distinction between "boats" and "vessels" is here taken; and a distinction does, in fact, exist in common parlance and maritime usage. The term "vessel" is never, or at least very rarely, used to designate any watercraft without a deck; but the term "boat" is constantly used to designate such small vehicles of this nature, as are without a deck. In Mortimer's Commercial Dictionary, a "boat" is defined to be "a small open vessel, commonly wrought by oars." He says, that the term "ship" is "a general name for all large vessels." And it appears to me, that the general sense, in which the word "vessel" is used in our laws, is in contradistinction to an "open boat," and excluding the latter. Such is its meaning in the act of 1815, c. 246 [2 Story's Laws, 1515 (3 Stat. 231, c. 94)], where it is declared lawful "for any collector &c. to enter on board, search, and examine, any ship, vessel, boat, or raft," &c. See, also, Acts 1802, c. 45, § 8 [2 Stat. 182]. And when the word is found in our laws without any thing in the context to explain or enlarge its meaning, it appears to me a sound rule of interpretation to construe it as used in that sense, which is its most common sense in maritime usage. Especially ought it to receive such an interpretation, when it interferes with no known policy of the legislature, and a different course would involve general inconvenience. The strong inclination of my opinion, therefore, is, that open boats, like the present, even if British owned, if not employed in trade from the British colonies, are not within the scope of the act of 1820. But this case does not turn upon that point alone; and therefore I leave it for an absolute decision, until it forms the single point for judgment.

There is another question of more importance, at least to residents within the United States; and that is, whether this boat was, within the sense of the act of 1820, a vessel "owned wholly or in part by a subject or subjects of his Britannic majesty." It is certain, that our laws allows aliens to build ships in the United States, and confer upon them privileges, which are denied to ships built and owned in foreign countries. The

former are allowed to be recorded in the custom-house, and to receive a certificate thereof, and thereby are subjected to a less tonnage duty than the latter. See Acts 1792, c. 45, §§ 20–22, 24 [1 Story's Laws, 268 (1 Stat. 287, c. 1)]; Acts 1790, c. 57, § 1 [1 Story's Laws, 106 (1 Stat. 135, c. 30)]. It is as clear, that British subjects, domiciled in the United States, are entitled to hold boats of the same description as the present. And I know of no law, which prohibits them from plying between port and port of the United States, so that they are not employed in the coasting trade or fisheries. It does not appear to me reasonable to presume, that congress had any intention to interdict intercourse, except with vessels belonging to British subjects, who retained their national domicil and privileges. If, by the laws of France, British subjects, domiciled in France, might bonâ fide own ships, which would be entitled to the privileges of French shipping, a ship so owned, and bonâ fide bearing the French flag, would not seem to me excluded from commerce with this country by the act of 1820. Without entering into the consideration, how far it is necessary to constitute an excluded ship, that she should be owned and registered according to the British registry acts, I think the true interpretation of the act of 1820 is, that the words therein, "British subject or subjects," mean such subject or subjects as still retain their British domicil, and hold their vessels in the character of British subjects; and not such as have a domicil in the United States, and own vessels, which are protected by the laws of this country, and have their home bonâ fide here. The policy of the United States has not been to interfere with merchants domiciled here; but to exclude shipping sailing under the flag of protection of England; such shipping as, in the sense of the law of nations, would be deemed British shipping. By the law of nations, for all purposes of capture and prize, and national character, this boat would be deemed an American boat, because her domicil is American. My judgment, therefore, is, that upon the first count the case of forfeiture is not made out in point of fact, because this boat is not, in the sense of the act of 1820, owned, in whole or in part, by subjects of his Britannic majesty.

The second count in the libel is founded on the 5th section of the act of 1823, c. 150 [3 Story's Laws, 1893 (3 Stat. 740, c. 22)]. That act opens commercial intercourse and navigation with certain enumerated British colonial ports, and among others, with St. Johns and St. Andrews, in New Brunswick; and declares it lawful to import in any British vessel, coming directly from any of the British colonial ports enumerated in the act, which vessels are navigated by a master and three fourths of the mariners British subjects, any articles of the growth &c. of any of the said British colonies, the importation of which is not from elsewhere prohibited, and which may be exported from the same ports to the United States on equal terms in vessels belonging to the states. It prohibits importations in any other manner, or of any other kinds, from the same colonial ports. The 5th section then proceeds to provide, that it shall be lawful to export from the United States directly to the same colonial ports in any vessel of the United States, or in any British vessel, as above described, any article of the growth &c. of the United States, or any article legally imported therein, the exportation of which elsewhere shall not be prohibited by law &c. And in the close of the section it declares, "and in case any such articles shall be shipped or waterborne for the purpose of being exported contrary to this act, the same shall be forfeited," &c. This is the clause on which the second count of the libel is framed. It propounds, that at Eastport, "sundry goods &c. of the growth &c. of the United States, composing the lading of the open boat aforesaid, were shipped and waterborne in said boat, on the waters of the Bay of Passamaquoddy, in said district, for the purpose of being exported from said States to the province of New Brunswick, in the boat or vessel aforesaid, the said boat or vessel then and there not being a vessel of the United States," &c. The 6th section of the act provides, "that this act &c. shall remain in force as long as the enumerated British colonial ports shall be open to the admission of vessels of the United States, conformably to the provisions of the British act of parliament, of the 24th of June, 1822. St. 3 Geo. IV. c. 44. But if at any time the trade and intercourse between the United States and all or any of the enumerated ports, authorized by the said act of parliament, shall be prohibited by a British order in council, or by act of parliament, then, from the day of the date of such order in council, or act of parliament, or from the time the same shall commence to be in force, proclamation to that effect having been made by the president of the United States, each and every provision of this act, so far as the same shall apply to the intercourse between the United States and the enumerated colonial ports, in British vessels, shall cease to operate in their favour; and each and every provision of the act," of 1818 and 1820, "shall revive and be in full force." The president made his proclamation according to this provision, on the 17th of March, 1827, and thus the acts of 1818 and 1820 were effectively revived. The true interpretation of this 6th section of the act has been matter of considerable argument at the bar. Is it, in the given case of the occlusion of the enumerated British colonial ports, virtually repealed in all its provisions, as to intercourse and trade with them, as the introductory clause seems to intend? Or is it repealed only as to intercourse and trade in British vessels, leaving the intercourse and trade in vessels of the United States under the regulation of the 5th section, as a

substantive and existing enactment; as the latter clause of the 6th section seems to intimate? The latter is the construction contended for by the district attorney, and on which the second count rests; the former is maintained by the counsel for the claimant.

The act of 1818 contains no provisions excluding trade, either by way of importation into the United States, or exportation from the United States, except in British vessels. Not a word is said respecting the vessels of the United States, or of any other foreign country, except Great Britain. The 1st and 2d sections of the act of 1820 are limited in the same manner. The 3d section prohibits the importation of any goods, &c. from the province of Nova Scotia, the province of New Brunswick, the islands of Cape Breton, St. Johns, Newfoundland, or their respective dependencies, from the Bermuda islands, the Bahama islands, the islands called Caicos, or the British possessions in the West Indies, or on the continent of America, south of the southern boundary of the United States, except such goods &c. as are the growth &c. of such provinces, islands, and possessions, where the same shall be laden, and from whence they shall be directly imported into the United States. Nothing is said as to exportations from the United States of any goods whatsoever in vessels, not British. The main object of the act of 1823 was to open the intercourse and trade with certain enumerated ports in those prohibited colonial possessions, upon the principles of reciprocity held out by the act of 3 Geo. IV. c. 44. The first four sections respect importations solely in British vessels. In the 5th section, for the first time, occurs any provision relating to exports, and there the phrase is (as has been already stated), it shall be lawful to export from the United States &c. in any vessel of the United States, or in any British vessel, &c. The first remark, that is called for by this posture of our legislation is, that as to British vessels, the whole intercourse and trade, provided for by the act of 1823, is completely suspended, and the exclusion of them, by the acts of 1818 and 1820, entirely revived. Thus the retaliatory system is put into complete operation; and that, which alone seemed within the legislative intention, the exclusion of British ships coming from, or going to, ports, where American ships were excluded, universally prohibited. The next remark is, that no legislative intention is any where avowed to interdict trade or intercourse in American vessels to or from any colonial ports. The next remark is, that though the 5th section of the act of 1823, contains an affirmative clause, that it shall be lawful to export from the United States to the enumerated ports, in any vessel of the United States, any goods &c.; yet there is no prohibitory clause, declaring any such exportation in any vessels, not of the United States, and not British, unlawful. Now, upon general principles of interpretation, no prohibition can be implied from merely affirmative words. The affirmative words may repeal or suspend a prohibition theretofore created, but per se they cannot create one. The forfeiture in the last clause of the 5th section applies only to cases, where articles shall be shipped or waterborne, for the purpose of being exported, "contrary to the provisions of the act." To inflict it, therefore, it must be established, that some prohibition exists in the act, which has been violated. Where is the prohibition of such exportation in vessels not British, and not strictly vessels of the United States in the sense of the registry act? None such has been pointed out; and if it had existed, it would not have escaped the scrutinizing sagacity of the district attorney. Assuming, then, that the 5th section, as to vessels of the United States, remains in full force, it is merely affirmative; there was no antecedent prohibition of exportation other than in British vessels; the present boat is not, in the sense of the act, such a British vessel; and consequently the second count falls for want of sufficient facts to maintain its vital averments.

The decree of the district court must be affirmed and restitution accordingly.

Case No. 15,968.

UNITED STATES v. OPEN BOAT.

[5 Mason, 232.] [1]

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

NONINTERCOURSE LAWS—BRITISH COLONIES—OPEN BOATS—FORFEITURE OF CARGO—BURDEN OF PROOF—PRACTICE.

1. Under the act of May 15, 1820, c. 122 [3 Stat. 602], prohibiting commercial intercourse from the British colonies in British ships, British owned vessels are included in the prohibition, although not registered or navigated according to the British navigation and registry acts.

2. But open boats, without decks, are not included in the prohibition.

3. The forfeiture, under the act, attaches to the cargo on board at the time the vessel enters, or attempts to enter our ports; and not to any cargo subsequently taken on board, though on board at the time of the seizure.

4. Where goods are seized, and claimed as forfeited as part of the cargo, the onus probandi is on the government to prove, that such goods were part of the cargo on board at the time of the offence.

5. The claimant may file a special defence on that point, if he chooses; but it is also in issue on the general denial of the allegations of the libel.

[Appeal from the district court of the United States for the district of Maine.]

Libel of seizure against an open boat and her lading, seized in fact at Eastport on navigable waters for a violation of the laws

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

of the United States, on the 4th of January, 1828, by the collector of the district of Passamaquoddy. At the trial in the district court, a decree of condemnation was pronounced against the boat and all her lading, except 7 barrels of flour, 2 barrels of pork, and 13 bags of meal, for default of any claim. [Case unreported.] The excepted goods were claimed by Bucknam and Gunnison of Eastport; and upon a subsequent hearing a decree of acquittal passed by consent in favour of the claimants; from which decree an appeal was taken in behalf of the United States to the circuit court.

Mr. Shepley, U. S. Dist. Atty.
Mr. Daveis, for claimants.

STORY, Circuit Justice. The present libel contains two counts. The first is founded upon the revenue collection act of 1799, c. 128, § 92 [1 Story's Laws, 656; 1 Stat. 697, c. 22], which declares, that "no goods &c. of foreign growth or manufacture, subject to the payment of duties, shall be brought into the United States from any foreign port or place, in any other manner than by sea, nor in any ship or vessel of less than thirty tons burthen," &c. with certain exceptions, which do not apply to the present case. The count alleges, that sundry foreign goods &c. were imported from a foreign port in this boat, the same being less than thirty tons burthen, against the form of the statute, &c. This count has been abandoned for want of evidence to support it, and may therefore be put entirely out of the case. The second count is founded on the act of May 15, 1820, c. 122 [3 Stat. 602], prohibiting commercial intercourse with the British colonies. That act declares, that "the ports of the United States shall be and remain closed against every vessel owned wholly or in part by subjects or a subject of his Britannic majesty coming or arriving by sea from any port or place in the province of Lower Canada, or coming or arriving from any port or place in the province of New Brunswick, the province of Nova Scotia, &c. And every such vessel so excluded from the ports of the United States, that shall enter or attempt to enter the same in violation of this act, shall, with her tackle, apparel, and furniture, together with the cargo on board such vessel, be forfeited to the United States." The second count alleges, that the boat is British owned, came and arrived by sea from some port or place in the province of New Brunswick, within the port of Lubec; and entered the same port, and was employed in trade between said foreign port or place and the United States, contrary to the form of the statute. The facts admitted to be true are, that the boat is an open boat, with a fore-cuddy, of six or seven tons burthen. She is owned by British subjects, and belongs to a place called La Tete, in the province of New Brunswick, and came from thence in ballast to Eastport, where she took on board a cargo of American growth and origin, for the purpose of carrying the same to the river Maguagadavie in the same province. After her cargo was on board and before sailing, she was seized by the collector for an asserted violation of the laws of the United States.

Before I proceed to the main question, it may be well to dispose of those, which have been discussed at the bar, as in some sort of a preliminary nature.

The first question is, whether the goods now claimed are liable to forfeiture at all, it not being established by any direct proof in the cause, that they constituted any part of the cargo of the boat. This point was not made in the court below, and now comes by surprize upon the government. Under such circumstances, if the cause turned upon it, I should have no difficulty in postponing a final decision until an opportunity was given to bring this matter of fact before the court. The district attorney supposes, that enough appears upon the record to raise a presumption, that these goods were part of the cargo of the boat, especially as the claim does not set up any such special defence. The claim is, indeed, in a very general form, and quite too general and imperfect to found an exact denial of the allegations of the libel, if legal nicety had been insisted upon in the earlier proceedings. It was, without doubt, competent for the claimants to have taken the present objection by a special answer, or exception, if they had chosen so to do. But if their claim and answer contain a general denial of all the matters in the libel, every fact alleged in the libel and necessary to maintain the asserted forfeiture, must be affirmatively established by the government; for the case does not fall within the 71st section of the revenue collection act of 1799, c. 128 [1 Story's Laws, 633, 1 Stat. 678, c. 22]. Now it is very clear, that upon the language of the act of 1820, no goods are forfeited, unless they are part of the cargo on board the vessel; and consequently that fact must be affirmatively established by the United States. I see no sufficient proof to this effect on the record; and there is some presumption against it; for the boat, on board of which these goods were laden, is said to have been given up by the collector; and the boat, to which the present libel attaches, has been condemned and sold under the process of the court. So that (to say the least of it) there is sufficient doubt to call for some farther proof and explanation.

A more material question is, what is the true construction of the act of 1820, as to the cargo liable to condemnation? Is it the cargo on board at the time of committing the offense, that is to say, at the time of the illegal entry, or attempt to enter; or the cargo on board at the time of the seizure, however long afterwards that may be

made? The latter construction is insisted on by the district attorney; and the former is contended for on the other side. My opinion is, that the cargo intended by the act is the cargo on board at the time, when the vessel enters, or attempts to enter the port. The words are, "every such vessel, &c. that shall enter or attempt to enter, &c. shall, with her tackle, &c. together with the cargo on board such vessel, be forfeited." The offence is committed, and the forfeiture is complete at the moment of the entry, or the attempt to enter. If she has no cargo then on board, none is subjected to forfeiture; for the words of the act do not look to any future events to impose a new forfeiture. The cargo affected with forfeiture is deemed in some sort a participator in the offence, and involved in the guilt of the vehicle. If the legislature had intended to subject every future cargo taken on board by the vessel to forfeiture, as tainted by association with the offending vessel, the natural language would have been, that every such vessel, together with the cargo found on board at the time of seizure, although not on board at the time of the offence, shall be forfeited. But the language used is different, and just such as must have been used, if the cargo to be forfeited was to be on board contemporary with the offence. It is difficult to read it, and not to perceive, that the vessel, her tackle, &c. and her cargo on board, are to be affected with the forfeiture at the same instant of time. The effect of a different construction would be to create a sort of floating, and fluctuating forfeiture, attaching to different things at different times. Thus, if various cargoes were put on board at subsequent periods between the time of the offence and the seizure, one of two things must happen; either, that the forfeiture would attach to each successive cargo taken on board, and thus be cumulative on all; or that the cargo found on board, though innocent, would be subjected to the offence, and discharge every antecedent cargo from it. The original cargo on board at the time of the offence might in this way escape, although embraced in the corpus delicti; and an entirely innocent cargo, belonging to persons in utter ignorance of it, become the victim. The forfeiture would thus be in suspense until the moment of seizure, and depend, not upon association in crime, but upon the choice, or caprice, or diligence of the seizing officer, as to the time of seizure. I do not say, that such a course of legislation might not exist; and if it did, the court would be bound to act upon it. But it would be so extraordinary and unprecedented, so dissonant from the principles of general justice and convenience, and so subversive of private security and private rights, that it would require very strong and direct expressions on the part of the legislature to justify such an interpretation of its acts.

The case of The Two Friends [Case No. 14,289], has been cited by the district attorney in favour of his construction of the statute. If I could view that case in the same light, it would very much abate my confidence in that decision on the particular point, for which it is now cited; although it would still be maintainable upon the other grounds stated in the opinion of the court. But I am of opinion, that nothing in that case touches the present in point of principle. That was the case of a coasting vessel, which was seized, while she was engaged in the coasting trade under a coasting license, regularly granted. The material objections against her were, that during the time the license was in force she was transferred to a British subject, and that she was engaged in a trade, for which she was not licensed. The 32d section of the coasting act of 1793, c. 52 [1 Story's Laws, 298; 1 Stat. 316], (c. 8), declares, that if any licensed ship or vessel shall be transferred in whole or in part, to any person, who is not at the time of such transfer a citizen of or resident within the United States, or if such ship or vessel shall be employed in any other trade than that, for which she is licensed, or shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel, with her tackle, &c. and the cargo found on board her, shall be forfeited. The court held, that the cargo found on board at the time of the seizure was forfeited. But that decision proceeded upon the ground of the peculiar language of the act, and the consideration, that the forfeiture was a continuing forfeiture by the vessel's still sailing and acting illegally under the license up to the very time of the seizure. If the vessel had ceased to be engaged in the coasting trade, and had afterwards taken an innocent cargo on board, there is nothing in that opinion, which decides, that such a cargo, under such circumstances would have been forfeited. And here I might stop. But I am given to understand, that the important question, which the parties wish to have settled, and which was the main object of the present appeal, is, whether a boat of the description of that under seizure, owned by British subjects, resident in a British province, is within the prohibitions of the act of 1820. The point has been fully argued in the present case, as well as in a former case before this court; and as all parties press for a decision upon it, and it is of great interest to the inhabitants of Maine bordering on the British provinces, the court will not decline to express its opinion. The true answer depends upon the point, whether an open boat, owned by a British subject, is a vessel within the meaning of the act of 1820. In the case of U. S. v. An Open Boat [Case No. 15,967], Noyes, claimant, decided at the last October term, at Wiscasset, the point was much discussed; and the reasoning of the court led to the conclusion (though

there was no absolute decision) that an open boat, without decks or masts, was not a "vessel" within the purview of the statute, because in a nautical sense, as well as in the sense of our revenue and navigation laws, the term "vessel" is used in contradistinction to such boats, to indicate a class of larger sized shipping. I do not go over the illustrations used on that occasion, because the case is already before the public; but I advert to it simply to state, that further reflection has induced me to adhere to that opinion. The boat now before the court could not be lawfully employed in any trade from the province of New Brunswick to the United States, with goods of foreign growth or manufacture; because such trade is prohibited by the act of 1799, c. 128, § 92 [1 Story's Laws, 656; 1 Stat. 697, c. 22], to vessels of less than thirty tons. She was not in fact so employed. Unless she was prohibited from an entry into our ports, the subsequent act of receiving a cargo on board of American growth for a return voyage to New Brunswick constituted no offence. The words of the act of 1820 do not, in my judgment, prohibit such an entry, or such an exportation. This court is not at liberty to look beyond the words of the act for the policy, which governed its provisions. The words must be construed according to their natural import, taken in connexion with other statutes for the regulation of commerce. It is a well known rule, that penal statutes are construed strictly; and that forfeitures are not to be inflicted by straining the words so as to reach some conjectural policy, not avowed on the face of the statute. Even where cases lie within the same mischief, if they are not provided for in the text of the act, courts of justice do not adventure on the usurpation of legislative authority to meet them. I must confess too, that if I were at liberty to travel out of the words of the act, and consult any supposed public policy of the government, there is no clear ground, upon which I could affirm, that boats of this description were intended by the government to be excluded from our ports, or were prohibited from carrying goods from our ports to the British colonies.

One argument, much pressed by the counsel for the claimants in the former, as well as in the present case, requires to be noticed. It is, that no British owned vessels are within the act of 1820, except such as are British owned and navigated in the sense of the British navigation and registry acts. It is said, and said truly, that this court, sitting in admiralty, may take notice of these acts; and that the very terms of our prohibitory and retaliatory acts invite the court to such an examination, by the references, which are tacitly made to the British system. But, giving whatever force we may to this line of argument, it must still be conceded, that our own acts must be construed by their own words; and that though the causes of our prohibitory system may be found in the corresponding British legislation, yet it by no means follows, that congress was bound to stop, where that stopped; or intended to confine its own enactments to the existing state of the British shipping laws. The court then is not called upon to impose any limitation upon the words of the act of 1820, which they do not of themselves import. The words are "every vessel owned, wholly or in part, by a subject or subjects of his Britannic majesty." Now, a vessel may fall within this category, although she is not registered or navigated according to the British acts, so as to entitle her to the statute benefits of a British character. British ownership is one thing; a title to the benefits of the British navigation acts is quite another thing. A different construction would make our own legislation dependant on the state of the British laws at every moment; and a slight relaxation of them in favour of her own colonial navigation would at once defeat our whole system, and reduce it to a dead letter. What authority has this court to presume, that so obvious a result was not within the scope of the legislation of congress, and intentionally provided for? The words of the act of 1820 cover such a case; and how can this court say, that they are to be narrowed down, so as to be inoperative, where they would be most needed, in cases within the same mischief, and justifying the same retaliation? My opinion is, that every vessel owned by British subjects, domiciled in the British dominions, is within the intent of the act; and that though our retaliatory system looked to the state of the British laws, it meant to meet them, not in their form, but in their principle, however that might be varied.

Upon the whole my opinion is, that the decree of the district court must be affirmed; but I shall certify that there was reasonable cause of seizure. Decree accordingly.

UNITED STATES v. The ORION. See Case No. 10,575.

Case No. 15,969.

UNITED STATES v. ORMSBY.

[3 Wash. C. C. 195.] [1]

Circuit Court, D. Pennsylvania. April Term, 1813.

ARMY CONTRACTOR'S ACCOUNTS — SETTLEMENT — INTEREST.

The defendant settled his account at the treasury department, in 1808, on which a balance was stated against him. In 1812, he claimed further credits, which were allowed to him, and which reduced the balance claimed from him in 1808. The court instructed the jury to

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

allow interest on the actual balance, from 1808.

Action on the case, for the balance of an account, settled at the treasury department. The defendant, under a special contract with the government, to furnish certain supplies to the army, received advances of money; and upon a settlement of his account at the treasury, in May, 1808, a balance of about 2200 dollars was found to be due from him. He afterwards, viz. in March, 1812, claimed other credits, which had not been allowed in May, 1808, but to which the treasury department, in March, 1812, was satisfied he was entitled; and being then admitted, reduced the balance to 1616 dollars. The only question was, whether the United States were entitled to interest on the 1616 dollars, from May, 1808, or from March, 1812.

WASHINGTON, Circuit Justice, delivered the opinion of the court. Interest ought to be given from the first named period; and cannot be affected by the subsequent allowance of a credit not known, nor perhaps proved, when the first settlement was made.

Case No. 15,970.

UNITED STATES v. ORTEGA et al.

[Hoff. Land Cas. 135.] [1]

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

MEXICAN LAND GRANT.

This claim is valid for the portion petitioned for by Maria Clara Ortega and Julius Martin.

Claim [by Quintin Ortega and others] for [the Rancho San Ysidro] one league of land in Santa Clara county, confirmed by the board, and appealed by the United States.

William Blanding, U. S. Atty.
Stanly & King, for appellees.

HOFFMAN, District Judge. It appears from the expediente on file in the archives that Quintin Ortega, in the year 1833, petitioned Governor Figueroa for a title to a tract of land granted to his father, Ignacio Ortega, by Don Joaquin Arrillaga, in 1809. The governor made the usual reference for information, and by the reports made to him it appeared that for more than twenty years, and in fact from 1809 until his decease in 1829 or 1830, the land had belonged to and been in possession of Ignacio Ortega, and that since that time his son and two daughters had continued to occupy it. On the third of June, 1833, the governor made his concession, granting to Quintin Ortega and his sisters, Maria Clara Ortega and Maria Isabel Ortega, the rancho called San Ysidro, bounded by the Mission of San Juan Bautista, by the ranchos of Animas and Las Llagas, and by the mountains—"the land being conceded in equal parts and subject to the stipulated conditions." These conditions, it is evident from the subsequent proceedings, related to the division of the land among the grantees, for the governor appears to have issued three documentos or titles, each granting a third part of the land included within the boundaries embraced in his decree of concession. By the documento issued to Maria Clara Ortega, wife of John Gilroy, there was granted to her a part of the rancho of San Ysidro, bounded by the Rancho de Las Animas and the mountain, and the parts which appertain to her brother Quintin and her sister Maria Isabel. The quantity of land granted is limited to one square league, and the sobrante is reserved in the usual terms. This grant, as well as those to Quintin and Maria Isabel for their portions of the rancho, was approved by the departmental assembly on the seventeenth of May, 1834. There seems to be no doubt of the genuineness of the grants in these cases, or of the occupation and cultivation of the land by the grantees and their father since 1809. It appears from the opinion of the board of commissioners that the claim of Quintin Ortega to the portion of San Ysidro granted to him, was confirmed in a separate suit instituted on his behalf, and as the petition filed does not embrace the claim of Maria Isabel, there only remains to be passed upon in this case the claim of Maria Clara and that of Julius Martin, who derives his title by deed from her and her husband, dated January 8, 1852. With respect to the boundary line of "Las Animas," which is also the boundary of that portion of San Ysidro granted to Maria Clara, some disputes have arisen. But for the reasons assigned in the opinion in that case, such disputes cannot in this proceeding be settled. It is clear that both claims are valid as against the United States. The precise location of the boundary line between the coterminous ranchos must be settled either by the surveyor general or by the proper tribunals of the country. The claimant, Maria Clara Ortega, is, therefore, entitled to a decree of confirmation for the portion of San Ysidro granted to her to the extent of one league, and bounded as described in the grant, excepting therefrom the part conveyed by her and her husband to Julius Martin, for which a decree must be entered in favor of said Martin.

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

Case No. 15,971.

UNITED STATES v. ORTEGA.

[4 Wash. C. C. 531.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.

PROOF OF FOREIGN LAWS—PAROL EVIDENCE—ASSAULT ON FOREIGN MINISTER.

1. The unwritten law of a foreign government may be proved by parol evidence, but the written law can only be proved by itself.

[Cited in Lattourett v. Cook, 1 Iowa, 1; State v. Behrman, 114 N. C. 797, 19 S. E. 223.]

2. What constitutes an assault?

[Cited in Kirland v. State, 43 Ind. 150.]

3. Upon an indictment for an assault committed on the charge d'affaires of a foreign government, proof that the person assaulted is received and recognized by the executive of the United States, is conclusive as to his public character; and that he is entitled to all the immunities of a foreign minister.

[Cited in U. S. v. Benner, Case No. 14,568; Ex parte Baiz, 135 U. S. 424, 10 Sup. Ct. 859.]

[Cited in People v. Jones, 24 Mich. 226.]

4. If a foreign minister commits the first assault, he forfeits his immunity so far as to excuse the defendant for returning it.

5. It is no defence upon such indictment that defendant was ignorant of the public character of the minister.

[Cited in U. S. v. Benner, Case No. 14,568.]

The defendant was indicted for an assault upon the person of Mr. Salmon, the Spanish charge d'affaires, and for infracting the law of nations by committing violence upon his person. These charges were contained in two separate indictments, both of which were tried at the same time. The facts of the case, as proved by Mr. Salmon (who presented himself to the court as a voluntary witness), were as follows. On the night of the 17th of September last, whilst the witness was returning from the circus, he heard the steps of some person walking gently behind him. The defendant came up to him, and seizing the breast of his coat, said, angrily: "Mr. Salmon, I am Ortega, you have insulted me, and I seek satisfaction." The answer was, "I have not insulted you, but you now insult me—let me go." "No," replied the defendant, "I have got you now, and I will not let you go, unless you will promise to give me satisfaction, for you have published many falsehoods against me." Mr. Salmon replied, that he had published nothing against him, but in answer to a very insulting manifesto of his against all kings, and especially against his government. He further added: "Is it so long after your arrival that you seek satisfaction for an old offence; and is this the way you demand it? Have you no friend to send on such an errand? You know who I am, and where I live." The defendant, still retaining his hold, Salmon again desired him to let him go, threatening to strike him if he did not. The defendant answered: "You need not strike me, for I shall fight you in another place"; and then inquired if he had any arms about him? Mr. Salmon replied that he had not, for he professed to be a peaceable man. The defendant observed, that he had none either, but that he could easily procure them, if Mr. Salmon would fight. Mr. Salmon answered that he should fight him immediately, if he did not release him. All remonstrances proving fruitless, Mr. Salmon thrust the defendant with the point of his umbrella, which was returned by a blow with another umbrella. The fight continued for some time, when Mr. Salmon, having greatly the advantage, having hold of his cravat with his back fixed against the wall, a Mr. Smith came up, and desired them to separate. Mr. Salmon agreed to release the defendant if he would promise to keep the peace. This, after some hesitation, was promised, and the defendant was released. But almost immediately afterwards the defendant again approached Mr. Salmon in a menacing attitude, with one of his arms raised. Mr. Smith immediately interposed, and after reminding the defendant of his promise, told him, that if he was determined to have a fight, he must first fight him. This put an end to the affray; and the parties separated. Another witness, Mr. Wallace, stated, that he passed the parties, who were talking in Spanish, with apparent ill blood, and that he did not observe the defendant to have hold of Mr. Salmon. He stopped at a short distance from them, and remained till the fight was over. To prove the public character of Mr. Salmon, the following evidence was given. An official letter from Mr. Anduaga, the Spanish minister, just previous to his departure from the United States, addressed to the secretary of state of the United States, dated 15th of March, 1823, informing him that he had appointed Mr. Salmon charge d'affaires of his Catholic majesty in the United States; and another letter to the same effect, from the same person, addressed to Mr. Salmon. A letter from the secretary of state, dated the 20th of the same month, addressed to Mr. Anduaga, in answer to the above, recognizing the character of Mr. Salmon, and stating he should with pleasure correspond with him. Two letters from the secretary of state, dated the 4th of April, 1823, and the 24th of September last, addressed to Mr. Salmon as charge d'affaires; the latter being in answer to one addressed to the department complaining of the outrage committed by the defendant, in which the secretary regrets the circumstance, and states, in substance, that the public prosecutor would do what was proper on the occasion.

Mr. Brent, the chief clerk in the department of state, was then examined; who de-

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

posed, that Mr. Salmon was recognized by the president as charge d'affaires, on the retiring of Mr. Anduaga, and was accredited by the secretary of state, who has continued to correspond with him as such, from the departure of Mr. Anduaga, until within a short time past. Mr. Salmon stated upon his examination, that Mr. Anduaga was appointed minister to the United States, under what was termed the constitutional government, which was established on the 9th of March, 1820, and might be said to have terminated about the 1st of October, 1823. To prove that the public character of Mr. Salmon was known to the defendant, two letters from the latter to the former, dated in May, 1824, addressed to him as charge d'affaires, were read. The counsel for the defendant offered to prove, by a witness, the contents of two decrees of the king of Spain, bearing date the 1st and 20th of October, 1823, as well as another called the "Decree of Purification," issued in December, 1824, for the purpose of showing that Mr. Salmon, not having complied with the last decree, ceased to be a minister of the Spanish king. The court refused to permit such evidence to be given, stating that, although the unwritten law of foreign countries may be proved by witnesses, the written law could be proved only by itself. To prove that a charge d'affaires is a public minister, entitled to the same privileges, immunities, and protection, and that it is sufficient, though he has no letters of credence, if he be received by the government to which he is sent, and personally presented, the district attorney referred to 8 Merl. Repert. p. 238. He contended that the public character of Mr. Salmon was abundantly proved.

The counsel for the defendant insisted, (1) That the alleged assault by the defendant was not sufficiently proved, the evidence of Mr. Wallace upon that point being opposed to that of Mr. Salmon. That even if it were not, it is no assault for one person gently to lay his hand upon another, or to take him by the coat, as Mr. Salmon states was done in this case. That the first assault was committed by Mr. Salmon, which will justify a battery committed even on a foreign minister; for which was cited U. S. v. Liddle [Case No. 15,598], decided in this court in 1807. (2) That no evidence had been given sufficient to prove that the defendant knew the public character of Mr. Salmon, without which the offence is not made out. For although Mr. Salmon may have been charge d'affaires in 1824, yet the defendant had reason to believe that he was displaced by virtue of the Spanish decrees, particularly that of purification. (3) The minister, Mr. Anduaga, had no authority to appoint Mr. Salmon charge d'affaires; the appointment could be made only by the government of Spain. But if he had the power, still, the official character of that gentleman ceased with the constitutional government, and could only revive by a new appointment of the king upon his restoration, of which no evidence has been given. They denied that the recognition of his public character by the executive of the United States, was sufficient evidence of his being a minister, and entitled to the immunities of one. Cases cited: Vatt. Law Nat. bk. 4, c. 7, §§ 80–83; Id. c. 8, § 111; 2 Burl. 366; Wicquefort, Ambassadors, 18, 112, 113; Cas. Temp. Talb. 282; 4 Inst. 153; Mart. Law Nat. 198.

The District Attorney, for the United States.

J. R. Ingersoll and S. Chew, for defendant.

WASHINGTON, Circuit Justice (charging jury). This is a prosecution instituted by the United States, for the purpose of vindicating the law of nations and of the United States, offended, as is charged, in the person of a foreign minister, by an assault committed on him by the defendant. It is a case which cannot fail to be highly interesting both to the defendant and to our government. To the former, on account of the punishment which might be the consequence of conviction; and to the latter, because the government of the United States, like that of all civilized nations, is bound to afford redress for the violation of those privileges and immunities which the law of nations confers upon foreign ministers, and which are consecrated by the practice of the civilized world. A neglect, or refusal to perform this duty might lead to retaliation upon our own ministers abroad, and even to war. The case, therefore, from its importance, recommends itself to the gravest attention both of the court and of the jury.

There are two questions for your consideration: (1) Is the charge, that an assault was committed by the defendant upon the person of Mr. Salmon, sufficiently proved? If it be, then (2) Was Mr. Salmon a public minister at the time the assault was made?

1. (After summing up the evidence as before stated, the judge proceeds:) It was argued by the counsel for the defendant, that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offence; and that nothing more is proved in this case, even by Mr. Salmon. It is very true that these acts may be done, very innocently, without offending the law. If done in friendship, for a benevolent purpose, and the like, the act would certainly not amount to an assault. But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount, not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger or in a menacing manner, are considered by the law as assaults. It is then

for you to say whether, from the evidence which has been given in the cause, Mr. Salmon was seized, or laid hold of, by the defendant, in kindness and for a justifiable cause, or in anger and with hostile intentions? If the latter, it is an unquestionable case of assault and battery.

It was further argued by the defendant's counsel, that the only witness to prove the assault, is the party who considers himself to have been aggrieved, and therefore, that his evidence ought to be received with great caution, particularly, as another witness, Mr. Wallace, who was present, did not observe the defendant to have hold of Mr. Salmon's coat. It is for the jury to say, whether the evidence of this fact, as stated by Mr. Salmon, is contradicted by Mr. Wallace; and if it be, whose statement is most to be believed; and whether this latter witness, who deposed that he passed the parties in the night and stopped at some paces from them, had it as much in his power to give them correct information in relation to this fact, as Mr. Salmon, who was immediately engaged in the transaction had? If there be no absolute contradiction, the mere circumstance that the testimony given in support of the prosecution is by the party alleged to be aggrieved, ought to have very little influence in the decision of the case. The law makes him a competent witness. He has no interest whatever in the decision of the case; and, if his character be unimpeached, his testimony given in such a manner as not to justify a suspicion of his want of strict veracity, and he stands uncontradicted by other testimony, he is a credible witness, and entitled to be believed. Again, it has been insisted, that, by waving his privilege in becoming a voluntary witness, he has himself violated the law of nations, and his duty to his sovereign. If this be so, that is a matter to be settled by them. We have nothing to do with it. It deprives him neither of his competency, nor of his credibility.

But should the jury feel doubts as to the first assault, on the ground of any discrepance in the evidence, the witnesses all agree that, after Mr. Salmon released the defendant upon his promise to keep the peace, the defendant again approached him in a hostile, or menacing manner, with his arm raised, when a further conflict was prevented by the commendable interposition of Mr. Smith. That this act amounted to an assault admits of not the slightest doubt, and brings the case within the provisions of the twenty-seventh [28th] section of the crime act of 1790 [1 Stat. 118], provided Mr. Salmon was a foreign minister; which is the second point to be considered.

2. Was Mr. Salmon a foreign minister, at the time the alleged offence was committed? The following evidence has been given to prove the public character of this gentleman. (Here the evidence before mentioned was stated to the jury.) The counsel for the defendant have gone into a rigid examination of the credentials of Mr. Salmon. They deny that any thing short of credentials emanating from the sovereign, from some department of his government charged to perform duties of this nature, could constitute him a minister; and, that, even if the appointment of a minister under the constitutional government of Spain was sufficient, it became void by the revolution, which restored the king to his former power, and rendered a reappointment necessary.

If these were questions fit for judicial inquiry and decision, we should say that the appointment of a charge d'affaires by a foreign minister, upon his retiring from the station to which he had been appointed, is usual in practice; and if he be recognized as such by that branch of the government which is authorised to receive ministers, and with which he is to transact the business of his own sovereign, his character of minister is unquestionable. And further, that if, after the constitutional government of Spain terminated, a reappointment, or a recognition, by the king, of the public character of this gentleman were necessary, still, as he is found, after a lapse of about two years, the recognized minister of Spain by our government, we ought to presume that his sovereign has done all that he thought necessary to clothe him with that character.

But the conclusive answer to these arguments is, that these are matters of state, with which courts of justice have nothing to do. The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has necessarily bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received; and so long as they continue to be recognized and treated by the president as ministers, the other branches of the government are bound to consider them as such. If courts of justice could sit in judgment upon the decision of the executive in reference to the public character of a foreign minister, and by pronouncing him to be unduly appointed, or improperly recognized, deprive him of the privileges of a minister, what an extraordinary anomaly would such an interference present to the world! The individual who should be placed in this predicament, would, for all the purposes of his own, and of this government, be a minister, the representative of his sovereign, authorised to transact the business with which he is charged, and to bind his sovereign, whilst acting in obedience to his orders; and yet, he would be no minister in the view of the judiciary, and, of course, not entitled to the protection due from that character. In other words, a public minister without the privileges and immunities of one. For, notwithstanding this judicial interference, he would still continue to be a minister as long as the president should con-

tinue to recognize him as such; and no judgment of a court of justice could deprive him of that character, although it should withhold from him the sanctity appertaining to it. Besides, if it belong to courts of justice to meddle with these matters, and looking beyond the acts and conduct of the president, to decide a person recognized by him as a foreign minister, to be no minister, surely that branch of the government ought to possess all the lights to guide their judgment which are possessed by the president, and should consequently be empowered to call for and to expose to public view, the archives of state, and the correspondence of the executive of this nation with foreign nations, in relation to the subject on which the decision is to be made. Yet, who would be wild enough to maintain a proposition so extravagant and absurd?

The principles which have been stated are those which governed this court in U. S. v. Liddle [Case No. 15,598], decided in 1807; in which it was stated, that the certificate of the secretary of state, that the person claiming to be a charge d'affaires, was received and recognized as such by the executive of this government, was the best evidence which could be given of that fact. The only proper inquiry, in short, in cases of this nature is, has the person, claiming to be a foreign minister, been received and recognized as such by the executive of this government? If he has, the evidence of those facts is not only sufficient, but in our opinion, conclusive upon the subject of his privileges as a minister. Such has been the nature of the evidence given in this case.

It now remains only to notice two or three arguments of the counsel, upon which some reliance was placed. It seemed to be supposed by the district attorney, that even if the first assault had been made by Mr. Salmon on the defendant, the blow which was returned would have been an offence under the act of congress. But this is not the opinion of the court. A foreign minister, by committing the first assault, so far loses his privilege, that he cannot complain of an infraction of the law of nations; if in his turn, he should be assaulted by the party aggrieved. This was decided by this court in Liddle's Case.

It was insisted by the defendant's counsel, that it is incumbent on the prosecutor to prove that the public character of Mr. Salmon was known to the defendant at the time this transaction took place. If this position could be maintained, still, as it is shown by the defendant's letters to Mr. Salmon in May, 1824, that he then knew that gentleman to be the Spanish charge d'affaires; if he had afterwards ceased to be so, it lay on the defendant to prove it. Knowing him once to have been entitled to this character, he acted at his peril if it should turn out that that character still continued; or if indeed the reverse should not be proved. But in point of law, it is immaterial whether the defendant knew that the person assaulted was charge d'affaires or not, and this point also was decided in the case before referred to of U. S. v. Liddle.

As to the Spanish decrees, alluded to by the counsel for the defendant; there is no evidence given of them, and consequently they are not to be noticed by the jury. It is impossible for the court or jury to say whether they do, or do not affect Mr. Salmon.

The jury returned with a verdict finding the defendant guilty.

NOTE. A motion in arrest of judgment was made on the ground that this was a case affecting a foreign minister, and that therefore the circuit court had not jurisdiction. This point was taken to the supreme court upon a pro forma certificate of a division of opinion in this court, and there decided in favour of the jurisdiction. 11 Wheat. [24 U. S.] 467.

UNITED STATES (OSBORNE v.). See Case No. 10,599.

Case No. 15,971a.

UNITED STATES v. OSGOOD.

[Betts, Scr. Bk. 27.]

Circuit Court, S. D. New York. 1839.

FORGERY OF PENSION PAPERS.

[1. Forgery is the false making of a paper, but it need not be the entire fabrication thereof. Any addition to a genuine paper, or any alteration of it in an essential particular, so as to give it a different meaning, is a forgery.]

[2. Aiding or assisting in forging papers with intent to defraud the government consists in the commission of any act having a tendency to forward or facilitate a forgery committed by another. The degree of aid or assistance is unimportant. To trace a name with a pencil, afterwards filled up with another in ink, or to take measures to prevent surprise or detection while the forgery is being committed would be such an act.]

[3. To forge the name of the magistrate to the jurat of an affidavit is a forgery of the affidavit, within the meaning of the law.]

[This was an indictment for forgery against Walter F. Osgood.]

BETTS, District Judge, stated to the jury, that the act of congress prohibited, under highly penal sanctions, the commission of forgeries for the purpose of defrauding the government of the United States. The indictment charges the prisoner at the bar with having been concerned in the forgery of certain affidavits or paper writings, with intent to defraud the government, or an agent of the government for the payment of pensions. The statute anticipates three various ways in which this offence may be committed, and the indictment charges the prisoner to have violated the act in each of those particulars. The prisoner can only be tried upon the accusations stated in the indictment, and the jury must first ascertain with clearness, what the offences are

upon which he stands arraigned, and by what acts he is accused of having committed them. The offences prohibited by the statute, and designated in the indictment, may be arranged in three classes; each class having its appropriate signification, and modes of proof. The first class is (1) forgery, aiding or assisting in forgery; and causing or procuring to be forged the paper writings set out in the indictment. Forgery is the false making of a paper. This false making need not be the entire fabrication of the paper; any addition to a genuine paper, or any alteration of it in an essential particular, so as to give it a different importance and meaning, is a forgery; and if this change is made for the purpose of defrauding the government, it is a felony, the crime interdicted by the statute. Aiding or assisting in forging consists in the commission of any act having a tendency to forward or facilitate a forgery committing by another. The degree of aid or assistance is unimportant; if what is done is, in any manner, calculated to promote the forgery, the act comes within the statute. To trace a name with a pencil, afterwards filled up with another in ink, would be such an act; so taking measures to prevent surprise or detection, whilst the forgery is actually committing, would be aiding and assisting in its commission. Causing or procuring a forgery to be committed would be the use of any persuasion or influence inducing another to commit it. In several of the first counts of this indictment, these acts are all charged to have been committed by the prisoner, in relation to several papers,—the affidavit of Benjamin C. Dubois; that of Hugh Stephenson, and of Samuel Loyd. These papers would not be perfect or complete, so as to answer the purpose they were prepared for, without being authenticated by the attestation of a magistrate. A simple statement of facts by a party claiming a pension, would be of no avail to him; to render the paper of service, it must be regularly sworn to. The jurat, accordingly, became an essential and vital part of the paper, giving to it that character without which it would not be acted on by the war department. To forge the name of the magistrate, would, therefore, be deemed, in judgment of law, the forgery of the affidavit, so as to support an indictment alleging the forgery, not of the name of the magistrate only, but of the paper itself.

The testimony shows beyond all grounds for doubt, that the name of the recorder appended to the affidavits is forged; the only question upon the evidence requiring deliberation, is, whether it is proved that the act was done by the prisoner; or by his aid or procurement. The proofs offered to establish this fact are circumstantial and direct. The circumstantial evidence consists of the facts that the body of the papers is in the handwriting of Luyster, a clerk in the prisoner's office and employment; that the affidavits were presented by the prisoner to the pension office, and the monies received by him upon them; that at least one of the supposed deponents, Stephenson, had been dead about eight months, and proof is offered to show that this last fact was well known to the prisoner; and that other papers to obtain pensions (proved to be forged, and to have been prepared by the prisoner) were also in part in the handwriting of Luyster. More remote facts, but being also relative to the subject, are also in proof,—that an affidavit in support of the application of one Clarke, proved to be in the handwriting of the prisoner, is forged; that Clarke died in 1826; and that papers in the prisoner's handwriting with the forged attestation of the recorder that he was living, &c., were executed and used in 1833, and that in 1833 the prisoner drew Clarke's pension, $960, in this city on a forged affidavit, at the same time asserting under his own signature, that Clarke did not apply personally for it on account of his age and infirmities. Evidence of a similar character in many features is also offered with respect to the application of Loyd, and the papers prepared and used in his name.

These facts are laid before the jury on the part of the prosecution as a foundation for the inference that the prisoner committed the forgeries laid to his charge, or procured them to be done, or aided and assisted in their perpetration. Circumstances may be so directly and necessarily connected with the conclusion of guilt as to amount to what is called a violent presumption of guilt, and so as to be equally satisfactory with positive proof. That force of evidence might probably be found in circumstances showing beyond doubt that the body of these papers had been prepared by the prisoner, that he had used them as genuine to his own individual benefit, and that he knew the persons whose names were used were fictitious. It would be difficult to suppose a combination of facts of that character without holding them connected with the further one; that the name added to the papers had been forged by him, or at his instance and with his assistance. It belongs to the jury to determine how far the testimony has established facts of that character, and also to decide what intendment must necessarily accompany them.

Although the circumstances in proof may not afford a violent presumption of the guilt of the prisoner, yet they may raise a probable presumption of such guilt. The distinction in law between these two degrees of presumptive evidence is that the latter is such an inference or conclusion as common observation and experience teach us ought ordinarily to be drawn from the facts. If a man attempts to pass a counterfeit bank bill, the filling up of which is in his own handwriting, the probable presump-

tion is that he forged the whole bill, and a jury would be well justified in finding him guilty of the counterfeiting, in the absence of proof on his part showing that he did not commit the offence. If he had passed such bills, and was found with a large quantity of them in his possession, the presumption that he was the counterfeiter would become violent,—would demand his conviction as upon full proofs, unless he could clear himself by countervailing testimony.

After maturely considering the circumstantial evidence before them, and estimating its weight and bearing, if the jury are in doubt whether the offence is proved by it, it will be necessary to bring into consideration the direct proof to this part of the charge. That consists of the testimony of the accomplice, Luyster. The law admits an accomplice to be a competent witness, but it declares it unsafe to convict upon his uncorroborated evidence alone. To corroborate his testimony there must be other proof supporting him in essential parts of his story. The jury will undoubtedly find much evidence of that character in this case, and, considering Luyster's credit affected only by the fact that he was a particeps criminis, there might be enough found probably to justify a good deal of confidence in his statements. The jury, are, however, to bear in mind that the witness has once before given an entirely opposite account, on oath, of the transactions to which he now testifies, and that in the one instance or the other he has committed manifest perjury. It may happen that the most depraved of human beings may so bear himself on his examination as to command the confidence of a court and jury; when he unbosoms himself without reserve, and carries to every judgment a deep conviction that he is honestly attempting the only atonement and expiation for his past offences allowed man in this life,—a confession of his sins, and making all the reparation in his power for the wrongs done by him. Even then the steadier experience of the law admonishes us against yielding to emotion and sympathy, and cautions us that it is safer to abide by well-tried rules of judging, than to proceed upon vague impulses, even though the mind may at the moment be entirely satisfied of the truth of the witness, and clear wrong be done in the individual case by not crediting him. The cardinal rule, which has served in all ages, and been applied to all conditions of men, is that a witness wilfully falsifying the truth in one particular, when upon oath, ought never to be believed upon the strength of his own testimony, whatever he may assert. And further, in respect to this witness, Luyster, the jury will carefully note his manner of testifying, and if they find he prevaricates, denies facts which it is plain he must know, endeavors to make concealments, half discloses at one moment what he fully discloses at another, it would be unsafe and improvident to rely in the slightest upon his testimony, except in so far as each particular statement is corroborated by other proofs.

The jury will be required to pass also upon the other classes of offences set forth in the indictment: (2) Uttering and publishing as true the three affidavits or papers described. (3) Transmitting or presenting them to the government or an agent thereof. The evidence of uttering or publishing the papers, and of presenting them to an agent of the government as true, is very explicit and uncontradicted. The counsel for the prisoner in no way question these two facts. To convict him, however, of the offence for which he is indicted, the proofs must satisfy the jury that the prisoner knew when he so used the papers that they were forged. All the evidence applicable to the first class of counts also applies to latter classes; and, though the evidence may be insufficient to prove the actual forgery, it may be adequate to establish the scienter, or knowledge of the prisoner that the papers were forged. It is to be examined only, in this point of view, in reference to these counts in the indictment, and the single inquiry referred to the jury on this branch of the subject is whether upon the whole evidence it is proved that the prisoner knew the papers described in the indictment were forgeries, at the time he offered them as genuine.

THE COURT further remarked that it was the right of the jury to separate the charges in their finding, and give a verdict of guilty upon any one of the counts in the indictment, and of not guilty upon all or any of the others. So, also, they may discriminate between the several particulars embraced in any one count or class of counts. Three affidavits are specified in the indictment as the subject of the offence; but the crime is complete, if either affidavit was forged by the prisoner, or uttered and published as true, with a knowledge that it was forged. Should the proofs establish the prisoner's guilt as to any one, and not as to the other particular specifications, the jury may acquit him, in respect to the latter, or return a general verdict of guilty, inasmuch as the crime is the same whether one or all the papers were forged.

It belongs to the prosecution to produce legal evidence proving the guilt of the prisoner. He is to have the advantage of every defect of testimony, and of every reasonable doubt existing upon the proofs; and whatever suspicions the evidence may raise, if it does not make out satisfactorily the criminality of the prisoner in the matter and manner charged in the indictment, he is entitled to a verdict of acquittal.

The jury found the prisoner guilty upon the whole indictment.

Case No. 15,972.

UNITED STATES v. OSIO.

[Hoff. Land Cas. 100.] [1]

District Court, N. D. California. Dec. Term, 1855.[2]

MEXICAN LAND GRANTS.

The grant in this case was made under the express authority of the Mexican government.

Claim [by Antonio Maria Osio] for Angel Island, situated in the Bay of San Francisco.

S. W. Inge, U. S. Atty.
Bates & Lawrence, for appellee.

HOFFMAN, District Judge. The claim in this case is founded on a grant made by Governor Alvarado on the eleventh day of June, 1839. The expediente is produced from the archives, and the genuineness of the original grant fully established. The island which is the subject of the grant appears to have been used almost immediately after the grant by the claimant for the raising of cattle, horses,, etc., a considerable number of which he placed upon it. He also built upon it a small house, which was occupied by his major domo. The claimant although he did not personally reside on the island, frequently visited it; and on one occasion remained upon it three months, superintending, among other things, the erection of a dam to form a reservoir for the use of his cattle. His title to the land seems to have been generally known and recognized, and the cattle upon it were marked with his brand. He afterwards built three other houses and put a portion of the land under cultivation, and at the time of the war his cattle were used to the number of five hundred. The only doubt which can be suggested with regard to the validity of the claimant's title is, whether the governor had a right to grant islands upon or near the coast. But it appears that the grants of this and other islands were made by the express direction of the superior government of Mexico; and the governor was enjoined to grant the islands to Mexicans in order to prevent their occupation by foreigners, who might injure the commerce and fisheries of the republic, and who, especially the Russians, might otherwise acquire a permanent foothold upon them. We agree with the board in the opinion that this express authority to make these grants removes all doubt on the subject. The board have unanimously confirmed this claim, and we see no reason for reversing their decision. Their decree must therefore be affirmed.

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

[2] [Reversed in 23 How. (64 U. S.) 273.]

[On appeal to the supreme court the decree was reversed and the cause remanded, with directions to dismiss the petition. 23 How. (64 U. S.) 273.]

Case No. 15,973.

UNITED STATES v. O'SULLIVAN et al.

[9 N. Y. Leg. Obs. 193.]

District Court, S. D. New York. July, 1851.

REMISSION OF CAUSES FROM DISTRICT TO CIRCUIT COURT.

1. A case will not be remitted to the circuit court from the district court, except when it shall appear that the questions of law are, in the judgment of the district court, of so grave a character that it must judicially declare them both difficult and important.

2. Nor would a judge be justified in remitting a case to the circuit court from the district court, because he had given a particular exposition to a crime's act in his charge to the grand jury, when it is not made to appear that his exposition is in conflict with that of any other court.

The question raised in this motion was, whether, on the indictment found by the grand jury against the defendants, the district court were bound to remit it to the circuit court. The facts and circumstances sufficiently appear in the opinion delivered by the learned district judge.

J. Prescott Hall, U. S. Dist. Atty.
John L. O'Sullivan, in pro. per.

BETTS, District Judge. The defendant moved the court, on the indictment found by the grand jury against him, that it be remitted to the circuit court. The act of congress of August 8, 1846 (Sess. Laws, 109, c. 98, § 2 [9 Stat. 72]), authorizes the United States attorney, at his discretion, to move the circuit court or district court to remit to the other indictments found in either. And in the 3d section further enacts that the district court may remit to the circuit court any indictment pending in the district court, when, in the opinion of the court, difficult and important questions of law are involved in the case. The district attorney opposed the motion for a remittitur, because of the great delay which such course must create, and because numerous witnesses were attending for the trial of the case on the part of the United States, many of whom were detained in jail, not being able to give recognizances for their appearance. The court asked to be furnished by the defendant with the points of law deemed by him to be of a character to call for the remittitur of the cause, under the provisions of the statute. A note of such points was accordingly given the court. They have been attentively considered, not with a view to determine which way the various suggestions propounded in them should be answered, but to ascertain wheth-

er they involve questions of such difficulty and importance as to render it the duty of this court to refer the subject to the circuit court. The points of law supposed to arise under this indictment do not seem to me to assume so grave a character. That the act of congress may present debatable questions, and demand the decision and construction of the court upon those questions, is highly probable; and it is not to be expected any statutory regulation will ever be expressed in a perspicuity and definiteness of language which admits of no exception or doubt. When one doubt is removed by construction, others spring out of the interpretation itself, and it is a constant occupation of jurists and judicial tribunals to encounter and solve such doubts. It cannot be supposed, therefore, that congress intended the district courts should exercise jurisdiction only in cases free of difficulty, and not important in themselves, and remit all others of a different character to the circuit courts. By the act of August 23, 1842 (5 Stat. 517, § 3), it is enacted that the district courts of the United States shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, the punishment of which is not capital; and in such of the districts where the business of the courts may require it to be done for the purposes of justice, and to prevent undue expenses and delays in the trial of criminal causes, the district courts shall hold monthly adjournments of the regular terms thereof for the trial and hearing of such causes. The direction to hold monthly adjournments does not apply to this court, it being required by the act of May 29, 1830 (4 Stat. 422, § 1), that the district court of the United States for the Southern district of New York shall hold a stated term, at the city hall of the city of New York, on the first Tuesday of each month. But the provision of the act of 1842 imports a direction to district courts to exercise the jurisdiction conferred by it, so that delays and expenses may be avoided in criminal cases. The manifest object of the statute would be frustrated, if these courts, on the occurrence of any debatable question of law in a criminal cause, should suspend their action, and remit the case to a circuit court. No one can, with reason, suppose such a step proper, unless the questions of law are, in the judgment of the court, of a character that it must judicially declare them both difficult and important. Those suggested in the memorandum handed me by the defendant may some of them be new, and not yet adjudicated upon in the United States courts, and perhaps were never before presented for consideration. Those circumstances do not, however, necessarily clothe them with the qualities of difficult and important questions. Questions of construction and interpretation are incessantly arising in the administration of criminal law. Scarcely an indictment, under a new or old statute, is brought to trial without there being started, and seriously discussed, question after question, vitally important to the defence, or perhaps to the prosecution; yet the district courts cannot consider they are authorized to disembarrass themselves from the consideration and decision of those questions, by adjourning them to the circuit court; nor, very often when clearly of the utmost importance in the cause, to declare them difficult.

The grand jury, at the present term, have already brought in thirteen indictments, and yesterday presented six for offences against recent statutes of the United States; all of which last are for offences never prosecuted in this court since I have presided in it. Still it is no less my duty to proceed and hear the new cases than the old, however apparent it may be that points very important to the defence of the parties accused may arise under many or all of them.

In the present case it would be most grateful to my own feelings to be relieved of the burthen of the trial; not only because there must necessarily devolve on the court great fatigue and anxiety, in a prolonged and actively contested case, surrounded with many other considerations than the intrinsic merits presented by the issues, but especially because it is plainly signified in this proceeding that the defendant desires by it no less to change the judge than the tribunal. In the points submitted by him, as the foundation of the motion, a paragraph was inserted taking the ground distinctly that the district judge had, in advance of argument, in his charge to the grand jury, given strong and decided views of the law, which would necessarily affect his judgment on the hearing of the cause. It is true the pen was struck through the lines of the paragraph, but evidently not intended so to obliterate them that the sentiment should fail being communicated to the judge. I take no exceptions to the suggestion. The party had a right to make it, and there would have been nothing offensive or indecorous in the objection if expressed openly. Most plainly it affords no legal cause for the judge to decline jurisdiction in the case, or for the party to challenge the propriety of his acting in it. A judge, from his office and station, is presupposed acquainted with the law of the land, and, from study and reflection, to have formed opinions upon the bearing of all positive laws of a general character, on any supposed state of facts. The more extensively and thoroughly he is informed upon those subjects, the better is he qualified for his place. His opinions should not be inflexible nor stubborn, but open to re-examination upon new light or reasons brought to his attention; still, his position is the reverse of that of a juror. Instead of having a mind free of all knowledge or impression on the subject to be sub-

mitted to his judgment, it ought to be strongly imbued with the law he is to administer, so as to be prepared to apprehend the justness of any criticisms or explanations applied to it; and it matters not if his opinion be in some measure already made up both on the law and facts of the case, by having acted as committing magistrate on the accusation. Under this theory a party acquires no benefit by appealing or transmitting his cause from one judicatory to another, to avoid its being heard by a judge who had formed an opinion upon the meaning of the law, because in every step upwards, from the lowest court to that of last resort, he must be presumed to meet judges of more matured and fixed opinions upon the subject. The policy and advantage of this ascending scale of review is to bring the matter ultimately before those who are prepared, by previous study and experience, to pronounce definitely upon the subject.

I cannot think, therefore, that the act of congress contemplates, or that a judge would be justified in remitting a case to the circuit court from the district court, because he had given a particular exposition to a crimes act, when it is not made to appear his exposition is in conflict with that of any other court. When it is discovered that judges in different sections of the United States put varying interpretations upon the criminal statutes, it is, then, clearly important that the judgment of the supreme court should be invoked to give an exposition which shall become a rule to all the tribunals of the country.

Independent of these general considerations, I consider it improper to remit causes to the circuit court in this district, except in cases of most manifest and grave importance. The circuit judge sits in that court only twice a year, and is unable to devote the time necessary to dispose of the business exclusively within its jurisdiction. He might be compelled, in order to clear the jails, to lay aside his civil calendar, and give his attention to cases, which, by law, the district court is required to hear; or he may feel constrained to remand to the district court the cases originating there, and within its jurisdiction, and he would be thus imposing great delay and enhanced expense upon individuals and the government, by reason of improvident concessions of the district court to parties under indictment. I consider it my duty to dispose of the business cast upon me by the law, and however willing I may be personally to be freed of these particular classes of cases, I discover nothing in them which authorizes me to send them from this court to the circuit court for trial. I shall accordingly decline giving the order asked in the present case, and also in those of Lewis and Schlessinger.

[See Cases Nos. 15,974 and 15,975.]

Case No. 15,974.

UNITED STATES v. O'SULLIVAN et al.

[9 N. Y. Leg. Obs. 257.]

District Court, S. D. New York. July Term, 1851.

INDICTMENT—MOTION TO QUASH—STATUTORY OFFENCES—NEUTRALITY LAWS—CONSTRUCTION AND EFFECT—INTERNATIONAL LAW.

1. A motion to quash an indictment is a proper mode of taking objections to it for want of form or substance.

2. It is, however, discretionary with the court whether it will quash an indictment for defect of form.

3. It is generally sufficient to describe a statutory offence in the words of the statute creating it, particularly so in cases of misdemeanors.

[Cited in U. S. v. Quinn, Case No. 16,110.]

4. U. S. v. Smith [Case No. 16,342], and U. S. v. Burr [Id. 14,693], are precedents establishing the sufficiency of such indictment under the 5th section of the act of June 5, 1794 [1 Stat. 384].

5. The 6th section of the act of April 20, 1818 [3 Stat. 449], is substantially a transcript of that. In U. S. v. Henderson, an indictment under this section, corresponding to that of U. S. v. Burr, decided to be good.

6. The particulars constituting the offence are matters of evidence and not of pleading.

7. The indictment in the present case *held* to be good in point of form.

8. The law of nations no less interdicts warlike aggressions made directly upon a nation at peace than the aid of one belligerent against another.

9. They are just cause for reprisal and war. What a nation may not lawfully do in its public capacity in respect to others, the citizens or subjects of it ought not to do in their private capacity.

10. Q. Whether they can be restrained or punished by the judicial tribunals therefor, under the law of nations, as part of the common law of the land?

11. The United States government is the first amongst civilized nations which compelled, by positive law, its citizens, individually, to observe the law of nations towards friendly powers.

12. The act of 1794 was not intended as merely a neutrality act.

13. The president invoked the legislation of congress for further objects than the means of maintaining the neutrality of the United States between belligerents solely.

14. The act has been accepted by the United States government and judicial officers ever since its enactment, as extending to warlike expeditions from this country, not intended to aid one belligerent against another.

15. The cases of U. S. v. Smith and U. S. v. Burr clearly evince that understanding of it.

16. Q. Whether a direct attack by the United States, or by individuals from the United States, on a Spanish province in America, is properly a breach of neutrality, though Spain be at the time at war in Europe with a power with whom the United States is at peace?

17. The act of 1818 has been uniformly treated by the executive department, and by judges of the United States courts, as embracing warlike enterprises set on foot in this

country against a friendly power at peace with all the world.

18. Such, also, according to established rules of construction, is the interpretation to be put upon the language of the act.

19. The matters charged in the indictment constitute a violation of the statute, and the motion to quash the indictment denied on both grounds.

[This was an indictment against John L. O'Sullivan and others for preparing and setting on foot, etc., a military expedition against the Island of Cuba. Heard on motion to quash.]

J. Prescott Hall and Ogden Hoffman, for the United States.

F. B. Cutting and J. Van Buren, for defendants.

BETTS, District Judge. The indictment in this case is founded upon the 6th section of the act "in addition to the act for the punishment of certain crimes against the United States," passed April 20, 1818. The provisions of the section are "that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, every person so offending, shall be deemed guilty of a high misdemeanor." The indictment, in ninety-seven counts, charges the defendants, by themselves and in conjunction with others, with having, within the United States and at the city of New York, begun a military expedition and enterprise, and with having provided and prepared the means for a military expedition and enterprise, to be carried on from thence against Cuba, the territory and dominion of the queen of Spain, and also against the people of the territory and colony of Cuba. Each count purports to charge the offence in the words of the statute, and the variations between them are mostly formal only and relate to the different appellations given in the indictment to the Island of Cuba, or place against which the expedition was destined. The defendants move to quash the indictment, for want of averments proper and necessary to be pleaded to by them, or on which any judgment of the court, in case of their conviction by a jury, can be rendered. These objections relate only to the form and structure of the indictment, and if well taken do not dispose of the accusations preferred against the defendants, as they may be obviated by a new bill correcting the deficiencies of the present one.

The essential point raised by the motion, and discussed with great earnestness and force on the part of the defendants, covers their liability to prosecution under any form of indictment, for the act alleged to have been committed by them. The position taken on the merits is, that the act of congress relates solely to the maintenance of a state of neutrality by citizens of the United States, in respect to foreign states in amity with us, but at war with each other. It will be proper to consider in the first place the sufficiency of the indictment as framed, for if that be vitally defective the defendants must be discharged from the present prosecution, and it will be labor lost to investigate and decide the main question as to the force and operation of the statute.

A doubt was suggested preliminarily on the part of the prosecution, whether it is competent for the defendants, after having plead the general issue to the indictment, to withdraw that plea and move to have the bill quashed; or even if the motion to quash is an appropriate one, to bring up merely technical points of pleading. It is true, the defendants, when arraigned, entered their pleas of not guilty to the indictment, but it was without the presence or advice of their counsel, and under the assurance of the court that the plea should no way prejudice their rights, and that they should have the privilege of every defence to the indictment, when their counsel came into court, that they were entitled to by law before the plea of not guilty was interposed. The authority of the court, to control the order of pleading at its discretion, cannot be doubted.

The doctrine of the English books is, that by the common law the court may, in discretion, quash an indictment for such insufficiency, as will make any judgment whatsoever, given upon any part of it against the defendants, erroneous. Hawk. P. C. bk. 2, c. 25, § 146; 1 Chit. Cr. Law; Archb. Cr. Pl. p. 64, § 8; Bac. Abr. Indict. K; Com. Dig. (Day's Ed.) Indict. H, and notes. The American authorities recognize the principle fully. Whart. Cr. Law, pp. 130, 61, 7, § 1; Barb. Cr. Law, 306, c. 7. But Hawkins says, the judges are in no case bound ex debito justitiæ, to quash an indictment, but may oblige the party to plead or to demur to it. Hawk. P. C. bk. 2, c. 25, § 146.

The first count of the indictment charges, that the defendants, on the 23d day of April, 1851, within the territory and jurisdiction of the United States of America, to wit, at the city of New York, in the Southern district of New York, and within the jurisdiction of this court, with force and arms did, in conjunction with some other persons to the jurors unknown, begin a certain military expedition, to be carried on from thence against the territory of a foreign prince, to wit, the territory of the queen of Spain, the United States then and there being at peace with the said queen of Spain. The twelve counts succeeding, also count on the words "begin a military expedition"; and state the offence substantially in the same language as the first count, varying from it in some instances in averring the military expedition was to be carried on from the United States, and also in naming Cuba as the place against which it was to be carried

on; and giving that sometimes the appellation of territory, dominion, colony or district, of the queen of Spain, or of the people of Cuba. Similar allegations are made in the counts charging the setting on foot a military enterprise, to the 34th count inclusive. From the 35th to the 75th counts inclusive, the defendants are charged with having provided the means for carrying on a military expedition or enterprise, and from the 76th to the 97th counts inclusive, with having prepared the means for the same.

The most material exceptions taken on the part of the defendants to the frame of the indictment, are: 1. That in the 34 first counts it is not stated what acts were done by the defendants, to begin or set on foot a military expedition or enterprise, nor what constituted or composed the expedition, and rendered it military. 2. That the defendants are not charged with having begun or set on foot the expedition or enterprise, with criminal intent, or knowing it to be a military one. 3. That it is not averred from what place in particular in the United States, nor at what time, the expedition or enterprise was to be carried on. 4. That the counts from 75 to 97, do not charge any criminal intent, or that the defendants had any knowledge that the means prepared and provided were to be employed in carrying on a military expedition. 5. That all the counts want the fulness and precision required by law, in describing a criminal offence, and connecting any person with its commission.

These objections and various minor ones, raised in the course of the argument, fall under two general considerations: 1. Whether it is legally sufficient in an indictment on this section of the statute, to describe the offence in the words of the act, and if so: 2. Whether the pleading in the present case fulfills the spirit of the rule, by designating times and places and acts, with the distinctness and precision necessary to bring the defendants within the charge of having violated the law.

In England, it is required that indictments for offences made so by statute, when of the degree of felony, shall contain the same formality and precision as on common law offences, and it is not enough to pursue the description of the offence given by the statute, but the special acts done, or ingredients of the offence, must be stated in the indictment. 1 Chit. Cr. Law, § 22; Archb. Cr. Law, 50; Starkie, Cr. Pl. 235. It is unnecessary to inquire whether the United States courts have adopted, even in cases of felony, the rigor of the common law rule of pleading in this respect. I apprehend the general practice is to charge statutory offences, carrying with them an infamous punishment, in the words of the statute constituting the offence; for instance, an assault with intent to kill, or commit a rape, or with a dangerous weapon, or making a revolt. Be this as it may as to felonies, the rule is clear and explicit in respect to misdemeanors, that it is generally enough in an indictment to describe the offence in the words of the statute creating it. U. S. v. Kelly, 11 Wheat. [24 U. S.] 418, where the indictment charged the defendant with an endeavor to make a revolt, and it was held by the supreme court to be a sufficient description of the offence. In U. S. v. Gooding [12 Wheat. (25 U. S.) 460], the defendant was indicted for fitting out a vessel to be employed in the slave trade —the act of congress of April 20, 1818, having made it an offence so to do. Exception was taken that the particular acts done by the defendant were not specified. There would be, apparently, in those cases, strong reasons for requiring such statement, that it might appear upon the record an offence had been committed, and also to enable the defendant to be prepared for his defence. But the supreme court held the indictment sufficient. [U. S. v. Gooding] 12 Wheat. [25 U. S.] 460. So, on an indictment under the 3d section of the act upon which the present indictment is founded, the defendant was charged with being knowingly concerned in fitting out a vessel with intent that she should be employed in acts of hostility, &c., &c., describing the offence in the language of the statute. The court decided that it was sufficient for the indictment to charge the offence in the words of the statute. U. S. v. Quincy, 6 Pet. [31 U. S.] 465. The decision in the last case has more pertinency and weight on the present question, because it had reference to a section of this very act, and because it declares a mode of describing the offence, no less general and indistinct than the present, to be all that is required in law. In U. S. v. Mills, 7 Pet. [32 U. S.] 142, the court again assert the general rule to be, that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. The court further say there is not that technical nicety, as to form, necessary, which seems to have been adopted and sanctioned by long practice in cases of felony, and, with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted.

These doctrines are applied in the U. S. circuit courts, in indictments for misdemeanor, in a spirit as broad and liberal as that indicated by the supreme court. U. S. v. Hayward [Case No. 15,336]; U. S. v. La Coste [Id. 15,548]; U. S. v. Martin [Id. 15,731]; U. S. v. Lancaster [Id. 15,556]; Whart. Prec. Ind. 608, note. And it is worthy of notice that, even in civil actions upon penal statutes, the United States supreme court hold it sufficient to charge the offence, or plead matter of defence in the words of the statute. [Locke v. U. S.] 7 Cranch [11 U. S.] 339; [Gelston v. Hoyt] 3 Wheat. [16 U. S.] 330. The counsel for the defendants suppose a decision of the supreme court of this state has marked a qualification not inconsistent with the rule declared by the supreme court of the United States, but which restores to indictments upon statutes a

more just and desirable conformity to those founded upon common law offences. People v. Taylor, 3 Denio, 96. I do not understand the decision in that case conflicts, in any essential particular, with those above cited; on the contrary, it seems to me to confirm, in the strongest terms, the principles upon which they rest. It was an indictment for setting on foot and for carrying on a certain lottery. The state statute made it an offence for any person to open, set on foot, carry on, promote, or draw any lottery, &c. 1 Rev. St. 665. The court say, all the counts based upon a lottery state the purpose for which the lottery was made, in the words of the statute, and that is enough to show that it was an illegal lottery. The counts also follow the statute in severally stating what was done by the defendant, to wit, that he did "set on foot," "carry on" and "open" a certain lottery, and in this are sufficient; neither of the counts contains any description of the lottery beyond a general statement of the purpose for which it was made. For the latter reason, the first, third and fourth counts were pronounced bad, but the second count was held good, because it had the averment that "a more particular description of the lottery was unknown to the jurors." This decision may perhaps be regarded as in a degree shaken, if not overruled, by that of the court of appeals in Charles v. People, 1 Comst. [1 N. Y.] 180, in which it was held that an indictment, under the same statute, for publishing an account of a certain illegal lottery was good without other description of the lottery or the acts done. The statute is "that no person shall by printing, &c., &c., publish an account of such illegal lottery." The case of Com. v. Dana, 2 Metc. [Mass.] 329, seems to stand opposed to the reasoning and conclusion of the court in People v. Taylor, as to the necessity of filling out the meaning of the legislature by averments in the indictment beyond the language of the statute. See, also, 5 Pick. 41, 42; 6 N. H. 53. Be that as it may, whether an indictment under the New York statute for setting on foot, or publishing an account of a lottery, must give the name of the lottery or an excuse for not setting it forth, the case of People v. Taylor is pointed and distinct that no other description of setting on foot, or carrying on, or opening a lottery, is necessary than to aver in the words of the statute that the defendant did set on foot, etc., etc. The counsel also call the attention of the court to the state act of 1849, c. 278 (Sess. Laws, 403), making it a misdemeanor "to manufacture, cause to be manufactured, sell or expose, or keep for sale or gift or part with 'slung shot,'" stating that it has been adjudged by the criminal court for this city, that an indictment under this act following its words is bad, and that the intent of the party charged, to use such slung shot, must be averred and proved. The decision undoubtedly rests upon the doctrine that when the statutory description does not give every necessary ingredient of the offence, then the indictment must aver the facts necessary to constitute the crime, and such as show a scienter and criminal intent on the part of the accused. Archb. Cr. Pl. 64; Barb. Cr. Law, 291. But such is not the case under the statute in question. The act charged to have been done by the defendants imports a knowledge of its criminality, and the intent necessary to constitute the offence described by the statute. To begin, or set on foot a military expedition from the United States against another nation, necessarily imports by force of the expressions themselves that the act was done understandingly, both as to the object and purpose for which the military expedition is prepared or set on foot, and the end it is to answer or accomplish.

After this brief consideration of the general rule in relation to indictments upon statutes for misdemeanors, and the exposition of the supreme court of the United States, of an indictment drawn in the language of the 3d section of the statute in question, it may be proper to advert to the evidence supplied in the action of the judiciary on the section specially under discussion, to ascertain whether any interpretation has been put upon it, which will throw light upon this inquiry and indicate the sense in which this act has been understood and executed. This is a re-enactment of the 5th section of the act of June 5, 1794, with the addition of "or of any colony, district or people," after foreign prince or state, with whom the United States are at peace. The description of the offence and the punishment are otherwise identical. In April, 1806, indictments were presented in the United States circuit court for this district, against Samuel G. Ogden and William S. Smith, founded upon the 5th section of the act of June 5, 1794. The indictments were very concise, the parties were indicted separately. Trial of Smith and Ogden, vi, ix.[1] The first count charges that Ogden on the 10th day of January, 1806, at the city of New York, within the district of New York, and within the jurisdiction of the United States, did begin a certain military expedition to be carried on from thence against the dominions of a foreign prince, to wit, the dominions of the king of Spain, the United States then and there being at peace with the said king of Spain. The second count, with the same preamble, avers that Ogden "did set on foot a certain military enterprise, to be carried on from thence against the territories," as before. Third count same as second, except alleging it to be against the province of Caraccas in South America, then and there being the territory of the king of Spain. Fourth count, same preamble, did provide the means, to wit, one ship or vessel called the Leander, for a certain other military expedition to be carried on from thence against the dominions of the king of Spain. Fifth

[1] [Cases Nos. 16,341a–16,342b.]

count, same as last, and after Leander, adding, "one hundred and fifty men, thirty cannon, five hundred muskets, four thousand pikes, thirty tons of cannon balls, one hundred swords, one hundred and fifty quarter casks of gunpowder" for a military expedition to be carried on from thence against the province of Caraccas, etc. Sixth, and same as last, except place, to be carried on against "the dominions of some foreign state to the jurors unknown." Seventh, same preamble, "did set on foot a certain other military enterprise to be carried on from thence against the dominions of some foreign state, to the jurors unknown." The indictment against Smith, has the three first and last counts the same as that against Ogden; the fourth, fifth and sixth counts also the same with those against Ogden, except in charging the means prepared and provided to be thirty men and $300 in money. The prosecution in those cases touched closely upon some of the exciting topics of party politics, and they were pursued and defended with an acrimony better befitting the arena of party strifes than a tribunal of justice. The first talents of the New-York bar appeared for the defence, and every point was combated with all the astuteness and ardor causes so circumstanced would be apt to engender in the then state of public feeling. Messrs. Emmet, Harrison, Colden and O. Hoffman, conducted the defence, and it is fair to infer that no tenable point of objection to the prosecution derivable from the law or the facts would escape the sagacity and experience of such counsel. Pleas in abatement were interposed, and motions made to quash the indictment, because improper testimony had been laid before the grand jury. Trial of Smith and Ogden, xxiv., xiii.[1] A most earnest and protracted argument was addressed to the court to compel the attendance as witnesses of the secretary of state, and other heads of the departments of the general government, and the most earnest efforts renewedly made to postpone the trials; but on the various motions and discussions, it was never suggested that the form of the indictment was objectionable, either in not describing properly the offences charged to have been committed, or averring the times and places they were to be perpetrated. It is to be remarked that Mr. Hoffman had been attorney general of the state of New York, Mr. Harrison United States attorney of this district, and the eminence of Messrs. Emmet and Colden in all branches of juridical learning, gives to the omission of such counsel, to raise an objection to the indictment in form or substance when so pressed by the case, the force of the strongest argument in its support and vindication of its legal sufficiency. On the 9th of September, 1807, after Col. Burr had been acquitted on an indictment for high treason, he was arraigned at Richmond, Virginia, before Chief Justice Marshall, on an indictment under the same section, the 5th section of the act of June 5, 1794, for beginning and setting on foot a military expedition against Mexico. From the synopsis of the indictment given (2 Burr, Tr. 538) it appears to have been framed nearly identically with those against Smith and Ogden. The offence is charged in the words of the act and in no other way; "did begin a military expedition," "did set on foot a military expedition and enterprise," against the territory and dominions of the king of Spain, against the province of Mexico, and against the territory and dominions of a foreign state unknown. The history of the trials of Col. Burr affords an exhibition of acumen, learning and perseverance in pressing every topic of defence supplied by legal skill and experience which is not surpassed by any case on record. Himself a jurist of pre-eminent distinction, and assisted by Edmund Randolph, Wickham, Charles Lee, Robert Goodlee Harper, Luther Martin, Botts, &c., some of them leading lawyers of the age, the prosecutions were opposed at every point of advance, when there seemed the faintest ground for objection, and thus, for a series of weeks, was maintained a struggle against the cases set up by the government against him. Both indictments were defeated, but it is certainly remarkable, if the one, now in question, was open to the objection that the offence was not sufficiently described, and that it was otherwise defective in form or substance, that ground should not have been then taken against it. And the more so, because it was most strenuously insisted that Col. Burr could not be properly prosecuted in that district for the offence; and if he could, that he ought not to be subjected to trial at that time, or at all, after his acquittal on the capital charge. In the unremitted efforts to get rid of the indictment or of the trial, it was never suggested by Col. Burr or either of his counsel, nor by the court, that the indictment in its then shape could not be maintained. It was treated in all the motions and arguments as sufficient and valid, in point of form, and the court, in a carefully prepared opinion on the motion to reject evidence offered under it on the part of the United States, declares "that any legal testimony which shows the expedition to have been military or to have been designed against the dominions of Spain, may be received." 2 Burr, Tr. 539, and Append. This case, surrounded with its attendant circumstances, augments the force of the implication derived from the trial of Smith and Ogden, that there was no valid and sound objection in law to the sufficiency of the indictments, in the form in which they were presented.

The argument, from the usage of the courts and the undoubting acquiescence of the profession in support of the sufficiency and propriety of setting forth the offence in question

[1] [Cases Nos. 16,341a–16,342b.]

in the words of the statute, is further strengthened by the recent proceedings in the United States circuit court for the District of Louisiana. An indictment was presented in that court, on the 6th section of the act of 1818, against Henderson, for beginning and setting on foot a military expedition against Cuba. I have been furnished with the form of the indictment, and find it corresponds almost exactly with those in the cases of Smith and Ogden and of Col. Burr. No demurrer or motion to quash the indictment was made on the part of the defendant; he went to trial upon it as sufficient in point of form and substance. On the trial, evidence offered by the United States of circumstances tending to show the beginning and setting on foot a military expedition by the defendant was objected to, because those circumstances were not set forth and averred in the indictment. The presiding judge, in a very carefully prepared and able opinion, overruled the objection and held that it was sufficient to charge the offence in the words of the statute, the particulars constituting the offence were matters of proof and not of averment. This case then also shows that in the understanding of the bar, the indictment was not open to exception upon its face, because of insufficiency in stating the offence, and it further shows the deliberate judgment of the court upon the precise point, that the objection cannot avail against the admissibility of evidence under the averment, so that it accordingly is sufficient as a description of the offence and also as notice to the accused of the matters he must be prepared to meet and defend himself against.

It was unnecessary in the present indictment to aver that what the defendants did, was done by them with a criminal intent or with knowledge that it was a criminal offence. The statute does not make these particulars a part of the description of the offence, but the definition given imports a criminal knowledge and intent in those committing it. To begin or set on foot, or supply means for a military expedition from the United States to be carried on against a nation at peace with the United States, as already intimated, implies in those concerned in such an adventure, a purpose and intention to do that act understandingly and intentionally, which is pronounced by the law to be a crime. No further charge of a criminal design can be required when not exacted by the terms of the statute, than to state a course of conduct necessarily importing a purpose to do those acts which are forbidden by law. The indictment against the defendants comports in all important particulars and nearly verbatim with those heretofore presented in the three different circuit courts of the United States as above referred to. I do not find, except in one count, the omission of any part of the description of the offence given by the statute, nor the insertion of averments variant from those employed in the preceding cases. In the 19th count, it is not asserted that the military expedition was to be carried on from any place. This is doubtless a clerical error, but it is fatal to the count. In some instances the allegation is, that the expedition or enterprise was to be carried on "from thence" (in the words of the statute), in some, "from the United States." The argument is that the grammatical relation of the words "from thence" in several counts, is to "the city and district of New York" and not to the United States. The meaning of the statute undoubtedly is, that the expedition shall be intended to be carried on from the territory or jurisdiction of the United States, but I apprehend an averment merely that it was to be carried on from the district of New York, would be precise and certain enough, as the court must judicially know that place to be within the jurisdiction of the United States. But all the counts add the allegation that the act was done within the jurisdiction of the United States, to wit, setting on foot, beginning, &c., to be carried on from thence. No further certainty is necessary in my judgment, to render these counts unexceptionable. The words "from thence," as used in this statute, mean from the United States and are precisely equivalent to the territory or jurisdiction of the United States.

It is questionable, in my mind, whether it is allowable to state in an indictment, that the military expedition was to be carried on against the territory or dominions of a prince or state, to the jurors unknown. That fact, it appears to me, should be ascertained and explicitly averred by the grand jury, and without a knowledge enabling them to present that fact, they could not properly charge the crime to have been committed. It is nearly as incongruous, in view of the object of the statute and the description there given of the offence, for the jurors to say, it is unknown to them against what place the expedition was designed, as for them to have asserted that the defendants did some kind of act, but whether it was beginning or setting on foot a military expedition, was unknown to the jurors. If the jurors do not know against what nation the expedition was to be directed, how can they know it was a nation at peace with the United States? I should certainly, if not controlled by authority or precedents, hold it to be an indispensable part of the description of this offence, to name the prince or state whose territories or dominions were to be invaded. These same averments, were, however, employed in the three indictments referred to, and without objection, and were held allowable in civil proceedings by the U. S. supreme court. Locke v. U. S., 7 Cranch. [11 U. S.] 339; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 329. And I shall, therefore, not decide on this motion, that the omission to name the friendly power against whom the enterprise is designed, is fatal to the indict-

ment, but leave the question to be presented more solemnly by demurrer or in arrest of judgment. In my opinion, it is not necessary to designate the particular part of the United States from which the expedition is to be carried on, nor the time when. These are matters collateral to the gist of the offence. That consists in concocting a military expedition within the United States, with a hostile purpose towards a friendly nation. It is no part of the description of the offence, that the expedition or enterprise shall have left the United States, and, accordingly, it can be of no essential importance to allege the particular point contemplated for its departure. The guilty purpose must be proved, and the guilty acts to be all done within the district of New York, and it no way qualifies or affects the character of these particulars, whether the defendants intended to put off the expedition at Castine, or Galveston, or any intermediate point.

In my opinion the motion to quash the indictment for want of proper form, must be overruled. I have given this point of the case a much more extended consideration than its importance or difficulty would seem to demand. I have been induced to bestow more attention upon the structure of the indictment because of the extremely able argument of the counsel for the defendants on the subject, and because this particular branch of criminal pleading has not before been brought distinctly in judgment in the courts of the United States. Independent of the controlling authorities cited in support of the mode of describing the offence pursued in this case, I think on general principles the succinctness and conciseness of description adopted here should be upheld in preference to having the pleadings crowded with multifarious details of facts, a great portion of which must necessarily be conjectural and thrown into the averments, to meet any possible state of proof that might chance to arise on the trial, and would not accordingly afford a specific notice to the accused of the facts relied on by the prosecution for their conviction. In libels of information on a statute to enforce forfeitures, and in defence for seizure of property as forfeited, pleading according to the terms of the statutes is held sufficient notice to the claimant and description of the offence. [Locke v. U. S.] 7 Cranch [11 U. S.] 339; [Gelston v. Hoyt] 3 Wheat. [16 U. S.] 339. To aver that the defendants set on foot or begun a military expedition at New York, will apprise them as distinctly of the matter of accusation as to set forth a schedule of facts, which may enter into the preparation of such expedition.

The multifariousness of details might more embarrass than aid the defence, as it would be obvious to the defendants, that although a hundred particulars might be enumerated in the indictment, the public prosecutor on the trial might limit his evidence to a single one, and might prove that by the admissions or declarations of the defendants themselves. There is no advantage afforded a party defendant by a multiplicity of notices ranging over an indefinite series of incidents and circumstances. The law wisely leaves these to the proof, and discards them from the pleadings. In the present case in my opinion, it is matter for proof and not of pleading, to show what was done by the defendants in beginning and setting on foot the military expedition charged against them.

The consideration of the main question on the merits, although the one of greatest magnitude in point of principle, will be made as brief as may be consistent with a distinct expression of the views of the court upon it. The motion to quash the indictment most legitimately attaches to the objection, that the acts charged upon the defendants constitute no violation of the act of congress, and do not fall within the criminal jurisdiction of the court. The authorities concur in the doctrine that if the matters alleged in the indictment are not punishable by law, the indictment will be quashed. Whart. Cr. Law, 131; Archb. Cr. Law, 64; Bac. Abr. Indict. K.

The position of the defendants' counsel is, that the acts of June 5, 1794, and of April 20, 1818, are neutrality acts, intended to have operation only in case of war between nations in amity with the United States, and to prevent the citizens of the United States committing acts favoring one, and hostile to another belligerent. The argument is, that the passage of the act of 1794 was induced by the relations then existing between the United States, France and Great Britain, and more especially to check the mischief with which this country was threatened through the pretensions and conduct of Mr. Genet, the French minister. That the legislation of congress being invoked only to the end to declare and enforce our neutral obligations, all the provisions of the statute must be construed in subordination to that purpose, and the 5th section be regarded no more than a restriction upon our citizens in respect to belligerent powers, and not a substantive and independent enactment, declaring a class of offences not known to our own laws, nor recognized by the laws of nations. It is further insisted that the construction claimed for the act of 1794 must be extended to the act of 1818, the latter being a transcript, substantially, of the former; and, also, that the incorporation in it of the act of 1817, which was, by title, avowedly a neutrality act, and nothing more, would tend to characterize the one adopting it, as a neutrality act also.

To determine the justness and pertinency of this train of reasoning, it may be important to look more closely to the foundation of the act of 1794, and endeavor to ascertain whether, in one feature more than another, it rests upon any admitted doctrine of the

law of nations. It is an infraction of that law for a friendly power to interfere in case of war, between other nations with whom she is at peace, and render aid to one belligerent against another, and such act may become a justifiable cause for reprisals and war on the part of the nation so injured. Mart. Law Nat. bk. 8, c. 6; Wheat. Hist. Law Nat. 453; 4 Gro. De Jure B. lib. 3, c. 17, § 3. But there is no conceded doctrine of that law, nor any uniform usage of nations which prohibits the citizens and subjects of a neutral power enlisting in the service or taking part with either belligerent. This, so far as it falls within the notice of publicists, appears to be a matter of municipal regulation, left to the authority of each particular government over its own subjects, and not to come within the cognizance of public law. Id. c. 18. Indeed, it has been made a question, and one which the United States felt themselves compelled to discuss, whether belligerent powers had not a right to enlist and enrol men in a neutral country to carry on war against nations at peace with such neutral, without impairing by those means the neutrality of such country. Wheat. Hist. Law Nat. 471, 472. The United States government properly repudiated the pretension and held itself bound by its relations to friendly powers to restrain within our territories the exercise of any such privilege. Letter of Jefferson to Gov. Morris, August 16, 1793 (3 Jefferson's Writings, 269). Still it is doubtful, whether the argument proves more than that the restraint devolves upon the municipal authority by force of the local or common law, and should be enforced by it.

The law of nations, which interdicts a neutral power, becoming a party in a war between others with which it is at peace, springs out of and rests upon that code of natural law which recognizes and declares the right of every nation to remain at peace, and not to be unjustly or wrongfully driven into war by the aggressions of another. Under its doctrine non-interference is as high a duty as neutrality. The right of every people to the undisturbed possession of its territory and independency, and to repel by force every encroachment upon either, is justly placed by writers on the ethics of national law, first amongst those natural rights which it is the end of public law to recognize and preserve. Mart. Law Nat. 69; 1 Wildm. Int. Law, 50; Wheat. Hist. Law Nat. p. 4, c. 1; Vatt. Law Nat. § 64; Id. 216, 217, 369. It is denounced as an act of wrongful aggression for any other power to interfere with the independency of a state or people, however objectionable may be its existing form of government or mode of administering it. 1 Kent, Comm. 21; Vatt. Law Nat. 49, 50, 198, 203. Chancellor Kent seems inclined to sanction the privilege of one nation to interfere in the domestic disturbances and insurrections of another, in behalf of the oppressed and wronged portion of the nation, when requested by it so to do. 1 Kent, Comm. 21–23. But the doctrine is controverted with great strength of argument and authority by a later writer, who repudiates as wholly untenable the notion that one nation is clothed with authority to adjudge upon the internal affairs of another or to intermeddle with them for any cause other than the necessity of its own defence. 1 Wildm. Int. Law, 50, 57; 1 Sparks' Washington, 382 (opinion of Gen. Washington).

The first administration of the government of the United States found itself called upon at an early day, in taking its place in the family of nations, to enforce an observance of the rules of public law in its transactions with two belligerents, each of which was united to this country by numerous ties of interest and sympathy. 2 Marshall's Life of Washington, 283, 287, 288; 1 Gibb's Administration of Washington and Adams, 140. The course it would pursue in relation to those engaged in war was explicitly announced by the proclamation of President Washington, dated April 22, 1793. 1 Wait, St. Pap. 44. The instructions of the treasury department of August 4, 1793, adopted by order of the president, framed a system of regulations to govern the conduct of its public officers, in enforcing the spirit of the proclamation in the ports and harbors of the United States. Id. 45. And similar directions were given the governors of states, and the troops of the United States, in respect to the interior of the country. 2 Marshall's Life of Washington, 334, 355. The president, in his speech at the meeting of congress, Dec. 3, 1793, calls for statutory enactments to sanction and enforce the principles thus promulgated by the government. Wait, St. Pap. 40. But to maintain our neutrality merely between belligerents was not all the exigencies the case called for, nor the whole that was contemplated by the government. It is manifest it did not mean to limit its action to a fulfillment towards other nations of its obligations in respect to them as belligerents alone. Its policy was of a broader character, and befitting the principle upon which it came into existence as a government, and exercised governmental powers. As the representative of the people,—their agent, delegated by the people of the United States,—the government adopted an administrative and legislative policy embracing both its direct relationship to foreign states, and the co-ordinate obligations of the citizens individually to uphold and effectuate that relationship. What the government might not do in its public capacity, without an infraction of the law of nations and subjecting itself to reprisals and war, it claimed the people should be prohibited doing individually, giving to its statute book the impress of that law, higher than the codes and rescripts of jurists, which inhib-

its doing to others, what others ought not to do to us. Charges of Chief Justice Jay and Mr. Justice Wilson to Grand Juries, in 1793 (Whart St. Tr. 55, 62). It is most manifest, that, at the earliest day the subject was acted on, the United States government intended to make the personal duties of citizens co-equal with those of the nation, in respect to acts of hostility against other states, and that the obligation was equally imperative whether those states were in peace or at war.

Mr. Jefferson in his letter to Mr. Genet, June 17, 1793, denies the right of the French government to enlist citizens of the United States within our territories into her service, upon the authority of writers on the Law of Nations; and in the end puts the objection to such acts of a foreign government, upon the broad ground, that we are at peace with all nations by the law of nature. "By that law man is at peace with man, till some aggression is committed, which by the same law, authorizes one to destroy another, as his enemy. For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared, says the secretary of state, to the executive and to those whom they consulted, as much against the laws of the land, as to murder or rob, or to combine to murder or rob its own citizens, and as much to require punishment if done within their limits where they have territorial jurisdiction, or on the high seas, where they have a personal jurisdiction, reaching their own citizens only. So say our laws, as we understand them. To them the appeal is made, and whether we have construed them well or ill, the constitutional judges will decide." 1 Am. St. P. (Foreign Relations) 124, 155. It is manifest from this despatch that the cabinet then supposed that either the common law of the United States or the laws of the particular states made the acts reprobated crimes, when committed within their territories, and that individuals would thus be amenable to punishment for the robbery and murder of the subjects of a friendly nation out of our territory the same as if the offences had been committed within any particular state.

The supreme court of Pennsylvania in 1784, had declared the law of nations formed part of the municipal law of the state. Respublica v. Longchamps, 1 Dall. 111. And the chief justice of the United States, and two at least of his able associates, in 1793, expressed their opinions that the law of nations could be enforced by the federal courts, as the common law of the country, against persons indicted for its violation. Whart. St. Tr. 52, 55, 56, 62, 83. This doctrine is upheld by eminent lawyers of that day, writing since the events have passed. Rawle, Const. 10; Dup. Const. 3, note. But it is manifest the popular opinion was against the doctrine. 4 Tuck. Bl. Append. 10. Appeals were accordingly made to the tribunals pursuant to the suggestion of Mr. Jefferson, both in respect to persons serving in armed vessels and with land forces against a friendly people, but it was found that the states either possessed no laws reaching the difficulty, or felt no disposition to enforce them (2 Marshall's Life of Washington, 233, 334), and that juries would not be governed by the law as laid down by the national judges in the federal courts (Whart. St. Tr. 83, 88).

In this state of the subject, the president in his speech at the opening of the next congress, called the attention of congress to his proclamation and the regulations he had caused to be adopted, to enforce neutrality, and it is most plain, he contemplated and solicited the interposition of the legislature to compel the citizens to conform in all respects to the principles of the law of nations, recognized and observed on the part of the government, in regard to friendly powers. He says, "It rests with the wisdom of congress to correct, improve or enforce the plan of procedure (adopted by the administration), and it will probably be found expedient, to extend the legal code and the jurisdiction of the courts of the United States to many cases, which, though dependent on principles already recognized, demanded some further provisions. Where individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, or usurp and exercise judicial authority within the United States; or where the penalties or violations of the law of nations may have been indistinctly marked, or are inadequate, these offences cannot receive too early and close an attention, and require prompt and decisive remedies." 1 Wait, St. Pap. 40; 1 Am. St. P. (Foreign Relations) 22. It is to be remarked, that out of three of the above four special calls for extending the criminal code, one only directly relates to a state of neutrality, the others looking to provisions for maintaining the sovereignty and peace of the United States in their relations with foreign powers, as well in peace as at war with each other.

The act of June 5, 1794, was passed the same session of congress, to which the above recommendation was addressed, and it deserves notice, as evidence of the scope and design of the enactment as understood by those active in producing its passage, that Mr. Jefferson, in 1806, as president, with the concurrence of Mr. Madison, secretary of state, caused prosecutions against Smith and Ogden and Col. Burr to be instituted, for setting on foot in the United States, warlike expeditions against provinces of Spain, and without any allusion to the offences imputed against them being violations

of our neutral obligations. 4 Jefferson's Writings, 86; Id. 103. At these periods Spain was nominally in alliance with France, but was secretly negotiating with England and Russia to come into the confederacy against Napoleon, and was therefore considered by them as quasi neutral. Ann. Reg. 1806, 1807; 4 Allison's Europe. And when the case of Smith and Ogden came before the United States court, Judge Patterson, without making any distinction in respect to belligerents, charged the grand jury that the principles of non-intervention embodied in the 5th section were founded upon the law of nations. Smith and Ogden's Trial, p. 219; also, p. 83. So it seems the policy and intent of this law has always been understood by the executive under every administration. An eminent statesman and jurist, speaking in the name of the government, declares its purpose was to prevent individuals being at war whilst their government is at peace. This exposition comports with the specific recommendations of President Washington. The United States, Mr. Webster remarks, have thought the salutary law of non-intervention by our nation with the affairs of others, is liable to be essentially impaired, if while the government refrains from interference, interference is still allowed to its subjects, individually or in masses.

The government of the United States has not considered it as sufficient to confine the duties of neutrality and non-interference to the case of governments whose territories lie adjacent to each other. The principle they regard the same, if those territories be divided by half the globe. The rule is founded on the impropriety and danger of allowing individuals to make war on their own authority, or, by mingling themselves in the belligerent operations of other nations, to run the hazard of counteracting the policy or embroiling the relations of their own government, and the United States have been the first among civilized nations to enforce that observance of this just rule of neutrality and peace by special and adequate legal enactments. By these laws it is prescribed to the citizens of the United States, what is understood to be their duty as neutrals by the law of nations, and their duty also which they owed to the interest and honor of their own country. Mr. Webster's letter to Mr. Fox, April 24, 1842; 1 Ex. Docs. (27th Cong., 3d Sept.) p. 127. The executive government since that period has adhered to the doctrine avowed in the above despatch, and denounced as a violation of the law of the land all acts contravening the terms of the 6th section of the act of 1818. That the law applies to and prohibits the setting on foot warlike expeditions in the United States to be carried on against any friendly power, was strongly maintained and declared during the administration of Mr. Van Buren.

The president in his proclamation of Nov. 21, 1838, declares that the combination or association of citizens of the United States to disturb the peace of the dominions of a friendly nation, is a violation of the laws providing for the performance of our obligations to the other powers of the world, and of that sacred code of laws by which national intercourse is regulated. 1 Ex. Docs. (3d Sept., 25th Cong.) p. 34. In his message to congress the president is distinct and explicit in asserting "that military invasions by our citizens into friendly countries and the commission of acts of violence on the members thereof, in order to effect a change in their government, or under any pretext whatever, have from the commencement of our government, been held equally criminal on the part of those engaged in them, and as much deserving of punishment as would be the disturbance of the public peace by the perpetration of similar acts within our own territory." These principles the president says were cherished and established by the great and good men who declared and established our independence, and were maintained at a highly critical period in our history, and subsequently embodied in highly penal enactments, the faithful enforcement of which he regards inseparably associated with the maintenance of our national honor. Id. pp. 5, 6. This language of the president was applied to the non-interference provisions of the statute, and not to those which may be strictly termed the neutrality clauses, and what he solicited from congress was a precautionary law to enable the executive to anticipate parties attempting the commission of the offences named in the 6th section and arrest them or their means before the acts should be actually consummated. So Attorney General Butler, in his opinion, upon the power of the president to seize, under the act of 1818, the arms of citizens setting on foot a military expedition against Canada, assumes that the 6th section applies to enterprises such as those then carried on against Canada. 2 Op. Attys. Gen. U. S. 1176. Neither the president or attorney general regard it an ingredient of the offence, that the state to be invaded, should be at war with another.

Looking at the provisions of the first section of the act of 1838, prepared as is understood with the sanction of the president, the secretary of state and attorney general, it seems to import a most explicit recognition that the acts done and means provided in the United States for carrying on warlike enterprises or expeditions into Canada, were in the then state of that province and the country, infractions of the 6th section of the act of 1818, and what was needful was something more than punishment by fine and imprisonment for the offences, when perpetrated, "provided," as the president says, "the parties can be found." It was a summary authority to intercept and break up the design

by seizing the means provided for carrying it on, and by arresting and holding to adequate bail persons suspected of being concerned in the enterprises. Act 1838, §§ 1, 6, 7.

This is all I deem necessary to be said in this connection in relation to the views of the executive department of the government, antecedent and subsequent to the passage of the law (and in this respect the acts of 1794 and 1818 may be regarded identical), showing that it was called for and always accepted and enforced as a law, no less of non-interference by our citizens by military expeditions against nations at peace with all the world, than one prohibiting acts of hostility in favor of any belligerent power against another in peace with the United States. This topic, however, being the one on which the defendants chiefly rely, they insisting the act of congress does not apply to the facts alleged against them, and the question being of great public moment to our own citizens and in our relations with foreign governments, it is meet the subject should be considered under other aspects. And I think the import of the law collected from its face, according to the established rules of interpretation plainly denotes the intention of congress to stamp as crimes acts done within our territories, designed to violate the peace and rights of a friendly people, whatever may be the relation of such people in respect to other nations. The cardinal consideration is, are they in amity with the United States, and if so, no persons shall be permitted within our jurisdiction, to take any warlike measures designed to disturb that peace.

We have already seen that the attention of congress was called to the subject of this law, because of unwarrantable usurpation of powers within the United States by the French minister. He openly claimed the right, and attempted to exercise it, to commission, arm, equip and man cruisers in our ports to commit hostilities on nations with whom the French were at war, and also to recruit land forces, issue commissions to officers, and organize within and march from our territories such forces against Florida and Louisiana, the dominions of Spain, or any other enemy of France. 2 Marshall's Life of Washington, 283, 287, 288, 334, 335. He publicly denied the power of this government to prevent his doing such acts, and a governor of a Western state, in which a warlike expedition was setting on foot against New Orleans, when required by the president to suppress it, coincided with the French minister, and denied there was any law of the United States prohibiting the enterprise. Id. 334, 335. This was in 1793. The measures taken by congress were designed to extend the criminal laws, and bring within them the very acts the government complained of and was endeavoring to suppress. It is nowhere said or intimated in the statute that this was done to maintain our neutrality in a technical sense. The act takes the title of an act "for the punishment of crimes against the United States," and only the 3d and 4th sections have express reference to acts in relation to other nations at war. The act under the same title was continued in force March 2, 1797, and made perpetual April 24, 1800. Nothing is more common than for the legislature to make provision in a public statute for matters beyond and distinct from the special causes which promoted its passage, and no principle of construction limits the operation of a statute to a particular mischief it remedies, when others of a kindred character are brought within its language.

It is the constant course of legislation, in removing a special evil or mischief, to make the enactments affecting it broad enough to suppress others, whether similar in character or wholly distinct from it in their nature. In such cases the statute is never interpreted to have relation only to the subject which more particularly called it into existence, but is made to operate in conformity to its language. Its true meaning is to be sought for in the body of the act itself. 1 Kent, Comm. 460, 463. Reading the act of 1794, with a view to these sensible and satisfactory rules of interpretation, it is difficult to see ground for doubt, that it does embrace and is carefully framed to include a class of offences distinct from those commonly understood to be infractions of the laws of neutrality. It devotes two sections specifically to those particular offences, and then furthermore declares to be high misdemeanors, for our citizens to enlist in foreign service or take commissions in it, or for any person within the territory or jurisdiction of the United States, to set on foot a military expedition, &c., &c., against any state, people, &c., with whom the United States are at peace. I see no mode of satisfying this language, but in holding it comprehends all the acts denounced, when committed within the United States, against a friendly power, without respect to his relationship to other powers. This, it appears to me, has been the acceptation in which the act has been received by our judges and most eminent jurists since its enactments.

The first instance in which the 5th section of the act of 1794 appears to have been acted upon judicially, was in the case of Bollman and Swartwout. The main point in the case related to other questions, but after the court had decided that the prisoners could not be held in the District of Columbia under imprisonment there for treason committed elsewhere, and that the facts in evidence did not prove the crime of treason, a question seems to have been made whether the prisoners were not liable to prosecution and to be detained under the 5th section of the act of 1794 for trial. The court say, "Admitting the affidavit of Genl. Wilkinson, both prisoners were guilty of a most culpable enterprise

against the dominions of a power at peace with the United States." They then rehearse the provisions of the 5th section, and remark that "there is a want of precision in the description of the offence which might produce some difficulty in deciding what cases came within it." U. S. v. Bollman, 4 Cranch [8 U. S.] 136, 137. The court thereupon discharged the prisoners, because the crime of treason for which they were arrested, was not proved against them and as they were not committed for setting on foot a military enterprise against the dominions of Spain, nor was it suggested that the offence had been committed within the District of Columbia, they ought not to be detained for that cause. The recognition of the act by the court as applicable to a warlike expedition from the United States against a friendly nation, without any reference to the proceeding having connection with a belligerent power, affords strong negative evidence, that the court did not regard the circumstance of such concurrence, to be an ingredient in the offence. But this implication is made to amount to almost conclusive evidence, by the proceedings the succeeding summer in the United States circuit court in Virginia against Col. Burr, already alluded to. He was not indicted, for any act of aid to one belligerent against another or otherwise violating the neutrality of the United States, but for setting on foot a military expedition in this country against the dominions of a nation at peace with the United States. On that occasion the point would directly arise and be cardinal for the defence of Col. Burr, if he was only indictable under the statute, for acts in aid of one belligerent against another. For supposing the fact that Spain, at the time, was at war with some other power with which the United States were at peace, a military expedition from the United States against the dominions of Spain in America, without concert or connection with any other belligerent, would not be regarded a violation of neutrality, on the part of the United States, but a direct act of invasion and war upon Spain. Vatt. Law Nat. 360. Each belligerent may indirectly in that manner aid the other against a common enemy; but, by making a common enemy and a common cause, the relationship of neutrality is abandoned and the attacking party becomes himself a belligerent. The defence was direct and patent, therefore, for Col. Burr, that the matters charged against him in the indictment were no violation of the statute, inasmuch as they were not, the assistance of one belligerent against its antagonist, so that if committed by the United States the acts would amount to a breach of their neutrality, if that fact any way affected the offence. It is not to be supposed a point so apparent and vital to the cause in one aspect, could have escaped the notice of the court and defence. Col. Burr was himself a member of the United States senate, and his counsel, Mr. Harper, a member of the house when the act passed; his counsel, Mr. Randolph, was secretary of state, and Mr. Lee, attorney general, the same year, and the presiding judge, shortly after, a member of congress and secretary of state. The presiding judge, the defendant and several of his counsel being thus lawyers and statesmen cotemporaries with the enactment of the law in question, and prominently active in the political agitations of the day, out of which the statute originated, had its purpose been solely to prevent a breach of our neutral relations with other countries, nothing could have been more familiar to the minds of those men than the fact that it was designed to have an operation so limited; and no evidence of a negative character can be more impressive and stringent, than the common assent on that trial, that the charges set forth made out a case of violation of the statute in its letter and intent. So, also, in the prosecution of Smith and Ogden, the indictment was for setting on foot a military expedition from the United States against Caraccas, Venezuela or Columbia, and other acts within the description on the 5th section of the statute only. That was also instituted under the presidency of Mr. Jefferson and the charges on which the accusation was grounded, were held by Attorney General Breckenridge to be an infraction of the act of 1794 for which the accused were subject to punishment. 1 Op. Attys. Gen. U. S. 98. Its design was to revolutionize that province, then being in a state of peace abroad, and with no domestic insurrection or disturbance. Enc. American Arts; Columbia, Miranda. Yet no exception was taken by the learned and zealous counsel who conducted the defence, and who brought to its support every topic which could tend to ward the prosecution from the defendants and fasten on the administration wrongful conduct and motives in instigating and directing it, nor was it suggested such a warlike expedition was no violation of the law, because it was no breach of neutral obligations. If not an innocent commercial expedition, as the defence maintained it to be, they took the other alternative, that it was direct and positive war, urged with the assent and concurrence of the government. In such posture of the defence, the prosecution stood defeated palpably upon the indictment, if the 5th section of the act of 1794 only interdicted those acts which were in violation of the neutrality of the country. The counsel and the court took no such limited view of the case. They understood the statute according to its plain reading, and the intimation was nowhere made in the whole range of the animated and not always entirely decorous discussions on the trial, that the statute did not embrace private acts of hostility begun to be carried on from the United States against a friendly power, in the largest sense of that language. Judge Patterson, in commenting on the provision of the act in question and its policy, says it is declaratory of the law of nations, and besides, every species of private and un-

authorized hostilities is inconsistent with the principles of the social compact and the very nature, scope and end of civil government. Trial of Smith and Ogden, 83; Whart. St. Tr. 55, 62 (Chief Justice Jay and Mr. Justice Wilson). The act of March 3, 1817 [3 Stat. 370], in its title and all the provisions, is strictly a neutrality act, and was occasioned by the insurrections and revolutions going on at the time in the South American and Mexican provinces. But so anomalous and extraordinary had been the character of hostilities and proceedings with some of those states and of citizens of the United States acting under assumed authority from them, that the attention of congress was called to the subject by a special message of President Monroe. 1 Am. St. P. (15th Cong., 1st Sess.) pp. 4, 5, Dec., 1817. The same session, the committee of foreign relations of the house of representatives reported a bill which, after long debates and repeated amendments, ultimately became the act of April 20, 1818. Journals, House Reps., 15th Cong., 1st Sess. That law purports in its title, to be a crimes act, and not one to preserve the neutral relations of the United States. It embodies the acts of 1794 and 1817, with alterations and additions. It is not now material to collate the three statutes, but it is observable that the last marks with more precision and exactness than the preceding ones the cases of violations of neutral obligations provided against. It also creates offences not named in the acts of 1794 and 1817, and which in no sense can be arranged under neutral obligations. For instance the 4th section, in relation to citizens of the United States being concerned, out of the United States, in privateers cruizing against the property of citizens of the United States. And it is doubtful, upon the terms of the statute, whether enlisting, within the United States, in the service of any foreign power, or going out of the United States with intent to enlist, is not made an offence, without regard to the employment of such soldier or sailor in the foreign service. The sections of the act which in terms indicate a reference to neutral duties, are the first, fourth and fifth; the 2d, 6th and 8th have no such connection in language, and must take effect independently of that consideration, unless upon the principles of reasonable construction, they are found limited to that application. The act has been otherwise always understood by our public functionaries executive and judicial.

President Van Buren, in his message to congress of Dec. 3, 1838, before cited, in reference to the hostile movements on foot in this country against Canada, says, "It is by the laws already made criminal in our citizens by unauthorized military operations on their part, to embarrass or anticipate the decision of congress, whether the country shall interfere with or be made a party to the struggle in those provinces." In his message of January 5, 1838 (which led to the act of 1838), the president further says, "The existing laws are insufficient to guard against hostile invasions, from the United States, of the territory of friendly and neighboring nations. The laws now in force provide sufficient penalties for the punishment of such offences after they have been committed, and provided the parties can be found; but the executive is powerless in many cases to prevent the commission of them, even when in possession of ample evidence of an intention, on the part of evil disposed persons, to violate our laws." 2 Executive Documents (25th Cong., 2d Sess.) Document 64. And the act of March 10, 1838 [5 Stat. 212], passed in compliance with the instance of the president, to aid the execution of the 6th section of the act of 1818, most manifestly indicates the understanding of congress that the offences denounced came within the meaning of that statute, and the latter one was required in the peculiar situation of the two countries to enable the president to enforce the former according to its spirit and intent.

Mr. Webster in his correspondence with the British minister, Mr. Fox, on this subject, before cited, also represents the act of 1818 as covering the very case of an invasion of Canada, from the United States, in a time of peace, within and without the provinces. 1 Ex. Docs. (27th Cong., 3d Sess.) p. 127. So, also, President Taylor in his proclamation, August 11, 1849, expressly pronounces the alleged enterprises on foot in the United States against Cuba, to be a violation of the criminal laws of the United States. 3 Ex. Docs. (1st Sess., 31st Cong.) pt. 1. The same declaration is repeated, by authority of President Fillmore, by Mr. Webster, in public instructions to the U. S. attorneys. Circular, Sept. 3, 1850. So far as the act has come within the cognizance of the United States judges, they have invariably recognized the 6th section as applicable to and designed to punish such state of facts. In 1835, the grand jury of this district submitted to the circuit judges the enquiry whether it was a violation of that section, for persons to hold meetings in this city and appoint committees to provide means and make collections for the purpose of enabling the inhabitants of Texas to engage in a civil war with Mexico, now at peace with the United States. The judges, Thompson and Betts, answered in writing, that the section applied to military expeditions to be carried on from the United States, and that the case supposed did not fall within it. But the answer necessarily imports the opinion of the judges that such military expedition would be a violation of the law. 3 Ex. Docs. (25th Cong., 2d Sess.). Judge Rawle, of the local court, New Orleans, in effect ruled the same point. Id. p. 22. Judge Conkling, in a letter to Mr. Fillmore in congress, on this subject, puts the same construction upon the 6th section of

the act. He notes a defect in the statute in not providing sufficient precautionary means to enable the government to arrest persons entering upon such enterprises before the crime is consummated. 3 Ex. Docs. (3d Sess., 25th Cong.) Doc. 35.

Judge McLean, in a matured charge delivered the grand jury, in relation to the hostile movements from our territories upon Canada, in 1838, declares the 6th section of the act has application to military expeditions of that character, against a people at peace with us and within itself. [See Charge to the Grand Jury] 2 McLean, 1. It may be added that this court, in 1850, gave similar instructions to the grand jury in this district, in respect to military expeditions against Cuba, and repeated the same sentiment to the grand jury who found the indictment now under consideration. In the circuit court at New Orleans, Judge McCaleb recently instructed the grand jury that the act applies to the case of setting on foot or providing means for a military expedition against Cuba, from the United States; and in his charge to the petit jury on the trial of the indictment and after prolonged discussions upon the subject, he adheres to that interpretation of the law. Pamph. Rep. pp. 4, 7, 29.

After this review of the subject in its various bearings, I am prepared to say, that upon the plain language of the statute, —from the circumstances which induced its passage, the double obligation of the government to keep individual citizens aloof from the conflicts of foreign powers, and to prevent their making private war upon nations at amity with us,—from the concurrent views of executive and judicial officers as to the meaning and design of the statute, that the case made by this indictment comes within the purpose and meaning of the sixth section of the act of 1818 and is a manifest violation of its provisions. The motion to quash the indictment cannot, therefore, on these views of the subject, prevail. But I would remark that, notwithstanding my own conviction, resulting from a careful survey of the questions debated on this motion, that the acts of the defendants charged in the indictment, constitute an infraction of the sixth section of the act of 1818, and are sufficiently laid in the indictment; yet, in deference to the opinion of the distinguished counsel of the defendants, so earnestly expressed and so ably supported, I shall submit this decision to the consideration of the judge of the circuit court; and if he suggests a doubt of the justness of the conclusions adopted in it, or shall intimate that he does not concur in them, I will then remit the case to the circuit court, that the defendants may, by means of a difference of opinion of the two judges, have the points certified to the supreme court for final decision.

[See Cases Nos. 15,973 and 15,975.]

Case No. 15,975.

UNITED STATES v. O'SULLIVAN.

[2 Whart. Cr. Law, § 2802, note.]

District Court, S. D. New York. 1851.

MILITARY EXPEDITIONS AGAINST FRIENDLY PEOPLES — STATUTE OF 1818 — WHAT CONSTITUTES THE OFFENCE — CRIMINAL LAW — PROVINCE OF JURY.

[1. Before the jury can convict any persons of preparing or setting on foot, etc., an expedition against any prince, people, etc., with whom the United States are at peace, under the act of 1818, it must be proved to their satisfaction that the purpose of the expedition or enterprise was some military service, some attack or invasion of another people or country as a military force. To constitute the offence there must be a hostile intention connected with the act of beginning or setting on foot the expedition.]

[Quoted in U. S. v. Lumsden, Case No. 15,641.]

[2. When connected with this hostile intent, there are four acts which the statute declares unlawful, either one of which completes the crime; namely: (1) to "begin" an expedition; (2) to "set on foot" an expedition; (3) to "provide the means" for an expedition; and (4) to "procure" those means.]

[3. To constitute the offence it is not essential that the expedition should start for its destination. On the contrary, the law is designed to reach any act done within the jurisdiction of the United States in preparation for, or furtherance of, a warlike expedition against a people with whom the United States are at peace, without regard to whether the expedition was ever actually started on its way or not.]

[4. The law of 1818 is not a neutrality law merely, which applies only during a state of war, in order to prevent our citizens from interfering as against one of the belligerents. On the contrary, it applies to all hostile expeditions or purposes designed to violate the peace and rights of a people at peace with the United States, whether they be at war with any other nation or not.]

[Cited in U. S. v. Lumsden, Case No. 15,641.]

[5. The statute of 1838 does not affect the application of the law of 1818 to all ordinary cases. The former act was only a temporary provision, adapted to the peculiar conditions of the Northern frontier, and intended to stop incursions into the Canadas.]

[6. The guilty purpose must be proved, and the guilty acts done within the judicial district, where the indictment is found.]

[7. In criminal cases in the federal courts the jury are not the judges of the law, as well as of the facts. They are to understand and accept the law as it is stated to them by the court.]

[See Cases Nos. 15,973 and 15,974.]

JUDSON, District Judge (charging jury). "The cause now to be committed to you is that of the United States against John L. O'Sullivan, Lewis Schlessinger, and A. Irvin Lewis, all of whom have been arrested. Schlessinger, having given bail, does not appear, and the case goes on against O'Sullivan and Lewis. The indictment is found on the 6th section of an act of congress, passed April 20, 1818 [3 Stat 449]. The section is in the following words: 'That if any person, shall, within the territory or jurisdiction

of the United States, begin or set on foot, or provide or procure the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, every such person so offending, shall be deemed guilty of a high misdemeanor.' The indictment contains ninety-seven counts, setting out in different forms the offence supposed to have been committed against this act. These various forms of declaring are adopted for the purpose of meeting the phraseology peculiar to this act. At the same time it is not claimed that more than one offence has been committed. You will, therefore, be unembarrassed with these matters of form. The 10th count must be laid out of the case. In the disposition of this case much depends upon the proper construction of this act of congress; and on this subject we are to be governed by established rules; and, so far as I have been able to investigate the matter, we shall have no occasion to seek out any new or untried rules for our guide. And, first of all, it is an undeniable proposition, that all penal statutes are to receive a strict construction. This is a penal statute, and it falls within this rule. The terms used are not to be extended beyond their natural import to fix an offence on the defendant; but this rule, on the other hand, does not require any such construction as to fritter it away, and defeat its object, and annul the law itself. I will then state to you, in the outset, some of these essential rules, and point out their application. We are to look at the spirit, intent, and object of a law—what mischief it was intended to prevent, and in what manner the remedy is to be applied? What, then, is this law? Its great object—the all-pervading object of this law—is peace with all nations—national amity—which will alone enable us to enjoy friendly intercourse and uninterrupted commerce, the great source of wealth and prosperity—in short, to prevent war, with all its sad and desolating consequences. These being the objects of this law, they are sufficiently important to arrest the intention of both court and jury, and secure, to the United States and to the accused, a fair and impartial trial. Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack, or invasion of another people or country, state, or colony, as a military force. The engagement of men to invade or attack any other people or country, by force and strong hand—the designation of officers—the classification and arrangement of men into regiments, squadrons, battalions, or companies; the divisions of the men into infantry, cavalry, artillery, or riflemen; the purchase of vessels or steamboats—military stores—such as powder or ball—for an expedition, give character to the expedition itself, provided that there is sufficient proof to satisfy the jury that they are to be used. But any expedition or enterprise in matters of commerce or of business, of a civil nature, unattended by a design of an attack, invasion, or conquest, is wholly legal, and is not an expedition or an enterprise within this act. A colonization, expedition, or enterprise is not unlawful. It contemplates only a peaceful settlement, without intention or design to make war upon people, or to overturn their government. To constitute a misdemeanor under the law of 1818, there must have been a hostile intention connected with the act of beginning or setting on foot the expedition. This intended hostility, or this intended peaceful movement, characterizes the act of beginning or setting on foot an expedition. The one makes it military, and the other makes it colonization. How this distinctive character shall be shown depends on the proof. A vessel, armed and equipped, with all the implements and munitions of war, with men organized into companies, might be a striking spectacle; but even then, we should inquire of the proof, what they were to do, and what their destiny was. Without such qualifying proof it might still be lawful, but with it the military character might be established. In this sense, declarations of intentions would do much to develop the real object, and the object is the great thing to be sought for. A specious covering, an artifice, secret movements, or deceptive proceedings, may aid in fixing the true character of any act.

"These remarks lead me to the consideration of such acts as are penal under the law of 1818. The term 'expedition' is used to signify a march or voyage with martial or hostile intentions. The term 'enterprise' means an undertaking of hazard, an arduous attempt. 'Begin' is to do the first act; to enter upon. We may say, with all propriety, that to begin an enterprise is to take the first step; the initiatory movement of an enterprise, the very formation and commencement of an expedition. 'To set on foot,' is to arrange, to place in order, to set forward, to put in way of being ready. Then 'to provide,' is to furnish and supply, and 'to procure the means,' is to obtain, bring together, put on board, to collect. After all these proofs are made out, the prosecution must further show that the beginning, the setting on foot, or the providing or procuring materials for such an expedition or enterprise, were within the territory or jurisdiction of the United States, and to be carried on from thence, against the territory or dominions of some foreign prince or state, colony or district, or people, with whom the United States were at peace. You will see,

by a careful attention to this law, that there are four acts which are declared to be unlawful, and which are prohibited by the statute. To 'begin' an expedition—to 'set on foot' an expedition—to 'provide' the means for an enterprise; and lastly to 'procure' those means. It is not necessary that all these distinct provisions shall be violated to constitute the offence—the proof of either one of them will be deemed sufficient. These are put in the alternative. As an illustration of what has been said thus far, I will remark—that to purchase, charter, repair, or fit up any vessel or steamboat; to procure and put on board such vessel or steamboat, powder, ball, fire-arms, military stores, ship stores, or any of them, to be used at any place in contravention of, and with an intent to violate, this act, is proper evidence; to enlist, engage verbally, or contract with men as officers, soldiers, or musicians, to go out on such an expedition, as I have defined, may be considered by the jury, as providing and procuring the means of a military expedition and enterprise; and if the proof shows the additional fact, that these means were provided and procured for a military expedition, or enterprise, then it is your business to consider such acts as falling directly within this law.

"It is not essential to the case that the expedition should start, much less, that it should have been accomplished. To 'begin' is not to 'finish.' To 'set on foot' is not to accomplish. To provide and procure powder is not to put to it the match, or the percussion. It is not necessary that the vessel should actually sail, nor is it necessary that war should exist between the nation on which the descent is to be made, with another nation.

"The counsel for the defence, in the course of the argument, have laid down several important propositions of law, of which I have been called upon to speak to you. They put forward this as the leading proposition, to wit:

"(1) 'The jury are judges of the law of the case.' This question has been argued at great length and with great zeal, enforcing upon you the propriety of adopting this as a rule of our proceeding. Now, why is this? The law is not so—the law never was so in the United States courts—and I think I may safely add, that it never can be so. I refer to the opinion of the late Judge Story, and especially to a very late opinion of Judge Curtis, one of the judges of the supreme court of the United States, which has been read to us. These opinions settle the matter, that the court is to judge of the law, and that the jury are to understand the law as it is pronounced by the court. Judge Thompson always so held in this circuit—so, I believe, in all the other circuits. No principle can be better settled, or more universally acquiesced in. It is no advantage to the jury to possess this power, and any attempt to exercise it, is a direct violation of the oath of the jury. What has surprised me is, that counsel, with all the knowledge of these decisions, should argue for hours that this is not law. Yet we have heard of such arguments here, and it becomes my duty to tell you that no countenance can be given to the proposition. But I think it requires and deserves the unqualified disapprobation from the place which I occupy.

"(2) 'This expedition, whatever it might have been, had never gone forth.' Now, gentlemen, this proposition is not the law of the United States, which you have sworn to support. The statute does not require that the expedition should go out, and the decisions which I will soon read to you will settle this in like manner.

"(3) 'That the law of 1818 is a neutrality law merely, and designed only to apply to a state of war.' Well, this proposition must stand also corrected by numerous determinations, which I will incorporate into my remarks. Again, it is said that

"(4) 'The law of 1838 shows that the law of 1818 could not operate.' The law of 1838 was a temporary law, adapted to the peculiar condition of the Northern frontier; and a new rule of evidence was introduced, founded on probable cause alone, as sufficient authority to seize and stop the incursions into the Canadas—then, by this law of 1838, a new set of officers were vested with the power to take possession and stop the invasion. It is, therefore, inapplicable, and may be laid out of view.

"(5) 'If convicted, these defendants are to be sent to the state prison.' This is not so. These varied propositions of the law cannot be sustained by this court. I will have you distinctly understand that the defence cannot be aided by these propositions—they will afford no security to the defendants, and I think it peculiarly unfortunate that the defence should be placed on grounds so untenable. And I shall here entreat you by no means to hazard the cause of the defendants upon such grounds.

"Gentlemen of the Jury, you will see now, by what follows, that all these questions of law have been settled, leaving nothing for me to do except to acquiesce in the law as it has been declared and pronounced by all the learned judges in the United States, who have passed upon the questions. The decisions have been uniform, and surely it would be worse than presumption in me, even to question what has been thus established by such high and ample authority. My business is to pronounce the law as it is, and it is yours so to receive it, and be satisfied. I hold in my hand the able opinion of the Hon. Judge Betts, delivered after full argument on this very indictment, delivered from this bench last July. Every question of law raised in this argument was then decided. How can I reverse that judgment? You know who pronounced it, and the great

weight to which it is entitled, from the long experience and great learning of that judge. I find, also, by the report itself, that these questions have been submitted to the learned judge of the supreme court, who presides over this circuit—that he concurs in the law as there ruled; and, of course, it has become the law in my district, as well as in this, and while it stands unreversed, it is the law of the Union. I cannot stop here to read the whole report, but I will read in your presence a few extracts:

" 'This is all I deem necessary to be said in this connexion in relation to the views of the executive department of the government, antecedent and subsequent to the passage of the law (and in this respect the acts of 1794 and 1818 may be regarded as identical), showing that it was called for and always accepted and enforced as a law, no less of non-interference by our citizens—by military expeditions, against nations at peace with all the world, than one prohibiting acts of hostility in favor of any belligerent power against another at peace with the United States. This topic, however, being the one on which the defendants chiefly rely, they insisting the act of congress does not apply to the facts alleged against them, and the question being of great public moment to our own citizens, and in our relations with foreign governments, it is meet the subject should be considered under other aspects. And I think the import of the law collected from its face, according to the established rules of interpretation, plainly denotes the intention of congress to stamp as crimes acts done within our territories, designed to violate the peace and rights of a friendly people, whatever may be the relation of such people in respect to other nations. The cardinal consideration is, are they in amity with the United States, and, if so, no person shall be permitted within our jurisdiction, to take any warlike measure designed to disturb that peace? I see no mode of satisfying this language, but in holding that it comprehends all the acts denounced, when committed within the United States, against a friendly power, without respect to his relationship to other powers. This, it appears to me, has been the acceptation in which this act has been received by our judges and most eminent jurists since its enactment. It is no part of the description of the offence that the expedition or enterprise shall have left the United States, and, accordingly, it can be of no essential importance to allege the particular point contemplated for its departure.'

"The guilty purpose must be proved, and the guilty acts to be all done within the district of New York, and it in no way qualifies or affects the character of these particulars, whether the defendants intended to put off the expedition at Castine, Galveston, or any intermediate point.

"I have occasion to refer again to the opinion of Judge Betts, contained in his charge to a grand jury of this district, and the legal argument which it embraces is so much in accordance with my own views, that I deem it proper to make it a part of my charge. The clerk will oblige me by reading it: 'The act of congress of April 10, 1814, prescribes the laws of neutrality which our citizens are bound to observe in regard to foreign nations. The provisions are stringent, but no more so than comports with the high character for justice and good faith towards others, which it is the policy and aim of this government to maintain. In leaving to every citizen, as an individual, the undisputed right to expatriate himself, at his own option, and connect himself with any other nation or people, this government still possesses the unquestionable power to prohibit that citizen, individually, or in association with others, entering into engagements or measures within the American territory, or upon American vessels, in hostility to other nations, and which may compromit our peace with them. It would be most deplorable if no such controlling power existed in this government, and if men might be allowed, under the influence of evil, or even good, motives, to set on foot warlike enterprises from our shores, against nations at peace with us, and thus, for private objects, sordid or criminal in themselves—or under the impulse of fanaticism or wild delusions—bring upon this country, at their own discretion, the calamities of war. The will of the nation is expressed, in this respect, by the statute of April, 1818. It attempts to guard against the infraction of the peace and rights of friendly powers by our own people, or by acts done within our territory, by inhibiting therein all proceedings of a warlike purpose or tendency, against any foreign government or people, with whom the United States are at peace. The only provisions of the statute which come within the scope of your inquiry to the court, and to which your attention should be addressed, are contained in the sixth section. The sixth section makes it a high misdemeanor for any person within the territory or jurisdiction of the United States to begin or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign power or state, or of any colony, district, or people, with whom the United States are at peace. This language is very comprehensive and peremptory. It brands as a national offence the first effort or proposal by individuals to get up a military enterprise within this country against a friendly one. It does not wait for the project to be consummated by any formal array, or organization of forces, or declaration of war; but strikes at the inception of the purpose, in the first incipient step taken, with a view to the enterprise, by either engaging men, munitions of war, or means of transportation, or funds for

its maintenance; and even further, it is not necessary that the means shall be actually provided and procured. The statute makes it a crime to procure those means. This would clearly comprehend the making ready, and the tender or offer of such means to encourage or induce the expedition; and may probably include also any plan or arrangements, having in view the aid and furtherance of the enterprise. Under this provision of the law, you will, therefore, inquire carefully whether any person or persons have been concerned within this district in getting up a hostile expedition against the Island of Cuba; whether by them, or through their agency or influence, men have been secured, enlisted, or employed, to carry it on; whether munitions of war, money, or transport vessels have been provided here for that object; and if the facts in proof fasten on any individual a participation in such acts, it is your duty to indict him for the violation of this statute, and present him for trial before this court. It must be manifest to you, gentlemen, that these criminal designs, if undertaken, will be managed with much disguise and caution; it is not probable that soldiers will be openly enlisted, or officers commissioned, or vessels freighted to transport munitions of war, or men to the field of action. Pretences and coloring will be employed to mask the real object the parties to such criminal proceedings contemplate. But if you discover the purpose really to be to supply the means of hostile aggression against Cuba, then all persons connected with it, and promoting it will be answerable for the violation of the laws of the United States in the undertaking, the same as if their proceedings had been openly and avowedly intended for a hostile invasion, and waging war on that community.'

"Superadded to this authority," continued Judge JUDSON, "which alone would be conclusive on me, we have the opinions of Judge M'Lean, Judge Catron, Judge Story, Judge M'Kinley, and Judge M'Caleb, all to the same point, fully and powerfully sustaining the decision of Judge Betts. I think I may say to you, with entire confidence, that the law is well settled, that the acts charged in this indictment fall within this law, and that the proper defence to be urged before you was, that the government have failed to prove the allegations in the indictment, and there the defence must rest. These are wholly questions of fact, belonging to the jury; and I am the last person to invade your rights, or to interfere with your exclusive privileges in weighing the testimony in all criminal cases. I would not, if I could, do that, because there is a sufficient responsibility on me without assuming yours. No, gentlemen, you are left free to be influenced by your own convictions of duty, in weighing this evidence. If, upon your oaths, you can say that the facts in this case are not true, then it will afford me unspeakable pleasure to hear the verdict so pronounced, because I confide this part of the case to you, and you must be responsible to your own consciences for the result.

"But, before this case is committed to your deliberation, it may be proper to allude to an appeal that has been made to you, which certainly requires a trifling notice. It is said here, that there has not been a conviction upon this act, by any jury. This is the appeal; and the recent trials at the South are relied upon as guides for you also. But, gentlemen, it was no fault of the law that an acquittal took place there. The fault was elsewhere; and I should tell you that the fault rested with the jury, precisely as it did many years ago in Georgia, when the much-lamented Whitney sought, in that state, to recover for a wanton interference with his rights. The law was in his favor; it was so pronounced by the court, over and over again; yet he could not have a verdict for the redress of his great wrongs, because the jurors were influenced by their interests, and by their prejudices, to have the law thus violated. The state herself was dishonored, and the jurors must have lived to feel the sting of remorse.

"But, again, it has been said that Colonel Burr was not convicted of treason, and could not be convicted under the act of 1794, for a high misdemeanor. He was indicted in the District of Columbia,[1] instead of the state of Ohio, where the crime was committed. He ought to have been indicted in the right district, and there he might have been convicted. I may be excused in a passing remark regarding what has been said by the counsel for the defence, as to the district attorney, his preparation and management of this cause. The terms used, as you will bear me witness, were unusually severe, harsh, and reproachful, such as are not often heard in a court of justice. I am induced to this for the sole reason that I fear you may suppose, from my silence, that the attack was to be justified by the circumstances of the case. Personal assaults like these should not be made, unless there shall be found a clear warrant for them, in both the conduct and motive of the person assailed. It has been my fortune to have known the district attorney from his youth. He is a native of my own county, born and reared up in a town adjoining that of my birth-place. He was prepared for college life in the village where I live. When he presented himself for admission at our bar, it was my lot to examine his qualifications; and, as we there had an old-fashioned requirement of good character, he was reported to the court by me as being, in this particular, above all suspicion or reproach. I well remember

[1] [Evidently a mistake. Burr was indicted and tried in the district of Virginia. See Case No. 14,692a.]

how joyfully we received him into our fellowship, and with what entire confidence he was received and cheered onward by the public confidence. At the May session of our legislature, in 1823, though much my junior, he was my successor to an honorable post in that body. But he left it for a more ample field, and found it in your city, where he is well known to you all, as a high-minded member of the profession, incapable in his nature of intentional wrong to any human being. Since then, I have only seen him once or twice, until the fall of 1850, but I have not been ignorant of his high position here, earned, as it has been, by a life of honorable toil. Others there may be, who have entitled themselves to as good a name, and to an equal share of public confidence, but there are none who can, for themselves, claim a better fame, or a more honorable post in the profession; and nothing in the course of this trial has shaken, in the least degree, my confidence in his honor and integrity. Judge ye, whether the remarks to which I have here alluded, were just in their application, or worthy the source from whence they came.

"There is another incident of this trial, which still lingers on my mind; but as it was a matter of personal, rather than a public, concern, I have some delicacy in taking the least notice of it. But, gentlemen, our relations thus far have been so friendly, that I confess I have a strong desire to carry home with me your good wishes, and for that purpose alone I may be indulged in saying that you all must remember that while the senior counsel was opening the defence, by an attack on an officer of this court, and after he was denounced in unmeasured terms, according to the views of the speaker, you were told 'that the court sanctioned the unlawful expedition on the treasury of the United States.' You will remember, also, that every eye, except that of the speaker, was fixed on the point of personal assault. You may remember, too, that the object of that attack, bitter and unkind as it was, sat in silence. A week has elapsed, and still the shaft is left. When this case is over, I expect to leave you, perhaps forever, and as I desire to carry back to my home your friendship and confidence, there is but one favor to be sought at your hands. For this reason I ask the jury to place these unmerited remarks by the side of the testimony of Burtinett, and let them both be stricken from the case. Perhaps you may say that it was my duty to have stopped all that portion of the argument which related to the law of the case, as was done recently by one of the most learned judges of the supreme court, Judge Curtis. Perhaps I should have done so; but on a moment's reflection you will see why I let the argument proceed. This is not my own judicial district; and as I am here in obedience to the law which has called me, and am a stranger to the jury, I did not wish even to appear to assume power which others might suppose belonged to you. I have heard it all. And again, I was equally disposed to give to these defendants every benefit of what their counsel might, by any possibility, conceive for their benefit. Hence the indulgence has been cheerfully granted; and I repeat, what cannot be too often repeated, that the defendants are entitled to every reasonable doubt arising out of the testimony.

"Now, gentlemen, I have endeavored to dispose of many of the difficulties and embarrassments which have hung around this case, and in some measure obscured the real merits, which are indeed so important to those defendants and to the country. In this humble effort, I hope that I may have aided you, and rendered your task somewhat less responsible. My wish and my object have been to render the case less complicated and more simple—to present to you only the real question to be tried. It is a question of fact merely. Give yourselves no trouble and no anxiety about anything else but the facts in the case. Have the allegations in this indictment been proved? That is all. This cause is put to you to be decided on its own merits—on the truth of the allegations contained in the indictment, as they are laid, in one or any of the counts except the nineteenth. You will, of course, remember that you are a New York jury, empanelled here, and not in New Orleans, nor in Mississippi—knowing, as you do, that your verdict must be according to the evidence given in court.

"A single word as to the facts: (1) From the evidence, you must be satisfied, beyond any reasonable doubt, that persons were combined to begin, or set on foot, a military expedition in the city of New York, to be carried on from thence against a territory with which the United States were at peace. (2) If from the evidence, you find such a combination or agreement to have been made, or understood by them, then what any one of those persons may have said or done, in relation to the expedition, becomes evidence against all. (3) The proof must establish in your mind, that the expedition or enterprise was a military enterprise, and evidence showing that the ends and objects were hostile or forcible against a nation at peace with the United States—then it is, to all intents and purposes, a military expedition. (4) The prosecution is bound to prove that act of beginning, or setting on foot, or that the means were provided or procured within the Southern district of New York. (5) You must be satisfied, from the evidence, that these defendants have done these acts, or participated in their being done, before you can return your verdict against them.

"The testimony is now before you, and that portion of it which has been presented

through Mr. Johannisson, the interpreter, in a manner acceptable to both parties, requires your careful attention. To show you the important principle involved in the invaluable right of a jury trial, and as that right is to be preserved inviolate, I. shall leave the evidence in your hands, without naming a witness, or commenting upon any of the testimony, either written or parol. It is your province to weigh that evidence. and apply the law as now construed to that testimony, and return your verdict accordingly. Prejudices you should have none; they are unworthy of such men and such a cause. Partialities you cannot entertain, because your oath forbids their indulgence. You are not to convict or acquit because those accused are great men or small men, but only because the evidence of the case makes your duty plain. The law is no respecter of persons, and the glory of our land is, that, in the hands of an upright jury, the administration of justice reaches the high and the low, the rich and the poor, with unerring equality. The law never punishes to inflict a wound. The real objects are, to reform the individual, and to prevent others from like offences, so that life, property, and character may be made secure.

"To conclude, I will only say, do your duty to the government—do your duty to the accused, without fear or favor of any man—protect the innocent, but punish those who may have violated your laws. Let the evidence in court and your conscience be your guide. This will give you rest and peace."

For forms of indictment, see Whart. Prec. Ind. 1121, &c.

Case No. 15,976.

UNITED STATES v. The OTTAWA.

[Newb. 536.] [1]

District Court, D. Michigan. Jan., 1857.

STEAM PASSENGER VESSELS—INSPECTION AND REGULATION—FERRY BOATS.

1. [The exception in] the 42d section of the act of congress passed August 30, 1852 [10 Stat. 61], entitled "An act to amend an act, entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam,' passed July 7, 1838 [5 Stat. 304], and for other purposes," cannot be so construed as to exclude boats or vessels ordinarily used as ferry or tug boats.

[Cited in American Transp. Co. v. Moore, 5 Mich. 390.]

2. Where a steamboat, built for a ferry boat, used in her daily employment as such, and occasionally as a tug boat, was employed one day in making several trips from Detroit to Hamtramck, three miles distant, carrying passengers to the grounds of the state fair; *held*, that such use did not change the ordinary character of the boat, or take her from the exception of the statute, or make her liable to the penalties of the act.

[1] [Reported by John S. Newberry, Esq.]

In admiralty.

Levi Bishop, for libelants.
Walker & Russel, for the United States.

WILKINS, District Judge. This is a libel and information filed by the district attorney of the United States, on the complaint and information of one Thomas Chilvers, a resident of said district, in order to recover from the steamer Ottawa the penalty, by the second section of the act of congress of 1838 [5 Stat. 304], imposed on steamboats propelled in whole or in part by steam, transporting merchandise or passengers upon the navigable waters of the United States, without first having obtained a license under the provisions of the law, requiring the inspection of boilers and machinery. The first section of the act of 1852 [10 Stat. 61], amendatory of the act of 1838, provided that no such license should be granted by any collector, unless upon satisfactory evidence that all the provisions of the law were complied with, excepting, however, from its penal application, all steamers used as ferry boats, tug boats, towing boats and steamers under 150 tons burden, and used in whole or in part in the navigation of canals. By the libel, the court is informed, that on the 1st of October, 1856, the steamer Ottawa, owned by George B. Russel, was employed in the transportation of passengers on the Detroit river, between this city and the adjacent township of Hamtramck, without having been inspected or licensed pursuant to law. To this allegation the respondent avers, that the steamer Ottawa was built and used as a ferry boat and tug boat, and was enrolled and licensed as such, and as such was engaged on the day specified, and was always so used before and since: and that on the said day she made her regular trips as a ferry boat between Detroit and the town of Windsor, Canada West. The language of the exception contained in the forty-second section of the act of 1852, is very explicit; and taken in connection with the obvious design of the law, which was "the better security of the lives of passengers on board of vessels running on voyages between distant ports," cannot be so construed as to exclude boats or vessels ordinarily used as ferry or tug boats. In this case there was evidence that the municipal authority leased to the respondent the landing and wharf at the foot of Woodward avenue, to be used as a ferry landing: that he was the proprietor of a number of boats, used by him for the purposes of a ferry boat between this place and Windsor: and that this boat was built as a ferry boat, used as such, was daily employed in this ferry line, and occasionally as a tug boat. There is no proof that she was ever used as a passenger steamer, running between distant ports with either freight or passengers. On the day alleged in the libel, there being a state fair in the township of Hamtramck, she was employed in several trips in conveying visitors from the city

to the fair grounds, and it is contended by the libelant, that these occasional trips changed her ordinary character as a ferry boat and took her out of the exception of the statute. I think otherwise. The exception is not confined to vessels licensed as ferry boats. Ferry license and ferry usage are two different terms. The one applies to the privilege, the other to the vessel; and the legislature evidently had in view the inspection of vessels constructed for voyages or trips of more than an hour's duration, and with the usual accommodations of state rooms and dormitories as passenger boats. The one class of steamers is more exposed to peril than the other, and to afford security to life was the object of the penalty imposed, while the exception cannot be considered as embracing only licensed ferries. Whether this boat was engaged at the time as a ferry boat, in running between this place and Hamtramck, is not deemed material; or, whether there was a regular license or not. There being evidence that she was built as a ferry boat, and that such was her daily occupation, is considered as bringing her within the spirit and letter of the statutory exception. Libel dismissed.

Case No. 15,977.

UNITED STATES v. OTTMAN et al.

[1 Hughes, 313.] [1]

Circuit Court, E. D. Virginia. July, 1877.

JURISDICTION OF FEDERAL COURTS—NONRESIDENTS OF THE DISTRICT—REMOVED CAUSES—CONSTITUTIONAL LAW—PLEA OF IMPRISONMENT.

1. Congress has constitutional power to confer jurisdiction on the United States courts, of suits brought against defendants non-resident in the districts where the suits are brought.

2. Congress has conferred this jurisdiction as to suits against non-residents, commenced in the state courts by attachment and removed into United States courts, by sections 2 and 4 of the act of March 3, 1875 [18 Stat. 470], "to determine the jurisdiction of the circuit courts of the United States," etc., etc.

[Cited in Kelly v. Virginia Protection Ins. Co., Case No. 7,677; Fidelity Trust Co. v. Gill Car Co., 25 Fed. 741; Romaine v. Union Ins. Co., 28 Fed. 636; New York, I. & P. Co. v. Milburn Gin & Machine Co., 35 Fed. 229; Elliott v. Shuler, 50 Fed. 456.]

3. A special plea of imprisonment is not valid in a civil action.

This is a suit in equity, commenced by process of attachment, which was brought in the hustings court of the city of Alexandria, Virginia, and afterwards, on motion of the United States, removed into this court. The demand of the United States against Ottman is for $15,000, of which $10,000 is claimed from the banking company as held for [W. H.] Ottman. At the time of commencing the suit, this sum of $10,000, alleged to have been deposited by Ottman, and held on deposit in the German Banking Company of Alexandria, was attached; and publication was made, as required in such cases by the laws of Virginia. There were also attached in this suit certain shares of stock in the said banking company, and in the Alexandria Marine Railway Company, amounting in approximate value to two thousand dollars. The defendant, Ottman, is a citizen of the District of Columbia, and was at the time of the issuing of process in this suit, and is now, confined in the common jail there under indictment for complicity in the larceny of $47,000 from the treasury of the United States, of which it is charged this $10,000 deposited by him in the German Banking Company of Alexandria was a part. The suit was first brought in August, 1875, and some proceedings were had in it in the fall of that year, but until recently it has been allowed to await the result of the indictment pending against Ottman in the District of Columbia, which has been mentioned. In November, 1875, special appearance for the purpose, and motion, was made by the defendant, by counsel, to quash the attachments taken out in the cause, but the motion was overruled. Thereupon the defendant entered by leave a special appearance for the purpose, and filed, January 5th, 1876, a plea setting forth that he was held in jail by the plaintiffs in the District of Columbia, and thereby prevented from defending the suit. Afterwards, in May last, the defendant filed a plea to the jurisdiction of the court, and also entered a motion to dismiss for want of jurisdiction. The plaintiffs demur to the first of the two pleas, and join in the other, and on this state of facts and pleadings the cause is now heard. Defendants' counsel also declare a purpose, if their plea to the jurisdiction is overruled, to demur to the bill, and have, in argument, set forth the grounds of their demurrer. The principal point relied on by counsel for the defendant in the argument is, the want of jurisdiction, by reason of Ottman being a non-resident of the district in which the suit was brought.

L. L. Lewis, U. S. Atty., and Jeremiah Wilson, for the United States.

Matthew H. Carpenter and Francis L. Smith, for defendant.

HUGHES, District Judge. This is an action in which the United States is complainant, and not one between citizen and citizen, in which either plaintiff or defendant must be a non-resident, in order that the court shall have jurisdiction. It is a suit which, to be effectual to secure the money claimed of the German Banking Company, must of necessity be brought in this district, and could not reach the money if brought in the District of Columbia. The object of the suit cannot be attained by suing elsewhere; and this suit, to accomplish the ends of jus-

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

tice by securing a trial on the merits, must proceed either in the state court or in this court. It is a case, therefore, for a liberal and not a narrow or technical construction of the law regulating the jurisdiction of the court. The provisions of law on which that jurisdiction depends are as follows: Section 1 of the act of congress of March 3, 1875, which appears as chapter 137 of the Acts of 1874–75 (18 Stat. 470), provides in substance, that the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, in which the United States are plaintiffs or petitioners. But no civil suit shall be "brought" before a circuit court of the United States against any person "by any original process" or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, "except as hereinafter provided." Section 2 provides that in any suit of a civil nature, at law or in equity, hereafter brought in any state court where the matter in dispute exceeds the sum or value of five hundred dollars in which the United States shall be plaintiff or petitioner, either party may remove said suit into the circuit court of the United States for the proper district. On being so removed, "the cause shall then proceed as if it had been originally commenced in the said circuit court." And section 4 of the act in question provides in substance, that when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered, to answer the final judgment or decree, "in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced," etc., etc. This act of congress is substantially the same as the corresponding sections of the judiciary act of 1789 [1 Stat. 73].

The decisions of the United States courts under this legislation of congress have been as follows: In Pollard v. Dwight, 4 Cranch [8 U. S.] 421, the proceeding was commenced by process of foreign attachment in the state court, and was removed by the defendants into the United States circuit court for that judicial district. The supreme court held that by appearing and pleading to issue the defendant waived all objection to the service of process. In Toland v. Sprague, 12 Pet. [37 U. S.] 330, where suit was commenced in the federal court by foreign attachment, the supreme court decided that the process of foreign attachment cannot properly issue from a circuit court of the United States against the property of a person not resident in the judicial district for which the court is held, but that if a non-resident defendant appears to such process, and pleads to issue, he waives his exemption from liability to the service of process against him, and the court thereby acquires jurisdiction. In Levy v. Fitzpatrick, 15 Pet. [40 U. S.] 171, the court says: "No judgment can be rendered by a circuit court against any defendant who has not been served with process issued against his person in the manner pointed out in section 11, Judiciary Act of 1789 (section 1, Act 1875), unless the defendant waive the necessity of such process by entering his appearance to the suit." In Day v. Hayward and Chaffee v. Same, 20 How. [61 U. S.] 214, the court held in the general terms which it had used in Levy v. Fitzpatrick [supra]. That case was one where the suit was brought in the United States circuit court against a non-resident, and, on failure of the marshal to find the defendant, process of attachment had been taken out against the defendant's estate in accordance with the practice observed in the courts of that state. At the hearing the defendant had not appeared nor pleaded to issue, and it was held that there was no jurisdiction. In Herndon v. Ridgway, 17 How. [58 U. S.] 424, which was a suit in equity against several defendants who were non-residents, and who had not been served with process, the court said: "The jurisdiction of the circuit court over parties is acquired only by a service of process or their voluntary appearance. It has no authority to issue process to another state. In the present case the defendants decline to appear, and process cannot be served, so that the court is without jurisdiction over the essential parties to the bill." In Sayles v. Northwestern Ins. Co. [Case No. 12,421], it was decided that where a suit was commenced by foreign attachment in a state court, if the defendant appear there, and by motion remove the cause to the circuit court of the United States, it is then too late to object to the jurisdiction of that court, or to raise the objection in the United States court of non-residency in the judicial district. Five years after the decision of the supreme court in Day v. Hayward [supra], which was the latest of the cases cited above, the case of Barney v. Globe Bank of Boston [Case No. 1,031], was decided. It was there held that a suit commenced in a state court by attachment upon property of a non-resident defendant, without personal service upon the defendant, was within the meaning of the law of the United States relating to the removal of suits, and that the federal court has jurisdiction of the cause, if properly removed, whether the defendant appears or not, although it would not have jurisdiction to compel the attendance of defendant if the suit had been originally brought in that

court. In the cases Pollard v. Dwight, Sayles v. Northwestern Ins. Co., and Barney v. Globe Bank of Boston [supra], the suits were commenced by attachment against the property of the non-resident defendant in the state court, and in each case the suit was removed into the federal court on the motion of the defendant. In each case the jurisdiction of the federal court was sustained. In the cases in 12 Pet. [37 U. S.] 330, and 20 How. [61 U. S.] 214, suit was commenced by attachment in the federal court. In one of them the defendant appeared and pleaded to issue, and was held to have waived thereby his right of objection to the jurisdiction. In the other the defendant did not appear or plead to issue, and it was held that there was no jurisdiction to compel him to do so. In the cases in 15 Pet. [40 U. S.] 171, and 17 How. [58 U. S.] 424, it was decided, generally, that judgment or decree cannot be rendered against a defendant unless service of process has been made upon him in the manner required by the 11th section of the act of 1789 (section 1. Act 1875).

The case now before us being one properly commenced in a state court, and properly removed to the federal court, it would seem to fall within the control of the decisions in Pollard v. Dwight, Sayles v. Northwestern Ins. Co., and Barney v. Globe Bank, and, being dissimilar in essential particulars from those in Peters and in Howard, which were not removed suits, would seem not to be governed by those cases. There can be no doubt that the suit was rightfully brought in the state court. It is not pretended but that that court possessed full jurisdiction to entertain and proceed in it. There can be no doubt that it was a removable suit, and that it has been removed here regularly, legally, and by proper proceeding. Indeed, counsel for defendant argued affirmatively that all these things were so, except the second proposition, as to which they maintain that it ought to have been a suit at law, and not in equity. They only contend that, now that the suit has got here, this court cannot proceed with it, for want of jurisdiction to proceed. But I think jurisdiction to remove carries jurisdiction to proceed. Section 1 of the act of 1875 provides only that such a suit as this shall not be brought here by original process. As this suit was not originally brought here, nor brought here at all by original process, that prohibition of the statute is not violated. True, the statute requires that, after a suit is removed here, it shall be proceeded in as if it had been originally commenced here, and it is contended that this requirement means only as "if originally commenced" here, and that inasmuch as the suit could not have been commenced here at all, it cannot be proceeded in here at all. Such a construction of the clause relied on would lead to the mockery of allowing a cause, proper for removal under the law, to be removed only for the purpose of turning it out of court. Such a construction is, of course, not to be given, if it can be avoided. Happily, this construction is especially forbidden by section 4 of the act, which makes an exception to this requirement of such suits as are commenced in state courts by attachment, and provides that, where any removed cause has been so commenced in the state court, such attachment shall hold the goods in the same manner as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which such suit was commenced. This provision would be a mockery if the view of the defendant's counsel were correct. How could the money attached in the hands of the German Banking Company be held in this cause for such decree as the state court could have given, if no further step could be taken here, especially if, as defendant's counsel contend, the suit cannot now be remanded to the state court? Surely congress could not have intended that such an absurdity of consequences should be reached by judicial proceedings taken under its legislation.

The view of Mr. Justice Curtis, fully sustained by Judge Shipman, ought therefore in my judgment to prevail, that if the suit be one rightfully brought in the state court, and which the act of congress authorizes to be removed thence into the federal court, the very fact of authority to remove empowers the federal court to take jurisdiction and proceed in the cause; the only real question in that court being, was the suit rightfully removed? If a cause has thus come into the federal court, then section 4 of the act empowers and requires that court to go on with it, and to give such decree against the property attached as the state court should have given if the suit had remained there. Congress has full constitutional power to give the United States courts jurisdiction over defendants non-resident in the districts in which suits against them are brought; and it has, in sections 2 and 4 of the statute under construction, given this power in the single instance of suits commenced by attachment in state courts, and removed into United States courts. This can easily be made apparent. It must not be overlooked that section 1 avoids the use of such language as would embrace removed attachment suits commenced in state courts, in the class of suits in which, in order that the federal courts may have jurisdiction, it requires that defendants must live, or be served with process, in the judicial districts where the suits are brought. As if to discriminate attachment suits removed out of state courts, from suits commenced in the federal courts, section 1 is particular to say that no civil suit shall be brought in a federal court by any original process, in a district where the defendant

is not a resident, or is not found; leaving suits commenced by original process in state courts out of its purview, to be governed by the provisions of sections 2 and 4, which follow. Section 1, 2, and 4 must of course be construed together. When so construed, they induce the following reasoning and lead to the following conclusions: Under section 1, jurisdiction over non-residents is, in general, not given to the federal courts in any suit commenced by original process in the federal courts; but under sections 2 and 4 these courts may acquire such jurisdiction, by removal, over attachment suits commenced by original process in state courts. For sections 2 and 4 give jurisdiction of removed attachment suits commenced by original process in state courts, and this jurisdiction of such suits is good over non-residents, unless it is prohibited by section 1. But section 1 avoids such a prohibition, for its limitation of jurisdiction only applies to suits commenced by original process in the federal courts; these limiting words not only not applying to removed suits commenced by original process in the state courts, but necessarily implying that jurisdiction in such suits is left to be determined by sections 2 and 4. Moreover, even if the words "no civil suit shall be brought by any original process" in the federal courts against a non-resident could be construed as denying jurisdiction of suits brought by original process in the state courts,—even in that event the words at the end of the same clause, "except as hereinafter provided," would require that the provisions in regard to attachment suits removed from state courts under sections 2 and 4 should be construed as falling within the exception. I must, therefore, overrule the plea to the jurisdiction, and deny the defendant's motion to dismiss for want of jurisdiction.

As to the plea of imprisonment, personal appearance is not essential in a civil action, and a defendant may be required to make defence by counsel to such an action, while in jail. This point has been already overruled in this cause on the motion to quash. See Slade v. Joseph, 5 Daly, 187, and Olery v. Brown, 51 How. Prac. 92. As to the objection intended to be raised on demurrer, that this being a case in which there is claimed to be complete and adequate remedy at law, equity has no jurisdiction, it is enough to say that this suit was brought in a Virginia state court, and that under the laws of Virginia. resort may be had by any creditor to a court of equity for an attachment to enforce a purely legal demand against a non-resident defendant. The statutory provisions allowing this remedy may be found in the state Code, and in sections 7, 37, and 181 of Daniel on Attachment. The defendant's intended demurrer to the bill on this ground is therefore overruled. So is his objection to the bill on the ground of multifariousness. The bill has but one object, to secure the payment of the debt directly by the defendant himself, and indirectly by his debtor, the German Banking Company. It is therefore not multifarious. A decree will be entered in accordance with this opinion.

Case No. 15,978.

UNITED STATES v. OUTERBRIDGE.

[5 Sawy. 620.] [1]

Circuit Court, D. California. June 25, 1868.

DEGREES OF MURDER—MANSLAUGHTER—MALICE—JUSTIFIABLE HOMICIDE—SELF-DEFENSE—THREATS.

1. In the laws of the United States, there is no such designation as murder in the first degree or murder in the second degree; they simply provide for the crime of willful murder, and attach to it the punishment of death.

2. In the absence of statutory provisions, the federal courts resort to the common law for guidance in the construction of legal terms and phrases.

[Cited in U. S. v. Clark, 46 Fed. 635.]

3. The difference between murder and manslaughter consists in the existence of malice, express or implied in the one case, and the absence of malice in the other.

[Cited in The Ambrose Light, 25 Fed. 426.]

4. Malice is implied in every case of intentional homicide; that is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused the death, and the burden rests upon him to rebut the implication.

[Cited in Ex parte Brown, 40 Fed. 83.]

[Cited in People v. Dillon, 30 Pac. 152.]

5. A man may repel force by force in the defense of his person, his family or property, against any one who manifestly endeavors by violence or surprise to commit a felony. The right to oppose force to force in such case, is founded upon the law of nature, and is not superseded by the law of society.

6. Neither words nor gestures, however insulting and irritating, nor an assault, will justify the killing of the aggressor; his killing is justifiable only when there is an apparent intent by him to commit a felony, and the danger is imminent, and the species of resistance used necessary to avert it.

7. By imminent danger is meant immediate danger, such as must be instantly met, such as cannot be guarded against by calling on the assistance of others or the protection of the law.

8. Mere threats against the person or life of another, without any attempt at execution, will not justify homicide, nor even when such attempt at execution is made, unless the danger be so imminent as not to admit of any delay in meeting it on the part of the assailed.

The defendant [Heber Outerbridge] was indicted and tried at the June term of 1868, for murder on the high seas.

J. B. Manchester, for defendant.
Delos Lake, U. S. Atty.

FIELD, Circuit Justice (charging jury). The facts of this case lie in a very narrow com-

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

pass, and the principles of law applicable to them are very simple and can be readily understood. You are the exclusive judges of the facts; that is to say, it is your province to pass upon the evidence, to give to it such weight as you may deem it entitled, and determine therefrom all disputed questions of fact. The duty of the court will end when it states to you the law by which the offense charged is to be considered, and the principles by which the evidence is to be weighed.

The prisoner at the bar is indicted for the crime of murder. The indictment charges that the defendant did, on the first of April of the present year, on the high seas, on board of the American vessel Jenny Prince, belonging to citizens of the United States, feloniously, willfully, and of malice aforethought, make an assault upon one William Anderson, then aboard of said vessel, and by a capstan bar, an instrument of wood, of four feet in length and six inches in circumference, inflict several mortal wounds upon his head and neck, of which he, on the same day, died. The charge here is of the murder of William Anderson, upon the high seas, on the first of April, last.

The act of congress under which the indictment is found provides what the punishment shall be for this crime; it declares that the punishment shall be death. But it does not define the crime itself, nor establish any degrees in the turpitude of the offense, as does the law of the state. There is no such designation made in the laws of the United States as murder in the first or murder in the second or any other degree. The statute simply enacts that if any person upon the high seas, or in any arm of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall commit the crime of willful murder, such person shall, upon conviction thereof, suffer death. We must therefore resort to the common law for a definition of the crime. In the absence of statutory provisions, the federal courts are obliged to resort to that law for guidance in the construction of legal terms and phrases. By that law murder is defined to be the willful killing of a human being in the peace of the country, with malice aforethought, either expressed or implied. The term malice is here used in a technical sense, and includes not merely hatred and revenge, but every bad and unjustifiable motive. Express malice exists when one, with deliberate premeditation and design formed in advance, kills another, such premeditation and design being manifested by external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes to do the party bodily harm. Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus it is implied when one man kills another without provocation, or where the provocation is not great, for no person except one of an abandoned heart could be guilty of such an act without cause, or upon any slight cause. The terms express and implied malice, in truth, indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide, and the other being inferred only from the act committed.

Manslaughter is the unlawful killing of a human being without malice, express or implied. It may be voluntary or involuntary. It is voluntary when committed with a design to kill, under the influence of a sudden and violent passion caused by great provocation, which the law, in its tenderness to the infirmity of human nature, considers such a palliative of the offense as to rebut the presumption which would otherwise arise of malice. Manslaughter is involuntary when committed by accident, or without any intention to take life. As you will thus perceive, the difference between murder and manslaughter consists in the existence of malice, express or implied, in the one case, and the absence of malice in the other.

Now, malice is implied in every case of intentional homicide; that is to say, when once it is established that a person was intentionally killed, the law implies that malice existed in the party who caused the death. If there are any circumstances of excuse or palliation which will rebut the implication of malice, it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the usual consequences of his acts. A man can not strike another violently with a bar of iron without inflicting bodily pain; if, therefore, he does thus strike another, the law presumes that he intended thus to inflict pain. The usual effect of a leaden ball fired from a loaded pistol of the common size, at a distance of a few feet only, striking the head or back of a person, is to kill such person; the law therefore presumes that every one who thus fires a loaded pistol within a few feet of the object intends to kill; it therefore implies malice in him.

In the present case there is no question as to the homicide charged, nor is there any question that the homicide was committed by the prisoner, nor is it denied that the blows which caused the homicide were intentionally given. The instrument used was of such magnitude and weight that it would, in all probability, have broken the skull, had it been applied with slight force, but the evidence shows that great force was used. There is no element in the case which can bring the homicide within the definition of manslaughter. There was here no sudden and violent passion produced by great provocation, which, for the moment, overpowered the reason of the prisoner. He does not rest his defense upon any such ground. His defense is that he was justified in taking the

life of Anderson; that the homicide was required for the preservation of his own life.

Now upon this subject of justification the law is explicit. A man may repel force by force in the defense of his person, his family or property, against any one, who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such case is founded upon the law of nature, and is not and can not be superseded by the law of society.

In the definition of justifiable homicide the following particulars, says Mr. Justice Washington, "are to be attended to. The intent must be to commit a felony. If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor. No words, no gestures, however insulting and irritating, not even an assault, will afford such justification; although it may be sufficient to reduce the offense from murder to manslaughter. In the next place, the intent to commit a felony must be apparent, which will be sufficient, although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like. And, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used necessary to avert it." U. S. v. Wiltberger [Case No. 16,738].

You will observe from this language that the intent to commit the felony must be apparent; that is, in the process of execution, so that the movement towards the execution becomes cognizable by the senses. For example, if a man declares that he will kill another, and moves towards him with a heavy weapon raised in the position to strike, or with a pistol cocked and directed towards him, the intent to commit a felony would be apparent, although in point of fact the party may never have intended to strike, or the pistol may have been unloaded. As observed by Mr. Justice Washington, this apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like.

You will observe from the language cited that the intent to commit a felony must not only be apparent, it must also appear that the danger was imminent, and the species of resistance used necessary to avert it. By imminent danger is meant immediate danger—one that must be instantly met; one that can not be guarded against by calling on the assistance of others or the protection of the law. And the species of resistance used, that is, the means to prevent the threatened injury, must be such as were necessary to avert it.

Tested by these rules, the defense utterly fails. We will not even presume to suggest that the threats of the deceased were the mere coarse vaporings of a brutal sailor, never intended to be carried out. We will assume that, at the time they were uttered, they were the expression of a determined purpose on the part of the deceased. There is no evidence of any subsequent attempt to carry them into execution; nor is there any evidence that there was not adequate means with the captain and the rest of the crew, for the protection of the defendant. The danger, if any ever existed, that the threats would be carried into effect, was not imminent. The deceased was at the time asleep, covered by a sail on the deck. If it had been reasonable to believe that on awakening he would have proceeded at once to the execution of his threat, even then the means to secure him and prevent him should have been resorted to. There was sufficient force on board to control him.

Mere threats against the person or life of another, without any attempt at execution, will not justify homicide, nor even when such attempt is made, unless the danger be so imminent as not to admit of any delay in meeting it on the part of the assailed. No other rule could exist with proper security to human life in society.

The case is in your hands. As already said, you are the exclusive judges of the facts; that is to say, it is your exclusive province to pass on the evidence, and to give it such weight as you may judge it entitled to receive.

The jury found the defendant guilty of murder.

Case No. 15,979.

UNITED STATES v. OVERTON.

[2 Cranch, C. C. 42.] [1]

Circuit Court, District of Columbia. June Term, 1812.

INTOXICATING LIQUORS—LICENSE.

The widow and administratrix of a deceased tavern-keeper cannot sell spirituous liquors under her husband's license; nor can she transfer it to another.

[Cited in State v. Lydick, 11 Neb. 373, 9 N. W. 560.]

Indictment for selling liquor as an ordinary-keeper, without license.

The defendant justified under a written authority from Mrs. Smallwood, the widow and administratrix of Walter B. Smallwood, indorsed on the original license which had been granted to him in his lifetime.

THE COURT (THRUSTON, Circuit Judge, contra,) said that Mrs. Smallwood had no authority to sell under her husband's license after his death. It is a personal trust. The recognizance given by the husband cannot be forfeited after his death by any misconduct of his widow.

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

The jury found the defendant guilty, and the court rendered judgment for the fine of 600 lbs. of tobacco, under the act of assembly of Maryland.

Case No. 15,979a.

UNITED STATES v. OWNERS OF THE UNICORN.

[3 Am. Law J. 188.]

District Court, D. Maryland. Feb. 12, 1796.

NEUTRALITY LAWS — FITTING OUT PRIVATEERS — EVIDENCE—LIABILITY OF OWNER FOR ACTS OF MASTER.

[1. Where it is claimed that defendant fitted out a privateer in his country, contrary to the act of June, 1794 (1 Stat. 381), it must appear affirmatively, in order to convict him, that the equipment was within the United States; that defendant caused such equipment to be made, or was knowingly concerned in it; and that the intent of the equipment was to commit hostilities on nations with whom the United States were at peace.]

[2. A French citizen, transiently within the United States, cannot be criminally prosecuted for piracies and robberies committed by the captain of a privateer, owned by him, upon neutral vessels.]

In admiralty.

WINCHESTER, District Judge. The owners of the privateer Unicorn, falsely called Sansculotte Laveaux, if liable to punishment in the United States, can only be prosecuted under the act of congress of the 5th of June, 1794 [1 Stat. 381], by the third section of which law it is provided, "that if any person shall within any of the ports, harbours, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any prince or state" to commit hostilities upon nations with whom the United States are at peace, such offence is declared to be a high misdemeanor, and subjects the party convicted to a fine not exceeding 5000 dollars, and imprisonment not exceeding three years. The offence designated by this law was, anterior to the passage thereof, a high offence against the sovereignty of the United States, and in contravention of the law and usages of independent neutral nations. But the difficulties which must ever exist in a government of limited and specified powers, in applying the punishment to the infraction of a law which created no specific penalty, as well as the doubts on the question, where does the sovereignty (as applied to the government) of the United States reside? induced the necessity of providing by an ordinary act of legislation for the punishment of such cases. The owner of the Unicorn must therefore be considered as having violated a civil law of the United States and will incur its penalties on a conviction according to the accustomed form of judicial proceeding. The evidence to establish his guilt must be of affirmative acts corresponding to the provisions of the law, to wit: that the equipment was within the United States; that he caused such equipment to be made, or was knowingly concerned in it; and lastly, that the intent of the equipment was to commit hostilities on nations with whom the United States are at peace. The evidence must be disclosed in court before a jury of the country who are to be his judges. The sentence of General Laveaux would not be admissible in our courts, inasmuch as he was not a party in the proceeding, and because according to our law it would be the highest iniquity to bind a man by a sentence which he had not the opportunity to controvert; besides it passed on a different question. On that trial there was no question as to the infraction of a civil law of this country. The same evidence which would be sufficient for the conviction of the owner would be enough to convict Americans concerned with him.

Question. Is the owner of the ship Unicorn responsible for the piracies and robberies exercised by his captain upon neutral vessels? Are there any laws of the United States which sanction that responsibility, and can he be prosecuted on those grounds?

Answer. Under the particular circumstances of this case, I am inclined to think that the owner of the Unicorn cannot be prosecuted criminally as for piracy and robbery. As a French citizen, transiently within the United States, he owed nothing but obedience to the laws of order and good government within the nation. He remained a French citizen, and although there may have been flagrant outrages committed on neutral vessels, they could only be considered as civil trespasses resulting from acts which were to them unlawful, as being an excess of the authority under which they acted.

There is no particular law of the United States on the subject. The only responsibility which exists is to answer in damages for the injury sustained. These can only be recovered by actions to be commenced by the individuals whose property was attacked and injured.

Case No. 15,980.

UNITED STATES v. PACHECO et al.

[Hoff. Dec. 62.]

District Court, N. D. California. March 22, 1862.

MEXICAN LAND GRANTS — OBJECTIONS TO SURVEY — ESTOPPEL.

[1. The claimants of a grant are estopped to object that parts of the land, which they have sold and conveyed as part of their rancho, are not within its limits, for the purpose of completing their quantity by embracing in the survey lands not conveyed by them.]

[2. The mere fact that the diseño of a neighboring rancho includes part of the land embraced in the claimants' diseño is no ground for excluding such land from the claimants' survey, where the adjoining rancho has not yet been surveyed, and the owners thereof have not intervened to assert their alleged rights.]

[Claim of Rosa de Pacheco and others to a rancho of four leagues in San Ramon valley, Contra Costa county. See Case No. 15,981. On objections to the official survey.]

HOFFMAN, District Judge. The survey in this case is objected to on behalf of certain parties claiming an interest in the southwest corner of the rancho by deed from the original grantee. A portion of the land conveyed to them has not been included in the survey. In the grant the land is described as included between the Arroyo de las Nueces and the Sierra de las Golgones, bounded by the said places and by the ranchos of Las Juntas, San Ramon, and Monte del Diabolo. The fourth condition describes it as "two square leagues" (decided by the supreme court to have been erroneously substituted for four square leagues), "a little more or less, as shown by the map, which goes with the expediente." The diseño very distinctly represents a tract of land bounded on the west and east by the Arroyo de las Nueces and the Sierra da Golgones respectively on the north, by a line drawn from the creek to the sierra, and is described "Linea Divisoria;" and on the south by a chain of hills inscribed "Sierra Divisoria." There cannot be any doubt that this sierra was intended as the southern boundary of the tract. It is identified by the witnesses as a well-defined ridge or watershed, running from a couple of hills or arnitos, near the Nueces, to the Sierra de los Golgones. The southern line of the official survey has been located considerably north, and apparently at an arbitrary distance from this unmistakable natural boundary. I think it clear that against their own grantees the claimants have no right to elect a location of the land which shall not include all of the tract conveyed by them lying within the exterior limits of the diseño. The claimants of the residue of the rancho are the only parties who have formally appeared in support of the survey. But the counsel who appeared for them is also interested in, or represents, the adjoining rancho of the San Ramon. In the interest of the owners of that rancho (who have not intervened in this suit) he objected to any location of the southern line by which it shall be made to extend to the west until it met the Arroyo del Ingerto. Admitting this objection to be just, the survey would, nevertheless, be erroneous, for the line of the "Sierra Divisoria" is wholly neglected as a southern boundary. That boundary being fixed in the official survey at a considerable distance to the north of the sierra towards the western end, and at an equal distance to the south of it, towards the eastern end. Whereas the indications of the diseño are clear that the sierra should be followed throughout the whole course of the southern boundary as near as may be. It is claimed on the part of the owners of San Ramon, that the southern line should stop before reaching the Ingerto, and that the boundary from that point is a line drawn a little west of north until it strikes the Arroyo de las Nueces a short distance above its junction with the Ingerto. In support of this location, the diseño of San Ramon is exhibited. On this is delineated the strip of land in question, lying on the east of the Ingerto, and extending northward to a point above the junction of the creeks. But the same piece of land is undoubtedly included within the diseño in the case at bar. The Rancho of San Ramon has not been surveyed, nor have the owners made themselves parties to this proceeding. No testimony as to the boundaries of that rancho has been taken, nor any information on the subject afforded, except the mere production of the diseño. It is by no means certain that the piece of land in question, though delineated on the diseño of San Ramon, was intended to be included within the tract actually granted. The diseños which accompanied the petitions addressed to the governor, not unfrequently represent large districts of country—far larger than it was intended to include even within the exterior boundaries within which the quantity granted was to be taken. They sometimes indicated the region of country where the land was situated, rather than the limits of the tract solicited. It is suggested that the diseño of San Ramon includes a quantity of land several times greater than to which it is alleged the grant is limited. However this may be, it is obviously impossible to declare, in the absence of all information as to the true boundaries of San Ramon, or of any elections of location which its owners may have made, and which would prevent them from crossing the creek, that this strip of land, though clearly within the limits of the claimants' diseño, and heretofore conveyed by them to third parties, should not be included within the survey merely because the same strip is represented on the diseño of San Ramon. It certainly does not lie in the mouths of the claimants to object that the land they have sold and conveyed as part of their rancho is not within its limits, and this in order that, by excluding it, they may complete their quantity of four leagues, by embracing lands not conveyed by them. I think, therefore, that the survey should be reformed by running the line as the same was located by Mr. Williamson, of the topographical engineers, and as laid down on the map attached to his deposition. I do not understand that the location made by him of the eastern portion of the southern line, or of the eastern and northern lines, is disputed. On the

coming in of that survey, the owners of San Ramon will have an opportunity to appear, and to show that the modified survey improperly embraces a portion of their land. It will then be possible, with both parties before the court, definitely to settle the disputed boundary between the ranchos.

Case No. 15,981.

UNITED STATES v. PACHECO.

[Hoff. Land Cas. 79.] [1]

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

MEXICAN LAND GRANT.

No objections to the confirmation of this claim.

Claim [by Saliro Pacheco] for [the Rancho Monte del Diablo] four leagues of land, in Contra Costa county, confirmed by the board, and appealed by the United States. [The grant was made March 30, 1844, by José Figueroa to S. Pacheco, and a patent was eventually issued.]

S. W. Inge, U. S. Atty.
B. W. Leigh, for appellee.

HOFFMAN, District Judge. In this case, a grant from Governor Figueroa to the claimant is produced and proved, and evidence is offered to prove the occupation and cultivation of the land within the year; as prescribed in the grant. In the opinion of the board the grant is treated as undoubtedly genuine, and the fact of the performance of the conditions as indisputable. No additional testimony has been taken in this court, nor has any reason for refusing the decree of the board and rejecting the claim been suggested to us on the part of the appellants. The only objections that could have been raised, viz., the want of juridical possession, and the fact that the land is within the ten littoral leagues, has already repeatedly been overruled. A decree confirming the claim must therefore be entered.

Case No. 15,982.

UNITED STATES v. PACHECO et al.

[Hoff. Land Cas. 150.] [1]

District Court, N. D. California. June Term, 1856.[2]

MEXICAN LAND GRANT—CONSTRUCTION.

[When the land was granted by specific boundaries, which were represented to the grantor to contain a certain quantity, and, on ascertaining that the quantity was the same as that represented, he proceeded to grant all the land within those boundaries, and referred to the map, which clearly indicated the quantity, it will be assumed that the intention was to grant all the land included in the boundaries, though in a subsequent condition in the grant the quantity was erroneously stated.]

Claim [by Rosa Pacheco and others, devisees of Juana Sanchez de Pacheco] for [the Rancho Arroyo de las Nueces y Bolbones] two leagues of land, more or less, in Contra Costa county, confirmed by the board for two leagues, and appealed by the United States and by claimants.

William Blanding, U. S. Atty.
A. P. Crittenden, for claimants.

HOFFMAN, District Judge. In this case appeals have been taken both by the United States and by the claimants. The board confirmed the title to the land to the extent of two leagues; and the claimants assert that they are entitled to a confirmation of the tract granted by metes and bounds, and irrespective of quantity. With regard to the validity of the grant no question seems to be raised. In the brief filed on the part of the United States it is observed, that "on the general question of the validity of the whole grant, it is not designed to repeat objections and arguments which this court has so often decided to be untenable." The validity of the title being thus admitted, under the principles laid down in the former adjudications of this court, the only question is as to the extent to which it should be confirmed. The petition was presented to Governor Figueroa on the fifteenth of May, 1834, and the usual order of reference for information was made. After receiving the report of the ayuntamiento of San José Guadalupe, a further reference was made to the alcalde of Monterey, directing him to examine witnesses, to be produced by the petitioner, as to her qualifications, as to whether the land was vacant, as to its extent and nature, and as to whether she had the means of stocking it with cattle. The alcalde accordingly took the depositions of the witnesses, by which it appeared that, as stated by two of them, the land was two and one-half leagues, "a little more or less," long, and about two leagues broad; and as deposed by the third, that it was two leagues long, more or less, and about two leagues broad. Upon receiving these reports, the governor made the usual order of concession, declaring the petitioner "owner of the land between the Arroyo de las Nueces and the Sierra de los Golgones, bounded by the said places and by the ranchos of San Ramon, Las Juntas and Monte del Diablo; and directing the expediente to be sent to the most excellent deputation for their due approval. The grant or final title, in what would seem to be strict compliance with the colonization laws, was withheld until the approval of the assembly had made the grant definitively valid. On the eleventh of July, 1834, the assembly passed a resolution approving "the grant made to Doña Juana Sanches de

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

[2] [Reversed in 22 How. (63 U. S.) 225.]

Pacheco of the place included between the Arroyo de las Nueces and the Bolbones." On the thirty-first of July, the governor, after referring to the resolution of approval, ordered the title to issue. It accordingly issued on the same day. The grant, after reciting that Doña J. S. de Pacheco had petitioned for the land included between the Arroyo de las Nueces and the Sierra de los Golgones, bounded by the said places and the ranchos of Las Juntas, San Ramon and Monte del Diablo, and after referring to the resolution approving the grant of the land between the Arroyo de las Nueces and the Sierra de los Golgones, grants to her "the aforesaid land, declaring to her the ownership of it by these presents, and subject to the following conditions." The fourth condition is as follows: "The land of which mention is made is two square leagues, a little more or less, as shown by the map which goes with the expediente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance, for the purpose of marking out the boundaries, leaving the surplus which may result to the nation for its convenient uses."

It is contended on the part of the United States that by this condition the quantity of land is limited to two leagues, a little more or less. It is urged on the part of the claimants, that the original order of concession, the resolution of approval, and the description of the land in the grant itself, clearly show the intention to have been to grant the land as delineated on the diseño and described in the grant; and that if the fourth condition be construed to limit the quantity, it is repugnant to the rest of the grant, inconsistent with the previous concession and resolution of approval, and probably introduced by mistake.

If such was the intention of the governor when he made the concession, and of the assembly when they approved of it, the final title, issued with an express reference to, and avowed conformity with the resolution of approval, should, if possible, be so construed as to give effect to it. The inquiry therefore is, did the governor intend by the fourth condition to limit the quantity of land granted, or is the mention of quantity to be treated as merely a misdescription of the extent of the land, which should, as at common law, yield to boundaries, when the latter are distinctly mentioned, and when such construction is necessary to give effect to the intention of the parties? In the case of U. S. v. Wright [Case No. 16,769], it was held by this court, that where land had been granted by specific boundaries, which included in fact about eight leagues, and the condition specified the extent as four leagues, a little more or less, the grant could not to be construed to embrace the larger quantity. But in that case it appeared that the petitioner himself, as well as the witnesses produced by him, had represented the land as only "three or four leagues in extent." The governor, therefore, in limiting the grant to the quantity represented to be included within the boundaries, either merely carried into effect the understanding and intentions of all parties, or else the representations were fraudulent, and the parties to the deception could not in a court of equity be allowed the fruits of their fraud. It seemed to the court in that case that justice would be satisfied and every substantial right protected by limiting the extent of the land to the quantity which the governor intended to grant and the petition asked for. But the case at bar is different. The governor was fully apprised of the extent of the land, not only by the testimony of the witnesses produced before the alcalde, but the diseño which was submitted both to the governor and the assembly, and which is referred to in the condition, shows the land included within the boundaries to be of about the extent mentioned by the witnesses. The boundaries mentioned in the concession, the resolution of approval, and the grant, are the same as those indicated on the map, and the governor in all probability derived his description of the land from that source. It is clear from this fact, as well as the express language of the condition, that the governor intended to grant the land "as shown by the map;" and that map contains a scale which must, independently of other information, have apprised the governor that the quantity was greater than two leagues.

In this, as in all analogous cases, the only object of the court should be to carry out the intentions of the granting power. When, therefore, we find the land granted by specific boundaries, and those boundaries represented to the grantor to contain a certain quantity; when the grantor's attention has been directed to the point; and on ascertaining that the quantity is the same as that represented he nevertheless proceeds to grant all the land within those boundaries, and refers to the map which clearly indicates the quantity—under all these circumstances, we must consider that the intention was to grant all the land included within the boundaries, notwithstanding that in a subsequent condition the quantity may be erroneously stated. That conditions applicable only to one species of grants were often inserted by mistake in grants of a different species is notorious. In this case the mention of two leagues as the extent of the granted land is perhaps owing to the fact that the clerk who drafted the document forgot that a tract two leagues broad by two wide contained four and not two square leagues. However this may be, we think it clear that in this case all the land within the boundaries was intended to be granted; and as there is no proof or suggestion that the land so included exceeds in

extent the quantity testified to by the witnesses before the alcalde, that the claim should be confined to the tract as described in the grant and delineated on the map.

[The case was taken by appeal to the supreme court, where the decree was reversed, and the cause remanded to the district court for further proceedings. 22 How. (63 U. S.) 225.]

UNITED STATES (PACHECO v.). See Case No. 10,641.

Case No. 15,983.

UNITED STATES v. PACIFIC RAILROAD.

[4 Dill. 66.] [1]

Circuit Court, E. D. Missouri. 1877.

SUIT TO RECOVER TAXES—SET-OFF—ILLEGAL TAX—REMEDIES.

1. The obligation or duty to pay taxes assessed by the United States, is one which may be enforced by suit—by an action at law or a bill in equity, according to the nature of the relief sought.

2. In such a suit by the United States, the defendant cannot plead a set-off, legal or equitable, growing out of independent claims against the United States, although such claims are just, and have been presented to and rejected by the proper auditing officers.

[See Apperson v. Memphis, Case No. 497.]

3. The remedy against an illegal tax assessed by the United States, pointed out.

[Quoted in Kensett v. Stivers, 10 Fed. 526. Cited in Snyder v. Marks, 109 U. S. 193, 3 Sup. Ct. 160.]

This was a bill in equity by the United States to recover the amount of certain taxes claimed to be due, under the internal revenue law, from the defendant company, and to enforce the lien of the taxes upon the property of the company, which, since the taxes accrued, has passed into other hands. Among other defences in the answer, is one in which the railroad company claimed a set-off for a sum exceeding the amount of taxes sued for, growing out of the use of the railroad of the defendant by the government during the war; which claim, it is alleged, has been duly presented to the proper department of the government and rejected. This portion of the answer was excepted to by the United States; and it was in disposing of these exceptions that the following opinion was orally pronounced by Mr. Justice MILLER.

W. H. Bliss, U. S. Dist. Atty.

Cline, Jamison & Day, for defendant.

[Before MILLER, Circuit Justice, and DILLON, Circuit Judge.]

MILLER, Circuit Justice, orally. The United States brings suit against the Pacific Railroad Company for the collection of a tax alleged to be due by the railroad company, and to enforce the lien of this tax upon the property of the company, which has passed into other hands. The railroad company sets up as one of its defences that it has a claim against the United States in excess of the amount of these taxes, for the use of the railroad and its appurtenances during the war, which has never been paid; and it alleges, also, that these claims have been presented to the proper auditing officers and rejected; and it is insisted that they come within the statutes of the United States upon that subject, which allows an equitable set-off where just claims have been rejected. And the defendant also claims that the government, being a plaintiff, and bringing this action in chancery in the nature of an action for a debt, the suit is liable to the principle of mutual set-off, which governs all suits in equity. A good deal of argument on both sides has been presented to us upon the question whether an action to recover taxes is an action of debt, and whether an obligation to pay taxes to the government is a debt. There is considerable conflict of authority on that subject. Not only is there such conflict in the courts other than those of the United States, but the supreme court of the United States, in at least two cases, has given what might appear to be conflicting decisions upon the subject. In the case of Lane County v. Oregon, 7 Wall. [74 U. S.] 71, which was a suit to recover taxes, the state of Oregon claimed that her taxes should be paid in gold, and that the legal-tender laws then in existence, and in existence long before, had no application to taxes, whether state or national, except as they were made receivable for dues to the United States by the act itself. And the question turned on whether the taxes which the state of Oregon assessed against her citizens was a debt within the meaning of the legal-tender laws, which provided in terms that they should be receivable in payment of all debts. The supreme court unanimously held that in that sense, at all events, and for that purpose, a tax was not a debt. In other words, the meaning of it was that the congress of the United States did not, by the use of the word "debt" in that act, intend to include taxes of the states. Chief Justice Chase delivered the opinion, and he referred to several of the authorities cited yesterday on the subject whether a tax is a debt or not. On the other hand, in a later case [Dollar Sav. Bank v. U. S.] 19 Wall. [86 U. S.] 227, coming up from Pennsylvania, where the United States brought an action at law for some internal revenue taxes, a recovery was stoutly resisted on the ground that a tax was not a debt, and as it was not a debt within the common law meaning of the phrase, that it could not be so collected. In that case the supreme court held that, for the purposes of that collection, and in some

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

senses, it was a debt; that the tax—which, I presume, was the same kind of a tax as this is—could be so collected. Whenever the proper officers themselves ascertain their earnings for that particular year, the law applied and made the assessment; it could be neither more nor less than that amount, and no assessment by the officers of the government was necessary to ascertain the amount; therefore, it is a debt collectible by suit. I state these things merely to show the difference of opinion that has existed upon the subject, as also to show the fact that the supreme court has, under one set of circumstances, recognized that a tax is a debt, while under another that it was not a debt. In the view that all of us here take, I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes; it is very clearly an obligation which may be enforced by the courts. In the case from the state of Pennsylvania, it was simply a suit for taxes, and nothing else; but if it was not such a suit, an equitable lien, it is claimed, would give the right in chancery to recover what was merely a debt at common law. The question remains whether it is liable to a set-off. This depends upon a principle of policy, in which both the government of the United States and its courts have sounded no uncertain note at any time. We have even, without the aid of an act of congress, refused to grant an injunction to stay the collection of taxes under any circumstances—and this upon the broad ground applicable to this case, that the taxes of the government are essential to the support and existence of the government; and we have always refused to permit any interference with their collection by injunction. The principle involved is this: That by setting up other debts, and cross-actions and counter-claims against the government, it would, in effect, be placing the existence of the government at the mercy of any person who chose to set up his right in this way, and thus hinder the collection of the taxes. Since that decision was originally made, the statutes passed by congress go very strongly in that direction. Congress has passed a statute expressly forbidding the granting of an injunction for that purpose. It has passed a statute for the correction of errors of the assessing and collecting officers of the government, which the supreme court has said, in two or three cases, is a complete and perfect system. If the tax is unjustly assessed, or supposed to be unjustly assessed, the remedy allowed is an appeal to the commissioner of internal revenue. If he decides against the party, or fails to decide within six months, the party injured can pay his taxes and go into court and sue for the amount, and recover it back if he is wrongfully assessed, the court being unprejudiced by any action of the commissioner. The statute says he may bring his suit to recover it back, and he will get it back if the court so decides. The time for bringing such a suit is limited, so as to have no delay in settling the matter. It must be within twelve months—six months after the commissioner has decided, and twelve months after the appeal has been taken. And we have said over and over again in our courts that that was a complete and exclusive system of correctional justice in regard to the collection of taxes unjustly assessed; that it was the only system, and by that ruling we abide. There can be no such thing as obstructing and objecting to the payment, as in the case of adjusting the accounts of individuals. It may be said that since the government has refused, by its auditing officers, to allow this party their claim, they have no remedy, and that it is inequitable to allow the government to recover one hundred and twenty thousand dollars against them, when the government owes them half a million. And the argument would have some force, notwithstanding the want of any express provision on the subject, if there were no other remedy. But it is to be considered that the application to the auditing officers is in itself a remedy. They act in a judicial capacity, and are impartial, or supposed to be so, and perhaps are just as good judges as to what ought to be done as we are. But suppose they are not, there remains the right to sue in the court of claims. That court was instituted for this very purpose. But it may be said that the claim set up here is not of a character over which the court of claims has jurisdiction. I cannot see, if it is a claim which can be made a set-off, why it is not a case which can be enforced in the court of claims, because the court of claims has jurisdiction of all claims against the United States growing out of contracts, express or implied. And surely no one can suppose that a claim can be used as a set-off if it does not grow out of a contract, expressed or implied. No statute of any state or of any government, and no principle of law, ever allows any set-off which does not grow out of a contract; so that, in refusing to allow this set-off to come in here and delay the government in the collection of its taxes, we do not leave the party without judicial remedy. The judgment of the court is that the exceptions to the answer which sets up that defence must be sustained. Exceptions sustained.

[Subsequently the defendant demurred to the bill, and the demurrer was sustained. Case No. 15,984.]

Case No. 15,984.

UNITED STATES v. PACIFIC RAILROAD et al.

[4 Dill. 71;[1] 23 Int. Rev. Rec. 384.]

Circuit Court, E. D. Missouri. 1877.

INTERNAL REVENUE LAWS—DEMAND OF TAXES—LIEN.

1. The internal revenue act of July 13, 1866 (14 Stat. 104; Rev. St. § 3186), provides, in reference to certain taxes, that if any person liable to pay the same, "neglects or refuses to pay them after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with interest, penalties, and costs, upon all property and rights of property belonging to such person:" *Held*, that a demand is necessary to create and bring into operation this lien.

[Cited in U. S. v. Allen, 14 Fed. 264.]

2. It is essential to such a demand that it should state the amount of the tax and demand payment thereof.

3. That each of the three several demands here alleged was insufficient to create the lien.

This was a suit in equity, brought in 1877, under the authority of the statute (Rev. St. § 3213), which provides for the recovery of taxes by suit and to enforce the lien of the taxes against the property owned by the delinquent (the Pacific Railroad) at the time the taxes accrued (Rev. St. § 3186). The taxes sought to be recovered, amounting to about twenty-five thousand dollars, accrued in 1871 against the Pacific Railroad. The property of that company has since been sold on a decree of foreclosure, and is owned by and in possession of the other defendants to the bill. The defendants, the present owners of the property, demurred to the bill, raising, principally, the question of the sufficiency of the demand averred in the bill and amended bill, to create or give a lien for the taxes. Three demands are relied on by the government: 1. The letter of Collector Maguire, of July 25, 1874. 2. A demand on August 29, 1874. 3. A suit brought in October, 1874, against the lessee of the Pacific Railroad, viz., the Atlantic and Pacific Railroad, for the recovery of said taxes, which suit is still pending, and to which the Pacific Railroad is not a party. The particulars of these several demands appear in the opinion of the court, which was orally pronounced by Mr. Justice Miller.

W. H. Bliss, U. S. Dist. Atty.

Melville C. Day, for defendants.

[Before MILLER, Circuit Justice, and DILLON, Circuit Judge.]

MILLER, Circuit Justice. We have before us the case of the United States against the Pacific Railroad et al. It was first submitted on the exceptions to the answer. [Case No. 15,983.] The purpose of the bill is to enforce by a decree in equity a lien against the Pacific Railroad Company, and those into whose hands the property has since come, for taxes, which, it is alleged, were never paid and never reported by the Pacific Railroad Company for assessment.

The first proposition which we had to decide was that the defence pleaded as a set-off could not be set up; that no set-off or counter-claim could be set up in any suit against a party in favor of the government for the collection of taxes. The question here involved then came up on other exceptions to the answer.

We soon discovered that the main question to be decided in this case was whether such a demand had been made of these taxes as brought it within the operation of section 3186 of the Revised Statutes, originally enacted on the 13th day of July, 1866, which is that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and the rights to property belonging to such person."

Now the main question is, whether such a demand had been made as makes effective the lien mentioned against the property of the Pacific Railroad.

In order that the question might be fully considered by this court on the facts just as they could be proved, the parties concluded to abandon the exceptions to the answer, and the attorney for the government took leave to amend his bill and perfect it so as to set out the exact facts which he claimed to constitute such a demand. He has done so by two amended bills, and the whole question turns upon whether these bills set out a sufficient demand to create a lien for the taxes. The first demand which he sets out is found in a letter of the date of July 25, 1874, from Mr. Maguire, the collector of this district, to the Pacific Railroad Company, which I will read:

"Gentlemen:—I beg leave to call your attention to the enclosed copy of the Internal Revenue Record, containing a letter from the honorable commissioner of internal revenue addressed to W. H. Sinclair, Esq., collector of Galveston. The letter referred to gives an abstract of the various acts of congress, to which you are referred, meaning taxes on the gross receipts, dividends, interest on bonds, etc., of railroad companies and others. Upon examination of the books of this office, it appears that during a large part of the time covered by these various acts no returns were made by you in accordance with their requirements, and from credible information in my possession it further appears that a large amount is due by your company for taxes, together with the penalty of fifty per cent for neglecting to make the return. I call your attention particularly to the matter of surplus earnings of interest on bonds.

"I am instructed by the commissioner of internal revenue to call upon you for a state-

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

ment of all taxable amounts which have not heretofore been returned, and to say further that if a proper return is made immediately, with a waiver in writing of exemption from assessment contained in section 20 of the act of June 30, 1864 [13 Stat. 229], indorsed across the face of said return, the assessment will be made without the penalty; otherwise, it will become my duty to report the case to the United States attorney of this district, for collection by suit, with penalty added.

"Any further information that I can furnish you for facilitating this matter will be cheerfully given.

"Your early attention is earnestly requested.

"Very respectfully, C. Maguire,
"Collector First District."

That is the first allegation of the demand. And the amended petition then goes on to allege: "And afterwards, on the 29th day of August, 1874, a demand was made by the said collector in person upon said company for a return of the taxes due; to which demand said company replied that it would make no return, and were prepared to defend."

The third statement of a demand is an allegation that about that time, or shortly afterwards, a suit was instituted by the government of the United States for these taxes, in which the amount due was fairly stated, against the Atlantic and Pacific Railroad Company; and the claim that such a demand is sufficient (not having been made on the Pacific Railroad) was founded on the allegation in the amended bill that the Atlantic and Pacific Railroad Company had become the successor of the Pacific Railroad by virtue of the contract or lease under which it took possession of all its property and agreed to discharge all its debts, including taxes.

I do not think it is necessary to say anything further about that allegation except that it is an allegation of a demand against a corporation different from the one against which these taxes are now sought to be enforced, and different from the corporation which owed the taxes. The Atlantic and Pacific Railroad Company is not a party to this suit. Whether the demand would be good against them or not if they were parties to this suit, it is not necessary for us to say. They never owed the taxes to the government in any other way than by their contract with the Pacific Railroad. It is a very doubtful question whether the government could have made them pay on that contract—that was a contract between them and the Pacific Railroad, and not between them and the government. But, passing that, the case was an action of debt, which is still pending against them. Whether they are liable or not, it seems to me too clear for argument that a demand made upon that company and upon no one else for the payment of taxes due from the Pacific Railroad Company cannot be held to be a demand within the meaning of the statute. The demand is not made against the proper party, and is not made against any party to the present suit.

The next question is as to the demand contained in the letter of Mr. Maguire. The demand in that letter is not, in my opinion, of as much force as the verbal one, taking it just as it is averred. The objection to it is, that, looking at this letter from beginning to end, it is an effort, a request, to have these parties furnish the means by which the amount of the tax can be assessed or ascertained against them. There is nowhere a demand that they should come up and pay these taxes; it is only a demand for such information as will enable the assessor, as a preliminary matter, to ascertain the amount of these taxes, and then make a demand for them, or at least then take such steps as the law would allow for the collection of these taxes. The corporation is told, as an inducement to make this report, that if they will waive certain things the penalty of fifty per cent will also be waived. Now, this statement is made upon the authority and request of the commissioner of internal revenue, and, in point of philological accuracy, there is certainly no demand here for taxes.

I will consider some parts of that letter in connection with the next point, which I will proceed to comment upon.

"And afterwards, on the 29th day of August, 1874, a demand was made by said collector in person upon said company for a return of the taxes due; to which demand said company replied that it would make no return, and was prepared to defend."

Now, if it were not for the language "prepared to defend," and that they "would make no return," that is exactly the same as the statement in the letter. It is not a demand for the payment of taxes—there is no demand that you come and pay. It is a demand for a return—that you make a return of the taxes due, by which I suppose they mean a return of the dividends, and the interest and the surplus on which the taxes could be ascertained.

It has, therefore, the same defect, and would be of no more significance than the letter, except that it is argued with some degree of force by the district attorney that, since those returns, or that return, which was demanded, was an essential and necessary foundation on which the government could ascertain the amount of the taxes and make a demand for them, and since they have refused peremptorily to do that, accompanied with the statement that they were prepared to defend—that they would not make any return, but would defend any suit against them—it is said that any further demand is not required; that it was practically a demand and a refusal; and there is some force in the argument. I confess

there appears to be more doubt upon it than any of the other matters in the case; and to determine whether that was such a demand as would create a lien upon "all the property and the rights to property" (for that is the language of the statute), we must look at the statute critically.

It is first to be observed that the statute bristles all over with the weapons which are supposed to be efficient to enable the government not only to ascertain what amount of taxes are due from any person or corporation, but to collect those taxes. All the processes which ingenuity can devise have been put into these statutes. Inquisitorial powers, production of books under oath, attachment and imprisonment, seizures and confiscations, are all at the command of the government from the beginning to the end; and all these have in appropriate cases been put into operation unhesitatingly. And this very section, as it stood at the time in regard to which this demand was made, is one of those which is most full of authority conferred upon the collecting officer in regard to that matter. One provision is that "the collector shall, within ten days after receiving any list of taxes, give notice to each person liable to pay any taxes stated therein, etc., stating the amount of such taxes and demanding payment thereof."

Now, if it is necessary to make a man liable to the processes of distraint and seizure, which will be carried out very soon after the notice reaches him—that the notice should state the amount as well as the time when the tax was due—why should it not be necessary that a notice which by an ex parte proceeding creates a lien on all the property and rights to property of the defendant, should state the amount, and demand its payment? But no amount is stated. No amount is hinted at. There is nothing in this letter or in any of the demands which would not be satisfied by ten dollars or by ten millions.

There is further to be considered the extraordinary nature of the lien. It is not only a lien upon the land, but it is a lien upon the personal property. It is not only a lien upon property in possession, but upon all rights to property depending upon contracts, and upon unexecuted contracts. It not only creates a present lien, but it relates back:

"Any person, banking association, or corporation liable to pay any taxes, neglecting or refusing to pay the same after demand, the amount will be a lien in favor of the United States from the time it is due until it shall have been paid."

This demand may be made three years or five years after the tax shall become due, and will create a lien which retroacts after five years, and establishes itself upon the real estate and personal property, books, written contracts, and everything that can be taken hold of and identified as the property or rights to property of the defendant.

Now, when the lien as created by the demand is of such a character, it is reasonable and it is proper that all the steps which the law requires of the party creating the lien in his own favor shall be pursued strictly. One of the evidences of that must be a demand for the payment of the taxes. Another one, it seems to me, ought to be a demand for the specific amount to be paid.

In all of these alleged demands there is no demand, literally or philologically speaking, for the payment of any tax whatever. There is no demand for any specific amount averred, and surely a lien attended by such consequences as this one ought to have the amount stated with particularity in order to permit its enforcement.

It is to be observed that all this is a very different thing from the collection of the taxes by the ordinary process of distraint, or by a suit against a party for the amount of them. In an action of debt no such demand is necessary for the collection, as the supreme court of the United States has decided, because when the dividends are declared or the interest paid the law annexes to it the obligation to pay five per cent on that amount. But the law does not annex to that any lien on a man's property. The law does not annex to those taxes as taxes ex proprio vigore any lien. It is different from the statutes concerning the distillation of spirits, in which the penalties are so heavy and where all the stills, houses, real estate, etc., are made liable from the beginning for the taxes, and a lien created on them from the moment they become due, without any act of the government. Those are different taxes, collected under different circumstances. Here the act that constitutes and creates the lien is the demand. Without the demand there can be no lien, but with a just and proper demand, made in a proper way, the officer creates the lien by the very act of making the demand.

It is not necessary to go any further. We are of the opinion that no such demand has been made as will authorize the United States to come into court by a bill in chancery to enforce a lien created by such demand.

The demurrer of the defendants to the bill of complaint is sustained. Demurrer sustained.

The district attorney took leave again to amend the bill of complaint.

Case No. 15,985.

UNITED STATES v. PACKAGE OF LACE.

[Gilp. 338.] [1]

District Court, E. D. Pennsylvania. Feb. Term, 1833.

CUSTOMS LAWS — FORFEITURES — FRAUDULENT INVOICES—OMISSIONS FROM INVOICE.

1. To justify the forfeiture of a package of goods, under the provisions of the fourth sec-

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

tion of the act of 28th May, 1830 [4 Stat. 409], either the package must contain an article not described in the invoice, or the package or invoice must be made up with intent to evade or defraud the revenue.

2. On an information for forfeiture of a package of goods, containing an article not described in the invoice, under the provisions of the act of 28th May, 1830, neither accident, mistake, nor innocence of fraudulent intention is a sufficient ground of defence.

3. The proviso in the sixty-seventh section of the act of 2d March, 1799 [1 Stat. 677], which declares "that a package differing in its contents from the entry shall not be forfeited, if it shall be made to appear to the satisfaction of the collector or of the court of the district that such difference proceeded from accident or mistake," is repealed by the act of 20th April, 1818 [3 Stat. 433], and the forfeiture can only be remitted in the manner prescribed by the act of 3d March 1797 [1 Stat. 506].

On the 5th September, 1831, the attorney of the United States, for the Eastern district of Pennsylvania, filed an information against a package of cotton lace, imported into the port of Philadelphia, on the 24th July, 1831, from Liverpool, in England, on board of the ship Monongahela. The information alleged that the said goods were subject to ad valorem duty, and that the package, being inspected, was found to contain certain goods, wares, and merchandise, not described in the invoice, whereby the same was forfeited; and due process of law for the condemnation of the goods in question was prayed for. On the 1st July, 1831, Eliza Bacon filed a claim to the said package, for and on behalf of Charles Mellor. In answer to the information, the claimant denied that the package was made up with any intent to evade and defraud the revenue, or that the same was liable to forfeiture.

On the 19th February, 1833, the case came on for trial before Judge Hopkinson, and a special jury. It appeared by the evidence, that, on the 10th August, 1831, the goods were entered at the custom house by the claimant, who produced the original invoice at the time of making the entry. On the same day, and immediately after the entry, the package in question was brought to the custom house, in order to be inspected, under the provisions of the fourth section of the act of 28th May, 1830. On opening the package, at the public warehouse, thirteen pieces of quillings were found lying on the top, which were not mentioned or described in the invoice. Testimony, taken under a commission to Nottingham, in England, where the lace was manufactured, went to show, that the thirteen pieces of quillings had been placed in the package by accident and mistake, and that the omission to describe them in the invoice arose from ignorance, on the part of the person by whom it was made, that they were contained in the package.

Mr. Gilpin, for the United States.

This information is founded on the fourth section of the act of 28th May, 1830, relative to goods subject to ad valorem duty, which declares, "that if any package shall be found to contain any article not described in the invoice, the same shall be forfeited." The provisions of this law are too plain to be controverted. Its object is to secure, even more strictly than before, the correctness of the invoice. It requires that document to be correct, under the heaviest penalty. By the act of 2d March, 1799, a discretion was confided to the collector of the customs, to judge whether or not a difference between the contents of the package, and the account of them given at the time of entry, was the result of accident or design; but that discretion no longer exists. Repeated evasions of the revenue have given rise to this change. If the error is not fraudulent, the secretary of the treasury is authorised to remit the forfeiture, by the act of 3d March, 1797; 1 Story's Laws, 458, 632; 3 Story's Laws, 1684 [1 Stat. 506, 677; 3 Stat. 433].

Mr. Broom, for claimant.

It is a mistake to suppose that the law does not look to the fraudulent intention. Without that there can be no forfeiture. None has been proved in this case, none even is alleged in the information or on the argument. The whole series of the revenue laws shows that the forfeiture depends on the fraudulent design. The only change has been in the tribunal which is to judge of this design; formerly it was the collector of the customs, now it is the court and jury. The act of 2d March, 1799, expressly exempts a package from forfeiture, though containing an article not described in the invoice, if the collector is satisfied there was no intention to defraud the revenue. The act of 20th April, 1818, repeals certain parts of that law, but does not touch this proviso. It could not be intended to apply the remedy prescribed in the act of 3d March, 1797, to these cases, for it was passed previously to the law of 2d March, 1799, which legislates upon these matters, and to which alone, and not to that of 3d March, 1797, the provisions of the act of 20th April, 1818, are supplementary. This is the more evident, because this latter law directs that "forfeitures are to be recovered and distributed in the manner prescribed by the act of 2d March, 1799," and surely it does not mean that the forfeitures are to be recovered and distributed under one law, and remitted or mitigated under another.

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

Nothing can be more explicit than the fourth section of the act of 28th May, 1830; if it conflicts with any previous law, it repeals it. Where a subsequent statute is inconsistent with a former one, and the two cannot be reconciled; or where the latter is on the same subject matter and introduces some new qualifications or modifications, the two cannot stand together; the latest must prevail. Affirmations in statutes that introduce new provisions, imply a negative of all that is not

within their purview; so that a law directing a thing to be done in a certain manner, implies that it shall not be done in any other manner. U. S. v. Hair Pencils [Case No. 15,924.]

But in fact there is no conflict between the act of 28th May, 1830, and that of 2d March, 1799. The designation of the offence is the same in both; the penalty is the same; the mode of recovery is the same. The difference is in the time and manner of redress, mitigation or pardon after the offence has been proceeded against and ascertained. To establish, therefore, the discordance now suggested, and to show that the subsequent and late law is to be controlled by that passed twenty-five years since, would not, even if it could be done, afford a valid ground of defence.

HOPKINSON, District Judge (charging jury). The information you are trying is founded on the fourth section of an act of congress passed on the 28th May, 1830. This section, after directing the manner in which the collectors of the customs shall cause the packages of imported goods to be opened and examined, goes on to enact that "if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation, or extension, or otherwise, to evade and defraud the revenue, the same shall be forfeited."

Two distinct acts are made the grounds or causes of forfeiture. 1. If a package contains any article not described in the invoice. 2. If the package or invoice has been made up with intent to evade or defraud the revenue. The information before you proceeds on the first, and charges that the package or box in question did contain certain articles not described in the invoice. This is the fact alleged in the information, and it is denied by the answer, and is thus put before you for your decision upon it. It is a question of fact merely, apart from every consideration of intention, innocent or fraudulent. Did this package contain any article not described in the invoice, or did it not? Your verdict is to answer this question. The inquiry on the second ground of forfeiture is more difficult and complicated, for in that case the jury have to decide, not only upon the truth of the fact charged, but also the intention with which the act was done, whether in innocence, by mistake, or by accident, or with a design to defraud the revenue. In this case there is no dispute about the fact; it is not, and it could not be denied, that the box of laces did contain articles not described in the invoice. The whole defence is put on the law of the case, which relieves you from the trouble and responsibility of deciding it. It is a question which belongs to the court, and I shall take it upon myself on my own responsibility.

The defence is, that, although the fourth section of the act of 28th May, 1830, declares that a forfeiture shall be incurred, if the package contain any article not described in the invoice, yet that no such forfeiture is incurred unless the articles so found in the package were put there with a fraudulent intent; that if it happened by accident or mistake, it may be inquired into on this trial; that this is to be decided by you; and that the claimant will be entitled to your verdict if you shall be of that opinion. Is this the true meaning and construction of the law? In such a question we must first look to the law itself. Is that clear and explicit? Has it no ambiguity, which requires that we should look further for an explanation? I can see no such ambiguity in the enactment in question. It is a direct, explicit declaration, that if any article shall be found in a package which was not inserted or described in the invoice of that package, the same, that is, the package, shall be forfeited; not a word or intimation about the intention with which the surplus articles were put into the package; not a suggestion that accident or mistake is to be a defence on the trial of a prosecution for this penalty, or is to be any part of the issue or inquiry on such trial.

The argument of the counsel for the claimant has taken another course to bring him to his conclusion. His main reliance has been on the sixty-seventh section of the act of 2d March, 1799, which he considers now to be in force, and to be incorporated with the provisions of the law of 1830. The section of the former act referred to, is in many respects different in its course of proceeding from the latter act; changes having been made from time to time as experience pointed them out. The sixty-seventh section of the act of 1799, made it lawful for the collector, after entry of any goods, on suspicion of fraud, to open and examine any package; and "if the package so examined shall be found to differ in its contents from the entry, then the goods contained in such package shall be forfeited." Here we see, that the examination is to be made after the entry; that it is to be made only on a suspicion of fraud; and the difference which works the forfeiture, is to be between the entry and the contents of the package. Nothing is said about the invoice. By the act of 1830, the collector is directed absolutely, and whether he has or has not a suspicion of fraud, to cause one package out of every twenty of each invoice, to be opened and examined; and if the package thus examined shall be found not to correspond with the invoice, then all the goods contained in the entry are to be inspected; and then it is declared, that if any package shall be found to contain an article not described in the invoice, it shall be forfeited. By the law of 1799, the collector is authorised to open and examine packages only on a suspicion of fraud: this is the groundwork of his proceeding; and the subsequent proviso of the law is consistent with the principle of the enactment; it is, that

the forfeiture shall not be incurred if it shall be made to appear to the satisfaction of the collector, or of the court in which a prosecution shall be had for the forfeiture, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. The opening and examination of the package is to be made only when, in the judgment and discretion of the collector, there is good reason to suspect fraud; and it is consistent with this principle, that if he shall afterwards be satisfied that his suspicions were unfounded, and there was no intention to defraud the revenue, he should have the authority to declare this opinion, upon which the forfeiture should not be incurred.

Now the argument for the present claimant is, that the proviso of the sixty-seventh section of the act of 1799 is still in force, although it is clear that the enacting clause has been suspended by subsequent laws; and that, therefore, if on a seizure under the law of 1830, the collector should be satisfied there was no intention of fraud when goods, not described in the invoice, are found in a package, the forfeiture would not be incurred; that the court has the same power; and that the jury stands in the place of the court in the exercise of this power, since it has been decided that seizures on land are to be tried by a jury. This process of reasoning, which is not a little complicated, would bring the question of intention before you in the determination of this cause. It is alleged that this proviso has never been repealed, and this is the foundation of the argument. The act of 1799 continued to be the law of the land until 1818, when a supplement to it was passed, introducing material changes in the whole revenue system. By the twenty-second section of the supplement, a change is made in the law on the subject of our present inquiry. The collectors are directed, without any previous suspicion of fraud, to cause at least one package out of every invoice to be opened and examined. We stop here to ask, if this positive order does not take from the collector the discretion to examine a package or not, according as he should or should not entertain a suspicion of fraud; and could he justify himself for neglecting to do it by the allegation that he had no such suspicion? Yet there is no express repeal of that part of the sixty-seventh section of the act of 1799, any more than of the proviso of that section.

We proceed with the act of 1818. After directing that the package shall be examined, it enacts, that if it shall be found not to correspond with the invoice, then a full inspection shall be made of all the goods included in the entry; "and if any package is found to contain any article not described in the invoice, the whole package shall be forfeited." It is further directed, that "if the goods shall be subject to an ad valorem duty, the same proceedings shall be had, and the same penalties shall be incurred as are provided in the eleventh section of the act: provided, that nothing therein contained shall save from forfeiture any package having in it any article not described in the invoice." We are here referred to the eleventh section of the act, and by that it is enacted that when, in the opinion of the collector, there is just ground to suspect that goods, subject to an ad valorem duty, have been invoiced below their true value, he shall direct them to be appraised; and if the appraised value shall exceed the invoice price, an addition is to be made to it, on which the duties are to be estimated. To prevent any misunderstanding, to preserve the distinction between goods found in the package not mentioned in the invoice, and an undervaluation of them in the invoice, it is expressly provided that nothing in the act shall save from forfeiture any package having in it goods not described in the invoice.

The whole clause or provision in the act of 1799, which relieves the forfeiture, if the collector or the court shall be of opinion that no fraud was intended, is omitted. Do we find no substitute for it; no power to discriminate between fraudulent and innocent cases of excess? There is a substitute. The power to discriminate between such cases remains, although it is vested in another tribunal. The twenty-fifth section enacts, that all penalties and forfeitures incurred by force of this act may be mitigated or remitted, in the manner prescribed by the act entitled, "An act for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," passed on the third day of March, 1797. That act directs the party who has incurred the penalty or forfeiture, to present his petition to the judge of the district, who is to inquire into the circumstances of the case; to state the facts and transmit them to the secretary of the treasury, who shall have power to mitigate or remit the forfeiture, if, in his opinion the same shall have been incurred without wilful negligence, or any intention of fraud. It is to be observed that there never was a power, in the collector or the court, to remit a forfeiture. The provision of the law of 1799, was that no forfeiture should be incurred in the case mentioned, if the collector should be of opinion that the difference, between the entry and the contents of the package, proceeded from accident or mistake, and not from an intention to defraud the revenue. The law of 1818, also enacts a forfeiture for such a difference, but does not re-enact the condition on which the forfeiture shall not be incurred. The forfeiture is declared to be absolute and complete, on finding any article in the package not described in the invoice, and the circumstance of accident or mistake which, in the former law, was referred to the judgment of the collector, and would relieve from the forfeiture, is, by the act of 1818, to be the ground of a petition for a remission, to be

judged of by the secretary of the treasury. How can we suppose that it was the intention of congress, that there should be no forfeiture in cases of accident or mistake, and, at the same time, to refer such cases to the treasury for a remission of the forfeiture at the discretion of the secretary? Yet such must be the state of the law, if the proviso of the sixty-seventh section of the act of 1799 is considered to be in force. The whole of that section is supplied by the act of 1818, and repealed so far as it is inconsistent with it.

Some stress was laid on that part of the twenty-fifth section of the act of 1818, which declares, that all the penalties and forfeitures incurred by force of it, "shall be sued for, recovered, distributed, and accounted for, in the manner prescribed," by the act of 2d March, 1799. It has been argued that this has reference to and keeps alive the sixty-seventh section of that act. I see no reason for this construction. The section of the law of 1799 referred to, is evidently the eighty-ninth, which provides expressly for the recovery and distribution or the penalties incurred by any breach of it.

The next act on the subject is that of 1st March, 1823, another supplement to the law of 1799. The fifteenth section of this act, among other things, enacts, that "if any package be found to contain any article not described in the invoice, the whole package shall be forfeited;" there is then this proviso; "that the secretary of the treasury be, and he is hereby, authorised to remit the forfeiture, if in his opinion, the said article was put in by mistake, or without any intention to defraud the revenue." Here then is the whole case provided for; what shall constitute the offence; what the penalty or punishment shall be; and in what manner and by what authority, a discrimination shall be made between cases of fraud and cases of mistake. It is hardly possible to believe that the same power was left in the collector under the law of 1799. The recovery and distribution of penalties and forfeitures are to be made according to the act of 2d March, 1799, and to be mitigated or remitted in the manner prescribed by the act of 3d March, 1797, already referred to.

We now come to the law of 1830, under which this prosecution has been instituted. It is entitled, "An act for the more effectual collection of the impost duties." I have already remarked upon the language of the section, which embraces the charge laid in this information. There is nothing doubtful or ambiguous in it, and I have found nothing in any antecedent law to affect the construction of this act, in the manner or to the purpose contended for by the claimant. The seventh section of this act also refers it to the secretary of the treasury to remit any forfeiture, whenever he is of opinion that no fraud on the revenue was intended.

On the whole case, then, the fact being admitted or proved to your satisfaction, that the box or package of laces in question, did contain articles not described in the invoice, I have no doubt on the law, that the whole package is forfeited, and that neither you nor I have any thing to do with the question, whether these articles got into the box by mistake or accident, nor with the intention, fraudulent or innocent, in putting them in. The law has given the decision of that question to another power in the government. It belongs not to you or to me.

The jury found a verdict for the United States.

Case No. 15,986.

UNITED STATES v. PACKAGE OF WOOL.

[Gilp. 349.] [1]

District Court, E. D. Pennsylvania. May Term, 1833.

CUSTOMS LAWS — FORFEITURES — OMISSIONS FROM INVOICE—EVIDENCE OF MISTAKE.

1. On an information for forfeiture of a package of goods, containing an article not described in the invoice, under the provisions of the act of May 28, 1830 [4 Stat. 409], evidence of accident or mistake may be given, to rebut the inference of fraudulent intention, but is not a sufficient ground of defence.

2. Where an article not described in the invoice is found in a package, the whole package, and not the article alone, is forfeited under the provisions of the act of May 28, 1830.

On the 16th October, 1830, the attorney of the United States for the Eastern district of Pennsylvania, filed an information against a package containing two hundred and fifty pounds of coney wool and five dozen and ten caps, imported into the port of Philadelphia on the 8th September, 1830, from Liverpool, in the ship Ann. The information alleged that the goods were subject to ad valorem duty, and that the package being inspected was found to contain certain goods, wares, and merchandise not described in the invoice, whereby the same was forfeited; and due process of law, for the condemnation of the goods in question, was prayed for. On the 26th November, 1833, Daniel Vail and Peter Marseilles filed a claim to the package. In answer to the information the claimants averred, that if the package did contain articles not described in the invoice, the same occurred wholly by accident and mistake, and without any intention to defraud the United States, and they alleged that it was not liable to forfeiture. To this answer a general replication was filed on the part of the United States.

On the 27th May, 1833, the case came on

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

for trial before Judge HOPKINSON and a special jury.

On the part of the United States the original invoice, presented at the custom house by the claimants at the time of entry, was produced. It described the package in question as containing only two hundred and fifty pounds of coney wool. It was proved that on opening it at the public stores five dozen and ten caps were found within. The counsel for the claimants then offered to read testimony, taken under a commission to London, in order to prove that the articles thus omitted in the invoice, were put into the box by accident or mistake.

Mr. Gilpin, U. S. Dist. Atty.
Mr. Chauncey, for claimants.

HOPKINSON, District Judge. The question of law in this case has been fully argued and considered, in another case, by this court. It is my opinion, that the only fact we have to try here, is whether the package contained articles not described in the invoice. We have nothing to do with the intention, with which they were so put in the box, nor whether it was done by mistake and accident, or with a fraudulent design upon the revenue. This is an inquiry for the secretary of the treasury to make, should the case be brought under his consideration, in the manner directed by the act of congress, and not for this court and jury to pass upon. In strictness, therefore, the evidence now offered should be rejected as having no relevancy to the issue; but, as the claimants are said to be respectable merchants, it may be due to them, or at least, no unreasonable indulgence, to allow them to show their case to the jury and the public, as it really is. I shall, therefore, permit the testimony to be read for the reason given, and not for any influence it can legally have on the verdict.

This evidence being read, and no other offered on the part of the United States, HOPKINSON, District Judge, delivered the following charge to the jury: It is the opinion of the court that, by the revenue laws, if any package, imported into the United States, shall be found to contain any articles not described in the invoice, the whole package shall be forfeited; and that this forfeiture cannot be avoided, by showing that the articles omitted in the invoice were put into the package by accident or mistake, and without any intention to defraud the United States. The power to remit the forfeiture, in cases of accident or innocent mistake, without a fraudulent intention, is given to the secretary of the treasury, and not to the court and jury by whom the issue on the information is tried.

The jury found a verdict for the United States.

Case No. 15,986a.

UNITED STATES v. PAGE.

[9 Betts, D. C. MS. 57.]

District Court, S. D. New York. June 12, 1847.

SHIPPING — MASTER'S BOND FOR RETURN OF SEAMEN FROM FOREIGN VOYAGE — INTERPRETATION AND PERFORMANCE—EXCEPTIONS—SPECIAL VERDICT.

[1. The statutory bond given by the master to the United States when going upon a foreign voyage, to exhibit his crew list, and produce the persons named therein, to the first boarding officer on his return from the voyage, imposes upon him a duty not merely to receive them passively, and return them when willing, but requires him to exercise all his lawful authority for the purpose of bringing them back.]

[2. The exception in the statute and bond of the case of a seaman who "absconds," does not necessarily apply to the case of a deserter, or of one who leaves the ship openly; for in such case the seaman may be found and apprehended by the aid of the local authorities, and it is the master's duty to have this done.]

[3. In an action on such a bond there was a special verdict finding that one of the seamen was dissatisfied, applied to one of the foreign owners for discharge, and understood from the answer that his discharge was assented to, and that he "left the ship, going to sea, 13 miles out from Liverpool, and returned there in the steamboat which towed her out." *Held*, that the court could not construe this as a finding that the seaman "absconded," within the meaning of the bond, so as to relieve the master from liability.]

[4. Assuming that there is no difference between bonds at common law and statutory or official bonds, the master would not be exonerated from his covenant by merely showing physical inability, subsequently accruing on his part, to perform it; or that others, whose assent and concurrence were necessary, could not be prevailed upon or compelled to aid or permit its performance.]

[5. The exceptions enumerated in the statute and bond are persons who may be discharged abroad with the written consent of the consul, etc., or who may have died or absconded, or been forcibly impressed into other service. *Held*, that these express exceptions should be extended by construction to other cases of a like character, and that, as the master signed the bond in his official capacity, he should be considered as relieved from its performance, when by reason of sickness he becomes unable to perform his duties, and is relieved in a foreign port and superseded by another.]

PER CURIAM. The defendant [Pitkin Page] as master of the ship Hudson, on the 24th day of March, 1845, at Mobile, executed to the United States a penal bond in the sum of $400, conditioned, that he would exhibit his crew list and produce the persons named therein to the first boarding officer at the first port at which he should arrive, on his return from the foreign voyage then to be made, except persons who may be discharged abroad with the written consent of the consul, &c., or who may have died or absconded, or been forcibly impressed into other service. The declaration avers the for-

feiture of the bond and negatives the existence of facts forming an exception or excuse to the defendant.

On the trial of the cause, a special verdict was rendered by the jury which finds these facts: The execution of the bond by the defendant. That William W. Benson was named on the crew list, and was one of the crew and chief mate of the ship, and performed the voyage with the defendant from Mobile to Liverpool, where the ship arrived the 7th day of May, 1845, when the defendant left her, being unable, in consequence of sickness, to attend to his duties on board. That a new master was appointed to the command of the vessel in place of the defendant, and the said Benson continued on board, discharged the outward cargo and took in the return one. That Benson was dissatisfied in not having the command of the ship given him, and applied to one of the owners, then in Liverpool, to be discharged; and understood from the answer that his discharge was assented to, and left the ship, going to sea, 13 miles out from Liverpool, and returned there in the steamboat which towed her out. That the defendant was not on board the ship or steamboat at the time. On his return to Liverpool, Benson called on the defendant for the balance of wages due him and was told it should be paid him soon, and in four or five days after, the defendant paid him $16, in full of the amount due him for his services on board the ship. That Benson never appeared before the United States consul for his consent to his discharge, and was so paid off and discharged without the consent and knowledge of the consul. That the defendant did not come to the United States in the ship. She arrived in this port July 22, 1845, under command of the master appointed in his place, this being the first port at which she arrived after the execution of the bond. That the defendant left Liverpool after said ship sailed, and arrived at this port July 23, 1845, this being the first port at which he arrived after the execution of the bond. But neither the master of the ship nor the defendant has ever produced to a boarding officer here the said Benson. That on the 7th of August, 1845, Benson applied to the United States consul at London for relief as an American seaman, and was sent by the consul to New York in the ship Quebec, where he arrived in the month of September, 1845. The question upon this special verdict is whether the penalty of the bond can be enforced by the United States against the defendant. The undertaking has not been fulfilled to the letter, by the production of the seaman. Nor does the special verdict find specifically any of the facts named in the statute and condition of the bond, excusing the defendant from performance.

It is argued in behalf of the defendant that the jury has found facts which the court should interpret to be an absconding of the sailor from the ship. I do not say that it would be out of the province of the court to give the facts found a name and interpretation not expressed by the jury. But in the case of a special verdict, I apprehend the court is not at liberty to select between various imports of facts stated and give that adopted by it the effect of an express finding by the jury. Trial per Pais, 280.

The court will draw the legal conclusion from facts found by a special verdict. Butler v. Hopper [Case No. 2,241]. But if the legal affirmation or negative conclusion on the issue does not follow as a necessary consequence from the facts stated, no judgment will be pronounced upon it. State v. Duncan, 2 McCord, 129; Peterson v. U. S. [Case No. 11,036]; Stearns v. Barrett [Case No. 13,337]; [Barnes v. Williams] 11 Wheat. [24 U. S.] 415. The term "abscond," employed in the statute and bond, is not to be understood solely in its ordinary acceptation or strict etymological meaning; but in determining the sense in which congress intended to use it, regard is to be had to the connection and subject-matter to which it has relation. The provision has respect to the relation of the master of a vessel to his crew, and his control over them on a voyage from the United States to foreign ports and back to this country. That control is taken away and lost when a sailor "absconds," because in such a case the master loses the means of coercing the person of the seaman by force of his own authority, or aid of that of the country where his vessel is in port. Admitting that in this instance the seaman deserted the vessel, such desertion will not necessarily bring the master within the exception of the bond, for it is manifest that the absconding and desertion of seamen from vessels are not equivalent in all essential particulars. Desertion may be open and in defiance of the officers of the vessel, or may follow from continuing an absence forty-eight hours beyond the time of leave granted, and the sailor may all the while continue notoriously within reach of the authority of the master. The Bulmer, 1 Hagg. Adm. 163; The Jupiter, 2 Hagg. Adm. 229. Indeed, he may show himself daily alongside the vessel, but, continuing to refuse to enter on board and do duty, he will be subjected to the pains and consequences of desertion. This is because the penalty is personal to himself, and follows his misconduct and dereliction of duty. But such condition of the sailor could not exonerate the master from the obligation of his bond. He is not merely to receive seamen passively, and return them when willing and consenting to come home, but he assumes a positive obligation, and is bound to exercise all his lawful authority to fulfil it. The court cannot assume in this case that the sailor left the ship furtively, or, intend-

ing to elude the notice of the master, or that he any way concealed or secreted himself on board the steamboat, whilst that remained by the ship. It is equally consistent with the finding of the jury to infer that he went openly from the ship, declaring his purpose to leave her and return in the steamboat to Liverpool.

In the language of the supreme court, if there was evidence sufficient in the special verdict from which the jury might have found the fact (that the seaman left the ship clandestinely and without the knowledge of the master) yet they have not found it, and the court cannot, upon a special verdict intend it. Barnes v. Williams, 11 Wheat. [24 U. S.] 416. In my opinion, therefore, the special verdict does not place the defendant within any of the exceptions named in the condition of the bond.

The remaining consideration is as to the legal effect and operation of the bond, and whether it is to be construed an absolute undertaking to restore the seaman, and must be pronounced forfeited unless one of the specifically excepted cases is proved to exist. Two considerations are involved in this inquiry: First, whether it became impossible, in a legal sense, for the defendant to perform the condition of the bond by reason of events subsequent to its execution; and, second, whether the exceptions stated in the condition are to be taken as positive and exclusive of all others, or only as general denominations or classes of excuses, comprehending likewise others of like character, not named.

In considering the first point, no question will be raised whether a distinction exists between bonds at common law and statutory or official bonds in the admission of the defence of inability of the obligor to perform. On this assumption it is clear that a party cannot be exonerated from his covenant by showing merely physical inability subsequently accruing on his part to perform it; or that others whose assent and concurrence are necessary to its execution cannot be prevailed upon nor compelled to aid or permit its performance. The common-law rule is stringent and precise on this subject. 5 Dane, Abr. 173, § 7; Mounsey v. Drake, 10 Johns. 27; Com. Dig. "Condition" (D 1), 2; (L 14). The obligor takes the hazard of all contingencies which may impede or prevent his doing the act stipulated, other than those overpowering occurrences called acts of God, or of the public enemy, which displace and supercede individual efforts and the ordinary connections and incidents of human affairs. The event of the defendant's indisposition and consequent absence from the ship would not prevent his having his undertaking fulfilled by his under-officers, and thus would not necessarily change his relations to the government and the subject-matter of the contract, and would not, accordingly, be deemed an obstacle interposed by the act of God, and in that sense rendering it impossible for him to perform his engagement.

The other point seems to me, however to present weightier and more prevailing considerations in support of the defence. There are forcible reasons for regarding the exceptions named in the bond as indicating the description of facts which should operate a defeasance, and not as intended to restrict the excuse to those specific particulars. If sailors are "forcibly impressed into other service" the master is exonerated, and assuredly the exemption would be extended, upon every principle of construction, to prisoners of war, or those captured by pirates, the condition of the bond looking to the interposition of an adversary force, irresistible by the master, as the ground of excuse, and not to the disposition made by the seaman of the invading force and a just and rational interpretation of the exceptions would therefore apply the principle to other facts of like character and effect with that specified. That this construction of the exception may be admissible is also probable, because the bond is exacted by statute and is given by the defendant in his official character of master of the ship. He stipulates in that capacity, and the manifest import of the engagement is that it shall have relation to his acts whilst actually or virtually in command of the vessel. It calls for the exercise of his powers as master and such only. Viewed merely as a personal obligation it would be senseless, if not nugatory; for the defendant, individually and independently of his official relation to the vessel, could have no rightful authority to keep or present the crew list to a boarding officer or control the movements of this seaman, and compel his continuing with the vessel or return to the United States. It was then necessarily the power of the master of the vessel which was designed to be bound by the bond, and to have it exercised to the end appointed; and that authority it was which the United States contracted with and relied upon. The exceptions to this condition all tend to indicate and corroborate that construction of the contract. They release the defendant from its obligation, in cases where he could not have or employ the authority of master, and parity of reason would carry the exemption to every case where that authority no longer existed on his part or could not be legally exercised by him. In case of desertion not attended with concealment the master personally, or those in his place for the time, his under-officers, have rightful power to bring back the deserter by force, or can apply to the local authorities to aid in recovering him. An omission to do one or both would be plainly a dereliction of duty, which the obligation of the bond properly covers. But in this case, the defendant had ceased to be master of the ship. He could not arrest the sailor by his own authority, and had no right to invoke the aid of the civil magistrate to cause the arrest had the desertion taken

place in the port of Liverpool; and it is not easily perceived what defence to an action for false imprisonment the defendant could have made, had he seized the sailor, and attempted to bring him home forcibly, after his relation as master of the vessel had terminated. This train of reasoning might be extended, but I shall content myself with stating the general conclusions that the bond being given by the defendant as master of the ship, and received and exacted by the United States from him in that capacity, and having stipulated for acts and the exercise of powers by him as master alone, and pointing out exemptions from its obligation where that official authority could not be exercised or applied, I am of opinion that its penalty does not attach and cannot be enforced against him in respect to any of the crew leaving the ship after the defendant ceased to be her master, and she was placed under the command of another person.

Judgment must accordingly be rendered on the special verdict for the defendant.

Case No. 15,987.

UNITED STATES v. PAGE.

[Hoff. Land Cas. 80.] [1]

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

MEXICAN LAND GRANTS.

This claim not resisted by the United States.

[Claim of Thomas S. Page for four leagues of land in Sonoma county, known as the "Rancho Cotate." Confirmed by the board of land commissioners, and appeal taken by the United States.]

S. W. Inge, U. S. Atty.
Thornton & Williams, for appellee.

HOFFMAN, District Judge. In this case the original grant was not produced, but its existence and loss are proved beyond all reasonable doubt by the depositions of the witnesses and the production of the expediente from the archives containing the usual documents, and also a certificate of approval by the departmental assembly. The grant is also mentioned in the index of grants by the former government. No doubt was entertained by the commissioners as to the sufficiency of the proofs on these points, nor is any objection raised in this court in regard to them. The evidence discloses a full compliance with the conditions, and the description in the grant and map determines its locality. No objection is raised on the part of the appellants to the confirmation of this claim, and on looking over the transcript we have not perceived any reason to doubt its entire validity. The decree of the board must therefore be affirmed.

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

Case No. 15,988.

UNITED STATES v. PAGE.

[2 Sawy. 353; [1] 17 Int. Rev. Rec. 158; 5 Chi. Leg. News, 363; 20 Pittsb. Leg. J. 158.]

District Court, D. Oregon. March 17, 1873.

INTERNAL REVENUE LAWS — WHOLESALE LIQUOR DEALER—NONPAYMENT OF TAX—INDICTMENT.

1. An indictment which charges the defendant with carrying on the business of a wholesale liquor dealer without the payment of a special tax therefor, at a certain place, continuously, between certain dates, is sufficient without stating the means or circumstances by which he became such dealer.

2. The rule upon this subject laid down in United States v. Howard [Case No. 15,402], affirmed.

[This was an indictment against W. D. Page for violation of the internal revenue laws. Heard on demurrer.]

Addison C. Gibbs, for the United States.
Benton Killin, for defendant.

DEADY, District Judge. The indictment in this case is found under section 44 of the act of July 20, 1868 (15 Stat. 142), as amended by the act of June 6, 1872 (17 Stat. 240), and charges that the defendant "did, on February 10, 1873, and continuously thereafter, until March 6 of the same year, exercise and carry on the business of a wholesale liquor dealer, without paying the special tax therefor." The defendant demurs to the indictment because the particular facts constituting the crime are not stated therein.

Among other things, said section forty-four provides, substantially, that any person who shall carry on the business of a wholesale liquor dealer, without having paid the special tax as required by law, shall be punished as therein provided; and subdivision five of section fifty-nine of said act, as amended by the act of April 10, 1869 (16 Stat. 42), and the act of June 6, 1872 (17 Stat. 240), declares that "every person who sells, or offers for sale, foreign or domestic distilled spirits, or wines, in quantities of not less than five gallons at the same time, shall be regarded as a wholesale liquor dealer."

Counsel for the demurrer insist that the indictment should not only state that the defendant carried on the business of a wholesale liquor dealer, but, also, the means or particular acts whereby he carried it on—as that, at a time and place named, he sold distilled spirits, wines or malt liquors, or offered them for sale, and in what quantities.

In U. S. v. Howard [Case No. 15,402], this court held that: "An indictment which charges a defendant with carrying on the business of a retail liquor dealer, without payment of a special tax, at a certain place,

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

continuously, between certain dates, is sufficient, without stating the means or circumstances by which he became such retail dealer."

The statute makes no difference in the definition of a retail and wholesale liquor dealer, except as to quantity; and if such an indictment is good in the one case it must be in the other.

The general rule, which requires that the indictment should not only contain the description of the crime charged, but also those particular facts and necessary circumstances, by which it is constituted and identified, is admitted. But this case falls within the exceptions to the rule, where the crime is habitual character or conduct, and consists of a frequent repetition of similar acts, such as the case of a barrator, scold, etc.

In re Lindaur [Case No. 8,358], the petitioner had been indicted for being engaged and concerned in the business of a lottery ticket dealer, without any statement showing how or by what means he was so engaged and concerned. Having plead guilty and been sentenced to imprisonment, he subsequently applied for a writ of habeas corpus, on the ground that as no crime was charged in the indictment, therefore the judgment was erroneous and void. The writ was denied; but on the argument no objection seems to have been made to the sufficiency of the indictment in this respect.

In U. S. v. Fox [Case No. 15,156], the defendant was indicted for carrying on the business of a distiller, on September 1, 1866, and on divers other days up to and until December 10 of the same year. After a verdict of guilty the defendant's counsel moved in arrest of judgment. One of the grounds of the motion was, that the indictment did not charge a crime, because it did not state the particular acts which would show that the defendant was a distiller. In passing upon this point the court, Lowell, J., said: "As I have had occasion to observe in another case, the precedents prescribe a very simple form of charging such a crime as this. * * * And in general when the charge is, that a certain trade has been carried on, or that the defendant has sustained a particular character, as that of a barrator, scold, etc., it is not essential to set out the particular acts which go to make up the trading or course of life. It would be otherwise if each act were a crime; or if by the statute definition a fixed number of separate acts made up the crime." Notwithstanding the able and ingenious argument of counsel for the demurrer, I am satisfied with the ruling in U. S. v. Howard [supra]. In principle and circumstances the cases are exactly alike.

Because the statute has declared who shall be regarded as a wholesale or retail liquor dealer, the rule of pleading in this class of cases is not changed. In this respect the statute is simply a rule of evidence, prescribing what shall be sufficient evidence of the fact that a party did carry on either of these trades or businesses.

[The demurrer is overruled.] [2]

Case No. 15,989.

UNITED STATES v. PALMER.

[2 Cranch, C. C. 11.] [3]

Circuit Court, District of Columbia. Nov. Term, 1810.

GRAND JURY—WITNESSES.

Witnesses cannot be sent to the grand jury on the part of the accused; nor can a grand juror be withdrawn after he is sworn, for a cause which existed before he was sworn.

[Cited in U. S. v. Terry, 39 Fed. 362.]

Mr. E. J. Lee stated that the witnesses were about to be sent to the grand jury on the part of the United States against one Palmer for perjury, and moved for leave to send up witnesses to the grand jury on the part of Palmer, and referred the court to Burr's trial at Richmond. He moved also to withdraw from the grand jury the magistrate who committed Palmer. As to the right to challenge grand jurors, he cited Hawk. P. C. (3d folio Ed.) 2, c. 25, § 16, pp. 215, 307, and Id. c. 43, § 1, p. 412. By the Virginia law, a magistrate of the examining court is excluded from the jury.

THE COURT said that, not being furnished with any precedent of sending up witnesses to the grand jury on the part of the accused, they refused the motion, and refused to withdraw a grand juror after he was sworn, for a cause which existed before he was sworn. See 4 Bl. Comm. 302.

UNITED STATES (PALMER v.). See Cases Nos. 10,695–10,697.

UNITED STATES v. The PALO ALTO. See Case No. 10,700.

Case No. 15,990.

UNITED STATES v. PALOMARES.

[Hoff. Land Cas. 97.] [1]

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

MEXICAN LAND GRANTS.

The validity of this claim not contested.

[Claim by the heirs of Francisco Guerrero Palomares for a lot 400 varas square in the Mission Dolores, San Francisco county. Confirmed by the board of land commissioners, and an appeal taken by the United States.]

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

Halleck, Peachy & Billings, for appellees.

---

[2] [From 17 Int. Rev. Rec. 158.]

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

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

HOFFMAN, District Judge. It appears from the documentary evidence in this case that Governor Figueroa's order, dated March 5th, 1835, directed the commissioner of San Solano to furnish to such individuals of the colony as might desire to remove and establish themselves elsewhere, the necessary assistance to pass the bay, and to report to the government the persons who might do so, with their places of destination. On the fourth of November, 1836, Francisco Guerrero petitioned Gov. Gutierrez, who had succeeded Figueroa, for a piece of land near the mission, and referred to the previous order of Figueroa allowing a settlement on any land that might be selected. This petition was referred to the administrator of the mission of San Francisco, by whom a favorable report was made, and the governor, on the thirtieth of May, 1836, granted to Guerrero the four hundred varas solicited according to his petition. The signatures of the documents are proved to be those of the officers by whom they purport to have been signed, and it is further proved that the grantee almost immediately after went upon his land, built a house upon it, fenced it and converted it into a garden—it having been before marshy and unoccupied. The grantee and his family, the present claimants, continued to reside upon it until his death in 1851. No objections to this grant are made on the part of the United States. It was confirmed by the board, and we see no reason for reversing their decision. The title of the claimants must therefore be confirmed.

UNITED STATES (PANAUD v.). See Case No. 10,704.

Case No. 15,991.

UNITED STATES v. PARK et al.

[2 Chi. Leg. News, 385.]

District Court, N. D. Illinois. Aug. 27, 1870.

INTERNAL REVENUE — CAPACITY OF DISTILLERY — PRO RATA TAX.

Under the act of July 4, 1868, if the government fails or refuses to assign to a distillery the necessary number of store-keepers, and directs that the distillery be run only a certain number of hours, it reduces pro tanto the productive capacity of the distillery, and can only collect a pro rata tax.

Before BLODGETT, District Judge.

[Nowhere more fully reported; opinion not now accessible.]

Case No. 15,992.

UNITED STATES v. PARKER et al.

[2 Dall. 373.] [1]

Circuit Court, D. Pennsylvania. April Term, 1797.

CAPIAS AD RESPONDENDUM — ALIAS WRIT — RETROSPECTIVE TESTE.

[1. There is no effectual mode of issuing an alias capias ad respondendum but by testing it of the term to which the original writ was returnable; and there is no principle or usage which will authorize giving a retrospective teste as of April term, 1792, to an alias capias issued in August, 1796.]

[2. Cited in Hunter v. U. S., 5 Pet. (30 U. S.) 185, to the point that while a defendant is charged in execution, the debt is considered as satisfied, and that a discharge of one co-debtor is a discharge of all.]

A capias had issued in this cause against Daniel Parker, Wm. Duer, and John Holker, returnable to April term, 1792; and the marshal then returned, cepi corpus as to Duer, (who gave special bail in due time) and non sunt inventi, as to Parker and Holker. After a declaration was filed (reciting that the marshal had not found two of the defendants within his district, and proceeding against the other alone, upon the principles of the practice of the courts of Pennsylvania) after issue had been joined, and a variety of continuances, and other entries made upon the record, an original, not an alias, capias was issued, on the 8th of August, 1796, returnable to October term following, against Holker alone, upon which writ he was arrested; but on a hearing before Wilson, Justice, he was discharged on common bail.[2]

Mr. Rawle, for plaintiff, observed, that upon principles of common justice, and, he thought, upon principles of law too, when there were several defendants, and one only was taken on the first writ, process might issue, from time to time, to bring the others into court, without compelling the plaintiff to discontinue his action. By the 11th section of the judicial act (vol. 1, Swift's Ed., p. 58, c. 9 [1 Stat. 78]), it is provided, that the courts of the United States "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." It is only incumbent on the plaintiff, therefore, to shew, that the present writ is necessary to the efficient exercise of the court's jurisdiction, and that it

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

[2] This action had been originally instituted in the supreme court of Pennsylvania; and Holker (who was then the only person arrested) pressed for a trial; but after an ineffectual opposition to an order for bringing on the cause, the attorney of the district entered a discontinuance. On this ground, I am informed, Judge Wilson directed common bail to be accepted from Holker in the second suit. In October term, the attorney of the district (Rawle) had obtained two rules: (1) That Holker shew cause, on the first day of the present term, why the writ issued should not be amended, conformably to the precept, which, it was alleged, directed an alias capias; and (2) that Holker shew cause why the plaintiff should not file common bail for him. It was agreed, however that the case should be argued, as if the last writ had been an alias capias, reciting the original capias and return; and the only question discussed was—whether an alias capias could issue, after the lapse of so many terms, and under the circumstances appearing upon the record, to arrest Holker, and make him a party to the existing suit?

is agreeable to the principles and usages of law. It is admitted, that the course of proceeding in England, is different. There, the defendant, who is not taken upon the writ, must be pursued to outlawry; and if he does not enter bail, in order to avoid the penal consequences, the plaintiff applies to the exchequer for a sequestration, and obtains payment from the outlaw's effects. 1 Strange, 473; 2 W. Bl. 759; 2 Bl. Comm. 283. But no mode of proceeding to outlawry in civil cases, is recognized, or prescribed, by any law of the federal, or state, government; and even in criminal cases, it is questionable, whether the state law could furnish a rule for the United States. Unless, therefore, the mode now pursued shall be sanctioned, endless inconveniences will arise in the administration of justice; for, the plaintiff cannot discontinue his action, without certainly losing bail as to one defendant, while he has only a chance of obtaining it from another. If then, there is a necessity of adopting some process to prevent a right being without a remedy, the present process will be found perfectly consistent with the principles and usages of law; and the informality of the continuances will not be of sufficient moment to attract the attention of the court. Sell. Prac. 400. Such process has been issued repeatedly, both in the supreme court and common pleas of Pennsylvania; though the regularity of it was never, indeed, contested. In England, however, the courts of law and chancery were bound by forms of writ, of almost immemorial antiquity, and always prescribed by the express authority of parliament; 'till the pressure of business, and the diversity of the cases that arose, produced the statute of Westm. 2, which authorized the clerks in chancery to frame writs in consimili casu; and in the exercise of that authority, from time to time, a considerable latitude has been taken. 4 Reeves' Hist. Eng. Law, 426; 2 Reeves' Hist. Eng. Law, 202; 2 Inst. 404, 407; Gilb. 2–4, 8; Coke, 48. An authority strictly analogous is given to the federal courts by the judicial act; and as there is no common officina brevium, it follows, of course, that each court must frame its own writs, according to the nature of the respective cases.

Gibson, Ingersoll & Dallas, for defendant, Holker, waived all objection to the mere form of the second capias; but insisted, that even an alias capias could not issue, unless it was tested of the term, to which the original was returned, and made returnable to the next immediately ensuing term.[3] They exemplified the mode of proceeding by outlawry in England, on a return of non est inventus as to one of several defendants; the force of the issue joined; and the impracticability of making an amendment in the declaration filed, to meet the new case to be brought upon the record; from 1 Strange, 473; 1 Wils. 78; 2 Sell. Prac. 389; 5 Com. Dig. 652. One defendant has given bail for the whole amount of the demand; the declaration expressly states, that Holker is not a party to the suit; and an issue is actually joined by Duer alone. If, therefore, the plaintiff succeeds in the present object, how is the record to be new modelled, upon any principle of law, or practice, so as to be rendered consistent with itself, and with the truth of the case? What will be the title of the declaration;—of what term shall it be filed;—what shall be the form of the old, or any new, issue;—and what is to be done with the original writ, and its return? Thus, the perplexity arising from the plaintiff's doctrine, (which, if it is just in one case, must be just in every case) is endless and insurmountable. Suppose the suit originated in the common pleas, but had been removed into the supreme court before the second writ issues:—from which court shall the second writ issue, and may one half of the cause be depending in the court above, and the other half in the court below? Suppose a verdict given on the first writ, before the second writ is returned:—can there be two verdicts for the same cause, how shall the amount be ascertained, or execution issue; and what is to be done if the verdicts should be contradictory? Suppose there are ten defendants to one contract, can it be reasonable or just, that there should be ten writs issued, or that ten bail bonds should be successively taken, for ten times the amount of the demand, or how is the bail to be modified and apportioned? Many other hypotheses might be fairly suggested to evince the extravagance, to which an allowance of the present motion would lead; and even after allowing it, there would arise another difficulty, in ascertaining in what action common bail should be entered for Holker, as there are now clearly two actions for the same cause on the records. See 5 Com. Dig. 297. But it is not intended to leave the plaintiff without a remedy. If the bail is satisfactory (and satisfactory bail can always be exacted, to the full amount of the demand upon the arrest of any one of the parties) the plaintiff may proceed to recover judgment, conformably to the state practice. If the plaintiff is not satisfied with the bail, then there may be a discontinuance; or, perhaps, the process may be kept alive, from term to term, till all the parties to the contract are brought into court.

Rawle, in reply. The consequences ascribed to the doctrine, in support of the motion, owe all their extravagance to the imagination of the opposite counsel. There is an important distinction between usages of law, and the practice of courts;—the latter

[3] IREDELL, Circuit Justice. Is it intended to maintain the writ on the footing of an alias, unless issued to the next term, after the return of the original capias?

Rawle. I think it can be so maintained.

being only a part of the former, and not, of course, as extensive. The question, therefore, should not be referred to the practice of the state courts, but should be decided by the usages of law, under the act of congress; and if it is shewn, that the mode of proceeding, now pursued, is not inconsistent with the state practice, while it is agreeable to the usages and principles of law, it should be sanctioned by the court. The process of outlawry in England is neither a dilatory, nor a precarious, remedy; for, all the writs may issue at once; the effect, by pronouncing the civil death of the party, cannot be prevented; and the plaintiff is entitled to receive his money from the public treasury out of the sequestered effects of the delinquent. Sell. Prac. Here, however, it would be idle to suspend all proceedings against the defendant who is arrested; since there is no legal process by which the effects of a non-appearing defendant can be made responsible; and it is uncertain when (if ever) he will come within the jurisdiction of the court. The process of outlawry was devised, principally, to get clear of the return of non est inventus, and to show that the plaintiff has done everything in his power to bring all the parties before the court; but it was never intended as an instrument of indulgence and benefit to the arrested defendant. It is asked, however, in what way the record and pleadings may be made consistent, on the insertion of Holker's name as a defendant? In the first place, it is to be answered, that whenever bail is entered, it has relation, by a legal retrospect, to the first day of the term, to which the capias was returnable; so, the court may order Holker's bail to be filed as of April term, 1792; and, thereupon, grant leave to imparl. As to the declaration, it may be amended to correspond with the fact; and even the case in 3 Wils. 78, shews in what manner this difficulty may be overcome. 1 Sell. Prac. 88, 260. Nor is it important how many defendants enter bail, or for what sum, since the plaintiff can recover no more than the amount of the demand for which the action is brought; and joint defendants may, in any case, give several bail bonds. The objection to the division and multiplication of suits, will, likewise, vanish, when it is recollected, that the same effect is produced by the severance of pleas, which may take place (as many precedents in Lilly's Entries establish) in every action against several defendants:—A joint issue, and a joint judgment are not indispensably requisite; and this court has no superior court, which might involve the inconveniency of a removal of the suit upon the first writ, before the second writ had issued. If, upon the whole, the process is a necessary instrument for the accomplishment of justice, it will be recognized and confirmed by the court, although it is not to be found in the ancient authorities of English law.

THE COURT, having taken from the 12th to the 16th of April, to advise upon the subject, delivered the following opinions, after a recapitulation of the entries on the record.

PETERS, District Judge. There is no controversy on the state of the action, as it respects Wm. Duer, who has given bail for the full amount demanded by the plaintiff; and, it is conceded, that the process used on the present occasion, could not have been used in England. In that country, the outlawry in a civil case is, perhaps, an adequate remedy for the plaintiff; but it is always optional with the defendant, whether he will submit to the rigor of the proceeding, or enter special bail. In Pennsylvania, likewise, a remedy has been introduced by long usage; the plaintiff being allowed, if he pleases, to proceed, at once, against the defendant who is arrested: And now, as the laws of the United States have prescribed no specific mode for a case of this description, it is proposed, under the authority of the 14th section of the judicial act, that the court shall frame, or rather sanction, a new form of writ, which the plaintiff deems adequate to the purpose, and consistent with the principles and usages of law. But I am not a friend to this species of judicial legislation; nor do I think it necessary, or proper, to exercise the power of the court, in the present instance; even admitting the existence of the power to the extent contended for. It appears sufficient to my mind, to defeat the present motion, that the alias is not tested at the return of the original capias, nor made returnable at the next ensuing term. 5 Com. Dig. 239. There is no principle, or usage of law, that will sanction the idea of giving a retrospective teste, as far back as April term, 1792, to an alias capias issued in August, 1796. I am, therefore, clearly of opinion, that, on this ground alone, both the rules must be discharged.

IREDELL, Circuit Justice. I agree, in substance, with the opinion of my Brother PETERS. Whatever idea may be entertained of the authority of the court, to adopt the practice of Pennsylvania, or to devise a new form of process upon the principles and usages of law, it does not appear to me, that the plaintiff would be regularly entitled, under the present circumstances, to the benefit of either proceeding; for, there is no effectual mode of issuing an alias capias, but by testing it of the term to which the original writ was returned. The practice of Pennsylvania may be reasonable; and its antiquity at least would certainly entitle it to respect; but that practice goes no farther, than to give to the plaintiff an option, either to suspend his proceedings 'till the non-appearing defendant can be arrested, or to waive, on filing a declaration, all chance against him, and enforce the suit only against the defendant, who is taken on the capias. In the present instance, it may have been expedient to adopt the latter course of the alter-

native, on account of Mr. Holker's permanent residence in another state; but being adopted, the plaintiff is bound by it, and cannot, even on the principles of the Pennsylvania practice, avail himself of Mr. Holker's casual visit to Philadelphia, without discontinuing the first action. What, indeed, would be the condition of the defendant, who is arrested, if a different construction were to prevail? He might be ready for trial; he might be able to prove that there was no cause of action; he might be desirous to avoid trouble and expense by a prompt confession of judgment; or he might be the principal, and the non-appearing defendant merely a surety, so that he could derive no advantage from the arrest of his colleague;—and yet he would be exposed to an indefinite term of imprisonment, or be held with his bail for an indefinite period in suspense, at the pleasure of a plaintiff, who should chuse to calculate upon any remote possibility of bringing all the defendants into court. The injustice and oppression to the defendant, furnishes a strong argument against the allowance of such a privilege to the plaintiff.

It is conceded, however, by the plaintiff's counsel, that the motion would be irregular, unless leave is given to file common bail for Mr. Holker, as of April term, 1792, when the original action was instituted. But why should such a retrospect be allowed? Mr. Holker was not then arrested; and shall the court countenance a mere fiction;—a fiction not indispensable to justice, unknown to the law, and directly adverse to the truth of the case, exhibited for a number of years upon the record? No:—I am an enemy to every species of fictions. The fictions which have been incorporated into the law by long usage, (and, I believe, the cases of ejectment and common recovery afford the only fictions recognized in America) must be sustained; but as far as I can prevent the introduction of novelties of this nature, I shall be assiduous to do so. All the entries upon the record were true and regular at the time of making them. There is, therefore, no error to amend; but the court is asked, for the convenience of the United States, arbitrarily to abolish the writ and its return, the declaration, the issue, and the continuances; and not only to undo all that has been previously done, but by an entry of common bail, to ingraft, in effect, this falsehood upon the record, that Mr. Holker was arrested in April, 1792. But after all, I will not anticipate an opinion, upon a case in which an alias shall be regularly taken out, and continued, from term to term; though my present impressions are unfavorable, even on that ground to the plaintiff's doctrine. The multiplication of suits, the perplexity of entries, and the oppressive vexation of successive bail bonds, each for the full amount of the demand, are effects that could not be easily tolerated in the administration of justice. I have not heard, during the discussion, of any principle, or usage, of law, that would reconcile them to my mind: but this is not the foundation of the present decision; for, the irregularity in the teste and return of the alias capias is a sufficient reason to reject the plaintiff's motion.

The rules discharged.[4]

CHASE, Circuit Justice. The whole proceeding is to my mind unintelligible and irregular. There is only one of the parties to the contract, and only one of the defendants named in the writ before the court; and no process of outlawry has been prosecuted against the others; how shall we proceed to give judgment? Again: to what is the plea of non assumpsit to be applied? Is it, that the appearing defendant did not assume himself, or that he did not jointly assume with the other defendants? And how comes the plea of the statute of limitations to be added, without the leave of the court? But the counsel will have time to reflect upon these difficulties. For, the jury are not sworn, even in this irregular state of the record, to try the issues between the parties; and therefore, the court, on its own authority, will direct the juror last qualified to be withdrawn.

A juror was, accordingly, withdrawn, and the action continued till the next term.

Case No. 15,993.

UNITED STATES v. PARKER.

[See Case No. 15,735.]

UNITED STATES (PARKER v.). See Cases Nos. 10,750 and 10,751.

Case No. 15,994.

UNITED STATES v. PARKHILL.

[2 Wkly. Notes Cas. 604, note.]

District Court, W. D. Pennsylvania. June 15, 1875.

INTERNAL REVENUE OFFICERS—VISITORIAL POWERS—EXAMINATION OF NATIONAL BANKS.

[Visitorial powers are not conferred upon the internal revenue officers, under Rev. St. §§ 3177, 5241, whereby they would be authorized to examine the checks of a national bank.]

In this case the defendant [the cashier of the Monongahela National Bank of Brownsville, Pennsylvania] refused to allow a deputy collector of internal revenue to examine the bank's checks. On the trial the district judge directed the jury to find a verdict pro forma for the plaintiff, subject to the opin-

[4] The cause (which was indebitatus assumpsit) came on for trial before CHASE and PETERS, Justices, at April term, 1798, when, after the opening was commenced by Rawle, for the plaintiff, it was discovered that the plea of "non assumpsit" was entered in short, and that the statute of limitations had, also, been pleaded; though the jury were only sworn to try the issue, and not the issues, joined between the parties.

ion of the court upon the question of law whether, under the acts of congress, visitorial powers over national banks are conferred upon internal revenue officers.

Upon the argument on the point reserved

Mr. Reed, for plaintiff, contended that such powers were vested in revenue officers by Rev. St. § 3177, and that Id. section 5241 did not exclude them therefrom.

Mr. Sweitzer, for defendant, argued these two propositions: (1) That section 37 of the act of June 30, 1864, (Rev. St. § 3177 [13 Stat. 238]), did not, in terms or by fair implication, extend to or include national banks; (2) that national banks are protected by positive statute against any other visitorial powers than such as are authorized by the national bank act, and such as are vested in courts of law and chancery.

Before McKENNAN, Circuit Judge (sitting as assessor), and McCANDLESS, District Judge.

THE COURT ordered judgment to be entered for the defendant upon the point reserved.

Case No. 15,995.

UNITED STATES v. PARKS.

[Cited in Re Crittenden, Case No. 3,393. Nowhere reported; opinion not now accessible.]

Case No. 15,996.

UNITED STATES v. PARKS.

[See Case No. 10,764.]

Case No. 15,997.

UNITED STATES v. PARMELE.

[1 Paine, 252.] [1]

Circuit Court, D. Connecticut. April Term, 1810.

PRINCIPAL AND AGENT — CONTRACT IN AGENT'S NAME.

No action will lie in the name of a principal, on a written contract made by his agent in his own name, although the defendant may have known the agent's character; and a demurrer, in such a case, to the declaration, where the United States were the plaintiffs, was sustained.

[Cited in Chandler v. Coe, 54 N. H. 567. Distinguished in Gilpin v. Howell, 5 Pa. St. 50; Huntington v. Knox, 7 Cush. 375. Cited in City of Providence v. Miller, 11 R. I. 278; Sisson v. Cleveland & T. R. Co., 14 Mich. 496.]

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

LIVINGSTON, Circuit Justice. This cause coming up on a demurrer to the declaration, if that be insufficient there must be judgment for the defendant below. This action is brought on a written contract of the defendant [John Parmele] by which he acknowledged to have received from one Stephen Rainy one hundred barrels of flour, and agreed to be holden therefor to Alexander Wolcott, Esquire, or order, when called for, he paying ten cents per barrel storage. The objections to the declaration are, that no demand is stated to have been made of the defendant, nor any tender of the storage; and that no action will lie on this agreement in the name of the United States. The last objection is the only one which will be examined, for if that be well taken, the plaintiffs cannot recover in this suit. To obviate the force of this objection, which seemed to be felt, it has been said, that the action is not founded on the written contract, but on the right which vested in the United States by the seizure and condemnation of this property; and that the agreement was only made use of as evidence. Whether such an action could have been brought, this court is not bound to say; but the present suit is not of that description. It proceeds entirely on the defendant's contract, and the court, if it cannot discover his liability there, has no right to look for it elsewhere. It is also contended, that an interest in the United States is sufficient for the purpose of maintaining this suit. Such an interest, it is true, is disclosed in the declaration, so far as a seizure and confiscation could give it; but a science of these matters not being imputed to the defendant, it is not easy to perceive how he could suppose the public had any interest in the flour committed to his keeping. But if he knew every thing, it will not, in the judgment of this court, make any difference.

The United States, in a case of this kind, have no privilege or rights beyond those of an individual. If they sue on a contract, they are as much held to prove it as a private citizen, and any variance will be as fatal in the one case as the other. If this flour had been private property, but not that of Rainy or Wolcott, and it had been known to be so to the defendant, yet on this contract no suit could have been maintained, but in the name of the parties to it. None of the cases cited show that the cestuy que trust can bring an action at law, on an agreement made with his trustee. There is a fitness in confining the remedy to the party to whom the promise is made; in which case the judgment can always be pleaded in bar to another action. If the United States recover in this action, who can say that Parmele may not be vexed by another suit in the name of Rainy or Wolcott? The court, although it has an opinion, is not called upon to say who would have been the proper plaintiff in this case; but as no promise was made to the United States, it is sufficient to say, that they have altogether failed in making out their cause of action. The court cannot say, that an engagement to deliver this property to Rainy or Wolcott was one to deliver it to the United States, or to their marshal of this district. Where there is no

[1] [Reported by Elijah Paine, Jr., Esq.]

difficulty in suing in the name of the party to the contract, there can be no necessity of supporting the suit of a stranger to it; and without a precedent in point, the court would feel great reluctance in making one.

This case has also been likened to those of principal and factor; and it has been said, and correctly, that the former can sue on a sale made by the latter, although he be not at the time known to the purchaser. Courts of law, out of their great solicitude to protect the interest of a principal, have gone great lengths in identifying him with his agent or factor, and as a necessary consequence, have permitted a suit in his own name, although he be not, except by implication of law, a party to it. But the court does not know that such suit was ever sustained on the contract itself, where one in writing took place between the factor and vendor, in which the name of the principal did not appear. What use might be made of such a paper, as matter of evidence, is one thing; but that a suit can be brought upon it in the name of any but a party to it, has not been shown; nor is it believed that such is the law. Without then disturbing any of the cases of this class which have been referred to, this court cannot, when sitting as a court of law, say, that an express and written promise to do a thing to Rainy or Wolcott, is a contract to do the same thing to the United States. It looks in vain to the writing itself for such an engagement; and that is the only source from which it has any right to make its deductions. It is on that which the plaintiffs have relied, and if they do not succeed in showing an assumpsit there, they fail in their action altogether.

Upon the whole, as the United States have sued on a written contract, to which they are not parties, and in which they are not even named, but which appears to have been made with other persons, it is the opinion of this court, that the judgment of the district court was erroneous [case unreported], and must be reversed.

UNITED STATES v. PARMENTER. See Case No. 14,756.

Case No. 15,998.

UNITED STATES v. PARROTT et al.

[1 McAll. 271; [1] Hoff. Op. 234; 7 Morr. Min. Rep. 335.]

Circuit Court, N. D. California. July Term, 1858.

INJUNCTION AGAINST WASTE—PRACTICE—PARTIES—EQUITY JURISDICTION—DENIALS OF ANSWER—AFFIDAVITS—PUBLIC MINERAL LANDS.

1. On a motion for injunction to enjoin waste, the complainant cannot, on bill and answer, read affidavits in support of his title.

[Cited in Farmer v. Calvert Lithographing, etc., Co., Case No. 4,651.]

2. The general rule is, that all persons interested in the object of the bill, are proper parties. There are qualifications to this rule; and the court will not suffer it to be so applied as to defeat the purposes of justice.

3. On a motion to dissolve an injunction, matters set up by way of avoidance in the answer responsive to the bill, should be deemed, on such motion, equivalent to an affidavit by the defendant. Such matters, on the final hearing, must be proved by the defendant.

4. The jurisdiction of this court is limited to certain persons and matters, but within those limits it can confer a remedy when a plain, adequate, and complete one cannot be had at law. In the exercise of its equity jurisdiction within those limits, it can afford relief where it can be afforded by the principles of the high court of chancery in England.

5. Injunction may issue to stay irreparable mischief or waste, in cases of disputed title.

[Cited in Le Roy v. Wright, Case No. 8,273.]

6. Where the answer denies, directly and positively upon personal knowledge, the allegations of the bill, it "denies the equity of the bill," and, acting upon it as evidence, the injunction will be dissolved by the court, in the absence of extraordinary circumstances.

7. Query:—Whether, in a case of irreparable mischief, the court will permit affidavits to be read in contradiction to positive denials of the answer?

8. Where fraud, forgery, and ante-dating are distinctly alleged in the bill, and the only denial of them is on "information and belief," it is not a "denial of the equity of the bill," and cannot arrest the issue of an injunction, or authorize a dissolution of it if one has been granted.

[Cited in Cole Silver Min. Co. v. Virginia & G. H. Water Co., Case No. 2,990.]

9. The working of a gold mine is the taking away the substance of the estate.

10. Mere insolvency, if inconsiderable, would not give jurisdiction to the court: but where the amount is great, and the inability of the party to respond is greatly disproportioned to that amount, such insolvency would be an element to influence the action of the court, and where it exists is proper subject for an allegation in the bill.

[Cited in brief in Dormueil v. Ward, 108 Ill. 216.]

11. The United States have not conveyed or dedicated the minerals in the public lands to individuals or the public.

[Cited in Lee Doon v. Tesh, 68 Cal. 48, 6 Pac. 97, and 8 Pac. 621.]

12. The institution of an action at common law, prior to the exhibition of a bill in equity, for injunction, is the general rule; but such action is not an indispensable prerequisite in all cases.

13. A court of equity will, in some cases, enjoin against the removal of the fruits of past waste.

The bill in this case is filed for an injunction, and the appointment of a receiver. The object is to restrain the working of a quicksilver mine, known as the "New Almaden," of the alleged value of $25,000,000 and from which defendants are extracting minerals to the annual value of $1,000,000. It alleges that the title under which defendants claim to hold possession, is derived from the Mexican government, and that the same, independently of all other defects, is forged and ante-dated. That defendants have, through

[1] [Reported by Cutler McAllister, Esq.]

one Andres Castillero, in their own behalf, petitioned the board of land-commissioners organized under the act of congress of March 3, 1851, for a confirmation of their claim; which application is now pending on appeal before the district court of the United States for the Northern district of California. The bill prays for an injunction to enjoin the destruction of the mine until the title to it is determined by the tribunals to which its adjudication is finally confided.

P. Della Torre, Dist. Atty., Edmund Randolph, and E. H. Stanton, for the United States.

A. C. Peachey and Gregory Yale, for defendants.

Before McALLISTER and HOFFMAN, District Judges.

McALLISTER, District Judge. The magnitude of the interests involved, the novelty of this case in some of its features, the fact that the documentary title on which the defendants to a certain extent rely, was obtained from Mexico pending the war between that country and this, a few weeks prior to the occupation of this country by the American forces, the allegation that such documentary title was procured by a conspiracy to defraud the United States and was forged and ante-dated,—are circumstances which have invested this case with no ordinary interest outside these walls. That interest has been reflected upon those who have appeared in court as the representatives of the respective parties, as evidenced by the strenuous and zealous efforts which have been made by the respective counsel. This court is reminded by this condition of things, of the remarks of Chief Justice Marshall, in Mitchel v. U. S., 9 Pet. [34 U. S.] 723. "Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement produced by ardent controversies, gentlemen view the same object through such different media that minds not unfrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes, and exercise its own judgment, guided by its own reason." The present proceeding may be viewed as in the nature of an information on the part of the government through its law officer. It is a bill filed by the district attorney of the United States in their behalf. It sets out the title of the United States to certain premises; that defendants are in possession of said premises, which consists of a mine of vast value, and are extracting its minerals to an amount in value of $1,000,000 per annum, and have abstracted already minerals to the amount of $8,000,000. It charges their possession to be tortious, and that the title under which defendants hold such possession was forged, false, antedated, and fabricated in pursuance of a conspiracy formed to cheat and defraud the United States of their rights to the said property; that defendants have filed a petition in the name of one Andres Castillero to the board of land-commissioners under the act of congress passed March 3, 1851 [9 Stat. 631], which is pending on appeal before the district court of the United States, for the Northern district of California, the object of which petition is to obtain from the United States a confirmation of the title which they pretend to hold from the Mexican government. It further alleges that defendants are destroying the substance of the mine, that they are unable to respond for the damages which have already accrued and still may accrue, and prays that an injunction may issue to stay the waste they are committing and threaten to commit, until the determination of the title by the tribunals to which the adjudication of it is confided by law shall take place, and that a receiver be appointed to take charge of the property intermediately.

This bill has been met by a demurrer and an answer. Double pleading in a court of equity is not allowable; and the answer in this case being a general one, overrules the demurrer upon the settled doctrine of the court. Taylor v. Luther [Case No. 13,796]. So that the demurrer may be dismissed without further observation, and the case stand on the bill and answer. Id. When the motion for injunction was made, the solicitors for defendants objected to any affidavit offered by complainants as to title. It was agreed that such affidavit might be read, and its admissibility argued on the discussion by counsel of the merits, and decided by the court in its opinion. Affidavits for defendant responsive to those on the part of complainants as to title, were admitted to be read, subject to the decision which should be made by the court on the admissibility of the complainants' affidavits to title. This motion for an injunction could be disposed of in a comparatively brief time; but the objections urged against the jurisdiction of the court, and to the character and form of this proceeding, have been numerous, and urged with so much zeal and apparent conviction in their correctness, that it is proper that special notice should be taken of them, in the hope of convincing parties that the court has "fairly considered the case, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised in the case."

The first question, then, is the admissibility of affidavits as to title, presented by defendants. The right of the plaintiff to read affidavits on a motion for injunction is declared to be a well-settled rule. It is his unquestionable right, say the court in Ken-

sler v. Clarke, 1 Rich. 620 [2 Hill (S. C.) 620], to read affidavits on an application for an injunction in the support of the allegations in his bill before the coming in of the answer; and as constituting a part of his case, they may be read on any subsequent motion to perpetuate or dissolve the injunction. But the court lays down the rule that no affidavits filed subsequently to the coming in of the answer can be read, for the reason it was calculated to surprise the defendant. The only exception to this rule of the right of plaintiff is to be found in the cases of waste and such as are analogous, for the purpose of preventing irreparable mischief; and that exception limits the affidavits to waste, insolvency, or other collateral fact, and does not permit them to extend to the question of title. This exception as to affidavits as to title was asserted by Lord Eldon in Morphett v. Jones, 19 Ves. 350, and in Norway v. Rowe, Id. 157; and seems to be recognized by the text-writers, by the case cited above from South Carolina, and by other decisions. Mr. Justice Story, in the case of Poor v. Carleton [Case No. 11,272], has intimated his doubts as to the existence of a good reason for the rule which denies the right of a complainant to read affidavits as to title, in a case of irreparable mischief; and the remarks of the learned judge upon the point are entitled to much consideration, and may lead hereafter to a qualification of the rule. The proposition for which he contends is, that affidavits to title should upon general principles be looked to, not for the purpose of establishing title, but to enable the court to see if probable foundation existed to believe that the complainant may establish his title and be liable intermediately to irreparable injury. In the case of Tobin v. Walkinshaw [Id. 14,068], decided by this court, it went into a full consideration of the case of Poor v. Carleton [supra]; and inasmuch as the point was not directly before the court in that case, and the learned judge in that case admitted that affidavits to title were only to be looked to for a qualified purpose, considering too, as well settled, that on a motion for an injunction a court of equity is not to look into title, this court came to the conclusion it would be better to adhere to the ancient rule until qualified by some authoritative decision directly on the point. The court, therefore, decided that affidavits to title could not be read. The law announced in that case must be applied to the present, and so much of the affidavits of plaintiff in this case as goes to title must be discarded by the court in the adjudication of this motion. The affidavits of the defendants, which were admitted to be read as responsive to plaintiff's affidavits, must be also rejected. As the court excludes the plaintiff's, on a consideration of the question of their admissibility, which by consent of parties when they were read was reserved for its decision, the affidavits of the defendants must share the same fate. The only ground on which they could be received was, that they were responsive to the affidavits of complainant as to title. In the absence of any such, no rule is better settled than that defendants cannot read affidavits to support their answer. 1 Hoff. Ch. Prac. 360; Roberts v. Anderson, 2 Johns. Ch. 202; 2 Hill (S. C.) 620. In the language of Lord Eldon, in Norway v. Rowe, 19 Ves. 157, "the title must be taken on the answer." The case, therefore, is to be discussed on the pleadings—the allegations in the bill as verified by the affidavits accompanying them, exclusive of any portion of them which go to title, and the denials in the answer.

A preliminary inquiry is, as to the jurisdiction of the court as to the parties. The decision of this court in the case of Tobin v. Walkinshaw [supra] has been cited as an authority which settles the question raised in favor of the objection taken by the defendants' counsel to the jurisdiction of this court, on the ground of want of parties. A reference to the structure of the bill in that case and in this, will show that, whatever may have been the language of the court arguendo in that case, it can not be cited as an authority in the present. In that case, it was alleged that defendants held under a conveyance from one Andres Castillero. There was no allegation that he was beyond the jurisdiction of this court, nor any prayer that he might be brought into court, should he at any time come within the reach of its process. It prayed for the cancellation of deeds in the hands of absent persons; it prayed for an account of all the profits of the mine for the preceding year, and for a perpetual injunction. By the subsequent pleadings it was ascertained, that two persons resident in this city, within the jurisdiction of this court, equally interested with defendants, were not made partes to the bill. It was in relation to such a bill the court said: "But the bill asks, that an account of profits belonging to other people be taken, and title-deeds to property in which those other and absent persons are as much interested and to a larger extent than the defendants themselves, shall be canceled." The court further said: "But there is one feature in this case which distinguishes it from all others. It is, that two absent persons (Parrott and Bolton), whose interests would be affected by a decree, are residents of this city, and within the reach of the process of this court. But if by bringing them before the court, this case would be beyond the jurisdiction of this court, can the court by indirection adjudicate upon their rights, and thus do indirectly what it could not do directly?"

Now, the present bill makes all persons in interest, within the reach of the process of the court, parties to the bill. It alleges, that certain persons who are absent from this state hold possession of the mine, by the de-

fendants as their agents, and prays, if they come within the jurisdiction of this court, they may be made parties. It asks for the delivery and cancellation of no deeds, nor any account of profits. It asks from the defendants the value of the ore extracted and carried away by either of them, or by any other person with license and consent of them, or either of them, while in possession, as alleged wrongdoers, of the premises. It alleges, that under the act of March 3, 1851, entitled "An act to ascertain and settle private land-claims in the state of California," a petition in conformity with the provisions of that act has been submitted to the board of land-commissioners in the name of one Andres Castillero, for and in behalf of defendants, asking for a confirmation of the claim to the premises in dispute held under a Mexican title; which proceeding is pending on appeal before the district court of the United States for the Northern district of California, before which tribunal the alleged title of the premises is now awaiting adjudication. The bill prays for an injunction to enjoin the destruction of the premises before the termination of that adjudication.

The averment of the answer which raises the objection to the jurisdiction is, that certain persons resident in foreign countries are associated with defendants, and the names of some of them are unknown. The lands and mine are admitted to be in possession of the agents of the company of which the said non-residents are parties. The question presented is, whether where the parties are prosecuting a claim in the district court by their attorneys, and holding possession and enjoying the proceeds of the premises by their agents, the court has the power to protect the property, or is deprived of that power because some of the parties are without the jurisdiction of the court. The affirmative of this proposition, if sustained, would be attended with singular results. It would only be necessary for parties to associate themselves with foreign parties who were beyond the process of this court, and entire exclusion from any equitable relief required by others who may have rights to or claims on the property in their possession, would be the result. The general rule in a court of equity is, that all persons who are interested in the object of the bill are necessary and proper parties. There are exceptions to this rule, which are governed by one and the same principle, which is—as the object of the general rule is—to accomplish the purposes of justice between all the parties in interest; and it is a rule founded in some sort upon public convenience and policy, rather than upon positive municipal or general jurisprudence. Courts of equity will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable. Story, Eq. Pl. § 77. The first exception to the rule stated by Judge Story is founded upon the utter impracticability of making the necessary or proper parties, by reason of their being beyond the process of the court. Id. § 79. This ground of exception is peculiarly applicable to suits in equity in the courts of the United States. If, therefore, this rule as to parties were of universal application, many suits in those courts would be incapable of being sustained therein; and Judge Story states that the general rule in the courts of the United States, is to dispense, if consistently with the merits of a case it can possibly be done, with all parties over whom the court would not possess jurisdiction. Id. § 79. Parties to bills are divided into three classes—nominal, necessary, and indispensable. The act of congress of February 28, 1839 (5 Stat. 321), and the 47th rule of equity of the circuit courts of the United States, were enacted to remove the disability alluded to by Judge Story, in the circuit courts, in the administration of justice, where some of the parties were beyond the jurisdiction of the court. The judicial construction placed upon those enactments is, that they have dispensed with the duty of making nominal or necessary parties where it is impracticable to do so by reason of their being beyond the reach of the process of the court; but the presence of an indispensable party is as necessary to the jurisdiction of the court as it was before the enactment of the rule and the law. The presence of an indispensable party is demanded by the consideration that no court of equity, however general its jurisdiction, can adjudicate directly upon the rights of a party unless he is actually or constructively present. [Mallow v. Hinde] 12 Wheat. [25 U. S.] 194. The absent parties are undoubtedly necessary parties, and had they been within reach of the process of this court, must have been made parties to the record. But are they, under the circumstances, so indispensable as parties, as to prevent any decree by this court?

In this case it is alleged in the bill, that certain parties reside out of the jurisdiction of this court; and it prays that they may be made parties whenever they shall be found within its jurisdiction, in conformity with the 22d rule of equity. The answer admits that they reside beyond the jurisdiction of the court, and the names of some of them are unknown to defendants. It admits the possession of the property by the agents of those absent parties, which agents are made parties to this bill. The same parties are in the district court prosecuting a claim to the same property in the name of Andres Castillero against the plaintiffs. No act is required to be done by these parties. They are before the district court, where their rights in the property are to be adjudicated. Not

actually, they are constructively present on this motion.

In the case of Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738, the bill was against, and the decree was rendered against, an individual who was the agent of another, who was not a party to the bill, being a sovereign state, and who could not be made a party. The objection in that case was, that as the real party cannot be brought before the court, a suit could not be sustained against the agents of that party. "Why," ask the court (page 843), "may not it (this court) restrain him from the commission of a wrong which it would punish him for committing?" The case of Osborn v. U. S. Bank was a demand for money of the principal in the hands of an agent, which belonged to a principal not a party to the record. Hence, this court in its opinion in the case of Tobin v. Walkinshaw [Case No. 14,068], in commenting on that, state as one of the grounds of difference that in the case of Tobin v. Walkinshaw "there is no question of principal and agent in this case."

There would seem to be no reason to restrain the court from acting, for want of parties. To do so in this case, would be a denial of justice. The parties, while using another judicial tribunal for the confirmation of their alleged title, would be enabled by reason of the absence of some of them without the jurisdiction, to bar the party against whom they are prosecuting their claim to the property, from the interposition of this court to preserve and protect that property pending such prosecution. The foreign parties would thus be making use of an American tribunal to enforce their claim, while they availed themselves of their absence to preclude the complainants from a right to which the humblest individual is entitled,—to invoke an injunction for the preservation of the property; for only to that extent can the action of this court go. Judge Story lays down the ordinary rule to be, that where the persons who are out of the jurisdiction are mere passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. If such absent persons are to be active in the performance and execution of the decree, or if they have rights wholly distinct from those of other parties, or if the decree ought to be pursued against them, they are indispensable. Story, Eq. Pl. § 81. Speaking of a defect for want of parties, this author says: "In many instances the objection will be fatal to the whole suit. In others, it will not prevent the court from proceeding to the decision of other questions between the parties actually before it, even though such a decision may incidentally touch upon or question the rights of the absent parties." Id. In Smith v. Hibernian Mine Co., 1 Schoales & L. 238, Lord Redesdale says: "The ordinary practice of courts of equity in England, when one party is out of the jurisdiction and other parties within it, is to charge the fact in the bill; and then the court proceeds against the other parties, notwithstanding he is not before it. It cannot proceed to compel him to do any act, but it can proceed against the other parties; and if the disposition of the property is in the power of the other parties, the court may act upon it." "I remember" (says the chancellor), "a case where a bill was filed to sell an estate for payment of debts, and the heir at law who was entitled to the surplus after payment of debts, was out of the jurisdiction. The court ordered the estate to be sold for the payment of debts; the heir (say the court) might file a bill to set aside the proceedings if they were erroneous."

In the case at bar, no act is required to be performed by the absent parties in the execution of the decree; their interests are incidental only to those of defendants, and they are passive parties; the possession of the property is in them by their agents. They may come into this court at any time; they are, in the name of Castillero, prosecuting for the confirmation of their claim to the property in the hands of their agents, the defendants. The case of Coiron v. Millaudon, 19 How. [60 U. S.] 113, has been cited by defendants' solicitors. In that case, the bill was filed to set aside a sale of property on the ground of irregularities in insolvent proceedings. If the sale were set aside, the defendants would have been enabled to recover from the creditors who had received their money. The court say: "The creditors, therefore, are the parties chiefly concerned in these proceedings, and as it respects those to whom the proceeds of the estate have been distributed, they are directly interested in upholding the sale; for if it is set aside, and the proceedings declared a nullity, they would be liable to refund the share of the purchase-money each one had received in the distribution." This latter case simply affirms the principle announced in Mallow v. Hinde, 12 Wheat. [25 U. S.] 194, and in Tobin v. Walkinshaw, decided by this court, that indispensable parties, as they were considered in those cases to have been, could not be dispensed with.

We cannot consider the objection to the jurisdiction for the want of parties as tenable.

Whether the answer should be regarded on this motion more than an affidavit, is the next question which has been raised. The ancient doctrine may be as contended for by the solicitors of complainants; but we think that upon the ground of reason and more recent authority, all direct denials in the answer responsive to the allegations of the bill, and not matters of avoidance, ought to have the effect of an answer as evidence on this motion as on a final hearing. On a motion to dissolve an injunction, Mr. Justice

Story says: The ground of "dissolving an injunction upon a full denial by the answer of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity, that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances." Poor v. Carleton [Case No. 11,272]. It is evident, then, that Judge Story considered that even on a motion to dissolve an injunction, the same effect was to be given to the answer as is to be given to it on the hearing.

As to the effect to be given to matters set up in the answer by way of avoidance, there has been some conflict of authority. In New York, South Carolina and New Jersey, the doctrine is well settled that matter of avoidance set out in the answer responsive to the allegations in the bill, is to be considered as equivalent to an affidavit on a motion for injunction. In Maryland and Georgia, a contrary doctrine obtains. In the former state (3 Bland, 162), while enforcing their view of the rule, the court did so upon a single authority in Bardiston's Chancery Reports, one hundred and thirty years old; and the Maryland court say "that the rule was not mentioned in any English digest, compilation, or book, other than that book." The court in Georgia (1 Kelly, 7), relied solely for their construction on the case of Hart v. Ten Eyck, 2 Johns. Ch. 63. But the decision in this case has been repeatedly reversed in New York. [1 Paige, 239; 2 Sanf. 673] [2]

As to the effect of the answer, then, in this case, the court considers that, on this motion, the denials made in it on personal knowledge, direct and responsive to the bill, are to receive the consideration due to them as if it was on the hearing, but that matters set up by way of avoidance are to be received as affidavits. As this question was raised at the bar, it is deemed proper to dispose of it, were it only to settle the practice of this court in view of the conflict of authority which exists.

The next subject of inquiry is the objection made to the jurisdiction of the court, by reason of the subject-matter. It is urged that its jurisdiction is special and limited, and does not extend its aid in an auxiliary proceeding to a court not governed by the principles of the common law. That this proceeding is auxiliary, and not the exercise of original jurisdiction, and is dependent upon that now exercised by the district court under the act of 1851. That the suit must be depending in a common-law court, and between the same parties; and the case of Clarke v. Mathewson, 12 Pet. [37 U. S.] 164, and that of Dunlap v. Stetson [Case No. 4,164], are cited to sustain these propositions. These cases were decided upon the question of jurisdiction as to the want of parties. Nothing was before the court as to jurisdiction as to the subject-matter. It had been decided by Judge Story (Clarke v. Mathewson [Id. 2,857]) that a bill of revivor, being a suit between the citizens of the same state, the court had no jurisdiction. On appeal to the supreme court, in Clarke v. Mathewson, 12 Pet. [37 U. S.] 164, they reversed the decision of the court below; and all that was decided was that a bill of revivor was not an original bill, but a mere continuation of it, and if the plaintiff in the original suit was competent to sue in the circuit court, his administrator, though a citizen of the same state with defendant, might revive the suit, the two bills being considered one and the same case. The case cited, Dunlap v. Stetson [supra], related also to the jurisdiction as to parties, the point being whether the suit could be sustained, the defendant being a citizen of Massachusetts, and not resident in Maine, and the subpœna having been served upon him in Massachusetts; and the decision was, that injunction would be issued by the court to enjoin a judgment obtained in the same court, although the original plaintiff is a citizen of another state, and this upon the ground that the injunction bill was part of the original bill. The court cannot consider that these cases, which were decided on the question of jurisdiction under section 11 of the judiciary act, have any bearing on the jurisdiction as to subject-matter. They decide that an injunction bill is part of the original bill it seeks to enjoin, and that in the issue of it the court is not in the exercise of original jurisdiction; and they predicate the same decree of a bill of revivor. But what is the jurisdiction of this court as to the subject-matter, they do not establish. This must be done by reference to the constitution, acts of congress, and the judicial construction they have received. There is no doubt that the jurisdiction of the circuit courts of the United States is limited to certain persons and subjects, but within those limits is the same in every state, and complete and full. The constitution provides (article 3, § 2) that the judicial power shall extend to all cases in law or equity specified therein, among which are enumerated "controversies to which the United States shall be a party." The judiciary act of 1789 (1 Stat. 78) enacts, that the circuit courts shall have original cognizance with the courts of the several states, of all suits at common law and in equity, where the matter in dispute exceeds the sum of five hundred dollars, and the United States are plaintiffs or petitioners. By the act organizing this court (10 Stat. 631), it is declared, that the court organized thereby, "shall in all things have and exercise the same jurisdiction as is vested in the circuit courts of the United States, as organized under existing laws." The jurisdiction of the circuit courts of the United States, is thus summed up by the

[2] [From Hoff. Op. p. 234.]

supreme court in Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 563: "Chancery jurisdiction is conferred on the courts of the United States, with the limitation that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." The supreme court has placed in several cases a judicial construction upon these words. In Boyce v. Grundy, 3 Pet. [28 U. S.] 210, they say, that the words "plain, adequate, and complete" were declaratory, making no alteration in the rules as to equitable remedies. In Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, that to determine the signification of these words, resort must be had to the principles of the common law of England, and not to the laws of the state where the court sits; and that if the state law has given a legal remedy for an equitable right, the jurisdiction of the circuit court is not affected; and that to bar a suit in equity, the remedy at law must be as efficient to the ends of justice and its complete and prompt administration, as the remedy in equity. Boyce v. Grundy, 3 Pet. [28 U. S.] 210.

It is difficult to see how, under the constitution, the judiciary act, and the judicial constructions given, it can be successfully urged that the circuit courts within the limits prescribed as to persons and subjects, have not a complete and full equity jurisdiction. In this case the court has jurisdiction as to parties, because the United States are plaintiffs. They have jurisdiction of the subject-matter because it exceeds the amount in value prescribed by law, and because there is no "plain, adequate, and complete remedy" for the injury complained of. Whether in affording the relief, they exercise original or auxiliary jurisdiction, has nothing to do with the question, unless an inquiry should arise where a party whose citizenship does not entitle him to invoke the original jurisdiction of the federal courts attempts to do so. The jurisdiction of the circuit courts of the United States has been defined by the supreme court. In Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 563, the supreme court say: "The rules of the high court of chancery have been adopted by the courts of the United States, and there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States. In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no court of chancery has been established. The usage of the high court of chancery in England, whenever the jurisdiction is exercised, governs the proceedings. This may be said to be the common law of the country, and since the organization of the government, has been observed. Under this system, where relief can be given, similar relief may be given by the courts of the Union." We cannot, therefore consider the objection to the jurisdiction of this court as to the subject-matter available. In granting the relief prayed for, it has all the powers of the English chancery.

We have seen that within the limits of their jurisdiction as to persons and subject-matter, the only restriction upon their equity powers is, that there be no plain or adequate remedy at law. Have the plaintiffs such complete remedy at law as should bar this suit? The rule is, that the party may come into equity, although he has a remedy at law: if such remedy be not plain, complete and adequate, a fortiori, if he has no remedy at law, he is entitled to the aid of a court of equity. The protection of the mine is the object contemplated by this bill; the preservation of its substance, until the title to it is ascertained by the tribunals to which the question is exclusively confided, is the prayer of the bill. That tribunal has no jurisdiction as to waste or destructive trespass. The title is the only question left to their decision. They have no power to save the property from destruction; and if this court possess none, complainants are without remedy. The administration of justice can neither be "complete nor prompt."

Stress has been placed upon the fact that previously to the institution of this bill, no action at common law has been instituted by complainants. It is urged that such step was necessarily preliminary to the filing of this bill, and the very form of the action is prescribed. Now in the ordinary course of things, where one claims title to real estate, his first step ordinarily is to enforce his claim in one of the ordinary courts of justice, in the form of an action of trespass to try title, or one of ejectment. The limited jurisdiction of a court of law may render it necessary that he should have the interposition of a court of equity to obtain a discovery in aid of his common-law suit; or he may have a defense equitable in character, of which he could not avail himself in a court of law; or the plaintiff may be attempting to avail himself of a legal title inequitably; and in many other instances it may be necessary to invoke the jurisdiction of equity. The fact that a party has not taken this usual step is matter of suspicion, and clearly shows, where no reasons exist for the omission, the want of that diligence the law requires from parties in the pursuit of their alleged rights. Hence, we find frequent allusions in the cases to the fact whether the party has instituted his action at law before he came into equity; and in a certain class of cases, the courts have refused to interfere when an action at law has not been brought. The rule is, however, by no means universal. That the institution

of an action at common law is an indispensable pre-requisite in all cases to the institution of a bill for an injunction, cannot be admitted. No case has been cited, which has made the omission of a party to have previously instituted a suit at law, the sole ground for refusing an injunction, where fraud was alleged and irreparable mischief the injury sought to be remedied. But the reasons for the ordinary rule do not exist in this case; and the maxim "Cessante ratione cessat et ipsa lex," must apply.

There is a pending litigation between complainants and Andres Castillero, under whom defendants claim, and in whose name they are, in their own behalf and that of their associates in interest, now prosecuting the title to the premises in dispute. To protect the substance of that property pending that litigation, is the object of this bill. The objection is, that such litigation must be pending in a particular form, and in a court of common law. We do not consider this proposition correct, and the cases where the courts of chancery in England have interposed to protect property in litigation in the ecclesiastical courts, disaffirm that doctrine. To these we shall hereafter refer. For the present we will inquire whether, under the peculiar circumstances of this case, the omission of the complainants to have instituted an action in a court of common law to try title, is sufficient to defeat the present application. It is true, the United States hold a legal title to the premises. Suppose that, counting upon that title, they had sued for the recovery of the possession, might not the defendants in that suit have pleaded to the action the act of congress passed 3d March, 1851, entitled "An act to ascertain and settle the private land-claims in the state of California," and their proceedings under it pending in the district court? By that act the United States are bound to hold their title subservient to the adjudication of special tribunals, with rules of decision very different from those which obtain in the ordinary tribunals of the country. An attempt on the part of the United States, so long as that act is unrepealed, to avail of their legal title in a court of common law, would have been inequitable and unjust. They have made no such attempt. They do not propose to do so, by this bill, further than as they allege it is necessary, in order to preserve the property until the question of title is determined as provided for by law. The fact that they have made their title dependent upon the action of special tribunals, and thus have deprived themselves of the right to enforce it at common law, cannot bar them from enforcing their equitable right to prevent the destruction of the property, on the ground that they had not previously to their application brought an action at common law to enforce that title.

Another objection to the relief prayed for is, that an injunction cannot be granted to enjoin a trespass where the title is disputed. In a case of mere trespass, or a technical waste where the mischief is not imminent, where no equitable circumstances appear, and no fraud alleged, and where the title of plaintiff is disputed in the manner prescribed by law, the rule is correctly stated. Where the mischief sought to be protected against is irreparable and imminent; where the bill alleges fraud and antedating in the execution of the title-papers set up by the defendants, and their genuineness is affirmed only on information and belief,—the case does not exist, to the knowledge of this court, where the rule contended for is to be literally applied. No one of the cases cited by the solicitor for defendants reaches this case. The authorities are numerous. To comment upon them in detail would be an unconscionable consumption of time.

The strongest case cited from the English authorities is that of Pillsworth v. Hopton, 6 Ves. 51; and from the American, those of Storm v. Mann, 4 Johns. Ch. 21, and Perry v. Parker [Case No. 11,010]. In the former case, the lord chancellor said: "I do not recollect that the court ever granted an injunction under any such circumstances." The character of the waste is not mentioned; and his lordship concluded by saying: "I remember perfectly, being told from the bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court." Now, this parol authority which his lordship applied to that case, decided in 1801, must have carried back his memory to about the middle of the eighteenth century. In 1837, nearly a century afterwards, Judge Story says: "Indeed, there are numerous cases which show the gradual meliorations or changes, often silent and almost unperceived, which have been introduced into the practice of the courts of equity, to obviate the inconveniences which experience has demonstrated, and to adapt the remedial justice of these courts to the new exigencies of society." The learned jurist adverts to an instance by way of illustration; and, in a subsequent part of his opinion, alludes to the qualification of the doctrine which existed, that affidavits could not be read in support of the title of the plaintiff, which is contradicted by the answer. "I cannot well see," said he, "why the court, to prevent irreparable mischief, may not look to affidavits in affirmance of the plaintiff's title, not so much with a view to establish that title, but to see whether it has such probable foundation in the present stage of the cause, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded." Judge Story has alluded to the proposition laid down by the chancellor in the case of Pills-

worth v. Hopton, and says: "The interference of courts of equity in restraint of waste may have been originally confined to cases founded in privity of title; and for the plaintiff to state a case in which the defendant pretended that the plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under the adverse right, was said to be for the plaintiff to state himself out of court. But at present the courts have by insensible degrees enlarged the jurisdiction to reach cases of adverse claims and rights not founded on privity, as for instance, to cases of trespass with irreparable mischief." Story, Eq. Jur. § 918. In Pillsworth v. Hopton, it is also to be observed that the plaintiff had failed in an ejectment suit he had brought; and further, there was no equitable circumstance calling for the interposition of a court of equity. In the second case, that of Storm v. Mann, 4 Johns. Ch. 21, decided in 1819, cited to sustain the general proposition as to dispute of title, the defendant had been for a long time, and was at the time, in possession; the nature of the waste is not stated, and no special ground was taken for equitable relief, nor any explanation made for the delay. The principle asserted in this case is, that a court of equity will not interfere where rights are properly determinable in a court of law where an adequate remedy can be found. In this case, the court referred to the case of Pillsworth v. Hopton, above referred to, as an authority for saying, "If the plaintiff in his bill states an adverse claim in the defendant, he states himself out of court." We have seen the views of Judge Story on this point; and it is extraordinary that the principle ever should have been asserted in any case in such general terms, that a party setting forth an adverse claim in the bill states himself out of court.

There are few cases which can be imagined where one enters upon land and exercises acts of ownership, that he cannot be said in common parlance to dispute the title of the owner so soon as he is known to him. We shall see, by reference to authority, that no such principle now exists. The last American case cited, is that of Perry v. Parker [Case No. 11,010]. The bill in this case was to enjoin the cutting of the dam and gates of the complainant; and Mr. Justice Woodbury, after noticing the cases in which injunction has been refused on the ground of the right being disputed, says: "Some cases of necessity, where the danger is great and the injury irreparable, may in England be regarded as exceptions;" and he refers to several cases decided in the high court of chancery. It is to be observed that in this case there was no fraud alleged, no irreparable mischief suggested, nor other equitable circumstances. The judge, in the absence of them, refused the injunction. But he states, after alluding to the exceptions in England, his own convictions as to the law. "And I am inclined to hold," he said, "that a mere denial of title is never sufficient, as such denial may be made for delay and mischief, unless as before remarked it is accompanied by circumstances showing it to be in good faith." If a denial unaccompanied by other circumstances is never sufficient, it seems that a denial on mere "information and belief" as in this case, of the charges of fraud, forgery, and antedating made against the documentary title of defendants, would be insufficient. A careful examination of all the authorities cited by defendant only shows, in the opinion of the court, that in the case of common trespass, in the absence of equitable circumstances, an injunction will not issue if the title of plaintiff is disputed; that the pendency of a suit is not of itself a ground for the interference of a court of equity; that a party may by laches, or delay unaccounted for, or by an omission to bring an action at law, there being no reason for the omission, deprive himself of the right to the interposition of a court of equity. There is no one of those cases which assert that a party by simply disputing plaintiff's title can defeat his application, in a case resembling the present.

The true rule will be found by referring to the English and American authorities. That decisions directly in point, on either side, are to be found to every part of this case, is not to be expected. It is novel in some of its features. But a new case does not create necessarily a new principle. Chief Justice Marshall, in Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 841, stated: "The appellants admit that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies the same remedy ought to be afforded." Principles have been enunciated both in England and this country, the application of which will dissipate all difficulty arising from the novelty of this case. Lord Redesdale, than whom there is no higher authority, and of whom the court say, in Bogardus v. Trinity Church, 4 Paige, 195, "His opinion upon a case of equity pleadings is always esteemed the highest authority," and in England where his treatise is received by the whole profession, "as an authoritative standard and guide," is clear and full upon this point. This author, in enumerating the general objects of the jurisdiction of a court of equity, includes the following: (1) Where the principles of law by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose. (2) Where the principles of law by which the ordinary

courts are guided, give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. (3) To provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interests. Mitf. Ch. Pl. 111. Again, he lays down the rule that, "pending a litigation, the property in dispute is often in danger of being lost or injured, and in such cases a court of equity will interfere to preserve it, if the powers of the court in which the litigation is depending are insufficient for the purpose." Thus, during a suit in an ecclesiastical court, for administration of the effects of a person dead, a court of equity will entertain a suit for the mere preservation of the property of the deceased till the litigation is determined, although the ecclesiastical court, by granting an administration pendente lite, will provide for the collection of the effects. Id. 158.

In Daniell's Chancery Practice, it is stated, that "an injunction will be granted in some cases where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more immediate relief than that which they could obtain at law; it has accordingly been granted, when the injunction amounted in fact to an injunction to stop a trespass; for if the court would not interfere against a trespasser, he might go on by repeated acts of damage which would be absolutely irremediable." The author refers to Flamang's Case [cited in 6 Ves. 147], in which Lord Thurlow refused to enjoin a mere trespass: but subsequently changed his opinion, on the ground that irreparable mischief would follow his refusal; holding, in effect, that if the defendant was using the substance of the thing, the liberty of bringing an action was not the only remedy to which in equity he was entitled; and the author concludes: "The same principle has been acted on and applied without scruple, in various other decisions; for unless there was a jurisdiction to prevent destruction or irreparable mischief, there would be a great want of justice in the country." 3 Daniell, Ch. Prac. 1854.

The foregoing are the expositions of the general doctrine by two standard text-writers; and they presuppose that the property sought to be protected was in dispute. In Poor v. Carleton [supra], Mr. Story does not confine himself to the question of title as raised upon the pleadings, but is of opinion that affidavits as to title ought, on general principles, to be permitted to be read. Whence the necessity, in any case, of reading affidavits as to title of plaintiff, unless upon the ground that such title has been disputed? The authorities which exclude affidavits to title do not do so upon the ground that defendant has disputed the title of plaintiff, but because the court has no jurisdiction to establish title between the parties. In U. S. v. Gear, 3 How. [44 U. S.] 120, the defendant had been sued in two actions, at law and in equity, and they involved his right to a tract of land upon which there was a lead mine. The first was an action of trespass, and the second a bill in chancery to stay waste, on the equity side. The defendant by his pleas to the common-law suit, raised the question of title. The same question was raised in the equity cause. Both cases were carried up, on a division of opinion between the judges, to the supreme court. Among other questions raised in the equity cause, was the right of complainant to an injunction; which was granted. In Kinsler v. Clarke, 1 Rich. 617 [2 Hill, 617],[3] a bill was filed for an injunction to restrain from waste or cutting timber. The defendant insisted in his answer that he had a perfect title to the premises, and set it out. The chancellor, in his decree, discussed the question of right, and decided in plaintiff's favor, and ordered an injunction to issue. On an appeal (Chancellors Johnson, Harper, and De Saussure, justices), the court declined to decree on the question of title, but sustained that portion of the chancellor's opinion which went to the issue of an injunction. "The claim," said Chancellor De Saussure, "of both parties to the title was set forth in the pleadings; and the chancellor on the circuit, to put an end to litigation and the multiplicity of suits, made a decree on the question of right. But, as this court is unwilling to decide on the question of title, which is pending in a suit at law, it will make no decree on the appeal on that ground, but will leave the parties to the litigation of the title to the court of law, to which the court remits them." The court confined itself to the appeal from the decree of the chancellor granting an injunction. The appeal was made on the ground, that in a case of trespass no injunction ought to be granted. Neither the chancellor below nor the appellate tribunal considered, that the right of complainant to an injunction was defeated by defendant disputing the title, and setting up in his answer an adverse one. The court of appeals say (De Saussure delivering the opinion): "On a careful examination, I concur entirely with him, in directing an injunction to be issued in this case. He has placed the interposition of the court for the protection of the land in question from irreparable mischief, on the true grounds; and I entirely concur with him. Nor is this doctrine and practice new in England or in this country."

The court cannot believe, in view of the foregoing authorities, that no injunction can

[3] [From Hoff. Op. 234.]

in any case be granted where the title is disputed, in a case of trespass of the character complained of in this case.

Thus far the attention of the court has been limited to the objections urged by defendant's solicitors to the jurisdiction of the court and the mode of procedure. The remaining question is one raised by one of the grounds of defense taken, viz. that the defendants are protected by the answer. This is a substantial defense. It is the ordinary question which arises on a motion for an injunction, or to dissolve an injunction (if previously granted), on bill and answer. A decision of it covers the whole merits of this motion. When an answer denies directly and positively from personal knowledge the material allegations of the bill, it "denies the equity of the bill," and the court is bound to consider it as evidence to which entire credit is to be given, until disproved by two witnesses, or one with stringent corroborative circumstances. Acting upon it as such, the court, in the absence of extraordinary circumstances, will dissolve the injunction if previously granted. If, on the contrary, such denials are not or cannot be made, they will consider that the allegations of the bill have not been disproved. The rule on this point, with its qualifications, will appear by reference to the authorities. The general rule is, that an injunction is to be dissolved when an answer comes in and denies all the equity of the bill. This is the rule in ordinary cases; but, to use the words of Lord Eldon in Clapham v. White, 8 Ves. 36, there are "excepted cases;" such are, mismanagement of partnership concerns, cases of waste or destructive trespasses, patent cases, and cases of irreparable mischief. But even in those cases to which the general rule applies, the answer, to have the effect of dissolving the injunction or preventing its issue, must be specific and positive.[4] [2 Story, Eq. Pl. § 832 et seq.]

In Poor v. Carleton [supra], Judge Story says: "But supposing the doctrine (which he by no means admits) were as comprehensive as to the dissolving an injunction on the coming in of the answer as the counsel has contended for, the question occurs whether it is applicable to all kinds of answers which deny the whole merits of the bill, or whether it is applicable to such answers only as contain statements and denials by defendants connusant of the facts, and denying the allegations upon their own personal knowledge. It seems to me very clear, upon principle, that it applies to the latter only. The ground of the practice of dissolving an injunction upon a full denial, by the answer, of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity that it is to prevail, if responsive to the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule, if we were to say that a mere naked denial, by a party who had no personal knowledge of any of the material facts, were to receive the same credit as if the denial were by a party possessing actual knowledge of them. In the latter case the conscience of the defendant is not at all sifted, and his denial must be founded upon his ignorance of the facts, and merely to put them in a train for contestation and due proof to be made by the other side." The learned judge proceeds: "What sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims; but merely establishes that the defendant has no personal knowledge to aid it, or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction." Poor v. Carleton [supra]. Judge Story has thus compendiously embodied the doctrine and the reason for its existence. His remarks were made on a motion for the dissolution of an injunction after answer. They apply to the present motion for an injunction after answer; for surely, if an answer does not so deny the material allegations of the bill as will authorize the dissolution of an injunction, such answer will not prevent the issue of one in a proper case.

In Clarke's Ex'rs v. Van Riemsdyk, 9 Cranch [13 U. S.] 160, the court say: "If a defendant asserts a fact (in his answer) which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an infallible deduction from the facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself. Thus, when the executors say, that John Innes Clark never gave Benjamin Munro authority to take up money or to draw bills; when they assert that Riemsdyk, who was in Batavia, did not take this bill on the credit of the owners of the Patterson, but on the sole credit of Benjamin Munro, they assert facts which cannot be within their own knowledge. In the first instance, they speak from belief; in the last, they swear to a deduction which they make from the admitted fact that Munro could show no written authority. "These traits in the character of the testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or deposition. The respondents could found their assertions only on belief: they ought so to have

[4] [From Hoff. Op. 234.]

expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what, in the nature of things, they could not know, cannot give to their answer more effect than it would have been entitled to had they been more circumspect in their language." A practical illustration of this doctrine, as applicable to an affidavit on a motion for injunction, is to be found in the case of Davis v. Leo, 6 Ves. 785, in which Lord Eldon says: "There is no positive affidavit in this case that the will was made, under which the plaintiff is next tenant for life, to the defendant Leo. This is a mere hypothetical title, upon the plaintiff's information and belief that a settlement was executed." It is to be borne in mind, that the grounds of defendant's information and belief were set forth and his belief sworn to. His lordship, however, proceeded and said: "There is no instance of an injunction in such a case. An affidavit to information and belief is nothing in this sort of case."

In Everly v. Rice, 3 Green, Ch. [4 N. J. Eq.] 553, the chancellor says, referring to the answer in that case: "In common charity it is to be presumed, that this general denial relates to a written agreement or deed which is not alleged in the bill, or else that it is predicated of the defendant's information and belief, which is not sufficient. The defendant must answer upon his own knowledge, and not upon information and belief, otherwise the injunction must be retained till the final hearing." Nor is this well-settled principle affected by the inability of a defendant to make a fuller denial; for the reasons given for the existence of it are unaffected by the inability of a defendant to make a fuller denial; and for the simple reason, that the existence of the fact alleged by complainant is unaffected by the ignorance of the defendant of its existence or the sincerity of his belief in its non-existence.

In Roberts v. Anderson, 2 Johns. Ch. 202, the bill prayed for an injunction staying all proceedings on a judgment in ejectment which had been obtained against the complainant. Chancellor Kent stated: "The only point is, whether the two deeds from Griffith to Sarah Johnson, under whom the defendants set up title, were fraudulent and void. The question of fraud was not tried; and from the history of the ejectment suit, as stated in the pleadings, it would seem that it could not be tried, as the recovery was placed entirely on the ground that the defendant at law was tenant to the new defendants, and so concluded from setting up this defense. But the fraud as charged, is a proper and familiar head of equity jurisdiction, and unless the answer be full and satisfactory, the injunction, if right in the first instance, ought to be retained until the hearing. All the denial contained in the answer is, that the defendants were not privy to any fraud, and were bona-fide purchasers, under a judgment and execution against Sarah Johnson. If she had no title, they had none, and they aver that they believe her title was good, because they do not know or believe that the conveyances from Griffith to her were fraudulent. This is leaving the question of fraud as unsettled as before the answer came in. It is true, the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance of the sincerity of their belief. In some particular cases, the court will continue an injunction though the defendant has fully answered the equity set up."

In the case of Everly v. Rice, the following is cited from the language of Chancellor Williamson, in the case of Kinnaman v. Henry: "I do not consider," said he, "the fraud in this case as sufficiently denied to entitle the defendants to a dissolution of the injunction upon the ground of the whole equity of the bill being denied. The defendants are not charged with being parties or privy to the fraud;" nor were they so. In relation to them the chancellor says: "All they could do, or which they have done, is to deny all knowledge or belief of the alleged fraud. The answer may be perfectly true, and yet Johnson, the mortgagor, guilty of the fraud imputed to him, and the complainant entitled to relief against these defendants. Such an answer is not sufficient denial of the complainant's equity to entitle the defendants to a dissolution of the injunction."

We will now submit to the principles enunciated in the foregoing authorities, the denials of the answer in this case. One allegation in the bill, and one of the most material, is direct and positive. It enumerates sundry documents constituting a part of the documentary title of defendants, and expressly charges, that all and singular said documents in relation to said Castillero's claim to said tract of land and cinnabar mine are false, fraudulent, ante-dated and forged, and they have all and singular been fraudulently contrived and fabricated since the right of property and possession to the said land and mine accrued to complainants, with intent to cheat and defraud the United States out of the property and possession of said land and mine. The denial of the defendants as to the forgery of the documents is to be found in section fourteenth of the answer. They say, that they have no personal knowledge of anything said or done by the said Castillero in or about his said representations to the Alcalde Pico, as shown in his letters, copies of which are exhibited in Exhibits A and B; neither have they any personal knowledge of what was said or done by the said alcalde, when he gave the said Castillero possession of the mine and lands around it, which was evidenced by the written instrument, a copy of which is exhibited, marked "Exhibit E;" nor have they any personal knowledge of what was said or done by Castillero, or the Mexican author-

ities, in and about the business which resulted in the proposals, contracts, grants, and official correspondence and reports which appear and are shown in the exhibits annexed to this answer, being Exhibits G, H, J, K, L, M, N; but they have been informed and believe that the said documents are perfectly genuine and fair, and express truly the matters and things to which they relate, and were made at the times of their respective dates.

Having stated their want of personal knowledge of the facts covered by said documents, in the fifteenth section of the answer, the defendants aver that, to the best of their knowledge, information, and belief, Castillero did present to said Alcalde Pico the two original letters, copies of which are hereto annexed, marked "Exhibits A and B," and that said letters were written on their respective dates; and said Pico did put the said Castillero in possession of the mine and of three thousand varas of land in all directions measured from the mouth of the said mine, in the month of December, 1845, and that all the matters of fact recited and described in the said instrument signed by Pico, alcalde, and by Antonio Suñol and José Noriega, attesting witnesses, a copy of which is shown in Exhibit E, are truly recited therein; and in the same section, the defendants Halleck and Barron say, and the defendants Parrott, Bolton, and Young, believe it to be true, that they (the said Halleck and Barron), have conversed with the said Pico, the alcalde, with the said Antonio Suñol, and with José Fernandez, who, in the month of December, 1845, was a clerk in the office of Pico, alcalde, who was present on the ground at the old mouth of the mine when the said possession was given, and also with other persons who lived in and about the pueblo of San José in 1845 and 1846, and who knew of the possession of said mine by Castillero as a matter of general notoriety; and from all the knowledge and information obtained from these and other various and authentic sources, which information was positive and precise, the defendants are convinced and believe that the possession of the mine, and of three thousand varas of land measured in all directions from the then mouth of the mine, was given by the said Alcalde Pico to the said Castillero, in the month of December, A. D. 1845, as set forth in Exhibit E. And this section concludes with the averment that to "the best of their knowledge, information, and belief," all the acts and things which are described and mentioned in the original documents, of which the Exhibits G, H, I, K, L, M, N, and O, are copies, did really take place, as they are therein set forth, and at the times therein specified, and that all the said documents are genuine, and were made at the times shown in their respective dates. In the sixteenth section of the answer, William E. Barron avers, and the defendants, Halleck, Young, Parrott, and Bolton, believe it to be true, that in the month of May, in the present year, he (the said William E. Barron), was informed by Segura, that he, Segura, was in 1846 president of the "Junta de Fomento," that his signature to the various "Exhibits," when shown to him, were genuine, and also declared that all the titles were signed by the persons who purport to sign them, and received by him; and a detailed statement by him is made of the facts connected with the acts of the said Segura in connection with the title of Castillero. In the seventeenth section of the answer a similar course is pursued, the difference being in the character of the facts communicated to Mr. Barron, and his informant on this occasion being Manuel Conto, secretary of "El Fondo de Mineria." In the eighteenth section of the answer a similar statement is made; the only difference being in the character of the facts narrated; being detailed by a different person, Jose Maria Duran, who stated he was chief clerk of the ministry of justice, under Becerra. In the nineteenth section of the answer, similar statements of facts are made upon the information of Castillo Lanzas, who was a Mexican official in 1846. In the twentieth section, the information was received by Mr. Barron from one Blas Balcarcel, who in 1846 was prefect of the National College of Mining in Mexico. In the twenty-first section of the answer, it is averred that Barron while he was in Mexico inquired in the various offices of the government, and found many persons who remembered when Castillero was in Mexico in 1846, and that it was reported and believed that he discovered a quicksilver mine in California, and that he was then engaged in making some contract with government in relation to the same; and from all the said Barron could learn, he is perfectly convinced that all the matters and things spoken of in the documents copies of which appear in the said Exhibits G, H, I, K, L, M, and N, are truly related in said documents, and that all the said documents are genuine and were made at the time they purport by their dates to have been made. In the twentieth section of the answer, all the defendants unite in the averment that they believe in the entire truth of all the information received as aforesaid by the said Barron, and from all said information, and from other sources of information, that all the matters and things spoken of in the documents copies of which appear in the said Exhibits G, H, I, K, L, M, and N, are truly related in said documents, and that all the said documents are genuine, and were made as they purport to have been made by their dates. The last section which alludes to that part of the bill which charges forgery and ante-dating, is the twenty-third; which denies generally the charges, and particularly denies that any of the documents copies of which are shown in the Exhibits A, B, E, G, H, I, K, L, M,

N, and O, are false, or fraudulent, or ante-dated, or forged, &c.

Most of that portion of the answer which responds to the allegations of forgery and ante-dating of the muniments of defendant's title, is given literally, and all substantially set out. It is matter elaborate and argumentative; but does not constitute positive and distinct denials, which the law requires in an answer in response to the material allegations in a bill, in order to influence the action of the court on a motion for an injunction in a case of irreparable mischief, or destructive trespass. The insertion in an answer of such denials merely, in the language of Judge Story, puts them in a train for contestation and proof by the other side. Poor v. Carleton.

The averment of the genuineness of the documents alleged by the bill to be forged and ante-dated, is founded entirely on "information and belief," and on deductions from facts of which defendants were informed. In the fourteenth section of the answer they say, they have no personal knowledge of anything said or done by Castillero in his representations to the Alcalde Pico, as shown in his letters; that they have no personal knowledge of what was said or done by the alcalde when he gave the possession of said mine to Castillero, evidenced by Exhibit E; nor any personal knowledge of what was said or done by Castillero or the Mexican authorities about the business which resulted in the documents, grants, &c., which are shown in the Exhibits G, H, I, K, L, M, N; but, they say, they have been informed and believe that said documents are perfectly genuine and express truly the matters and things to which they relate. The allegation in the bill is positive, and charges that these very documents, or rather their supposed originals, were fraudulent, forged, and ante-dated. The denial is, that the defendants have no personal knowledge of the facts exhibited in the documents, but they have been informed and they believe the documents to be perfectly genuine, express truly the matters and things which they relate, and that they were made at the times of their respective dates. Can such denial be deemed clear, direct, and positive? They do not pretend to have seen the originals; they disavow all personal knowledge of the facts to which they relate. Their belief as to the genuineness of the documents, is founded on the information they received that they were genuine; and upon the authenticity of that information they found their belief of the genuineness of the facts of which they relate, of which themselves are in no other way connusant. Every word they have uttered may be strictly true. Their belief may be sincere, they undoubtedly may have received such information, and yet the documents may have been fabricated as alleged, without imputation of false swearing. Hence the well-settled rule that the denial in an answer must be direct and founded on personal knowledge before the court can act upon them in a case of irreparable mischief, and the issue of an injunction to enjoin the same.

It is due to the defendants in this case to say, they have frankly disclosed the sources of their belief and sworn only to it. They have not placed themselves in the position of parties described by Chief Justice Marshall in Clarke's Ex'rs v. Van Reimsdyk, 9 Cranch [13 U. S.] 160. The strength of their belief has not betrayed them into a mode of expression of which they were not apprised. That when they intended to utter only a strong conviction of the existence of a particular fact, or what they deemed an infallible deduction from the facts known to them, they may assert that fact or that deduction in terms which convey the idea of their knowing the fact itself. In this case, the defendants tell us, they have no personal knowledge of the transactions; that they were informed the documents were genuine, and acting on that information, they swear to their belief of the existence of the facts to which they relate.

It may be urged, they could not truly make a fuller answer in the nature of things. This is true; and if the question was, whether such denials be sufficient to raise the issues for trial on the final hearing, and impose upon the complainants the duty of meeting them by proof, there could be no doubt that the pleading would be sufficient for that purpose. That defendants are unable to answer more fully, is not their fault; but the rights of complainants cannot be prejudiced, for it certainly is not their fault. The defendants are in the precise position of all other parties who are called on in a case like the present, to answer an alleged simulation of the title by those under whom they claim. Chancellor Kent only affirms the well-settled doctrine, when he says: "It is true, the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance, or the sincerity of their belief." Roberts v. Anderson, 2 Johns. Ch. 202.

In ascertaining the sufficiency of the denials in the answer, it is necessary to refer to some other allegations in the bill. The twenty-eighth article of the bill charges that all the pretended proceedings before the said Alcalde Pico, in respect to the judicial possession of the mine, and all the pretended proceedings of the government of Mexico, were falsely and fraudulently made, contrived, procured, ante-dated and forged, in pursuance of the aforesaid fraudulent conspiracy against the United States, and with intent to defraud the United States out of said mine and minerals, or some part thereof, under false, forged, and ante-dated Mexican titles. The bill further charges that in pursuance of said conspiracy, letters were written and communications and memoran-

dums made between the said Alexander Forbes and his confederates, and the said J. Alexander Forbes, as their agent (copies of which are herewith filed as exhibits, marked "B, C, D" and "E," and made part of the bill), in and about the fabrication and procuring the aforesaid false, ante-dated and forged Mexican titles, &c. To these charges, they reply in the thirty-second section of the answer, and the defendants admit the correspondence embraced in said exhibits, to have been written by the parties to them, at the times they bear dates respectively, and at the places from which they purport to be written, except the letter dated 25th March, 1848, which they aver to have been forged. They do not deny that J. Alexander Forbes was acting in behalf of, or as agent of the parties, but they deny "that said letters and communications were written by the said parties with an intent to commit a fraud in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as appears from said letters on the part of the said James Alexander Forbes." They neither deny nor admit such intention on his part; but refer to the correspondence for the ascertainment of the fact, whether or not a person under whom some of the defendants claim title, was guilty of the charges of conspiracy and intention to cheat, as alleged in the bill. Such denials of material allegations of the bill in the answer, though sufficient for the purpose of pleading, to place the issues raised in a train for contestation, are not sufficient to enable the court to act upon the documents as proved, and to refuse the injunction on that ground.

We have discussed this motion on the allegations of the bill and the denials of the answer, as all affidavits as to title have, in my opinion, been excluded by the well-settled rules of courts of equity, a rule affirmed by this court in the case of Tobin v. Walkinshaw [supra]. Judge Story has, as we have seen, expressed strong doubts of the propriety of the rule, and as an extended discussion has been made by the respective counsel in relation to title, it is deemed proper to look to the facts elicited by the affidavits, and to inquire into the allegations of forgery and ante-dating made against the documentary title set up by defendants, with a view not to decide upon or establish title, a matter within the exclusive jurisdiction of another tribunal, but to ascertain whether the facts and the testimony bearing upon the allegations of fraud, forgery, and ante-dating, be such as to satisfy the court that there is reasonable foundation for the plaintiff's title, which would entitle them to protection from irreparable mischief, in the event that such title should turn out to be well founded. My associate will give his views upon that point.

The remaining inquiry is, does the present case come within the range of cases in which courts of equity have exercised the powers now invoked? A response to this question will be found by reference to a few decided cases, in addition to authorities incidentally alluded to while commenting upon the objections urged by the solicitors for defendants. It is proper to observe, that the court on this motion is not to try title. The determination of that question belongs exclusively to another tribunal. All that we have to do in relation to title is to look to the allegations of the bill and the denials in the answer, and ascertain from them whether the plaintiff's title, in the language of Mr. Justice Story, "has such a probable foundation in the present stage of the cause, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded." Poor v. Carleton. To this, the court will limit its remarks.

In Lloyd v. Passingham, 16 Ves. 59, a receiver and injunction were refused where defendant was in possession, but where the legal estate was charged to have been obtained through forged documents. The action of the court did not turn upon a want of power in the court, but upon the special circumstances of the case. The grounds on which the court decided will instruct us as to the principles on which a court of equity acts in cases analogous to the present. In that case, the defendants had recovered, by ejectment, certain estates. This occurred some fourteen years prior to the suit in equity. The latter was a bill filed to impeach the verdict in ejectment, principally as obtained upon forged entries of burial and death, contrived by Robert Passingham. The bill prayed for an injunction to enjoin the cutting of timber and other waste, and for a receiver. The case was argued on affidavits. Lord Eldon refused the application on three grounds: (1) Because the trial in ejectment had been had upon other testimony than the entries which were alleged to have been forged; (2) because doubts were thrown upon the affidavits charging the forgery, on account of contradictions as to time and circumstances, which made the act of forgery, if done, a remarkable one; and (3) because no danger as to the rents was suggested. His lordship looked to the additional circumstance, that the defendants would be made illegitimate, provided the testimony should bear out the affidavits.

It was under foregoing circumstances, where the defendants held the legal title and a judgment in ejectment obtained by them fourteen years previously, when the judgment had been obtained on other testimony beside the alleged forged documents, where the evidence as to the forgery was contradicted and where there was no irreparable mischief, for none such was suggested, that Lord Eldon refused the motion and concluded with these words: "Whatever may be the ultimate event of this suit to which my act this day, refusing this application, will be no prejudice, I do not consider that these circumstances form that extreme case in

which the possession is to be taken from those who have the legal title." 16 Ves. 72. Nothing is said of want of power in the court; a perfect legal title was in defendants, held under a judgment for fourteen years, accompanied by possession. The judgment was obtained on other testimony beside the documents alleged to be forged, the testimony as to forgery contradictory; and, above all, irreparable injury not even suggested; and yet his lordship in deciding against the motion bases his decision to a considerable extent on the last ground,—"that refusing the application will be of no prejudice." In his opinion the chancellor expressly says: "I give no opinion upon the application from injunction to stay waste." This language was used by him in view of the fact, that he did not view the case as one of irreparable mischief. This case not only establishes the power of the court, but no notice was taken of the fact that there was no suit at law pending at the time.

In the case of Lining v. Geddes, 1 McCord, Eq. 304, no suit at law was pending, and the court in its opinion was discussing the power of a court of equity to interfere by injunction in a case of trespass. They overruled the decision of the court below ordering an injunction to issue to restrain the defendant from obstructing a right of private way; and they at the same time place the doctrine on its true ground, that of irreparable injury. They consider a temporary obstruction of a private road, and similar trespasses, as not cognizable in equity. The decision in this case enunciates the true rule. It is the irreparable mischief which is to govern. A party may complain of what may be deemed technically a nuisance or waste; but the true question remains, is the act complained of one of irreparable mischief? The court in the above case say, that the nuisance complained of must be productive of irreparable injury. 1 McCord, Eq. 309. In reference to trespasses which are not attended by such mischief and an adequate remedy can be obtained at law, they say, such cases do not require the aid of a court of equity, and certainly not until the right has been determined at law. Id. Upon the nature and character of the injury complained of, depends to a considerable extent the jurisdiction of this court. Is it irreparable? Irreparable injury is such as cannot be estimated with accuracy in money, or where it is so great that the party committing it, cannot make a compensation, or where from its nature the injured party cannot be made whole. Such for instance, as the destruction of the substance of the thing. The property sought to be protected is mineral land, and a mine of great value. The acts which defendants are committing and intend to commit, are such as the law adjudges to be waste. This point is settled by the case of U. S. v. Gear, 3 How. [44 U. S.] 120. and also by the supreme court of this state.

In the case of Merced Min. Co. v. Fremont, 7 Cal. 321, it is said: "The ground upon which the injunction was granted in these cases of timber, coals, ores, and quarries was, that the trespasser, in the language of Lord Eldon, was 'taking away the very substance of the estate.'" "It must be conceded that the principles of these cases apply to gold mines as well as to others. In fact, there are circumstances connected with gold mines (and the remarks apply equally to quicksilver mines) that render the remedy by injunction more appropriate than to other mines. The only value of a gold-mining claim, in most cases, consists in the mineral. If a party removes the gold, he removes all that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate." After affirming the rule, that facts to show that the injury is irreparable must be stated in the complaint, the court proceeds: "But in the cases of mines, timber, and quarries, the statement of the injury is sufficient. In the nature of the case, all the party could well state as matter of fact, is the destruction of the timber in the one case, and the taking away the minerals in the other. Taking away the minerals is itself the injury that is irreparable; because, it is the taking away the substance of the estate. The allegation of insolvency is not necessary to procure the injunction in these cases. The right to the remedy is based upon the nature of the injury, and not upon the incapacity of the party to respond in damages." In the opinion of this court, mere insolvency, if the amount is inconsiderable, would not give jurisdiction to a court; but where the amount is great, and the inability to respond is greatly disproportioned to that amount, such insolvency would be an element which would certainly influence the action of a court; and where it exists is a proper subject for an allegation in the bill.

Having disposed of the question relative to the power of the court, and the irreparable character of the injury complained of, we come to the consideration of another point: Have the complainants such a right in the premises as entitles them to an injunction to protect them until the litigation pending as to their title shall be determined? That the United States, by the treaty of Guadalupe Hidalgo, acquired the legal and paramount title, seems not to be denied. That no legal title can vest in defendants until the confirmation of their claim, under the act of March 3, 1851, is clear [Stoddard v. Chambers] 2 How. [43 U. S.] 316. But it is contended that the congress of the United States have dedicated the minerals in the lands of California to the public. The grounds on which this proposition is placed by defendants' solicitors are: (1) The United States by their general policy, and the direct concurrence of the executive branch of the government, have encouraged the working of

mines and the employment of mining capital in California. (2) The state has done the same by express legislation; and all the departments of the state government have concurred in establishing mining operations in the state on public land as the paramount interest of the state, to which all other industrial branches are subservient.

We shall not pause to inquire into the legislation of this state in relation to minerals on the public lands of the United States. One thing is certain, that neither her policy nor legislation, however much they may influence the action of the legislature of the Union, can deprive the United States of any legal right, or influence the action of this court in this case. That has been guarded against in the act of congress passed September 9, 1850 (9 Stat. 452), entitled "An act for the admission of the state of California into the Union." In that act it is expressly provided, "that the people of said state, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits; and shall pass no law, and do no act, whereby the title of the United States to and right to dispose of the same, shall be impaired or questioned."

As to the ground that the congress of the United States have dedicated the minerals to the public, and hence there is no equity in this bill, it is difficult to perceive, if such dedication had been made, how it could affect in any way the equity of the present claim. Suppose it to be the fact, how can it affect the rights of defendants' private claim? If such dedication does authorize the occupancy of the public lands, and permit persons who occupy them to dig the minerals in conformity with state laws, can the acquiescence of the general government in their so doing, aid legally or equitably the title of defendants, who do not claim under that permission, but claim to have an adverse and exclusive right to the property as against the United States and all the world?

The claim of these defendants of the exclusive ownership of the mine, is inconsistent with the title they attempt to set up, under the dedication by congress of the minerals to the public. They cannot in the same breath set up a superior adverse title, and also a right to work the mine by reason of a dedication of the minerals to the public. Congress has never parted with the right (reserved as we have seen by the act admitting this state into the Union) of disposing of the public mineral lands. They have merely exempted them from the general land laws, and have omitted to legislate in regard to them except to exempt them from pre-emption rights, by the act of March 3, 1853. They can at any moment dispose of them. The defendants did not enter upon the premises by virtue of any tacit or implied permission and license, but adversely as owners, and claim the lands as theirs, whatever disposition the United States may make with regard to the public mineral lands. If relying upon such permission to all persons to enter upon, and work mineral lands, defendants had entered, it might be a sufficient answer to a bill for an account of profits during the time such permission continued. But defendants did not enter, nor do they claim under such license, but adversely as owners. The United States having the title to the mine, the court cannot say that they have lost their rights, because, with regard to other minerals they have not asserted them.

Congress, to whom alone under the constitution of the United States, regulations for the disposal of public property is confided, have, so far as their action goes, manifested their determination to relinquish no right to any public land in California. Having protected in the act admitting the state into the Union, their title to the public lands so far as the state was concerned, they proceeded to guard that title from individual claimants. The treaty of Guadalupe Hidalgo addressed itself to the political department; and up to the passing of the act of March 3, 1851, that department alone had power to perfect titles and administer equities to claimants. [Glenn v. U. S.] 13 How. [54 U. S.] 260. Congress in the fulfillment of its treaty obligations, passed that act entitled "An act to ascertain and settle the private land-claims in the state of California." It is an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. Beers v. Arkansas, 20 How. [61 U. S.] 527. Under this power, the political department transferred, by the act of March 3, 1851, the power of perfecting titles and administering equities to individual claimants. Aware that many claims would be made under Mexican titles, some legal, others equitable and inchoate, and others fraudulent, and with a view to segregate all lands of individual claimants from the public domain, congress passed the act in question. Desirous to fulfill in a liberal spirit the treaty obligations of the government, they imparted to the tribunals to which the jurisdiction was committed, rules of decision different from those which obtained in the ordinary judicial tribunals of the country. This extended range of principles was made their rule of action, to effect what congress purposed they should; that is, to enable them to confirm a large number of

claims which were inchoate and, being no evidence of legal title, presented inchoate and equitable rights, commending themselves to courts regulated as those tribunals were by the "principles of equity which could not be enforced by the ordinary judicial tribunals."

We consider it evident that the United States have a title and interest in the premises in dispute, and have a clear right in a proper case to invoke the interposition of a court of equity to protect the property until the title to it is ascertained in the manner prescribed by law—whether it be public land or not. One of the terms on which the United States consented to be sued, is prescribed in the 13th section of the act; which enacts that all lands the claims to which have been finally rejected by the commissioners, or which shall be decided to be invalid by the district or supreme court, shall be deemed, held, and considered as part of the public domain of the United States. Dunl. Laws U. S. 1296.

The fact is admitted by the pleadings in this case, that a petition is pending in behalf of defendants, in the name of one Andres Castillero, in the district court, on appeal from the commissioners, having for its object a confirmation of the title to these premises. The result of a decision in one way will be to segregate the premises from the public domain; and they will not be segregated until such decision is made. A contrary decision will leave the property in the hands of complainants. Can it be successfully asserted that the United States have no such interest in the mine as will authorize a court of equity to protect the property while that issue is pending? We consider the legal title to this property to be in the United States, until it is decided to be private property. But suppose it be assumed that the interest held by the United States is to be confined to what they hold under the act of March 3, 1851. If such assumption be made, it may be contended that, so limited, it is a mere contingent interest, and not to be protected by the court,—that it is not a vested interest. The answer to such suggestion is, that the right or interest of defendants is equally contingent; and again, that the right of complainants, if it be admitted to be contingent, will not deprive it of protection from a court of equity in a proper case.

The court will grant an injunction when the aggrieved party has only equitable rights. Thus in cases of mortgages, if the mortgagee or mortgagor in possession commits waste, or threatens to commit it, an injunction will be granted. So where there is a contingent estate on an executory devise dependent over upon a legal estate, courts of equity will not permit waste to be done to the injury of the estate. In case of a mortgagee filing a bill to stay waste by the mortgagor in possession, the court will interpose, although the right of the mortgagee in the land or its proceeds is contingent upon his recovery of the debt, to secure payment of which the mortgage was given. In Camp v. Bates, 11 Conn. 51, a bill was filed to enjoin waste upon property on which complainant held a lien as an attaching creditor, under a law of the state. It was admitted that by the attachment the party acquired no legal title to the property, and that he might never obtain one. The court say: It has been urged that the "plaintiff had neither an equitable nor a legal title. That he had no interest in the estate, none which a court of equity would consider a vested interest;" and the court proceeds to inquire into the right of the party, and coming to the conclusion that the attachment, when completed, would bind the estate under the provisions of the law, say: "We are not, then, to speculate as to the result whether the creditor will recover at all, or recover the full sum he demands. The estate attached is to be held subject to meet that recovery, be it more or less. The question then arises, does the law give this privilege and then leave the debtor to take it away or destroy it? Does the law give a privilege and allow the party against whom it is given to render it useless? Is a court so utterly impotent, or is it so fettered by its own rules, that this may be done and the court have no power to prevent it? Did not the plaintiff, by his levy, acquire the sanction of the law that the property should stand pledged to await his judgment? Had he not, then, a right acquired by this lien, a right which a court of justice is bound to respect and defend? It is not indeed a legal interest, which would pass by a release deed; but it is a right not less sacred, and no less regarded by a court of law." The fact, then, that the interest of the complainants under the act of congress of March 3, 1851, is made contingent, does not defeat their right to the protection of the court. We have referred to this last case, to show that the submission by the United States of their title to a contingency does not affect injuriously the present application.

The bill in this case prays for an injunction to stay future waste, and also that the action of the court may extend to the preservation of the ore and materials now upon said mine and land, and all the quicksilver extracted from the ore of said mine in the possession of said defendants. It is urged that injunction is not granted in restraint of the removal of that which has been disconnected from the realty and assumed the shape of chattels. In the case of Watson v. Hunter, 5 Johns. Ch. 169, the principle affirmed is that in ordinary cases where no special circumstances intervene, injunction will not be issued to prevent the removal of timber already cut. Chancellor Kent concludes his opinion by saying: "I do not mean to be understood to say that the court will never interfere, but that it ought not to be done in ordinary cases like the present." In Winship v. Pitts, 3 Paige, 259, 261, it is said: "In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction

against future waste, and is directed to prevent a multiplicity of suits. The rule, however is general, that although the recovery of damages for waste is not a substantial ground for a bill in equity, yet if the court has jurisdiction of the subject upon any other ground, it will decree an account of the waste committed." 1 White & T. Lead. Cas. Eq. 554. In Backler v. Farrow, 2 Hill (S. C.) 111, the court asserts the general rule to be, that damages for waste cannot be recovered, the remedy being at law; but they say: "But, having proper jurisdiction of the case, there is hardly any question in relation to property which this court may not determine incidentally, for the purpose of doing complete justice and preventing multiplicity of litigation." The rule as laid down in the case of Jesus College v. Bloom, 3 Atk. 262, Amb. 54, is that a bill will not lie for waste merely, but if the party be properly in court for another purpose, as to obtain an injunction, then an account of past waste will be granted. "There are many cases where this court have made decrees in the cases of mines which they could not have done in the cases of timber. There is no question that the court was in possession of this case, and incident to it were the accounts for rents and profits and the account for waste."

Where an injunction against waste is granted, if the complainant has a claim in law to satisfy for the value of the timber or other matters, the removal of which constitutes the waste, he is entitled to an account as of course, as incident to the injunction and to prevent multiplicity of suits. 1 White & T. Lead. Cas. Eq. 554. Now, the removal of large amounts of minerals constitutes waste. The result of the doctrine furnished by the authorities is, that in an ordinary case an injunction will not be issued to operate upon past waste; but that in cases where the court has original jurisdiction of the case, and the party is properly in court for some other purpose, for instance, to obtain an injunction, or where there is the allegation of fraud, or where the removal constitutes a part of the waste, the court may extend its protection to past waste. That the cases which constitute exceptions to the rule which applies to ordinary cases are those where the profits of mines and the opening of mines is the waste complained of.

To this point is the case of Jesus College v. Bloom, Amb. 56, where the court, referring to an authority cited, say: "The more probable reason for decreeing an account in that case seems to be because it was the case of mines; and the court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many cases where this court will relieve and decree an account of ore taken when in any other tort or wrong done it has refused relief." We consider this case not to be the ordinary one of cutting timber, but the working of a valuable mine, and that the injunction in this case should extend to ore extracted, and remaining on the premises as well as to future waste.

A careful examination of this case has brought the court to the following conclusions: That the complainants have exhibited a title to the premises in dispute, which entitles them to an injunction to stay waste upon it; that the character of the waste complained of is what the law deems irreparable mischief; that the allegations of the bill charging forgery, fraud, and ante-dating upon the documentary title under which defendants claim, have only been denied "on information and belief," which will not authorize the court to consider the allegations in the bill on this motion as disproved; and lastly, that the facts as shown by the exhibits annexed to the pleadings, and the affidavits filed, if they are to be considered, do not set forth circumstances showing good faith, which, according to Mr. Justice Woodbury, in Perry v. Parker [Case No. 11,010], must accompany "a general denial" of plaintiff's title, in order to make it sufficient. The court, therefore, are constrained by a "judicial necessity," to grant the injunction prayed for. The injunction will be temporary, subject to the further order of the court. It is not to be anticipated that either party will interpose any obstacle to the prompt determination of the issue as to the title to the premises now pending. But it is deemed proper to keep this injunction under the control of the court, so that it may be able to do what subsequent events may require.

The bill prays that a proper person or persons may be appointed receivers of the said tract of land, mine, and minerals, take possession of the same, with the appurtenances, receive the profits of same, and all the ore of said mine, and the quicksilver extracted therefrom, and to lease, work and manage the said mine, and receive the rents, issues and profits thereof, and the ore and quicksilver to said mine or elsewhere, in the defendant's possession, that has been extracted from said ore; to make sale and disposition thereof, to be accounted for under the order of this court. The court do not consider that the appointment of receivers with such extreme powers, is at this time necessary. The ground on which the court has felt it to be its duty to interpose by injunction in this case, is to preserve the premises from waste and destruction, while the title to it is undecided. It has also considered it its duty to enjoin against the removal of the ores which have been already extracted, and remain on the premises. Every object contemplated by the bill, and which the court desires to effect, would seem to be attained by enjoining the further working of the mine, and the reduction and carrying off the ores now on the premises. Unless those ores are liable to deterioration, from natural causes or by being plundered, there is no necessity to appoint a receiver. If, however, it be made to appear

that the condition of those ores is from any cause insecure, or other circumstances which may call for further interposition, the court will take into consideration an application for the appointment of a receiver.

An injunction, in accordance with the prayer of the bill, and in conformity with the views herein expressed, will be submitted, by the solicitors for complainants, to the court.

HOFFMAN, District Judge. In the opinion just read, this case has been considered on the allegations of the bill and answer alone, excluding all affidavits on either side relating to title. It has been seen, however, that in the opinion of Judge Story, the court to prevent irreparable mischief may look to "affidavits in affirmance of the plaintiff's title, not so much with a view to establish that title, but to see whether it has such a probable foundation in the present state, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing of the cause it should turn out to be well founded." Poor v. Carleton [Case No. 11,272]. Had no answer been filed, it is clear that the court, as in the case of Lloyd v. Passingham, 16 Ves. 59, and in that of Perry v. Parker [supra], relied on by the defendants, might have heard the motion on affidavits filed on both sides. Unwilling to rest the decision of the motion upon what may seem a technical and rigorous rule, and on allegations in the bill which are assumed to be true merely because not met by a positive denial in the answer, we have looked into the affidavits on either side with a view of ascertaining whether the complainants, assuming such an inquiry to be admissible, have made out such a prima facie or probable case, as will warrant the interference of the court in this preliminary stage of the cause. That the court will interfere to prevent the destruction of the estate or fund, even though the title is disputed, has already been abundantly shown. That it will so interfere against a party in possession, and even against such a party having the legal estate, is also clear. The inquiry arises, what must be the nature or force of the evidence which the court will exact before it exercises this authority? It is admitted in the case of Perry v. Parker that a mere denial of plaintiff's title, without any evidence to show the denial to be made probably in good faith, and to be sustained by something of fact and law, is not sufficient. In Daniell, Ch. Prac. p. 2027, it is said: "The court will appoint a receiver against a party having possession under a legal title, if it can be satisfied that such party is wrongfully entitled to such legal estate." Where the right to the possession is in dispute, the court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favor, appoint a receiver pending the suit. Id. p. 2026.

It might be inferred from these authorities that the court will in no case interfere against a party in possession, unless on evidence sufficient to satisfy it that he has no title. Such, however, we do not conceive to be law. The extracts from Daniell's Practice, above cited, refer to cases where the property is in possession of a party having the legal estate. In such cases much reluctance is undoubtedly felt by courts of equity to interfere by injunction. But even in such cases, the case of Lloyd v. Passingham impliedly sanctions the doctrine that where there is danger to the substance of the inheritance, and the damage apprehended is great and irreparable, the court will not confine its interposition to those cases alone, where it can declare itself satisfied that the defendant has no title. In the case of Perry v. Parker it does not appear that any irreparable injury was apprehended; and even in that case the court enters into an elaborate examination of the titles of plaintiff and defendant with an evident inclination to the opinion that the former is more than doubtful. Daniell, on the page succeeding that on which the last citation is found, states that though the court will not interfere on the mere ground of title, it will appoint a receiver at the instance of parties beneficially interested, even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step is taken. In the case of Poor v. Carleton [Case No. 11,272], Judge Story says: "The true rule seems to me to be that the question of dissolution of a special injunction, is one which after the answer (denying the whole merits of the bill) comes in, is addressed to the sound discretion of the court. In ordinary cases the dissolution ought to be ordered because the plaintiff has prima facie repelled the whole merits of the claim asserted in the bill. But extraordinary circumstances may exist, which will not only justify but demand the continuation of the special injunction. This, upon the principles of a court of equity, which will always act to prevent irreparable mischiefs and general inconvenience in the administration of justice, ought to be the practical doctrine; and I am not satisfied that the authorities properly considered establish a contrary doctrine." And this, says Judge Story, seems to have been the course which commended itself to the mind of that great equity judge, Chancellor Kent. Poor v. Carleton [supra].

We think that the opinion of Judge Story above cited, is sufficient authority for the position that in cases, like the present, of irreparable mischief, the court in examining the affidavits, assuming them to be admissible, will inquire whether the title of the plaintiff has such a probable foundation as to entitle him to be protected during the litigation by which it will finally be determined. And that in cases of threatened waste and destruction of the estate, where the apprehended injury is great and irreparable, as also in cases of the threatened destruction of heir-looms, works of art, &c., the court, in the exercise of a sound discre-

tion, should interfere even in doubtful cases to preserve the parties in statu quo until the right can be determined. We will therefore examine to some extent the evidence which has been adduced on either side, and which has been so largely discussed at the bar, in order to see whether the complainant's title appears to have such a probable foundation, and the allegations of the bill are sustained by such proof, as to warrant the court in interposing to protect the estate until the determination of the right.

The title set up by the defendants consists of an alleged mining right or title, originally acquired by denouncement and registry under the mining laws of Mexico; and secondly, an alleged concession of two sitios de ganado mayer, made by the supreme government of Mexico. The evidence of the mining right or title is in the form of an expediente or record, consisting of two letters of Andres Castillero, addressed to Antonio Maria Pico, alcalde, and an act of possession purporting to be executed by that officer, in which he recites that he has given possession of the mine and of three thousand varas of land in every direction, to Castillero. The evidence of the two-league grant consists of a dispatch from Castillo Lanzas, minister of exterior relations of Mexico, addressed to the governor of California, but produced by the defendants. In this dispatch a communication to Lanzas from the minister of justice, is set forth. In that communication the minister of justice transcribes a communication addressed by himself to Segura, president of the junta for the encouragement of mining. In this last communication, the minister of justice informs Segura, that the president has been pleased to approve the agreement made with Castillero, to commence the exploration of the mine, and that the corresponding communication is made to the ministry of exterior relations, that it may issue the proper orders relative to what is contained in the 8th proposition with respect to the granting of lands in that department. The minister of relations, after reciting the above letter, adds: "And I have the honor to inclose it to your excellency (Lanzas) to the end that with respect to the petition of Senor Castillero, to which his excellency the president ad interim, has thought proper to accede, that as a colonist, there be granted to him two square leagues upon the land of his mining possession, your excellency (viz. Lanzas) will be pleased to issue the orders corresponding." Castillo Lanzas thereupon adds: "Wherefore I transcribe it to your excellency (viz. the governor of California), that in conformity with what is prescribed by the laws and dispositions upon colonization, you may put Senor Castillero in possession of the two square leagues which are mentioned. God and Liberty, Mexico, May 23, 1846. Castillo Lanzas. To His Excellency, the Governor of the Department of Californias." It is not pretended that this dispatch was ever delivered to, much less acted on by, the governor of California. On its face it purports to be merely one official communication reciting another, in which it is stated that the president has thought proper to accede to an application for a grant, and that fact is communicated to the governor in order that he, in conformity with the laws of colonization, may put the applicant in possession. Whether a dispatch of this kind, addressed by one Mexican functionary to another, never acted on by the latter, and which in all probability could not have reached him until after the subversion of Mexican authority in this country, and after the rights of the United States by conquest had accrued could convey any title either legal or equitable to a person who, during the existence of the Mexican authority, did no act whatever on the faith of it, it is not necessary now to decide. It is at least clear, that it is not a formal grant. It is at most, evidence that the president had acceded to a petition for two leagues of land. It is not addressed to the petitioner, nor intended as a muniment of title to him. It is but an order to the governor to make him a title and put him in possession. Whatever title, therefore, the defendants may claim under this official letter, it is evident that it can be at most but equitable and inchoate. And that, as the two leagues were never measured off to the applicant, nor was he put in possession by Mexican authority, the legal title and right of possession to the land vested by the conquest in the United States.

It was not contended at the hearing that any measurement was made or possession given of any specific tract of land by metes and bounds, or that the three thousand varas in every direction, mentioned in the act of possession, were marked upon the ground. It is also clear, that the mining judge, under the ordinances, had no right to give possession of a tract so extensive. It is claimed, however, that this act of possession was ratified and confirmed by the supreme government. No formal act of ratification is produced, or alleged to have been made. The evidence of the ratification is to be found, if at all, in the letter of Lanzas, already cited, and in the communications which it recites, and copies of which are produced, taken, it is alleged, from the Mexican archives. As Castillero, in his proposals to the mining junta, had asked that body to recommend the ratification of his mining possession, and as the communication from the minister of justice states that the president has been pleased to approve in all its parts the agreement made with Castillero, it is urged that that letter is evidence of such ratification. Whether or not it should so be considered, it belongs to another tribunal to decide. It is not claim-

ed, however, that any possession by metes and bounds of this 3,000-vara tract was taken, nor was any survey or measurement effected until long after the conquest of the country, and after the rights of the United States had accrued. It is evident, therefore, that the defendants can claim no legal estate or prior adverse possession, either in the two-league tract which they have surveyed, and now occupy, or in the 3,000-vara tract, mentioned in the alcalde's act of possession. But all these documents are in the bill charged to be fraudulent, and antedated.

The evidence chiefly relied on in support of this allegation, is contained in a correspondence attached as an exhibit to the bill. The genuineness of all of these letters, except one, is admitted. The answer denies "that the said letters and communications were written by the said parties with intent to commit a fraud, or in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as the said intention appears from said letters on the part of the said James Alexander Forbes." Section 32. Two of the defendants claim under James Alexander Forbes. As to him, the conspiracy to fabricate a title "so far as appears from said letters," is admitted. An examination of the letters will, however, convince us, that whatever fraudulent designs were entertained by James Alexander Forbes, were equally entertained by the parties whose agent he was, and with whom he was in correspondence, and that the somewhat anomalous case is not presented of a conspiracy by one person. The original act of possession, or registry of the mine, was obtained, as alleged by defendants, by Castillero for the benefit of himself and his socios or partners. On the 12th June, 1846, Jose Castro, in pursuance of powers given to him, as he recites, by his other partners, executed a power of attorney to one McNamara, authorizing him to enter into a contract for the three pertenencias of the mine with an English company "with exclusion of any other nation." This power of attorney, if its date be genuine, must have been executed on the occasion of McNamara's visit to California in May, 1846, as mentioned in Alexander Forbes' letter of May 11, 1846. He seems not to have immediately acted on it, for a letter is produced from him, dated at Honolulu on the 27th September, of the same year. As the alleged dispatch of Castillo Lanzas was written in Mexico on the 23d May, 1846, it is evident that at the time of executing this power of attorney, the only evidence of title to the mine which Castro could have possessed, or the existence of which he could have known, was the act of the alcalde, in which possession is given of three thousand varas in every direction from the mine. The power of attorney, however, exclusively refers to three pertenencias of the mine. In pursuance of this power of attorney, McNamara, on the 28th day of November, 1846, at Tepic, entered into a contract with Alexander Forbes for the working of the mine. It is, we think, evident from the letter of Alexander Forbes, of January 7, 1840, that Castillero was present at this negotiation. In that letter, Forbes says: "I had the pleasure to receive your very obliging letter of the 29th October last (1846), which chiefly relates to the mine of quicksilver about which I wrote you at so much length by Mr. McNamara. I had, previously to the receipt of your letter, been in treaty with D. Andres Castillero, and on the arrival of Mr. McNamara with powers from the other proprietors, the treaty was much facilitated; and I am now happy to inform you that I have contracted for the habilitacion of the mine, and have purchased a portion of Mr. Castillero's barras, all of which will be made known to you by Mr. Walkinshaw, who goes to California as my agent and attorney for the examination and working of the mine." If, then, as would seem to be the case, Castillero was present when the contract between Forbes and McNamara was entered into, it is strange that he did not himself become a party to it; and it is still more strange that the contract refers exclusively to the working of "the three pertenencias embraced in said quicksilver mine," and makes no allusion whatever to the two-sitios tract which Castillero must at that time have obtained. The instrument by which Castillero ratified this contract, and also that by which he sold a portion of his barras, are dated in Mexico on the 17th December, 1846. In the deed of ratification, for the first time allusion is made to the two square leagues conceded to Castillero, and a copy of the Lanzas dispatch is annexed to it. No reference is, however, made to the mining possession of three thousand varas in every direction, nor to any alleged confirmation of it, but the contract of McNamara for working the three pertenencias of the mine is alone referred to.

In the letter of James Alexander Forbes, in reply to that of Alexander Forbes, of January 7, 1847, and to another of the 27th January, which is not produced, he says: "It is of the most vital importance to obtain from the government of Mexico a positive, formal, and unconditional grant of the two sitios of land conceded to D. Andres Castillero, according to the decree appended to the contract, and also an unqualified ratification of the judicial possession which was given of the mine by the local authorities; including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverer. These documents should be made out in the name of Don Andres Castillero." He then expresses the opinion that it will not be difficult to obtain these documents from the supreme government, and adds that they should be

of the date of the decree of Señor Lanzas. This letter is relied on by the defendants, as showing that at that time the decree of Lanzas, as now produced, was in existence. It must be admitted that the reference to a dispatch of Lanzas, ordering a possession of two sitios to be given, is clear. Whether that dispatch is in all respects the same as that now exhibited, does not so certainly appear. But it is equally clear that the recommendation to procure other documents, the dates of which were to be false, is unequivocally and explicitly made. No letter is produced from Alexander Forbes, which discloses the manner in which this proposition was received; but in October of the same year, we find that the latter has come to California, and is actively engaged in exploring the mine. His proceedings while here will hereafter be referred to. Mr. Alexander Forbes seems to have remained in California until the end of March, 1848. In April of the same year, he appears to have sold his interest in the contract to various habilitadores, among whom, Jecker, Torre & Co. and the house of Barron, Forbes & Co., of Tepic, were chiefly interested. The first letter from these parties is dated on the 20th May, 1849, and is addressed to James Alexander Forbes. It commences as follows: "From certain circumstances you have communicated to us, it may be necessary to purchase some lands in the vicinity of the mine of New Almaden." It then empowers James Alexander Forbes to make such purchase at a sum not exceeding $5,000. On the 27th May, 1849, a memorandum was left with Alexander Forbes, at Tepic, by James Alexander Forbes, "of the documents which Castillero will have to produce in Mexico." The documents required were as follows: (1) A full approbation and ratification of all the acts of the alcalde. (2) An absolute and unconditional title for two leagues of land to Andres Castillero, with boundaries which are mentioned. (3) The dates to be arranged by Don Andres, and to be certified by the American minister. We will hereafter see that this memorandum was alluded to, and its contents repeated, in subsequent letters between the parties.

On the 28th October, 1849, James Alexander Forbes, in a letter to William Forbes, again alludes to the insecurity of the title on which the mine was held. After stating his apprehensions of the destruction of some important papers of the original registry of the mine; or, that a question might arise as to their legality; and, after adverting to the fact, "that no posterior grant of the government could authorize the occupation of the land of the Berreyesas, on which the mine is declared to be situated, in the original expediente of registry," he adds: "In view of these facts, it behoves you to obtain from the supreme government of Mexico, the full and positive grant of the two sitios of land upon the land of New Almaden, under date of the order to Castillo Lanzas, bearing in mind that this document must express the entire approbation of the supreme government of all the concessions made by the local authorities or alcalde of the district of San José, of the original grant or registration of the mine." He then proceeds to give the boundaries which should be mentioned in the concession. They are the same as those given in the memorandum above referred to. In the succeeding letter which, perhaps erroneously, has the same date as the last, James Alexander Forbes again calls the attention of William Forbes to the importance of his suggestions relative to the "perfecting of the title to the mine," and adds: "Without now entering into particulars, already explained to yourself and Mr. Alexander Forbes verbally, I desire only to impress upon your mind the vast importance of securing from the supreme government of Mexico the documents comprised in the memorandum left with Mr. Alexander Forbes when I was in Tepic, for Castillero." On the 30th October, 1849, he again recurs to the subject. In his letter of that date, he says: "You will now readily perceive the great importance of my advice to purchase a part both of the lands of Cook and of the Berreyesas. You were of opinion that this measure would not be necessary, in view of the supposed facility of getting the title to the mine perfected in Mexico. It is now more than five months since it was decided that Castillero should procure the necessary documents in that city, and that they should be sent as soon as possible. On the one hand, I depend on the precarious and illegal possession of the mine granted by the alcalde to Castillero, who was in reality the judge of the quantity of land given by the alcalde. On the other side, I am attacked by the purchasers of the same land declared by Castillero himself to comprise the mine." He concludes as follows: "I do entreat you to use every effort to send me the document of the ratification of the mine, and the grant thereon, at the very earliest opportunity—properly authenticated and certified, as explained by me when I was in Tepic." On the 30th November, 1849, Barron, Forbes & Co., reply to the communications of Jas. Alex. Forbes. As this is the first letter in which his suggestions are noticed by the parties with whom he was corresponding, it is important to see how they were received, and how far the allegation of the answer that the design of fabricating a title existed on the part of James Alex. Forbes alone, is sustained.

After acknowledging the receipt of letters and communications from Jas. Alex. Forbes, by the steamers "California" and "Panama," Barron, Forbes & Co. say: "We are glad that you have not been obliged to purchase Berreyesa's land. This is certainly a most important point, and we trust that the document sent will be of great consequence in that respect. But you will of course take care that no risk is run, and you will do

in this affair as your best judgment shall direct you, keeping in view that at all hazards, and whatever cost, the property of the mine must be secured. Castillero, we expect, will soon be here, from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted." On the 1st December, 1849, Alexander Forbes writes to James Alex. Forbes, as follows: "The document sent up to you by the last steamer, for the grant of lands to D. Andres Castillero, was by mistake, not the one meant to be sent. I find now that the proper one was registered by me in Monterey, and the original deposited there. The one sent you was directed at foot to the governor of California, and the one deposited at Monterey was directed to Don Andres Castillero. The difference is, that by one the delivery by the governor was perhaps necessary to make the grant valid, whereas the other, being addressed directly to Don Andres, did not require that formality, nor was any other proceeding necessary, thus making it a better document than the greater part of the other titles for lands in California." He then proceeds to advise James Alex. Forbes to apply for a copy of the Monterey document, and to withdraw the one sent, and substitute the other. After reminding him of "another difficulty," viz. that the instrument made in the city of Mexico contains an exact copy of the document sent to him, and addressed to the governor, he concludes by leaving the whole subject to the discretion of his correspondent.

It is apparent from this letter, the genuineness of which is admitted, that two documents were then in existence, purporting to be concessions of land to Castillero. One addressed to the governor, which is that now produced, and one addressed to Castillero, which has disappeared. None such has been found at Monterey, where Alexander Forbes himself states he deposited it; nor do the defendants now claim that any such document was ever issued. If, as Forbes states, such a document was deposited in Monterey, it must have been fabricated. For the theory of this case on the part of the defendants is, that the dispatch to Lanzas, addressed to the governor, constitutes their only title for the two-sitios grant. On the 20th December, 1849, Jas. Alexander Forbes, in a letter to Barron, Forbes & Co., acknowledges the receipt of a certified copy of the grant of the two sitios to Castillero, and states at length his opinion that it is insufficient. He again urgently recommends that "Castillero, or some other fit person, should obtain from the supreme government of Mexico, a positive, explicit, and unconditional grant of the two sitios of land. In this document particular reference must be made to the concession of the mine by the alcalde of San Jose, approving of said concession, and conceding to Castillero and his associates in place of the three thousand varas, the said two sitios of land, citing dates, and making that of the said document to correspond with the imperfect and ambiguous document of which you have sent me the copy." At the close of this letter he adds: "I pray you not to be deluded into the belief that there will be no necessity for obtaining the document herein described." On the 29th January, 1850, James Alexander Forbes acknowledges to Alexander Forbes, the receipt of a copy of the contract of habilitacion, and adds: "As you request me to address myself to B., F. & Co. (Barron, Forbes & Co.) on the affair of the mine, I have now written upon this particular subject, to which I request their earnest attention, not as regards the habilitation, but another document which you know of." On the 3d February, 1850, Alexander Forbes writes to James Alexander Forbes as follows: "I have every reason to believe that the documents you mentioned will be found in the city of Mexico; and as Mr. Castillero will return there, they will no doubt be procured; but we are at some loss to know what is exactly wanted, and I beg you will by the next steamer give a sketch of the documents to which you allude, particularly a description of the limits of the grant. I think you must not have received the information sent you of the existence of the grant of the two sitios directly to Castillero and registered in Monterey; nor am I sure if that will mend the matter." After alluding to a last resort which he mentions "with great repugnance," viz. "the promotion of the invalidation of the title of the Berreyesas to their rancho, and adding that "if no opposition or disclosures are made, they may be left in possession," he proceeds as follows: "We think at present that it may be the best plan to get an authenticated copy of the approval of the Mexican government of the grant of 3,000 varas given by the alcalde. Castillero says such approval was given, and that on his arrival he will procure a judicial copy of it. This is the plan we shall adopt, if we hear nothing from you to alter this resolution. Since writing the foregoing, I have looked over your private letter to William Forbes, dated October 18th, and find you state the limits or boundaries as follows." Mr. Forbes then states the boundaries, and adds: "Castillero is not certain of accomplishing this latter plan, and thinks the first, that is, the three thousand varas, the best." And on the 6th February, 1850, Barron, Forbes & Co. write to Jas. Alex. Forbes, informing him that "they had hoped that the document lately sent for this grant to Castillero, would have been sufficient; but as you seem doubtful on this point, we have spoken to him, and his opinion is, that if this grant is not tenable, it will be better to go upon the three thousand varas of the alcalde, granted at the time of giving possession of the mine, and approved of by the Mexican government, which approval will be taken from

the Mexican archives and sent on to you." On the 26th February, 1850, Jas. Alex. Forbes again addresses Alexander Forbes on the subject of the title. He says: "I really did have more faith in the tact and ability of Castillero to perceive the important objects set forth in my memorandum of what was to be done nine months ago by that eccentric individual, and that with the powerful influence he was to have exercised, and the efficient aid that was to be lent him, he would meet with no obstacle to the attainment of the important documents explained in that memorandum. But Castillero has deceived himself; for he thought that boundaries were not necessary, as I shall presently show you. He succeeded in obtaining the grant of two sitios to himself in the mining possession of Santa Clara, while that very act of possession declares that the mine is situated on the land of José Berreyesa, five leagues distant from Santa Clara, &c. Without troubling you with what I have so many times written and explained to you verbally on the importance of the acquisition of the document, I will only say now what it must be; and it is this." The documents so often mentioned are again described with the impressive injunction that "both must be of the proper date, and placed in the proper governmental custody in Mexico." On the 2d March, 1850, Barron, Forbes & Co. inform James Alex. Forbes that "Mr. Barron and Don Andres Castillero are about to proceed to Mexico, and will attend to what you have recommended." On the 16th March, 1850, Alexander Forbes writes to James Alex. Forbes: "Mr. Barron and Castillero have gone off to Mexico, and I wrote them to-day respecting the document you know of, which, if possible. will be procured." This letter significantly concludes: "Let us have quicksilver and all will be well." On the 7th April, 1850, Alexander Forbes informs Jas. Alex. Forbes that "Mr. Barron and Castillero have arrived in Mexico, and have every prospect of finding the documents you are aware of." With this letter of the 16th March, 1850, all information as to the operations of Barron and Castillero in Mexico ceases. It is not disclosed what unexpected obstacle prevented their "finding" in Mexico the documents so much desired, or whether the doubts which Castillero entertained of "being able to accomplish the latter plan" (i. e. the grant of two sitios by definite boundaries) were unhappily realized.

Comment on the evidence afforded by these letters of a conspiracy to fabricate titles on the part, not of Jas. Alexander Forbes alone, as the answer admits, but of Alexander Forbes, and of Barron, Forbes & Co., is unnecessary. The full and specific instructions for the documents "to be procured," and for the "arrangement of their dates," originally given by Jas. Alex. Forbes, and so frequently referred to and repeated; the recital, in the letter of Alexander Forbes, of February 3d, 1850, of the boundaries indicated in the memorandum left by Jas. Alex. Forbes at Tepic; the positive statement by the former that the documents mentioned would, no doubt, be procured by Castillero; the doubts as to the best "plan" to be pursued in their fabrication; the announcement by Barron, Forbes & Co. that Mr. Barron and Castillero "are about to proceed to Mexico," and would attend "to what Jas. Alex. Forbes had recommended;" the significant instruction of Alexander Forbes to Jas. Alexander Forbes that "the document you know of" will, if possible, be procured; and, finally, the announcement that they had arrived in Mexico, and "had every prospect of finding the documents you are aware of,"—seem to establish beyond doubt, the existence of the conspiracy to fabricate titles as alleged in the bill. The nature of the suggestions of Jas. Alexander Forbes is as clear as language can make it. No answers from Alexander Forbes or from Barron, Forbes & Co. are produced in which those suggestions are rejected with the natural indignation of honesty. On the contrary, they are received and acted upon.

It is urged, however, that these letters themselves disclose that the Castillo Lanzas dispatch, now produced, was in existence at least as early as May 5th, 1847; and that therefore it must be regarded as genuine, whatever designs may have been subsequently entertained to fabricate or to "procure" other documents. We have seen that this document for the first time appears in the instrument of ratification by Castillero, dated at Mexico, December 17th, 1846; that no mention is made of it in the contract of McNamara with Alexander Forbes, made at Tepic, and dated November 28th of the same year, although it would seem from Alexander Forbes' letter that Castillero was then present, and must have then been in possession of the Lanzas dispatch if it was issued at the time it is dated. Admitting, then, that the dispatch referred to by James Alexander Forbes in his letter of the 5th May, 1847, is the same as that now produced, a copy of which is appended to the contract of the 17th December, it merely proves that the dispatch was in existence at the latter date, which was after the entire subversion of the Mexican authority in California. If, however, the letter of Alexander Forbes of March 28th, 1848, be genuine, it is an express admission that all the documents produced by Castillero in Mexico as his title to the mine and lands were obtained long after the occupation of California by the Americans. In that letter Mr. Forbes says: "But this interest renders it necessary for me to have the control of all the shares, in order that I may dispose of the whole whenever an opportunity may offer, and save myself from the heavy loss that would ensue should it unfortunately leak out that in fact all the documents procured by Castillero in Mexico

as his title to the mine and lands were all obtained long after the occupation of California by the Americans." "This unfortunate irregularity cannot easily be repaired, and serious objections might be made to our new act of possession." The authenticity of this letter is denied by the defendants. The original is not produced. It is stated by James Alexander Forbes to have been stolen from him. The existence of the original and the accuracy of the copy are sworn to by two witnesses, James Alexander Forbes and Robert Birnie. The latter swears that he was employed by one of the defendants to obtain from James Alexander Forbes any document that would be prejudicial to the mine, and he was informed that any such document would be liberally paid for. He accordingly made a copy of the letter of Alexander Forbes of March 28, 1848, which he gave to Mr. Barron, by whom he was paid at the time $200, and $200 a few days afterwards. That the copy now produced is the same as that left with Mr. Barron, and that the original was in the handwriting of Alexander Forbes, with which the witness is acquainted. James Alexander Forbes states that on the day on which he furnished a copy of this letter to be given to Mr. Barron, the letter was stolen from his carpet bag. The character of Mr. Birnie is unimpeached. No affidavits contradicting any of the statements made by him have been submitted. We are therefore not warranted in treating the allegation of the answer that this letter is forged, as sufficient to establish the fact.

We have seen from the letter of Alexander Forbes of the 1st December, 1849, and from his letter of 3d February, 1850, that at the date of the former there were at least two documents for the grant of lands to D. Andres Castillero: one, a notarial copy of which had been sent to James Alexander Forbes, which was directed at foot to the governor; the other, the original of which was deposited at Monterey, and which was "directly addressed to Don Andres," and therefore did not, in the opinion of Alexander Forbes, require a delivery by the governor to make it valid. This latter, as has been stated, has not been produced, nor is it pretended by the defendants that it ever existed. The fact that Mr. Forbes deposited at Monterey the original of a document which would thus seem to have been fabricated, may well suggest suspicions as to the genuineness of the other which is now produced.

In the exhibit attached to the deposition of Jose M. Lafragua, a copy of the Castillo Lanzas dispatch is found, together with a certificate of Jesus Vejar, a notary public, signed, as it recites, on the 1st March, 1850, "at the instance of Messrs. Barron, Forbes & Co." In this certificate the notary attests that the dispatch signed by Lanzas has "been respected under that signature, and obeyed by the Mexican authorities that governed in Upper California in the year 1846—according to insertions which said authorities made of said instrument in acts which they passed upon the subject of which they treat, and which I certify to have seen." Almost every statement contained in this certificate is admitted to be false. It is not pretended by the defendants that the dispatch of Lanzas was ever delivered to the governor, nor that it was even presented to, much less "respected and obeyed by the Mexican authorities of Upper California, in the year 1846." The "insertions of said instrument, made by those authorities, in acts which they passed upon the subject," and which the notary certifies to have seen, are purely imaginary. When a certificate of this character is procured from a Mexican notary, by some of the defendants in this case, and by them filed as an exhibit, the court is surely justified in regarding with suspicion, not only all documents which are authenticated in a similar manner, but also those the genuineness of which is assailed by other proofs.

We have thus far considered the case as it is presented by defendants, and as it appears from the letters admitted by themselves to be genuine, with the exception of one letter, the genuineness of which they deny. We have not thought it necessary to enter upon a minute examination of the mass of evidence which has been offered on either side. That duty properly belongs to the district court. Whether or not the letters are susceptible of an explanation consistent with the bona fides of the parties by whom they are written; whether or not the testimony of Lafragua, and other witnesses, the mention of this grant in his report, and the production of the document from the archives, and other evidence which may be offered hereafter, will be sufficient to satisfy that court of the genuineness of the titles produced by the defendants, we cannot now anticipate.

We have only entered upon the inquiry so far as was necessary to show, that the allegations of fraud in the bill are sustained by testimony sufficient to suggest grave suspicions as to the genuineness of the titles on which the defendants rely, and to justify the court in interposing, by injunction, in behalf of the legal title, to stay the destruction of the estate in controversy, pending the proceeding by which the validity of the title will finally be determined. Allusion has been made to the visit of Alexander Forbes to California in October, 1847. His proceedings on his arrival will now be adverted to, with a view of showing how the possession of the lands and mine now held by the defendants was acquired. In the letter of James Alexander Forbes to Eustace Barron, dated January 30, 1846, information is given that "Castillero, a sort of commissioner from the Mexican government, is working a quicksilver mine near the mission of Santa Clara." How long he

continued in California does not appear except from the affidavit of Forbes, in which it is stated that soon after entering into partnership with his associates, he went to Mexico and never returned. It also appears from the same affidavit, that Padre Real, one of the partners, was left in possession. On the 22d September, 1846, James Alexander Forbes writes to Alexander Forbes: "I am now in charge of the quicksilver mine, and am going to work it until I hear from Castillero, and am upon the point of striking a bargain for four shares." The motive for thus transferring the possession to James Alexander Forbes is stated by Mr. Forbes in his affidavit, and is in itself probable. It was to place the mine under cover of English protection, as the American forces were in possession of California, and Mr. Forbes was British vice-consul. The possession so delivered to Mr. Forbes comprised the mine itself, a log-cabin and shed, together with some old tools and utensils. The cabin was not occupied; but an Indian sometimes slept in the mine. Up to this time, 2,000 lbs. of quicksilver had been extracted. It is further stated by Forbes that this possession was kept up by Indians whom he sent to work there, although during the winter of 1846 it was for a time entirely abandoned. Such seems to have been the situation of the property up to the time when Alexander Forbes acquired his interest in it by his contract with McNamara, and dispatched Walkinshaw to California as his agent. To him, Mr. James Alexander Forbes transferred the possession, and assays and observations were commenced. The scarcity of operatives and the indolence of the Indians appear, however, to have prevented any considerable operations. In the month of October, 1847, Mr. Alexander Forbes arrived in California, with tools and laborers. On his arrival, explorations were immediately commenced, and on the 24th November, 1847, he announces the discovery of the "cinta," or vein of ores, the direction of which had been before entirely mistaken. On the 19th January, 1848, he writes to James Alexander Forbes, as follows: "I am very much obliged to you for your very prompt attention to the business in hand, and return the expediente immediately. I am much surprised at the result of your assay, and shall try what I have. It will, of course, be better to say nothing about it, particularly as I have already written to Monterey that there is no mine; nor does there appear to be any quantity of this kind of stuff. I hope soon to see the alcalde."

It is admitted in the answer that in January, 1848, the alcalde, James W. Weekes, made on the petition of Alexander Forbes, "a concession to him of the said mine, to correct and reform what had previously been given." The extent of the possession so given is stated by James Alexander Forbes to have been four pertenencias, or two hundred by eight hundred varas. It is to this "new act of possession" that Alexander Forbes probably alludes in his letter of 25th March, 1848, when he says "that serious objections may be made to its legality." Shortly after this possession was obtained, Mr. Forbes caused two square leagues to be surveyed around the mine, which in 1852 were put under fence, and have ever since been inclosed, and are now in possession of defendants. It is obvious that neither the act of Weekes, by which possession was given of a tract of eight hundred by two hundred varas, nor the act of Forbes himself, by which possession was taken of two square leagues, can have any validity against the United States, who had already acquired the legal title to and constructive possession of the land. It is not claimed that at the time of the first possession any measurement was made or boundaries fixed of the three thousand varas of which possession was alleged to have been given. No evidence has been offered to show that the possession up to the time of Weekes' measurement was other than that described in the affidavit of Mr. Forbes.

It has already been stated that the mining-title relied on by the defendants is claimed to be founded on a registry and act of possession by Pico the alcalde of San José. At the time when Weekes, the American alcalde, gave the possession of the mine and four pertinencies above referred to, Alexander Forbes also procured from him a certified copy of the expediente of the mine. This copy was prepared by James Alexander Forbes from an original furnished to him by Alexander Forbes; and to this copy the certificate of Weekes is annexed, certifying it to be "a faithful copy made, to the letter, from its original, the expediente of the mine of Santa Clara, or New Almaden, which exists in the archives under my charge." This certificate is admitted to be untrue, or at least inaccurate. The original from the archives of the alcalde has since been produced, and it shows that the copy certified by Weekes is neither "faithful" nor "to the letter." It is evident that the copy certified to by Weekes could neither have been prepared from nor compared with "any original existing in the archives under his charge." The original expediente now produced, is stated by Capt. Halleck, the superintendent of the mine, to have been found by himself in the office of Mr. Belden, mayor of San José, in the winter of 1851. If this document be indeed the original denouncement and registry of the mine, and if from the time of the denouncement it had remained on file as an original record in the alcalde's office, it is strange that the superintendent and counsel of the mine should so long have been ignorant of its existence.

In the suit brought in 1850 for the possession of the mine, by Berreyesa against James Alexander Forbes and Walkinshaw in the district court for Santa Clara county, a mo-

tion was made to require the defendants to produce "all papers of a pretended grant for two sitios, together with all other paper or papers connected with the title to said Almaden mine or the land upon which the same is situated, upon which defendants intend to found their claim to said land or said mines, &c." This motion was granted by the court, and said papers "or copies thereof" were ordered to be produced according to said motion. To this order the defendants answered by affidavit. In this affidavit they allege that they "have exercised all diligence to procure the said documents; but have been unable to do so, but expect soon to receive them from the parties in Mexico who hold them." They further aver "that the said documents and others which they have sent for in Mexico, are necessary to enable them to proceed to the trial of the cause; and they specify the following documents as absolutely necessary to them before they can proceed to trial": (1) "The original denouncement of the mine of New Almaden, and the judicial possession given of the same in the year 1845." (2) "The confirmation of said denouncement and possession by the supreme government in 1846, and prior to the late declaration of war by the United States against Mexico." (3) "The original grant of land, including said mining possession, made by the supreme government of Mexico prior to the declaration of war as aforesaid to the owners of said mine." This affidavit is sworn to by Mr. Halleck, one of the attorneys for defendants. It is evident that at this time, viz. December, 1850, Mr. Halleck could not have been aware that the original denouncement of the mine and judicial possession of the same given in the year 1845, was not in Mexico but on file among the archives of the alcalde's office to which it belonged. Nor could he have been aware that the concession of two leagues and the ratification of the mining possession were not, as implied in his affidavit, contained in two documents, but in one, viz., the dispatch of Castillo Lanzas, and that that dispatch was not dated "prior to the declaration of war by the United States," but ten days subsequently. But at this very time Mr. Jas. Alex. Forbes, one of the defendants in that suit, had already received a notarial copy of the Lanzas dispatch, addressed to the governor of California; and the original of another, addressed to Andres Castillero himself, he had been informed by Alexander Forbes had been deposited and registered in Monterey.

Up to the time of filing the petition of Castillero to the board of land-commissioners, the original expediente on file in the recorder's office seems to have escaped observation; for the exhibit filed with that petition is a copy of the document certified to by Weekes, and not a copy of that since produced from the recorder's office. We are aware that all these circumstances may be explained, and that the genuineness of this document is testified to by a number of witnesses. We have referred to the manner and time of its production to show that it has not that proof of genuineness which would be afforded by its admitted production from the archives of a Mexican office, transferred to us on the acquisition of the country.

The defendants have also produced in support of their title a large number of documents, purporting to be copies of originals on file in Mexico. They consist of official communications from various officers in Mexico, and purport to be the proceedings of those authorities, on the application of Castillero to the junta for the encouragement of mining, and which resulted, it is claimed, in the concession of the two sitios, as shown in the dispatch of Lanzas. None of these documents are authenticated under the great seal of Mexico. They are certified by the secretary or chief clerk of the departments in which the proceedings purport to have taken place They have been recently procured in Mexico, by an agent of the defendants. Whether documents alleged to exist in the archives of Mexico, can be regarded by the court if unauthenticated by the political power of that country under its great seal, it is not necessary now to decide. But as they have been obtained since the visit of Mr. Barron and Castillero to Mexico, and as the last injunction of James Alexander Forbes to Alexander Forbes was to have the documents referred to by him "of the proper date, and placed in the proper governmental custody in Mexico," we are at least justified in regarding such documents with suspicion unless authenticated in the most satisfactory manner. But especially should we call for such proof, when we remember that the documents purport to be a grant of land in California, dated May 23d, 1846, and that the Mexican government, in the original treaty of peace with the United States, declared in the 10th article, "that no grants whatever of lands in any of the territories ceded to the United States had been made since the 13th day of May, 1846."

We have thus examined at greater length than was intended the evidence on which the United States rely, to sustain the allegations of fraud which are made in the bill. The evidence considered has been chiefly that afforded by a correspondence admitted, with the exception of one letter, to be genuine; and that relating to the production of the expediente of the mine, in great part presented by the defendants themselves. The examination has been prosecuted not with a view of reaching any conclusion upon the question involved, but merely to ascertain whether the allegations of fraud in the bill which are not positively denied by the answer, have such a probable foundation as to justify the court in interfering by injunction, to preserve the property during the investigation in which the validity of the title will finally be determined.

The results of the examination may briefly be recapitulated as follows: It appears from the letters of the defendants, or those under whom they claim, that in the years 1847, 1848, 1849, and 1850, plans were discussed, and the design was entertained to procure documents from Mexico, the dates of which were to be "arranged" by Castillero, and which were to be "placed in the proper governmental custody in Mexico," and certified copies of which were to be sent on. That in May, 1850, Mr. Barron and Castillero proceeded to Mexico, "to attend to what had been recommended" by James Alexander Forbes. That documents have since been produced "from the proper governmental custody in Mexico," which are claimed to be a grant of two leagues of land and ratification of the mining possession. That these documents are not attested by the great seal of Mexico, or officially authenticated and recognized as genuine by the political power of that country. That they are dated subsequently to the 13th of May, 1846; and that the Mexican commissioners solemnly and repeatedly declared to the government of the United States, that no grants whatever of lands had been made in the territory of California since that date. That in December, 1849, two documents, of nearly similar import, appear to have been in existence; both of which could not have been genuine. That the original of one of these, which was deposited in Monterey, has disappeared; while the other is authenticated by the certificate of a notary obtained, as it recites, at the instance of some of the defendants, nearly every statement of which is untrue. That the expediente of the mine originally produced, and which was by Alexander Forbes procured, to be certified by Weekes, to be a "faithful copy to the letter" of the expediente on file in his office is not a copy of the documents since produced from that office. That this last document was not discovered until 1851, and up to that time its existence seems to have been unknown to those of the defendants who were most likely to have known of it, and to their agent and attorneys. That no measurement of the land alleged to have been granted by the alcalde, or demarkation of its boundaries, was effected during the continuance of the Mexican authority in this country; but the possession of the mine itself, which had been kept up with occasional interruptions, by Indian workmen, was transferred after the occupation of the country, to the British vice-consul, in order to place it under cover of the protection of the English government. That the first formal possession, by metes and bounds, of the tract now held by defendants, was taken long after the occupation of California by the American forces, and after the title of the United States had accrued. That at the time this possession was taken, the existence of valuable ores on the land was studiously concealed; and that two leagues of land were subsequently taken possession of and inclosed by the defendants without any authority whatever. It further appears that the United States are now seized of the legal title of the land, and that the title of the defendants, assuming it to be a genuine but an imperfect or equitable title, is one the validity of which, under the Mexican mining and colonization laws, is open to grave doubts. All these circumstances are, in our opinion, abundantly sufficient to show, not only that there is a substantial ground of controversy between the parties, but that the allegations of fraud in the bill, which are met with no positive denial in the answers, are sustained by proofs of the fraudulent designs of the parties, and of the manner in which the documents are produced, which leave the question of their genuineness open to grave doubts.

In such a case, where the substance of the estate and that which constitutes its chief value, is being wasted and carried off in enormous quantities, and where the threatened injury is to an extent far greater than can be compensated by damages, it seems to us clearly the duty of the court to preserve the property pending the litigation by which the right to it will be determined.

Case No. 15,999.

UNITED STATES v. PARROTT et al.

[1 McAll. 447.] [1]

Circuit Court, N. D. California. Jan. Term, 1859.

EQUITY PRACTICE — COMMISSION TO TAKE TESTIMONY ABROAD—NOTICE—STATE AND FEDERAL COURTS.

1. A motion for the appointment of commissioners to take testimony abroad, is not grantable of course.

2. Special motions, unlike those grantable of course, require allowance by the judge, and previous notice to the adverse party.

3. The power to grant a dedimus potestatem, is given to the federal courts, to prevent the failure of justice, to be exercised according to "common usage."

4. Where motion is made to a court of equity, the usages and rules of chancery must apply.

5. The practice and jurisdiction of this court, as a court of equity, cannot be controlled by the practice of the state courts.

6. The materiality of the testimony, and the purposes for which it is invoked, will determine the action of the court.

Application for a dedimus potestatem to take testimony abroad. [An injunction pendente lite was heretofore granted. See Case No. 15,998.]

P. Della Torre, U. S. Dist. Atty.

Edmund Randolph and Edwin M. Stanton, for complainants.

A. C. Peachy, Gregory Yale, and Hall McAllister, for defendants.

McALLISTER, District Judge. In this case a bill was filed by the district attorney

[1] [Reported by Cutler McAllister, Esq.]

of the United States, in behalf of the government. Among other matters, it alleged that the title to the premises in dispute was in the United States; that defendants had taken tortious possession of them; that they consisted of a mine of great value; that defendants had extracted minerals therefrom to the value of $8,000,000; that they were extracting therefrom minerals to the annual amount in value of $1,000.000, and threaten to continue the waste; that they were unable to respond for the damages which had already accrued, and which would still accrue; that the defendants, in the name of one Andres Castillero, had presented a petition to the "board of land commissioners," under the act of congress approved March 3, 1851 [9 Stat. 631], which was pending on appeal from the decision of the commissioners, before the district court of the United States for the Northern district of the state of California, the object of which petition was to obtain from the United States a confirmation of the title which they pretended to hold from the Mexican government; that the title under which they held possession was forged, ante-dated, and fabricated in pursuance of a conspiracy to cheat and defraud the United States of their rights to the said property. The bill concluded by charging that defendants were destroying the substance of the mine, and prayed that an injunction might issue to stay the waste defendants were committing, and threatened to commit, until the determination of their alleged title by the tribunals to which the adjudication of it was confided, and that a receiver be appointed. To this bill an answer was filed, and on the bill and answer the motion for injunction was argued and decided. The charges in the bill specifically made, of forgery, and ante-dating of the documentary title under which defendants held, were not directly and fully denied; all that was averred was the ignorance of defendants of their existence, and their belief of the genuineness of the documents. In relation to the charge made in the bill of a conspiracy to cheat and defraud the United States, after admitting the genuineness of all the letters save one, appended to the bill, the answer, in response to the allegation of conspiracy, denies "that the said letters and communications were written by the said parties with intent to commit a fraud, or in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as the said intention appears from said letters on the part of the said James Alexander Forbes." So far, then, as the intention of conspiracy appears from the letters, it was admitted that "Forbes," under whom two of the defendants claimed, may be guilty. In view of the insufficiency of the denials in the answer, the irreparable character of the mischief complained of, and the prima-facie title of the complainants exhibited by the bill, answer, and exhibits, the court granted the injunction, and refused the appointment of a receiver.

The well-settled rules of chancery require that full, direct, and positive denials should have been given to the charges of fraud, forgery, ante-dating, and conspiracy. This doctrine is enunciated by uniform decisions. Poor v. Carleton [Case No. 11,272]; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch [13 U. S.] 160; Everly v. Rice, 3 Green, Ch. [4 N. J. Eq.] 553; Roberts v. Anderson, 2 Johns. Ch. 202; Apthorpe v. Comstock, 1 Hopk. Ch. 143; Ward v. Van Bokkelen, 1 Paige, 100. Independently of authority, reason and common sense affirm the propriety of the rule. The facts charged in the bill were forgery and ante-dating. These were not denied, but the ignorance of the defendants of their existence and their belief in the non-existence of them averred. In Roberts v. Anderson, 2 Johns. Ch. 202, Chancellor Kent has well said, "The defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance, or the sincerity of their belief."

It has been suggested, that the allegations of the forgery and ante-dating not having been sworn to from personal knowledge, that circumstance should modify the rule. No authority has, nor it is believed can, be invoked to sustain a proposition so novel. The allegations of a bill properly made, which so clearly charge the fraud as to make it perfectly intelligible to the defendants, entitle the complainant to such a denial as is prescribed by the rules of chancery. If such an one is not put in, the defendant cannot arrest the issue of an injunction on the ground that he has filed an answer denying the equity of the bill. Relax that rule, and what might not be the injurious results?

There are many cases in which rights may be violated under circumstances which may warrant an honest belief that atrocious fraud had been perpetrated; but those circumstances may have transpired at a distance from the party, and he unable to swear to them from personal knowledge. Can it be contended with any reason, that when the party comes into a court of equity, that tribunal will award to an answer whose denials of forgery and ante-dating are made "upon information and belief," the character which the law annexes to an answer where the denial of the fraud is on personal knowledge? The allegations of a bill, are mere pleadings; the averments in an answer responsive to them, are regarded as evidence equivalent to two disinterested witnesses, or one witness and strong corroborative circumstances. To consider that the denials of an answer on "information and belief" are to be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge, is simply to confound the distinction which exists between pleadings and evidence. So to modify the rule, would

exclude any application by way of information, through its officer, by a government. To every such application an answer on "information and belief" would be sufficient, for personal knowledge of facts is not to be expected from the government. Deeming the rule applicable to this, as it is to all similar cases, the court considered that the denials of the fraud, ante-dating, and forgery were not such as ought to arrest the issue of an injunction; that the case was one of irremediable mischief; and lastly, that the pleadings and exhibits in the case showed a probable foundation to entitle the complainants to be protected against that irreparable mischief, until the determination of the question of title in the tribunal in which it was pending,—this court, without pausing to dwell upon the title set up by defendants, independently of any alleged forgery of it, directed the injunction to issue, but declined for the present the appointment of a receiver. The injunction exists, the issue of title is still pending in the district court, there is no suggestion of any fact that has arisen since the decision of the court to change the relative attitude of the parties from what it was at that time, nor to alter the jurisdiction of the court in any way over the case. That jurisdiction was distinctly enunciated to be confined to granting the prayer of the bill, the court disclaiming at the same time all power to decide upon title, either on a motion to dissolve an injunction, or on a final hearing.

In this condition of things, an application is made to this court to designate commissioners to take testimony abroad. The facts expected to be proved go mostly to the establishment of the title of the defendants, and the genuineness of the documents by which they propose to sustain that title. The avowed object of invoking that testimony, is "to offer it in evidence on the trial of this case, or on a motion to dissolve the injunction which has been granted against the defendants therein, or for any other purpose in said cause to which such evidence shall be applicable." The grounds taken in support of this motion are,—1st. That it is matter of right, grantable of course; 2d. That the materiality of the testimony invoked, whether there is to be any hearing at all in the case, whether the testimony would be hereafter admissible, are all matters to be considered when the evidence is offered, not by anticipation. If the first proposition be correct, the second follows as a corollary from it.

The first ground which claims the action of this court as matter of right, and the granting of the application as matter of course, presupposes the act of the court to be merely ministerial. If this be so, it has no right to investigate whether the testimony be material, or whether it can be used when obtained. All it has to do, is to perform the mere ministerial duty which it is commanded to discharge, and the present application is needless. Whence the necessity of naming witnesses, the facts they are expected to prove, and the purpose for which their testimony is invoked, if this motion is grantable as a matter of course? Both these grounds will be discussed together, for each is involved necessarily in the other; for if the granting a "dedimus potestatem" is matter of course, the court has nothing to do with the materiality of the testimony, the use to be made of it, or any other matter connected with it. If, on the contrary, the power of this court to grant this application depends upon the materiality of the testimony, and the purposes for which it is invoked, it is evident that neither ground can be tenable.

To sustain the proposition that the granting of the present application is matter of right, reference is made to the 67th rule governing equity practice, as amended in 1854, by the supreme court of the United States, and to the 5th section of the act of congress of 22d August, 1843. By the 67th rule it is provided, that after a cause is at issue, commissions to take testimony may be taken out in vacation, as well as in term-time upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice being given to the adverse party to file cross-interrogatories before the issuing of the commission, &c. And the rule provides that in all cases the commissioners shall be named by the court, or a judge thereof. The amendment to this rule, to be found in 17 How [58 U. S.] vii., declares that the presiding judge of any court exercising jurisdiction, either in term-time or vacation, may vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge can now do by the 67th rule. The presiding judge of this court has never vested in the clerk any such power. We must look, therefore, to the former rule, the construction of which will necessarily determine the extent of any power which the judge could have delegated to the clerk; for the judge could not have delegated any power which he did not himself possess, and which by the requisitions of the amended rule was to be exercised by the clerk in the same manner as it could be by the judge. The fifth section of the act of 22d August, 1843 (5 Stat. 517), provides, that the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for certain purposes, and that it will be competent for any judge at chambers, and in vacation as well as in term-time, to award all such process, commissions, rules, and proceedings, &c., whenever the same are not grantable of course, according to the rules and practice of the court. It is evident, then, from the act, that all commissions are not granted of course. Looking through the equity rules, it will be found that a distinction is preserved between spe-

cial motions and those grantable of course. What constitutes a motion grantable of course, and a special one, is to be inferred from the 5th rule of equity. The distinction is, that a motion which requires an allowance from the judge or a notice to the opposite party is a special one; all others are grantable of course. This motion asks for the interposition of the judge to nominate commissioners, and requires that previous notice of ten days should be given.

In addition to foregoing rules and act of congress, reference has been made to Daniell, Ch. Prac. 1099, where that author discusses the question, what facts are necessary to be inserted in the affidavit on which the application for a commission is founded, and shows it is from the authorities, uncertain whether the names of the witnesses, or a statement of the points to which it is intended to examine them, are necessarily to be given in the affidavit. In relation to the names of witnesses, he states that according to the books of practice all that need be stated in the affidavit is, that the testimony of some of the witnesses whom it is proposed to examine is material, and that the party cannot proceed to trial safely without their testimony. He further states, when the application is made in an early stage of the case the court seldom denies the application for a commission; it will, however, exercise a discretion upon this subject, and he gives various instances where such applications were refused. As to the necessity of stating the facts to be proved, or the names of the witnesses in the affidavit, the conclusion to which he comes, after a review of the authorities, is, that in order to dispense with the necessity of stating them in the affidavit, the names of the witnesses, and the object to which their testimony is required, and the necessity for examining witnesses abroad, must be evident from the pleadings, if not made so by the affidavit; and he distinctly states, that the reason why Lord Eldon, in the case of Montizibel v. Machada, did not require those matters to be stated in the affidavit, was, that his lordship had looked into the case, as made by the pleadings, in order to see whether there were facts to which it was proper to examine the witnesses. The same author tells us, that it must appear that the facts relied on as to which evidence is sought, are such as can be made use of, either in support of the action or in defense of it. Daniell, Ch. Prac. 1096.

The foregoing authorities (all that have been cited by counsel) do not sustain the proposition asserted. There are but two sources of power to which this court can look for its action to obtain the testimony of absent witnesses. The first is by the issue of letters rogatory. There is no instance on record of these having been issued as a matter of course, nor is the present an application for such. The second source is statutory; nor can this court receive any aid, save by implication from that source. The two acts of congress upon this subject, are those of 24th September, 1789, and 24th January, 1827. The former, after describing minutely the mode of taking depositions de bene esse, limits the execution of commissions to an American magistrate. The latter act (1827, 3 Stat. 197) is limited in its terms to the execution of commissions within the limits of the United States and their territories. It would be a strange state of things, that without any express legislation as to the mode and manner of issuing commissions, parties would have the right to consider the issue of a commission to take testimony abroad grantable of course, and the nomination of commissioners a mere ministerial act by the judge. The only source of power to which this court can look, is the 30th section of the judiciary act of 1789 (1 Stat. 73); and from it derive that power by implication. That section provides, "that nothing herein contained shall be construed to prevent any court of the United States from granting a dedimus potestatem to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice." This act, like all laws made in derogation of the common law, should be strictly construed. No commission should be issued under it, unless necessary to prevent a failure or delay of justice, or in accordance with common usage. What is meant by common usage, when an application is made to a court of equity for a dedimus potestatem to authorize the taking of testimony abroad? It has been contended on this motion, that by the terms "common usage" in the statute of 1789, congress must have meant the practice of the courts of the states; and the case of Buddicum v. Kirk, 3 Cranch [7 U. S.] 293, has been cited to sustain this proposition. It is true that Conkling, in his treatise (page 421), states that the above case enunciates a proposition which he embodies in these words: "The circumstances under which a commission will be issued, and the mode of obtaining, executing, and returning it, in the several districts, depend upon the practice and laws of the respective states, and the rules of the several courts of the United States." If this text-writer intended to say that the rules of chancery, in relation to taking testimony abroad, were to be in accordance with the practice and laws of the different states, he asserts a doctrine totally indefensible. If such was his intention, his ingenuity has detected in that case what has escaped the sagacity of Mr. Justice Curtis; for the latter, in his head-notes (1 Curtis, Dec. 584), has failed to perceive, for he does not notice, any such doctrine. The case of Buddicum v. Kirk was a common-law case, and the question arose, whether service of a notice to take a deposition upon an attorney at law was equivalent to one upon an attorney

in fact? As the law of Virginia required the notice to be made on the attorney in fact, the court, very properly, under the 34th section of the judiciary act, adopted the law of the state in a common-law case. That case is no authority to sustain the proposition that the practice of this court acting as a court of equity, is to be controlled by the practice of the state courts, whatever that may be. It would make the chancery jurisdiction and practice of the federal courts subservient to the practice of the courts of every state in which the federal court might sit; whereas, it must be uniform in all the states. In Gaines v. Relf, 15 Pet. [40 U. S.] 9, this question is fully discussed, and even in Louisiana, where there is no equity state court, it was decided that chancery practice prevails in the circuit court of that state, and must prevail in accordance with the rules prescribed by the supreme court, and where they are silent, according to the practice of the high court of chancery.

The question then arises, whether an application to a court of equity to take testimony abroad is grantable of course, and all considerations of the materiality of the testimony invoked, and the purposes for which it is sought, are to be postponed until the testimony is offered as evidence? Authorities have been cited to sustain the position, that a party has a right to move to dissolve an injunction, and even to renew such motion. This is doubtless true; but the right to make any number of such motions does not alter the nature of the evidence proposed to be offered to sustain them, or fix the propriety of granting the application to take testimony abroad. These are to be controlled by the usages and rules of a court of chancery.

The proviso to the 30th section of the judiciary act of 1789 (1 Stat. 90) gives the power to issue a dedimus potestatem according to "common usage." When an application for such process is made to a court of equity, that common usage is to be ascertained by reference to the usages of chancery. One of the fundamental principles which control that court is, that as its object in compelling a discovery, or granting an application for a commission to take testimony abroad, is to enable itself, or some other court, to decide on a matter in dispute between the parties, the discovery or testimony sought must be material to the relief prayed for, or material to be used in some other suit actually instituted or proved to be capable of being instituted in another forum. If, therefore, the party does not show the testimony he seeks is material to enable him to support or defend a suit, he shows no title to what he seeks; and, consequently, if he seeks it by bill a demurrer will lie, if he seeks it by motion he is not entitled to it. Such is the doctrine enunciated by Lord Redesdale (Mitf. Ch. Pl. 192). It is illustrated by decided cases. Daniell in his treatise cites from the case of Shedden v. Baring, 3 Anstr. 880, to sustain the proposition that a bill for discovery or a commission to take testimony abroad must not only show that the action has been brought, but it must show that the facts relied on as to which evidence is sought are such as can be made use of, either in support of the action or in defense of it; otherwise, the bill will not lie. In England the usual mode is to apply by a bill for a discovery and a commission to take testimony abroad, or to take testimony abroad only. "A bill of this kind [says Daniell], for the mere purpose of examining witnesses abroad, is subject to nearly the same rules as bills for discovery in aid of an action at law." Daniell, Ch. Prac. 1096. There can be no stronger proof that an application to take testimony abroad is not matter of course, but is an application to the judicial discretion, than the fact that the ordinary course in England is to apply by bill in equity to obtain it. In Lousada v. Templar, 2 Russ. 561–564, Lord Eldon says "that though the circumstances were such that even if the plaintiff at law had obtained a verdict, he could not allow him to receive the money until it was ascertained what had been done in Peru, yet he would not grant commissions in aid of a defense to an action when he was not satisfied that the facts alleged as a defense would constitute a legal defense to the legal demand." "The court," he added, "ought never to grant a commission without examining strictly what is the state of the pleadings." It is evident from this statement of the lord chancellor, that when after his retirement from office he gave an opinion, as stated by Daniell, that the witnesses' names need not be inserted in the affidavit, he did not intimate they and the other facts were not necessarily made to appear in the pleadings and by other means. In the case of Martin v. Nicolls, 3 Sim. 458, there is a strong illustration of this doctrine. The principle asserted is, that a bill for discovery against a defendant, and a prayer for a commission to take the examination of witnesses, is demurrable. The facts in the case were, that a bill was filed alleging that a judgment had been obtained against complainant in Antigua, on which an action was pending in England against the complainant. It set forth certain facts to show the foreign judgment was void, prayed a discovery against the defendant, and stated that without proof of such facts the complainant could make no defense at law; it prayed also, that a commission might issue to take the testimony of witnesses at Antigua, and other places beyond sea. A demurrer was filed. The court after deciding (correctly or not is not the inquiry), that to the foreign judgment the facts if proved could not constitute a defense, for that reason sustained the demurrer. The chancel-

lor said, "If I were to allow this bill to stand, I should be in effect saying, that the judgment obtained in 'Antigua' may be overruled in the court of common pleas." In the language of the chancellor in that case, this court may say, that if they allow the present application, so far as the evidence as to title goes, that it is in effect to say it has the right to try title. Lord Eldon has said, as we have seen in Lousada v. Templar, 2 Russ. 561, the court ought never to grant a commission without strictly examining the pleadings. This is for the purpose of ascertaining the issue to be tried by the court, and the materiality of the testimony to try it. When we look at the pleadings in this case, we find the relief prayed for is the issue of an injunction to arrest the destruction of property until an adjudication of it has been made by the tribunals to which it has been confided by law. The whole structure of the bill assumes the ground, and upon it asks the relief prayed, that the district court has sole jurisdiction between the parties on the question of title, and that all the power of this court is limited to granting an injunction, and thus extending a relief not within the sphere of the district court. In the answer, a demurrer is incorporated, which assigns as one of its grounds, that it appears from the bill itself, that no other than the district court can entertain jurisdiction of said claim. It has been contended throughout, by the defendants, that this court could not adjudicate upon title, it being within the sole jurisdiction of the district court, and that circumstance assigned as a reason why this court could not entertain jurisdiction of this bill, which asks for the issue of an injunction. The court, by decreeing the relief prayed for, asserted jurisdiction over the injunction, although it disclaimed all power to decide title. They did so, upon the ground that a court of equity would provide for the safety of property in dispute, pending a litigation, and sustained the position by reference to the action of the English chancery in relation to the preservation of property in dispute in the ecclesiastical courts. Now, the pleadings in this case are not changed; the issue is the same; title is no more now in issue in this court than it was; the jurisdiction of this court over this case is in no ways altered, increased, or diminished.

Under these circumstances, application is made to obtain testimony from abroad which relates to the title of defendants, to be used on the trial of this cause, or upon a motion to dissolve the injunction which has been granted. It is the ordinary practice of a court of chancery to dissolve an injunction already issued, after answer filed; and there is no objection to the renewal of such motion upon new and material testimony which would be admissible as evidence on the issue pending between the parties. Indeed, such motion may arise on any new matter which may have arisen since the issuing of the injunction. For instance, the injunction issued in this case has been granted to preserve property, the title of which is pending in another court. This tribunal will watch the conduct of the parties, and continue or dissolve the injunction, as the justice of the case may demand. If the conduct of the complainant be such as to intimate a desire to delay or postpone the trial of the title, this court would, upon motion, dissolve the injunction and dismiss the bill. If, on the other hand, the conduct of the complainant be such as evinces a desire to go to prompt trial of the title, the injunction would be continued until the determination of the title by the courts to which it was confided by law. If that determination be in favor of defendants, a dissolution of the injunction would be decreed, and the bill dismissed. If in favor of complainant, it is unnecessary to prejudge the action of the court. But the result must be in one event, to decree a perpetual injunction; and in another, to dissolve the injunction, restoring the parties to their former relative position and respective rights, the court having accomplished its object—the preservation of the property pending the dispute. Whether a perpetual injunction be granted or the bill dismissed, the decree will be final on the only issue of which this court has jurisdiction.

Upon the ground, then, that the court has no jurisdiction to try title, and that it would be the assertion on its part of the right to do so if this application were granted; that the evidence as to title cannot be used in this court,—this tribunal in the exercise of the discretion reposed in it, as controlled by the usages and principles of a court of chancery, is constrained to deny the present motion. But there is another aspect in which this case must be viewed, and which must also control the discretion of the court. Whatever may be the legal effect of the adjudications of the tribunals to whom the question of title is confided by law, upon the rights of third parties, who have conflicting claims to the property disputed, and who were not parties to the proceedings in those tribunals, there can be little doubt, that, as between the claimants under the act of March 3, 1851 (9 Stat. 631), and the government of the United States, the provisions of that law cannot be disregarded by this court. By that act, congress prescribed the agencies, manner, and conditions on which the government consented to be sued, and through which, in which, and upon which they would surrender the legal title which had become vested in them by the treaty of Guadalupe Hidalgo, to such as established a better title, in accordance with the provisions of that law. By it, that body delegated to certain special tribunals the adjudication of title, and limited

the manner in which they were enabled to act, taking every precaution by the provisions of the law, to guard against fraud and imposture. The power of this court, as one of chancery, to grant injunction, and the application by the United States for such process, gives no additional jurisdiction to this court, nor confers power, beyond that which it has exercised as a court of equity, to preserve the substance of the property. To grant this application, would (to use the language of the chancellor, in Martin v. Nicolls, 3 Sim. 458, as we have seen) be in effect saying, that this court has jurisdiction to try title, and, consequently, to give relief if decided in favor of the defendants.

Was it within the power of congress to pass the act of 3d March, 1851, or is it in conflict with any clause in the constitution of the United States? In the case of West v. Cochran, 17 How. [58 U. S.] 415, the supreme court of the United States enunciate the following principles. "It was also competent for congress to provide, that before a title should be given to any one, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner, as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced,—these being left to the nation to whose powers they were confided; so that the question is, what has congress deemed expedient?"

Now, to ascertain what has been done in this case, we must look to the act of congress passed March 3, 1851 (9 Stat. 631), entitled "An act to ascertain and settle the private land claims in the state of California." By it, they have confined exclusively to certain tribunals, the adjudication of title, with specially delegated powers, and which, not being courts of general jurisdiction, can exercise none not expressly granted, or directly and necessarily derived by implication. So far from conferring authority upon them, to send process to a foreign country, to procure testimony, a power exercised by courts of general equity powers, as we have seen with great caution, congress have excluded a conclusion that any such power can exist, by enacting that "no deposition taken by or in behalf of any such claimant, shall be received in any case, whether before the commissioners, or before the district or supreme court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district-attorney of the proper district, so long before the time of taking the deposition, as to enable him to be present at the time and place of taking the same; and like notice shall be given of the time and place of taking any deposition on the part of the United States." The introduction of this clause into the act, is a clear expression of the determination of congress, when they gave their consent that the government should be sued, that her rights were not to be affected by any deposition or testimony in writing, save such as had been taken in the presence of their agent, or of the district-attorney of the proper district. Now, that clause in the law may have been "gross injustice" or "oppression," and a refusal on the part of the present administration to amend the law, may be an "iniquitous attempt to suppress the means of truth," as zealously urged by one of the solicitors of those who are making this application. Congress may, however, have been impelled by what they deemed legitimate and prudent precaution to shield the rights of the government from the dangers of testimony taken in a foreign country, among a people who had just ceased to be avowed enemies of this country, without the checks and sanctions thrown around the proceeding by the presence of the agent of this government, and by the execution of the commission before an American functionary. The present administration may have been actuated by the same motives in refusing to amend the said act, as has been urged.

The general rule is, however, "that if the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, the former ought to be preferred." Arredondo's Case, 6 Pet. [31 U. S.] 716. But with the motives of the government which passed the law, or the present administration which, it is urged, has declined to aid in its repeal, this court has nothing to do. Such legislation, if it be as represented, does not conflict with the constitution of the United States; and the highest tribunal in our country has decided that it is competent for congress to regulate the manner and agencies by which the title of claimants to lands shall be ascertained, and that such legislation does not violate any rights intended to be secured by the treaty. The conclusions to which the court has come, are:

1st. That an application for the appointment of commissioners to take testimony abroad is not grantable of course; but it is addressed to the judicial discretion which is controlled by the usages and rules of chancery practice, in accordance with which the present motion cannot be granted.

2d. The act of 3d March, 1851 (9 Stat. c. 31), cannot be disregarded; and this court ought not to violate the spirit and policy of that act, by granting its process to take testimony abroad, to be used in the trial of title in this cause.

The motion, therefore, must be denied.

Case No. 16,000.

UNITED STATES v. PARSONS.

[2 Blatchf. 104.] [1]

Circuit Court, S. D. New York. April, 1849.

POSTAL LAWS — EMBEZZLEMENT OF LETTER — DELIVERY BY MAIL CARRIER—CONSTITUTIONAL LAW.

1. The 22d section of the post-office act of March 3, 1825 (4 Stat. 108), which makes it an offence for any person to open any letter which shall have been in a post-office, or in the custody of a mail-carrier, before it shall be delivered to the person to whom it is directed, with a design to obstruct the correspondence, and for any person to secrete, embezzle or destroy any such letter, does not look beyond a possession of letters obtained wrongfully from the post-office or from a mail-carrier.

2. After the voluntary termination of the custody of a letter by the post-office or its agents, the rights of the real proprietor of the letter are under the guardianship of the local law, and not of that of the United States.

3. Where a letter, mailed at Boston and directed to a person at New York, reached the post-office there, and was taken by a letter-carrier for delivery: *Held* that, under section 41 of the act of July 2, 1836 (5 Stat. 89), such letter-carrier was a mail-carrier within section 22 of the said act of March 3, 1825.

4. But, the letter-carrier having given the letter to a person in the defendant's house, the defendant not being present, and not participating in the delivery, and that person having subsequently and at a different place delivered it to the defendant, and the defendant having opened it and embezzled money from it, it not being intended for him, but for another person of the same name, the letter, however, not having come into the possession of the defendant within view of the letter-carrier, or with his knowledge, or while he remained at the place where he left it: *Held*, that the defendant was not liable to indictment under section 22 of the said act of March 3, 1825.

[Distinguished in U. S. v. M'Cready, 11 Fed. 227. Cited in Re Burkhardt, 33 Fed. 28.]

5. All action and authority of the post-office department, in respect to the letter, terminated with its delivery to the third person, and section 22 of the act applies only while the letter is within the power and control of that department.

[Cited in U. S. v. Driscoll, Case No. 14,994; U. S. v. M'Cready, 11 Fed. 227; Re Burkhardt, 33 Fed. 28; U. S. v. Safford, 66 Fed. 944.]

6. Whether congress has power to pass laws governing the conduct of persons in respect to letters which have been mailed, after such letters have become strictly disconnected from the post-office department, quære.

The defendant [Charles H. Parsons] was indicted under section 22 of the post-office act of March 3d, 1825 (4 Stat. 108), which provides that any person who shall open any letter or packet which shall have been in a post-office. or in custody of a mail-carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, or to pry into another's business or secrets, or shall secrete, embezzle or destroy any such mail, letter or packet, shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding twelve months. At the trial, a special verdict was found by the jury, that a letter was put into the post-office at Boston, directed to Charles H. Parsons, at the city of New York, and containing another letter addressed to Ann M. Parsons; that in the letter were inclosed thirty-three dollars in bank bills; that the mailed letter reached the post-office in New York, was taken by a letter-carrier for delivery, and was given by him to a person in the house of the defendant, the defendant not being present, and not participating in the delivery; that that person subsequently, and at a different place, delivered it to the defendant; that the defendant opened both letters, and embezzled the money enclosed; that the letter addressed to Charles H. Parsons was not intended for the defendant, but for another person bearing the same name; and that the letters did not come into the possession of the defendant within view of the letter-carrier, or with his knowledge, or while he remained at the place where he left them.

Lorenzo B. Shepard, U. S. Dist. Atty.
Alanson Nash, for defendant.

[Before NELSON, Circuit Justice, and BETTS, District Judge.]

BETTS, District Judge. The facts found by the special verdict are within the letter of the statute. The letters had been in a post-office, and were opened, and their contents embezzled by the defendant, before they had been delivered to the persons to whom they were directed. The special verdict, however, raises the question, whether the intent and proper construction of the 22d section of the post-office act of March 3, 1825, embraces the case.

The 41st section of the act of July 2, 1836 (5 Stat. 89), gives to persons entrusted with the delivery of letters the character of mail-carriers, within the meaning of the 22d section of the act of 1825. Therefore, the letters in question in the present case, while in charge of such letter carrier, are to be regarded as in the post-office, or in the custody of a mail-carrier. What, then, is the true import and force of the phrase, "shall have been in a post-office or in custody of a mail-carrier," and of the phrase, "before it shall have been delivered to the person to whom it is directed"? Are they of unlimited extent, covering every condition of a letter, until it reaches its rightful destination? To give the language this construction, would be to continue letters which had been once in the mail still under the power and control of the federal government, in every change and transfer from person to person and place to place, and without limitation of time. Legislation of such scope

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

and extent would clearly not be in furtherance of the functions and duties of the post-office department, but in protection of the private property of individuals, after it had become detached from that department, and was wholly out of the charge of its agents. Such legislation would thus necessarily take the quality and form of a municipal regulation, governing the relations and responsibilities of individuals to each other, in respect to letters and their contents which had been in the post-office, although not obtained from the post-office or any of its agents, or in the possession of a party through any act of fraud or deceit against the post-office laws. And congress would thus in effect be invested with the power to compel every person into whose possession a letter which had been in the post-office should come, to take upon himself the responsibility of carrying and delivering it to the person to whom it should be directed.

We think that the object of this 22d section does not look beyond a possession of letters obtained wrongfully from the post-office or from a letter-carrier. Its design is to guard the post-office and its legitimate agents in the execution of their duties, in the safe-keeping and delivery of letters. After the voluntary termination of the custody of a letter by the post-office or its agents, the property in and right of possession to it belong wholly to its real proprietor, and his rights are under the guardianship of the local law, and not of that of the United States.

The delivery of the letter in the present case by the letter-carrier was to a person at the house, as was supposed by both, of the person to whom it was directed. The defendant was not then at the house, and in no way participated in the delivery. The person who received the letter supposed that it belonged to the defendant, and afterwards carried it and delivered it to him at a different place, as being rightfully his. All action and authority of the post-office department, in respect to the letter, terminated with its delivery to that third person; and, in our opinion, it was not intended that the act of congress in question should apply any longer than while the letter should be within the power and control of that department. From that time the law of the state takes authority over it, as the property of one of its citizens.

A question was raised on the argument, as to the power of congress to legislate on the subject indefinitely, and to pass laws governing the conduct of persons in respect to letters which have been mailed, after such letters have become entirely disconnected from the post-office department. But the construction we have given to the act, limiting its operation to letters yet remaining under the authority of the department, renders it unnecessary to consider this question. Judgment for defendant.

Case No. 16,001.

UNITED STATES v. PARSONS et al.

[4 Cranch, C. C. 726.] [1]

Circuit Court, District of Columbia. March Term, 1836.

LARCENY — INDICTMENT — OWNERSHIP OF GOODS.

If the goods stolen be charged as the goods of A. B., and if upon evidence, it appears that A. B. was a feme covert, and that the goods were the property of her husband, the court will not instruct the jury to find the prisoners not guilty, if the husband be absent, and not contributing to her support, and she keeping house by herself.

Joseph Parsons, John Callihan, and William Drane were indicted for stealing the goods of Ann Bell. It appeared upon the trial that Ann Bell's husband was temporarily absent seeking employment as a printer elsewhere, and did not contribute to her support; and that she kept house in Washington.

W. L. Brent, for defendant, prayed the court to instruct the jury that if they should be satisfied, by the evidence, that Ann Bell was a feme covert, and that the goods stolen were the property of her husband, they should find the prisoners not guilty upon this indictment.

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

Verdict, "Guilty."

Case No. 16,002.

UNITED STATES v. PARSONS et al.

[1 Lowell, 107.] [2]

District Court, D. Massachusetts. Sept., 1866.

SEAMEN—BOND FOR RETURN OF CREW—ACTION—LOSS OF CONSUL'S CERTIFICATE—EVIDENCE OF CONTENTS.

1. A shipmaster, who is sued on his bond for the safe return of his crew, may give parol evidence of the contents of a consul's certificate, authorizing the discharge of one of the men, on satisfactory proof that such a paper was once in existence and has been lost.

2. Notwithstanding the very sweeping language of section 3 of Act Feb. 28, 1803 [2 Stat. 203], and section 8 of Act July 20, 1840 [5 Stat. 395], requiring masters of American vessels to give bond for the return of all the crew, unless discharged in a foreign country with consent of a consul, &c., yet these sections, construed with the aid of the other parts of those statutes, cannot be held to require a master to return to the United States foreign seamen shipped at their own home, for a particular cruise, ending where it began, and discharged there, according to the terms of their contract, though without the consent of a consul.

3. The consent of a consul could not be rightly withheld in such a case, and there is no law requiring it to be asked.

4. Whether the bond is intended to be given for seamen, even if shipped in the United

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

[2] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

States, who by the terms of their engagement are entitled to be discharged abroad, quære?

Debt on a bond given by the master of the ship William & Henry, as required by the act of Feb. 28, 1803, § 1 (2 Stat. 203), for the return to the United States of the company of the ship. The ship sailed from New Bedford, in 1860, on a whaling voyage to and in the Pacific Ocean, in the course of which the defendant William C. Parsons was deprived of his command by the owners, and came home, and the vessel was brought back by another master, who failed to produce to the boarding-officer five of the original crew, and five persons, not shown to be citizens of the United States and not shipping as such, who had shipped at Tombas, in Peru, for a whaling cruise which by its terms ended at Tombas, where they were discharged in accordance with their contract. As to none of these persons was there any consular certificate. By consent of parties the case was submitted to the court, without a jury. There was evidence that of the crew shipped at New Bedford, three had deserted, one had died, and one had been discharged by Captain Parsons, with the consent of the consul, to whom the three months' extra wages had been paid, and a fee for his certificate.

W. A. Field, Asst. U. S. Dist. Atty.
E. L. Barney, for defendants.

LOWELL, District Judge. This master had no opportunity to comply with the literal tenor of his bond by exhibiting his crew to the boarding-officer, nor his consular certificates or satisfactory evidence of the death and desertion of certain of the men to the collector of New Bedford, because he was not permitted to bring the ship home, but came before the ship arrived, and without any of her papers. I cannot say that he is exonerated from his obligation under the bond by his discharge abroad, so far as his own acts or neglects are concerned; but he may now produce the evidence, which, if he had remained on board the ship, he should have given to the revenue officers. So far as four of the men shipped at home are concerned, the evidence is satisfactory that one died and three deserted. For the fifth he should have a consular certificate, and it has been held, that no other evidence of the consul's consent is admissible. U. S. v. Hatch [Case No. 15,325]. But the case here is, that such a certificate was paid for and promised, and, I may well presume, it was given. No case has decided that the contents of a lost certificate cannot be proved by parol; it is the consul's consent which cannot be so proved; and as Captain Parsons has not had the custody of the papers, and his successor may not have had his attention called to this man's discharge, it is not improbable that the papers may have been mislaid in the consul's office or on board ship.

The persons who were shipped for an intermediate off-shore cruise, and were discharged when their time was out, seem to be within the letter of the statutes of 1803, § 1 (2 Stat. 203), and of 1840, § 8 (5 Stat. 395); which require a bond to be given for the return of all the crew, including those shipped in a foreign port. And yet, it can hardly have been the intent of congress that foreigners, shipped in their own country, for a distinct voyage or part of a voyage, ending where it began, should be brought to the United States, unless some consul should consent to their discharge. Certainly, no consul would have any right to dissent in a case of that kind, and I know of no possible advantage which would accrue to such seamen by being discharged before a consul. Undoubtedly, such men are American seamen, within the protection of our laws, and can call on the consul to redress their grievances. Matthews v. Offley [Case No. 9,290]. But supposing them to have no cause of complaint, I do not know that they are deemed incapable of settling their own affairs with the master. The act of 1840, § 9 (5 Stat. 395), authorizes a consul to discharge any mariner who shall complain to him that the voyage is continued contrary to his agreement, or that he has fulfilled his contract; and if upon the face of the articles the consul finds the complaint to be well founded, he shall then require an advance of three months' pay, as provided by the act of 1803, unless he shall be satisfied that the contract has expired or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, in which case he may discharge the mariner without requiring the three months' additional pay. This statute seems to imply that, where the contract has expired, it is the first duty of the master to discharge the man, and that it is only when he fails to do so that the consul is to be applied to, and then the fact that the man has not already been discharged is prima facie evidence against the master on the question of additional pay.

It has never been decided that the bond must be given for seamen who, by the very terms of their contract, are to be discharged abroad. Such agreements may be rare, and may have been overlooked. The act of April 14, 1792, § 8 (1 Stat. 256), required the master of an American ship, which was sold in a foreign port, to send his crew back to the state where they entered on board, "unless the crew are liable by their contract, or do consent to be discharged" at the foreign port. The act of 1803 (section 3), provides for paying the consul three months' extra pay, for each man, when a ship shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country. This act is silent concerning seamen who by their contract are liable to be discharged in a foreign

country, though they are mentioned in the act of 1840, already cited. The words of the bond and of the statute establishing it, are more extensive, requiring the master to bring home all seamen who have not died, &c., or been discharged with the consent of a consul. Taking the whole law together, it seems reasonable to understand it as meaning that all those shall be brought home, who by their contract are entitled to be brought home, unless, &c. I cannot readily believe that the intent of the law is, that men who have freely, and for reasons satisfactory to themselves, agreed on a month's voyage, to end abroad, are to be paid three months' wages, and that the United States is to be paid for still another month, unless the consul shall remit it. And until 1840 the consul had no power to remit. It may be argued, that the policy of the legislature is to discourage the discharge of our seamen in foreign countries, and to guard the United States against the expenses of their support.

However this may be with citizens, or those who appear as such on the crew list, foreigners shipping abroad as such, and domiciled there, are never entitled to the extra pay, and the United States are not liable for their support; and there is no reason, as I have said, why the consul should be formally applied to to ratify their necessary discharge, unless they choose to invoke his power on account of some failure by the master to carry out the contract. Notwithstanding the very sweeping language of the statutes concerning the bond, I hold that it does not require the master to return to this country foreigners who ship in their own home for an intermediate cruise, which ends where it began; or if it does, that the condition is satisfied by their discharge at their home, in compliance with the very terms of their engagement, though without the consent of a consul. Such being the case here, there must be judgment for the defendants.

Case No. 16,003.

UNITED STATES v. The PARYNTHA DAVIS.

[1 Cliff. 532.] [1]

Circuit Court, D. Maine. Oct. Term, 1860.[2]

SHIPPING—FISHING VESSELS—BREACH OF LICENSE—ADMISSIBILITY OF EVIDENCE—PAROL EVIDENCE.

1. A libel under the thirty-second section of the act of February 28, 1793 (1 Stat. 316), need not specify the particular trade in which the vessel was engaged at the time of the seizure; it is sufficient, as a general rule, to bring the case within the words of the act of congress.

2. Where a vessel was libelled for forfeiture for breach of a license to catch codfish, by catching mackerel at a certain time and place, *held*, that parol evidence might be given of her catching mackerel at other times and places during the trip, as showing the real business of the voyage.

3. A fishing-vessel licensed to catch codfish cannot catch mackerel, except as bait or provision for the crew; and this incidental privilege ought to be exercised fairly and in good faith.

[Cited in The Grace Darling, Case No. 5,651.]

[Appeal from the district court of the United States for the district of Maine.]

This was a libel of seizure against the schooner Paryntha Davis for a forfeiture, resulting from an alleged illegal employment of the vessel. The libel set forth that the schooner was regularly seized at Portland on the 12th of October, 1857, and that prior to the seizure she was a vessel of the United States, duly enrolled and licensed to carry on the cod-fishery, and that, being so licensed, was then and there employed in a trade other than that for which she was licensed. At the hearing it appeared that the schooner, on March 27, 1857, took out a license in the collection district of Barnestable, in the state of Massachusetts, for carrying on the cod-fishery, and was employed under that license until July 23d, when the license was surrendered and one taken out for the mackerel-fishery. The schooner held her mackerel license until September 22d, when she again surrendered it and took out a cod-fishing license. The schooner sailed from Wellfleet, September 24, 1857, and was seized October 11th at Hogg Island Roads, in Portland Harbor. When seized, she was at anchor by the side of another fishing-schooner, and had mackerel-lines all around the waist. Some fifteen or twenty barrels of mackerel were found on board, and also twenty empty mackerel-barrels. Mackerel recently caught were found in wash-barrels on the deck, and there were about fifteen barrels of salt on board. The hawser and chain cable of the vessel were not such as are suitable for deep-sea fishing. No codfish were seen on board, except a few dried or pickled, apparently having been caught more than a month. The first day the boarding officers went on board no cod-lines were discovered, but on a second visit they were shown some which were brought on deck by the crew, but the lines were without sinkers. The barrels containing the mackerel were stowed away on the bilge. There were porgies for floating bait, and a mill for preparing them. Inquiry from the master and others on board the schooner elicited that they were "catching anything that came along." It was in testimony that there was a complement of cod-lines on the vessel, and everything necessary for preserving the fish when caught. The testimony showed that during a course of several days more mackerel than codfish had been caught, although several attempts had been made at various places. It was set up that the mackerel were caught to be used for bait, although it did not appear that they

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 16,004.]

were used for such purpose. Several barrels of mackerel were caught at different times, but no codfish of any amount. It was shown in evidence that a portion, at least, of the mackerel were split and corned. The vessel was on her trip some sixteen or seventeen days, at the end of which, returning to Portland for water, she was seized. Nine days afterwards she was delivered to the claimants, upon giving a bond in the usual form, shortly after which she took a license for the mackerel-fishery. The district judge was of opinion that the vessel was employed, if not exclusively, at least in part, in taking mackerel, not for bait or consumption by the crew, but as the proper business of the voyage. [Case No. 16,004.]

B. F. Hallett, for claimants.

The information is insufficient, because it does not set out what other trade, and, though in the words of the statute, is uncertain where it should be specific. Dunl. Adm. Prac. 431; The Merino, 9 Wheat. [22 U. S.] 391. The libel having alleged a specific time and place, "then and there" when the vessel was so employed, the libellants can give no evidence except of employment at that time and place. Macomber v. Thompson [Case No. 8,919]. To work a forfeiture under the thirty-second section of the act of 1793, the vessel must have abandoned her employment in the cod-fishery and engaged in some other. The catching of mackerel is not a trade separate from fisheries, because the act of 1793 (section 4) speaks of licensing vessels for the coasting trade and other fisheries. U. S. v. The Reindeer [Case No. 16,145]. The court will require the most determinate evidence that the mackerel-fishery was intentionally and exclusively carried on. The Harriet [Id. 6,099]. The decisions bearing on this case are The Active, 7 Cranch [11 U. S.] 100; The Two Friends [Case No. 14,289]; The Eliza [Id. 4,346]; The Swallow [Id. 13,666]. The intent is no part of the evidence for or against condemnation. The law does not punish the intention to defraud the revenue; there must be an unlawful act. U. S. v. Riddle, 5 Cranch [9 U. S.] 311.

G. F. Shepley, U. S. Dist. Atty., for the United States.

The cod-fishery and the mackerel-fishery are severally "trades" within the legal meaning of the act of 1793, and each is a distinct trade from the other. The Harriet [Case No. 6,099]; The Nymph [Id. 10,389]; The Active, 7 Cranch [11 U. S.] 100; The Eliza [Case No. 4,346]; 4 Stat. 312; 5 Stat. 16.

CLIFFORD, Circuit Justice. Forfeiture of the vessel is claimed under the thirty-second section of the act of the 18th of February, 1793. Omitting all such parts of the section as are inapplicable to this case, it provides, in effect, that if any licensed ship or vessel shall be employed in any other trade than that for which she is licensed, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited. 1 Stat. 316. As shown by the proofs, she was engaged in the mackerel-fishery, and it is insisted, on behalf of the United States, that the mackerel-fishery is an employment other than that for which she is licensed, within the meaning of the act of congress upon which the proceeding is founded. But it is objected by the appellants that the allegations of the libel are insufficient to support a decree of forfeiture, because it does not specify the particular trade in which the schooner was engaged at the time of the seizure. But it is quite obvious that the objection cannot be sustained. Technical rules of pleading are not so much regarded in libels of this description as in indictments and informations at common law. Where there are no technical words or phrases employed in the prohibition of the statute, it is sufficient, as a general rule, to bring the case within the words of the act of congress on which the information is founded. Repeated decisions have established that rule of pleading in cases of this description, and it is undoubtedly correct. The Samuel, 1 Wheat. [14 U. S.] 9; The Hoppet, 7 Cranch [11 U. S.] 389; The Merino, 9 Wheat. [22 U. S.] 401. No such objection was taken in the district court, and I am of the opinion it cannot prevail, especially after appearance and answer to the merits.

Looking at the testimony of the claimants alone, it would not be possible to hold that the crew were in good faith pursuing the business for which the schooner was licensed, and, when taken in connection with the testimony of the boarding officers, it clearly shows that the conclusion reached by the district court was correct. But it is insisted by the claimants that none of the parol evidence was admissible, except that offered to prove what the employment of the vessel was at the time and place as alleged in the libel. Two answers may be given to that objection, either of which is sufficient to show that it cannot be sustained: 1. All the evidence in the case as to what was done during the trip was introduced by the claimants, and clearly they cannot now object to testimony introduced in their own behalf. 2. Another answer, however, may be given to the objection, which perhaps will be more satisfactory; and that is, that the testimony would have been admissible if it had been offered by the government and seasonably objected to by the claimants.

As alleged in the libel, the charge is, that, prior to the seizure, to wit, at Portland on the 10th of October, 1857, the schooner was a vessel of the United States, duly enrolled and licensed to be employed in carrying on the cod-fishery, and that she was then and there employed in a trade other than that for which she was licensed. Whether that charge is true or not depends upon what had been done

during the trip, and obviously evidence to show what had been done was admissible to make out the charge or to establish the defence. Unless the rule was so, it might be impossible to administer justice, as any evidence that could be offered as to what had been done on a given day might, and in all probability would, be unsatisfactory. Correct pleading requires that time and place should be specifically alleged, and if prior acts during the same trip should be held to be inadmissible, great injustice might be done. Without stopping to cite authorities to this point, suffice it to say that I am clearly of the opinion that on principle the objection is without merit. Lastly, it is insisted by the claimants that the catching of mackerel is not a trade other than that for which the schooner was licensed. It is a sufficient answer to this objection, to say that the rule of law as understood in this court is settled otherwise. Judge Ware held, in the case of The Nymph [Case No. 10,389], that since the act of the 24th of May, 1828, a vessel licensed for the cod-fishery is not authorized by her license to engage in the mackerel-fishery, because that act requires a distinct license for that business. 4 Stat. 312. That case was appealed to the circuit court, and after a very deliberate consideration, the decree of the district court was affirmed. Until the mackerel-fishery was, by the act of congress, separated into a distinct employment, says Judge Story in a later case, it was frequently carried on in common with, and as an incident to, the cod-fisheries; and he adds, somewhat unguardedly, that no one can now doubt that mackerel may still be caught in the cod-fisheries, if it be not so pursued as to supersede the principal employment, but is a mere accessory or incidental business. While it must be admitted that the closing paragraph of the sentence is rather broader than the rule laid down in the previous case, still it must be weighed in connection with the residue of the opinion, and, when so read and understood, the two opinions are entirely consistent. The Harriet [Case No. 6,099].

Undoubtedly a vessel licensed for the cod-fishery may take mackerel for bait and for consumption by the crew, as provisions during the trip; and as fresh mackerel make the best bait, the crew may take them as frequently and in such quantities as it may be reasonably necessary for them to do for those purposes; and where it appears that they pursued the proper business for which the vessel was licensed, in good faith, and on the return of the vessel, or at the time of her seizure, have only such quantity of mackerel on hand as may reasonably be inferred from the circumstances to have been taken in the fair exercise of that legitimate right, the law does not authorize the forfeiture of the vessel because there happens to be some excess. They must pursue the proper business for which the vessel is licensed, and in exercising the incidental right of taking mackerel for bait and for consumption by the crew, they must act reasonably and in good faith. Such in effect is the rule laid down by the two learned judges in the cases already cited, and I am of the opinion that it is correct. Reference is made by the counsel of the claimants to the case of The Reindeer [Id. 16,145], as asserting a more liberal doctrine, and it cannot be denied that there are some expressions to be found in that opinion which afford some countenance to the argument. But it does not purport to overrule the prior decisions upon the subject, and until the question is revised by the supreme court, I consider myself at liberty to adopt the earlier and, as I think, the better construction of the act of congress. The decree of the district court is therefore affirmed with costs.

Case No. 16,004.

UNITED STATES v. The PARYNTHA DAVIS.

[3 Ware, 159.] [1]

District Court, D. Maine. July, 1858.[2]

SHIPPING—COD FISHERIES—BREACH OF LICENSE—TAKING MACKEREL.

1. The fishing business is a trade within the meaning of the license act of Feb. 18, 1793 [1 Stat. 305]. The meaning of the word "trade" in the act, is equivalent to "employment," and every act of trade beyond the scope of the license subjects the vessel to forfeiture under the 32d section of the act.

2. Since the act of May, 1828 [4 Stat. 312], authorizing a special license for the mackerel fishery, that is a trade distinct from the cod fishery.

3. A vessel with a cod-fishing license may take mackerel for bait, or for the consumption of the crew, but if she engages in this fishery as a business, she is liable to forfeiture.

In admiralty.

Mr. Shepley, U. S. Dist. Atty.

B. F. Hallett, for claimants.

WARE, District Judge. This was a libel in rem for a forfeiture. The schooner was regularly licensed on the 22d of September, 1857, in the collection district of Barnstable, in Massachusetts, for carrying on the cod fisheries, and on the 11th of October was seized, while lying in Hog Island Roads, in Portland, where she had gone to make a harbor, and for water, on a charge of being engaged in a trade other than that for which she was licensed. It was proved at the hearing, that the schooner took out a cod-fishing license the 27th of March, and was employed under that till the 23d of July, when it was surrendered, and a license taken for the mackerel fishery. This was held until the 22d of September, when it was surrendered and another license for the cod fisheries taken. It was while she held this license that she was seized on the

[1] [Reported by George F. Emery, Esq.]

[2] [Affirmed in Case No. 16,003.]

11th of October. The schooner sailed from Wellfleet on the 22d of September, completely equipped for the cod fishery, as is stated by the witnesses for the claimants, and as appears from other testimony, as well prepared for the mackerel fishery; and after stopping at Townsend over Friday night, sailed for the east Saturday morning. She tried for cod on the way, but took none, and went into Wellfleet Saturday night and lay there over Sunday. Monday she went to Long Island and remained there and in the waters about there about three days, trying for cod, but took very few, but she took two or three barrels of mackerel for bait. Thursday she went west without fishing, and stopped at Fox Island at night. There she was detained by the state of the weather the next day. Saturday she continued her westward course, and once in the forenoon and once in the afternoon tried the codfish, but found none. While fishing for cod a school of mackerel came to the top of the water, and three or four barrels were taken for bait. At night they went into Townsend and remained there over Sunday. Monday she went out and tried for cod about Damariscotta, but caught not more than half a dozen, and left for Seguin, and she caught a barrel of mackerel for bait. Leaving Seguin Tuesday they were off Portland trying for cod without taking more than half a dozen, but they took half a barrel of mackerel. They remained on this fishing-ground, fishing for codfish in the day time, and lying to at night. They got very few cod, but one day took three or four wash-barrels of mackerel. While they were seeking for cod, mackerel from time to time came to the surface of the water, and then a few were taken for bait. Saturday two or three codfish were taken, and three or four barrels of mackerel. Saturday evening they went to Portland for a harbor and a supply of water. Sunday morning the vessel was visited by the boat of the revenue cutter Caleb Cushing, and on an examination of the schooner her license was taken away, and Monday the vessel was seized. Such, in substance, is the account, given by Lombard, one of the crew, of the vessel's employment from the time that she took out her license in September, until she was seized on the 11th of October. The depositions of two others of the crew were produced at the hearing, but their statements do not materially vary from that of Lombard.

The allegation in the libel on which a forfeiture is claimed, is founded on the 32d section of the act of February, 1793, commonly called the "License Act." The act provides generally for the licensing and regulating of vessels to be employed in the coasting trade and fisheries, and the section mentioned has a provision that if any licensed vessel shall be "employed in any other trade than that for which she is licensed, she shall be forfeited." At the time of the passage of this act, and down to the year 1828, the law provided but two forms of fishing licenses, one for the cod and the other for the whale fisheries. All the bank and coast fisheries were carried on under a cod-fishing license. But by that time the mackerel fishery had grown up to an important branch of business, and a special license was provided for that trade. A case arose in this district soon after the passage of the act of 1828, which involved the consideration of the construction and effect of that law. In that case it was held that the fishing business was a trade within the true intent and meaning of the 32d section of the license act of 1793. And that since the act of 1828, providing a special license for the mackerel fishery, that by itself constituted in a legal sense a trade separate and distinct from cod fishing, and required a special license to protect the vessel from the penalty of the law, and that when a vessel under a cod-fishing license engaged in the mackerel fishery as a business, she was employed in another trade than that for which she was licensed, and thereby became liable to forfeiture. That case was carried by appeal to the circuit court, and the decision was then affirmed, and it has been considered as settling the law on this subject. The Nymph [Cases Nos. 10,388 and 10,389]. Some doubt was indeed thrown over the doctrine of that case by the subsequent case of The Reindeer [Id. 16,145]. A doubt was then suggested, whether, as the cod and mackerel fishing business were both of the same generic nature, they could properly be considered as distinct and different trades. But it was expressly added by the court, that it was not its intention to overrule the case of The Nymph [supra]. The Nymph was under a cod-fishing license, and it was shown by the evidence that about one-half of her time she had employed in cod fishing, and the other half in taking mackerel. It was a case of mixed employment. But it is well-settled by a series of decisions, that any engagement in an unauthorized trade, any employment of the vessel beyond the scope of her license, works a forfeiture. The Active, 7 Cranch [11 U. S.] 100, was the case of a vessel under a fishing license, which was loaded in the night, had left the wharf without a clearance, under circumstances which justified the belief that she was intended for a foreign voyage, and for this she was seized and adjudged to be forfeited. See, also, U. S. v. The Mars [Case No. 15,723]; The Eliza [Id. 4,346]; The Julia [Id. 7,574].

The only question then open in this case, is one of fact. The schooner was under a cod-fishing license, and did she, on her trip commencing Sept. 24th and ending Oct. 11th, engage in the mackerel fishery as a business, or trade, or was she engaged in a mixed

business of cod and mackerel fishing? In either case she is liable to forfeiture. I do not ascribe so much importance to the fact that when taken she had a complete outfit for taking mackerel, for this reason. Her cod-fishing license authorized her to pursue that business in the customary manner, and for that purpose she must have her supply of bait and provisions for the crew, or obtain them in the course of the cruise. And it is the well-known custom of the trade, for vessels in the cod-fishery to supply themselves, in the season of mackerel, with this fish for bait, the fresh mackerel being found to be the best bait for cod. It is also an equally well-known custom for the crew to live, in part at least, on fresh fish. It is not, therefore, a circumstance of suspicion that she had mackerel lines aboard, nor perhaps that she had a full supply for a regular mackerel voyage, as her last trip had been in that fishery. To take mackerel for bait, or for the consumption of the crew, was no violation of the license. The instructions of the treasury department authorize this to be done, and these instructions are in conformity with the previous decisions of the courts. And if, in the course of the trip, it should so happen that somewhat more of mackerel are taken than are consumed in this way, it would be a harsh construction of the law to require the crew to throw overboard a small surplus that may remain, or expose their vessel to forfeiture, provided the cruise had been fairly and in good faith devoted to cod fishery.

The manner in which the crew were employed during the cruise has already been stated from the depositions of three of their number. Part of the time they were employed in fishing for cod, and part of the time in taking mackerel, as the witnesses state, for bait. The proceeds or result of that employment, was shown by the fish found on board the schooner, when she was seized. There was not a single cod found, but there were at least fifteen barrels of mackerel, if not more, for they were not counted. A small part of them were on deck in open wash-barrels, but the greater part were pickled, barreled up, and stowed under deck, as they would be if intended for the market, and not for bait. The cod-lines were put away, but the gear for mackerel-fishery were all rigged and ready for use. On this evidence I find it difficult to be persuaded that the crew had truly, and in good faith, employed themselves in cod-fishing as their exclusive business, and that no part of their time had been occupied in taking mackerel except for bait. I agree with what was said by the court in the case of the Reindeer, that the fishermen are to be considered with indulgence, and even with kindness. They are a hardy, industrious, careful, and highly meritorious class of men at all times, and invaluable to the country in the times of her greatest need. But there must be limits to this indulgence, and courts of justice are bound to execute the laws.

The unfavorable inferences which not unnaturally follow from the testimony of the claimants, are strengthened and fortified by the evidence offered by the government, of what took place at the time of the seizure. When the skipper was asked how it happened, that being under a cod-fishing license, he had mackerel and not cod, what was the object of his voyage, he answered that it was to take any kind of fish that came in his way, and that he had taken mackerel as he had a right to do. His previous trip had been under a mackerel license, and under that he was authorized by the act of 1836, c. 55, 5 [Stat. 16], to take all kinds of fish. But no such liberty is allowed under a cod license. The reason of the difference is, that the mackerel fishery is encouraged by a drawback of the duty on the salt used, but in the cod fishery, as a substitute for this, a direct bounty is paid for the time employed in proportion to the tonnage of the vessel.

My opinion on the whole evidence is, that this vessel was employed, if not exclusively, at least in part, in taking mackerel, not for bait, or for the ship's use, but as the proper business, in the whole or in part, of the voyage, and that consequently she is liable to forfeiture.

This case was appealed to the circuit court, and there the decree of the district court was affirmed at September term, 1860. [Case No. 16,003.]

Case No. 16,005.

UNITED STATES v. PASSMORE.

[4 Dall. 372.] [1]

Circuit Court, D. Pennsylvania. April Term, 1804.

REPEAL OF ACT—EFFECT.

[The repeal of the bankrupt law of 1800 was a bar to a criminal proceeding under that law.]

[Cited in U. S. v. Finlay, Case No. 15,099.]

The defendant, who had become bankrupt, was prosecuted by indictment, containing two counts, for perjury, in swearing before the commissioners, on the 20th day of September, 1803, that he "could not tell exactly the time, but believed it was the latter (end) of 1799, that he first owned the brig Abigail. He ceased to own her, he rather thought, in the year 1800," when in truth and in fact he never did own her, but had covered the property for an alien under his name. He had before sworn, at the custom-house (on the 31st of July, 1799) that he "was the true and only owner of the brig Abigail; that there was no subject, nor citizen, of any foreign prince, or state, directly or in-

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

directly, by way of trust, confidence, or otherwise, interested therein, or in the profits or issues thereof:" but no information tending to falsify this oath, was received, until a prosecution was barred by the act of limitation. 1 Stat. 119, § 32.[2] On the 19th of December, 1803 (7 Laws [published by authority] 14 [2 Stat. 248]) an act of congress was passed, enacting, "that the act of congress, passed on the 4th day of April 1800 [2 Stat. 19], entitled 'An act to establish an uniform system of bankruptcy, throughout the United States,' shall be and the same is hereby repealed. Provided nevertheless, that the repeal of the said act shall in no wise affect the execution of any commission of bankruptcy, which may have been issued prior to the passing of this act, but every such commission shall be proceeded on, and fully executed, as though this act had not passed."

The facts being laid before the jury, Rawle and Dickerson, made a defence, principally, upon two grounds: 1st. That the defendant was not guilty, upon the merits. 2d. That the oath, charged to be false, was taken before the repeal of the bankrupt law; and, in consequence of the repeal, could not be the subject of a prosecution, either under the bankrupt law, under the general penal law, or at common law.[3] On the first ground they cited 4 Bl. Comm. 136; 1 Bl. Comm. 60; 1 Hawk. P. C. 331; 2 Hawk. P. C. 84; Cro. Car. 852; Cro. Eliz. 148; 1 Salk. 374; Bankr. Law, § 18; 2 Esp. 281; 1 McNal. Ev. 3; 1 Ld. Raym. 396; 1 Hale, P. C. 706; 2 Salk. 513; 10 Mod. 335; Cro. Jac. 644; 3 Mod. 78; 2 Ld. Raym. 991; 1 Burrows, 543; 4 Burrows, 2026; Cowp. 297; Leach, C. L. 252, 268; Bankr. Law, §§ 15, 21, 51; 4 Laws (Folwell's Ed., Acts Cong.) 427, § 88 [1 Stat. 695]; 3 Laws [Folwell's Ed.] 337 [1 Stat. 477]; 2 Laws [Folwell's Ed.] 30; 2 Laws [Folwell's Ed.] 21 [1 Stat. 229]; 4 Laws [Folwell's Ed.] 102, § 2 [1 Stat. 554]; 2 Laws [Folwell's Ed.] 157, 193 [1 Stat. 287, 305]. And on the second ground they cited 1 W. Bl. 451; 1 Hale, P. C. 291, 525; 1 Hawk. P. C. 306; 4 Laws [Folwell's Ed.] 523, 202 [1 Stat. 596].

Mr. Dallas (the district attorney) submitted to the court three propositions: First. That, notwithstanding the repealing act, the perjury charged was indictable, according to the first count of the indictment, under the bankrupt law, as an incident to the execution of the commission. 5 Laws [Smith's Ed.] 61, § 21 [2 Stat. 27]; 6 Bac. Abr. 384, 390; 2 Leach, 810; Co. Litt. B. L. 7; 5 Geo. II. c. 30, § 44; 6 Laws [published by authority] 93, 95, § 14 [2 Stat. 156, 164]; 5 Laws [Smith's Ed.] 238; 1 Laws [Folwell's Ed.] 113, § 32 [1 Stat. 119]; 2 Hawk. P. C. 87, c. 69, § 4; 6 Laws [published by authority] 80, § 5 [2 Stat. 153]; 3 Laws [Folwell's Ed.] 163; 6 Laws [published by authority] 58, § 1 [1 Stat. 148]; 1 Laws [Folwell's Ed.] 327, § 46 [1 Stat. 199]; 3 Laws [Folwell's Ed.] 97 [1 Stat. 381]; 3 Laws [Folwell's Ed.] 334 [1 Stat. 561]; 3 Laws [Folwell's Ed.] 88 [1 Stat. 331]; 1 Laws [Folwell's Ed.] 236 [1 Stat. 145]; 4 Laws [Folwell's Ed.] 446, § 112 [1 Stat. 704]; 4 Laws [Folwell's Ed.] 427 [1 Stat. 627]; 1 Hawk. P. C. 306; Brooke, Abr. 203; 1 Hale, P. C. 291, 525; 2 Hale, P. C. 190. Second. That the perjury charged, was indictable according to the second count of the indictment, independent of the bankrupt law, upon the general penal act (1 Laws [Smith's Ed.] 103 [1 Stat. 112]), inasmuch as the provisions of the bankrupt law, do not create the offence; are affirmative and not repugnant; and, with respect to the punishment, are cumulative. Cowp. 297; 2 Hale, P. C. 705; 4 Burrows, 2026; 23 Geo. II. c. 13; Leach, 253; 1 Hawk. P. C. 306, bk. 1, c. 40, § 5; Leach, 715; 2 Hale, P. C. 191, 2. And, third, that according to the opinions of some of the judges of the supreme court, (3) the perjury charged, was indictable at common law; and, in that case, the conclusion of the indictment, "against the form of the statute," was to be regarded as surplusage. 2 Hawk. P. C. 83; U. S. v. Ravara [Case No. 16,122]; William's Case, 2 Cranch [6 U. S.] 82, in note; U. S. v. Worrall [Case No. 16,766].

WASHINGTON, Circuit Justice, delivered the charge of the court at large, upon the points of law; but cautiously abstained from giving any opinion upon the facts. He considered the repealing act, as an absolute bar to the prosecution; and told the jury, expressly, that the defendant was, on that ground alone, independent of any question upon the merits, entitled to an acquittal.

On this charge, the jury immediately found a verdict of not guilty.

---

[2] In consequence of this, and other similar cases, occurring at the custom house, the time allowed for prosecuting offences under the revenue laws, was enlarged. 7 Laws [pub. by authority], 126.

[3] Before the jury were sworn, Rawle said, that, although he did not mean to move to quash the indictment, he should propose, under the sanction of the court, that the question of law, arising upon the repealing act, should be discussed, as soon as the jury were sworn, and before any evidence was produced. The attorney of the district objected to the novelty of such a proceeding. And by the Court: The trial must proceed in the usual course. The evidence and law must both be laid before the jury, who will then give a verdict, under the charge of the court. If the verdict should be against the defendant, his counsel may move the point of law in arrest of judgment.

Case No. 16,006.

UNITED STATES v. PATRICK.

[2 Cranch, C. C. 66.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

RAPE BY SLAVE.

An attempt, by a slave, to ravish a white woman is punishable by death.

The defendant, a slave, was convicted of an attempt to ravish a white woman. The indictment was under the act of assembly of Maryland, 1751, c. 14, § 2.

Judgment of death was entered on the 30th of January, 1813, and executed on the 11th of March. The slave was valued by the court at 400 dollars, according to the 7th section of the act.

Case No. 16,007.

UNITED STATES v. PATTEN et al.

[Holmes, 421.] [2]

Circuit Court, D. Maine. Sept., 1874.

SHIPPING—"COASTWISE" AND "FOREIGN" TRADE—DUTIES ON MATERIALS FOR REPAIRS.

1. The term "foreign trade" as used in the tenth section of the act of June 1, 1872 (17 Stat. 238), includes trade between the Atlantic and Pacific ports of the United States.

2. The term "coastwise trade," as used in that section, does not include trade between the Atlantic and Pacific ports of the United States.

3. An American vessel previously engaged exclusively in foreign trade, was repaired in Boston, and thence sailed in ballast, via New York, to San Francisco for a cargo to Europe, and thereafter was engaged exclusively in foreign trade. In an action by the United States to recover duties on articles of foreign production withdrawn from the United States bonded warehouse in Boston under the tenth section of the act of June 1, 1872 (17 Stat. 238), and used in the repairing, *held*, that the vessel was engaged exclusively in "foreign trade," and had not by the voyage to San Francisco engaged in "coastwise trade" within the meaning of those terms as used in that section; and that the articles withdrawn from bond and used in the repairing were exempt from duty.

[Cited in Russell v. U. S., Case No. 12,164.]

Action at law [against Jarvis Patten and others] to recover duties on materials used in the repair of the ship Matterhorn. The case was heard by the court on an agreed statement of facts, the material parts of which are stated in the opinion.

Nathan Webb, for plaintiff.

A. P. Gould, for defendants.

SHEPLEY, Circuit Judge. The ship Matterhorn was built at Bath, in the district of Maine, in the year 1866. She was exclusively engaged in foreign trade after her first voyage from Bath to New Orleans in September, 1866, until her arrival in Boston from Calcutta in the fall of 1872. In October, 1872, she was repaired, and for the purpose of repairing her copper a quantity of yellow metal and composition nails were withdrawn from the bonded warehouse in Boston as free of duty, and used in the repair of the ship. The ship then sailed in ballast via New York to San Francisco for the purpose of obtaining a grain freight to Europe. With a cargo of grain the ship sailed from San Francisco to Havre, thence to New Orleans, thence to Antwerp, thence to Cardiff, and thence to Rio Janeiro, during which voyage this action was commenced. The action is brought to recover the duties on the yellow metal and composition nails, on the ground that the defendants, by sending the ship from New York to San Francisco, had engaged in the coasting trade for more than two months in one year, and thus rendered themselves liable for the duties on which a rebate had been allowed; and on the further ground, that the vessel was not exclusively engaged in the foreign trade.

The tenth section of the act of June 1, 1872 (17 Stat. 238), provides: "That from and after the passage of this act all lumber, &c., and copper and composition metal, which may be necessary for the construction and equipment of vessels built in the United States for the purpose of being employed in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, and finished after the passage of this act, may be imported in bond under such regulations as the secretary of the treasury may prescribe; and upon proof that such materials have been used for the purpose aforesaid, no duties shall be paid thereon: provided, that vessels receiving the benefits of this section shall not be allowed to engage in the coastwise trade of the United States more than two months in any one year, except upon the payment to the United States of the duties on which a rebate is hereby allowed: and provided further, that all articles of foreign production needed for the repair of American vessels engaged exclusively in foreign trade may be withdrawn from bonded warehouses free of duty under such regulations as the secretary of the treasury may prescribe."

The first clause in the section relates to certain materials used in the construction and equipment of vessels built in the United States and finished after the passage of the act for the purpose of being employed in the foreign trade; and for the purposes of that clause in the section it defines the term "foreign trade" as "including the trade between the Atlantic and Pacific ports of the United States." Materials described in the statute used for the construction and equipment of such vessels may be withdrawn from bond free of duty.

It is well known that vessels engaged in

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

[2] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

the foreign trade frequently sail from the ports of the United States in which they are built and registered to other ports in the United States to obtain a freight for a foreign port. This is the case with freighting ships built in Northern ports and sailing in ballast to Southern ports for a cargo of cotton. It is well known that such vessels, having discharged their cargo of cotton or grain in foreign ports, seldom return directly to the ports from which they sailed, but frequently take return cargoes of merchandise to New York or other ports, into which the importations are much greater. The result is that vessels engaged in the foreign trade must necessarily sail also very frequently between those ports in the United States where they discharge their foreign cargoes and the other ports from which they load for foreign ports. They must necessarily (unless they go in ballast, and perhaps even then) be engaged during some portion of the year in the coastwise trade. In view of this necessity, and in view of the fact that the benefits of the statute were only intended to encourage and revive the foreign carrying trade in American ships, the first proviso in the statute fixed the period of two months in any one year as the limit of time during which the ship could engage in the coastwise trade without being subject to the payment of the duties on which the rebate is allowed. This, it was evidently supposed, would cover the time during any year in which the vessel employed in the foreign trade would find it necessary to trade between any two or more home ports. But as no vessel could sail from an Atlantic to a Pacific port of the United States in two months, it is clear that if on making such a voyage the terms of the proviso would compel a payment of the duties, the proviso would nullify that part of the first clause which included the trade between the Atlantic and Pacific ports of the United States in the words "foreign trade." Such a construction would be repugnant to common sense and every established rule for the construction of statutes. The "foreign trade" in the first clause includes the trade between the Atlantic and Pacific ports of the United States.

The coastwise trade in the first proviso as clearly excludes those ports. The term "foreign trade" in the first clause is used in a sense broader, and the term "coastwise trade" in the first proviso in a sense narrower, than the literal meaning of those terms. The terms "foreign trade" are then indisputably defined for the purposes of this section, as including the trade between the Atlantic and Pacific ports of the United States. The second proviso relates to articles of foreign production needed for the repair of American vessels engaged exclusively in foreign trade. Foreign trade has been already defined in the same section, and it was not necessary to repeat the definition in the subsequent clauses. It is clear that the foreign trade in the second proviso is the same foreign trade as that which is distinguished from coastwise trade in the first clause and in the first proviso. It includes the trade between the Atlantic and Pacific ports of the United States. Great stress is laid on the word "exclusively" in this proviso. The proviso only extends the benefit of exemption from duty to articles needed for the repair of American vessels engaged exclusively in foreign trade. What foreign trade is, has already, for the purpose of this section, been clearly defined. A vessel is engaged exclusively in the foreign trade when she is trading between a port of the United States and a foreign port, or between two foreign ports, or between the Atlantic and Pacific ports of the United States. The word "exclusively" was not used to limit the definition already given to foreign trade, but to limit the benefits of the section to vessels exclusively engaged in that trade, as already defined.

When the articles of foreign production are to be used in the construction of a new ship, the question of exemption from duty is determined by the fact of the ship being built in the United States for the purpose of being employed in the foreign trade. But even if built for that purpose or with that declared purpose, if she afterwards engages in the coastwise trade for more than two months in any one year she forfeits the benefit of the exemption. In the case of new ships that had not been engaged in any trade, the question was one of intent and purpose of construction. To prevent fraud on the act by building a vessel with a declared purpose of engaging her in foreign trade, and after obtaining remission of duty on the materials used in her construction and equipment, employing her in the coastwise trade, the first proviso was added providing for payment of duties in case of coastwise trade beyond a limited time. In the case of the vessel already built, the question is not one of purpose and intent, but one of past employment. Whether she is entitled to the benefit of exemption of duty depends upon the question of her employment. If engaged in the coastwise trade exclusively, she is not entitled. If engaged indifferently in the coastwise or foreign trade as opportunity is presented or interest may dictate, then she is not entitled. If engaged exclusively in the foreign trade she is entitled, and that foreign trade is the foreign trade defined in the section as including the trade between the Atlantic and Pacific ports. If the word "exclusively" were not used, a shipowner might claim exemption from duty on materials used in the repair of a vessel which was engaged both in coastwise and in foreign trade, or he might take his vessel from the coastwise trade and employ her in a foreign voyage, and on her return repair and recopper her, and claim that the materials were free of duty because she was then engaged in a foreign trade, or under charter for a foreign voyage. To pre-

vent such perversions of the policy of the statute, the word "exclusively" was used to show that the benefit of the statute was applicable only to materials used in the repair of vessels employed in foreign trade, and in foreign trade only.

In the sense in which those terms are used in the tenth section of the act of 1872, the Matterhorn was employed exclusively in the foreign trade, and the materials taken out of bond and used in repairing her were entitled to exemption from duty. If the second proviso is to be construed, as is suggested by the attorney for the United States, as in fact not a proviso affecting the construction or operation of the general provisions in the preceding part of the section, but as a separate and distinct enactment in relation to a different subject, the same result would follow. If that clause is to stand alone, without any reference to the clauses preceding it in the same section, then, if the vessel were a vessel engaged in the foreign trade when the repairs were made, the articles used in the repairs were free of duty. Whatever employment the vessel might subsequently be engaged in would not forfeit the right to exemption to duty under that clause alone without reference to what precedes it. The Matterhorn, up to the time when the repairs were made, had been engaged exclusively in the foreign trade in its literal sense. The materials used in her repair were entitled to exemption. If by reason of her subsequent employment in a voyage between an Atlantic and a Pacific port of the United States it is claimed that the duties which had been rebated became payable, it must be by reason of what is contained in the previous clause, but, as we have already seen, the previous clause does not embrace such a voyage in the coastwise trade.

Judgment for defendants.

Case No. 16,008.

UNITED STATES v. PATTERSON et al.
SAME v. BRENNEMAN et al.

[Gilp. 44.] [1]

District Court, E. D. Pennsylvania. Feb. 18, 1829.

OFFICIAL BONDS — ACTION TO RECOVER PUBLIC MONEYS—AUDITOR'S REPORT AS EVIDENCE.

1. The auditor's report of a balance due from a person, accountable for public money, is a guide to the comptroller as to the amount to be sued for, but not evidence for the court of the debt.

2. A certified statement of a balance due, and the report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury, as may be given in evidence under the second section of the act of March 3, 1797 [1 Stat. 512].

[Cited in U. S. v. Harrill, Case No. 15,310; U. S. v. Smith, 35 Fed. 492; U. S. v. Case, 49 Fed. 271.]

These were actions for debt [against John Patterson and Elizabeth, his wife, and Daniel Branley and Mary, his wife, administrators of George Lewis Lefler, and against Christian Brenneman, John Forrey, and Mary Gossler, executors of the last will and testament of Philip Gossler] on two bonds for twenty-five thousand dollars each, dated on the 14th October, 1799. George Lewis Lefler and Philip Gossler were sureties of Henry Miller, the principal obligor in the bonds, and a supervisor of the internal revenue of Pennsylvania. On the final adjustment of his account on the 25th September, 1811, it appeared that there was a balance of five thousand and thirty-seven dollars and forty-four cents, due from him at the time of his death. To recover this balance these suits were instituted against the legal representatives of his sureties.

Mr. Ingersoll, U. S. Dist. Atty.
Mr. Binney, for defendants.

The district attorney, to support the claim, offered in evidence the following document, certified by the register, and authenticated under the seal of the treasury department:

"No. 23,008. Treasury Department,

"Auditor's Office, July 6th, 1810.

"I have examined and adjusted the account of Henry Miller, late supervisor of the revenue for the district of Pennsylvania, and find that he stands chargeable as follows, viz:

To balance due on settlement of his account per report, No. 15,877...		$13,723 78
Peter Muhlenburg for commission on $287,908.47, (the amount of duties and bonds outstanding, and cash in hands of the collectors and inspectors transferred to said Muhlenburg) at $1^{18}/_{100}$ per cent.	$3,397 32	
Deduct amount charged on account of said commission per report No. No. 14,504	2,834 43	
		562 89
Tench Coxe, acting as supervisor, for commission on $65.70, (the amount of the balance due from officers, transferred to said Coxe, per report, No. 15,877,) at $1^{18}/_{100}$ per cent. which commission is to the credit of said Coxe, per report, No. 22,944.....		77
		$14,287 44

"I also find that he is entitled to the following credits, viz.:

By amount of the following warrants in favor of the treasurer, viz.:		
No. 1669	$4,000 00	
1684	2,250 00	
1696	500 00	
1702	2,500 00	
		$ 9,250 00
That the balance due the United States amounts to.....		5,037 44
		$14,287 44

"As will appear by the statement and documents herewith transmitted, for the de-

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

cision of the comptroller of the treasury thereon. R. Harrison, Auditor.

"To Gabriel Duvall, Esquire, Comptroller of the Treasury."

Mr. Binney for the defendants objected: This document is not evidence. Of the large sum of thirteen thousand seven hundred and twenty-three dollars and seventy-eight cents, no particulars are given. It is brought here as the balance reported from a former account, respecting the items of which no information is given, nor how this balance is made. The act of congress of the 3d of March, 1797, makes a transcript from the books of the treasury evidence in suits between the United States and receivers of public money; but a mere certified balance of the account, in gross, is not a transcript from the books, within the meaning and objects of the act, which intended that the whole account should be submitted to the jury. 1 Story's Laws, 464 [1 Stat. 512].

There is besides another objection. If the transcript were full and in proper form, the act makes it evidence only against the principal debtor, or receiver of the public money, and not against his sureties.

HOPKINSON, District Judge. It is unnecessary to give any opinion on the second point, as the first is sufficient to exclude the evidence. The first section of the act of congress referred to, entitled, "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money," enacts, that when any revenue officer, or other person accountable for public money, shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, it shall be the duty of the comptroller, and he is thereby required, to institute suit for the recovery of the same. The reported balance, thus made to the comptroller, is to be his guide and instruction for the amount he is to claim, and sue for, from the delinquent; and this is the whole office and effect of the report. It is the direction to the comptroller, but not the evidence for the court.

The second section of the act provides the evidence, which shall be received on the trial, in proof of the claim, if it is judicially resisted; and then we hear nothing of the report made to the comptroller, on which the suit is brought; but for this purpose, it is declared, that "a transcript from the books, and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted as evidence;" by which, I understand that the whole accounts, as they appear in the books; the elements out of which the reported balance is formed; together with all the proceedings, which have been had concerning them, shall be certified, and submitted to the court and jury, that they may judge whether the sum or balance, for which the suit is brought, be fairly made up, and is justly due; that they may see and determine whether any unfounded or illegal charges have been made against the defendant; or any credits refused or omitted, to which he is justly or legally entitled. A full transcript from the books, containing the accounts, and also of the proceedings of the treasury in relation to them, in admitting or rejecting disputed vouchers, charges, &c. are indispensable to these objects; they can never be reached by the mere exhibition of the balance apparent on an adjustment made, ex parte, by the officers of the treasury, and reported to the comptroller for his information of the amount claimed by the United States, and for which he is to bring suit; but which is the very matter complained of; the very adjustment appealed from, by the defendant.

The question to be tried by this jury is the correctness of this adjusted, reported balance; but if it is allowed to prove itself, what is to be tried? If a treasury certificate that such is the balance reported to be due, is enough to entitle the United States to a verdict and judgment for that amount, the trial is a mere pretence; an useless form which might be dispensed with, and the judgment entered at once on the production of the certificate. This cannot be the intention of the law. The whole cause of controversy must be put into the possession of the court, as it exists in the treasury department; and thereupon the court and jury will pass their judgment. This construction is further manifest from the fourth section of the act. It directs that "no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury, for their examination, and by them disallowed in whole or in part." How appear? Assuredly by the transcript from the books and proceedings of the treasury. But these things will not, and cannot appear, and the defendant will be shut out from all the defence allowed him by the act, if it be sufficient for the United States to produce a certificate of the balance claimed by them, as reported by their accounting officers to their comptroller; which may not be impeached by denial, nor penetrated by adverse testimony; which cannot be opened to admit credits unjustly refused, nor to withdraw charges unjustly made; which, in short, furnishes nothing to be tried. In other cases, we have seen the whole accounts transcribed and produced, which shows that it is not the usage of the department to give such transcripts as that now offered.

The evidence was rejected, and exceptions were taken by the district attorney.

The jury found a verdict for the defendants.

Case No. 16,009.

UNITED STATES v. PATTERSON.

[3 McLean, 53.] [1]

Circuit Court, D. Ohio. July Term, 1842.

UNITED STATES MARSHALS — PAYMENTS TO DEPUTIES—PENALTIES—INFORMERS AS WITNESSES.

1. A marshal of the United States is bound to pay over to his deputies and assistants, in taking the census, the same funds, or their equivalent, which he may have received from the government.

2. And if he pay less, he is liable to the penalty of five hundred dollars, under the act of the 3d of March, 1839 [5 Stat. 336].

3. An informer is a competent witness, although he may receive a part of the penalty. This is not strictly the rule at the common law.

4. But it is founded on necessity and policy, and is now fully established.

5. A sale of treasury notes by the marshal for currency, at eight per cent. premium, and a payment of his deputy in such currency, is a violation of the law.

[This was an indictment against John Patterson, a United States marshal, charging him with paying his deputies in depreciated paper. See Case No. 16,010.]

OPINION OF THE COURT. This is an indictment against the defendant for having, as marshal of the United States for the district of Ohio, paid his deputies for taking the sixth census, less than he received from the government, for the same service. The eleventh section of the act of the 3d of March, 1839, in relation to the taking of said census, provides, "that if any marshal, in any district within the United States or territories, shall, directly or indirectly, ask, demand or receive, of any assistant to be appointed by him under this act, any fee, reward or compensation, for the appointment of such assistant to discharge the duties required of such assistant, any portion of the compensation allowed to the assistant by this act, the said marshal shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount of five hundred dollars for each offence, to be recovered by suit or indictment," &c.

As the informer, under this statute, receives one half the penalty, on conviction, being called as a witness, he was objected to, as incompetent. "An informer, who is entitled to any part of the penalty, is, in general, incompetent to give evidence; but in some instances the testimony of informers has been received, where a statute could receive no execution unless the party seeking to recover the penalty were admitted as a witness." 4 Phil. Ev. 166. Heward v. Shipley, 4 East, 180; Mead v. Robinson, Willes, 425. Although by the common law informers entitled to a part of the penalty are incompetent, yet by the particular provisions or policy of several acts of parliament, they may be admitted. "In a prosecution on St. 21 Geo. III. c. 37, against exporting machinery, the informer is competent. So on a prosecution for penalties under St. 9 Anne, c. 14, § 5, the loser of money at cards may prove his loss. And on a prosecution under St. 23 Geo. II. c. 13, § 1, for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty." In neither of the above acts is it provided that the informer may be a witness. In U. S. v. Murphy, 16 Pet. [41 U. S.] 213, it was held that an informer was a competent witness, although he received a part of the penalty, "upon the ground of necessity and of public policy, and of attaining the manifest objects of the statute, and the ends of justice."

The informer, being sworn as a witness, stated, that being appointed by the marshal to take the census in the county in which he lived, was sworn as such; that he performed the work, and was entitled to receive as his compensation five hundred thirty-eight dollars and twenty-six cents; that he received from the defendant a letter enclosing a check for five hundred and twenty dollars and twenty-six cents, on the Columbus Bank; that eighteen dollars were retained under the pretence that the return was imperfect, and had to be corrected. The witness returned the check, and requested that he might receive his pay in treasury notes. Afterwards, when witness saw defendant at Columbus, he proposed to receive from him a thousand dollar draft, but the defendant refused to pay it, saying that he had no funds, but those in the Franklin Bank. This was about the 9th of July, 1841. Subsequently, defendant offered the witness a check on the receiver at Jeffersonville, to pay other claims which the witness might have, if he would pay specie in change, the check being large. This the witness could not do. The witness then received the check first transmitted to him, demanded specie of the bank, but was refused, and he was obliged to receive currency, which was at a discount of some six or ten per cent. He used the paper at a loss of ten per cent. Defendant refused to pay the witness the premium for which he sold the treasury notes. Witness offered to take less; but this also was refused. It was proved that treasury notes were worth nine or ten per cent. in currency. The treasury notes remitted to the defendant were sold by him for eight per cent.

The cause was argued before the jury, by the counsel on both sides.

THE COURT instructed the jury, that a payment in currency of less value than the treasury notes received by the government, was a violation of the act above cited, and subjected the defendant to the penalty prescribed by it; that no public officer can speculate upon the funds of the public placed in his hands for disbursement; that the act was designed to prevent such an use of the public money.

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

But if a deputy, knowing his rights, should voluntarily receive in payment that which was of less value than specie, he would have a right to waive his claim in this respect. But, if he was ignorant of his rights, or if knowing them, was compelled by circumstances to receive less than the entire sum in specie, or its equivalent, the defendant must be found guilty. If the assistant, in this case, was paid in a currency of less value than treasury notes, by eight per cent., the defendant as much violated the law as if he had retained the same per cent., paying the balance in specie.

The jury found the defendant guilty, &c.

Case No. 16,010.

UNITED STATES v. PATTERSON.

[3 McLean, 299.] [1]

Circuit Court, D. Ohio. Dec. Term, 1843.

PENALTIES — INFORMERS AS WITNESSES — UNITED STATES MARSHALS—PAYMENT OF DEPUTIES.

1. An informer who receives one-half of the penalty on conviction is, notwithstanding, a competent witness.

2. This is chiefly placed on the ground of public policy.

3. A payment by a marshal to his assistant for taking the census in depreciated paper, is a violation of the census act of 1839 [5 Stat. 331]. And this is especially so, where good funds had been received by the marshal, to pay his assistants.

Mr. Anthony, U. S. Dist. Atty.

Mr. Hamer, for defendant.

OPINION OF THE COURT. This is an indictment under the act of the 3d of March, 1839, in relation to the census, the defendant being marshal of the district of Ohio, charging him with retaining from one of his assistants in taking the census, a portion of the compensation allowed by law for that service. The indictment contained several counts, charging the defendant with paying his assistant in depreciated paper, when he received from the government funds with which to pay them, equivalent to specie. The defendant gave bond, as marshal, in 1838. A certified transcript from the treasury showed the transmission to him of a large amount of treasury notes, and also a draft for $1960.17, payable at sight, on the order of the defendant, on the receiver of public moneys at Jeffersonville. Mr. Taylor stated that he acted as assistant in taking the census for Champaign county. On the 8th of July, 1841, having received in part his compensation, he demanded of the defendant the payment of the balance. Defendant said he could not pay his assistants in treasury notes, as they were large, but that he had made an arrangement to pay them through the banks. The witness offered to take treasury notes, but eventually received currency which was at a discount of ten per cent. Major Hunt was present when the above payment was made, and heard the marshal offer to pay in a draft on the receiver at Jeffersonville, Indiana. Mr. Swan stated that treasury notes were worth from seven to nine per cent. above their face, for currency. Witness purchased from the marshal from five to eight thousand dollars of treasury notes, for which he paid eight per cent. in currency. The treasury notes were one per cent. better than specie. Mr. Moody stated that the draft on Jeffersonville for specie was worth from six to seven per cent. above par in bankable money. Mr. Espy, cashier of the Franklin bank,—the bank at that time was in a state of suspension, as to specie payments,—stated that defendant had a deposit of $35,000, which was drawn for by him and paid by the bank in currency. The defendant took a receipt in full from the witness Taylor.

This prosecution rests on the 11th section of the above act, which provides, "that if any marshal, in any district within the United States or territories shall directly or indirectly ask or demand, or receive, or contract to receive, of any assistants to be appointed by him under this act, any fee, reward or compensation, for the appointment of such assistant to discharge the duties required of such assistant under this act, or shall retain from such assistant any portion of the compensation allowed to the assistant by this act, the said marshal shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount of five hundred dollars for each offence, to be recovered by suit or indictment," one-half to the informer, &c. An objection was made to the competency of Taylor, who was the informer, and who, should the defendant be convicted, will be entitled to one-half of the penalty. A distinction is made between a qui tam action and one like the present. An informer who sues for himself as well as for the state, recovers the amount of the penalty that he is entitled to, but in the present case the informer does not receive it under the sentence on the indictment, but must sue for it. This distinction, though made in the case of U. S. v. Murphy, 16 Pet. [41 U. S.] 210, appears to me to be unsustainable. In the case cited, the court say, "The general rule undoubtedly is, in criminal cases, as well as in civil, that a person interested in the event of the suit or prosecution, is not a competent witness. But there are many exceptions, which are as old as the rule itself." One exception is, where, from the nature of the offence, there can be no conviction if the party interested be not a witness. 1 Phil. Ev. c. 8, § 7. "So cases of necessity where no other evidence can be reasonably expected, as an indictment for robbery." Id. p. 120, c. 5, § 6. "Another exception is, that of a person who is to receive a reward for or upon the conviction of the offender." The rule is founded

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

upon public policy, and is sustained by the decision in 16 Pet. [41 U. S.], above referred to, and the authorities there cited. On these authorities the court think that the informer in this case, is a competent witness.

On the facts of the case THE COURT instructed the jury, that to pay an assistant in depreciated funds, nominally calling for the true sum, but intrinsically worth seven or eight per cent. less, is a violation of the eleventh section, and subjects the defendant to the penalty prescribed. That an exchange of the government funds for currency of less value, and a payment by the marshal in such currency is clearly within the mischief, to prevent which the statute was passed.

The jury returned a verdict of guilty.

[See Case No. 16,009.]

Case No. 16,011.

UNITED STATES v. PATTERSON.

[6 McLean, 466.] [1]

Circuit Court, D. Michigan. June Term, 1855.

OFFENSES AGAINST POSTAL LAWS—EMBEZZLEMENT OF LETTER—INDICTMENT.

1. In an indictment for embezzlement, under the post office law, it is sufficiently certain to charge "that defendant was a person employed in one of the departments of the post office establishment of the United States."

2. When the embezzlement is of a letter containing a bank note, it is not necessary to describe the note.

[Cited in State v. Noland, 111 Mo. 487, 19 S. W. 716.]

3. In larceny such description is necessary.

4. The verdict being general, if one count is good, judgment will not be arrested.

George E. Hand, U. S. Dist. Atty.

Betham Duffield, for defendant.

WILKINS, District Judge. The motion made to arrest the judgment in this case is founded principally on two reasons:—1st. That the offense is not described in the indictment with sufficient certainty and precision. 2d. That no offense is charged against the defendant in the last four counts.

1. The offense in the fifth count is described thus:—"That Charles Patterson, a person employed in one of the departments of the post office establishment of the United States, a certain letter which came to the possession of him, the said Patterson, and which was intended to be conveyed by post, and containing a bank note of great value, viz.: of the value of $50, did then and there, with force and arms, feloniously embezzle," &c. Stripped of the verbiage descriptive of time, place, and circumstance, and what is the charge here specified? Is it not "that Charles Patterson, employed as stated, embezzled a certain letter which came to his possession as deputy post master?" The language employed is the language of the statute creating and defining the offense, which is sufficient. The time has gone by when the technical objections so ably urged in the argument, and for which there is so much authority in England and in our state tribunals, can be of any force in the courts of the United States The cases of U. S. v. Lancaster [Case No. 15,556], and U. S. v. Martin [Id. 15,731], cover the whole ground as to this objection; and certainly settles the law in the Seventh circuit until reversed by the supreme court. And the cases of U. S. v. Mills, 7 Pet. [32 U. S.] 142, and U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, declare the law of the United States to be "that it is sufficient to charge the offense in the words of the statute;" Mr. Justice Story intimating in the last case that any other description would be fatal. If the offense was the simple larceny of a letter and bank note, indictable at common law, a description of the letter and of the note would have been necessary. But the offense is embezzlement, a criminal breach of trust, and that the thing embezzled was a bank note of a certain value, is but an aggravating circumstance, and the description of the same not held essential. And the form in Archb. Cr. Prac. & Pl. 156, which was for the embezzlement, as clerk, of a bill of exchange, a particular description of the bill, other than its amount, is omitted. This objection is not sustained.

2dly. It is urged that it is not succinctly or grammatically charged that the defendant committed the offense. Separating the 1st clause of the charging matter from the concluding part, and making two sentences instead of one, there is doubt and obscurity as to the offender; but, considering the whole as one continuous sentence, there can be no misunderstanding as to the party accused. The court can reject the unnecessary word "that" as surplusage; as, in the case of Rex v. Cooke, 4 Harg. State Trials, the omission of the words "et ipse idem Petrus Cooke," which was not fatal. Consider the "Charles Patterson" in the first clause as the nominative case, and that he did embezzle the letter and money mentioned. Charles Patterson is charged with being employed in the post office department, and with embezzling a certain letter and bank note, which then and there came into his possession. The repetition of the nominative case, namely, "that he, the said Charles," did embezzle, might have saved the court and the counsel an argument and research; but its omission does not make the charge so equivocal as to warrant the arrest of the judgment, and the consequent discharge of the accused. It is clear, some intelligent being did the act, and equally clear that no other being is connected with the description of the offence than Charles Patterson, whose name is re-

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

peated twice in the sentence: once as being the person entrusted with the letter in question, and once as being employed in the post office at the time. To hold, judicially, that the indictment leaves it in doubt who is meant, would be grammatically straining words beyond their usual import. Some one mentioned did embezzle; who was it? Not White, for Patterson is described as his deputy, and "the deputy," or "the said Patterson," must be the nominative preceding, and giving signification to the verb. But could I have sustained this objection, it would have been of little avail to the defendant. Here, as in the 1st objection, English and state authorities may be considered as fully sustaining the position of defendant's counsel, but the United States cases are the other way.

The verdict is general on an indictment containing seven counts, two of which are unquestionably good; but it is authoritatively ruled by Mr. Justice McLean in Lytle v. Fenn [Case No. 8,651], and by the supreme court in the case of U. S. v. Furlong, 5 Wheat. [18 U. S.] 184, "that each count in an indictment is a distinct substantive charge, and that on a general verdict, if one be deemed bad, the judgment of the court may be pronounced upon that count considered sufficient." Here, the court hold all the counts as sufficient, and only allude to those U. S. authorities in order to remark that where such exist, and are applicable, this court will not regard as of any weight whatever, either the English or state decisions, and this intimation will supercede hereafter a laborious research, so commendable in counsel, but which must prove, eventually, labor lost. Motion refused.

Case No. 16,012.

UNITED STATES v. The PAUL SHEARMAN.

[Pet. C. C. 98.] [1]

Circuit Court, D. New Jersey. April Term, 1815.

NON-INTERCOURSE LAWS—FORFEITURE OF INSURANCE—PROOF OF POLICY—ADMISSION OF COPY—PRESUMPTIONS—BURDEN OF PROOF.

1. Condemnation of a vessel and cargo, under the act of congress prohibiting intercourse with Great Britain, &c. 4 Laws [Bior. & D.] 211 [2 Stat. 550].

2. A copy of a policy of insurance, proved to have been compared with the original register on the books of the insurance company, and notice given to produce the original, cannot be read in evidence. The register, in the hands of the company, should be exhibited, after proving the existence of the original policy.

3. Where a prohibited cargo was taken in at a port with which intercourse is prohibited by law, and brought into a port of the United States, it is to be presumed, that the cargo was laden with an intention to import the same into the United States; but this presumption may be repelled by evidence.

4. The burthen of proof, is placed on the claimant of property taken in delicto.

5. Liberty in a policy of insurance to touch at a place, does not justify trading, and trading would be a deviation, and avoid the policy.

[Appeal from the district court of the United States for the district of New Jersey.]

This was a libel filed in the district court of New Jersey, on behalf of the United States, against this vessel and her cargo, for a breach of the non-intercourse law. The libel charges, that the cargo, being the produce of the Island of Jamaica, a British dependency, was, some time in June, 1811, taken on board at that island, with the knowledge of the master, with the intention of importing it into the United States; and that the same was in fact imported into the port of Perth Amboy, contrary to the act, "to interdict the commercial intercourse between the United States and Great Britain and France, and for other purposes." To this libel, an answer was put in by Peter M'Kinley, who claims the vessel and her cargo; stating that this cargo was sent on board, with intention to be carried to the Havanna, to be there disposed of, and the proceeds to be invested in the produce of the Island of Cuba, to be imported into the United States. But that the vessel was refused an entry at Havanna, on account of her having on board three Frenchmen, who, together with fourteen others, and about 10,000 dollars in specie, had been saved from a wreck on the coast of Cuba, by the captain of this vessel, whilst on her voyage to Havanna. That in consequence of this refusal, and the want of provisions and water for this increased number of persons on board, the captain had entered the waters of the United States, in order to land the persons so taken from the wreck, to obtain provisions and water, and to receive instructions for the further destination of the brig and cargo. The district court dismissed the libel [case unreported], from which sentence this appeal was taken.

It appeared in evidence, that this vessel arrived at Amboy on the 15th of July, 1811. On the next day, the captain delivered, to an officer of the customs, a manifest of the cargo, stating the voyage to have been from Havanna to Amboy. The second report and manifest, with the usual affidavit subjoined, was delivered to the collector of that port on the 23d July; in which the voyage is stated to have been from Jamaica to Amboy, by the way of Havanna; the cargo (except one puncheon of rum, belonging to the captain) being consigned to the claimant at New York. On the 17th July, before any attempt to break bulk, or to land the cargo, the collector made the seizure; and, on the same, or the next day, the captain made his protest. The clearance at Jamaica, was for

[1] [Reported by Richard Peters, Jr., Esq.]

the Havanna. The facts stated in the claim, were fully supported by the testimony of the master and of the supercargo. A policy of insurance, made at New York, dated the 11th July, 1811, on this vessel, on a voyage from Jamaica to the United States, with leave to touch at the Havanna, to return half a per cent. in case this privilege should not be used; was given in evidence by the claimant. The appellant offered in evidence, a copy of a copy of a policy of insurance on the cargo of the vessel, taken from the books of the insurance company at New York, and proved, by the deposition of a witness, to have been compared by him with the written parts of the said policy on said books, and to be a true copy. Notice to produce the original, was proved to have been given. To this evidence it was objected, that this is only a copy of a copy, and there is no evidence that an original policy had ever been executed, which ought to be proved. Peak, Ev. 96, 97.

WASHINGTON, Circuit Justice. This evidence is inadmissible, for both the reasons mentioned. To introduce a copy of an instrument, or to give evidence of its contents, the party should lay a foundation, by some evidence tending to prove that there was a genuine instrument in existence. The register of policies of insurance, kept by the insurance company, is nothing more than a private memorandum, which ought to have been produced, after proving the existence of an original.

Mr. M'Ilvain, and Mr. Stockton, for the United States, contended:

First. That the intention, when the cargo was taken on board at Jamaica, was to bring it into the United States; the calling at the Havanna, was a mere pretence to cover the real destination. That the captain, being the shipper and consignee of one puncheon of rum, part of the cargo; and being answerable to the owners for his conduct, is an incompetent witness; although that puncheon of rum is omitted in this libel. This ground will condemn the vessel, as well as the cargo, as it is admitted, that the cargo was taken on board with the knowledge of the master. As to the incompetency of the master, they cited Reeve, Shipp. 262. Second. That the cargo must be condemned upon the ground of an illegal importation, the necessity set up to justify it, being clearly unsupported.

Messrs. Williamson and Ogden, for the claimant, contended, as to the first point, that the onus probandi lies upon the United States, to prove the criminal intention alleged, as cause of forfeiture. But the evidence is all the other way. The evidence of the master and supercargo are uncontradicted, and proves the destination to have been for the Havanna. As to the second point; there was no importation at the time of the seizure; and, if so, nothing done afterwards by the claimant, could furnish a ground of forfeiture. There can be no importation, unless there was an intention to import, manifested by breaking of bulk, landing, or attempting to land, part of the cargo. In this case, the vessel was forced in by necessity; and the seizure was made, before any evidence of an intention to import was given. The first section of the non-intercourse law, prohibits armed vessels from coming within the waters of the United States; but, as to merchant vessels, the 4th, 5th and 6th sections speak of importation, and not of a mere coming into the waters of the United States. The 7th section shows, that a vessel having prohibited goods, and goods not prohibited; may come in and land the latter, without incurring a forfeiture of the former. Cases cited to show what amounts to an importation: 2 Wils. 257; Reeve, Shipp. 203, 206, 207; Harg. Law Tracts, 216; Coll. Jurid. 80.

WASHINGTON, Circuit Justice. It is contended for the claimant, that the United States, to effect the confiscation of this vessel and cargo, must make out a clear case of forfeiture; by proving that the cargo was taken in at Jamaica, with intention to import the same into the United States; or, that it was taken in, with the knowledge of the master, and was actually imported into the United States. The United States have proved, that the cargo, the produce and manufactory of a dependency of Great Britain, was taken in at Jamaica, and afterwards brought within the waters, and to a port of the United States. That the cargo was taken on board, with intention to import it into the United States, with the knowledge of the master, is a presumption arising out of the acts which are proved; because a man is always presumed to have intended to do, what he has actually done. But this presumption may be repelled by evidence on the other side, tending to show a different intention. Nothing is to be presumed in favour of a claimant in such case as this. His property is taken in delicto; and the burthen of proof is placed upon him, to explain his conduct, and to show the transaction to be innocent. It is always in his power, if he has acted bona fide, to exculpate himself from the charge to which appearances have exposed him; and, if he fail to do so, he must take the consequence of those acts, which, unexplained, amount to a breach of the law.

Let us see how the claimant in this case, has explained this transaction, and by what proof. He says, that his captain took in this cargo at Montego Bay, with an intention to carry it to Havanna, and there to dispose of it; and to invest the proceeds in sugar, to be transported to the United States. In proof of this intention, he shows the clearance from Montego Bay to the Havanna, and also produces the evidence of the captain and supercargo, to prove that such was the real des-

tination of the vessel. The clearance, though a necessary paper to be produced by the claimant, amounts to very little in the scale of evidence; where a different voyage has in fact been performed, and the reality of the ostensible destination, is subject to suspicion. If the real destination of this vessel had been to the United States, it is not to be supposed, that it would have been disclosed in one of the ship's papers; but a fictitious destination would of course have been avowed. As to the captain's testimony, I lay it entirely out of the case; not only on account of the strong motives he must have felt, to prevent the forfeiture of the vessel and cargo; but on account of his uncandid conduct after his arrival at Amboy. To use the least harsh epithet in respect to him, he was guilty of a palpable equivocation in his oath, verifying his second manifest; and it is most apparent, that his first report was untrue, and was designed to mislead the officers of the government, and to induce a belief that his voyage had been from the Havanna, and was of course a lawful one. I cannot, therefore, believe this man. It is sufficient to destroy his credit with me, to prove him guilty of a suppressio veri, and of unfair conduct, in relation to this particular transaction.

The evidence of the supercargo is not impeached, and it would therefore go a great way towards supporting the case of the claimant, if it were otherwise free from suspicion. But the trade, stated by this witness to have been intended, is altogether of so extraordinary a nature, that something more than his testimony is necessary to obtain credit for it. West India produce and manufactures, are carried by a vessel of the United States, from one West India island to be sold in another; where the same articles are produced and manufactured for exportation. There might be circumstances which would justify such a trade; but their existence should be proved, in order to remove the improbability, which the general nature of such trade stamps upon the transaction. It will not be sufficient for claimant to suppose circumstances, which might render such an intercourse probable; and from thence to argue that they existed in this case. It is said, that the claimant may have had funds in Jamaica, produced by the sale of the outward cargo of this vessel, or of the cargoes of former voyages; and that it might have been his interest to invest those funds in the produce of that island, and to dispose of them again, though at a loss, in the Havanna. But where is the evidence on which to found this supposition? If it be real, it was in the power of the claimant to show it. Where are his letters to his correspondent in Jamaica, and particularly, his letter of instructions to his captain and supercargo? It is not also to be supposed, that he left these agents to act and to carry on such a trade, with his funds, as they or either of them pleased. And even if this had been the case, some authority for doing so, either written or verbal, would have been given, and might have been proved. It is said, that the claimant is an illiterate and irregular merchant, and probably kept no copies of his letters. But this assertion, so improbable in itself, is but an assertion, gratuitously made; and if well founded, was also susceptible of proof. Whilst speaking of the absence of the papers, and of evidence to clear away the strong presumption, which exists against the legality and fairness of this transaction; it may not be amiss to remark, that no bill of lading or invoice of this cargo, appears to have been produced in the district court, or has been produced in this court. These are the regular ship's papers, the absence of which ought to be accounted for. But this case is attended by circumstances, which scarcely leave a doubt as to the original and real destination of this vessel. In the first place, it appears by the report and manifest delivered to the collector on the 23d of July, that the cargo except one puncheon of rum, came consigned to the claimant, the owner of the vessel, on whose account it was purchased. This, in the absence of the usual ship's papers, before noticed, affords strong presumptive proof, that the real destination of this vessel, was to some port of the United States, where the consignee lived. In the next place, it appears that the vessel was insured, by the owner, from Jamaica to New York, with liberty merely to touch at Havanna. If the object of the voyage was, as has been supposed, to withdraw funds from Jamaica, and to invest them in the produce of the Island of Cuba; is it conceivable, that the claimant would pay a premium for an indemnity, which the contemplated act would forfeit? For the liberty to touch at Havanna, would not have justified a trading there; and the act of trading, would have amounted to a deviation, and have avoided the policy. Besides, the agreement to return a part of the premium, in case even the slight privilege of touching at the Havanna should not be used, taken in connection with the voyage insured, is conclusive to show, that the real destination was from Jamacia to the United States. Such was the voyage intended, and such was the voyage performed. It is said, however, that she came into Amboy for the purpose of landing the persons taken from the wreck, and to receive the orders of the owner. But, was any such intention even pretended by the captain or supercargo, until the lapse of two or three days; when it seems to have been thought prudent to draw up a protest? So far from it, that the first report delivered by the master to an officer of the customs, falsely stated a legal voyage from Havanna to Amboy; although the master has sworn in his deposition, that he did not even drop his anchor at that port. This circumstance alone, is sufficient to destroy the plea of ignorance in the captain, set up to excuse this statement. In short, I feel myself constrained to say of this case, that the illegality of the

transaction, is attempted to be concealed by a drapery, too thin to impose upon the most credulous mind. The sentence below must be reversed, with costs, and the vessel and cargo condemned.

Case No. 16,013.

UNITED STATES v. PAXTON.

[1 Cranch, C. C. 44.] [1]

Circuit Court, District of Columbia. Dec. Term, 1801.

INTOXICATING LIQUORS—UNLAWFUL SALES.

A servant selling spirituous liquors for his master without license is not liable to the penalty.

[Cited in U. S. v. Shuck, Case No. 16,285; U. S. v. Voss, Id. 16,628.]

Indictment for retailing spirituous liquors without license.

THE COURT directed the jury that if they should be of opinion that the defendant sold the liquor as clerk, agent, servant, or barkeeper of Brown, then he was not guilty. It was the selling of Brown within the meaning of the act. See, also, U. S. v. Shuck [Case No. 16,285], Alexandria, Jan. term, 1802, and U. S. v. Voss [Id. 16,628].

Case No. 16,014.

UNITED STATES v. PAYNE.

[4 Dill. 387.] [2]

Circuit Court, D. Kansas. 1877.

JURISDICTION OF PROBATE COURT — PROPERTY OF POTTAWATOMIE INDIANS—ACTION FOR MONEY HAD AND RECEIVED.

1. Without the assent of the general government, the probate courts of a state have no jurisdiction to administer upon the property or credits of Indians who were members of a tribe which maintains towards the United States its tribal relations.

2. The grant of administration on the estate of a member of the Pottawatomie tribe of Indians, by a probate court in Kansas, by virtue of the treaty of 1867 (15 Stat. 536, art. 8, of senate amendments), when such member is in fact alive, is void as respects the administrator, and money paid to him by the United States in that capacity may be recovered back.

This cause is submitted to the court upon the facts set forth in the petition, answer, and reply, which are severally admitted to be true. The petition states that, on June 10th, 1871, the defendant [Benjamin T. Payne] was indebted to the plaintiff in the sum of $6,111.84, for money before that time had and received by the defendant, to and for the use of the plaintiff. The answer states, "that, in January and May, 1871, the defendant was duly appointed by the probate court for Wabaunsee county, Kansas, administrator of the following named deceased persons: In-kuh-da-o-ks, Go-she-was-kpa-zo-mah, etc. (naming several other Indians having like names), and as such duly qualified; that said several persons were Pottawatomie Indians, and were, at the times of their several deaths, members of the Pottawatomie Tribe or Nation of Indians, and each owned real estate in said county, and was entitled to receive from the government of the United States, under treaty stipulations, $661.18, amounting in all to $6,611.80; that said sum was duly paid by the United States to this defendant, as such administrator; that defendant has duly accounted to the said probate court, and paid out under its direction, of the said moneys received from the United States, the sum of $4,271.22, and holds the balance subject to the orders of jurisdiction of the said probate court; that defendant has never received any other moneys of the United States." The replication states that the said Indians mentioned in the answer were alive, and members of the said tribe, at the time the defendant was appointed as administrator. The senate amendment to article 8, of the treaty of 1867, with the Pottawatomie tribe of Indians, is as follows: "Where allottees, under the treaty of 1861, shall have died, or shall hereafter decease, such allottees shall be regarded, for the purpose of a careful and just settlement of their, estates, as citizens of the United States, and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms, and in accordance with the laws of the state, as in the case of other citizens, deceased," etc. 15 Stat. 536.

George R. Peck, U. S. Dist. Atty.
Martin & Case, for defendant.

DILLON, Circuit Judge. It is admitted that the several Indians for whose estates the defendant was appointed administrator by the local probate court, were, at the time of such appointment, in full life, and members of the Pottawatomie tribe of Indians, and that the money received by the defendant of the United States was due to them by the United States under treaty stipulations with the tribe.

Where Indians maintain the tribal relations, their property is not subject to the laws of the state, or their estates to be administered upon in the probate court of the state, unless by the assent of the general government. The Kansas Indians, 15 Wall. [82 U. S.] 737, 757, 759; Mackey v. Coxe, 18 How. [59 U. S.] 100; Mungosah v. Steinbrook [Case No. 9,924]; Gray v. Coffman [Case No. 5,714].

It will be conceded, for the purposes of this case, that the senate amendment to article 8 of the treaty of 1867, gave the probate court the authority to appoint administrators and settle the estate of deceased allottees of the

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

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

tribe. But it gave the probate court no authority to appoint administrators of an Indian, unless he had been an allottee under the treaty, and was dead.

The weight of judicial opinion would seem to be in favor of the proposition, even if the Indians and their property were subject to the probate jurisdiction of the courts of Kansas, that the court had no jurisdiction, and could have none, to make an appointment of an administrator of a person who, at the time, was alive. Jochumsen v. Suffolk Sav. Bank, 3 Allen, 87; Griffith v. Frazier, 8 Cranch [12 U. S.] 9, 23; Fisk v. Norvel, 9 Tex. 13. Contra, by the court of appeals of New York, in Roderigas v. East River Sav. Inst. [63 N. Y. 460], 15 Am. Law Reg. (N. S.) April, 1876, p. 205, where the note in disapproval, by the late Judge Redfield, may be found. Much may be said on both sides of the general proposition last stated. Roderigas v. East River Sav. Inst., just cited, may, possibly, be distinguished on solid grounds from such a case as the one before us. It was there held that a payment by a debtor in good faith to an administrator was valid, and would protect the debtor against a second payment, although the supposed intestate was alive at the time, and the letters of administration were subsequently revoked for this reason. The debtor was innocent, and acted on the faith of the grant of administration of the proper court. It may be a different question when it arises between an innocent third party and the administrator himself, which is the present case. It is possible that the case in the court of appeals of New York may be sustained on this ground, but we need not express any opinion on this point. We place our judgment in the case at the bar on the ground that under the treaty the probate court had no jurisdiction to make an appointment of an administrator for Indians who were alive at the time, and that its decision that it had jurisdiction, evidenced by the grant of letters of administration, is not conclusive in favor of the administrator, who, perhaps, had himself appointed, and who, at all events, voluntarily assumed that character, and held himself out to the world as sustaining that relation.

As the government owed this money to these Indians; as the defendant had no right to receive it; as the payment to the defendant did not absolve the government from the liability or duty to pay the amount to the Indians entitled thereto; and as the defendant, if he did not, indeed, apply for, voluntarily accepted and undertook to act as administrator, and does not claim that he has paid the money to the Indians entitled, or that the latter have ever ratified or confirmed the receipt of the money or its disposition by him, our judgment is that the United States may maintain this action to recover back the amount unlawfully received by the defendant.

Judgment for the plaintiff.

Case No. 16,015.

UNITED STATES v. PAYSON et al.

SAME v. SANCHEZ.

[1 Cal. Law J. 235.]

District Court, N. D. California. Feb. 17, 1863.

MEXICAN LAND GRANTS—PAROL EVIDENCE—ACT OF POSSESSION.

[The record of the act of possession based on depositions containing statements upon which the alcalde acted cannot be contradicted by parol evidence of aged, illiterate, and infirm witnesses as to their recollection of what was done or intended by the alcalde.]

Settlement of the boundary between the Buri Buri and the Visitacion ranchos, in the neighborhood of San Francisco. [See Case No. 16,017.]

OPINION OF THE COURT. The official surveys of these ranchos are objected to by the owners of the former. The principal controversy relates to the location of the northern line of the Buri Buri, or Sanchez grant, which is also the southern boundary of the Visitacion Rancho, confirmed to Henry R. Payson et al. The grant to Jose De La Cruz Sanchez was issued on the 23d September, 1835. The only boundaries it mentions are "San Mateo and the Corral de San Bruno." The fourth condition describes the land as of the extent of four square leagues, as shown by the map. In the resolution of approval by the departmental assembly, the boundaries are mentioned with more particularity: "The tract conceded will include the lands now occupied, bounded by the Mission of San Francisco on the north, with the rancho of San Mateo on the south, with the esteros of the bay on the east, and with the rancho of La Costa on the east, which dimensions will be observed at the time of giving possession." The rancho of Cañada de Guadalupe Visitacion y Rodeo Viejo, granted to Jacob P. Leese, is described as bounded "on the east by the bay, on the west by the Camino Real and Portezuelo, on the north by the rancho of Don Cornelio Bernal, and on the south by that of Don Jose Sanchez." In order, therefore, to establish the southern boundary of the Visitacion Rancho, the northern boundary of the Buri Buri must be ascertained. The description in the decree in the Buri Buri case is taken from the record of the judicial possession of the rancho, given in 1835 to the grantee; and this record is referred to in the decree for a more particular description of the boundary. The record contains, as is usual: (1) The depositions of the witnesses who testify to the recognized boundaries of the rancho. (2) The account of the preliminary reconnoissance, or "vista de ojos," where the witnesses point out to the alcalde, on the ground, the boundaries and landmarks, previously described in their depositions. And (3) the record of the actual measurement and estab-

lishing of the boundaries, and the formal giving of the possession by the alcalde. The witnesses examined by the alcalde were Bartolo Bojorques, Jose Antonio Alviso, and Antonio Soto. They all describe the northeastern corner and the northern boundary line in the same terms. The eastern and the northern boundaries are the last mentioned, and they are described as follows: "Thence, following a direction to the north along the margin of the esteros of the bay of the port as far as the rincon called San Bruno, at the foot of that hill, and, from east to west, along the foot of that hill, 'cerro,' as far as a very short cañada," etc. Soto describes the line as running north, along the margin of the esteros "as far as the foot of the hill of San Bruno and rincon of the same name, and, from east to west, following the foot of said hill," etc., thus reversing the order in which the foot of the cerro and the rincon are mentioned by the other witnesses, but obviously intending, like them, to indicate a rincon at the south base of the hill of San Bruno.

In the account of the preliminary reconnoissance the alcalde describes the boundary pointed out to him by the witnesses as follows: "I ordered the aforesaid individuals to show me the places, limits, and boundaries, according to the indications they have made in their depositions and in conformity with them. They guided me toward the north as far as the foot of the hill ('cerro') named San Bruno, where enters an estero which looks towards the south, and, standing at that place and the point of said estero, which they told me was called the 'Rincon de San Bruno'; from thence beginning the examination with direction towards the west, following the foot of said hill, they showed me a small cañada," etc. After making this reconnoissance, swearing the measurers, measuring the cordel, &c., the alcalde proceeds to the formal measurement of the land and establishment of its boundaries. In his record of the proceeding, the measurement of the boundary in question, is described by the alcalde as follows: "They began said measurement from the 'Solar,' which looks towards the north, and is situated at the foot of the San Bruno hill, the rincon of that name, and the end of an estero which is there and looks towards the south; from said point directing their course towards the west, following the skirt (falda) of said hill," etc. From these descriptions it is very plain that no part of the hill of the San Bruno was included within the limits of the Buri Buri Rancho.

The depositions of the witnesses, the account of the preliminary reconnoissance, and the record of the formal measurement, clearly indicate that in following the eastern boundary in a northerly direction along the esteros they stopped on reaching the rincon or corner at the foot of the hill of San Bruno, and that the northern boundary ran from that point in a westerly direction along the base of the same ridge of hills. The indications of the diseño of the Visitacion grant are equally explicit. It is drawn by Vioget, a professional surveyor, and with more than usual care. The southern boundary of the Visitacion Rancho is indicated by a dotted line, which commences at the bay to the south of the hill or cerro of San Bruno, and running along the southern base of the range of hills of that name, terminates at the Camino Real. It cannot be doubted that it was intended to include within the limits of this map the hills of San Bruno, and that the boundary between the two ranchos was meant to be drawn at their base. The official survey, following literally the erroneous translation of the word "rincon," contained in the decree, has adopted as the point of beginning the "Punta de San Bruno," or the most easterly extremity of the hills of that name, where, projecting into the bay, they form a point or promontory. From thence the line has been surveyed in a westerly direction, running along the hills at a considerable elevation above their base, and in several instances following the line of their crest. But this survey is obviously inconsistent with the terms of the decree as well as with the very explicit language of the act of possession to which the decree refers, and which it was meant to adopt. The language of the decree is, "Beginning at the base of the hill of San Bruno at the point (rincon) of the same name, and the extremity of an estuary which is there and looks to the south, and running thence in a westerly direction along the side of said hill," etc. Read by the light of the act of possession, it is plain that the point of commencement herein referred to was the extremity of an estuary in a rincon or corner of land, lying at the southerly base of the San Bruno hill, and that the line was to be run thence along the base of the hills towards the Camino Real. The term "falda," which occurs in the record of measurement, is translated "side" in the decree. But in the depositions of the witnesses, and in the account of the preliminary reconnoissance, the word "pie," or "foot," is alone mentioned, and the term "falda," which means the lower slope of a hill, was undoubtedly used by the alcalde in the same sense. It is perhaps not easy precisely to define the limits of the tract described as the rincon of San Bruno; nor is it necessary. It was evidently a piece of land lying at the southern base of the hill of San Bruno, within which was an "estero" at the point or head of which the survey commenced. This estero is a natural object readily identified. It is pointed out by Galindo, one of the measurers who assisted at the act of possession. It is the only estero in the immediate vicinity, and its punta or extremity is immediately adjacent to the base of the cerro, and lies within the limits of the rincon. It is evidently the

point of commencement established by the alcalde, and described in the decree. From this point it is plain that the line should run in a general westerly direction along the base of the hills so as to leave the latter on the north and within the limits of the Visitacion Rancho. An effort has been made to prove by the testimony of Bajorques and Alviso that the point of commencement fixed by the alcalde was a shell mound or site of an Indian rancheria, north of the estero but south of San Bruno point, adopted in the official survey as the point of beginning. But to this suggestion it is enough to say that it is inconsistent with the act of possession and with the language of the decree. Nothing can be clearer than that the point of commencement established by the act of possession and referred to in the decree was the extremity of an estero situated in a rincon at the base of the San Bruno hill. It is also sought by the testimony of the same witnesses to show that though the line was in fact run along the base of the hills, it was intended to follow their crest.

It is unnecessary to allude to the admissibility of parol testimony to vary the positive terms of a formal record of a judicial proceeding. The record itself discloses that the statement of the witnesses cannot be true. Their own depositions on which the alcalde acted, fix in the most explicit manner the northern line of the Buri Buri at the "pie" (foot) of the hills, and the alcalde certifies that they pointed out that line to him, and it was measured in their presence along the "falda." As against a formal record of this kind, the evidence of aged, illiterate and very infirm witnesses as to their recollection of what was done or intended by the alcalde is, even if admissible, entitled to no weight whatever.

It is also objected, on the part of the United States, that the northern line of the surveys is incorrect in not running in a straight line from the extremity of the estero to the "Laguna Alta." The effect of the alteration suggested would be to exclude from the Buri Buri a strip of land of a triangular shape, which it is contended would constitute a "sobrante" not included within either rancho. But it is evident from the terms of the act of possession that the line from the estero could not have been a straight line, for it is described as following the "falda" of the hills, and it was drawn to a small valley, which begins at the public road, and ends between the Laguna San Bruno and a wooden corral, also called the "Corral de San Bruno." These objects, the Laguna de San Bruno and the corral of the same name, are clearly identified, and I do not understand their position to be disputed.

All the witnesses before the alcalde mention the "Corral de San Bruno," which is at the margin and south of the laguna of the same name, situated in a small valley, or cañada, as the first boundary, or landmark, of the rancho, and they state that the line runs "from said place of the Corral de San Bruno in a westerly direction to the Laguna Alta." The principal ground for contending that the line should run directly from the estero to the Laguna Alta is the fact that the record, after describing it as following the falda of the hills to a small cañada between the Laguna and the Corral de San Bruno, states that it was continued "in the same direction" to the Laguna Alta. But it is not said that the line was a straight line, and we have seen that all the witnesses describe the line from the Corral de San Bruno to the Laguna Alta as running in a westerly direction. In point of fact its course will be considerably to the south of west; but it is highly probable that the alcalde, whose notions of courses by compass were probably as vague as those of the witnesses, assumed, as they did, that the line from the corral would run in a westerly direction, which would be in the same general course as that portion of it from the estero to the corral. But this slight discrepancy is clearly of too little importance to justify us in rejecting the explicit call for the little valley between the Corral de San Bruno and the laguna of the same name, contained in the act of possession, and adopted in the final decree of confirmation. The diseño is also appealed to to show that the line should run directly to the Laguna Alta; but it is evident that both the Laguna Alta and that of San Bruno are very inaccurately laid down on the map, the distance between them being much less than the actual distance. The dotted lines on the diseño seem to have been intended by the alcalde to indicate rather the breadth and length of the tract than its boundaries; for the easternmost line is drawn at some distance from and parallel to the shore of the bay, and yet it is not and cannot be denied that the bay was the eastern boundary. The northern line is drawn at right angles to the eastern line from the estero to the Laguna Alta, but passing near to the Laguna San Bruno at what was no doubt supposed to be the cañada, between the corral and the Laguna San Bruno.

The error already noticed, viz. the supposition that the line from the corral, or the little valley between it and the Laguna San Bruno to the Laguna Alta, would be in the same direction as the line from the estero to the corral, is reproduced on the diseño, and the line is represented as passing by the Laguna San Bruno, and continuing in the same course to the Alta. The whole delineation is very rude, and obviously inaccurate. It was no doubt made by the alcalde to indicate, roughly, the more important landmarks established by him when giving the possession; but it is of no weight when opposed to the explicit and unmistakable description of the lines actually run and the landmarks established, contained in

the formal record of his proceedings. The objection last noticed is made by the United States. But it may well be doubted whether, if sustained, the effect would not be to give the strip of land in question to the owners of the Visitacion Rancho and not to the United States. That rancho is bounded on the south by the rancho of Sanchez. It was granted subject to the boundaries of the latter, with which it was intended to be colindante. These boundaries, therefore, when finally established by competent authority, would seem to determine the boundaries of the neighboring rancho, especially as it is shown that there is not enough land within the exterior limits of both ranchos to satisfy the calls for quantity. But the owners of the Visitacion Rancho make no objection to the northwestern corner as fixed in the official survey, and for the reason above given I am of opinion that the location is substantially correct. My opinion is that the official survey should be modified by drawing the northern line of the Buri Buri Rancho from the extremity of the estero, commencing at the stake pointed out by the witnesses, and adopted in the survey of that line by Milo Hoadley; thence following the base of the hills, as indicated in the diagram, marked "Exhibit No. 2," attached to the deposition of that witness, but changing the last course so that it shall terminate at the station marked "B. B., No. 2," on said diagram, and also on the official survey.

[See Case No. 16,016.]

Case No. 16,016.

UNITED STATES v. PAYSON.

SAME v. PIERCE.

[1 Cal. Law J. 325.]

District Court, N. D. California. April 8, 1863.

MEXICAN LAND GRANTS—CONSTRUCTION OF DEEDS—REFORMATION.

1. If the description in a deed is impossible or repugnant, the court will so correct it as to make it conform to the probable intentions of the parties.

2. Where no such repugnancy or impossibility exists, the court will not (as against third parties who purchased the remaining interest of grantor at sheriff's sale, ignorant of his intentions in making his previous conveyance, except so far as the deed disclosed them) entertain an application to reform the description in a deed, although it has no doubt of the error of the description.

3. The facts that the tract in question was confirmed by the board of land commissioners, in the same language as the description in the deed; that, in the same language, it was excepted out of the confirmation of another part of the same general rancho to another claimant; and that eleven years have elapsed since the presentation of the claim—operate strongly against such application.

[See Cases Nos. 16,015 and 16,017.]

OPINION OF THE COURT. The claim for the Rancho Cañada de Guadalupe, La Visitacion y Rodeo Viejo, granted by Governor Alvarado to Jacob P. Leese, July 31, 1841, was finally confirmed to Henry R. Payson, with the exception of a certain tract which had been sold by Ridley, the assignee of Leese, to parties from whom Pierce derived title. For this excepted tract William Pierce duly presented his claim and obtained a final decree of confirmation. In the decree in the Payson case the land excepted from its operation is described in the language of the deed under which Pierce claimed, and, in the Pierce suit the land confirmed to him is described in the same terms. As the deed describes the tract by courses and distances, and as its execution and validity are not disputed, it would seem that there should be no difficulty in running off and establishing the lines. But, on attempting to apply the calls of the deed to the ground, most embarrassing questions have arisen. It is found that of the three last courses mentioned in the deed one is partly, and two others are wholly, in the waters of the Bay of San Francisco. These courses, as given in the deed, are as follows: "Thence east, 37 chains 37 links; thence south, 75° 30′ east, 44 chains 16 links; thence north, 18° east, to place of beginning."

In running the lines called for in the deed and decree, taking them as true, the surveyor found that the first of these courses could not be completed without running into the bay. He therefore stopped at the shore, leaving the length of the course less by 3 chains and 2 links than that called for. The next course, if run in the direction and to the length called for, would have terminated at a point in the bay nearly 5/8ths of a mile distant from the point on the shore at which the surveyor stopped; while the last course would, in like manner, be wholly in the bay, terminating at a rock on the shore from which the survey began. It will be observed that, in each of these courses, except the last, distance is given as well as direction. It might seem, therefore, that the first two must have been surveyed and their lengths determined by actual measurement. But this, if the deed is to be literally followed, is evidently impossible; for the 14th, or next to the last, course in the deed, is a point on the bay more than half a mile distant from the shore, and inaccessible to the surveyor. It was therefore impossible for him to determine the length of this course by measurement, or to ascertain by observation how its points of termination bore from the point of beginning. It is possible, however, that the surveyor, after running out the previous courses on land, may have drawn the courses on his map and determined their length by calculation. But this seems highly improbable. The official survey has followed, with some slight variations, the calls of the deed—except that on reaching the shore in the

13th course, the margin of the bay is meandered to the place of beginning, and the remainder of the 13th, together with the 14th and 15th courses, is discarded, as including lands not embraced within the original grant.

To this survey the claimants of the tract and the United States object. It is contended that the line of a fence, erected in the winter of 1851–2, should be adopted as the true boundary of the tract. It appears that, in 1849, Leese, the grantee, conveyed the entire tract to Ridley. In January, 1851, Ridley conveyed to Hammond, Vokes, and Gorham the tract now in question, and known as "Visitacion Valley." In September, 1851, Gorham released to Hammond and Vokes, and in the same month Hammond conveyed to Vokes. In October, 1851, Vokes sold to Eaton and Bryant, but the deed was to Eaton alone. The present claimants derive title from Eaton. In July, 1851, all the right, title, and interest of Ridley in and to the remaining portion of the rancho was sold under execution by the sheriff of the county. The claimant, Payson, derives title from the purchaser at this sale. The fence in question was erected by Eaton and Bryant in the winter succeeding the sheriff's sale. It does not appear that any attempt was made to place it on the lines called for in the deed. On the northerly side a line indicated by some stakes was followed, but by whom these stakes were planted, or with what object, does not appear. On the southerly side of the valley the fence was erected on the hill side, about one-third the distance from the base to the crest, in accordance, it would seem, with a general idea derived by Bryant and Eaton from Vokes that the land purchased included the valley and the slope of the hills to about that distance. It does not appear that Ridley was aware of these proceedings. No proof is offered that he pointed out the land inclosed by the fence as the tract sold by him, or that he has in any way indicated an intention to sell any other tract than that described in the deed. An attempt is made by Mr. Matthewson, the surveyor, to reconcile the calls of the deed with the lines of the fence. He observed that the line of the fence begins at the rock admitted to be the point of beginning and ends on the shore of the bay at a point from which the point of beginning bears north 18° 23′ east magnetic. This last course agrees within 23′ of the last course mentioned in the deed, taking it, also, as magnetic. Mr. Matthewson was of opinion that this coincidence was too remarkable to be accidental, and therefore supposed that the fence was intended to be placed on the lines described in the deed, especially as it seemed far more probable that the last course was determined by observation, and that the surveyor obtained the bearings of the point of beginning by sighting it with an instrument placed on the land, than that he laid down by calculation two courses and part of a third wholly in the water. But in attempting to make the calls of the deed conform to the lines of the fence he is obliged to alter three of them by substituting a southwesterly for a northwesterly direction. But even with this alteration the lines do not exactly coincide. In fact no one of the courses of the fence corresponds with a course described in the deed. The difference, however, is slight, and the tract enclosed is substantially the same. The hypothesis of Mr. Matthewson derives some additional probability from the fact that the tract granted seems to have been known as "Visitacion Valley," though it is not so named in the deed. It would seem probable therefore that the whole valley was intended to be granted, bounded on either side by lines drawn along the slope of the hills at a uniform distance from their base. On the south side the line must be located along the falda or hillside, whether we take the courses of the deed as magnetic or as true, or adopt the line of the fence. It would seem probable that a corresponding line was intended to be adopted as the boundary of the valley on the northern side, and not a line running through and excluding a portion of the level land. On the other hand the area of the tract included in the survey, as proposed by Mr. Matthewson, is more than 1,100 acres, while the deed mentions the extent of the land at 700 acres, "more or less." That its extent was not accurately known is evident, but a difference of 400 acres between its actual and its supposed area is so great a discrepancy as to afford an argument of some force against Mr. Matthewson's theory. That the deed was intended to convey the tract surrounded by the fence is also rendered probable by another circumstance. If the order of the courses be reversed, not only will the last course, if taken as the first, strike the shore at or near the termination of the fence line, but the corner of the survey on the northwest will be found to be identical with the northwest corner of the fence—thus affording corroboration of the theory that the tract conveyed and the tract enclosed were intended to be the same.

It is also to be observed that on the hypothesis that the courses in the water were obtained by calculation it is difficult to imagine why the length as well as the direction of the last course was not given. The fact that the direction alone is mentioned leads to the inference that the surveyor must, after measuring the other courses on land, have fixed his instrument on the shore, and obtained merely the bearings of the point of beginning, being unable to measure its distance as the line ran across the bight of the cove, forming the chord of the curve formed by the shores of the bay. Again, if the courses were, in fact run, as mentioned in the deed, it would

appear almost inevitable that the surveyor would terminate his land courses on the shore, leaving the remaining ones to be determined. It would hardly happen that any course would be partly on land and partly in the water; that is, would commence at a point some distance inland and terminate at the water. And yet this must have occurred, whether the courses are taken as true or magnetic.

All these considerations incline me strongly to the belief that an error in the description has occurred; and, probably, in the courses indicated by Mr. Matthewson. It seems very improbable that the purchasers would, within less than a year after they acquired title, have gone to the great expense of surrounding a tract of land with a fence, if they knew or suspected that the land conveyed to them had entirely different boundaries.

But, whatever be the plausibility or probability of this conjecture, I have been unable, after much consideration, to see that in this proceeding and at this stage, I am justified in setting aside the final decree and reforming the deed, the description of which it recites. The fence, we have seen, was erected in 1852. In 1853 a survey of the tract following the line of the fence was made. This survey must have apprised the owners that the boundaries of the tract enclosed, in no respect corresponded with the calls of their deed. No application was made to the board for a confirmation of any other tract than that described in the deed. A confirmation of that tract described in the language of the deed was obtained. And the same tract, similarly described, was excepted out of the confirmation to Payson, the claimant of the remainder of the rancho. No application to correct either of these decrees was made in this court; and they have both become final and conclusive. It is only where a survey is made under them that, after a lapse of nearly eleven years from the date of the presentation of the claim, that this court is asked under color of correcting the survey, to set aside the decrees and reform the deed in accordance with the alleged intention of the parties. If the description in the deed were impossible or repugnant, the court would, necessarily, be obliged to construe it and to correct its calls so as to make them conform to the probable intention of the parties. But the tract partly on land and partly on water, described in the deed, may have been intended to be granted, though it seems to me highly improbable. The surveyor who furnished the description may have measured the land courses and have obtained the others by calculation. And, as against third parties, who purchased the remaining interest of the grantor at sheriff's sale, ignorant of his intentions in making his previous conveyance, except so far as the conveyance disclosed them, it has appeared to me that this application to reform it cannot, in this proceeding, be entertained.

The official survey has strictly pursued the courses of the deed, taking them as true. But this seems at variance with the legal presumption in such cases. "A contract that land shall be surveyed in square, to the cardinal points, is well performed by a survey made according to the magnetic meridian. It being doubtful whether the true or magnetic meridian was meant, the popular and not the technical meaning must govern." Finnie v. Clay, 2 Bibb, 351. In Vance v. Marshall, 3 Bibb, 148, the magnetic, and not the true, meridian was held to be the proper guide for ascertaining the beginning of a survey. No proof is offered as to the person by whom, or the manner in which the survey on which the deed was founded was in fact made. The probabilities of the case are strongly in favor of the legal presumption, for at the date of the survey the true meridian had not been determined, as has been since done by the United States officers.

My opinion is that I have no alternative but to follow the description in the deed and decree, adopting the calls of the former, if any discrepancy arising from clerical errors be found—and that the courses are to be taken as magnetic. The survey is to stop on reaching the shore, which is thence to be meandered to the point of beginning. The land below high water was not included in the original grant, and, of course, cannot be included in the survey of a subgrantee. With regard to Payson's survey, the only objection is as to the location of the southern exterior boundary. It is claimed that the line should run from the Portezuelo, along the crest of the hills to the Miconada of San Bruno, the point of beginning. The grant describes the land as bounded on the west by the Camino Real and the Portezuelo, on the south by the rancho of Jose Sanchez. The diseño shows unmistakably that the southern line was intended to run along the southern base of the San Bruno mountains, from the bay to the road to San Jose, the road forming the western boundary. On the south lay the rancho of Sanchez, known as "Buri Buri." But for the ascertainment of this line between these ranchos, we are not left to the calls of the grants, or the indications of the diseños. A judicial possession was given, and measurement made of the boundaries of the Buri Buri. The true location of the line thus established was considered and determined by this court in the Buri Buri case, the owners of both ranchos and all others interested being parties to the proceeding. The establishment of the northern line of Buri Buri necessarily fixes the southern line of the adjoining rancho, as the grant of the latter calls for the former, as bounding it on the south. The official survey in this case has pursued the common boundary line from the

bay to the Camino Real, running at or near the base of the hills, as indicated by the diseño, and as the line was fixed by the officer giving judicial possession. On reaching the road the boundary line turns to the north, following the road to and beyond the Portezuelo—thus forming the western boundary—the Camino Real and the Portezuelo the western boundary, as called for in the grant. It appears to me that the official survey is, in this respect, correct. It is therefore approved, except as to the lines by which the excepted tract confirmed by Pierce—which must be modified as hereinbefore directed. It being understood that said excepted tract shall in no case be surveyed so as to embrace lands within the exterior limits of the original grant and diseño—and that, if the lands of the deed, when run, are found to include any such lands they must be modified so as to exclude them.

Case No. 16,017.

UNITED STATES v. PAYSON.

[Hoff. Land Cas. 138.] [1]

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

MEXICAN LAND GRANTS.

The validity of this claim is undoubted.

Claim [by Henry R. Payson] for two leagues of land in San Francisco county [known as the "Rancho Cañada de Guadalupe" and "Visitacion y Rodeo Viejo"], confirmed by the board, and appealed by the United States

William Blanding, U. S. Atty.
E. O. Crosby, for appellee.

BY THE COURT. The claim in this case was confirmed by the board, and it has been submitted on appeal without additional evidence, or the statement on the part of the appellants of any objection to the validity of the claim. I have however, as has been my practice, examined the transcript on file, but have discovered no ground for reversing the decision of the board. The authenticity of the original grant seems undoubted, and the expediente is produced from the archives confirmed by a record or note of the grant in the book in which such entries were made. The land was occupied by the original grantee within the time limited, and appears ever since to have been held by him and his grantees as its notorious and recognized owners. The mesne conveyances appear to be regular and to vest the title to the land claimed by him in the present claimant. A decree confirming the decision of the board must therefore be entered.

[See Cases Nos. 16,015 and 16,016.]

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

UNITED STATES (PEABODY v.). See Case No. 10,870.

Case No. 16,018.

UNITED STATES v. PEACO et al.

[4 Cranch, C. C. 601.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

RIOT—WHAT CONSTITUTES—PERSONS PRESENT AND COUNTENANCING—PRIOR CONVICTION OF ASSAULT—ARREST OF JUDGMENT.

1. To constitute a riot, it is not necessary that the violence and tumult actually committed should have been premeditated by three or more persons assembled with intent to commit the same; nor that there should have been promises of mutual assistance, before or at the time of committing the actual violence.

2. To charge a man with riot, who is seen in the crowd, after the commencement of the affray, it is not necessary to show that he was actively engaged in the affray, or actively countenancing or supporting the same, if present and ready to give his support when necessary.

3. A person convicted of assault and battery committed in a riot, may still be tried and convicted of the riot.

4. To constitute a riot, three or more persons must assemble, and either at the time of assembling, or afterwards, while assembled, intend, with force and violence, to do some unlawful act, and mutually to assist each other against any who should oppose them in doing such act; and the act must be done in a violent and turbulent manner, to the terror of the people.

5. It is no good ground of arrest of judgment, in a criminal case, that the marshal did not summon forty-eight jurors, and the clerk draw twenty-three grand jurors, by ballot, according to the Maryland act of 1797, c. 87, which was only applicable to the county courts; nor that one of the petit jurors had been summoned and had served on the petit jury of the next preceding term; such objections are too late, after the jurors are sworn.

Indictment for a riot, which originated in a quarrel between the members of the Typographical Society and some journeymen printers in the employment of General Duff Green, and which was immediately provoked by an attack made by Harvey, one of those journeymen, upon Lowry, the secretary of a meeting of the society, in which General Green's men were designated as rats (which means, unworthy members of the profession); a revised list of rats having been, on that day, published.

After the evidence was closed on both sides, Mr. W. L. Brent, for the defendants, having cited 1 Russ. Crimes, 247, 249; 2 Chit. Cr. Law, 487; and 1 Starkie, 524,—prayed the court to instruct the jury: "1st. That to constitute a riot, the violence and tumult must not only be premeditated, but the premeditation must be by three or four persons assembling, or already assembled together, with the intention to commit an act, and afterwards committing the same

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

in a violent, turbulent manner, to the terror of the people. 2d. That should the jury be of opinion, from the evidence, that the disturbance, on the night of the 30th of May, spoken of by the witnesses, was not premeditated, and arose upon a sudden quarrel or cause, produced by the previous attack on Lowry, and without promises of mutual assistance, before, or at the time, the defendants are not guilty of a riot. 3d. That, should the jury be of opinion, from the evidence, that the defendants did engage in the affray, after they had assembled to assist Lowry, who had been beaten, they are not guilty of a riot, unless it has been proven, by satisfactory evidence, that, before their engaging therein, or at the time thereof, they formed themselves into a party of three or more, and made mutual promises to assist one another. 4th. That, should the jury be of opinion, from the evidence, that the defendants were seen in the crowd, after the affray began, they are not guilty of a riot, unless it be satisfactorily proven that they were actively engaged in doing, countenancing, or supporting the same, or ready, if necessary, to support the same. 5th. That, in the present case, should the jury be of opinion, from the evidence, that the only proof of Walter's being in the affray, is from his having assaulted Madden, he is entitled to a verdict of acquittal, because he has been tried and found guilty of the said assault, and cannot be again tried and punished for the same."

Which instructions THE COURT refused to give, but instructed the jury, that, before they can lawfully convict the defendants, upon this indictment, they must be satisfied, by the evidence, that the defendants, to the number of three or more, assembled; and, either at the time of assembling, or afterwards, while assembled, formed an intent, with force and violence, to do the acts charged in the indictment, or some of them, and mutually to assist each other against any who should oppose them in doing such acts; and that the defendants did the same in a violent and turbulent manner, to the terror of the people. That it is not material how suddenly that intent was formed, nor whether it was produced by the previous contest between Lowry and Harvey. Nor is it necessary, to the conviction of the defendants, on this indictment, that they should have actually made formal promises to each other, of mutual assistance, if they had such a mutual intent. Nor is it necessary to their conviction, that those who were assembled, with intent to commit the acts charged in the indictment, should have been actively engaged therein, if they were present, and ready to support, if necessary.

THE COURT refused to give the fifth instruction prayed by the defendant's counsel, because, although the assault on Madden should be the only evidence of his being concerned in the riot (if it was one) and although he should have been punished for that assault, yet if he was one of the rioters, he is jointly guilty with all the rest of the defendants, of all the other outrages committed by them in that riot; and the punishment for the assault will be considered (if he should be found guilty of the riot) when the court is about to apportion the punishment of the defendants according to their several degrees of guilt. Although an assault may be given in evidence upon a prosecution for a riot, yet it is not the only evidence necessary to support it. The true criterion of identity of cause of action, or of prosecution, is, that the same evidence will support both; the offences are quite distinct and different. An assault is not necessary to constitute a riot; nor are the ingredients of a riot necessary to constitute an assault. 2 Hawk. P. C. c. 35; 1 Chit. Cr. Law, 452.

After a verdict against the defendants, their counsel moved in arrest of judgment, because forty-eight jurors were not summoned by the marshal, and twenty-three grand jurors drawn, by ballot, by the clerk, according to the provisions of the Maryland act of 1797, c. 87, § 8; and because one of the petit jurors who sat upon the trial, had been summoned and served as a petit juror at the next preceding term, contrary to the 3d section of the same act.

THE COURT, however, overruled the motion, being of opinion that the eighth section of the act of 1797, c. 87, applied only to the county court of Maryland; as this court had decided at the very commencement of its practice, when the following order was entered upon its minutes: "Friday, July 10, 1801. Ordered, by the court, that twenty-four grand jurors, and thirty-six petit jurors be summoned to the next term;" and such has been the practice ever since that time. In Burr's Trial [Case No. 14,692d], it is said that any one, under a criminal charge, may, before the grand jury is sworn, except to an irregularity in summoning them; from which an inference is drawn, that after they are sworn the exception is too late. The third section of the act of 1797, c. 87, "that no person shall be summoned as a juror, by any sheriff or coroner of this state, to two general, or county courts successively," is for the ease of jurors, and merely directory to the summoning officer. It constitutes no valid exception to the qualification of the juror; and if it did, it is too late to take it after the juror is sworn.

Motion overruled; and judgment upon the verdict.

Case No. 16,019.

UNITED STATES v. PEACOCK.

[1 Cranch, C. C. 215.] [1]

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

CRIMINAL LAW—POSTPONEMENT OF VENIRE—FORGERY OF BILL OF EXCHANGE—INDICTMENT.

1. A venire may be postponed.

2. In an indictment for forging a bill in the name of a fictitious drawer and indorser, it is not necessary to state any real subsequent indorsements. They are no part of the bill. The indorsement by the prisoner may be given in evidence to prove his intent to defraud, although such indorsement be not set forth in the indictment.

3. The omission of the words "account of" was fatal to the indictment. After jury sworn the court will not quash the indictment. The prisoner has a right to a verdict.

[4. Cited in U. S. v. Brown, Case No. 14,658, to the point that the person whose name is forged may testify for the prosecution under a charge of forgery.]

Indictment for forgery. A venire was ordered to this day, Thursday, January 17, 1805, and upon request of the prisoner [B. W. Peacock] the trial was postponed until Monday next; whereupon the jurors summoned were ordered to attend on Monday. The like was done in the case of U. S. v. Williams [Case No. 16,709] at last term. This indictment was for the forgery of a foreign bill of exchange in the name of a fictitious drawer and payee and indorser, with intent to defraud Sperry & Barnes, to whom the prisoner had sold the bill and indorsed it.

P. B. Key, for the prisoner, objected to the bill being given in evidence; it being indorsed by the prisoner and W. Thornton, and by Crow, Wright & Co., and the indorsements not being set forth in the indictment.

Mr. Jones, for the United States. The indorsement is no part of the bill. As between the indorser and indorsee the indorsement is the drawing of a new bill; and as between the holder and the drawee it is only an assignment. In setting forth the intent to defraud any party, it is not necessary to set forth the manner; but the general intent is sufficient. This appears clearly from all the authorities. Gilb. (Lofft) Ev. 690; Rex v. Powell, 2 W. Bl. 787; 1 Leach, 77, Case 43. The manner is matter of evidence. Forgery at common law may be of an order to pay money. An objection was taken, in that case, that the indictment did not set forth that J. Ward had alum of the Duke of Buckingham in his hands whereby it would appear that the Duke of Buckingham could be injured by the draft. But it was held not necessary; if the Duke of Buckingham might be defrauded thereby, it was sufficient to constitute the crime of forgery at common law. Rex v. Ward, 2 Ld. Raym. 1461, 2 Strange, 747.

Mr. Key. The drawer and drawees are fictitious. If I draw a bill in the name of a fictitious drawer and drawee, and keep it in my pocket it is no offence; for it cannot be with intent to defraud persons not existing; no intent to defraud could be alleged until it was indorsed; the intent must be proved by acts; until indorsed there can be no evidence of the intent to defraud Crow, Wright & Co.; the intent did not commence until the bill was indorsed. The forgery in this case, if it exists, did not exist until it was indorsed and thrown into circulation with intent to defraud some person. It cannot appear to be a criminal act unless it be stated in the indictment that the bill was thrown into circulation. The indictment states that the bill was payable to the order of R. W. Peacock; and does not state that R. W. Peacock even appointed to whom it should be paid; and therefore there was no person who could receive the money; the bill had no operation until indorsed by R. W. Peacock. If the bill had been drawn in the name of a real person, then it might have been criminal; but being in a fictitious name, the indictment must show the facts by which it shall appear that injury could arise to some person. Instruments in indictments must be set forth in hæc verba; if the omission of a letter makes it a different word, it is fatal; a fortiori, the omission of the indorsement, which indorsement constitutes the essence of the offence. McNal. Ev. 511, 513. R. W. Peacock was a party on the face of the bill; and it was necessary (in order to show that the fact was criminal) to state his indorsement. This indorsement was essential to the negotiability of the bill. Upon this indictment they have charged the forging a bill never negotiated; and which without negotiation is an innocent paper. The case in Lord Raymond, as to forgery at common law, is not law. 2 McNal. Ev. 637. It was decided since the colonization of Maryland. By the common law there could not be a forgery of a bill of exchange. There is a difference between forging the name of a real person, and putting in a fictitious name; this cannot be to the injury of the fictitious person; but in the former case it may be to the injury of the real person; in the case of a fictitious person it can injure no one until indorsed; before indorsement it is an innocent act.

Mr. Jones. The only question is whether the indorsement constituted a part of the bill; the omitted indorsements are true, and therefore it is not necessary to state them. If the bill was forged with intent to defraud, although it might have been kept in his pocket and never negotiated, it is sufficient to constitute the offence The case of a forged lease and release (Rex v. Crooke, 2 Strange, 901), which were imperfect and therefore inoperative, was held to be a case of forgery; the intent being proved. It is not necessary to state that the forged bill was published (Rex v. Ward, Ld. Raym. 1461).

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

THE COURT was of opinion that on the first count, in which the offence charged is the forging of the bill with the intent to defraud some person therein mentioned, this intent may be proved by after circumstances, without their being set forth. The indorsement of the bill by the prisoner is one of those circumstances, and is not a part of the bill; evidence may therefore be offered of the making of the bill produced by the attorney of the United States, notwithstanding the indorsements are not set out in the indictment.

Mr. Key objected to the bill going in evidence under the indictment, it having the words "account of" in it, which are not in the bill set forth in the indictment. This variance was admitted to be fatal.

Mr. Jones then moved the court to quash the indictment; but

THE COURT refused to quash it, being of opinion that the prisoner had a right to a verdict.

Verdict for the prisoner.

Mr. Jones, after verdict, renewed his motion to quash the indictment. Granted; no objection being made.

The prisoner was afterwards at the same term convicted upon another indictment, for a similar forging of another bill, on the trial of which the same objection was taken, that the real subsequent indorsements should have been set forth in the indictment. But the objection was again overruled by THE COURT.

To show that a fictitious bill may be forgery, the following cases were cited: Lewis' Case, Fost. Crown Law, 116; Bolland's Case, 1 Leach, 83, Case 47; Lyon's Case, 2 Leach, 597, Case 267; Taft's Case, 1 Leach, 172, Case 88; Taylor's Case, Id. 214, Case 106; and Moffatt's Case, Id. 431, Case 200.

Case No. 16,020.

UNITED STATES v. PEARCE.

[2 McLean, 14.] [1]

Circuit Court, D. Michigan. Oct. Term, 1837.

POSTMASTERS—VACATION OF OFFICE—DETENTION OF LETTER—STEALING LETTER.

1. A postmaster, until the action of the postmaster general, does not vacate his office by remaining out of the neighborhood of the office.

2. If he keep the office by an assistant he is still responsible to the department and to individuals.

3. The 21st section of the postoffice law [4 Stat. 107] which prescribes a punishment for the detention of a letter or packet, refers to a letter or packet detained, before it reaches the place of destination.

[Cited in brief in Shirk v. People, 121 Ill. 63, 11 N. E. 888.]

4. The stealing or taking a letter, &c., as expressed in the same clause, in the 22d section, means a clandestine taking—not a taking through mistake, or with an innocent intent. It must be a taking with a criminal intent.

[Cited in U. S. v. Marselis, Case No. 15,725; Re Burkhardt, 33 Fed. 27.]

[Cited in Bloom v. City of Xenia, 32 Ohio St. 461.]

The district attorney appeared for plaintiff, and for defendant [Josiah Pearce].

OPINION OF THE COURT. This was an indictment under the postoffice law. It contained two counts as follows: "That the defendant was employed in the postoffice department of the United States, as an assistant to Lemuel Brown, the postmaster of the United States at the said township of Shiawassee, and did then and there unlawfully and forcibly detain from the said Lemuel Brown, postmaster, as aforesaid, two packages of letters with which he, the said Josiah Pearce, was then and there intrusted, as such assistant to the said Lemuel Brown, postmaster, as aforesaid, against the peace," &c. "And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Josiah Pearce, to wit: on the 25th day of January, 1839, at the said township of Shiawassee, in the district aforesaid, unlawfully, fraudulently and deceitfully, did take from the mail of the United States three packages of letters, against the peace," &c. It was proved that Lemuel Brown was postmaster, and being about to leave the neighborhood for some months, he appointed Pearce, the defendant, assistant, the person who had acted as assistant in the office being unwell. After an absence of about three months Brown returned, and finding that the defendant had removed the office to his own house, and that there was complaint respecting the removal, he called on the defendant, at his house, in company with his former assistant whose appointment had not been revoked, and informed the defendant that he would relieve him from any further care of the office, and would take the papers, &c. Certain letters directed to the postmaster, received in his absence, and others received by the last mail, and the dead letters were handed to him; but the defendant refused to deliver the other letters, or pay over the money he had received for postage, and seizing a gun threatened to shoot the postmaster if he did not leave the house. The postmaster retired, and left the letters he had received with his former assistant, with instructions to act as his assistant. He did so, and handed out the letters in his possession as they were called for. The postmaster boarded at the house, with the assistant, at which the office was kept. In the course of two or three days after this, the defendant made oath before a justice of the peace that certain property had been stolen or fraudulently taken from him, specifying certain letters, &c., which were legally in his possession; on which a search warrant was issued, and the letters in the possession of the regular assistant taken from him, and

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

he was arrested and taken before a justice of the peace. On examination the assistant was released, but the letters were delivered over by the justice to the defendant, who continued for some days to open the mail and hand out letters, claiming a right so to act by virtue of his appointment. The postmaster then applied to the authority of the United States, instituted a prosecution against the defendant, and, through the instrumentality of the marshal, obtained possession of the postoffice, letters and papers.

The defendant offered evidence to prove that the postmaster had agreed to resign the office in his favor; that he had sold him the case in which the letters were deposited; that he had removed from Shiawassee, and, consequently, had, under the law and instructions of the department, vacated the office. And in support of this last position the postoffice act was read, which provides that no person shall hold the office of postmaster who does not reside at the place where the office is kept. But THE COURT held that this provision was directory to the postmaster general, and, indeed, was imperative on him; but that until he acted, the postmaster and his sureties were responsible to the department, and to individuals who should be injured by any neglect of duty in the office. That if the postmaster had intended to remove, about which fact there was contradictory evidence, the weight of the evidence being decidedly against the allegation that he had removed, it could constitute no justification to the defendant.

The evidence being closed the district attorney claimed a conviction of the defendant under that part of the 22d section of the postoffice act of 1825, which provides, that "if any person shall steal the mail, or shall steal, or take from, or out of, any mail, or from, or out of, any postoffice, any letter or packet therefrom, or from any postoffice, whether with or without the consent of the person having custody thereof, and shall open, embezzle or destroy, any such mail, letter or packet, the same containing any article of value, &c., shall, on conviction thereof, be imprisoned not less than two, nor exceeding ten years." And it is insisted that a conviction should be had, also, under the 21st section, for the detention of letters, on the first count in the indictment. The 21st section provides, that "if any person employed in any of the departments of the postoffice establishment, shall unlawfully detain, or open, any letter, packet or mail of letters, with which he shall be intrusted, or which shall have come into his possession, and which are intended to be conveyed by post," he shall, on conviction thereof, be punished, &c. The evidence does not show that the defendant detained any letters which came into his possession, "and which were intended to be forwarded by mail;" and it is the detention of such letters that is punishable under this clause of the statute. It applies to letters in transitu, and which have not reached their place of destination; letters deposited in a postoffice to be forwarded, or handed to a mail carrier on his route, between postoffices, come within the provision if fraudulently detained. As there is no evidence against the defendant, showing the detention of such letters, he cannot be convicted on the first count in the indictment. More difficulty arises in giving a construction to the 22d section as applying to the facts proved. The language of the act is, if any person shall steal, or take from any mail or postoffice a letter, &c., shall be punished, &c. Now to give a literal construction to this language, the taking from the mail, or a postoffice, a letter, is punishable the same as for stealing it. This could not have been the intention of the legislature. A mere taking may be an innocent act, as if done through mistake, or, without any criminal intent; and we find in the latter part of the same section that, if any person shall take any letter or packet not containing any article of value, out of a postoffice, a very different punishment is inflicted. It could not have been the intention of the legislature to provide different penalties for the same act; and, consequently, the taking in the part of the section first cited, must either be limited to letters containing some article of value, or to a felonious taking. The taking of a letter which contains an article of value, is limited in this section to a taking with or without the consent of the person having the custody thereof, and where such letter is embezzled or destroyed. This provision does not embrace the class of offences provided for in the previous part of the section, which is stealing or taking. The design of the taking is shown by the embezzlement or destruction of the letter. But is a simple taking, without a felonious intent, punishable the same as for stealing? We think, when the statute is taken together, and its object and scope are considered, that such a construction cannot be sustained. To come within this provision of the statute, the taking must not only be unlawful but felonious; it must be a clandestine taking—such as would amount to larceny of personal property. This construction is not only justified by a different punishment being provided in the same section, for taking a letter from a postoffice, but by the first taking being placed in the same class and punished as for the stealing or the embezzlement of a letter.

The conduct of the defendant was highly reprehensible in refusing to surrender the office, on the demand of the postmaster; and still more so on his obtaining possession of the letters delivered to the postmaster, under the forms of law. This proceeding was an aggravation of his offence, and can only be palliated, in any degree, by the ignorance of those who were engaged in it. It was a prostitution of the forms of law to attain an illegal object. But unless the defendant in taking the steps he did take had a criminal intent, he is not guilty under the above sec-

tion. If he was honestly engaged in the prosecution of what he supposed to be a right, and his whole conduct evinced nothing more than a disposition to hold the office and fairly to discharge its duties, he was not guilty of a felonious taking within the meaning of the statute. It is the intent, in all instances, which constitutes the crime, and which is ascertained by the acts of the offender. In many instances the act itself being a crime of great enormity, the whole burden of proving an innocent intent is devolved on the party accused. In this case enough appears in the evidence to show that the defendant did not intend to steal the mail, or any letters or packets from the postoffice. Of this, however, the jury can judge.

Verdict not guilty.

Case No. 16,021.

UNITED STATES v. PEARCE et al.

[2 Sumn. 575.] [1]

Circuit Court, D. Massachusetts. May Term, 1837.

COLLECTORS OF CUSTOMS—EMOLUMENTS—REMOVAL FROM OFFICE.

The act of congress of 1822, c. 107 [3 Stat. 693], provides, that whenever the emoluments of certain collectors of the customs "shall exceed $3,000 in any one year, &c. the excess shall in every such case be paid into the treasury of the United States." The defendant was collector of the port of Gloucester, and was removed from office July 29th, 1829. From January 1st of the same year to the day of his removal, he had received for salary, fees, and commissions $3,457.83; the excess of this over $3,000, after deducting certain legal expenses, he paid to the treasury of the United States. *Held*, that all the fees and commissions received by the collector are to be deemed to be received for his own use, until they exceed the maximum amount of $3,000; that the defendant was, therefore, absolutely entitled, in his own right, to the fees and emoluments of office, not exceeding $3,000, received during the seven months preceding his removal, although he did not continue in office a whole year from January 1st; and that the year of his successor in office commenced on the day of his appointment, and ended with the same day in the succeeding year.

[Cited in Hooper v. Fifty-One Casks of Brandy, Case No. 6,674; U. S. v. Wendell, Id. 16,666.]

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

Debt by the United States upon the official bond of the collector of the port and district of Gloucester, in Massachusetts. Plea, non est factum. At the trial the jury found a verdict for the plaintiffs for the sum of $1,157 67, upon which judgment was rendered in the district court of Massachusetts district in favor of the plaintiffs. [Case unreported.] There was a bill of exceptions taken at the trial by the plaintiffs, upon which the present writ of error was brought. From that bill of exceptions it appeared, that the defendant, William Pearce, (the time of whose appointment did not appear,) was collector of the customs for the port of Gloucester, in 1829, and was removed from that office, by the president, on the 29th of July of the same year. Between the 1st day of January of the same year and the day of his removal from office, he had received, for salary, fees and commissions, the sum of $3,457 83, of which $144 70 was for salary, $473 35 for fees, and $2,839 78 for commissions. From this aggregate sum there was deducted the sum of $216 62 for official expenses during that period, and the sum of $241 21 paid over by Pearce to the treasurer of the United States. The balance, $3,000, Pearce claimed a right to retain as the maximum compensation for his services for the year 1829. The United States allowed to Pearce the sum of $1,736 41, the maximum compensation from the 1st of January, 1829, to the time of his removal from office, and insisted upon their right to the balance ($1,263 28). And the district attorney, at the trial, accordingly prayed the district judge so to instruct the jury; which instruction the district judge refused to give; and instructed the jury, that Pearce had a right, by law, to retain the whole of the said sum of $3,000 for his compensation from the 1st of January, 1829, to the day of his removal from office; and the jury, accordingly, in their verdict disallowed this claim of the United States.

J. Mills, U. S. Dist. Atty.

R. Choate, for defendant.

STORY, Circuit Justice. The only question, arising upon this writ of error, is upon the instruction given to the jury by the learned judge of the district court, as set forth in the bill of exceptions. The question, then, is, whether this instruction is correct in point of law; and the solution of it depends upon the true interpretation of the statutes of the United States upon this subject. The only statutes upon this subject are the statute of 1799, c. 129, § 2 [1 Story's Laws, 664; 1 Stat. 704, c. 23], and the statute of 1822, c. 107 [1 Stat. 693]. The former statute provides for the payment to the collectors of the customs of certain fees and emoluments for their own use, the fees to arise from certain specified official acts and papers, and the emoluments to arise from a certain specified per centage on all moneys received by them on account of duties on goods imported, and on the tonnage of ships and vessels. And, in addition to the allowances above mentioned, it further provides, that certain collectors (among whom is the collector of the port of Gloucester) shall be annually paid the sum of $250. In another section it further provides, that, when a collector shall die, or resign, the commissions, to which he would have been entitled on the receipt of the duties bonded by him, shall be equally divided between him, or his personal representative, and his successor, whose duty it shall

[1] [Reported by Charles Sumner, Esq.]

be to collect the same. It is very clear, that, under this statute all the fees and emoluments (exclusive of the salary, which would be governed by other principles,) actually received by any collector, during his continuance in office, would belong to him for his own use, notwithstanding his subsequent removal from office within the same official year. And unless the statute of 1822, c. 107, has made some different provision, changing this result, it is equally clear, that the United States have no title to demand the balance, which they now seek to recover from Pearce, the collector. We are, therefore, driven to the consideration of this last statute. After having limited, in the 8th section, the emoluments of the collectors of the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, to a certain sum, the statute proceeds, in the 9th section, to provide, "that whenever the emoluments of any other collectors of the customs shall exceed $3,000, in any one year, after deducting therefrom the necessary expenses incident to his office in the same year, the excess shall, in every such case, be paid into the treasury of the United States." Now, in point of fact, Pearce has paid all the excess over the $3,000, received by him in the year 1829, into the treasury for the use of the United States. So that, in a literal sense. he has complied with the very terms of the act. But the argument for the United States is, that the $3,000 is intended by the statute as the maximum compensation for the services of the collector for the whole year; and that consequently, if he serves only for a part of the year, he is entitled at most only to a compensation pro rata for the proportionate period, less than a year, of his services. Now, assuming the first branch of the argument to be true in a general sense, there is nothing in the statute, which sustains the latter dependent branch, and authorizes a pro rata compensation for the services of the collector for a part only of the year. If he is entitled to such compensation, it is, because an equity is superinduced upon the statute, not comprehended by its terms, or its professed objects, but flowing from the general principles of natural justice. On the other hand, if we are to construe the language of the statute according to the natural import of the words, as founded upon, and not superseding the provisions of the same act, there is no necessity for any such superinduced equity. All the fees and commissions, received by the collector, are to be deemed to be received for his own use, until they exceed the maximum amount of three thousand dollars; and the excess only, afterwards received, belongs to the government. So, that until he has received $3,000, whatever he receives is for his own sole use without farther account; and there is not a word in the statute, which justifies the conclusion, that, what he has received primarily for his own use, is afterwards, by any subsequent events, to be treated as received for the use of the government. The language of the statute forbids any such interpretation. It declares, that the excess beyond the maximum amount, and not any portion received below that sum, shall belong to the United States. The right, or trust, attaches to the excess, and not to the whole sum received.

If the argument be well founded, then, if Pearce had received during his continuance in office only $500, for his salary, fees, and emoluments; and afterwards his successor in office had received $2,500 before the close of the same year (1829), Pearce would nevertheless, have been entitled to one moiety of the $3,000; that is to say, $1,000 beyond the fees and commissions, which accrued during the time, in which he was collector. Such a doctrine has never been maintained in any judicial tribunal; and, I presume, has never yet been asserted by the government. For, in effect, it would be to transfer from the collector for the time being the fees and emoluments, given to him by the very terms of the statute of 1799, c. 23, to another person, who was not the collector, when those fees and commissions accrued. But, let us put the case a little farther, and suppose, that the new collector, after having thus received $2,500 in the year 1829, should, during the residue of his first official year up to the time when his predecessor was removed, and he was appointed in his stead, have received only $500 more; then he would be entitled, according to the strict terms of the law, to retain the $500 for himself. But, according to the argument, he would be entitled to the $3,000, subject to the deduction of the $1,000 belonging to his predecessor; that is to say, he would be entitled to $2,000 only. Surely this cannot be a safe or just interpretation of the statute.

Again, suppose Pearce, before his removal from office, had received for salary, fees, and commissions $2,500 only. In such a case there would be no excess received by him while in office, in any one year; and, under such circumstances, the terms of the statute would not reach his case. He would be entitled to retain the $2,500. Why? Because the statute of 1799, c. 23, the only one, which gives him the right, gives the fees and emoluments to him for his own use, as soon as they accrue.

The truth is, that the statute of 1799, c. 23 (and in this respect it stands wholly untouched and unrepealed), gives to the collector fees and commissions for certain acts and services performed officially by him, as a compensation therefor. When the services are performed, and not till then, the right attaches; and all that the act of 1822, c. 107, professes to do, is to limit the aggregate amount of those fees and commissions (together with the fixed salary) to the maximum of $3,000, and to make the excess, received by the collector, a trust fund for the United States. This is the natural and appropriate meaning

of the language. But the argument for the United States would give the fees and commissions, in many cases, not to the collector, who performed the services; but to another collector, by whom they had not been performed. And this not only in the case of a vacancy by a voluntary act of the collector, such as his resignation, and the case of a vacancy by inevitable accident, as his death; but also in case of a vacancy occasioned by the direct power of the executive in removing him from office. So that the collector, who has borne the burthen, and performed the service, is to yield up his rights, not to the government, as a case of excess, but to his fortunate and unburthened successor. Well might he exclaim in such a case, in the language of the poet, on another occasion, "Sic vos non vobis. Hos feci versiculos; tulit alter honores."

Besides; in my judgment, the true interpretation of the statute applies, and can apply, in its language only to one and the same collector. The words are, "whenever the emoluments of any other collector shall exceed $3,000 in any one year, the excess shall, in every such case, be paid into the treasury." The statute does not look to the case of two different collectors within any one year, or join them together for any period of a year. When does the year of any collector begin and end in the sense of the statute? Plainly, in my judgment, it begins on the day of his appointment, and ends with the same day of the succeeding year. It has nothing to do with the beginning or end of the official year of his predecessor, or with that of the calendar year. If the statute meant, what the argument supposes, its language would have been very different. It would have declared, that the emoluments of the collector or collectors of any other port shall not, in the aggregate, exceed in any one year, calculated from the 1st day of January and to the 31st day of December of the same year, the sum of $3,000; and when there shall be more than one collector of the same port in any one year, the emoluments of the whole year shall be apportioned among them pro rata, according to their respective terms of service. Now, this is the true scope of the argument; and upon the slightest examination it is apparent that it is not possible, by any straining of language, to bend the words of the statute to such an import. In short, the court would be making a new statute, instead of construing an old statute, by such an interpretation. I am not bold enough to undertake such an enterprise. It may be, that there would be more wisdom in such a provision, than there is in the existing law (though it may well be doubted). But that is a matter for the consideration of congress, and not for courts of justice. The case of a commission merchant, who is to receive a compensation for selling goods at a given per centage, not to exceed in the whole a given sum, which has been put by the district attorney, is certainly very much in point. But it is only changing the actors, and not the drama. It is the argument of idem ad idem, resolving itself into the old maxim of antiquity, "Nil agit exemplum litem, quod lite resolvit."

Upon the whole, my opinion is, that by the statute, the collector, who receives, while in office, the fees and emoluments of his office, not exceeding $3,000, is absolutely entitled to them in his own right, whether he continues in office during the whole year or not. The judgment of the district court is, therefore, affirmed.

Case No. 16,022.

UNITED STATES v. PEARL.

[5 Cranch, C. C. 392.] [1]

Circuit Court, District of Columbia. March Term, 1838.

LARCENY—TAKING BY HACKNEY COACH DRIVER—INDICTMENT.

1. If the owner of goods, by mistake or accident, leaves them in a hackney coach, and the driver finds them there, and, knowing to whom they belong, takes and converts them to his own use with intent to steal them, he is guilty of larceny.

2. In an indictment under the penitentiary act [4 Stat. 448], for stealing bank-notes, quære whether, it is not necessary to state the name of the bank and the date of the notes?

Indictment, under the penitentiary act (section 9) [against negro Frank Pearl] for stealing "one silk reticule of the value of twenty cents, one silver pencil of the value of one dollar, one bank note to the amount of fifty dollars, of the value of fifty dollars, for the payment of fifty dollars; three bank notes, of the value of ten dollars each, to the amount of ten dollars each, for the payment of ten dollars each; of the bank notes, goods, and chattels of one Elizabeth Lee," "against the form of the statute," &c.

W. L. Brent and Mr. Dandridge, for defendant, objected to evidence being given upon the charge of stealing the bank-notes, because they were not sufficiently described in the indictment. The name of the bank should have been stated, and the date of the notes, that it may appear that there was any such bank in existence at the date of the notes. They cited Starkie, Cr. Pl. 216, 217, upon the statute of 2 Geo. II. c. 25, § 3, which provides for the punishment of persons for stealing "any bank-notes." An indictment under that statute describes the bank-note as being "a bank-note of the governor and company of the Bank of England." If it is sufficient to describe the thing in the words of the statute, this would have been a sufficient indictment if it had merely stated that the defendant had feloniously taken and carried away "the property of Mr. Lee, of the value of five dollars."

Mr. Key, contra, contended that it was sufficient to charge the offence in the words

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

of the statute. The English precedents, under the statute of 2 Geo. II. c. 25, § 3, are so. They merely describe the note as "one bank-note." 3 Chit. 917, 973, note a, 974; Archb. Cr. Law, 130; 2 Leach, 1103; 2 East, P. C. 602; Rex v. Johnson, 3 Maule & S. 547; 2 Russ. Crimes, 170.

THE COURT (THRUSTON, Circuit Judge, absent), said the question had better be reserved for a motion in arrest of judgment, and thereupon evidence was given as to the bank-notes.

Mr. Brent contended before the jury that if a man finds goods and converts them to his own use with intent to steal them, it is not felony; and cited to the jury several authorities, of which the court did not take a note.

Whereupon Mr. Key prayed the court to instruct the jury, that if they believe, from the evidence, that Mrs. Lee left her reticule, pencil, and bank notes in the prisoner's hackney-coach by mistake or accident, and that the prisoner found them there, and knew them to belong to her, and took and converted them to his own use with intent to steal them, then he is guilty of larceny.

Mr. Key cited Wynne's Case, 1 Leach, 413; 2 East, P. C. 664; 2 Russ. Crimes, 101.

THE COURT (THRUSTON, Circuit Judge, absent) gave the instruction as prayed.

Mr. Brent then prayed the court, in substance, to instruct the jury, that if Mrs. Lee lost the property, and the defendant found it and converted it to his own use, with intent to steal it, it is not felony.

But THE COURT refused.

Verdict, "Guilty."

There was a motion in arrest of judgment; but before it was argued, the president pardoned the defendant, and he died.

UNITED STATES (PEGRAM v.). See Case No. 10,906.

Case No. 16,023.

UNITED STATES v. PELLETREAU.

[14 Blatchf. 126.] [1]

Circuit Court, E. D. New York. Feb. 5, 1877.

OFFENSES UNDER POSTAL LAWS — EMBEZZLEMENT AND STEALING OF LETTERS.

1. Under section 5467 of the Revised Statutes, an indictment will lie which charges a person employed as a letter carrier in the postal service, with having embezzled a letter which was intended to be conveyed by mail and contained an article of value, and had been entrusted to him, and had come into his possession as such letter carrier.

[Cited in U. S. v. Wight, 38 Fed. 107; U. S. v. Larcher, 134 U. S. 632, 10 Sup. Ct. 628.]

2. Said section 5467 is not confined to the offence of stealing or taking things out of a letter, packet or bag.

[Cited in U. S. v. Falkenhainer, 21 Fed. 627.]

[Cited in U. S. v. Fuller, 4 N. M. 358, 20 Pac. 177.]

[This was an indictment against John Pelletreau for embezzling a letter from the United States mails. Heard on motion to quash.]

Asa W. Tenney, U. S. Dist. Atty.

John J. Allen, for defendant.

BENEDICT, District Judge. This is a motion to quash an indictment framed under section 5467 of the Revised Statutes of the United States, upon the ground that the facts stated do not constitute an offence. The averments of the indictment are, that the accused was a person employed as a letter carrier in the postal service of the United States, and embezzled a certain letter, described, which was intended to be conveyed by mail, and which contained an article of value, described, which said letter had been entrusted to the accused, and had come into his possession as such letter carrier. The contention in behalf of the accused is, that the only offence created by section 5467 is that of stealing or taking things out of a letter, packet or bag. The section is in these words: "Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post office or branch post office established by authority of the postmaster-general, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock, or other pecuniary obligation or security of the government, or of any officer or fiscal agent thereof, of any description whatever; any bank note, bank post bill, bill of exchange, or note of assignment of stock in the funds; any letter of attorney for receiving annuities or dividends, selling stock in the funds, or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract, or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter or thing; any receipt, release, acquittance, or discharge of or from any debt, covenant or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery, or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession,

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

either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years." It is contended that this section omits to say that persons doing any of the acts that are mentioned in the section prior to the last semicolon in it shall be liable to punishment, and makes punishable only the acts mentioned after the words "any such person who shall," following the semicolon. But this construction of the section is entirely too strict even for a criminal statute. It is conceded, that, if the conjunction "and" had been inserted between the semicolon and the words "any," the statute would be complete. But, the omission of the conjunction, by way of ellipsis, in such statutes, is a very common thing. Sections 5463 and 5464 just above, present several instances of such omissions. The intention of the statute is as plain without the conjunction as with it. Manifestly, two classes of offences are intended to be created, one relating to the embezzlement of letters, &c., the other relating to stealing the contents of letters; and this intention is carried out if we suppose an ellipsis, while, without an ellipsis, a very considerable part of the section is useless and void. According, then, to the familiar rule of construction, the statute should be read so as to render its language effective, and, by inserting the conjunction, this is done. So read, it creates the offence charged in the indictment. The motion to quash is, therefore, denied.

UNITED STATES (PENDLETON v.). See Case No. 10,924.

Case No. 16,024.

UNITED STATES v. The PENELOPE.

[2 Pet. Adm. 438.] [1]

District Court, D. Pennsylvania. 1806.

NON-INTERCOURSE LAWS — TRADING TO ST. DOMINGO—PERSONS "RESIDENT" IN THE UNITED STATES.

[A British subject living in Bermuda, who came to Philadelphia in his own sloop to take his children home from school, and who, after remaining in the United States 13 days, purchased a cargo for St. Domingo, was not a person "resident within the United States," and therefore not within the prohibition of the act suspending commercial intercourse with certain parts of the Island of St. Domingo. 2 Stat. 351.]

[Cited in Burnham v. Rangeley, Case No. 2,176.]

[Cited in brief in People v. Cady (N. Y. App.) 37 N. E. 673.]

This was an information filed by A. J. Dallas, Esq. against the schooner Penelope and her cargo for a supposed breach of the first section of the act of congress, entitled "An act to suspend the commercial intercourse between the United States and certain parts of the Island of St. Domingo." [2 Stat. 351.] The facts of the case were these: Mr. Richard Wood, a native of Bermuda, and who had been established there for a great number of years, in partnership with Mr. Joseph Wood his brother, both British subjects, and owners of the sloop Penelope, had during the year 1805, placed his children at school in Philadelphia. Previous to this circumstance, Mr. R. Wood had not been in the United States for many years. With a view to take his children back to Bermuda, and not contemplating any particular commercial enterprise, he came to Philadelphia, on board the Penelope, on the eighteenth day of May, 1806. He found, after his arrival, the law prohibiting intercourse between the United States and certain parts of St. Domingo, in force; and at the instance of some of his friends, and exclusively on his own account, the Penelope took on board a cargo calculated for the markets of the prohibited island. This cargo was purchased by himself, and by Mr. Edward Russel, his brother-in-law, and paid for by Mr. Russel out of the funds of Joseph and Richard Wood. During his stay in Philadelphia, Mr. R. Wood remained at the house of Mr. Russel; and thirteen days after his arrival in Philadelphia, he sailed with his children for Bermuda, where he landed, and ordered the Penelope to Cape François. The Penelope entered Cape François under the American flag, in order, as it was said, to prevent her being interrupted by the British cruizers; but her British register was lodged at the custom-house there; and having disposed of her cargo, she received another on board, and returned to Philadelphia on the twenty-seventh day of August, 1806. She was immediately seized, and the present information was filed.

The cause was tried by a special jury, before the district court, on the 26th day of September. On the part of the claimants of the Penelope, it was said, that the only persons who were objects of the law prohibiting intercourse with St. Domingo, were citizens of the United States, or residents in the same; and that the short visit of Mr. R. Wood for the purpose before stated, and his short stay in Philadelphia, did not bring him within the meaning of the term "resident."

Mr. Dallas (district attorney) in support of the information, considered, first, the facts; and second, the law.

First, the facts. The sloop Penelope sailed from Philadelphia, touched at Bermuda, and went to Cape François, after the non-intercourse act was notified at the custom-house; and returned directly from the Cape to Philadelphia. If, therefore, she was owned, or employed, in part, or in whole, by a person resident within the United States, the

[1] [Reported by Richard Peters, Jr., Esq.]

voyage was unlawful, and the vessel was forfeited. The evidence on the point of ownership and residence proves, that the sloop was in part the property of R. Wood, a British subject, who came in her from Bermuda to Philadelphia, where he remained for several days; that while he was here, he shipped a cargo, through the medium of American merchants; that he returned in her to Bermuda (Capt. Dunscomb commanding her both when she sailed from and returned to Philadelphia), and then sent her on, with the cargo, to the Cape; that by the custom-house papers of the Cape she was described as "the American sloop Penelope of Philadelphia, Capt. Hatchet;" and that, consequently, for the purposes of the voyage, she had changed her ownership, her captain, and her flag.

Second, the law. From these facts it was urged, that the case came clearly within the pre-existing mischief of a trade, between the United States and the rebellious parts of the Island of St. Domingo, which the legislature meant to suppress; that it was within the scope of the particular remedy provided, as well as within the general spirit and policy of the law. That Wood, who owned and employed the sloop, in the voyage to Hayti, was resident, in fact, within the United States, at the time of her departure from Philadelphia, cannot be denied; but, it is contended, that a resident within the meaning of the act of congress, applies not to occasional, and transient visitors, but only to permanent, domiciliated inhabitants of the United States. In refutation of this defence, however, it was endeavored to fix upon a contrary ground, in the legislative sense, as well by a review of the mischief declared, the remedy provided, and the object of the law, as by the consequences of the claimant's doctrine; the provisions contained in acts of congress, in pari materia, particularly in the non-intercourse acts of 1798, 1799, and 1800 (4 Laws [Folwell's Ed.] 129, §§ 1-3, 5 [1 Stat. 565]; 4 Laws [Folwell's Ed.] 244, §§ 1-3 [1 Stat. 613]; 5 Laws [Folwell's Ed.] 15, §§ 1, 2 [2 Stat. 7]), and the legislative use of the word "resident," upon analogous subjects. (2 Laws [Folwell's Ed.] 132, §§ 2, 3, 5 [1 Stat. 287]; 2 Laws [Folwell's Ed.] 142, §§ 11, 17 [1 Stat. 292]; 3 Laws [Folwell's Ed.] 163, §§ 1, 2 [1 Stat. 414]; 4 Laws [Folwell's Ed.] 134 [1 Stat. 566].

Mr. James S. Smith, for the claimants.—The present case is important not only on account of the value of the property seized, but because it is the first in which an act materially affecting the mercantile interest has received a judicial examination. Yet it lies within a narrow compass, and turns upon a single point, viz. was the Penelope "owned, hired or employed," &c. by any person resident within the United States.

In discussing this point it is proper to enquire—(1) What constitutes a residence, or who is meant by the term "resident." (2) Was the Penelope "owned, &c. by any person resident within the United States." The word "resident" is defined by Dr. Johnson, "Dwelling or having abode in any place."—Johnson's Dict. It will not be contended on the part of the United States, that Philadelphia was Mr. Wood's dwelling place; yet, according to Johnson, dwelling place and place of residence are synonymous. Johnson's Dict. "dwell," "dwelling," "dwelling place." So too, "inhabitant" and "resident" are synonymous.—Johnson's Dict. Who is an inhabitant has been judicially decided. "A person coming hither occasionally as a captain of a ship, in the course of trade, cannot be called an inhabitant; nor does a person going from his settled habitation here, on occasional business to Boston, or elsewhere, cease to be an inhabitant." [Barnet's Case] 1 Dall. [1 U. S.] 153. Being resident at a place, means then, having a family there, a home, transacting business there, and above all, its being the place to which, when absent from it, a man always proposes to return. Such is not only the strictly correct meaning, but also the common acceptation of the word. What more common than the question, Where do you reside? What more absurd if "resident" means merely "being present." But "residence" is a term that has a definite legal meaning, established by numerous decisions. By an act of the legislature of Pennsylvania freeholders are exempted from arrest except in certain cases, one of which is where they have not been residents in the state for the space of two years next before the issuing of the writ. Yet the supreme court determined that a man who was in Georgia fifteen months previous to the issuing of the writ did not lose his privilege, because his family was here, and he meant to return. [Penman v. Wayne] 1 Dall. [1 U. S.] 241, 348. So too, in the case of a foreign attachment which can only issue where the defendant does not reside within the state, the court refused to quash the attachment only because it did not sufficiently appear that the defendant intended to return. [Taylor v. Knox] 1 Dall. [1 U. S.] 158. Similar case 2 N. Y. Term R. [2 Caines] 318.

By the constitution of Pennsylvania, art. 1, § 3, no person residing within any city, &c. which shall be entitled to a separate representation, shall be elected a member for any county. Suppose the case of a merchant whose counting house is in the city, and dwelling house in the county; he spends a great proportion of his time in the city; and, therefore, if the district attorney's construction of the term "resident" is correct, is eligible. Nay, according to that construction, it would only be necessary that he should remain in the city on the day of election. But admitting that the common acceptation of the word and its legal technical meaning are different, we must presume that congress meant to adopt the latter. This is a highly penal statute; it subjects to for-

feiture the property of innocent persons knowing nothing of the vessel having been at St. Domingo, which may be on board at the time of her return to the United States. It is, therefore, according to a well established rule, to be construed strictly. 1 Bl. Comm. 88. To discover the intention and construction of congress, statutes in pari materia have been referred to. Not one, however, has been cited that will support the construction contended for on the part of the United States. Wherever the intention of congress clearly was to include persons actually within the United States, and not technically residing there, they have used other words in addition to that of resident.

The act to suspend the commercial intercourse with France (4 Laws [Folwell's Ed.] 129 [1 Stat. 565]), is in general terms like the present. "No persons resident," &c.; and it has been asserted, that like it, it applied to all persons within the United States. Congress, however, when it was about to expire, instead of merely passing an act to continue it, passed one in more general terms, thereby shewing their construction of the former act. Act Feb. 27, 1800; 5 Laws [Folwell's Ed.] 15 [2 Stat. 7]. In that act we find the phraseology materially altered, "persons resident within the United States or under their protection," that is, persons actually within the United States, but who do not reside there. The local or temporary allegiance which an alien owes to the government within whose territories he is, and the consequent protection of his person and property by that government, are alluded to in the phrase used. No term could have been more properly applied to aliens transiently within the United States. It is said, however, that citizens of the United States resident in foreign countries were meant.—Not so: the next sentence provides for their case. The phraseology is again varied to apply to them:—"Citizens of the United States resident elsewhere." That the phrase was intended to apply to persons who did not technically reside within the United States, appears also from the second section of the act, which allows a clearance to vessels owned, &c. by persons "permanently residing in Europe;" that is not merely those persons within the United States whose place of residence is Europe, but those who have not left it. The title of that act deserves to be noticed. It is as general as the title of the act upon which this information is founded, which has been referred to to support the construction contended for on the part of the United States. Both are entitled, acts "to suspend the commercial intercourse," &c. yet in both we find excepted cases in which an intercourse is allowed, and a clearance may be granted. The title, therefore, does not in the least explain the intention.

The act to prohibit the carrying on the slave trade (Act March 22, 1794, p. 22 [1 Stat. 347]) makes a distinction between persons coming into, or residing within the United States. The naturalization act (6 Laws [Folwell's Ed.] 76 [2 Stat. 153]) requires, that persons applying to become citizens shall prove that they have resided five years within the United States, and one year within the state in which they apply. If "resident" means being personally present, those aliens who have been out of the state for one day during the year, could not be admitted. Such, however, has not been the construction given to the act.—Mariners are daily naturalized. They are considered as residents because they have families within the United States, and always propose to return. But waving further comparison with other acts, we assert that the intention of congress is apparent upon the face of the act itself. Had they meant to prohibit all persons within the United States from trading to St. Domingo, they would have omitted the word "resident," altogether. Their meaning then would have been clear, and much more forcibly expressed. It is a rule in the construction of statutes that they are to be so construed, that, if possible, every word may stand and have a meaning. 1 Bl. Comm. 88. This rule can be complied with in the present case only by adopting the construction contended for by the claimants.

It has been said, however, that the words "resident within the Island of St. Domingo," are also used; that the same construction must be given to "resident" wherever it occurs; and that if our construction is adopted, a person resident within the United States may trade to St. Domingo with a person not domiciliated or legally resident there. The same construction must undoubtedly be given to the term "resident" in both cases, but the consequence asserted will not follow. Residents within the United States, are not only prohibited from having any commercial intercourse with persons resident within the Island of St. Domingo, but their vessels are liable to forfeiture if they are carried, or destined to proceed to any port within that island.

The construction contended for on the part of the claimants renders the whole act intelligible and consistent, and therefore must be presumed to be correct.

(Mr. Smith, in reply to the observations of the district attorney, commented upon the evidence to shew that only British funds were employed—that the claimants did not act in a clandestine manner, &c.)

Mr. Tilghman was about to proceed in the argument on the part of the claimants of the Penelope and cargo, when the jury mentioned that they had already made up their minds in the case. The court was requested to give a decided direction to the jury on the law, in order to afford an opportunity to either party to remove the cause to another tribunal.

Mr. Dallas, for the United States.

Mr. E. Tilghman, Mr. Smith, and the Reporter, for the owner of the Penelope and cargo.

THE COURT (charging jury). I do not think that this case, being one I have not had much time to consider, should be left to rest on my opinion. Although not one so well digested, as more deliberation would have enabled me to deliver, I shall give a direction sufficiently decided to afford an opportunity of taking an exception to it. My habit is not to leave points of law to the jury; it being the province and duty of the court to take on itself the responsibility for them, where time is afforded to form a deliberate opinion; which can seldom be done in the hurry of a trial in new and extraordinary cases. In this case it is not necessary for you to embarrass yourselves (nor shall I set the example) with passing in review all the acts of congress alleged to be in pari materia. It is considered to be a proper course to pursue in argument by counsel, but it is a dangerous and unnecessary conduct for courts, to decide on a number of acts said to be in pari materia, when a question arises only on a construction of one. These acts may (as some of them have been) be brought before me for construction directly, and it would be unsafe to commit myself by an incidental opinion. Every law has something peculiar in its intention and object; the same words may on some subjects be of different import from that in which they are used on others. I often find one at a time an over match.

I join the counsel on both sides in recommending to you to divest yourselves of all political considerations and consequences. The only point is that of a forfeiture; and the only enquiry is whether the individual whose property is placed under your view, is of the description intended by the law to incur it. The facts are fairly and fully in proof. The arguments and suspicions adduced to suggest ideas of the investment of American capital, used for the outfit or lading of the vessel in question, are not conclusive, or grounded in proof: they are out of the case. A British subject, owning a British vessel, comes into a port of the United States with private views, to wit, to convey home his children, who had been placed here for education: having funds and commercial credit in our city, he was advised to use them in an enterprise inhibited to our own citizens, but, as he was taught to believe, not forbidden to aliens. On whatever ground he formed his opinion, he must take the risk attending it. Arguments of innocent, or mistaken intention, are to be used in applications for mitigations of forfeitures; but are here irrelevant. The power of relieving from penalties, is in another department. He had the law before him, and must hazard the consequences of any act which produced an infraction of it. What were his motives is not, with us, so material, as what were his actions. It seems clearly proved that he did not come here to establish his domicil; but for a particular and transient purpose. There seems no disagreement about the general meaning of the words "inhabitant and resident," but it is said that the act of congress, under consideration, means any personal residence, while the business was in operation which incurs the forfeiture. A commorancy for the shortest time is held to be a residence, to bring the person within the act. The words are not "residing or being," but "person resident," throughout. Other acts of congress wherein the word, or words, are used, are brought to explain this; and yet they may, on examination, be found to be as deficient in perspicuity as this; which, on some future occasion, may be enlisted to explain them. Reasoning founded on the pari materia plan, is frequently a petitio principii, a begging question, or expounding one of unknown or doubtful expression, by another. The act produced to elucidate, is as little clear as the other. I recollect no direct judicial decisions on those acts, affecting the point now before us. It is true that persons "being" within our jurisdiction, owe allegiance as it respects crimes, for the commission whereof they are punishable. But this is an highly penal act, and must have a strict construction. Here is a forfeiture declared in the case of a person, not only actually "being," but one who must be described by the words "any person or persons resident within the United States," to be included in its purview. Congress may have intended to comprehend one "residing or being." If resident means nothing but mere momentary commorance, where it is even coupled with "being," it might as well be left out. The question seems to be whether they inserted "resident" without the legal meaning generally affixed to it. If they have omitted to express their meaning, we cannot supply it. Our duty is to expound, and not to make acts of congress. In so penal a case what can we do better than to take the legal interpretation? That I may not mistake, I will read, from notes in other cases, what I have said on a similar point, over and over again. In the case of Hylton v. Brown [Case No. 6,981] in the circuit court, and cases in this court, the following has always been my definition of the words "resident," or "inhabitant," which, in my view, mean the same thing. "An inhabitant, or resident, is a person coming into a place with an intention to establish his domicil, or permanent residence; and in consequence, actually resides: under this intention he takes a house, or lodgings, as one fixed and stationary, and opens a store, or takes any step preparatory to business, or in execution of this settled intention.

The time is not so essential as the intent executed, by making or beginning the actual establishment, though it is abandoned, in a short or longer period." A mere transitory coming for a special purpose, a mere transient visit, does not fall within the legal meaning of the word "resident." He must have the intent of staying, or abiding, for permanent purposes; and begin it, though he does not continue to prosecute it. On the meaning, if doubts exist in common interpretation, we must be governed by the legal definition. The attorney of the district does not consider it a clear case, because he has taken great pains, and brought together a mass of information. For the purpose of affording opportunity for exception to my opinion, though I have had no time to consider it maturely: I say that this claimant is not a "resident," or within the meaning of the act of congress on which the prosecution is founded. It is a case of great importance in its consequences, and ought to be well considered. Though I have thus directed you, this being a case partaking of crime, a malum prohibitum, though not morally criminal, you have, perhaps, a latitude both as to law and fact; and under all these circumstances, and with this opinion of the law, I leave you to decide according to your unbiased judgments.

Verdict for the claimants.

No appeal was prosecuted in this case.

Case No. 16,025.

UNITED STATES v. PENN.

[13 N. B. R. 464.] [1]

Circuit Court, S. D. Ohio. 1876.

CRIMINAL LAW—EVIDENCE—BANKRUPTCY—INDICTMENT FOR OBTAINING GOODS ON FALSE PRETENCES.

1. The examination of a witness before an examining court, where the witness has since died, is competent evidence in a trial upon indictment of the party for the same offense.

2. The statements of a party charged with absconding, made on his way from the place of his residence, as to his intention of returning, is competent evidence to disprove the charge.

3. Under an indictment based upon the ninth clause of the forty-fourth section of the bankrupt law (Rev. St. § 5132), charging the defendant with obtaining goods under the false pretense of carrying on business, and dealing in the ordinary course of trade, it must be shown that the defendant represented to the person from whom the goods were obtained, that he was so carrying on business, that the person was induced to part with his goods by reason of such representation, and that he was not so carrying on business. But this representation may be by acts and conduct as well as by words.

[Cited in U. S. v. Myers, Case No. 15,848.]

4. Under the tenth clause of this section, it must be shown that the intent to defraud existed in the mind of the bankrupt against his creditors generally, and not against this particular creditor from whom the goods were obtained.

5. The rule as to the measure and character of proof in criminal cases.

Indictment for obtaining and disposing of goods in violation of the provisions of the bankrupt law.

The first count in the indictment in this case, alleges that on the 17th day of October, in the year A. D. 1873, Robert B. Smart commenced a proceeding in bankruptcy against the defendant, Samuel M. Penn, late of the county of Ross, in the state of Ohio, by filing in the district court of the United States, within the Southern district of Ohio, a petition, duly verified, and recites the allegations of the petition, giving jurisdiction to said court, and the act of bankruptcy, charged in said petition, to wit: That on the 10th day of September, A. D. 1873, the defendant departed out of and from the state of Ohio, with intent to defraud his creditors, and that on the 28th day of October, A. D. 1873, the defendant was adjudged by said court a bankrupt: And charges that the defendant, within three months next, before the commencement of proceedings in bankruptcy against him, did unlawfully, willfully and fraudulently, obtain on credit, from Meyers, Thieman & Co., certain goods and chattels, to wit: Two trunks of notions, white goods, hosiery, gloves, and ribbons, of the value of three hundred dollars, under color and pretense of carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade, which said color and pretense was false, and which goods and chattels were not obtained as aforesaid, for the purpose of carrying on business as a merchant, and dealing in the ordinary course of trade; he, the defendant, then and there, well knowing that the said color and pretense was false. The second count charges that the defendant, within three months next before the commencement of proceedings in bankruptcy against him, to wit: On the 17th day of September, A. D. 1873, did unlawfully, knowingly, and with intent to defraud his creditors, dispose of to one Mrs. Estelle, certain of his goods and chattels, to wit: Two trunks of notions, white goods, hosiery, gloves, and ribbons, of the value of three hundred dollars, otherwise than by bona fide transactions in the ordinary course of his trade, which had been obtained by him on credit from Meyers, Thieman & Co., and remained unpaid for. The third count charges that the defendant within three months next before the commencement of proceedings in bankruptcy against him, to wit: On the 17th day of September, A. D. 1873, did unlawfully, willfully, and fraudulently, obtain on credit, from John Shillito & Co., certain goods and chattels, to wit: One package of embroidery and laces, of the value of one hundred and fifty dollars, under color and pretense of carrying on business as a merchant and dealer

[1] [Reprinted by permission.]

in the ordinary course of trade, which said color and pretense was false, and which goods were not obtained for the purpose of carrying on business as a merchant, and dealing in the ordinary course of trade; the defendant well knowing that the said color and pretense was false, and intending there and then to defraud the said John Shillito & Co. The fourth count sets out in full the proceedings in bankruptcy, and charges the defendant with obtaining goods of John Shillito & Co., as in the third count charged.

This prosecution is brought under the 5132d section of the Revised Statutes of the United States. The first, third, and fourth counts in the indictment are based upon the ninth clause of the section, and which provides, "that every person, who within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit, from any person, any goods or chattels with intent to defraud," shall be punished by imprisonment, with or without hard labor, for not more than three years. The second is based upon the tenth clause of the section, which provides: "Or within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith, in the ordinary course of trade, any of his goods or chattels, which have been obtained on credit, and remain unpaid for, shall be punishable by imprisonment, with or without hard labor for not more than three years."

During the progress of the trial, counsel for the government, after having shown that there had been an examination of the defendant before a United States commissioner, upon the charge contained in the indictment, that upon that examination one Williams was sworn and examined as a witness on behalf of the government, and was cross-examined by counsel for the defendant, and that said Williams was dead. Offered in evidence the examination of said witness on said examination. To the admission of this evidence, counsel for the defendant objected, for the reason that the examination before the commissioner was not a suit, and that the issue was not the same.

HELD BY THE COURT. The examination by the commissioner, was such a judicial proceeding as would come within the rule, admitting such evidence, and the charge in one of the counts being the same as was the issue in the examination before the commissioner, to that extent that it was the same issue, and the general rule being that where a witness already examined in a judicial proceeding, between the same parties, involving the same issue, has since died, his former examination is admissible. Starkie, Ev. 51; 1 Greenl. Ev. 193; Tayl. Ev. 436, 440; U. S. v. Macomb [Case No. 15,702]; Wagers v. Dickey, 17 Ohio, 439; Hoover v. Jennings, 11 Ohio St. 624. The objection will, therefore, be overruled and the testimony admitted.

The counsel for the government introduced further evidence tending to prove that the defendant had absconded and left the state with the intention of remaining absent therefrom. The counsel for the defendant then offered to prove by a witness, what the defendant, while on his journey from the state, stated his intentions were in regard to returning, to which the counsel for the government objected.

BY THE COURT. The rule of law is, "That if a person changes his domicile or actual residence, or is upon a journey, or leaves his home, or returns thither, or remains, or secretes himself, or, in fine, does any other act, material to be understood, his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are, therefore, admitted in proof, like any other material facts; so upon an inquiry as to the state of mind, sentiments, or opinions of a person at any particular period, his contemporaneous declarations are admissible as part of the res gestæ." "And so extensive is the rule in its operation, that to a certain degree it overrules the rule which precludes a party's declarations from being evidence for himself." 1 Tayl. Ev. 521, 529; Starkie, Ev. 87, 467; 1 Greenl. Ev. § 108; Thorndike v. City of Boston, 42 Mass. [1 Metc.] 242; Lund v. Inhabitants of Tyngsborough, 63 Mass. [9 Cush.] 37; Inhabitants of Gorham v. Inhabitants of Canton, 5 Me. 266. The objection will therefore be overruled, and the testimony admitted.

W. M. Bateman and Mr. Richards, for the Government.

Job Stephenson and R. A. Johnston, for defendant.

SWING, District Judge. The offense created by the ninth clause of this section, and which is charged in the first, third, and fourth counts of the indictment, is composed of the following elements: First. That proceedings in bankruptcy were commenced against the defendant. Second. That he obtained on credit from the parties named in the indictment the goods therein described. Third. That he obtained them within three months before the commencement of the proceedings in bankruptcy. Fourth. That he obtained them under the color and pretense of carrying on business, and dealing in the ordinary course of trade. Fifth. That such color and pretense were false. Sixth. That he obtained them with intent to defraud. Each one of which must be established by the evidence in the case before the jury will be justified in returning a verdict of guilty. There is no material controversy in regard to the existence of the first three facts, to wit: The commencement of the proceedings in bankruptcy; the obtaining on credit from the parties the

goods; and that it was within three months before the proceedings in bankruptcy. But the last three are the principal facts contested.

If you find from the evidence that proceedings in bankruptcy were properly commenced against the defendant, that he obtained on credit from the parties the goods described, and that it was within three months before the commencement of the proceedings in bankruptcy, you will then inquire whether he obtained them under the color and pretense of carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade? In order to establish this fact, it must be shown by the evidence that the defendant pretended to the parties that he was carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade. This pretense may, however, have been by conduct as well as by words. 2 Whart. Cr. Law, 2097, 2113; 2 Rup. Crimes, 292, 297; Reg. v. Boyd, 5 Cox, Cr. Cas. 502; U. S. v. Prescott [Case No. 16,084]. But the evidence must nevertheless establish its existence. And the evidence must further show that parties in consequence of this pretense were induced to part with their goods. And that this pretense was false, that is, that he was not in fact carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade. It will be remarked that the statute is not against obtaining goods under all false colors and pretenses, but against the single one, that of carrying on business and dealing in the ordinary course of trade. Reg. v. Boyd, 5 Cox, Cr. Cas. 502; U. S. v. Prescott [supra].

If you find from the evidence that he made the pretense—that he was carrying on business as a merchant at Bainbridge, dealing in the ordinary course of trade—that the parties in consequence of this representation and pretense parted with their goods, and that in fact he was not carrying on business as a merchant at Bainbridge, dealing in the ordinary course of trade, then you will inquire whether the defendant obtained such goods with intent to defraud. This is an important element in the offense, and its existence must be established by the evidence in the case. This, however, may be established by facts and circumstances. If, therefore, you find that the proceedings in bankruptcy were commenced against the defendant, that he obtained upon credit from the parties the goods described in the indictment—within three months before the commencement of said proceedings, that he represented to them that he was carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade—and that the parties, by reason of such representation, parted with the goods, and that he was not in fact carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade—and that he obtained the goods with the intent to defraud, the defendant would be guilty under the first count of the indictment, if the goods were obtained from Meyers, Thieman & Co., and under the third and fourth counts if the goods were obtained from Shillito & Co.

The offense created by the tenth clause of this section, and which is charged in the second count in the indictment, is composed of the following elements: First. That proceedings in bankruptcy were commenced against the defendant. Second. That he sold the goods therein described. Third. That he sold them within three months next before the commencement of the proceedings in bankruptcy. Fourth. That the goods were obtained on credit, and unpaid for. Fifth. That the sale was not made in good faith, in the ordinary way of trade. Sixth. That the sale was made with the intent to defraud his creditors.

The first three elements constituting the offense under this clause, are the same as the first three elements constituting the offense under the ninth clause of the section, except in that, the goods were obtained and in this they were sold and it may be said of these as well as of the fourth element necessary to constitute the offense under this clause, that their existence is not seriously controverted. If you, therefore, find from the evidence in the case that proceedings in bankruptcy were commenced against the defendant; that he sold the goods described; that he sold them within three months next before the commencement of the proceedings in bankruptcy, and that the goods were obtained on credit and unpaid for, you will then inquire whether the sale was made in bad faith and out of the ordinary way of his trade? This also may be established by facts and circumstances. If you find that the sale was made in bad faith, and out of the ordinary way of his trade, you will then inquire whether the sale was made with intent to defraud his creditors. This, too, may be established by circumstances, but it must be shown to the satisfaction of the jury by them that the intent existed in the mind of the defendant at the time the sale was made. A question is made whether this intent must exist against the particular creditor from whom the goods were purchased or against his creditors in general? I think it clear that it must have existed against his creditors in general, and not against the particular creditor from whom the goods were purchased. U. S. v. Clark [Case No. 14,806]. If, therefore, you find from the evidence, that proceedings in bankruptcy were commenced against the defendant, that he sold the goods described, that the sale was within three months next before the commencement of the proceedings in bankruptcy, that the goods were obtained on credit and unpaid for, that the sale was made in bad faith out of the ordinary course of his trade, and that the sale was made with the intent to defraud his creditors, the defendant would be guilty under the second count in the indictment.

The legal presumption is that the defendant is innocent of the crime charged, and so strong is this presumption that it can only be overcome by evidence which establishes his guilt beyond a reasonable doubt; in civil cases the preponderance of evidence will justify a verdict, but it is not so in criminal cases, for no preponderance of evidence which falls short of removing from the minds of the jury every reasonable doubt of the guilt of the accused, will justify a verdict of guilty. In a criminal case, it is competent for the accused to put in evidence his former good character in relation to the particular crime with which he stands charged. Thus, in the present case, the character of the defendant for integrity and honesty as a merchant, is evidence to be considered by the jury upon the question of his guilt, for the reason "that it may not be probable that a man who has sustained a uniform good character for integrity and honesty will forfeit it by the commission of a fraudulent and dishonest act." If, therefore, the evidence satisfies your minds beyond a reasonable doubt of the guilt of the defendant, your verdict will be guilty, but if it does not so satisfy your minds it will be, not guilty.

Verdict of not guilty.

Case No. 16,026.

UNITED STATES v. PENNINGTON.

[Pet. C. C. 113.] [1]

Circuit Court, D. Pennsylvania. April Term, 1815.

INTERNAL REVENUE—REFINED SUGAR.

1. The act of congress passed July 24, 1813 [3 Stat. 35], which imposed "a duty on all sugar refined within the United States," after the first day of January 1814, did not subject to the duty sugar refined before that day and put into moulds.

2. In an action on the bond given in pursuance of that act, it would be sufficient for the defendant to show, that the sugar sent out for sale, was refined before the first of January, 1814.

The only question in this cause was, whether sugar, which had gone through the whole process of refining, and was, on 1st of January 1814, in moulds or in the store room; was subject to the duty imposed by the first section of the act of the 24th of July 1813,—4 Laws [Bior. & D.] 564 [3 Stat. 35],—which declares, that "from and after the first of January 1814, there be levied, collected, and paid, upon all sugar which shall be refined within the United States, a duty of four cents per pound." It was proved, by witnesses who had long been engaged in the business of refining sugar, that when it is fit to be removed into the cistern, where it is granulated, it is considered as refined, the subsequent processes being only necessary to mould, whiten and dry it. It was also proved, that under the law of June, 1794,—2 Laws [Bior. & D.] 428 [1 Stat. 384],—the sections of which are the same as those of the law under consideration, the duty was not demanded, or in any instance paid, upon sugar, which, prior to the 30th September, 1794, was in a state, similar to the sugar, respecting which the question in this case arose.

WASHINGTON, Circuit Justice. It is contended, on the part of the United States, that unless the whole process of preparing sugar for market, was completed before the 1st of January, that it could not either technically, or to the common understanding of the world, be called refined sugar; and if any thing to render it so remained to be done, after the 1st of January, it is subject by law to the duty. 2dly. If it is not so, still the duty ought to be paid, although the whole process had been completed before that time, if it was sent out from the building, after that day.

First. The argument on this point might be more plausible, if the duty had been imposed upon refined sugar, or upon loaf or white sugar; as it might then have been said, that sugar does not in general obtain those appellations, until it is fully prepared for sale. But the duty is imposed upon all sugar, refined before a certain day, referring to a particular process in preparing the sugar for sale; and which it is proved, by abundant evidence, is terminated before the sugar is put into the moulds; the act of refining is completed, when it is fit to be granulated; and if this be accomplished before a particular day, it is absurd to say that it is refined after that day.

There is still less doubt on the second point. The 1st section of the law imposes a duty on sugar, refined after the 1st of January, and not upon sugar sent from the house after that day. But it does not become due, until it is sent out. Had the duty been laid upon all sugar, which might be sent out after a certain day; it is scarcely to be believed that any refiner would have had sugar subject to the duty, in his warehouse on that day; and consequently, a construction, which admits the inefficacy of the law, by the facility with which it might have been evaded, is not to be hastily adopted. But the condition of the bond, directed to be given by the 2d section, is conclusive. This bond is required to secure the United States, in the duties to be paid under that law; and it refers expressly to sugar refined after the 1st of January; and in an action upon that bond, it would clearly be sufficient for the defendant to shew, that the sugar sent out, was refined before the 1st of January, 1814.

Verdict for defendant.

[1] [Reported by Richard Peters, Jr., Esq.]

Case No. 16,027.

UNITED STATES v. The PENNSYLVANIA CANAL BOAT NOS. 68 AND 69.

[30 Leg. Int. 249; 18 Int. Rev. Rec. 56; 8 Am. Law Rev. 162.] [1]

District Court, D. Maryland. July 12, 1873.

SHIPPING—TONNAGE DUES, ETC.

A canal boat is not a ship or vessel within the meaning of the act of congress of February 18th, 1793 [1 Stat. 305].

In admiralty.

GILES, District Judge. This case is submitted to me on libel and answer. The libel was filed for a decree for the sale of the said canal boat to pay certain tonnage dues and light money claimed to be due to the United States by virtue of the 6th section of the act of congress of 18th February, 1793. That section provides, that, after the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled or licensed, or if less than twenty tons, and not less than five tons, without a license, in manner as is provided by this act, such ship or vessel, if laden with goods the growth or manufacture of the United States only, (distilled spirits excepted,) or in ballast, shall pay the same fees and tonnage in every port of the United States at which she may cruise, as ships or vessels not belonging to a citizen or citizens of the United States, &c., &c. The answer states, that this canal boat hath no motive power attached thereto, hath no masts or sails, and is only moved by some power external to itself. And from a drawing filed in the case, it appears that this boat hath no permanent deck, but only a narrow plank running around inside the bulwarks, just sufficient for a man to walk on. The question is, is such a boat, a ship or vessel within the true meaning of the act of 1793? And I am of opinion that it is not. The general provisions of that act in reference to the enrollment or licensing of vessels, showing what is requisite for such enrollment, negatives the idea that congress could have intended its provisions to have embraced canal boats such as this. Nor does the language of the act warrant such an interpretation. Nor is the act of 1793 extended to include such boats by the provisions of the act of July 20th, 1846 [9 Stat. 33]. That act provides "that persons employed in navigating canal boats without masts or steam power, now by law required to be registered and licensed, or enrolled and licensed, shall not be required to pay any marine hospital tax," &c., &c. It excepts from the payment of such dues, persons navigating the canal boats therein described, if they were required to be registered or enrolled, but does not enact that such should be the case. It is at most, only a legislative interpretation of the provisions of the act of 1793. A boat navigated by oars might still be bound to pay the dues mentioned, so far as this law of 1846 extends. But in this case the canal boat has no oars, no sails, and no steam power, and is merely a box to carry goods, drawn by and attached to a steam vessel that is enrolled and licensed. When congress wished to include such a craft they used appropriate language to do so. The act of July 18th, 1866 [14 Stat. 178], to prevent smuggling, provides, "that for the purposes of this act, the term 'vessel,' whenever hereinafter used, shall be held to include every description of watercraft, raft vehicle, and contrivance used, or capable of being used, as a means or auxiliary of transportation on or by water," &c., &c. In arriving at the conclusion I have, I am gratified to know, that I am sustained by a decision of the learned district judge of the Eastern district of Pennsylvania, (Judge Cadwalader), made last year in U. S. v. The Ohio [Case No. 15,915]. I will therefore sign a decree dismissing the libel filed in this case.

[1] [Reprinted from 30 Leg. Int. 249, by permission. 8 Am. Law Rev. 162, contains only a partial report.]

Case No. 16,028.

UNITED STATES v. PENSACOLA & G. R. CO. et al.

[11 Int. Rev. Rec. 78.]

Circuit Court, N. D. Florida. 1870.

CUSTOMS DUTIES — PAYMENT INTO TREASURY OF INSURRECTIONARY STATE.

[Payment of duties on goods imported into a port of the state of Florida in July, 1860, into the treasury of the state during the Rebellion in no way affected the right of the United States to recover the amount of the duties by action on the importer's warehouse bond.]

This was an action of debt on a bond executed by defendants to secure the payment of duties upon railway iron imported by them into the port of Fernandina, and deposited by them in a bonded warehouse in July, A. D. 1860. Felix Livingston was at that time collector of the customs of the United States for the port of Fernandina. The defendants filed a plea of payment, and on the trial, read in evidence the receipt of Felix Livingston, who appends to his signature the word "Collector," bearing date May 26, 1863. The defendants rest upon this evidence. Plaintiff then called Felix Livingston, who testified that in January, 1861, he sent his resignation as collector of the port of Fernandina, Florida, to the secretary of the treasury of the United States, but had some correspondence with the department at Washington afterward; that he then accepted the appointment of collector of the customs for the port of Fernandina from the president of the Confederate States; that in the year 1861, while the Confederate forces were in pos-

session of Fernandina, he was requested by the Pensacola and Georgia Railroad Company, one of the defendants, to send this iron into the interior of Florida, which he declined to do; that the said defendant then against his consent, under an order of the military commander of the Confederate forces, took the iron and carried it away into the interior of Florida; that when the forces of the United States were approaching Fernandina, in the early part of 1862, witness removed to Madison, where he was living in May, 1863, when the defendants wrote to him to come to Tallahassee to arrange the duties on the said iron; that he did come, and was invited by defendants into the office of the treasurer of the state on the said 26th day of May, A. D. 1863, where he was told by the treasurer that the defendants had deposited in the state treasury the amount due for duties upon said iron, for which said treasurer gave to witness a receipt, and for which he gave to defendants the receipt which was read in evidence in this case; that he received no money, and saw no money paid.

BY THE COURT (charging jury). 1st. That to show a legal payment of the duties upon said iron it must appear that the defendants had paid the same in coin to some officer of the United States authorized by law to receive them.

2d. That a payment thereof into the treasury of the state of Florida was no payment to the United States.

3d. That the arrangement made between the state treasurer, the defendants, and the said Livingston, was an attempted fraud upon the United States, and was utterly void so far as the United States are concerned, and cannot operate to discharge either the principal or sureties in said bond; that the defendants were presumed to know the law, and consequently knew that a fraud was attempted in this transaction, and that the United States was no party to it, and gave no consent to it; that consequently there was no proof of payment, and the plaintiff was entitled to a verdict for the amount of duties mentioned in the bond, with interest thereon at the rate of six per cent. per annum from the time when it became due in coin; that such would be the proper verdict for the jury to find.

The verdict of the jury was in accordance with the foregoing charge.

Case No. 16,029.

UNITED STATES v. PERALTA.

[Hoff. Dec. 190; 1 Cal. Law J. 345.]

District Court, N. D. California. 1863.[1]

MEXICAN LAND GRANTS — ABSENCE OF ARCHIVE EVIDENCE—SECONDARY EVIDENCE.

[Where the expediente was produced from the possession of the claimant, and bore as its last entry an order of a suspicious appearance purporting to be a direction by the governor that a title issue, but there was no evidence whatever from the archives, and the parol evidence that a grant was, in fact, issued, was unsatisfactory, *held*, that the claim must be rejected, notwithstanding the fact that the alleged grantee had, without objection, entered upon the land, and occupied the same for about a year prior to the conquest of the country. Applying U. S. v. Castro, 24 How. (65 U. S.) 350. Distinguishing U. S. v. Alviso, 23 How. (64 U. S.) 318.]

[Claim by Maria Teodora Peralta for the Rancho Buacocha, 2½ square leagues, in Marin county.]

HOFFMAN, District Judge. The claim in this case is founded on an alleged grant by Pio Pico, made in the spring of 1846. The expediente which is produced by the claimant shows that in 1845 she petitioned the alcalde of San Rafael to obtain a report from the colindantes of a certain tract she desired to solicit from the government, in order that the report might accompany her petition to the governor for a grant of the land. On the same day the magistrate certifies that the colindantes had stated before him that the sobrante asked for was vacant and might be granted. On the 8th November, 1845, she presented a petition to the prefect, in which she set forth her previous application to the alcalde, and the report of that officer, and requesting him to take such further proceedings as might be necessary. This petition was referred by the prefect to the subprefect, and by the latter to the first judge of San Rafael. On the 29th November the first judge reports the land to be vacant. On the 20th December, Castro, the prefect, recommends to the governor that the title issue. And on the 18th February, 1845, the governor attaches to the expediente an order to that effect. The expediente containing all these documents is produced by the claimant. The archives contain no record or trace whatever of any of these proceedings. There seems no reason, however, to doubt the genuineness of any of the papers, except the last and most important of all, viz.: the order by the governor that the title issue. This order and the signature are evidently in Pico's handwriting; but his signature bears little resemblance to those elsewhere found in the archives, the uniform and striking peculiarities of which this court has had frequent occasion to comment on. But it resembles the mode of signing his name, and especially forming the letter "P," adopted by him at a much later period. No explanation is offered of the circumstance that the expediente is found in the claimant's possession. Had it ever reached the governor, and had he made the order for the issuance of the title, it is difficult to imagine how it found its way into the claimant's hands, and has since been preserved, while the title paper, which it is alleged was issued, has been lost. If, however, after obtaining Castro's recom-

[1] [Affirmed in 3 Wall. (70 U. S.) 434.]

mendation, the claimant procured the expediente from that officer in order to send it to the governor, and through accident or neglect, omitted to do so until the war broke out, her possession of the expediente and the absence of a grant are easily understood. It is unnecessary critically to examine the testimony by which the existence of a grant and its loss were sought to be estabblished.

In this case there is neither a grant nor archive evidence. What, in the absence of even the latter evidence alone, is the nature of the testimony the court will exact before confirming a claim, is very explicitly laid down by the supreme court in U. S. v. Castro, 24 How. [65 U. S.] 350; and by the authority of that case I am governed. I may add that the fact that the expediente is not found in the archives, but in the claimant's possession, is far stronger evidence to my mind that it was not presented to the governor than the somewhat inconsistent statements of the witnesses who have attempted to prove that a grant was in fact issued. Nor is this conclusion materially weakened by the circumstance that at the end of the expediente is an order that the title issue, for that order has a very suspicious appearance, and there are no means of knowing with certainty at what time Pio Pico appended it to the expediente. The fact, too, that in her petition to the board the claimant herself stated that no title was issued owing to the political disturbances is of some significance, for, although the petition was amended on the allegation of a mistake or misapprehension of those in charge of the claim, it seems highly improbable that a mistake on so important a matter could have been committed, or the claimant could have failed to apprise her counsel of the fact that she had received a grant, and that it had been lost. The confirmation of this claim is urged on the authority of U. S. v. Alviso, 23 How. [64 U. S.] 318. But that case differs from this in the circumstance that Alviso, so far back as 1838, obtained from the governor permission to occupy the land solicited, while the proceedings were pending to perfect the title. The report of the case states that it was proved that his occupation commenced in 1840, and had continued for fourteen years, during which time he had been recognized as owner of the land. "No imputation was made against the integrity of his documentary evidence, and no suspicion existed unfavorable to the bona fides of his petition, or the continuity of his possession and claim."

In the case at bar the circumstances are very different. It is by no means satisfactorily proved that the petition and accompanying reports were ever laid before the governor. No grant is produced, nor any corroborative proofs from the archives. The only evidence offered is parol testimony, some of which comes from witnesses well known to the court, and a brief order signed by Pio Pico, which may have been a very recent addition to the expediente. In Alviso's Case, the governor, after granting the provisional permission to occupy, naturally returned the papers to the petitioner for the reports, &c. required. It was therefore found in his possession, or that of the officers whose informes were asked for. But in this case, if the claimant's allegation be true, and the governor not only ordered the title to be issued, but actually signed and delivered it, there is no mode of accounting for the fact that the expediente was not retained by him, and archived as usual. The evidence of possession and occupation is far less strong and satisfactory than is Alviso's Case. Richardson swears that the claimant was occupying the land in 1844. Castro testifies that she was living there in 1845. Ma. B. Duarte de Valencia, the daughter of the claimant, swears to her reception of the grant, and that for about a year previous to its delivery she had occupied the land under a provisional license. But there is no record evidence whatever of any such provisional license. It certainly did not come from the governor, for the petition was sent to him for the first time in January, 1846, and the only action he is claimed to have taken on it was to issue the final title at once. It was not granted by the prefect, the subprefect, or the alcalde, for the expediente shows that no such grant was solicited; and that those officers merely made favorable reports to be laid before the governor. Pacheco swears that he gave her possession after the grant in his capacity as alcalde. But this statement seems quite incredible.

1st. The grant not having been approved, no judicial possession could regularly or legally be given.

2d. The grant being for a sobrante, no judicial possession could be given of it until the boundaries of all the colindantes were determined and the extent of the sobrante ascertained.

3d. The legal evidence of the giving of judicial possession is the formal record of the proceeding. No such record is produced, nor is its absence accounted for. The claimant has not even offered the testimony of any of the colindantes and neighbors, who must have been present at the ceremony. We have only the bare statement of the alcalde that he gave possession of the land at the time of the granting thereof.

It is probable, however, from all the testimony, that about the date of the first application to the alcalde and the certificate of the colindantes, that the land was vacant, the claimant went upon it, and erected a house, etc. This was in the summer of 1845. She had no written permission to do so, but it was probably not objected to because there seemed no obstacle to her obtaining the title. But that title she did not,

in all probability obtain. At least there is no evidence sufficient, according to the rules laid down by the supreme court, to justify me in pronouncing that the grant issued. If, then, the petition was never presented, or not acted on by the governor, I am unable to discover in the fact that she moved on the land, and occupied it for about a year prior to the conquest of the country, any substantial equities which require or authorize a confirmation. The case is, undoubtedly, a hard one for the claimant, or rather her heirs, for she is now deceased. She is said to have been of a reputable family. And the reports of the alcalde, the prefect, etc., show that she would have had no difficulty in obtaining the land. But if by accident or neglect she failed to get it, I see not how this court can remedy the misfortune.

My opinion is that the decree of the board rejecting the claim should be affirmed.

[The decree of this court was subsequently affirmed by the supreme court. See 3 Wall. (70 U. S.) 434.]

Case No. 16,030.

UNITED STATES v. PERALTA et al.

[Hoff. Dec. 212; Cal. Law J. & Lit. Rev. 41.]

District Court, N. D. California. Oct. 1, 1862.

MEXICAN LAND GRANTS—DECREE OF CONFIRMATION—AFFIRMANCE BY SUPREME COURT—OBJECTIONS TO SURVEY—AUTHORITY OF DISTRICT COURT.

[Where the supreme court, in affirming a decree of confirmation by the district court, delivers an opinion clearly showing that the land intended to be confirmed is that described in the title papers, but it is not clear from the decree of the district court that the boundaries fixed are the same as those described in the title papers, the latter court may, under the act of 1860, upon objections to the official survey, inquire, not merely whether the boundaries described therein are in accordance with the terms of its own decree, but whether they are in accordance with the title papers upon which the judgments of both courts were founded.]

[Claim of Domingo and Vicente Peralta for San Antonio in Alameda county. Claim filed January 21, 1852, confirmed by the commission February 7, 1854, by the district court January 26, 1855, and by the United States supreme court in 19 How. (60 U. S.) 343.]

HOFFMAN, District Judge. This cause comes up on objections filed to the official survey on the part of the United States and of certain parties who have intervened for their interests. The principal point in controversy is the location of the northern boundary or dividing line between the rancho of the Peraltas and that of Castro. The official survey has been made in conformity with an amended decree of this court. This amendment was allowed by the court on the supposition that the error to be corrected was merely clerical, and that the decree, as amended, expressed the intention of the court when the original decree was framed. The cause having been originally tried in this court by the late judge of the Southern district, I was, at the time of allowing the amendment, unacquainted with the merits, and assumed, perhaps too hastily, that the alleged error was merely accidental. It is now objected that the court had no power to make the amendment, and that, the decree having been affirmed in the supreme court, it is res adjudicata, and the law of the case, whatever be its correctness. I shall consider the question thus raised precisely as if no amendment had been made, and shall inquire whether, by the just construction and legal effect of the decree of the supreme court affirming that of the district court, I am precluded from examining into the true location of the northern boundary in question, and establishing the same as the proofs taken in this proceeding under the act of 1860 [12 Stat. 22], shall require.

It is not pretended that this court has any power to reverse or annul its own final decrees for errors of fact or law after the term at which they were rendered, unless for clerical mistakes, or that any change or modification can be made which will vary or affect it in any material thing. Ex parte Sibbald, 12 Pet. [37 U. S.] 491; [Cameron v. M'Roberts] 3 Wheat. [16 U. S.] 591; [Bank of Kentucky v. Wistar] 3 Pet. [28 U. S.] 431. Still less has it any such power over the final decrees of the supreme court,—its duty being to execute the mandate,—and this though it should be discovered that neither it nor the supreme court had jurisdiction over the cause. [Skillern v. May] 6 Cranch [10 U. S.] 267; [Washington Bridge Co. v. Stewart] 3 How. [44 U. S.] 424; Id. 611. It is urged, however, that the proceedings in the cause, and the opinion of the supreme court, when considered in connection with the mandate, show that it was not the intention of the supreme court to determine the question now raised with respect to the location of the northern boundary; and further, it is contended that, by the act of 1860, all questions of location and boundary are referred to this court to be determined in a new proceeding between new parties and on additional evidence.

To arrive at a just appreciation of the true construction and effect of the decree and mandate of the supreme court, a brief review of the proceedings in the cause and the questions presented for decision is necessary. The claimants derived title under an order made by Governor Sola, in August, 1820, directing Luis Peralta to be put in possession of a tract of land extending from the creek of San Leandro to a small hill adjoining the sea beach, at the distance of four or five leagues. This was accordingly done, and the return of the officer, Martinez, describing the boundaries of the tract of which he gave possession,

is produced. On the thirtieth of August of the same year, the governor, on the reclamation of the Mission of San Francisco, directed a portion of the lands assigned to Peralta to be withdrawn, and on the sixteenth of September, Martinez established new boundaries for the grantee, fixing them at a rivulet which runs down from the mountains to the beach where there is a grove of willows, and about a league and a half from the cerrito of San Antonio, in the direction of San Leandro (i. e. to the south). On the thirtieth of August, 1823, Governor Arguello made a decree, directing that "the land which, by the order of his predecessor, had been taken from Peralta after it had been granted to him and possession had been given, should be returned to him," and on the fourth of December, 1824, Martinez returns that in compliance with the order "the land which had been taken from Peralta has been returned to him, and he has been put in possession of the place called 'Cerritos de San Antonio,' and the rivulet which crosses the place to the coast, where is a rock looking to the north." On the eleventh of February, 1844, Ignacio Peralta, one of the heirs of Luis Peralta, petitioned the governor for a new title to the land, in consequence of the original title papers having been lost. This petition was accompanied by a diseño, or map. On the thirteenth of February, 1844, Jimeno reports that by the documents which Don Ignacio Peralta presents he shows that there was granted to his father the tract of land called "San Antonio," agreeably to the extent shown by the map which he presents, and that, as it is twenty-two years since the government of that period made the grant and ordered possession to be given, the interested parties having occupied the land since the year 1819, he believes there is no objection whatever to granting him a new title. On the same day the governor, Micheltorena, ordered the title to be issued. The usual decree of concession was accordingly drawn up. It declares Peralta owner in fee of the land bounded "on the southeast by the creek of San Leandro, on the northwest by the creek of the Cerritos de San Antonio, on the southwest by the sea, and on the northeast by the top of the range of hills." This document contains an order that "this expediente be transmitted to the departmental assembly for their approval," but nothing further appears to have been done, no formal title seems to have been issued, nor is the decree of concession signed by Micheltorena. On these documents it was contended before the board that: 1st. The officers were without power to make the grant, and 2d, that the northern boundary should be fixed at the creek of San Antonio, being the reduced limits fixed by Martinez when Peralta was deprived of a part of his land on the reclamation of the mission. A majority of the board confirmed the claim within these limits.

A dissenting opinion, however, was delivered by Mr. Commissioner Thompson, in which the right of the claimant was maintained to the whole tract originally assigned and subsequently returned to him by order of Arguello, and the boundaries of which are described in the report of Martinez, and in the decree of concession by Micheltorena, and delineated on the map which accompanied Peralta's petition to the latter. In this opinion the location of the northern boundary is discussed; and the attempt made to identify the rivulet issuing from the "mountain range and running along the foot of the cerrito of San Antonio, where, at the entrance of a little gulch there is a rock elevating itself in the form of a monument, looking towards the north," as described by Martinez, with the San Antonio creek, is pronounced incompatible with the proofs, which unmistakably establish the identity of the two cerritos of the brook which runs at the base of the larger one, and the rock at the entrance of the little cañada. The testimony of Berreyesa, who states that the southern and not the northern base of the cerrito of San Antonio was established by Martinez as a boundary, is referred to as constituting the only discrepancy in the evidence, and his statement is rejected "as directly in conflict with the return of the officer who gave the possession, and the other testimony which established the rivulet running at the base of the mountain as the boundary." The cause having been appealed to the district court by the claimants, it was again urged by the United States that the grant was invalid, and that the claim should be rejected in toto. But the court affirmed the validity of the claim presented in the petition to the whole extent of its bounds. In the decree the northern boundary is described as follows: "A line commencing on the Bay of San Francisco, at a point where there are close to the bay the two cerritos as described in the first possession given by Martinez to Luis Peralta on the 16th August, 1820, running from the said bay eastwardly along by the southern base of the cerrito of San Antonio up a ravine, at the head of which is a large rock, or monument, looking to the north, described in the evidence as the 'Sugar Loaf Rock'; thence by the southern base of said rock to the comb or crest of the Coast Range of Mountains." It does not appear for what reason the court thus described the northern boundary, nor is it easy, without doing some violence to the terms of the description, to adopt the Codornices creek as the boundary. The line is directed to be run from the bay "eastwardly along by the southern base of the cerrito of San Antonio, up a ravine, at the head of which there is a large rock, described in the evidence as 'Sugar Loaf Rock,' " etc. But we have seen that the boundary which, according to Martinez' report, divided and separated the land, was a "rivulet," and not a "ravine;" nor is any ravine found near either the northern base or the southern base of the cerrito, until the whole width of the plain is crossed, and the base of the mountains reached. If,

then, the Codornices be taken to be the boundary intended, we must attribute to the court a singular inaccuracy of language, and this when the report of Martinez, which was evidently intended to be adopted, pointedly distinguishes between the arroyito or rivulet designated as a boundary, and the cañadita or little gulch, at the mouth or entrance of which was the penasco, or monumental rock.

Again, the decree speaks of a ravine, "at the head of which is a large rock, described in the evidence as the 'Sugar Loaf Rock,'" etc. But the sugar loaf rock described in the evidence at that time before the court was the remarkable rock near the Cerritos creek; and this is situated not at the head but "at the entrance of a ravine," and that ravine, or rather the brook which issues from it, is at the northern, and not the southern, base of the cerrito. If, then, we consider that the rock referred to in the decree is the same as that mentioned by Martinez in his report, and which had, up to that time, been alone spoken of by the witnesses, it would be impossible to adopt the Codornices as a boundary, for the rock is not near that creek, and no attempt had then, or has since been, made to show that at the mouth of the gulch from which it issues, any rock exists at all corresponding with the description given by Martinez. On the appeal from this decree, taken by the United States, it was again urged—1st, that the whole claim was invalid; and 2d, that the land did not extend beyond San Antonio creek. To these points the attention of the supreme court was exclusively directed. No question seems to have been raised as to whether the brook mentioned by Martinez as flowing at the case of the cerrito of San Antonio flowed at its northern or southern base. The identity of the two cerritos being satisfactorily established, the attention of the court was not called to the fact that there might still be room for controversy as to the particular rivulet mentioned by Martinez. The decree of the district court was, therefore, affirmed.

But the opinion of the court discloses that in settling the northern boundary the supreme court intended to adopt precisely the line described by Martinez in his first report; again, in his redelivery of possession under Arguello's order, and again in the title of confirmation given by Micheltorena. All these documents are expressly referred to by the supreme court, and the description of the line given by Martinez in his first report is even copied into the opinion totidem verbis. Indeed, any other interpretation of their decree would be absurd; for, the validity of the grant by Sola, and the subsequent restoration of the land by Arguello, being recognized, the only tract to which that grant could have referred was the tract of which the possession had been given by Martinez, and which is described in his report. If, then, on further examination, it appears that the land described in the decree affirmed by the supreme court is not the same as that whereof possession was given by Martinez, it has appeared to me to be the duty of this court, under the act of 1860, to conform to the obvious intention of the supreme court, rather than to the mere letter of its mandate, and to cause to be surveyed to the claimants the tract of which Martinez gave possession, and which he describes in his report.

I therefore think myself at liberty to inquire, not merely whether the official survey is in accordance with the terms of the decree of this court, affirmed by the supreme court, but whether it is in accordance with the possession given by Martinez, upon which the judgments of both courts were founded. Had the two reports of Martinez, the concession by Micheltorena, and the diseño presented by Peralta, been expressly referred to in the final decree for a further description of the land, there would then (if the decree describes a different tract from that described in those documents) have been such a repugnance on the face of the decree as would clearly have authorized the location of the land as required by the title papers, rather than by the description in the decree. But the opinion of the supreme court shows as clearly as if it had been so stated in the decree that the land intended to be confirmed was that described in the title papers; and the decree of the district court is affirmed and adopted, because it was supposed to describe the same land, no suggestion to the contrary appearing to have been made or considered. It is to be observed, in addition, that the objection to the official survey is made on the part of persons claiming title under Castro, the grantee of the rancho to the north of that of the Peraltas. That rancho is bounded on the south by the rancho of San Antonio. But even if, by reason of the point having become res adjudicata, the northern boundary of San Antonio should be fixed at the creek to the south of the cerrito, it would not follow that the same line would form the southern boundary of the Castro rancho. As between the owners of the latter rancho and the United States, it would still be open to show what were the true boundaries of the San Antonio; and, if the northern boundary of the latter should be found to be the northern base of the cerrito, that boundary would be the southern limit of the Castro rancho. Moreover, the decree in the Castro case, as well as the title papers, call for the "Cerrito de San Antonio" as its southern boundary. If, then, by reason of the acquiescence of the Peraltas in the decree of the district court, which fixed their boundary at a brook about half a mile south of

the cerrito, they should be restricted to that line, the only effect would be to leave between the two ranchos a strip of vacant land, which the United States do not claim should be reserved. Unless, therefore, the line described in the decree in the case at bar should be found to be the true line of division between the ranchos, and such as the court would adopt in the Castro case, were that now under consideration, I am unable to perceive how the parties intervening in this cause can be benefited by a decision adopting the line contended for by them, not because it is the true line, but because the decree adopting it has become final.

I proceed to consider the question of location on its merits. The identity of the cerrito of San Antonio is not disputed. It is claimed that the rivulet mentioned by Martinez is the Codornices creek. This creek rises in the mountains, and flows in a nearly westerly direction toward the bay, not far from parallel with the Cerritos creek, and at the distance from it of about a mile, to the south. But this creek in several respects fails to answer the description given by Martinez. The creek described by him flowed at the base of the larger cerrito. The Codornices does not run into the bay, although its channel from the hills and to a considerable distance across the plain is clearly marked. But shortly after crossing the main road which traverses the plain from south to north, its channel disappears, and though, perhaps, as testified by the witnesses, its course at very high water may be traced by a superficial deposit of gravel, etc., there is nothing which could be called a channel, or which in ordinary seasons would reveal the existence of a brook or the bed of a brook. It is contended that its waters have been in some degree diverted by a small ditch recently dug; but this suggestion seems conclusively met by the diseño presented by Peralta to Micheltorena in 1844. On this diseño a creek is delineated running from the mountains, and sinking a short distance to the west of the road, precisely as it is represented on the recent and accurate topographical map of Stratton. The Codornices, moreover, if continued to the bay in the same direction, would pass by the cerrito at the distance of more than a quarter of a mile from its southern base, and when we remember that the possession of Martinez was given on the 16th of August, in the middle of the dry season, it is almost impossible to suppose that he could have intended to describe that brook as a "stream flowing at the base of the cerrito." On ascending the Codornices, we find no rock situated "at the entrance, or mouth of the little gulch." The high conical rock which it has been sought to identify with that spoken of by Martinez, is situated far up on the mountain. It is at a considerable distance to the north of the main branch of the creek, and to an observer approaching it from the west or southwest it seems to be nearly on the crest of the ridge. But by no one could it be described as "situated in the mouth of a little gulch, or cañadita." But the diseño of Peralta decisively settles any doubt which might be felt as to the creek referred to by Martinez. This diseño was drawn to indicate to Micheltorena the tract which had been granted to the father of the petitioner, and for which he asked a new title. With this diseño before him, and perhaps after referring to the Castro expediente, which was then in the archives, Jimeno reports: "By the documents which Don Ignacio Peralta presents, he accredits that to his father was granted a tract of land called 'San Antonio,' agreeably to the extent shown by the diseño which he presents." On this diseño the cerrito of San Antonio is plainly delineated, and to the north of it, flowing from the hills into an estero of the bay, is a creek, on the north side of which is written "Terreno de los Castros," and on the south "Terreno de los Peraltas," thus "dividing and separating the land." That this creek is the Cerritos creek, cannot be doubted. Its course and position with respect to the cerrito, exactly correspond, and it falls into an estero which puts up from the bay at right angles to the shore, or towards the east. At the point where the creek issues from the mountains, is a small triangular object, which seems almost certainly to have been intended to represent the rock spoken of by Martinez, and in fact there is found at the entrance of the little gulch in the hills from which the creek issues, and in a position corresponding to that of the object on the diseño, a very remarkable rock, of which photographic drawings have been exhibited, and which is identified by some of the witnesses who assisted at the act of possession, as the rock referred to by Martinez.

At the request of all the parties, and accompanied by their counsel, I have visited the rancho, in order to learn by personal observation the actual features of the country. I confess myself unable to see how any one with the diseño before him, could for a moment doubt what creek was there intended to be delineated as the northern boundary of the tract. Much testimony has been taken to show that the Cerritos creek did not, until recently, extend to the estero by any clearly defined channel. That on the present road, which runs much nearer the bay than that used by the old inhabitants of the country, the creek may be crossed in the dry season without attracting notice, is quite possible. But my own observation has shown me, and the photograph (Exhibit Watkins, No. 8) proves, that to one standing on the hills, its course is distinctly marked across the whole

plain, and nearly, if not quite, to the point where it runs into the marsh and estero. The diseño, however, removes all doubt on the subject, for it demonstrates that whether or not its channel was discernible in 1850 and 1851, when the witnesses testify to crossing it with hay-wagons, etc., it was in 1844 known to flow in a well-defined channel from the mountains to the marsh and estero at the northern base of the cerrito. In fact, if it be once admitted that the diseño represents the land granted by Sola, and of which possession was given by Martinez, I cannot perceive how the location of the boundaries can be open to controversy. That the diseño does represent that tract is expressly stated by Jimeno, and the well-known carefulness and circumspection of that officer give to his statements great weight. The tract delineated on the diseño exactly corresponds with the description given by Martinez. We have the larger cerrito at a short distance from the beach, the creek flowing along its base, and the high rock at the entrance of the cañadita from which it issues. That Micheltorena intended to grant, or rather issue, a new title for the land delineated on the diseño, cannot be doubted. In his decree of concession, the creek of Los Cerritos de San Antonio is expressly mentioned as the northwestern boundary, and this decree, called by the supreme court the title of confirmation by Micheltorena, is referred to in its opinion as clearly describing the same monuments as those mentioned by Martinez. It is therefore clear that this claim must be considered precisely as if the diseño of 1844 had been attached to the report of Martinez, or the grant by Sola. And, if so, the location of the boundaries is unmistakable. A corroboration of these views is found in the expediente and diseño of Castro. By the grant to Castro, his rancho is bounded by the cerrito of San Antonio, and the same boundary is designated in the decree of confirmation, which has been acquiesced in by the parties. This description of itself, would, if the ordinary rule be applied, exclude the object named as the boundary. But the diseño removes all doubt. On it a conical hill is represented, and inscribed "Cerrito de San Antonio," while from its summit, or northeastern side, it is not easy to say which, a dotted line is projected, evidently intended to indicate the boundary. This line, though not extended to the hills, nevertheless shows that the boundary ran to the northeast, and that it did not commence at the southern base of the cerrito, and run towards the hills in a direction south of east.

If, however, the limits of the Castro rancho be fixed as is now contended for, at the Codornices creek, it will include not only all the cerrito, but a tract nearly a quarter of a mile wide to the south of it, and will embrace lands not even represented on the Castro diseño. Much testimony has been taken to show that Castro has occupied the tract in question with his cattle and cultivated fields, and that the Peraltas have at various times acknowledged the Codornices to be the boundary. But evidence as to oral admissions of this nature is at all times unreliable, especially when it is, as in this case, conflicting. That in 1844, Peralta claimed to the creek called "Cerritos," is clear from the diseño, and we learn by the report of Jimeno that his father had occupied the land agreeably to the extent shown by the diseño since 1819. One of the Peraltas testifies that Castro was the first squatter he ever had on his land, and it is clear that in 1830, when the diseño of Castro was drawn for him by Forbes, and in 1834 when Joaquin Isidro Castro presented it to the governor, the tract in dispute could not have been occupied or claimed by Castro, for it was not even represented on his diseño. That in times comparatively recent, the Castros had a cultivated field to the south of the Cerritos creek, seems to be established, but I see nothing in that fact or the other evidence showing Castro's occupation of the disputed tract, sufficient to justify us in disregarding the boundaries so unmistakably indicated by the report of Martinez, the diseño, and concession in the expediente of 1844, and the natural objects found upon the ground. For these reasons I am of the opinion that the location of the northern boundary is correctly located in the official survey, and that the objections to it should be overruled.

The official survey is also objected to on the ground that it embraces lands on the shores of the bay below the ordinary high-water mark. These lands have been treated as having passed to the state of California as incidental to her sovereignty on her admission to the Union, and they have been disposed of by the state as her own. I do not understand it to be denied that the call in the grant for the bay as a boundary bounds it by the shores of the bay, nor is it contended in this case that that term should not be construed to embrace only what at common law is considered to be the shores of the sea. It includes all lands below ordinary high-water mark; that is, the limits reached by those tides which happen between the full and change of the moon, twice in the twenty-four hours. Teschemacher v. Thompson, 18 Cal. 21; Ang. Tide Waters, c. 3, and cases cited.

It seems, from the deposition of Stratton, that the official survey embraces lands below ordinary high-water mark, and in this respect it is evidently erroneous. I think that the western boundary should therefore be modified so as to exclude those lands lying below that limit, whether they be situated on the bay itself, or on the shores of any navigable estuary that may extend from the bay into the interior.

Case No. 16,031.

UNITED STATES v. PERALTA et al.

[Hoff. Land Cas. 89.] [1]

District Court, N. D. California. March 10, 1856.

MEXICAN LAND TRUSTS.

The validity of this claim fully established.

[Claim of Sebastian Peralta and José Henandez to the Rancho Rinconada de los Gatos, comprising a league and a half of land in Santa Clara county.]

S. W. Inge, U. S. Atty.
A. P. Crittenden, for appellees.

HOFFMAN, District Judge. The grant under which this claim is made was issued by Governor Alvarado on the twentieth of May, 1840. The original title is produced, and the signatures fully proved, and also a certificate of approval by the departmental assembly. The land seems to have been occupied prior to the grant, and a house was built in which the parties have ever since continued to reside. The land granted is described as the "Rinconada de los Gatos," and the third condition limits the quantity to one league and a half, as shown on the map. On recurring to the map, we find the tract solicited indicated with tolerable precision, and sufficiently so to enable a surveyor to locate it without difficulty. The claim was confirmed by the board, and we think their decision should be affirmed.

Case No. 16,032.

UNITED STATES v. PERALTA.

[Hoff. Op. 63; Hoff. Dec. 6.]

District Court, N. D. California. Nov. 28, 1859.

MEXICAN LAND GRANTS — LIMITATION AS TO QUANTITY — CONFIRMATION OF CLAIM — FINALITY OF DECREE — STIPULATION BY UNITED STATES ATTORNEY.

[1. There is no authority which will justify the court in confirming to a claimant a tract four or five leagues in extent, under a grant which designates the quantity as two leagues, a little more or less.]

[2. An appeal was taken from a decree confirming a claim, but thereafter the district attorney, by a stipulation, consented that the order granting the appeal might be vacated and an order entered allowing the claimant to proceed under the decree of this court, as under a final decree. The stipulation was made upon a misconception by the district attorney, occasioned by misrepresentations upon the diseño, and by a witness, as to the extent of the land contained within the boundaries confirmed; and it subsequently appeared that these boundaries gave to the grantee more than twice the quantity granted. *Held*, that the stipulation would not prevent the court from so modifying the decree, in advance of the official survey, as to give only the quantity granted.]

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

HOFFMAN, District Judge. In this case a decree was entered at a former term by consent of the United States, confirming the claim. In the decree of the board the land was described as of the extent of two leagues, a little more or less, and the boundaries as contained in the grant were mentioned. In the decree of this court the boundaries set forth were those which are mentioned in the original decree of concession as well as in the titulo or final title, and the limitation of quantity was omitted. The cause was appealed and at a subsequent day, pursuant to instructions, the district attorney entered into a stipulation consenting that an order be entered vacating the order granting an appeal, and giving leave to the claimant to proceed under the decree of this court as under final decree. It was afterwards brought to the notice of the district attorney that the land contained within the boundaries mentioned in the decree is of the extent of about five leagues. A motion was therefore made to amend the decree by limiting the extent of land to the quantity mentioned in the grant.

In support of this motion it was shown by affidavit that the land was five leagues in extent, and the counsel for the claimant admitted in court that its area was about nineteen thousand acres, which would be something more than four leagues. It is quite clear that under no ruling of this court, or the supreme court, in this class of cases, can a claimant be entitled to a confirmation of a tract four or five leagues in extent, under a grant which designates the quantity as two leagues, a little more or less. If in any case it could be held that the governor intended to grant the large tract, notwithstanding the limitation of quantity mentioned in the grant, it could only be where it appears that he knew the quantity contained within the boundaries; that the boundaries are distinct and well defined, and that he granted all the land within them. But in this case only three boundaries are mentioned in the grant. The names of a rancho (San Antonio) and of two places ("parages"), viz: El Hombre and Monte del Diabolo, are given, to which the land granted is said to be contiguous ("colindante"). In the map which is found in the expediente, and to which the grant refers, the tract is delineated, and at the foot of it is a note signed with the rubric of one Zamorano, in which it is stated that the land "from north to south is a little more than two leagues, and from east to west a little less than one league." It was under these representations that the governor described the land as of the extent of two leagues, a little more or less, as shown by the map, and reserved the surplus to the nation. It was also testified by José Maria Amador, a witness produced by the claimant, that the distance between the two streams of Las Juntas and the San Ramon, from north to south, is a little more

than two leagues, and the distance from east to west in some places two miles, in others a little less than one league. So far, therefore, as the record disclosed the facts, it appeared that the extent of land embraced within the boundaries was about two leagues.

It had previously been held by this court that, where all the boundaries of a grant were clearly defined, and where the conditions specified the extent as of a certain number of leagues, a "little more or less, as shown by the map," the whole land included within the boundaries should be deemed to pass by the grant, provided that the quantity over and above that specified did not exceed a fractional part of the usual unit of measurement, viz: one league, it being supposed that such excess might reasonably be considered to be covered by the words "more or less." It had also been held that for the purpose of ascertaining the boundaries resource was to be had not to the grant alone, but also to the petition, diseño, and to inquiries whether the name of the rancho indicated a place of known limits and extent. But in the case of U. S. v. Fossatt [20 How. (61 U. S.) 427], this view was held to be erroneous. The words "more or less" were rejected as having no place in our system of survey and location, and the grantee was restricted to the quantity clearly expressed. The grant in that case as in this, mentioned only three boundaries, but the court refused to refer to the petition, or diseño, to ascertain the fourth boundary, or to inquire if the name of the place granted "had any significance as connected with the limits of the tract." It is clear, therefore, that if the quantity of land exceeded two leagues (the quantity clearly expressed) by only a fraction of a league, the claimant would, under the decision of the supreme court, be limited to the precise quantity of two leagues; a portion must be so limited when the excess is from two to three leagues. If, then, this court has not lost jurisdiction over the cause, it is clearly its duty to reform the decree by designating the quantity of land confirmed. It is objected that this is a consent decree, and therefore cannot be reopened or appealed from.

With regard to the first consent, given by the district attorney, it is sufficient to say that it was merely a consent to a confirmation of the claim, and to an affirmance of the decision of the board. It cannot, in any case, be called a consent to the decree made by this court. With regard to the second consent, there is more difficulty. That consent was in the usual terms of the stipulation filed by that officer whenever instructed to dismiss an appeal to the supreme court. He consents that the order granting the appeal be vacated, and that an order be entered allowing the claimant to proceed under the decree of this court, as under final decree.

It will be observed—First: That this stipulation does not in terms purport to be a consent that a certain decree shall be made, but it consents that an appeal shall be dismissed, and that a decree previously made shall be regarded as final. If, then, that decree is to be considered a consent decree, it cannot be because it was made on a previous consent, but because a subsequent assent to its finality has given it that character.

Second: It appears that that consent, whatever be its effect, was given not only in ignorance of the facts, but on a misconception of them, occasioned by the misrepresentations as to the extent of the land contained in the note upon the diseño furnished by the grantee, and the testimony of Amador, a witness produced by the claimant.

As the court sees that this decree will, if suffered to stand, give to the claimant more than double the quantity of land which he solicited from the governor, and to which he is by the law, as declared by the supreme court, entitled, it seems to me that the technical objection which has been noticed ought not to be permitted to prevent the correction of the mistake, both as to the law and the fact, into which this court fell. But even if in an ordinary case, where the final decree of this court is exhaustive of its power, such a mistake could not, under these circumstances, be corrected, there can be no doubt that in the special class of cases, of which this is one, this court possesses such authority.

In the recent decision of the supreme court in the case of U. S. v. Fossatt, 21 How. [62 U. S.] 450, it is declared that this power of the district court over the cause does not terminate until the issue of a patent conformably with its decree. As that case was remanded, because the decree entered by this court was not a just decree, it was argued with much force that all decrees of this court were to be regarded as interlocutory until a final decree, embodying and adopting a survey was entered. It was held, however, by this court, that the decrees heretofore entered, by which the validity of the claim was ascertained, were to be regarded as final decrees in a sense to authorize a survey, as of lands "finally confirmed," to be made, or an appeal to be taken from them. But it was also held that such decrees did not exhaust the power of the court over the cause, and that it had authority to hear objections to the survey and location which might be made, and to direct the surveyor to correct or modify the survey, conformably to its opinion. This jurisdiction the court has since frequently exercised. If, then, a survey be made under the decree in this case, it will be the duty

and within the power of the court to hear any objections to it that may be urged. If there be any ambiguity or repugnance in the decree, it will be the duty of the court to construe and explain it.

The decree, as has been stated, sets forth the boundaries of the tract confirmed. But, though it does not mention the quantity, it refers for more particular description to the grant and the diseño, with the note by Zamorano. In one of these documents the quantity of land is clearly expressed as "two leagues, a little more or less" (which the supreme court has decided to mean two leagues); and in the other its extent is declared to be a little more than two leagues in length, and a little less than one league in width. If then the grant and diseño are to be consulted and followed in these respects, the boundaries cannot be reached. If the land is surveyed according to the boundaries, the limitation of quantity contained in the grant must be disregarded. A case is thus presented where the decree must be construed and explained by the court; and, under the circumstances of this case, and the law as laid down by the supreme court, there can be no doubt as to what the construction should be. If the views taken by the claimant be correct, it would follow that, notwithstanding that the decree of the court was made on a misconception of the facts occasioned by evidence produced by the claimant himself, and notwithstanding that a motion to open the decree was duly made before the expiration of the term, yet by reason of a purely formal stipulation, given by the district attorney in ignorance of the facts, this court is not only powerless to amend its decree, but is bound to confirm a survey, giving to the claimant at least double, and it might be ten times, as much land as he is entitled to claim. Such cannot, it seems to me, be the duty of the court. As, then, this court has the right and may be required to construe and explain this decree, when a survey under it shall have been made, and to instruct the surveyor as to the manner in which a new survey shall be made, it is clearly within its power, when its attention is called to the decree in advance of the survey to explain and construe it in such a manner that a survey may in the first instance be made under it, such as it would if a survey had already been submitted to it, direct to be made. By this means the expense and delay of two surveys are avoided, and the surveyor is relieved from all embarrassments in the matter.

It is for the foregoing reasons the opinion of the court that the decree in this case should be amended, and that, as in the decree ordered by the supreme court in the case of U. S. v. Fossatt [supra], the grant to the original grantees should be adjudged to be for two square leagues of land to be taken within the boundaries mentioned and decree of concession and delineated on the diseño in the grant, to be located at the election of the grantee or his assigns, under the restriction established for the location and survey of private land claims in California, by the executive department of this government; and that the claim of the claimant to one undivided half of the said two leagues be confirmed to him.

Case No. 16,033.

UNITED STATES v. PEREZ.

[2 Wheeler, Crim. Cas. 96.]

Circuit Court, S. D. New York. Sept., 1823.

CRIMINAL LAW—DISCHARGE OF JURY FOR INABILITY TO AGREE—DISCRETION OF COURT.

[The jury having been discharged after being out only about four hours, and reporting that they were equally divided, and could not agree, the court was divided on the question whether the discharge was justifiable under the circumstances; Van Ness, Circuit Judge, being of opinion that the discharge was too soon, and Thompson, Circuit Justice, holding that the matter was in the sound discretion of the court under all the circumstances, and that it was not necessary that the jury should be so far exhausted as to be incapable of any further deliberation, or should be disabled by sickness or intoxication.]

[This was an indictment against Joseph Perez for piracy.]

In calling the jury the panel was exhausted and Dr. Roosa was selected as a talesman. He was objected to by the counsel for the prisoner, that he was a physician. The court overruled the objection, and a peremptory challenge was made. It was permitted by the court that the counsel for the prisoner might interrogate the jurors as they came to the book to be sworn, "whether they had expressed an opinion against the prisoner," and they were so interrogated. Captain Edward Johnson testified, that he was a citizen of the United States, sole owner of the schooner Bee, and principal owner of her cargo. He sailed with her from Charleston, S. C., on the 20th of July, 1822, on a voyage to St. Juan de Remedios, in the island of Cuba. The vessel was of about 50 tons, and the cargo consisted of flour, rice, butter, lard, codfish, tinware, watches, &c. On the 14th of August, being then about a mile and a half from the coast of Cuba, and not far from the place of destination, saw a small schooner of about 30 tons coming out from under the land. She was Baltimore built, schooner rigged, apparently about 30 tons burthen, without a topsail, and hoisted Buenos Ayrean colors. She hailed the Bee, on which the anchor was let go, and a boat sent from the Bee on board of her. When the boat returned, witness was forward stooping down, and paying out the cable. His first notice that the pirates were on board was their cutlasses, with which they

began beating him with great violence. He had with him on board the Bee a sailing-master, whose name was Manuel Fernandez, a Portuguese, who spoke Spanish, James Deban, Joseph Porter, James Thompson, and a Portuguese passenger, who was taken in at Charleston, who spoke no English, and whose name the witness never knew. Fernandez interceded with the pirates, upon which they desisted from beating the witness. They then put a six-pounder, which was on board the Bee, into the boat, together with colors, trumpets, and other tight articles, and got the Bee under weigh, again running until within half a mile of land, when they brought her to anchor, and laid the piratical schooner on the larboard side, close to her. At this time there were about twenty of them on board. They took off the tarpaulin, and one of them, who, according to the best of witness' knowledge and belief, was Joseph Perez, the prisoner, took a crowbar and drove it in once or twice into the hatch. They called for the axe of the cook, but before anything was further done, witness was hurried on board the piratical schooner to assist in throwing out the ballast, for the purpose of lighting her so as to receive the cargo of the Bee. The witness then stated various acts of wantonness and cruelty during eight days, that were inflicted on them by the pirates; the manner in which they sold off the greater part of the cargo to the people who flocked down from the country to purchase, and the arrival of a British schooner from New Providence to whom the residue of the cargo was sold.

On the 22nd of August, having disposed of all the cargo, the pirates got both schooners under weigh, and beat out to the entrance of the Keys, five or six miles from the main land, when witness was told by the carpenter that they were about to run the Bee ashore. This was soon after done, after taking two or three stretches upon West Salt Key. A small boat like a canoe was brought alongside, with one sail, and one oar and a half, some beef and water. They then ordered witness into the boat. He went in. They then ordered him out again, and he came out. On this the prisoner, Perez, came up to him, and ordered him to take down his small clothes. Prisoner then examined the waistband and lining, searched witness' person for belts, and ripped open the lining of his hat and shoes, searching for money. Shortly afterwards the prisoner came up from below, and brought up a gold piece in his hand. He held it up towards witness' face, and said, "Dis for you," meaning, as witness supposed, have you any more like this on board? Witness answered him, "No gold in America;" when the prize master, who could speak English, said, "No, no—no gold in America." Witness was now standing by the gunwale, when, turning round, he saw the prisoner take a long knife from his side, and cut the standing part of the forepeak haulyards, for the purpose, as witness then thought, and still believes, of hanging the cook therewith. Prisoner called the cook, and made a grasp at him, when the prize master called out, "No, no!" and then he desisted. They ordered witness, the passenger, and all the crew, except Deban, into the boat. There were five in the boat. Capt. Fernandez said they must not stand in shore, or the pirates would kill them all. They accordingly continued to stand out, till they ran down the hull of the piratical schooner. They soon after saw the Bee in a blaze. They then made for the land, (as the boat leaked exceedingly, and had to be bailed constantly by two men,) and got into the mouth of a creek near Matanzas, after being about four days at sea, and landed at Matanzas on the 27th, in the evening.

These facts being proved to the court and jury, no doubt existed that they amounted to piracy. Witnesses, however, were introduced who testified to facts that left some doubt whether the prisoner was the same person who committed the piracy upon Captain Johnson.

The case was summed up to the jury by Messrs. Nevins & Hoffman, for the prisoner, and by Messrs. Haines & Tillotson, for the United States.

THE COURT charged the jury about eight o'clock in the evening. They retired to consider upon their verdict, and returned into court before ten the same evening, when some points of law were explained to them, and they were again sent out, and about twelve o'clock they were discharged; they having previously informed the court that they were equally divided, and that there was no prospect of their ever agreeing upon their verdict.

A motion was made to discharge the prisoner, by his counsel, on the ground that the court had no authority to discharge the jury but in extreme cases, and that this was not such a case.

The court were divided. VAN NESS was of opinion the jury were discharged too soon. THOMPSON, Circuit Justice, decided upon the motion, that there need not be a physical impossibility to a unity of opinion. He decided, the court had power to discharge the jury in criminal cases, and that it rested in the sound discretion of the court, under all the circumstances of the case; that it was not necessary the jury should be so far exhausted as to be incapable of further discussion and deliberation, nor was it necessary that they should be disabled by sickness, intoxication, or mental derangement. It was enough that they could not agree; that there was a moral disability. In this case the jury had been out near four hours; a length of time amply sufficient to agree upon their verdict, if they could. This was a plain question of fact for them to decide. There were no intricate questions of law in

the case. A longer time ought to be afforded to the jury where a case involved a great number of facts and points of law. It depended more upon the nature of the case than upon any settled rule that could be laid down for the discharge of the jury. If the jury could not make up their minds and agree upon their verdict in four hours, where the identity of the prisoner was the only question before them, it was probable they never could agree.

As the court were divided, no judgment was given.

[NOTE. Upon a certificate of a division in the opinions of the judges the cause was taken to the supreme court, which decided that the prisoner was not entitled to be discharged from custody and might again be put on trial. 9 Wheat. (22 U. S.) 579.]

UNITED STATES (PERKINS v.). See Case No. 10,990.

UNITED STATES (PEROTS v.). See Case No. 10,993.

Case No. 16,034.

UNITED STATES v. PETER.

[2 Cranch, C. C. 98.] [1]

Circuit Court, District of Columbia. April Term, 1814.

LARCENY—PEREMPTORY CHALLENGES.

In Alexandria, a prisoner indicted under the act of congress, for larceny, has the right of peremptory challenge.

Mr. Jones, for the United States, admitted that under the Virginia law of November 13, 1792, p. 103, § 8, the prisoner [the negro Peter], who was indicted for larceny under the act of congress of April 30, 1790, § 16 (1 Stat. 116), was entitled to a peremptory challenge of twenty jurors.

Case No. 16,035.

UNITED STATES v. PETERS.

[2 Abb. U. S. 494.] [2]

District Court, E. D. Michigan. March Term, 1870.

COUNTERFEITING—REQUISITES OF INDICTMENT.

An indictment for "falsely making," &c., coin of the United States, under section 20 of the crimes act of 1825 [4 Stat. 121), need not aver an intent to pass the coin as true, nor an intent to defraud.

Motion to quash an indictment. The defendant, Frederick W. Peters, was indicted, under section 20 of the crimes act of 1825, for counterfeiting the coin of the United States.

Mr. Russell, for the motion.

Mr. Maynard, U. S. Dist. Atty., opposed.

WITHEY, District Judge. The indictment charges that Peters falsely made, forged, and counterfeited half and quarter-dollar coin, in the similitude of the silver coin of the United States, and also assisted in doing the same thing; but the offense is not charged to have been committed with intent to pass as true, nor with intent to defraud anybody.

The motion rests on the omission to charge the intent. The court is of the opinion that the intent to pass, &c., constitutes no part of the crime as defined by the statute. The crime consists in falsely making, forging, or counterfeiting. This is a distinct offense, viz: to make with a false intent. The indictment charges, in the language of the statute, that defendant "did falsely make," &c. Under this charge it would be no proof of an offense to show that Peters made the coin from curiosity or amusement, or for other purposes, without any design to falsify the coin of the United States. Such false purpose may be shown by proof that it was with intent to pass, utter, publish, or sell, or with intent to deceive any person.

Another offense defined by section 20 of the act of 1825, under consideration, is the passing, &c., or bringing into the United States, with intent to pass as true, knowing the same to be false, with intent to defraud. Here, an ingredient of the offense is the intent to pass as true, and intent to defraud, and therefore must be charged in order to justify sufficient proof to convict.

We are entirely clear that the words of the section, "with intent to pass as true," and to defraud, do not relate to the falsely making coin in the semblance of the coin of the United States. Motion denied.

Case No. 16,036.

UNITED STATES v. PETERSBURG JUDGES OF ELECTION.

SAME v. PETERSBURG REGISTRARS OF ELECTION.

[1 Hughes, 493; 14 Am. Law Reg. (N. S.) 105, 238; 9 Am. Law Rev. 370.] [1]

Circuit Court, E. D. Virginia. 1874.

ELECTIONS—ENFORCEMENT ACT OF 1870—PREVENTING REGISTRATION—INDICTMENT—CONSTITUTIONAL LAW—CITIZENSHIP.

1. An indictment charged that defendants unlawfully prevented, etc., from voting at a municipal election in Petersburg, certain legally registered voters qualified according to law. Another indictment charged that defendants refused to register certain legally qualified electors of African descent, as voters at the said election. On demurrer it was *held*, by Bond, Circuit Judge, that the indictments were sufficient, and that the motive of hostility as to race, etc., might be inferred from the acts charged; Hughes, J., contra, that the indictments

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

[2] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 14 Am. Law Reg. (N. S.) 105, and 9 Am. Law Rev. 370, contain only partial reports.]

were defective for not charging that the acts were done on account of race, color or previous condition of servitude, and that they should be quashed.

2. Per Hughes, District Judge. The 4th section of the enforcement act of May 31, 1870 [16 Stat. 140], is not founded on the fifteenth amendment, and is unconstitutional.

3. Id. The federal courts have no jurisdiction to protect rights which accrue from the citizenship of a state, but only such as accrue from citizenship of the United States. The right to vote belongs to the former class. It is not a natural or inherent right, but a privilege conferred or withheld by the several states in their own discretion. The only guarantee of the United States in this connection is under the fifteenth amendment, that no state shall deny or abridge the privilege on account of race, color, or previous condition of servitude. The only case in which the federal courts can entertain jurisdiction of any question upon this right is where violation of this guarantee is alleged.

4. Per Bond, Circuit Judge. The fourteenth amendment declares what shall constitute citizenship of the United States as well as of the several states, and gives congress the power to protect the citizen in all the franchises, rights, and privileges which belong to him either as a citizen of the United States or of a state.

[Cited in Ex parte Kinney, Case No. 7,825.]

5. The rights which are given to a citizen by a state, such as the right to vote when possessing certain qualifications, may be modified or taken away by the state, and the United States cannot interfere, but so long as the right remains, the United States has the power to protect him in its enjoyment and exercise.

6. Rights which do not arise from citizenship but accrue to men as men, such as the security of life and property, remain under the exclusive protection of the states.

7. The enforcement act of May 31, 1870, providing for the punishment of obstructing voters, is appropriate legislation to enforce the fourteenth amendment, and is, therefore, constitutional; and an indictment under it charging the prevention of legally qualified citizens of Virginia from voting, and the refusal to register such citizens as voters, is valid and sufficient, although it does not charge that the acts were done on account of race, color, or previous condition of servitude of the citizens.

The cases first named above were indictments against the judges who held the municipal election of Petersburg in 1874, respectively at eight precincts in that city. They charged that at a municipal election held there on the 2d May, 1874, these defendants (respectively naming three at each precinct) did unlawfully prevent and obstruct from voting divers persons, to wit, A., B., etc., "citizens of the United States, twenty-one years old, residents of Virginia for more than twelve months, and of Petersburg for more than three months, resident and legally registered voters in said election, and otherwise qualified by law to vote at said election," at the said precincts respectively. The second cases above named were indictments against the defendants for refusing to register as voters certain citizens, etc.

The defendants demurred to the indictments on the grounds: (1) That there is no averment in any of the counts in the said indictment that the acts of commission and omission charged as criminal in said indictment were done or omitted to be done because or on account of "race, color, or previous condition of servitude" of the persons whose rights are averred to have been denied, diminished, impaired, or obstructed by the alleged acts of commission and omission of the defendants. (2) That the said acts and omissions are not averred to have been done under color or in execution of any state law or authority. (3) That the act of congress, or that part of it on which the said indictment is formed, is unconstitutional and void.

R. T. Daniel, for demurrers.

L. L. Lewis, U. S. Dist. Atty.

Before BOND, Circuit Judge, and HUGHES, District Judge.

BOND, Circuit Judge. It is conceded in the argument that had this been at an election for members of congress or for presidential electors the demurrer would have been bad; or that if the pleader had charged that the unlawful obstruction was on account of the race, color, or previous condition of servitude of the electors, no fault could have been found with the indictment. But this was not at a federal election, nor does the indictment charge that the obstruction was made on account of race, color, or previous condition of servitude. The question then is whether or not there is constitutional power in congress to protect a citizen of the United States, qua citizen, in the exercise of the elective franchise, either by force of the fourteenth or fifteenth amendment of the constitution. Citizenship of the United States prior to the passage of these amendments was, to say the least, but an ill-defined relation. It was by many thought to be derivative, and not direct. A person became a citizen of the United States by force of his citizenship of some one of the states. It was as a citizen of a state that he had a right to sue in federal courts, and hence a large number of our fellow-citizens during the late civil war were led to think that as they first became citizens of the state, and indirectly through that relation citizens of the United States, their allegiance was first due to the state, and secondarily to the United States. It seems to me that the object of the first clause of the first section of the fourteenth amendment was to settle this question of allegiance forever, and to make the United States a nation by declaring "that all persons born in the United States are citizens thereof," owing allegiance upon birth, and that consequently the power to protect such persons as owed this allegiance belonged to the United States as fully as the power to protect its citizens for the purposes of its organization inheres in any other nation. Whether a person's duty to the state or to the United States is paramount, was the question fundamental in the war; and after the expenditure of so much blood and treasure, the people through their legislatures thought

it not right to leave the matter doubtful, and so declared in this amendment that not only are all persons born or naturalized in the United States citizens thereof, but are also citizens of the states wherein they reside, thus establishing not only what constituted citizenship of the United States, but, so far as this description of persons is concerned, what constituted citizenship of a state.

Congress is empowered to enforce these two relations created by this amendment by appropriate legislation. It has seen fit since the adoption of it to legislate upon the right to vote only. It is objected to this legislation, which, so far as these cases are concerned, is contained in the 4th section of the act of May 30, 1870, which provides "that if any person by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, or prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at an election," etc., that the right to vote is not a privilege or immunity of a citizen of the United States as such, and that, therefore, it does not come within the power of congress to legislate concerning it. But the constitution of the state of Virginia declares in its third article that "every male citizen of the United States, twenty-one years of age," who shall have the requisite qualifications, shall have the right to vote; and now the question is, as the right to vote at an election in Virginia is not a right absolute, dependent solely upon citizenship, but a right which the state may modify and control, has congress the power, where and while the right is given, to protect a citizen in the exercise of it?

It may be fairly concluded that what is meant by citizenship of the state is the same, so far as the power to protect that relation goes, though it may not be coextensive in the privileges given, as is meant by citizenship of the United States. A state has the undoubted right to control, protect, tax, and summon to arms its citizens to promote the objects for which it exists. And when the fourteenth amendment declares that all persons born within the jurisdiction of the United States are citizens of the state in which they reside, every such person becomes liable to these burdens and is entitled to this protection. This will be admitted. When the same amendment declares that such persons are also citizens of the United States, it must mean that they shall occupy the same relation to the general government so far as its purposes are concerned. These purposes we are not left in doubt about, for the constitution of the United States declares in its preamble that the object of the government is to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, and to secure the blessings of liberty to ourselves and our posterity. Whatever, therefore, if a state had these objects for its organization, it might require its citizens to do or to refrain from doing to promote them, it seems to me the United States may require. The citizenship which owes its allegiance to each is now created by the same paragraph of the fourteenth amendment, and each may summon its citizens to enforce them, or defend them in so doing. In a republican form of government the duty of voting is as responsible a burden as that of bearing arms. The government cannot exist without the power to require both; and if it may protect the citizen in the one obligation, I see no reason, if it be desired to preserve its existence, why it may not do so in the other. If, therefore, a state, by virtue of a person's relation to it as citizen, claims, and has always claimed, the right to protect him in the exercise of a right granted by the United States, surely the United States is not claiming unlawful authority when it undertakes to protect one of its own citizens in a right granted by a state to him as a citizen of the United States. Now the right to vote at a federal election is bestowed by the constitution of the United States upon such citizens of the states as have the requisite qualifications for electors of the most numerous branch of the state legislature. The state prescribes the qualifications for such electors; but being designated by the state through qualifications prescribed, the United States grants them the right to vote at a federal election. Every state by its laws protects its citizens in the exercise of this right, with which, not the state, but the United States clothes them. If this be within the power of the state by virtue of the citizenship of its citizens, why may not the United States protect its citizens to the fullest extent in a right with which a state clothes them? But this fourteenth amendment goes much farther than this. It declares that all persons born or naturalized in the United States are citizens of the state wherein they reside, and that congress shall enforce this by appropriate legislation.

That which constitutes citizenship, if it be not the mere privilege of calling oneself citizen, must be the prerogatives, franchises, rights and privileges which the state governments grant to those occupying that relation, in return for the performance of the duties which spring from allegiance and citizenship; and unless this amendment was inane, fruitless and ineffectual, it must mean that congress by appropriate legislation can protect the citizen of a state in the exercise of all the rights conferred upon him as such, and which distinguish him from those who are aliens or merely residents in the state. The exercise of this power on the part of the United States can in nowise interfere with the right of the state to prescribe the qualifications of citizens to vote, nor with their privileges and immunities in any other respect. That power remains as heretofore with the state, with the exception that they shall not make race, color, or previous condition of servitude a ground of distinction. It only asserts the power of the United States in return for his

allegiance to protect the citizen in the rights which the federal government grants, and in such as the states from time to time voluntarily bestow upon him, and which they can continue or withdraw at pleasure. There is a citizenship of the states and a citizenship of the United States. What the states may do by reason of this relationship the United States may do. To give any other construction to the clauses of the fourteenth amendment we have been considering would be to say that everybody born or naturalized in the United States had a right to call himself citizen, and that the amendment drew the relation of citizenship no closer than before its adoption; and that in view of the great contest just over, the people adopted an amendment declaring every one born or naturalized in the United States a citizen, and that congress might enforce that nominal relation, and the empty claim to be called such, by appropriate legislation. To overrule this demurrer, it is necessary to claim only that the sovereignty of the United States is equal in its sphere for the protection of the rights and privileges of citizens, to that claimed by the states in the protection of their own. Nor does this construction of the amendment interfere with the rulings of the supreme court in what is known as the Slaughterhouse Cases, 16 Wall. [83 U. S.] 36.

The right to slaughter animals within the limits of the city of New Orleans was not a right appertaining to citizenship at all. Aliens might do it; but in these cases the right to vote is given to all citizens of the United States as such, and no one else can exercise it. It is an immunity, a defence, a privilege peculiar to that relation, and is not shared in common with all persons whatsoever. It was not personal to a man by reason of his manhood at common law. It is the endowment of the state, peculiar to citizenship. Before the state was, men had certain rights which belonged to them because they were men. As our Declaration of Independence declares, men are born with certain inalienable rights. These rights we do not contend the fourteenth amendment empowers the United States to protect. It is only such rights, privileges and immunities as the state or the United States, confers upon them because of their citizenship to the United States, that the laws of the United States can insure. The fear that this construction will draw into the United States courts all cases of offences against the person and property of individuals is groundless. The rights which are inalienable and belong to men as men, and not as citizens, are life, liberty, and the pursuit of happiness. The right to be secure in one's person or property is not peculiar to citizenship. Citizens share that with aliens. Offences against the person as well as those against property are cognizable in the state courts, except where the controversy arises between citizens of different states, a choice of forum is given; but all such privileges as are peculiar to citizenship this fourteenth amendment, it seems to me, was adopted to enforce. And all that the supreme court decided in the Slaughterhouse Cases, was that the United States by force of the fourteenth amendment was not clothed with authority to enforce the rights common to all men but those only peculiar to citizenship.

The right to vote is not the common right of all persons resident in Virginia. It is not the right of all citizens of Virginia per se, because a person might be a citizen of Virginia who is not a citizen of the United States, and the constitution of the state confers the right to vote upon citizens of the United States solely. The demurrer insists upon it, that as the state has passed no law abridging the right of citizens in any particular, the indictment is bad. This view leaves out of consideration the final clause of the fourteenth amendment, which empowers congress to enforce its provisions by appropriate legislation. The mischief to be prevented by the fourteenth amendment was the obstruction of the citizen in the exercise of the rights of citizenship, whatever they from time to time might be. There is no way as yet pointed out by which a state can be punished, and the mischief sought to be prevented might be flagrant in violation of state law, or without any color of authority under it. The white people in Virginia might, without law or in spite of it, determine that no colored man should vote, and the colored people in South Carolina might, in the same unlawful manner, unite to violently obstruct their white fellow-citizens from exercising the elective franchise. The mischief to be prevented would be flagrant, and yet if this demurrer be good, no remedy could be found. Now congress, in this view of the case, has thought it appropriate legislation to punish the individuals who commit the wrong, whether under color of state authority or without pretending to any authority at all. Who can say that this is not appropriate legislation? It remedies the existing evil; and a law which accomplishes or tends to accomplish a purpose required by the constitution to be effected, cannot be said by a judicial tribunal to be inappropriate. Fugitive Slave Law, Act Sept. 16, 1850 [9 Stat. 462].

In answer to the objection that these indictments do not allege that the obstruction had was done on account of race, color, or previous condition of servitude, it is sufficient to say that the statute under which the indictments are drawn uses no such language; and it is most generally sufficient in setting out in pleading a statutory offence, to use the words of the statute creating it. But if it be contended that the only power congress had to pass the statute was that granted by the fifteenth amendment, which prevents discrimination among vot-

ers on account of race, color, or previous condition, etc., and authorizes appropriate legislation to prevent such discrimination, there is answer to it in this, that it is impossible to prove, though the fact may be so, if a body of colored men in South Carolina assault and beat fifty white people at the polls and prevent their voting, and at the same time knock two colored people down, that this was done on account of race or color. Congress thought to cut the thing up by the roots, and enacted what is really and practically the only appropriate legislation, as any person who has seen the efforts to enforce this section must know, that no person shall disturb another at an election to prevent his exercise of the franchise; and as the greater includes the less, if he can do so from no motive he cannot do it because of race, color, or previous condition, etc.

And from these considerations we have drawn the following conclusions:

1st. That by the fourteenth amendment to the constitution the people have provided a citizenship to the United States, direct, positive and paramount, springing from birth within its jurisdiction, or by statutory naturalization.

2d. That what the states have claimed to do by virtue of their sovereign power over their citizens, the United States may do over its citizens by virtue of its sovereign power and the direct relationship thus established.

3d. That while the fourteenth amendment, in furtherance of this view, declares that no state shall make or enforce any law contrary to this provision, it likewise declares that congress shall enforce the amendment by appropriate legislation. And that as congress cannot punish a state qua state, it is appropriate legislation within the meaning of the statute to attain its end, i. e., the protection of the citizen in his right to vote by punishing the individuals who obstruct him in its exercise.

And that even under the fifteenth amendment, where experience has shown the obstruction of voters on account of race and color cannot be, in the judgment of congress, otherwise prevented, it is appropriate legislation to provide by statute that no such obstruction shall take place at all.

And that this construction of the fourteenth and fifteenth amendments does not affect the rights of the states to define the rights of citizenship, nor does it draw into the jurisdiction of the United States courts the question of the invasion of the rights of persons or property, as such. It concerns only the rights which distinguish persons as citizens, and which they hold in that character.

HUGHES, District Judge. If the election described, instead of being for municipal officers, had been for a member of congress or presidential electors of the United States, these indictments, for reasons which need not here be set forth, would have been valid to give jurisdiction to this court, and would have been founded on those sections of the enforcement acts of congress which expressly relate to national elections. On the other hand, if the indictments had charged that the persons prevented from voting at this state election were persons of Saxon, Celtic, Mongol, African, or other descent, and that the defendants prevented them from voting on account of race, then, being founded upon those sections of the enforcement acts which were designed to enforce the fifteenth amendment of the national constitution, they would have given jurisdiction to this court: because the fifteenth amendment expressly declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." The offence charged, however, is clearly not within either of these categories. If it had been, the jurisdiction of this court to try it would have been undeniable.

The indictments are really founded upon the 4th section of the enforcement act of May 31st, 1870, which declares that "if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, ... any citizen from doing any act required to be done to qualify him to vote, or from voting at any election (by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision), such person shall for every such offence . . . . . be guilty of a misdemeanor, and shall, on conviction thereof, be fined, etc., or imprisoned, etc., or both at the discretion of the court." This section is clearly not founded upon the fifteenth amendment, and, if constitutional at all, is so only by virtue of the clauses of the fourteenth amendment, which declare as follows: "All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, ... nor deny to any person the equal protection of the laws. Congress shall have power to enforce, by appropriate legislation, the provisions of this article." If this language of the fourteenth amendment, giving to congress power to legislate for preventing the abridgement of the rights of citizens of the United States, were not qualified by another provision of that amendment, and were allowed its widest signification, then it is broad enough to cover the 4th section of the enforcement act of May, 1870, which I have quoted, in the broadest signification of that section's language; and the national

courts would have jurisdiction to try any offence abridging any right of any citizen of the United States on any account; and the indictments at bar would give jurisdiction to this court over the offences charged.

But is this language to be so interpreted? Is it not rather to be limited by construction? If the latter, then the language is to be construed according to rules of statutory interpretation, which are as much a part of the statutory law as the statutes themselves. Although, as will appear in the sequel, it is unnecessary for me to do so with reference to the eight indictments under immediate consideration, I shall first treat this clause of the fourteenth amendment as if it were not qualified by any other clause in that amendment, or by the fifteenth amendment.

It is a settled principle of construction that all instruments are to be interpreted according to their real intention and object; and when statutes employ general terms, those terms are to be limited in giving effect to the statutes, according to the real meaning of their authors, rather than according to their literal meaning, so as to correct the evil and advance the remedy contemplated by them. The illustration of this principle, which is most familiar to the legal profession, is that given by Blackstone (book 1, p. 59). A law of Edward III. forbade all ecclesiastical persons to purchase provisions at Rome. If the term "provisions" had been given its widest meaning, it would have forbidden any of the English clergy who might happen to be at Rome from buying food; but the statute was construed with reference to its intention, which was to prohibit the purchasing of nominations by the pope to ecclesiastical benefices in England, which at that day were called "provisions." It is a general principle, that the language of statutes is, if possible, not to be so interpreted as to produce absurdity, or oppression, or evils greater than those designed to be remedied by them. Indeed, the very function and province of a court is to construe and apply the law according to its true meaning only, and for securing its real objects alone. It is, therefore, perfectly competent for the national courts to discriminate between "the privileges and immunities of citizens of the United States," alluded to by the fourteenth amendment, and to limit the meaning of the acts of congress passed to protect them (the fourth section of the first enforcement act among others), so as to make them conform in practice to the spirit of the constitution of the United States, which regards the national government as one of limited, express powers, and the governments of the states as of general powers, not expressly enumerated. The authority of the courts to enlarge the powers of the national government by construction has always encountered more or less disfavor. Their authority to limit those powers by construction has never been regarded with jealousy. The only difficulty in thus discriminating lies in ascertaining the principle on which to proceed, and the line of distinction to be drawn in regard to the privileges of the citizens of the United States intended to be protected. I flatter myself, however, that this difficulty can easily be surmounted in considering the questions raised upon the indictments before us. The supreme court of the United States, in its decision in the Slaughterhouse Cases, 16 Wall. [83 U. S.] 36, has taken a part of the responsibility of this task off our hands. Those were cases in which the subject of complaint was an act of the legislature of Louisiana. That act created a joint stock company; empowered it to hold certain estate near the city of New Orleans; required that all animals which should be slaughtered within a large territory surrounding that city should be slaughtered upon the premises of this company; and gave it, in these and other respects, exclusive rights in abridgment of the like rights of other citizens, and especially of persons following the trade of butchering in the area described.

The United States supreme court held that the national courts had no jurisdiction to protect citizens of Louisiana, though they were citizens of the United States, in such privileges as were abridged in the act of incorporation complained of, passed by the legislature, and approved by the supreme court of the state. In its decision in these cases, pronounced by Justice Miller, the supreme court say (16 Wall. [83 U. S.] 77, 78): "Was it the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the states to the federal government? And where it is declared that congress shall have power to enforce that article, was it intended to bring within the power of congress the entire domain of civil rights heretofore belonging exclusively to the states? All this and more must follow if the proposition of the plaintiffs in error be sound. For, not only are these rights subject to the control of congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative powers by the states, in their most ordinary and usual functions, as in its judgment it may think proper, on all such subjects. And still further, such a construction, followed by the reversal of the judgment of the supreme court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged

against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of congress in the exercise of powers heretofore universally conceded to them, of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the state and federal governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the congress which proposed those amendments, nor by the legislatures of the states which ratified them." That august court accordingly decided that it had no jurisdiction to protect the privileges which were abridged by the act of incorporation complained of, the privileges abridged being those which belong to citizens of the state as such, and distinguished from those which attached to them as citizens of the United States. Its decision authorizes us to construe the clauses of the fourteenth amendment in question, and the acts of congress passed to enforce them, according to their direct historical object, rather than their mere literal meaning; and, more particularly, so to construe them as to discriminate between those rights of the citizen which he has as a citizen of the state and those which belong to him as a citizen of the United States.

In Corfield v. Coryell [Case No. 3,230], Justice Washington defined the privileges and immunities which belong to citizens of the states as such to be those which he called "fundamental;" such as "belong of right to citizens of all governments, and always belonged to citizens of the several states of this Union from the time of their independence." They embrace those rights which belong to a man as a member of society, together with those which the constitution and laws of his state confer upon its citizens. On the other hand, the rights which we have as citizens of the United States are such as are implied in the language of Judge Taney, when he declared that "we are citizens of the United States for all the great purposes for which the federal government was established." For instance, a man as a citizen of Virginia may carry on a business here by paying a certain tax: in virtue of which fact a citizen of Maryland, as a citizen of the United States, has a right to carry on the like business in Virginia by the payment of no greater tax. So, under the constitution of the state, a man born in Virginia is a citizen here after a certain age; by virtue of which fact he may become, under the constitution of the United States, a citizen of New York by a change of residence to that state. This parallel between the rights held by citizens, respectively, in their two characters, might be run out through many examples; but the distinction is too plain to need further illustration. For other decisions on the subject see [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 203; [Mayor etc. of City of New York v. Miln] 11 Pet. [36 U. S.] 102; [License Tax Cases] 5 Wall. [72 U. S.] 471; [Paul v. Virginia] 8 Wall. [75 U. S.] 180; [U. S. v. De Witt] 9 Wall. [76 U. S.] 41; and [Ward v. Maryland] 12 Wall. [79 U. S.] 430.

Adopting this broad distinction, and availing of the authority given by the supreme court in its decision in the Slaughterhouse Cases, the national courts are justified in refusing to take cognizance of offences committed in violation of those rights which belong to a person as the citizen of a state, not created or conferred, but only guaranteed, by the national constitution; and in confining their jurisdiction to those rights which belong to persons peculiarly in their character as citizens of the United States. This much being settled, and inasmuch as the fourth section of the enforcement act of May, 1870, concerns only the citizen's right of voting, it is only necessary to inquire how the right of voting attaches to the citizen; whether in his character as a citizen of the state, or in that of a citizen of the United States.

Before the adoption of the fourteenth amendment, a man was a citizen of the United States only derivatively, by virtue of his being a citizen of a state. Such was the principle of the decision of the supreme court of the United States in the case of Dred Scott v. Sanford, 19 How. [60 U. S.] 393, in which that court expressly decided that as a man of African descent was not the citizen of any state, therefore he could not be a citizen of the United States. By the adoption of the fourteenth amendment, the new status of citizenship of the United States, independently of that of citizenship of the state, was first established; but it does not follow that the incorporation of this new provision into our national policy has abolished or obliterated the line of distinction which the national courts had claimed the power to draw between the rights of a person as citizen of a state and those which he had as citizen of the United States. There is not yet any general act of congress clothing the citizen of the United States proprio vigore with all the rights of the citizen of the state where he resides, and giving the national courts express jurisdiction to protect those rights. Certainly there can be no law of congress found which directly purports to constitute any citizen of the United States a voter in the state in which he resides. Indeed, such a law would seem to be unconstitutional; for the fourteenth amendment itself contains a clause which leaves to the states the power, always before possessed by and conceded to them, of prohibiting citizens of the United States from voting, and of declaring who shall be voters, even in national elections.

That amendment. in the second paragraph, provides that "when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years old, and citizens of the United States, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens bears to the whole number of male citizens twenty-one years of age in such state." Thus the right to vote, even of citizens of the United States, is left even by the fourteenth amendment itself, to be regulated and defined by the states, which had always held that power. The state of Virginia has accordingly exercised this prerogative, pursuant to her own uncontrolled views of justice and propriety, in the first clause of the third article of her state constitution, which is in these words: "Every male citizen of the United States twenty-one years old who shall have been a resident of this state twelve months, and of the county, city, or town in which he shall offer to vote three months next preceding any election, shall be entitled to vote upon all questions submitted to the people at such election;" following this general provision with the usual exceptions of persons committing crimes, etc. And here I will remark that the right to vote would seem to be not fundamental; not a natural right. The power to declare who shall be voters, who shall be constituents of the political sovereignty of a state, has been claimed by and conceded to each state from the beginning of our independence; and is expressly conceded by the clause of the fourteenth amendment which I last quoted. The right to vote would seem to be not an inherent right, but a conferred privilege; a privilege not derived from the United States, but from the state alone; a privilege belonging to the man as a citizen of the state, and not to him in his character as citizen of the United States. The noble liberality of Virginia in making every citizen of the United States resident within her borders a voter in every election, does not in any degree change the fact that he derives this right from herself. Nor does the obligation of the United States to guarantee to the states a republican form of government change the fact now existing, and which has existed from the founding of the Union, that to the states is left the power of defining and regulating the right of suffrage, a power without which a state could scarcely be considered as any longer retaining its autonomy.

It being, therefore, incontrovertible that the right to vote in a state election belongs to a man as the citizen of his state, it remains to ask what right connected with voting belongs to him as a citizen of the United States. Under the fifteenth amendment his right as a national citizen is—not to be prevented from voting "on account of race, color, or previous condition of servitude;" which is a right not involved in the indictments at bar. Has he any similar right in his national character under the fourteenth amendment? Whatever right the national citizen, as such, may have, under the general terms of the fourteenth amendment, not to be abridged in his privileges or immunities, so far as other privileges are concerned, yet that amendment gives him no such right as to the privilege of voting, because it expressly leaves to the states the power of regulating the right of suffrage in both state and national elections. It is therefore plain that not only is the right to vote derived from the state, and not only does it belong to the category of rights which it is peculiarly within the province of the state tribunals to protect, but it is excepted by the fourteenth amendment from those general privileges and immunities of citizens of the United States which the states are forbidden to abridge. It is indeed a right which the states are expressly allowed to abridge in every other respect than on account of race, color, and previous servitude. If the constitution gives this permission to the states, then no act of congress forbidding the abridgment of this right on other account than of race, color, etc., is constitutional, and no indictment founded upon such a law is valid to give jurisdiction of the offence charged to the national courts.

It is contended that from whatever source a right comes to a citizen of the United States, yet, once attaching to him, it is competent for congress and the United States courts to protect him in it. This argument would confer the power and duty of protecting the citizen of the United States from any of the ordinary offences at common law, such as murder, false imprisonment, and the like. This cannot be a sound proposition. There is an obvious distinction to be made on this subject. Although still unnecessary to my argument as to the eight indictments mentioned, I will advert to the distinction which should be drawn between rights proper and those improper for the jurisdiction of the national courts. It is that so well stated by Mr. Justice Bradley in his opinion in the case of U. S. v. Cruikshank [Case No. 14,897], where the learned justice distinguishes between those provisions of the national constitution which guarantee fundamental rights, the duty of protecting which properly belongs to the states, and those provisions which either create rights or enjoin in affirmative legislation upon congress for their protection.

I cannot but express a cordial and full concurrence in the following remarks of Mr. Justice Bradley on that subject. He says: "With regard to those acknowledged rights and privileges of the citizen which form a part of his political inheritance de-

rived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular state of which he is a citizen to protect and enforce them, and to do nought to deprive him of their full enjoyment. When any of these rights and privileges are secured by the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guarantees that they shall not be impaired by the state, or the United States, as the case may be. The fulfilment by the United States of this guaranty is the only duty with which that government is charged. The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the state government as a part of its residuary sovereignty." If this distinction be correct, then, as the right of voting is not conferred by the national constitution, nor even guaranteed by that instrument, except in a qualified and negative way by the fifteenth amendment, it is not one of those rights over which, when proposed to be exercised in a state election, congress or the national courts have jurisdiction.

Thus are we brought by legitimate argument founded upon the decision in the Slaughterhouse Cases, and the very able one in the Cruikshank Case [supra], to a conclusion against the validity of the eight indictments pending against the judges of election of Petersburg. But there is a much more direct method of reaching the same conclusion, which avoids a resort to the power of construction, and which renders useless the distinction drawn by the national courts in the cases alluded to between the rights belonging to a person respectively in his two characters of citizen of the state and citizen of the United States, and between the rights created or conferred, and those merely guaranteed by the national constitution. It is this: Admit for argument's sake, that the fourteenth amendment, in its first paragraph, was intended to prohibit the abridgment of any privilege of the citizen by the state, or by its citizens, on any account whatever: yet the second paragraph of the same amendment, which leaves to the states the power always held by them to prescribe the qualifications for suffrage at their pleasure in national and state elections, expressly excepts the right of voting from those general privileges; and the most that can be insisted upon is that the fourteenth amendment protects the citizen of the United States in all privileges except the right of voting, and leaves this right to be regulated ad libitum by the states. It was this latter fact which created the necessity for the fifteenth amendment, and that amendment would mean nothing, and would have been wholly unnecessary if before its adoption the states had not had uncontrolled power over the right of suffrage Its sole object was to limit the unrestrained power of the state over this right which had been conceded by the fourteenth amendment; but it undertook to limit the power only in one respect. It declared in substance that notwithstanding the states possessed uncontrolled power over this right they should be restricted in exercising their power at least this far, to wit: They should not deny or abridge the right of the citizen to vote "on account of race, color, or previous condition of servitude."

I am, therefore, of opinion that any law of congress is unconstitutional which makes the preventing of a voter from voting in a state election penal on any other account than of race, color, or previous condition of servitude; and that any indictment charging such an offence, though founded upon such a law or section of a law of congress, is invalid to give jurisdiction of such an offence to this court. I think, consequently, that the demurrers of the defendants to the eight indictments against the Petersburg judges of election are good, and that the indictments should be quashed.

II. The three indictments pending against certain registrars of election in Petersburg differ in two respects as to the questions which I have been considering, from those pending against the judges of election.

1. They allege that the persons who were prevented from registering were of African descent, but omit to charge that they were prevented from registering "on account of race, color, or previous condition of servitude." These are not indictments, therefore, founded upon the fifteeenth amendment or any act of congress passed for enforcing it. We are not at liberty to infer from the mere circumstances that a man was of any particular race, and prevented from exercising a right, that he was so prevented on account of his race. That fact must be charged before it can be proved, and the failure to charge it is, I think, fatal to these indictments, so far as the fifteenth amendment and the statutes enforcing it are concerned.

2. These three indictments each charge in substance that the defendant "did refuse and knowingly omit to give to all citizens of the United States in his ward the same and equal opportunity, without distinction of race, color, or previous condition of servitude, to register, etc.; but to the contrary thereof, refused and knowingly omitted to give A., B., C., D., and E. the opportunity to register which he gave to others, the said A., B., C., D., and E. being qualified, etc., and citizens of the United States of "African race and descent." By not charging

that the refusal was on account of the race, etc., of the injured persons, these indictments, for the reasons I have stated, do not come under the fifteenth amendment. If they are valid at all, to give jurisdiction to this court it must be under the fourteenth amendment and the 4th section of the act of May, 1870. But, for reasons already abundantly stated, registration is a right conferred by the state. Each of the three indictments under immediate consideration expressly recites that the right is conferred by the laws of Virginia, and that the duties of the registrar were duties imposed by state laws. Nor do they charge that in consequence of the failure of the injured persons named to be admitted to registration they lost their right to vote either at a state election or an election held for officers of the United States. The denial merely of registration is an offence against the state, if it be on any other account than of race, color, etc. If the indictments had charged that the denial had been on account of race, etc., the offence would have been cognizable here; or if, after charging the denial, the indictments had gone on to charge that in consequence thereof the citizen of the United States was prevented from voting at an election held for a member of congress, or electors of a president of the United States, I am inclined to think that the offence would have been cognizable here. But a charge merely that a citizen of the United States was denied registration, without other allegation to make it appear that some right was abridged which belonged to the man as a citizen of the United States, is not sufficient to give cognizance of the offence to this court. I am, therefore, of opinion that the demurrers to these indictments against the Petersburg registrars ought to be sustained, and that the latter ought to be quashed.

The judges being divided in opinion, the case was certified to the supreme court of the United States.

UNITED STATES v. PETERSBURG REGISTRARS OF ELECTION. See Case No. 16,036.

Case No. 16,037.

UNITED STATES v. PETERSON et al.

[1 Woodb. & M. 305.] [1]

Circuit Court, D. Massachusetts. May Term, 1846.

REVOLT OF SEAMEN—AUTHORITY OF MASTER—EXCESSIVE PUNISHMENTS—ALIEN SEAMEN ON AMERICAN SHIPS—INDICTMENT—JOINDER OF OFFENCES—NOLLE PROS.

1. Revolts on shipboard are to be considered now as defined by the act of congress of March 3, 1835, c. 40 [4 Stat. 775], and consist not only in attempts to usurp the command from the master, or to transfer it to another, or to deprive him of it for any purpose by violence, but in resisting him in the free and lawful exercise of his authority.

[Cited in U. S. v. Coppersmith, 4 Fed. 205; U. S. v. Huff, 13 Fed. 637.]

2. So if no actual revolt is made, that act punishes, though in a milder manner, attempts to commit a revolt and various acts likely to lead to mutiny, and, among them, to assemble with others on board "in a tumultuous and mutinous manner."

3. The crew have no right to disarm the captain, though using a deadly weapon, if they are in a mutinous state, and exercising personal violence to resist his lawful commands.

[Cited in Fuller v. Colby, Case No. 5,149.]

4. Seamen must obey the lawful commands of a master, as well as refrain from acts of piracy and mutiny; and look for redress against excessive punishment, or illegal orders, to the tribunals at home, and the acts of congress for their protection, rather than to violence by themselves at sea.

[Cited in Fuller v. Colby, Case No. 5,149.]

5. Foreign seamen on board American ships, are as much subject to punishment for such disobedience or violence as Americans, and are alike to be protected and redressed on their return home.

6. To render a vessel American, so as to punish offences on board of her, it is enough to show, that she sailed from and to an American port, and was apparently owned and controlled by citizens of the United States.

7. If there be two counts in one indictment for offences committed at the same time and place, and of the same class, but different in degree, as one for a revolt and another for an attempt to excite it; the judgment will not be arrested, though a verdict of guilty is returned on both.

[Followed in U. S. v. Stetson, Case No. 16,390. Cited in U. S. v. Stone, 8 Fed. 252.]

8. The district attorney is allowed before judgment to enter a nol. pros. on one, if he deems it advisable.

9. It is not a misjoinder of offences in different counts in the same indictment, unless they belong to different families, or the judgments and punishments are inconsistent with each other.

[Cited in People v. Sweeney, 55 Mich. 588, 22 N. W. 50; State v. Smalley, 50 Vt. 741.]

This was an indictment against the prisoners [John Peterson and others] found at this term, in two counts.

The first count alleged, that one Baily Foster, on the 7th of May, 1846, was master on board the American vessel Charles Carroll, bound from New Orleans to Boston, and the prisoners, a part of his crew; and that, on the day aforesaid, upon the high seas, they resisted him with force, while "in the free and lawful exercise of his authority," and thus created a revolt, contrary to the act of congress in such case made and provided. The second count charged them, at the same time and place, with having assembled together in said ship, "in a tumultuous and mutinous manner," contrary to the same act of congress.

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

The prisoners on being arraigned, pleaded not guilty.

C. B. Goodrich, for prisoners.
R. Rantoul, U. S. Dist. Atty.

The latter relied upon the act of congress, passed April 30, 1790, § 1 [1 Stat. 112], as defining the offence described in the first count; and the second section of the same act, as defining that described in the second count. And, on being questioned by the counsel for the prisoners, whether he intended to rely on both counts for the punishment of the conduct of the prisoners on that occasion, replied in the affirmative, as the transaction, though a single one, might be considered on the evidence as constituting the second offence, if it did not amount to the first.

Evidence was then offered to show, that the Charles Carroll was owned by American citizens, and was fitted out and sailed under their orders, with Baily Foster as master, and the prisoners, a portion of the crew, were under contract at a certain rate of wages, from New Orleans to Boston.

This evidence being offered, and not the register of the vessel or the shipping articles, its admission was objected to by the counsel for the prisoners. But THE COURT overruled the objection.

The district attorney then, after showing those facts, proved, that on the day stated in the indictment, about twenty-eight miles from this port, the captain gave orders to have all hands come on deck and prepare the vessel for going into port. That the mate communicated these orders below, as well as to the portion of the crew then on deck; and they were promptly complied with except by the four prisoners. They constituted together one watch, that had recently been relieved. It appeared, that they refused to assist in clearing up and preparing the ship, as the captain and mate desired; objecting that the other watch had time enough to do all which was necessary before reaching Boston harbor, and that they were unwilling to do any thing which was directed except to aid about the anchor and chains. An altercation at once commenced on the subject between these men and the mate, which soon extended to other matters concerning the quality of the provisions which had been furnished to them on the voyage, and some difficulties with the second mate on the part of Peterson. The captain, being attracted by the loud conversation, came up to them, and asked what was the noise? and seeing that Peterson had an iron belaying pin in his hands, which he seemed to be swinging towards the mate, ordered him to lay it down. This Peterson did not do, and as the captain stepped forward to take it from him, Peterson struck at him with it twice, but the blows were avoided by the captain, who then run below for his pistols and sword. Some one cried out, "Draw knives," and one of the four did it, and all fell upon the two mates and the captain, as he returned with his weapons, and knocked the whole of them down, and disarmed him and broke one of his arms. After recovering their feet and going aft, they consulted together, and did not deem it safe to make any further efforts to enforce obedience to the captain's commands as to clearing and preparing the ship for coming into port. This was about eight o'clock, a. m., and at one o'clock in the day, when the men were called up again, all obeyed except Hanson, who was stated to be injured so as not to be able to work. Various threats and taunts, and many details of the rencounter and injuries were testified to, which need not be repeated.

On all the material facts there was little if any conflicting testimony, between the several witnesses on both sides. After the evidence and arguments to the jury were closed, the counsel for the prisoners requested the court to give the following instructions on the law of the case:

First count: (1) To sustain the first count in the indictment, the jury must be satisfied beyond reasonable doubt, that the prisoners, or some one or more of them, usurped the command of the ship, and overthrew that of the master. (2) That they, or some one or more of them, took possession of the vessel against the will and in defiance of the authority of the master, or put another person in command and control of her navigation against his will. Second count: (1) To sustain the second count in the indictment, the jury must be satisfied beyond reasonable doubt, that the prisoners, or some one or more of them, assembled with intent to overthrow the legitimate authority of the master, and to remove him from his command. (2) That they, or some one or more of them, assembled with intent to take possession of the vessel by assuming the government and navigation of her, or with intent to transfer their obedience from the master to some other person. General instruction: If the prisoners had reasonable cause to believe and did believe, the master intended to make an attack upon them or either of them, with any dangerous weapon or weapons, they had authority, in self-defence, to resist or disarm him.

WOODBURY, Circuit Justice, charged the jury, and, in relation to the law applicable to the subject, informed them that he did not feel justified in stating it to be as the counsel for the prisoners desired. He must decline giving it to them in charge, as requested, on any of the points, without important limitations and qualifications. However revolts may have been defined at common law, or under the act of congress of April 30, 1790, c. 9 [1 Stat. 112], they were now to be considered and punished only as provided by the act of the 3d of March, 1835, c. 40 (4 Stat. 775). That act, instead of punishing as a revolt only one kind of violence on shipboard, such as to usurp the command of the master; or another kind,

such as to transfer his command to a different person, or another still, to deprive him of his command, without either usurping or transferring it, made each of them an offence; and also made it an offence to "resist or prevent him in the free and lawful exercise of his authority and command." Conceding that all the cases cited, as to decisions under other acts of congress and at common law, were correct, as the laws then existed for a guide, but on which he expressed no opinion (U. S. v. Sharp [Case No. 16,264]; U. S. v. Bladen [Id. 14,606]; U. S. v. Cassedy [Id. 14,745]; U. S. v. Smith [Id. 16,344]; U. S. v. Hemmer [Id. 15,345]; U. S. v. Savage [Id. 16,225]; U. S. v. Kelly, 11 Wheat. [24 U. S.] 417), the law now in force made the mere resistance to the master's lawful authority punishable, and for that and that alone the prisoners were indicted, and were to be tried under the first count. To make them guilty of this offence, it was not necessary that they should either deprive the master of his command, or usurp it themselves, or transfer it to another; but it was enough, if he issued lawful orders which they disobeyed, and with violence resisted their enforcement.

So as to the second count, it was framed in order to reach another and milder offence, under the second section of this same act of congress, which consisted in behavior likely to excite to, or end in, revolt or mutiny, although no actual revolt should be believed by the jury to have occurred. Under the first section an actual revolt was liable to be punished with great severity, even to ten years hard labor and $2,000 fine, if of an aggravated and flagrant character. On the contrary, if of a mild character, the court was wisely vested with a discretion to inflict any small portion of the above fine and imprisonment, according to the nature and aggravation of the offence, and thus make it in a proper case, not so severe, as some bad attempts at mutiny under the second section, where the punishment may range as high as $1,000 fine and five years' imprisonment. The offence, under this last section, may be committed, likewise as under the first one, in various modes. One is, by endeavoring to make a revolt or mutiny on shipboard in any way; another is, by contriving with any person to do it; another, by soliciting or stirring up any of the crew to disobey or resist the lawful orders of the master, or to refuse or neglect their duty, or to make a riot on board, or unlawfully to confine the master; or, as in the second count in this indictment, "to assemble with others on board in a tumultuous and mutinous manner." You are instructed, that to convict of this last kind of outrage, it is not necessary to prove guilt of any of the other kinds described, either in the second or first section. But it is sufficient, in a tumultuous and mutinous manner, to collect together; that is, in a noisy and insubordinate state, endangering the police of the vessel, and likely to terminate in actual disobedience of orders, and actual resistance to the master's lawful authority.

In respect, also, to the general instruction, which the prisoners' counsel asks as to the right of the crew to disarm the captain, when about to attack any of them with a deadly weapon, it is clear that, if the master, without any disobedience of orders or resistance, is about to attack any of the crew, he might be disarmed, if done, repelling great violence, which is threatened and impending without any justifiable cause. But if the crew are disobedient, and resort to personal violence and seditiously resist the master in enforcing his lawful orders, he can then rightfully arm himself; and, if only intending to use his weapons, so far as is necessary to produce obedience and put down mutiny, he cannot be properly opposed or disarmed by his crew. The judge stated, that the safety of the lives of the crew as well as of the officers, and of the vast property afloat in our commercial marine, depended much upon the strict discipline and careful police enforced by commanders of vessels. And while the law exacted obedience to all lawful commands of the captain, as the wisest course to secure those important objects, judging from the experience of all ages, and justified also by his superior skill and intelligence, and the contract itself of the crew to obey him, it, on the other hand, carefully protected them from any abuse and oppression under such enlarged powers.

The very same acts of congress, which inflict heavy punishment on the crew for dangerous resistance to the master, inflict heavy penalties on him for unjustifiable blows, or unusual punishments, or insufficient or unwholesome food; and a seaman, when wronged abroad, can always rely with safety on ample redress at his return home, through the laws and the juries and judges of his country. It behooves him, then, with patience and order, as well as fidelity, to continue to discharge his own duties to the laws and flag of the Union, convinced as he should be unfalteringly, that none will be allowed to violate them with impunity. It is not sufficient to have no intention to assume the command of the vessel, or to destroy her, or carry her off like pirates, but there must be no insubordination, no disobedience, no violence, towards those who, by law as well as contract, are to rule and not be ruled on board the ship. However uneducated or inexperienced, seamen cannot but know, that they and the master on the deck of the vessel are not acting together in the same capacity, and like equals or citizens, adopting or opposing measures, by each one's taste, or by the popular vote, as at a town-meeting; but acting together for a time, one with large powers, for the benefit of all,

and the others without those powers, for the same benefit of all, and by the previous agreement of all. And thus while this relation between them requires nothing from sailors but what they can perform—implicit obedience to lawful commands—it protects them from any illegal exactions, and punishes sternly all wanton abuse of their dependent condition.

It was objected, also, on the evidence, that the prisoners were born abroad, and have not been shown to be naturalized, and hence were not liable to be punished at all under the acts of congress, for mutiny or revolt. But the court give it to you in charge, that it is sufficient to render them liable, if the Charles Carroll was an American vessel, and they were on board engaged to serve as a part of her crew. This imposed a duty towards them, on the one hand, as in an American ship, whose deck for this purpose, while on the high seas, is as a part of our territory, and all within it—all under our flag—are entitled to protection, and are receiving the benefit of our laws in defence of their persons and property from outrage. On the other hand, it rendered them subject and responsible, while their service continued within our jurisdiction, to obedience to law and the lawful commands of the master. Indeed, they had virtually stipulated for this in their shipment, as well as in their voluntary selection of our government for their domicil. Beside this, a portion of the crews in American vessels are allowed by law to be foreigners; and, for aught which appears, these men, though born abroad, may have since become naturalized. But, without dwelling on these considerations, the vessel being in the possession and control of Americans, as owners, and having sailed from and to an American port, under an American captain, and under a contract for service made in this country, it is primâ facie, enough to render them liable under this act of congress, without the production in the first instance of any register of the vessel or the shipping articles. Abb. Shipp. 96; 3 Phil. Ev. 1151; Robertson v. French, 4 East, 130, 137. "There are many cases in which the possession of property and acts of ownership exercised over it, furnish presumptive evidence of a title to it; and some, also, in which the possession alone is sufficient to maintain an action, although the legal title may be outstanding in another." Abb. Shipp. 60; 5 Esp. 88; 2 Taunt. 302. And it has been decided in this country, that we may establish the national character of a ship by that proof, even in piracy. U. S. v. Furlong, 5 Wheat. [18 U. S.] 184; [U. S. v. Amedy] 11 Wheat. [24 U. S.] 392; 7 Johns. 308; 15 Johns. 298; 16 Mass. 336; U. S. v. Jones [Case No. 15,494]; 14 Johns. 201. Because certain documents are required to prove ownership for fiscal or international objects, but not for titles between individuals, or as to offenders. [U. S. v. The Pirates] 5 Wheat. [18 U. S.] 199.

The jury returned a general verdict of guilty, against the prisoners.

Their counsel then moved in arrest of judgment, on the ground, that the two counts were for different offences, not alike in degree or punishment, and were, therefore, misjoined.

WOODBURY, Circuit Justice. I have taken some time to examine this motion in arrest of judgment, and shall be happy to give to the prisoners any benefit which can grow out of it; or if none, any mitigation in the punishment to be inflicted, which the circumstances in their case may show to be exculpatory. There certainly are some such circumstances, as the prisoners did not continue to persist in their disobedience, nor evince any disposition to alter the navigation of the vessel, or to destroy her, or assume permanently the command of her. But clearly for some time, they opposed the lawful authority of the master. They did this, also, in a tumultuous and mutinous manner; and they endangered the lives of the master and mates as well as their own, by their disobedience and violence, and prostrated all the salutary police and order of the vessel, for a time, as effectually as if they had meditated gross acts of piracy. They must, then, be made an example of, in order to deter others from like outrages, as well as to punish duly their own misconduct; and if it can be done legally under the present form of the indictment and the deliberate finding of their guilt by the jury, it must and should be. The rules, applicable to objections like this, have been much controverted; and though, in my view, there are still doubts as to some of them, they may be considered as settled to the extent I am about to explain.

1. Every indictment with only one count, and each count in itself ought, under the rules of good pleading, to describe but one distinct offence. 1 Chit. Pl. 201; 1 Chit. Cr. Law, 252; Rosc. Cr. Ev. 215; 1 Moody & R. 71; 1 Starkie, Cr. Pl. 246. Most cases hold, that if it describes more, the prisoner, on motion, before trial, may require the prosecutor to try only one, in order to prevent confusion and distraction as to different offences and different kinds of challenges and evidence, that may be admissible at times in trials for different crimes. See 1 Chit. Cr. Law, 253, and notes; Rex v. Kingston, 8 East, 41, 46; Young v. Rex, 3 Durn. & E. [3 Term R.] 98, 103; Kane v. People, 8 Wend. 203; 2 Camp. 131; 3 Camp. 132; State v. Nelson, 8 N. H. 163; Rosc. Cr. Ev. 215; 2 East, P. C. 515. Some cases would seem to limit this privilege or indulgence to indictments for felonies and not misdemeanors. 8 Wend. 208;

Rosc. Cr. Ev. 215. But others seem to extend it to both. See 3 Durn. & E. [3 Term R.] 107, by Justice Grose. As illustrative of this rule, it may be seen that robbery and assault with an intent to rob, should not be united in one count, or in one indictment with a single count. Galloway's Case, 1 Moody, Crown Cas. 234. See other cases, 2 Moody & R. 71. And the court, in its discretion, will either make the attorney for the government select and try but one offence on such motion before trial, or on demurrer or motion quash the indictment, if the offences are of a different nature, and not requiring a like form of plea and judgment, and are both described in but one count. Rex v. Kingston, 8 East, 41, 46; People v. Wright, 9 Wend. 193; U. S. v. Sharp [Case No. 16,265]; 8 N. H. 163. But it has been held, that they will not require even that selection or quash the indictment, if the offences are as much alike in character and punishment, as "breaking and entering with intent to steal," joined in one count with "stealing." Com. v. Hope, 22 Pick. 1. See, also, Com. v. Tuck, 20 Pick. 356, and Com. v. Eaton, 15 Pick. 273. So if indicted in one count as receivers, and the other as principals. 1 Moody, Crown Cas. 234; Madden's Case, Id. 277. Or in one as principal in the first degree, and in the other in the second degree. Gray's Case, 7 Car. & P. 164; 1 Moody, Crown Cas. 351. So a receiver may be indicted as accessory in one count, and for a substantive felony in another. And though the judge might make the prosecutor elect, he will not, where it is clear there was but one offence, and the joinder cannot prejudice the prisoner. Rosc. Cr. Ev. 215; Jervis' Case, 6 Car. & P. 156; Rex v. Wheeler, 7 Car. & P. 170; Rex v. Austin, Id. 795. So in a prosecution for arson, it will not compel a selection if it was all one fire, and the houses of different persons were burned. Reg. v. Trueman, 8 Car. & P. 727. But where one count was for conspiracy and one for a libel, and no evidence against one defendant for the last, the court compelled a selection before a verdict. Reg. v. Murphy, 8 Car. & P. 297. It is for a reason somewhat similar to this, perhaps, and because the allegations for the higher offence include all which is necessary to constitute the smaller one of the same sort or family, that where the indictment is for murder, the prisoner may be convicted under it of manslaughter; or for assault with intent to kill, be convicted of an assault, and so onward through several classes and degrees of family crimes. Com. v. Briggs, 7 Pick. 177; Com. v. Cooper, 15 Mass. 187; State v. Shepard, 7 Conn. 54. But in Com. v. Roby, 12 Pick. 496, 505, the court held, that this could not be done if one offence was only a misdemeanor, and the other a felony. For then a conviction would be no bar to another prosecution for the original offence.

2. So if there have been a trial and conviction of one or both of the offences, thus united in one count, or in one indictment with a single count, the court will not generally sustain a motion in arrest of judgment, unless the two offences belonged to a different class or family of crimes. People v. Rynders, 12 Wend. 425; 2 Camp. 132–134; Rex v. Kingston, 8 East, 41, 46; Rex v. Johnson, 3 Maule & S. 539, 542; State v. Nelson, 8 N. H. 163. Some cases hold, it will not be done, unless the two offences required different forms, not merely degrees of punishment. Com. v. Symonds, 2 Mass. 163; Rex v. Johnson, 3 Maule & S. 539, 542; U. S. v. Sharp [Case No. 16,264]. Other cases seem to hold, that the two offences should require different challenges and modes of trial. See those cited in Burk v. State, 2 Har. & J. 426. Without some of these material diversities between the two offences, there having been a conviction on a full hearing, it does not appear expedient or proper, after verdict, to disturb it; and the more especially does it not, when, on a previous motion to limit the trial to one offence, the request would, in the exercise of a sound discretion, have probably been granted; and the prisoner, without delay or expense, have been allowed virtually all he now asks. But none of these rules or illustrations reach the present case, as here the two offences are set out in separate counts.

3. In such cases it seems to be equally well settled, that if two offences are described separately in two counts in one indictment, and there is a general verdict of guilty, the judgment will not be arrested as for a misjoinder, unless the offences are of a nature and character radically different, as well as requiring different judgments, different in kind, and not merely punishments differing in amount or degree. U. S. v. Sharp [Case No. 16,265], where it is admitted; Case of The Pirates, 5 Wheat. [18 U. S.] 184; U. S. v. Dickinson [Case No. 14,958]; Archb. Cr. Pl. 25, 26; Burk v. State, 2 Har. & J. 426; 8 N. H. 163. Where they are in different counts, they are, for most purposes, as if in different indictments. U. S. v. Sharp [supra]; 4 Hawks, 356; 2 Camp. 585. Some of the technical rules as to misjoinders in civil cases, do not apply here, as there; the forms of judgment in assumpsit and debt, &c., being different, prevent an union in the same writ of counts which sound differently as to the judgments required, though in one sense they may all belong to the large family of debts due, or contracts, though not to the smaller one of mere promises, or that of mere covenants. 2 Har. & J. 426. As illustrations of what is meant by this rule, it is laid down, that petit treason and murder may be united. 2 Hale, P. C. 173; 1 Hale, P. C. 378. Burglary and larceny. 2 East, P. C. 1023, 1028. Forgery of a writing and uttering it; or assault with an intent to kill, and a common assault. People v. Wright, 9 Wend. 193. The punishments in these cases

are often much more widely different than in this now under consideration; as in some of them one offence is a felony, and the other a mere misdemeanor, and if punished somewhat alike in some of them formerly, when capital crimes were so numerous, they were not punished alike in all the cases. It will be seen, however, that they belong in each instance to one genus or class. 1 Chit. Cr. Law, 255; 1 East, P. C. 408, 409. And in Rex v. Denon, 2 Leach, 608, the court censured the bringing of different indictments for different offences, if committed by the same person, and belonging to the same family of crimes. Some cases hold, however, that the court, before verdict, may exercise the same discretion as to selecting one of two distinct offences for trial, when set out in two counts, as when set out in one. Dunn's Case, 1 Moody, Crown Cas. 146. But this is a different question from that of objecting to the joinder, if in separate counts, by motion in arrest. Archb. Cr. Pl. 26. But in People v. Wright, 9 Wend. 193, there is at first an appearance of dissent from this result. It was there held, according to the marginal note, that if two offences are described in different counts, though of the same family, and they require different punishments, the court will arrest judgment. One punishment there was not less than ten years in the state prison. The other, not over five years. But in that case, on examining the details, it seems doubtful if any offence under the first count had been committed; and the court said they could not tell what punishment to inflict, unless they arbitrarily selected the second one, where the jury may have gone chiefly or entirely on the first. The indictment was said, by the court, to be drawn under one section of a law, when the offence was committed against or under another section. Hence the ground of the decision has been misapprehended, and subsequently in People v. Rynders, 12 Wend. 426, the court unhesitatingly held, a joinder of offences of the same family in different counts to be good, though the punishment of them was different; e. g., forging an instrument, and uttering it, knowing it to be false. They would not, even before trial, refuse to let the attorney proceed on both, if of like character, though liable to different punishments. U. S. v. Dickinson [Case No. 14,958]. And in Kane v. People, 8 Wend. 203, 208, it was held, that where two counts in the same indictment are for different offences, though felonies, it is no ground of error, or arrest, or demurrer. 2 Peake, N. P. 228, note. But if in such case, it is there said, the two offences are embraced in one count, the court may quash, or compel the attorney, before trial, to elect one, though they will not do even that in mere misdemeanors. Two counts often describe the same offence differently, and the jury return a general verdict, though only one offence is proved; and "no one (says the court,) ever supposed that formed a ground for arresting the judgment." And in such case, if one count is bad, the court say it will be presumed, that judgment will be rendered or has been, on the good one, rather than one which is defective. and the judgment will be good. 1 Johns. 320; U. S. v. Pirates, 5 Wheat. [18 U. S.] 184. Lord Mansfield regretted it was not so in civil cases. Doug. 730.

4. Again, it has been deliberately adjudged, that if one of the counts be double, or it is doubtful whether it be properly joined with the other, as being for an offence somewhat different in character and punishment, the judgment, after a general verdict, will not be arrested, but rendered entirely on the other count. Rex v. Fuller, 1 Bos. & P. 180, 2 Leach, 926. So it has been held, that the attorney-general, after verdict, as well as before, may enter a nol. pros. as to one count, without the assent of a prisoner, or as to a part of a count, as for example, in burglary, to the breaking and entering, but leaving the larceny. Com. v. Tuck, 20 Pick. 356; Rex v. Butterworth, Russ. & R. 520; U. S. v. Keen [Case No. 15,510]. A nol. pros. may be entered after or before verdict, against some of the parties. Minor v. Bank of Alexandria, 1 Pet. [26 U. S.] 74. Again, if advantage be not taken of a misjoinder of offences distinct in their character, by motion to try but one, or by demurrer, it is very doubtful if it can be objected to in arrest. Archb. Cr. Pl. 26. The twelfth rule in common law suits in this circuit, provides, that where a general verdict is rendered on several counts, the plaintiff may have leave to enter it on any one count, and strike out others. This is tantamount to what is requested here. These last views and cases appear fully sustained in rendering judgment here on the first count, after a general verdict, even if it were more doubtful than it is, as to the propriety of joining these two counts in one indictment, or if misjoined, of the propriety of taking advantage of it in arrest of judgment, rather than by motion before trial. The two offences, described in these counts, are certainly of the same family and nature, viz., revolts, and excitements to revolts. They are set out separately and distinctly. They are both defined in one statute, and both made punishable by fine or imprisonment, though there is this difference, that both of these last may be imposed in one case, and both must be in the other. The amount of both, too, may go higher in one than the other, but they do not differ in kind, except that one is "imprisonment," and the other "imprisonment to hard labor." These vary less than the punishments in assault with intent to kill, and a mere assault at common law, or burglary and larceny, which, it has been held, can be united. And "in a variety of cases, though the punishment be different, yet the counts can be joined," says Lord Ellenborough, in

3 Maule & S. 549, 559. See also, 2 Russ. Crimes, 1233, 1234. I should hesitate, however, if the punishments were so different as to be inconsistent or impracticable with each other, or if one of the counts was for a separate transaction, occurring at a different time, or belonged to a family of crimes wholly unlike, or required a trial by different kinds of evidence, or tribunals, or under different rights as to challenges. But none of those existing here, I do not feel justified in granting the motion.

Let judgment, then, be entered against the prisoners, on the verdict, upon the first count, and sentence of $50 fine against Hanson, Morgan and Bennett, and six months' confinement to hard labor; and $100 fine and one year's confinement to hard labor against Peterson.

UNITED STATES (PETERSON v.). See Case No. 11,036.

Case No. 16,038.

UNITED STATES v. PETTIS.

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

Circuit Court, District of Columbia. Oct. Term, 1831.

CRIMINAL LAW—ARRAIGNMENT.

In cases of felony, the prisoner is to be arraigned in the criminal bar, or dock.

Indictment [against F. H. Pettis] for perjury.

Baldwin and Giberson, for defendant, requested that the prisoner might plead without being arraigned. But THE COURT ordered him to be arraigned, and he pleaded without going into the criminal bar, or dock.

THE COURT, however (nem. con.), said, that in the case of U. S. v. Pittman [Case No. 16,053], in Alexandria, at April term, 1828, they had required that he should be arraigned at the bar, in the criminal dock, as in other cases of felony, and that in future they should adhere to the established rule and practice.

Case No. 16,039.

UNITED STATES v. PHELPS et al.

[17 Blatchf. 312.] [2]

Circuit Court, S. D. New York. Nov. 24, 1879.

CUSTOMS DUTIES—DAMAGE ALLOWANCE ON TRIAL—CONCLUSIVENESS OF LIQUIDATION.

1. One entry was made at the custom house of fruit imported in a vessel, which fruit belonged to several owners, and was embraced in several invoices. The duties were estimated at $4,648 and deposited and the goods were delivered. Afterwards a damage allowance for loss by decay on the voyage was applied for. The report showed that the damage sustained by various lots of the fruit was more than 25 per cent. of the quantities in such lots, but that the damage on all the fruit imported by the vessel was less than 25 per cent. of the whole quantity. The collector, by allowing the damage on the lots which were damaged more than 25 per cent., liquidated the duties at $270.40 less than the amount deposited, and refunded the $270.40. Afterwards the collector reliquidated the duties at $4,648, refusing to allow any damage, because it did not exceed 25 per cent. of all the fruit covered by the entry. The United States having sued, in the district court, to recover the $270.40, that court directed a verdict for the defendants. On a writ of error: *Held* that, under section 2931 of the Revised Statutes, the first liquidation was not conclusive as to the United States.

[Cited in U. S. v. Comarota, 2 Fed. 146; U. S. v. Campbell, 10 Fed. 819; U. S. v. Clark, 11 Fed. 79; U. S. v. Earnshaw, 12 Fed. 286; U. S. v. Schlesinger, 14 Fed. 685; U. S. v. Leng, 18 Fed. 17; s. c., 7 Sup. Ct. 445, 120 U. S. 113.]

2. The United States are entitled to recover according to the last liquidation.

[Cited in U. S. v. Campbell, 10 Fed. 818; U. S. v. Leng, 18 Fed. 21.]

3. The defendant could not be allowed to give evidence to show that the decision of the collector in the last liquidation was erroneous.

[Cited in Chase v. U. S., 9 Fed. 883.]

4. The district court ought to have directed a verdict for the United States.

[Error to the district court of the United States for the Southern district of New York.]

At law.

J. Dana Jones, Asst. U. S. Dist. Atty.

A. J. Heath, for defendants in error.

BLATCHFORD, Circuit Judge. This suit was brought in the district court by the United States against the defendants in error [Frank Phelps and Howard Phelps], to recover $270.40 in gold coin, with interest from March 6th, 1878. The complaint alleges that the defendants, on the 6th of March, 1878, imported into the port of New York certain fruit, subject to duties, and entered it at said port; that, thereupon, the collector of said port decided that the amount of duties to be paid thereon was $4,648 in gold coin; and that the defendants have paid thereon $4,377.60 and no more. The answer sets up, that the defendants paid, on entry, $4,648 in gold coin, as duties; that the defendants made a claim for an allowance of duties for damage to the fruit on the voyage; that the fruit was appraised and damage allowed; that the collector adjusted the duties and decided that the amount of duties was $4,377.60 in gold coin, and no more, and refunded to the defendants $270.40; and that the $4,377.60 was paid to and received by the United States in full settlement and payment of all the duties on said fruit.

The bill of exceptions sets forth, that, on the trial, the following facts were proved: On the 6th of March, 1878, the defendants imported into the port of New York, from foreign ports, by the steamship Olaf, 4,008 boxes

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

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

and 2,227 cases of oranges. The oranges were shipped from Messina, Palermo and Valencia, and consigned by the several owners in those respective ports to the defendants at New York City, a separate invoice having been made for each separate lot or shipment by the several owners thereof, containing the date of shipment, the place from which shipped, the description and value of the goods so shipped, and the name of the owner or owners. There were in all eleven invoices of this character, upon which only one entry was made at the custom house. On the same day the duties upon the goods were estimated by the collector to be $4,648, which sum was then and there deposited with the collector, by the defendants, to secure the payment of the duties when finally ascertained, and the goods were delivered to the defendants, the consignees named in the entry. On the 12th of March, 1878, the defendants made an application for damage allowance for loss by decay of said fruit during the voyage. On the 26th of March, 1878, the report of the appraisers as to the amount of damage sustained by the said fruit on the voyage was made. Such report showed that the damage sustained by the various lots of the fruit was more than 25 per centum of the quantities contained in said several lots, but that the damage on all of the fruit imported by the Olaf was less than 25 per centum of the whole quantity imported. On this report, the collector, on the first of April, 1878, by allowing the damage on the various lots which had sustained more than 25 per centum of damage, liquidated the duties on the said goods, and fixed the same at the sum of $4,394. This amount of money was applied by the collector to the payment of the duties, and the sum of $254 (being the difference between $4,394 and $4,648) was refunded by him to the defendants on the 29th of April, 1878. On the 10th of May, 1878, the defendants called the attention of the collector to an error in this liquidation, which was corrected and the duties were reliquidated at the sum of $4,377.60 and the further sum of $16.40 was refunded to the defendants. On the 6th of July, 1878, the defendants filed with the collector a protest, addressed to him, in which they said: "We do hereby protest against the present system of liquidating entries for damage on boxes and cases of green fruit, and particularly in the case of our entry per steamship Olaf, made March 6th, 1878, and liquidated about April 25th, and reliquidated on June 26th, both times incorrectly, so far as the method of adding boxes and cases together indiscriminately, as by so doing we have, in the last instance particularly, been credited with $16.40 instead of $61.60, as would appear if the cases were either considered separately or figured upon at their relative value. We, therefore, look to you to have the entry liquidated in such a way that we can have a correct return and have the proper amount due us returned." Thereafter, on July 19th, 1878, an order was made by the collector that the entry should be amended, and the proper amount of duty fixed. This amendment was thereupon made, and, on the 20th of July, 1878, the duties were fixed by the collector at the sum of $4,648, the amount originally deposited with the collector. On this liquidation the collector refused to allow any damage, because the amount of damage did not exceed 25 per centum of the whole quantity of fruit imported and covered by the entry. There was only one appraisal of the goods, and the different ascertainments or liquidations were all based upon the appraisers' report of the damage sustained by the fruit on the voyage. The plaintiffs sued for $270.40 and $11.48 interest.

On the foregoing facts, the counsel for the defendants asked the court to direct a verdict for the defendants. The counsel for the plaintiffs asked the court to direct a verdict for the plaintiffs, for $281.88, on the grounds, (1.) That the last liquidation by the collector was final and conclusive in this action brought by the United States for duties; (2.) That, if such liquidation was not final and conclusive, the $270.40 was due from the defendants as duties on the goods imported. The court denied the motion of the plaintiffs, and directed the jury to find a verdict for the defendants. [Case unreported.] To such refusal and direction the counsel for the plaintiffs duly excepted. The jury thereupon, under the direction of the court, rendered a verdict in favor of the defendants. On this verdict a judgment was entered dismissing the complaint on the merits of the action, as against the plaintiffs.

It is contended, for the United States, that the court should have directed the jury to find a verdict for the plaintiffs for the full amount claimed, because the $270.40 was proved to be a part of the ascertained or liquidated duties on the goods imported by the defendants; that the fact that the duties had been twice previously liquidated did not deprive the collector of power to make the last liquidation; and that it was within his authority, on the same facts, to change his interpretation of the law, and correct the mistake he had made.

It is well settled, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer; that the consignee is, for this purpose, treated as the owner and importer; that such debt is independent of any lien on the goods and of any bond given for the duties; and that the right of the government to the duties accrues when the goods have arrived at the proper port of entry. Meredith v. U. S., 13 Pet. [38 U. S.] 486. By section 2931 of the Revised Statutes the decision of the collector, in liquidating duties, as to the amount of duties on imported goods, is made final and conclusive against all persons interested in such goods, unless notice in writing of dissatisfaction with such decision is given to the

collector, by the importer, within 10 days after the liquidation, and unless within 30 days after the liquidation there is an appeal by the importer from the liquidation to the secretary of the treasury. Such liquidation is not made final and conclusive as against the United States. There is nothing in the section which forbids a reliquidation or a new decision by the collector, even after the payment of all the duties fixed by a prior liquidation, or even after the refunding of money deposited beyond the amount of duties so fixed; or which forbids a new decision by the collector as to the law on the same facts, or a new decision as to facts, based on additional or new or different facts. This view is confirmed by the enactment of section 21 of the act of June 22d, 1874 (18 Stat. 190), which is as follows: "Whenever any goods, wares and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent or consignee, be final and conclusive upon all parties." This provision was in force when the transactions in this case took place. It applies to the United States. The expression "all parties," includes the United States. By section 2931 of the Revised Statutes, there was no limitation imposed on the power of the collector to reliquidate, when such reliquidation was in the interest of the government. But, by section 21 of the act of 1874, a limitation is imposed on such power, so that, after the entry of goods, and after the liquidation and payment of duties on them, and after the delivery of the goods to the importer, such settlement of duties, if there be no fraud and no protest by the importer, is, after one year from the entry, final and conclusive even as respects the government. In the present case, the suit was brought before the one year expired. The collector, therefore, had power to make the reliquidation of July 20th, 1878; and there is nothing in the provisions of the act of March 3d, 1875 (18 Stat. 469), which affects such power. The complaint counts on such reliquidation, as made on the importation and entry of goods subject to duty.

The reliquidation at $4,648 being lawful, such reliquidation stands for the purposes of this suit as if it was the only liquidation. On a liquidation, the United States is entitled to recover, in a suit against the importer or consignee, under section 2,931 of the Revised Statutes, formerly section 14 of the act of June 30th, 1864 (13 Stat. 214), the amount liquidated, as duties, and evidence in such suit, on the part of the defendant, to show that the decision of the collector was wrong, cannot be received. The only remedy of the importer is in a suit to recover back the duties, after paying them, in a case where such a suit is allowed by the statute. This was the ruling in U. S. v. Cousinery [Case No. 14,878], in the district court for this district, following the decision of the supreme court in Westray v. U. S., 18 Wall. [85 U. S.] 322. Such ruling was approved by Chief Justice Waite, in Watt v. U. S. [Case No. 17,292], and must be held to be the law, until it is reversed.

For these reasons, it was error in the court below to refuse to direct a verdict for the plaintiffs, and error to direct a verdict for the defendants. The first ground urged by the counsel for the plaintiffs, as a ground for directing a verdict for the plaintiffs, was a sound one, namely, that the last liquidation by the collector was final and conclusive against the defendants in this suit; and it is unnecessary to consider the question as to whether the collector was wrong in refusing to allow any damage, on the last liquidation.

The judgment is reversed, with costs to abide the event, and a direction to the court below to enter an order granting a new trial.

Case No. 16,040.

UNITED STATES v. PHELPS et al.

[20 Blatchf. 129.] [1]

Circuit Court, S. D. New York. Nov. 18, 1879.[2]

CUSTOMS DUTIES—CONCLUSIVENESS OF APPRAISEMENT—ALLOWANCE FOR DAMAGE.

Under sections 2927 and 2928 of the Revised Statutes, there can be an appraisement for an abatement of duties, on account of damage to goods sustained during the voyage of importation, after the goods have been entered at the custom house and the estimated amount of duties thereon have been paid.

[In error to the district court of the United States for the Southern district of New York.

[This was an action brought in the district court against Frank Phelps and Howard Phelps, to recover certain duties alleged to have been illegally refunded to the defendant by the collector of the port of New York. The judgment was for the defendants. Case unreported.]

C. P. L. Butler, Jr., Asst. U. S. Dist. Atty.

Charles M. Da Costa, for defendants in error.

BLATCHFORD, Circuit Justice. This is a writ of error to the district court. The following facts appear by the bill of exceptions. The defendants in error (who were the defendants below and will be called the defendants), on the 7th of August, 1876, imported into the port of New York from a foreign port, 3,825 boxes of lemons.

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

[2] [Affirmed in 107 U. S. 320, 2 Sup. Ct. 389.]

The value of said lemons in the foreign market, when and where they were purchased, was 74,521.09 francs, equal to $14,383. The duties thereupon, at the rate of 20 per centum ad valorem, amounted to $2,876.60, on which sum the plaintiff gave a credit of $2,013.60, the amount admitted by the complaint to have been paid, claiming to recover the balance, $863, as duties. The defendants, in like manner, imported, on the 15th of August, 1876, 2,930 boxes of lemons, of the foreign value, when shipped, of 49,861.89 francs, equal to $9,623. The duties thereon, at the rate of 20 per centum, ad valorem, were $1,924.60, on which sum the plaintiffs gave a credit of $1,636, the amount admitted by the complaint to have been paid, claiming to recover the balance, $288.60, as duties. After the plaintiffs had proved the foregoing facts, the defendants offered to prove that they made entry at the custom house in New York of the first above mentioned importation of lemons at the full invoice price on the 7th of August, 1876, and then paid to the plaintiffs $2,876.60, as the estimated amount of duty on said importation, if in sound condition, and afterwards, and on the 14th of August, 1876, applied for an allowance for damage to the same on the voyage of importation; that, thereafter, an examination and appraisement of the damage were made, and thereupon an allowance was made for said damage; that the amount of said damage allowance was $4,315; that the duties thereon, at 20 per cent., amounted to $863; that, in accordance therewith, the said entry was liquidated on the 3d of October, 1876; and that, on the 14th of October, 1876, the plaintiffs refunded and paid to the defendants the sum of $863. To this evidence the counsel for the plaintiffs objected, on the ground that the damage allowance should have been applied for, and the damage ascertained, before the entry of the goods; that, as the application was not made, nor the amount of damage ascertained, until after the entry, the proceedings therefor were irregular, and without warrant of law; and that the defendants could acquire no benefit or advantage from any allowance made in pursuance thereof. The court overruled the objection and admitted the evidence, and to such ruling and admission, the plaintiffs' counsel excepted.

As to the importation of August 15, 1876, the defendants offered to prove that an entry was made of the goods at their full invoice price on that day, and the sum of $1,924.60 was paid to the plaintiffs as the estimated amount of duty on said importation, if in sound condition; that an application for damage allowance was made August 22, 1876; that an examination and appraisement were thereupon made, and an allowance for damage was thereupon made, to the amount of $1,443, on which the duties amounted to $288.60; that the entry was liquidated on the 29th of September, 1876; and that, on the 11th of October, 1876, the plaintiffs refunded and paid to the defendants the said sum of $288.60. To this evidence the counsel for the plaintiffs objected on the same ground as before. The court overruled the objection and admitted the evidence, and to such ruling and admission the plaintiffs' counsel excepted.

The defendants then rested. The counsel for the plaintiffs thereupon requested the court to charge the jury, that, as the goods had been entered at the full invoice prices in the first instance, and the application for allowance, the examination and the appraisement were not made, nor the damage ascertained, nor the damage allowance made, until after the entries of the goods, the damage allowance was unwarranted by law, and the jury could not give the defendants any abatement of duties on account of such damage allowance. The court refused so to charge, and the counsel for the plaintiffs excepted to such refusal. The jury rendered a verdict for the defendants.

It is presented, as a question for decision, whether there can be an appraisement for an abatement of duties, on account of damage to goods sustained during the voyage of importation, after the goods have been entered at the custom house and the estimated amount of duties thereon has been paid.

Section 2927 of the Revised Statutes provides as follows: "In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty, either by number, weight or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage so ascertained and certified shall be deducted from the original amount subject to a duty ad valorem, or from the actual or original number, weight or measure on which specific duties would have been computed. No allowance, however, for the damage on any merchandise that has been entered, and on which the duties have been paid, or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may, on examining the same, prove to be damaged, shall be made, unless proof to ascertain said damage shall be lodged in the custom house of the port where such merchandise has been landed, within ten days after the landing of such merchandise." This is a re-enactment of like provisions in section 52 of the act of March 2, 1799 (1 Stat. 666).

Section 2928 of the Revised Statutes provides as follows: "Before any merchandise which shall be taken from any wreck shall be admitted to an entry, the same shall be appraised; and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage; and in all cases where the owner, importer, consignee or agent shall be dissatisfied with such appraisement, he shall be entitled to the privileges of appeal, as provided for in this title." This section is taken

from section 21 of the act of March 1, 1823 (3 Stat. 736), which section 21 was in these words: "Before any goods, wares, or merchandise which may be taken from any wreck shall be admitted to an entry, the same shall be appraised in the manner prescribed in the sixteenth section of this act, and the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any goods, wares, or merchandise shall have sustained in the course of the voyage; and in all cases where the owner, importer, consignee or agent shall be dissatisfied with such appraisement, he shall be entitled to the privileges provided in the eighteenth section of this act." The words "in the manner prescribed in the sixteenth section of this act," found in said section 21 are not reproduced in section 2928 of the Revised Statutes. The manner prescribed in the sixteenth section of the act of March 1, 1823 (3 Stat. 735), is by appraisers to be appointed in a manner designated in that section. By the fifty-second section of the act of 1799, it was provided that, in the case of goods which had received damage during the voyage, the appraisement to ascertain such damage should be made by two merchant appraisers, one to be appointed by the collector, and the other by the importer. By the fifteenth section of the act of April 20, 1818 (3 Stat. 437), it was provided as follows: "Before any goods, wares or merchandise which may be taken from any wreck shall be admitted to entry, the same shall be appraised in the manner prescribed by the ninth section of this act; and the same proceedings shall also be had where a reduction of duties shall be claimed on account of damage which any goods, wares or merchandise imported into the United States shall have sustained in the course of the voyage." The ninth section of that act provided for the appointment by the president and senate, in each one of six designated ports, of two appraisers, who, with a merchant appraiser, to be chosen by the importer, were to make appraisements in such six ports, and in other ports appraisements were to be made by two merchant appraisers to be selected by the collector, and one merchant appraiser to be chosen by the importer. This act of 1818 was to continue in force for two years. By the act of April 18, 1820, it was continued in force till March 4, 1823 (3 Stat. 563). Then came the act of March 1, 1823, before referred to. The sixteenth section of that act provides for the appointment, by the president and senate, in each one of seven designated ports, of two appraisers, who were to make appraisements in such seven ports, and in other ports appraisements were to be made by two merchant appraisers to be appointed by the collector.

A change was made by the act of 1818, and continued by the acts of 1820 and 1823, in the mode of appointing appraisers who were to appraise in the case of damaged goods. By the act of 1799, there were to be two appraisers, one appointed by the collector and the other by the importer. By the act of 1818 there were to be in certain ports two standing appraisers appointed by the United States, and one appraiser selected in each case by the importer, and in other ports two appraisers selected in each case by the collector, and one appraiser selected in each case by the importer. This was continued by the act of 1820. By the act of 1823 there were to be in certain ports two standing appraisers appointed by the United States, and in other ports two appraisers appointed in each case by the collector. The change made by the act of 1818 from the act of 1799, in the mode of selecting the appraisers, was a marked and a material one, as it gave to the United States the selection of two appraisers, and to the importer the selection of one, instead of giving to the United States the selection of one, and to the importer the selection of one. Hence, when the fifteenth section of the act of 1818 said that "the same proceedings shall also be had," on a claim to a reduction of duties on account of damage, the reference would seem to have been to an appraisement "in the manner prescribed" by the ninth section of that act, without any prescription that it should be either before or after the entry of the goods. The appraisement is a proceeding. By the fifty-second section of the act of 1799, appraisement to ascertain damage was to be made by appraisers appointed in a manner prescribed by that section. By the fifteenth and ninth sections of the act of 1818, such appraisement was to be made by appraisers appointed in a different manner. The requirement of the fifteenth section of the act of 1818 that goods taken from a wreck shall not be entered until they have been appraised, is clear and explicit. Prior to that act goods taken from a wreck could have been entered as other imported goods, before appraisement, and were within the provisions of law as to goods damaged during the voyage. Reasons can very well be suggested why a change was made in regard to wrecked goods, coming into the country in an irregular way, and not by the discharge of them at a landing wharf, directly out of the vessel which brought them, such change requiring them to be appraised before entry. But no satisfactory reasons can be assigned for a like change in regard to damaged goods landed in the regular way, and it ought to appear very clearly from the language of the statute, that a change was intended in regard to such goods. The system prescribed by the act of 1799, and continued in force, in regard to the landing of goods regularly imported, was that they should first be entered and the duties on them be paid or secured, and then a permit be obtained for their landing, and severe penalties were imposed for landing goods without a permit. Act March 2, 1799, §§ 49, 50 (1 Stat. 664, 665). It is impossible for an importer to ascertain, until he sees his goods, after they have been landed in pursuance of

a permit following an entry, whether they have been damaged or not. Hence, the fifty-second section of the act of 1799 clearly provides for the entry, the payment of duties, the permit, and the landing, in the above order, and then for the allowance for damage. It ought to require explicit language to make a change in this order of proceeding. It was very proper to require that proof of damage should be lodged within ten days after the landing. But, to require appraisement before entry or landing, in the case of goods regularly imported, would be to prescribe a system impossible of practical execution. These views apply to the provisions of the twenty-first section of the act of 1823. The natural meaning of the words of that section, which provide that "the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any goods, wares or merchandise shall have sustained in the course of the voyage," is the same as the natural meaning of the words in the fifteenth section of the act of 1818, which provide that "the same proceedings shall also be had where a reduction of duties shall be claimed on account of damage which any goods, wares or merchandise imported into the United States shall have sustained in the course of the voyage," and that is, that the appraisement proceedings shall be conducted in the manner before prescribed in the acts respectively, and not that goods regularly imported and bonded, and not "taken from any wreck," shall be appraised before entry.

In the case of Shelton v. Austin [Case No. 12,752], affirmed by the supreme court, as Shelton v. The Collector, 5 Wall. [72 U. S.] 113, the fifty-second section of the act of 1799 had not been complied with, in that proof to ascertain the damage had not been lodged within the ten days prescribed by that section. The goods were not taken from a wreck, but they were entered before they were appraised. Mr. Justice Clifford, in the circuit court, held that they must pay duties on their sound value, as entered, because, under the twenty-first section of the act of 1823, they were required to be appraised before entry, in order to warrant an allowance for damage on the voyage. In the supreme court no counsel appeared for the plaintiff in error. The court held that there could be no allowance for damage under the act of 1799, because proof had not been lodged within the ten days after landing; and that there could be none under the act of 1823, because there had been an entry before appraisal. The first ground was an adequate one for the affirmance of the judgment, and the United States alone were represented on the argument. In the present case the record shows that the requirement as to the ten days was complied with.

By section 5595 of the Revised Statutes, those statutes are declared to embrace the statutes of the United States, general and permanent in their nature, in force on the 1st of December, 1873. It follows that the provisions of the Revised Statutes are to be construed as the enactments in force on the 1st of December, 1873, would have been construed. Sections 2927 and 2928 of the Revised Statutes are both of them enacted as having been in force on the 1st of December, 1873. The regulations of the treasury department in regard to claims for damage allowance, in force and acted on since the Revised Statutes were enacted, clearly recognize the practice and the propriety of entering goods, and then claiming a damage allowance on them, and proceeding to an appraisement. Such was the practice in the present case, acted on by the collector, even to the paying back of the deposited duties on the amount of the damage.

It is contended for the United States, that, under the twenty-first section of the act of 1823, goods damaged in the course of the voyage, though not taken from a wreck, must be appraised before entry, in order to warrant an allowance for damage; and that as, in this case, the entry was made before appraisal, no allowance for damage was lawful. The district court took a different view. The practice of the treasury department and of the collector has evidently been contrary to what is now contended for by the United States, notwithstanding the decision of the supreme court in Shelton v. The Collector [supra]. This practice, it is fair to assume, has obtained because the treasury department did not regard that decision as disposing of the question finally. It is important that the question should be speedily decided by the supreme court, both in the interest of the government and of importers; and, in view of all the facts of the case, I think the most proper disposition of it is, to affirm the judgment of the court below, and thus enable the United States to obtain speedily a reconsideration of the question by the supreme court, instead of sending the case back for a new trial in the district court, with a long delay before it can reach the supreme court. The judgment is affirmed.

[Subsequently a writ of error was sued out from the supreme court, where the judgment of this court was affirmed. 107 U. S. 320, 2 Sup. Ct. 389.]

Case No. 16,041.

UNITED STATES v. PHELPS.

[Brunner, Col. Cas. 89;[1] 4 Day, 469.]

Circuit Court, D. Connecticut. 1810.

INDICTMENT—VARIANCE.

Where in a prosecution for resisting an officer of the customs the indictment improperly describes the office, the variance is fatal.

This was an indictment [against Stiles Phelps] for assaulting Edward Cheesebor-

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

ough, an inspector of the customs for the district of New London, duly appointed and sworn, knowing him to be such inspector, while executing the duties of his said office, under the direction of Jonathan Palmer, surveyor of the customs for said New London district, and for forcibly resisting him, the said Edward Cheeseborough, in the execution of his duty in said office.

The district attorney, in support of the indictment, offered in evidence a warrant under the hand of Jonathan Palmer, surveyor of the port of Stonnington, for the appointment of Cheeseborough as inspector of the customs.

Mr. Daggett (with whom were Goddard & Billings), for the prisoner, objected to this evidence, on the ground that the law requires the inspector to be appointed by the collector, and recognizes no other mode of appointment.

Before LIVINGSTON, Circuit Justice, and EDWARDS, District Judge.

THE COURT said the indictment must be strictly proved.

The attorney then observed that the surveyor had a right by law to appoint assistants in the execution of his office, and that it was penal to resist such an officer thus appointed; and contended that Cheeseborough was an officer of this description, and that the warrant of the surveyor was admissible to prove his appointment in this point of view.

THE COURT acquiesced in the position that the surveyor might nominate assistants, and that it would be penal to resist them in the execution of their office; but if a man is prosecuted for such an offense, the indictment must describe the assistants in their real character and capacity. Here Phelps is prosecuted for resisting an inspector of customs, an officer known and described in the law. It does not appear that Cheeseborough was appointed to that office; and although he might have held another office, and how penal soever it might be to resist him, it is clear that this indictment cannot be supported. If Phelps be guilty of any crime it is that of resisting an assistant of a surveyor; but he is charged with a different crime.

No other evidence being offered,

THE COURT directed the jury to find the prisoner not guilty, which they did without retiring from their seats.

UNITED STATES (PHILLIPS v.). See Case No. 11,107.

Case No. 16,041a.

UNITED STATES v. The PICAYUNE.

[New York Times, Nov. 7, 1863.]

District Court, S. D. New York. Nov., 1863.

WAR—CONFISCATION ACTS—ENFORCEMENT OF FORFEITURE—PLEADINGS AND PROCEDURE.

[In a proceeding under the confiscation act of August 6, 1861 (12 Stat. 319), to forfeit an interest in a vessel, the pleadings and proceedings are subject to like rules as in ordinary cases of prize of war, and therefore the mere charge of the offence is all the specification that need be made in a libel alleging that the property was seized as prize.]

This was an information filed to forfeit two-sixteenths of the vesssel, as being owned by inhabitants of the state of Louisiana, under the act of congress of July 13, 1881 [12 Stat. 255], and the proclamations of the president dated April 15 [12 Stat. 125S] and August 16, 1861 [12 Stat. 1262]. The vessel was seized under the process. After the return of the process by consent of the district attorney the two-sixteenths was bonded in the sum of $3,125, its appraised value, by John H. Brooks, the master, with the condition that "claimants have the right to surrender the two-sixteenths in the same condition as when bonded, at any time previous to the forfeiture of the said bond for value."

The master afterwards filed an answer in the cause stating: 1st. That he had claimed and bonded the vessel and she had been delivered to him; 2d. That he denies all the statements in the libel; 3d. That he excepts to the libel that no cause of action is set forth or embraced within it; and 4th. That the libel does not disclose facts sufficient to justify a decree of condemnation. The case was submitted to the court on the pleadings.

Beebe, Dean & Donohue, for claimant.

HELD BY THE COURT (BETTS, District Judge). That these allegations are inadequate and faulty as matters of pleading, because Brooks does not connect himself in interest with the cause. That in point of form and regularity the pleading establishes no fact which can in law inure to the defence of the vessel. That if the paper can be accepted as a general issue to the information, it admits all the averments set forth in that pleading and can rely only on their legal inefficiency. That the pleadings are doubtless to be regarded within the spirit of the act of August 6, 1861, and subject to like rules of procedure as in ordinary cases of prize of war. In these cases, the mere charge of the offence is all the specification that need be made in a libel alleging that the property was seized as prize. That the allegations in this libel clearly place this vessel within a range of facts which make her confiscable by the law. It states: 1. That two-sixteenths of the vessel were the property of Albert Connor and Addison Cammack of New Orleans, La., and that it was seized within the navigable waters of this state. 2. That a state of insurrection and condition of hostility existed and still remains between the inhabitants of the state of Louisiana and the United States; and 3. That such steps had been taken by the president under existing laws, as to give full action and effect to the condemnatory provisions of the act of July 13, 1861, and to bring the vessel within that

act. That these allegations mark out with adequate distinctness the corpus delicti imputed to the property, and nothing is discerned by the court disabling it from being executed in the condemnation and forfeiture of the vessel. Decree of condemnation and forfeiture accordingly.

Case No. 16,042.

UNITED STATES v. PICKERING.

[2 Cranch, C. C. 117.] [1]

Circuit Court, District of Columbia. April Term, 1816.

SLAVERY.

An indictment will not lie against a person for dealing with a slave without his master's consent, the statute having provided a different mode of prosecution.

This was an indictment for dealing with a slave without the consent of his master, contrary to the act of Virginia of 17th December, 1792, (page 188, § 16).

E. J. Lee, for the United States.
Mr. Taylor, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) decided, upon the authority of U. S. v. Simms, 1 Cranch [5 U. S.] 252, that an indictment will not lie; the statute having directed the prosecution to be by action on the case by the master for fourfold the value of the article bought or sold, and a penalty of $20 to be recovered by any person who will sue for the same, &c.

Case No. 16,043.

UNITED STATES v. PICKETT et al.

[1 Bond, 123.] [2]

District Court, S. D. Ohio. April Term, 1857.

RECOGNIZANCE—LIABILITY OF SIGNERS—ACKNOWLEDGMENT.

1. Where a defendant and another person signed a recognizance before a justice of the peace, conditioned for the appearance of the defendant, before the district court of the United States, to answer to a charge of stealing from the mail; and three days subsequently to said signing, a third person, whose name did not appear in the body of the recognizance, also signed the same: *Held*, that a joint action could not be sustained against all of said persons upon such recognizance, and that it did not, upon its face, import a joint liability on the part of all the signers thereof.

2. There is no statutory provision, either of the United States or of the state of Ohio, requiring parties to sign a recognizance.

3. An acknowledgment, without the signatures of the parties, certified by a justice of the peace, is all that is required to make a recognizance valid and obligatory.

[Cited in Heyward v. U. S., 37 Fed. 765.]

At law.

D. O. Morton, U. S. Dist. Atty.
W. M. Dickson, for defendant Harding.

LEAVITT, District Judge. The declaration in this case avers, that on September 9, 1854, Sophia B. Williamson, and on the 12th of September, in said year, William Harding, together with one Pickett, as to whom the process is returned not served, entered into a recognizance before Nathan Guilford, a justice of the peace for Hamilton county, by which they acknowledged themselves jointly and severally to owe the United States the sum of two thousand dollars, on the condition that the said Pickett should fail to appear before the district court of the United States, next to be held for the Southern district of Ohio, to answer to a charge of feloniously stealing from the mail of the United States. The declaration then avers that the said Pickett did not appear, and that the recognizance was duly forfeited, whereby the United States became entitled to said sum of two thousand dollars. The defendant, Harding, appeared by his counsel, and having craved oyer of the recognizance, has demurred generally to the declaration. It is on this demurrer that the question now to be decided is presented. No brief has been filed, nor any authority cited, by counsel on either side. After a good deal of examination the court has not been able to find any decided cases bearing on the point raised by this demurrer.

The question presented is, whether the recognizance, as to the defendant, Harding, is valid and obligatory. The facts, as they appear from the recognizance, and as averred in the declaration, are that on the 9th of September, Pickett, the accused person, and the said Sophia B. Williamson, appeared before the justice and signed the recognizance, acknowledging themselves jointly and severally to owe the sum before stated, on the condition set forth. To this the justice of the peace annexed his certificate, in the following words: "Taken and acknowledged before me, this 9th of September, 1854, Nathan Guilford, Justice of the Peace." On the 12th of September the defendant, Harding, appeared and signed the recognizance; and the justice thereupon added a memorandum, as follows: "Signed by William Harding, this 12th day of September, 1854, and acknowledged before me, N. Guilford, J. P." The name of Harding was not, however, inserted in the body of the recognizance. It is not necessary to decide whether Harding is liable, on the facts as they are before the court, to a separate suit, as on a recognizance entered into by him at a time subsequent to that by which the other parties became bound. The question immediately arising on this demurrer is, whether the recognizance on which this suit is brought, by fair legal construction, imports a joint liability on the part of Harding with

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

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

the other parties, so that he may be joined with them in this suit.

My reflections on this point have led me to the conclusion that there is no such liability, and that the demurrer to the declaration must be sustained. It is clear that the recognizance entered into by Pickett and Williamson, on the 9th of September, and certified by the justice, was a perfect and valid instrument. It was an acknowledgment of a joint and several liability on the condition set forth. This acknowledgment, without the signature of the parties, with the certificate of the justice, was all that was required to make the recognizance valid and obligatory. There is no statutory provision, either of the United States or of the state of Ohio, requiring the parties to sign a recognizance. Harding's name does not appear in the recognizance as one of the parties making the acknowledgment; and he is not otherwise connected with it than by the fact that he appeared on a subsequent day and put his name to it. The memorandum of the justice, that Harding appeared on the 12th of September and signed the recognizance and acknowledged such signing, did not make him a party to the instrument. It was, no doubt, competent for the justice to have taken a separate recognizance from him; and this would have been the correct course of procedure. But, without his name in the body of the instrument, his signature to the recognizance, at a subsequent day, did not make him a party to it, and thereby create a joint and several liability with the other parties. As before intimated, it may be that the certificate of the justice as to such signing might, by a very liberal construction, be deemed sufficient evidence that he did enter into a separate recognizance, but does not connect him with the instrument, already perfect and complete in itself, as a party to it.

The demurrer to the declaration must be sustained.

Case No. 16,044.

UNITED STATES v. PICO.

[Cal. Law J. & Lit. Rev. 78.]

District Court, N. D. California. Nov. 5, 1862.

MEXICAN LAND GRANTS — LOCATION OF BOUNDARIES — OBJECTIONS TO SURVEY.

HOFFMAN, District Judge. The grant in this case describes the land as known by the name of "Arroyo Seco," situated towards the cordilleras of the Sierra Nevada, and having for limits on the north the river Consumnes, on the south the Moquelumne, on the west the road of the Sacramento, and on the east the adjoining sierras ("las sierras immediatas"). The third condition recites that the land of which mention is made is of eleven square leagues within the limits of the diseño which accompanies the expediente. The claim having been finally confirmed [Case No. 11,127], a tract of eleven square leagues has been surveyed. This survey, which is an amended survey made under the immediate supervision of the late United States surveyor general, is objected to on the ground that it is not within the limits described in the grant and shown on the diseño.

The only question presented in the cause is as to the true location of the eastern boundary described in the grant as "las sierras immediatas" and represented on the diseño by a line of mountains inscribed "Sierra." The whole tract embraced within the exterior limits of the very rude map found in the expediente is, according to the scale of the diseño, as it is in fact, of much greater extent than the eleven leagues which, by the terms of the third condition, were to be taken within its boundaries. On the north and south, the Consumnes and Moquelumne rivers are represented as issuing from the sierra, and running nearly due west across the Sacramento road. Between these rivers, and running north and south, that road is laid down and inscribed "Camino del Sacramento." It forms the western boundary of the tract. On the east is represented a chain of mountains running from the Consumnes due south for about half the length of the tract, when its continuity is broken by a cañada, or narrow valley, which seems to penetrate it. To the south of this cañada the course of the range deflects considerably to the east, and is continued in a south-easterly direction until it reaches the Moquelumne river. In about the centre of the tract thus enclosed between the sierra, the road, and the two rivers, there is represented a valley lying between two nearly parallel ranges of "lomas muertas," or barren hills, and running nearly east and west, or at right angles to the general direction of the road and of the mountains. Through about the centre of this valley a creek inscribed "Arroyo Seco," is represented as flowing. It appears to issue from the sierra, and curving around the eastern end of the northerly line of "lomas muertas," it flows down the valley between the two ranges of "lomas," towards the Sacramento road. The southern range of "lomas" is also delineated as trending to the south, and terminating very nearly opposite the "cañada" before spoken of, as piercing the sierra on the east. The valley is thus drawn as narrowest to the west, or towards the road, and as gradually widening towards the east, or the sierra, as the hills which form its sides diverge. At the request of all the parties to the cause, and accompanied by their counsel, I have personally visited the lands.

The testimony, though very voluminous, is little else than a description of the general features of the country and the expression of the witnesses' opinions as to the identity of the natural objects indicated on the diseño. But these opinions are in no sense those of experts. To know the natural features of

the country is all that is necessary to enable the surveyor or the judge who may be required to locate the land, to determine what objects are intended to be represented on the diseño, and the conclusions thus reached must be adopted by them, whatever may be the opinions of witnesses who have perhaps, from their want of familiarity with Mexican diseños, less means of forming a correct judgment. The valley of the Arroyo Seco, at a short distance east of the Sacramento road, is a clearly defined strip of bottom land, of the average width of nearly a mile, and skirted on either side by low hills, or elevated table or rolling land. As the valley is ascended, the stream bends to the north, or rather its course becomes southwest instead of west, which is its general direction lower down toward the road. The hills on the north also deflect in the same direction, and the stream passes by or through them, and, preserving the same general direction, traverses a valley now known as "Ione," and after receiving some confluents is traced to the mountains from which it issues. At about the point where this change of course first occurs, another creek, flowing from the same range in a nearly westerly direction, falls into the Arroyo Seco. This is known as "Jackson Creek," and on either side of it is a valley of considerable width. From the junction of these creeks, and running in a northerly direction, is a range of hills which it is claimed is the sierra of the diseño. There is also a range of low hills running nearly parallel with the course of Jackson creek, which serves to separate the valley of that name from the Ione valley on the north, while the range running north and south, before spoken of, in like manner separates Dry Creek valley from Ione valley on the east. These three valleys have thus come to be distinguished from each other in the common speech of the inhabitants, and are spoken of in the depositions as distinct natural features of the country. They in fact, however, seem to be but parts or branches of one large and irregular tract of alluvial and nearly level land. The line of hills which separates Dry Creek valley from Ione valley on the east, is for the most part easy of ascent, and in many places readily traversable by vehicles of every description. One or two of the hills rise to some height, but the majority are low and rolling, and admitting between them strips of nearly level land, affording ready communication from one valley to the other. The hills which are supposed to separate Ione valley from Jackson valley on the south are of the same general character.

An observer standing on any of the hills belonging to the range, if such it can be called, which serves to distinguish Dry Creek valley from Ione valley, and looking to the eastward, beholds the snow-covered chain of the Cordilleras, bounding his view at the distance of fifty miles, while at his feet lies the broad and fertile valley of Ione, bounded on its eastern side by the clearly defined line of the foothills of the great chain, whose snowy summits he sees in the distance. These foothills are of steep ascent, crowned for the most part with chemisal, and, whatever valleys may be found between them and the loftier peaks beyond, they seem unmistakably to form the base or commencement of the great sierra. If, however, from the standpoint supposed the eye be turned either to the north or the south, and it be attempted to trace the line of hills on which the observer is placed, it will be found difficult, if not impracticable, to do so. And it will appear inconceivable that any person sufficiently well acquainted with the country to draw the diseño, and desirous of obtaining the best land in the vicinity, should either have neglected to ask for the singularly attractive and beautiful valleys of Ione and Jackson, which stretch along the base of the mountains, or, with the mountain range full in view and bounding those valleys on the east, should have designated the low hills to the west of the valleys as the "sierra." But there is one indication of the diseño, which seems decisive as to the range of mountains represented upon it. On the theory of those who object to the survey, the mountains inscribed "sierra," are a range of hills lying to the west of Ione valley. On the diseño, the "sierra" is represented as a continuous chain running from the Consumnes to the Moquelumne, and pierced at but one point by a small valley or cañada. If then the range of hills intended be that supposed by the counsel for the United States, we should expect to find it extending continuously northwards to the Consumnes, and separating Ione valley from Dry Creek valley and the rolling plain of the Sacramento. But this range of hills wholly fails in this respect to satisfy the indications of the diseño. For a short distance north of the confluence of Dry and Jackson creeks it is more or less distinctly traceable as a line of hills; but further to the north the hills disappear, and a strip of level and fertile land of considerable width extends from Ione valley, past the northern termination of the range of hills, into the plain of the Sacramento. Beyond, and to the north of this level land, hills again occur, but they are of no great height, and evidently such as the diseño intended to indicate by the words "mesas y lomas muertas." They are certainly not such mountains as the draftsman of a Mexican diseño would have represented as a mountain chain marked "sierra." The fact, then, that the range of hills is not continuous, but is broken, as has been stated, would seem to be an unanswerable objection to identifying it with the "sierra" of the diseño.

It is urged that the foothills, or base of the Sierra Nevada, which have been adopted in the survey as the eastern boundary, cannot

have been referred to in the grant, because that boundary is therein described as "las sierras immediatas," in contradistinction, it is said, to the "Cordilleras de la Sierra Nevada," "toward which" the tract is described as situated. But I see in this language no ground for supposing that by "sierras immediatas" a broken range of low hills was intended rather than the base of the great chain to the east, which would properly be described as the adjacent mountains, or the "sierras immediatas." By the "Cordilleras de la Sierra Nevada," was no doubt meant the distant chain of snow-covered peaks which, more than fifty miles to the east, bound the horizon. The "sierras immediatas" are evidently the mountains which form the eastern limit of the flat land, and which, rising abruptly and covered with chemisal, constitute the base or commencement of the vast mountain system which culminates in the lofty heights beyond.

Much testimony has been taken to prove what natural objects are meant by the "laguna" and a high peak to the south of the valley, represented on the diseño. If the theory of those who oppose the survey be true, there can be found in the lower valley, or bottom of the Arroyo Seco, a pond answering in some degree to the laguna of the diseño. There is also found on the hills to the south a peak higher than those in the immediate vicinity which may be supposed to have been intended to be represented. On the other hand, if the sierra of the diseño be the base of the main sierra, as contended for by the claimant, there is found in Ione valley, and to the south of the Arroyo Seco, a laguna, which may, with perhaps greater probability, be identified with the laguna of the diseño, while to the south is a high and conspicuous mountain called "Chaparal Peak," which would correspond with that represented on the map. The same observations apply to the "cañada" of the diseño. It is either the valley of Jackson creek, at or near its confluence with the Arroyo Seco, or it is its upper end, where, under the name of Buena Vista valley, it penetrates into the sierra. All depends, as the principal witness for the United States admits, on what line of hills be taken as the sierra of the diseño. Where the description in the grant is so general, and the delineation of the diseño so rude as in this case, it is perhaps not practicable to affirm with absolute certainty the exact limits of the tract intended to be granted. But the United States surveyor who has made the location, with ample opportunities to become as thoroughly acquainted with the natural features of the country as any of the witnesses who have expressed opinions as to the meaning of the diseño, has adopted the foothills or base of the sierra as the eastern boundary. My own personal examination of the tract, and comparison of its natural objects with the description in the grant and the representation on the diseño, have convinced me that the conclusion of the surveyor was correct. I think, therefore, that the official location and survey should be confirmed.

Case No. 16,045.

UNITED STATES v. PICO.

[Hoff. Dec. 65.]

District Court, N. D. California. May 20, 1862.

MEXICAN LAND GRANTS—EVIDENCE TO ESTABLISH.

[The only papers in relation to a claim consisted of a grant of June 6, 1846, and a certificate of approval by the departmental assembly on June 15, 1846. These papers were produced from the possession of the claimant, and the governor's signature thereto was different from that used by him on other documents of about the same date. The only papers produced from the archives was a communication signed by a deputy secretary of the assembly, informing the secretary of state that the grant was approved on July 15th. This communication was on a detached sheet, which could easily have been placed in the surveyor general's office by fraud. The journal of the assembly showed that the grant was not approved on the day mentioned in the communication. There was no evidence of occupation, or that the existence of the grant was known until after the conquest. *Held*, that the claim must be rejected.]

HOFFMAN, District Judge. The claim in this case was confirmed by this court [Case No. 11,129], but with much hesitation and grave suspicions as to its genuineness. On appeal to the supreme court that decree was reversed, and the cause remanded for further evidence. [22 How. (63 U. S.) 406.] It is apparent from the opinion of the court that the further evidence contemplated was either that derived from the archives, or secondary evidence from those records which the court has declared it will require. No such testimony has been given. The only additional evidence has been that of Pico. But he merely testifies to the genuineness of his signature, and that merely from the fact of seeing them on the documents, and not from any recollection of having made the grant. The only papers produced are the grants dated June 6, 1846, and a certificate of approval by the departmental assembly, dated June 15, 1846. Both of these are produced from the custody of the claimants. There is also produced a communication, signed "Botello, Deputy Secretary of the Assembly," addressed to "Moreno, Secretary of State," in which he informs the latter that the grant was, with two others, approved on the 15th July. With the exception of this communication, the archives contain no trace of the existence of this. There is no expediente; no petition or informes; no note of it "in the corresponding book"; no borrador of the title delivered to the party, nor any allusion to the grant in any document or record whatsoever. The communication

signed "Botello," is on a detached sheet of paper, which could readily have been placed among the numerous documents in the surveyor general's office at any time previous to 1858, when they were collected and bound up in books. In the case of U. S. v. Limantour [Case No. 15,601], it was shown that the introduction of a fraudulent expediente into the archives was by no means impracticable.

But there are objections to this document. (1) The handwriting evidently differs from that of Botello contemporaneous with its date. (2) It conflicts with the certificate of approval signed by Pio Pico. One states the approval to have been given on the 15th June, the other on the 15th July. (3) At the date given by Botello, the journals of the assembly show there was no session of that body. (4) That this could not have been a clerical error, by which July 15th was substituted for June 15th, is shown by the record of the proceedings of June 15th signed by Botello himself. The record shows that on the 16th June the assembly was in session; that it transacted various business; that no proceedings with reference to this grant were had; and that, "there being no other business, the assembly adjourned." It thus appears that not only is there no archive evidence whatsoever of the existence of this grant, but that those records afford positive proof that a part at least of the alleged proceedings with regard to it could not have been had. Under the rulings of the supreme court, this objection alone would be an insuperable obstacle to the confirmation of the claim. U. S. v. Luco, 23 How. [64 U. S.] 543; U. S. v. Castro, 24 How. [65 U. S.] 346. There are other objections which are equally fatal: (1) The signatures of Pico are in his later style, differing essentially from all the signatures, with two exceptions, which appear on the very numerous documents signed by him during his official career. (2) There seems to have been no possession or occupation of the land, nor any evidence that the existence of the grant was known or suspected until subsequently to the American occupation. Neither could, therefore, under the colonization laws, have received a grant for more than one additional league. The grant was made, if at all, in June, about a month previous to the capture of Monterey. It was made without informes, and apparently without taking any of the steps required by the colonization laws. It had never been acted on, up to the conquest of the country; nor, so far as appears, had the land been even visited by the grantee. Supposing the grant to be genuine, it was evidently not made in the just exercise of the governor's powers, or with any idea of carrying out the policy of the colonization laws. In the language of the supreme court: "Besides the suspicious character of the grant, it appears to be wholly destitute of merit." [22 How. (63 U. S.) 406.] The claim must be rejected.

Case No. 16,046.

UNITED STATES v. PICO et al.

[Hoff. Land Cas. 172.] [1]

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

MEXICAN LAND CLAIM.

This claim not contested by the United States.

[Claim of Maria Antonia Pico to the Rancho Punta del Año Nuevo embracing four leagues of land in Santa Cruz county. The board confirmed the claim, and the United States has appealed.]

William Blanding, U. S. Atty.

Stanly & King, for appellees.

HOFFMAN, District Judge. The claim in this case was confirmed by the board, and has been submitted to us without argument or observation, or the production of additional testimony. The grant is produced and proved, and the expediente is duly found in the archives of the former government. The occupation of the land by the grantee in 1840, two years before the title issued, is also shown; and it further appears that in 1842 another house was built by him, and that wheat, corn, beans, melons and potatoes were cultivated by him. There is nothing in the testimony to afford the slightest presumption of an abandonment of his grant by the grantee during the existence of the former government. The board, after an attentive examination of the grant and accompanying diseño, came to the conclusion that the intention of the governor was to grant by metes and bounds. The description of the boundaries is unusually precise, and there is no reason to suppose that the quantity of land included within them exceeds that mentioned in the grant. We think that the decision of the board should be affirmed and a decree of confirmation entered.

Case No. 16,047.

UNITED STATES v. PICO et al.

[Hoff. Op. 412.]

District Court, N. D. California. June 30, 1859.

MEXICAN LAND GRANTS—EVIDENCE TO ESTABLISH.

[An alleged grant of certain mission property in 1846 rejected, where the only evidence thereof was the original grant, together with a letter of the governor and a receipt for part of the purchase money, unsupported by any evidence whatever from the archives, or any evidence of assertion of title prior to the conquest, or of any knowledge of the existence of the grant by parties likely to know of it if it had in fact been made; there being also intrinsic and other evidence that the papers relied on were fabricated after the conquest.]

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

HOFFMAN, District Judge. The claim in this case was confirmed by the board, and it is submitted to this court on substantially the same evidence as that on which it was decided by the commissioners.[1] The original grant by Pio Pico, dated May 5, 1846, is produced, and its genuineness testified to by Pio Pico himself. The claimants have also produced an original communication from the minister of war and marine, dated March 10, 1846, to Pio Pico, which the latter alleges he received prior to making the grant in this case, and which contains, as he states, the authority under which he acted. There is also produced a receipt from Gov. Pico for $6,000, on account of the $12,000 for which the mission was sold; and one from Gen. Jose Castro for a like sum—the first dated May 15, 1846, the last July 28th of the same year. The claimants have also produced a document signed by Pio Pico, in which he recites an order from himself to the father president of the missions of the north, and dated May 5, 1846. In this order the governor informs the father that the government, in view of the urgent necessities of the nation, as communicated in the official note of the minister of war and marine of the 10th March, 1846, and pursuant to the decree of the departmental assembly of April 13, 1846, had sold the mission of San Jose, with all its lands, real and personal property, and other existing moveables, to Andres Pico and Juan B. Alvarado. The governor therefore directs the president to cause the said establishment to be delivered up without hindrance, reserving the parsonage house and ground pertaining to it for the use of the reverend father missionary. The claimants have also filed a certificate or statement made by Friar Jose Maria del Refugio Suares del Real, dated December 24, 1849, setting forth that Don Andres Pico had presented to him a deed of sale of the mission of San Jose, dated May 5, 1846, whereby the governor constituted the said Andres Pico and Juan B. Alvarado owners of the arable lands, and dwelling houses, recognized as belonging to the mission, which up to that time had been under his administration and tutorship; that in pursuance of said deed, as well as an order previously received from the governor to deliver said property to its owners, he went in person to the mission, and on the 22d November, then last past, made a formal and solemn delivery of the appurtenances of said establishment, except the church, cemetery, priest's house and adjoining huerta, to Don Andres Pico, who took possession, etc. There is also filed a petition addressed to Antonio Maria Pico, dated January 2, 1850, asking that the judicial possession of the lands, etc., ordered to be given, to which is attached the record of an act of judicial possession, made in pursuance of the petition, by H. C. Smith, alcalde, on the 18th, 19th, and 20th of February, 1850. The above, with certain agreements, mesne conveyances, etc., includes all the documentary evidence exhibited in the case on the part of the claimants.

It has frequently been remarked by this court that the only reliable evidence which can be offered in support of a grant is that furnished by documents found among the archives of the former government, and that afforded by showing an occupation, or at least a notorious assertion of title, before the acquisition of the country by the Americans. In the case at bar no one of the documents exhibited is found among the archives. The proofs of title rest, as has been seen, exclusively on the grantor deed of sale by Pio Pico, the genuineness of which is sworn to by that officer; and on two receipts, the authenticity of which is proved in a similar manner. The certificate of Padre Real is not only inadmissible in evidence as being nothing more than the unsworn statement in writing of a person not examined as a witness, but it is dated December 24, 1849, long after the treaty by which California was acquired, and about the time at which it is contended on the part of the United States the documents now produced were fabricated, and at which, as will hereafter be seen, the claim of the appellees was for the first time heard of.

The original order addressed to the father president of the missions is not produced. It is recited in a letter addressed to Andres Pico and Juan B. Alvarado by Gov. Pico, and dated May 5, 1846, the very day on which the grant purports to have been made. The grant itself contains at the foot the usual note or memorandum that a note of it has been taken in the corresponding book. No such note can be found. Among all the records, correspondence, and other papers in the archives, no reference or allusion to, nor any trace whatever of, this transaction appears. The order to the president of the missions was undoubtedly, if it was given, an official letter, a copy or borrador of which would have been preserved; and it is almost impossible that the draft of the letter to Andres Pico and Alvarado, in which that order is recited, would not also have been found among the archives. The sale of so considerable a property was an important transaction, which it is equally difficult to conceive to have occurred without some preliminary proceedings, traces of or allusions to which would exist among the official transactions of the former government; and the receipt by the government of so very considerable an amount as $12,000, $11,000 of which was in cash, would almost certainly have somewhere been evidenced by the records. The grant or deed of sale purports to convey to the vendees "the establishment or mission of San Jose, with all its lands, real

[1] The district attorney having been, before his appointment to office, of counsel for the claimants, the case was argued on the part of the United States by Mr. Hartman.

and personal property, and other existing moveables, according to the inventory made by the commission appointed by this government." No such inventory appears in this case. It ought, if ever made, to be found in the archives.

In the case of U. S. v. Cambuston [20 How. (61 U. S.) 64] the supreme court, after alluding to the entire absence in that case of any documentary evidence of title of record, or found among the archives, says: "We think, for the reasons above stated, that the case in the court below was too defective to have warranted a confirmation of the title to the claimant as it was unsupported by the evidence; and also for the further reason that, for aught that appears in the proofs, the alleged grant has never been recorded in the proper book, or, indeed, in any book of the Spanish records. This is expressly required by the regulations of November, 1828, and enjoined in the grant itself. The record should have been produced, or its nonproduction reasonably accounted for."

It is urged that in this case (which is claimed to have been a sale, and not a grant) the governor did not act under the colonization laws, but under some authority conferred on him by the departmental assembly, or by the circular of Tornel, minister of war and marine of the republic of Mexico. But the grant itself recites that it is made in conformity with the law of August, 1824, and the regulations of 1828; and the memorandum at the end states that a note has been taken of it in the corresponding book. The nonproduction of this book is not in this case accounted for, but it is known to the court that the book of "Tomas de Razon," as it is commonly called, for the period at which this grant was made, is not found in the archives. The absence of any note of the grant is not, therefore, of itself a suspicious circumstance; but the entire absence of any trace or allusion to the grant in any report, correspondence, order, or other document in the archives, is a circumstance which to any one acquainted with the official habits of the former government, is pregnant with suspicion. If this grant be deemed to have been made under the colonization laws, the case of U. S. v. Cambuston [supra] is a decisive authority for the rejection of the claim; and even if it be deemed not to have been made under those laws, the observations of the supreme court in the case referred to, clearly inculcate the principle that in all cases evidence of some kind from the archives should be rigorously exacted, or its absence reasonably accounted for. But the evidence of occupation or the assertion of title under the former government is equally unsatisfactory. The only testimony which even tends to show that Andres Pico and Alvarado ever asserted any title to the mission before the end of 1849, or beginning of 1850, is that of Antonio Maria Pico and Joaquin Castro.

The first of these witnesses swears that he gave to Andres Pico and Alvarado possession of a garden, but under what title he does not recollect. It was done (he says) under an order of the governor, which he believes is among the papers. But, in the first place, no such order is produced; and, secondly, this possession was given, according to Antonio Maria Pico, in 1844, two years before the date of the grant now relied on. Joaquin Castro swears that certain debts due by the mission were paid by Andres Pico and Alvarado. The payment of those debts was one of the duties imposed on the grantees in the grant itself. Unfortunately, however, it appears by Castro's own statement that the 900 fanegas of wheat which the mission owed to Jesus Vallejo were paid by Andres Pico in 1850, and that he was told by Antonio Maria Pico in 1850 or 1851 that one hundred dollars which the mission owed him had been paid. When, he does not state, nor does Antonio Maria Pico himself, though he was examined as a witness for the claimants.

But there is more decisive proof that no title to the mission could have been asserted by the claimants until long after the change of flags. In the letter of Pio Pico to his brother and Alvarado he recites the order which, as he says, he had on that day (May 5, 1846) given to the father president of the missions for the transfer of the property to the vendees. It has already been observed that the original of this order is not produced, nor is the office copy found among the archives. If it had been issued, it is impossible to suppose that the vendees would not at once have insisted on its execution. The buildings, orchards, etc., of the mission were valuable and productive; and yet during the whole period from the date of the sale and of the order to the father president (May 5, 1846) up to at least the end of 1849, the mission lands and buildings were suffered by the vendees to remain in the possession and under the control of Padre Real and of the father president. Adolfo Carrenos testifies that in October or November, 1847, he took possession of an orchard of the mission by order of the padre, and that he kept possession thereof until January, 1849, when he surrendered it to a Mr. Bolcoff, by direction of the same priest. During all this time he, the witness, divided the produce of the orchard with the padre according to agreement. The same witness also states that after Bolcoff had remained in possession some months he agreed to surrender the land in consideration of the sum of $1,000, to be paid him by the priest. He also testifies that he never knew of Andres Pico asserting a claim to the mission lands until 1850, when he was told by Padre Real that certain persons occupying rooms in the mission must have an understanding with Andres Pico, as he had a title to the whole mission. He also adds that if such a claim

had been asserted before 1850, he would probably have heard of it from the padre, with whom he was on terms of intimacy; and he states, on cross-examination, that previous to 1850 Padre Real rented some of the buildings, corrals, and portions of the lands to different persons, and that he (the witness) was employed by the padre to collect some of the rents. It is also shown on the part of the United States, by the record of a suit commenced by Padre Real against E. L. Beard, to recover possession of a portion of the land, that on the 17th July, 1849, Padre Real and the father president of the missions executed a lease of the mission lands to John B. Steinberger for the term of five years for the sum of $22,000. It was claimed by Padre Real in this suit that Beard entered under Steinberger. This Beard denied, but averred that he had entered on the premises as vacant public lands of the United States. The suit seems to have been prosecuted until November, 1850, when it was dismissed by consent; Beard having by that time acquired an interest under the alleged grant to Pico and Alvarado.

It would seem clear from these facts, not only that the alleged grantees for more than three years suffered Padre Real to deal with and use the property for his own benefit, without asserting either to him or his tenants their own title, but also that no order to deliver the possession to the vendees could have been issued by the governor to the father president on the 5th May, 1846. That he and Padre Real should, notwithstanding an official notification of the sale to Pico and Alvarado, and notwithstanding the positive order to deliver possession to them, have ventured to make a lease of the lands three years afterwards, is in the highest degree improbable. More especially, as by the lease it is expressly stipulated that the lessors should on no account be responsible in case the government of the United States or of the territory of California should annul the contract while no mention whatever is made of the far more probable contingency (if the facts averred by the claimants are true) that the real owners of the land might assert their title to it. I cannot but consider that if this lease was executed by Padre Real and the president of the missions, as alleged in the complaint of the former, we are justified in inferring that at that time they could not have heard of the sale of the mission to the present claimants; and that they could not have received three years before an order from the governor to surrender the possession—an inference strongly corroborated, as we have seen by the testimony of Carneros, and by the absence of all positive testimony as to the assertion of title by the claimants up to the end of 1849, except the statement of Antonio Maria Pico that he heard of the sale before 1848. Had this claim been asserted during the years 1846, 1847, 1848, and 1849, it is impossible that it should not have been heard of by some of the persons who occupied or desired to possess the buildings, orchards, gardens and fertile lands pertaining to the mission as well as the priest and the father president. But no such evidence, except the loose statement of Antonio Maria Pico, has been produced, and the court is authorized to assume that a fact so susceptible of proof, and which is not proved, does not exist. But if it be in a high degree improbable that the father president would, after being notified of the sale and ordered to deliver the possession, have made the lease referred to, it is still more improbable that the vendees, who had paid in cash so large a sum as $11,000, in current money, and obtained on the very day on which the sale was made an order for the immediate delivery of the possession, would, for three years and a half, have wholly neglected to avail themselves of the rights they had acquired; during all which time the padre continued in possession, and rented the land, buildings, etc., while their own title remained unasserted, and even unknown, so far as it appears, to any one but Antonio Maria Pico.

It thus appears, not only that the archives fail to furnish the slightest evidence in favor of this claim, but, that the absence of all allusion to or trace of its existence affords a strong presumption against its genuineness; and, secondly, that it is not only unsustained by any proof of the assertion of title prior to the conquest of the country, but its existence was unknown to parties who, if the papers are not antedated, could not have been ignorant of it, and it remained unasserted under circumstances, and for a length of time, which render the silence and neglect of the alleged grantees almost incredible. But there are other circumstances which tend to strengthen our suspicions as to the genuineness of this title. The receipt of $6,000, dated May 15, 1846, and the letter of Pio Pico in which he recites his order to the father president, dated May 5, 1846, are signed by Pio Pico in the mode now used by him, as it appears by the signature attached to the deposition. A slight examination of the archives shows that this mode of signature is unmistakeably different in the shape of the letter "P," which is the initial letter of both his names, from that uniformly adopted by him at the period when this grant purports to have been issued. On the very day when the documents we are considering are dated,—i. e. on the 5th and 15th May, 1846,—his signature appears on the departmental assembly records and other documents of undoubted authenticity, exhibiting its characteristic peculiarities and wholly dissimilar in the form of the letter referred to, to that appended to the document in this case. Nor is this all. The signature to the grant or deed of sale has evidently been altered. It is obvious on inspection that both the "P's" were

originally written in the form used by him at the date of the grant, but those letters have since been altered so as to make them conform in shape to the signatures on the two other documents bearing his signature exhibited by the claimants.

This alteration is wholly unexplained. It suggests the suspicion that the deed of sale may have been made perhaps before the flight of Pico from California in 1846, when he would naturally have adopted the mode of signature then used by him; but the parties, perceiving that such a sale would be of no validity unless the consideration had been paid, and unless proved by some other evidence than the bare production of the title itself, have more recently, probably in 1849 or 1850, procured the ex-governor to sign the receipt and the letter ordering the mission to be delivered to the vendees. In signing these last, Pio Pico has inadvertently used his later mode of signature; and the parties, not willing that the papers should show him to have signed his name in two different ways on the same day, have altered his first signature to correspond with his last. Whatever probability there may be in this conjecture, the fact remains that the first signature has obviously been altered; and that the two others are similar to that attached to his deposition, but different from that officially used by him not only before and after the time at which the documents purport to have been signed, but on the very days on which they are dated.

Secondly. In the case of Larkin v. U. S. [Case No. 8,091], this court had occasion to review at length the legislation and policy of the Mexican government with regard to the missions of California. It was in that case considered that the order of the supreme government signed "Montesdioca," and dated November 14, 1845, which directed Pio Pico to suspend all proceedings relative to the sale of the property pertaining to the missions, applied to the buildings, orchards, gardens and other improved property which had been created by the industry of the missionaries and the Indians under their charge, but that it probably was not intended to deprive the governor of his general power of granting, under the colonization laws, the extensive tracts of vacant and entirely unimproved land which may at one time have pertained to those establishments.

The deed of sale in the case at bar includes not only the lands of the mission, but "all its property, real and personal, and other existing moveables, according to an inventory, etc., excepting only the priest's house, consisting of six rooms, with the ground thereto belonging." This order of Montesdioca was presented to the departmental assembly on the 15th April, 1846, two days after the alleged session of the 13th April, at which the grant in this case recites the power to sell the mission was given by that body to the governor. The sale was thus in open and flagrant violation of the peremptory order the governor had received less than three weeks before. That he should have so acted seems highly improbable.

Thirdly. The decree or resolution of the assembly to which the governor refers in his grant as having been passed on the 13th April, 1846, is not found among the proceedings of that body. On the contrary, it appears from their journals that the assembly met on the 30th March, and again on the 15th April; but there appears to have been no session during the interval. This mistake of Governor Pico might well have been made if the grant had beeen written after the lapse of a considerable time, and when he had no longer access to the archives. It could hardly have occurred within about three weeks of the supposed session, and when the governor himself had, two days after the supposed session, communicated to the assembly the order he had received to suspend all further proceedings relative to the sale of the missions.

Fourthly. We have seen that the only sources of power to which the governor refers in the grant are the decree of the assembly of April 13th, 1846, and the colonization law of 1824 and the regulations of 1828. In his letter to the president of the missions, dated on the same day, as also in his deposition, he states that he also derived his power from a communication of the minister of war and marine, dated March 10th, 1856. We have also seen that there was no decree of the departmental assembly of the 13th of April, 1846, nor was there any session of that body on that day.

In the case of Larkin v. U. S., before referred to, it was observed by this court that the communication from the minister of war and marine "appears to be a circular addressed to the commandant-general of California, amongst other functionaries. All of it except the address is marked as a quotation, and its object seems to have been to stimulate the public authorities to a vigorous defense of the national territory and the maintenance of the national honor. The only clause by which any authority to sell the missions can be deemed to have been conferred on the governor is that in which it is stated that the supreme government expects from your loyalty and patriotism that you will dispose such measures as you may judge most suitable for the defense of the department, for which object ample power is granted to you and Senor the governor. It is evident that the power here conferred was given to the commandant-general as amply as to the governor. It can hardly be pretended that under it the commandant-general could have sold the vineyards and orchards of the missions to whomsoever and at whatsoever price he chose. It appears to me that the object of this circular was

merely to authorize and direct the general commanding to take the proper military measures for the defense of the country, and that, had it been intended to revoke or modify the order signed 'Montesdioca,' prohibiting the sale of the mission property, and which was issued only three months previously, that object would have been unequivocally expressed, and the governor directed to make sales of that property to procure resources for the war. The board of commissioners were unanimously of the opinion that this circular conferred no power to make the sale at bar, and in that opinion I concur." But supposing that Governor Pico considered that this circular did confer upon him the power to sell the missions, it is a little remarkable that he did not refer to it in the grant itself when alluding to the decree of the assembly of the 13th April, and especially when he is at pains to set forth the circular in his letter to the father president, dated on the same day as the grant. But it is still more surprising that the circular should at the date of that letter (May 5th) been received by him. The circular is dated at Mexico on the 10th March, 1846. The communication of Castillo Lanzas, addressed to the local authorities, and advising them of the approach of war, is dated on the 13th March, 1846. It does not appear to have reached California until about July 4th of the same year. The Montesdioca document, so often referred to, is dated November 14, 1845. It seems not to have been received until about April 15, 1846. It is therefore a remarkable circumstance that the Tornel circular, dated March 10th, should have reached California in the beginning of May, and been acted on by the governor on the 5th May; while another circular, equally important, and dated only three days afterwards, did not reach the government until two months subsequently. If to these considerations we add the fact that Moreno, the secretary, has not been called as a witness, although the grant is signed by him and is in his handwriting, and the circumstance that the amount alleged to have been paid in cash, viz., $11,000, is a sum which few Californians would at that time have been able to command or willing to devote to such a purchase, we are justified in saying that all the circumstances connected with this claim confirm the suspicions which the entire absence of evidence from the archives, or of proof of occupation or assertion of title prior to 1849, unavoidably excite.

I have not thought it fit to put the decision of this case on the ground of want of power in the governor to make the sale; though, as already decided by this court, I think that his power to grant mission property was confined to granting the vacant and unoccupied land adjacent to those establishments, and did not extend to the buildings, orchards, vineyards, etc., which the order of Montesdioca had expressly prohibited him from selling. I think, for the reasons above given, that in the language of the supreme court already quoted, "the case is too defective to warrant a confirmation of the title to the defendant, as it is unsupported by the evidence." The claim must therefore be rejected.

Case No. 16,048.

UNITED STATES v. PICO.

[1 Sawy. 347.] [1]

District Court, D. California. Sept. 21, 1870.

MEXICAN LAND GRANTS—EFFECT OF LONG POSSESSION—PROVISIONAL OCCUPATION.

[Where the papers relating to a grant were produced from the archives and were regular in all respects, including the approval of the grant by the departmental assembly, but there was a doubt as to its validity, arising from the fact that the grantee himself was acting governor, and made out the papers to himself, according to a petition presented to a previous governor and a provisional possession conferred long before, *held*, that the fact of such provisional occupation, which lasted some 16 years to the time of making the grant, was sufficient to entitle the claimant to a confirmation.]

L. D. Latimer, U. S. Dist. Atty.

Williams & Thornton, for claimant.

HOFFMAN, District Judge. It appears in this case that Pio Pico, on the twenty-second day of March, 1831, petitioned Governor Victoria for a provisional grant of the rancho of "Jamul." On the twentieth April, the governor granted to the petitioner the right provisionally to occupy one sitio on the place called "Jamul," for the purpose of cultivating the lands, keeping his stock thereon, etc., etc.

On the nineteenth July, Santiago Arguello, military commander of San Diego, and in charge of the civil jurisdiction of the same, in conformity with the governor's decree, put Pio Pico in provisional possession of the land, assigning to him boundaries, which are described in his report. Pico thereupon built a house upon the rancho, and occupied it with his family and servants until 1838, when he was driven off by an incursion of the Indians, and his house burnt.

After this time the rancho appears to have been in charge of Juan Foster, his brother-in-law. On Dec. 23, 1845, Pio Pico, who was then, as first vocal of the departmental assembly, acting governor, presented a petition, setting out the provisional grant previously obtained by himself, and praying a title for the land. On this petition he issued a regular title to himself, but immediately transmitted the expediente to the departmental assembly, by whom it was referred to the appropriate committee, and on the favorable report of the latter, was finally approved.

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

In 1853, Gen. Burton, late of the United States army, acquired Pio Pico's title under a sale made, it is said, without authority, by Juan Foster. Pio Pico has since quit-claimed to the widow and heirs of Gen. Burton his whole interest in the premises.

The documentary evidence on which the claim rests, is of unquestioned authenticity. The petition of Pio Pico, the governor's concession, and the record of the possession given by Arguello, are found in the archives.

Those records also contain the expediente of the grant by Pio Pico to himself, with the approval of the departmental assembly. The grant is also noted in Hartnell's continuation of Jimeno's index, and in the book known as "Toma de Razon."

There appears no room for doubt that, under the provisional grant, Pio Pico took possession, built upon, and occupied the land for about seven years, when he was driven off by the Indians, and that he continued to claim it, and exercise control over it by his brother-in-law up to the time when it was sold by Foster in 1851. In 1853, Gen. Burton acquired the title, and his family, and that of his wife, have continued in the possession and enjoyment of the land up to the present time.

I do not deem it material to consider in the abstract, whether a governor of California could, under the colonization laws, make a grant to himself, or what validity would in all cases be imparted to such a grant by the approval of the departmental assembly.

It may well be, that such a grant, even though confirmed, if made by Pio Pico in the last days of his power, and under the expectation of the impending conquest of the country—if preceded by no preliminary concession, occupation, or settlement, or other circumstance which would create an equity in the grantee's favor, and if followed by no fulfillment during the existence of the former government of those conditions, which under their system constituted the consideration for the grant, should be treated as invalid by the United States. But in this case, the circumstances are quite different. The provisional grant gave to Pio Pico an inchoate or imperfect right. It authorized him to occupy and improve the land under a just expectation, if not an implied promise that the full title should be given him. When under this authority, and with this expectation, he made his home upon the land, he acquired rights, which, so far as I am informed, were uniformly respected by the former government. No other person would have been able to obtain a grant for the land, and his own application for a full title would have been, unless political or personal hostility on the part of the governor prevented, at once acceded to.

The action of the departmental assembly, whether or not it be regarded as giving absolute validity to his own grant to himself, is, at least, a recognition of his equitable claims and of his right to be secured in his ancient possession.

In the case of U. S. v. Alviso [23 How. (64 U. S.) 318] the supreme court recognized and enforced the equities growing out of the possession of fourteen years, begun under a provisional permission to occupy while the expediente was being formed.

In the case at bar the possession had continued for more than sixteen years up to the time of the change of flags, since that time it has continued uninterrupted and undisputed up to the present moment, a period from its commencement of nearly forty years. I am clearly of opinion that the manifest justice of this claim, as well as the principles established by the supreme court, demands its confirmation.

A decree to that effect in favor of the widow and heirs of the late Gen. Burton, will accordingly be entered.

UNITED STATES (PICO v.). See Cases Nos. 11,127–11,130.

UNITED STATES v. PIERCE. See Case No. 16,016.

Case No. 16,049.

UNITED STATES v. PIGNEL.

[1 Cranch, C. C. 310.] [1]

Circuit Court, District of Columbia. June Term, 1806.

PEACE OFFICER—WARRANT.

It is not necessary that a peace-officer should have a warrant to suppress an affray.

[Cited in U. S. v. Long, Case No. 15,625.]

Presentment, for opposing Clement Venable, a constable, in the execution of his duty; it having been proved that Venable had a warrant against the defendant, [Richard Pignel.]

Mr. Law, for defendant, moved that the warrant should be produced, and to instruct the jury to that effect.

Mr. Jones, contra. It is not necessary to produce the warrant. Venable took the man in an affray, and had a right to do so as a peace-officer.

THE COURT (nem. con.) instructed the jury that if they should be of opinion, from the evidence, that Venable, the constable, was in the general execution of his office as a conservator of the peace, and as such endeavoring to suppress the affray, then it is not necessary to produce the warrant spoken of by the witness. But if the jury should be of opinion that he was only endeavoring to execute the warrant, then the warrant must be produced, or its non-production satisfactorily accounted for.

UNITED STATES v. PIKE. See Case No. 16,429.

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

Case No. 16,050.

UNITED STATES v. PINGREE.

[1 Spr. 339;[1] 19 Law Rep. 667.]

District Court, D. Massachusetts. Feb., 1857.[2]

CUSTOMS DUTIES—TRANSPORTATION BONDS—STATUTORY REQUIREMENTS.

1. An instrument not in the form of a bond with a penal sum and condition, but containing the requirements of the statute of 1854, c. 30 [10 Stat. 270], and the obligors not being prejudiced by the form, was *held* a sufficient bond under that statute.

2. The "additional duty of one hundred per cent." secured by transportation bonds, under Act 1854, c. 30, § 6, is one hundred per cent. on the original duty, and not on the invoice value of the goods.

3. The transportation bond under that section, properly includes the original duty, as well as the additional duty, the bond first given for the original duty being cancelled.

[Cited in brief in U. S. v. Cutajar, 59 Fed. 1001.]

Messrs. Pingree & Co. imported certain bags of castana nuts, and placed them in the bonded warehouse in Salem, giving bonds for the import duties, which were $105. The invoice value of the nuts was $350. Being desirous of removing them to Boston for sale, in bond, they executed, with sureties, the instrument required of them at the Salem custom house, which is called a transportation bond. It was not in the usual form of a bond, with a condition and a penal sum, but was a covenant, under seal, that the goods should be transported to Boston and there re-warehoused within thirty days, and failing that, that the defendants would pay the import duty of $105, and a further sum of $350 as "an additional duty," under the act of 1854 (chapter 30). By a misapprehension on the part of the merchants who bought the nuts of the defendants, and without any intent to avoid re-warehousing, the nuts were not re-warehoused within the time. The government claimed a verdict for $455, which was so rendered, under pro forma instructions from the court. The defendants then moved in arrest of judgment.

B. F. Hallett, U. S. Dist. Atty.

R. H. Dana, Jr., for defendants.

SPRAGUE, District Judge. Several grounds are taken in support of this motion. The first is, that the instrument in suit is not "a bond," within the meaning of the statute. It is not, to be sure, in the form of a bond with a penal sum and condition, but if its requirements are those of the statute, and no harm is done to the defendants by its form, and I cannot see that they are prejudiced by the form, I think they must be held by the instrument they have executed.

The second and chief ground is, that the bond is in too large an amount. This depends upon the construction to be given to the act of 1854 (chapter 30). And there is a singular difficulty in construing this statute. The act requires the collector to take a bond for transportation and re-warehousing; and then provides that if the goods are not duly re-warehoused, the collector shall levy and collect "an additional duty of one hundred per cent.," which additional duty shall be secured by said bond. The district attorney contends that this clause means an additional duty of one hundred per cent. on the invoice value of the goods. The bond was framed, the declaration drawn, and the verdict rendered on this theory. The defendant's counsel contends that it means one hundred per cent. on the original duty, or, in other words, a second duty of the same amount as the first.

Taking this statute alone, we find no antecedent to which to refer this language, except the import duty. The statute makes no allusion to invoice or value, but only to import duty. The percentage must be calculated upon something. That something must be the original duty, if we confine our view to this act, for the act presents no other subject-matter than the duty.

But on referring to the general tariff act, we find that all duties are ad valorem, that is, a percentage on the value of the goods. The original duty, then, being thirty per cent. ad valorem, it is argued that the "additional duty of one hundred per cent." must be one hundred per cent. ad valorem.

But, in reply, it is said that the act of 1854 is only supplementary to the act of 1846, c. 84 [9 Stat. 53], and that it must be construed in subordination to that act. The act of 1846 establishes the warehouse system. It allows of transportation from one warehouse to another, in bond; and provides that when goods are taken out of warehouse for transportation, a transportation bond shall be given in "double the duties." Under this act, if the goods were not re-warehoused, the utmost the government could recover was "double the duties," and as the bond could be chancered, the court could direct a sum to be paid less than the penalty.

I have made an examination into the regulations of the treasury department, and find the construction of the warehouse acts, and the practice under them prior to the act of 1854, to have been thus.—When the goods were originally warehoused, a bond was given in double the duties, conditioned to be void, if the duties were paid, or if the goods were withdrawn according to law. When goods were withdrawn for transportation, under bond, the condition of the original bond was considered as fulfilled, and it was cancelled. The goods being delivered to the owner, the only security which the government has for the original duties is the transportation bond; and this bond, under the act of 1846, was in a penal sum equal to double the duties. If the goods were duly re-warehoused, the transportation bond was cancelled,

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [Reversed by circuit court; case unreported.]

and a new warehouse bond given in the same form as the original.

But it is said that, under the act of 1846, goods were frequently taken out of warehouse, as for transportation, on this bond, and never, in fact, re-warehoused, but put into the market, and the government officers collected only the original duty, the bond being treated as merely a new security for the duty. In this way the importer evaded the payment of cash duties, and obtained a credit, until his bond was payable and demanded. This may serve to explain the peremptory requirement in the act of 1854, that the additional duty "shall be levied and collected." If the goods are not re-warehoused, the original duty and the additional duty are both due, and must both be paid. The penal sum of the bond may be whatever is usual, but the whole additional duty must be collected, whatever may be the grounds for equitable relief, from accident, mistake, or otherwise.

I am satisfied that the practice of including the original, as well as the additional, duty in the transportation bond is authorized by the statute, the original bond being cancelled. This bond, therefore, properly secured the duty of $105. But as to the mode of calculating the "additional duty of one hundred per cent.," I am of opinion, after careful consideration, that it ought to be construed as one hundred per cent. on the original duty. If the other interpretation is put upon it, the owner, for a mere failure to re-warehouse within the time, perhaps through accident, mistake, or the fraud of others, must pay the duties, and also a sum equal to the whole value of his goods. The collector is obliged to collect the entire amount. No court can chancer the bond. And the case is not within the provisions authorizing the secretary of the treasury to remit the whole or part of a penalty upon a certificate. It can hardly be supposed that congress intended such a result. Taking, therefore, this act in connection with the act of 1846, and considering the mischief to be remedied, I am of opinion that it was intended to require only a second duty of like amount with the first.

It is argued, that the rest of the section which follows the requirement of the "additional duty," providing that the collector may, instead of the "additional duty," exact a forfeiture of the goods, shows that the duty must have been equal to the value of the goods. But the additional duty is absolute. The forfeiture is discretionary, and is accompanied by a power of remission. This, I think, shows that they were not considered by congress as equal to each other. The forfeiture is the greater penalty, to be inflicted in whole or in part, in cases justifying or requiring it. The additional duty is a lesser penalty and made absolute in all cases.

The bond having been given and the verdict rendered for a larger sum than the statute authorizes judgment must be arrested.

This decision was reversed upon appeal to the circuit court, May 7, 1857 [case unreported.]

Case No. 16,051.

UNITED STATES v. PITMAN.

[1 Spr. 196;[1] 15 Law Rep. 36.]

District Court, D. Massachusetts. March Term, 1852.

CRIMINAL JURISDICTION OF FEDERAL COURTS—PLUNDERING OF VESSEL.

1. The courts of the United States have jurisdiction over the offence of plundering, or stealing, property from, or belonging to a vessel, although she may be lying upon the shore; and even if the property has been plundered, after it has been separated from the vessel and thrown upon the shore.

2. Construction of the words "plunder or steal," in the "Crimes Act" of 1825, c. 65, § 9 [4 Stat. 116].

[Cited in U. S. v. Stone, 8 Fed. 250.]

[3. "Plunder," as used in this section, is a word of very broad and general description, including the criminal taking of the goods of another by open force, or by secret fraud and furtively, from a vessel in distress, etc.; and it also includes an embezzlement by the master and others.]

The prisoner, master of the ship Sterling, of Boston, was indicted, jointly with Samuel N. Dixey, master of the bark Missouri, of New York, and also separately, upon the 9th section of the statute of 1825, c. 65, commonly called the "Crimes Act." 4 Stat. 116. The statute provides, "that if any person or persons, shall plunder, steal, or destroy any money, goods, merchandize, or other effects, from, or belonging to any ship, or vessel, or boat, or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place, * * * every person so offending, shall be deemed guilty of felony," &c. To the indictment, Dixey pleaded guilty, and Pitman, having put himself upon trial, was found guilty by the verdict of the jury. Motion for a new trial.

George Lunt, U. S. Dist. Atty.

R. Choate and Cyrus Cummings, for defendant.

SPRAGUE, District Judge.—The various points made for the prisoner, in this case, upon his motion for a new trial, resolve themselves into two. One is an objection to the jurisdiction; the other, that the verdict ought to be set aside, as against the evidence, and the weight of evidence. The defendant was tried upon three indictments, which, by agreement, were consolidated. These were so framed as to cover every contingency contemplated by the statute. Under the decision in U. S. v. Coombs, 12 Pet. [37 U. S.] 72, if the evidence in this case had shown the property plundered to have been separated from the vessel, and taken upon the shore, the indictment would still have been quite sufficient, and the jurisdiction would

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

have been sustained, under the power of congress to regulate commerce. The evidence submitted to the jury was, that the vessel missed stays, and went upon the beach, stern first. There can be no doubt that she was stranded when she touched the shore, nor any doubt that she was then within the jurisdiction of the United States. If afterwards she had gone high and dry, she would still have been stranded and wrecked, within the meaning of the statute. She was upon a beach, or shore, of the island of Sumatra, and upon an arm, or inlet of the sea, but still upon the sea.

The money was, in fact, taken on the sea; it was taken from the wrecked vessel into a boat, to be transported to the Sterling, and thus, when plundered, was actually on the sea, and so, unquestionably, within the admiralty and maritime jurisdiction.

The other point raised is, that the verdict is against the weight of evidence, because the testimony did not sufficiently show that the money was plundered. A suggestion is made that the money was taken from the wreck, whereas, the averment of the indictment is, that the money was "belonging to the vessel." The statute is in the alternative. Its expression is, "from, or belonging to;" and it is evident that money, so taken from the wreck, was belonging to it. The indictment alleges, that this money the defendant did "plunder, steal, take, and carry away." As the statute makes it an offence to plunder or steal, if the evidence prove either of these alternatives, it is sufficient.

It is suggested, that the word "steal," involves the crime of larceny, and the 6th section of the statute is referred to in support of this view. But the 9th section has no reference to the 6th. The language of the statute is, "plunder or steal." Now, as to the word "plunder," I would remark, that no instructions were asked, as to the meaning of this word, nor was any argument made by counsel upon this point. It was left to the jury, therefore, to determine whether plundering was made out. The word is, in fact, used in this section in its popular sense, in such a sense as would be understood by seamen, for instance, and as it would be used and understood in ordinary conversation. The jury found no difficulty in understanding it. It is contended by counsel, that "to plunder," means to take by force. But although this is undoubtedly one sense of the word, it by no means expresses its full meaning. The various lexicographers, who have been quoted at the bar, inform us that it means as well, taking by fraud. And so in the quotation made from the Scriptures, by the district attorney, where the words "to spoil," ("To spoil the Egyptians." Exodus, xii. 35, 36,) which the lexicographers give as one of the original synonyms of "plunder," were applied to a taking of property, of which the possession was originally obtained by consent. But it does not rest here. So long ago as the time of Judge Peters, it was practically adjudged by him, that plundering was equivalent to embezzlement. Mariners v. The Kensington [Case No. 9,085]. And further, it will be found, by reference to the shipping articles used in England and this country, that the word "plunderage," is used in them, in a manner to imply, not a forcible taking, but a fraudulent taking, in fact, an embezzlement. And these words, "to plunder," are of very general meaning. They embrace robbery and fraudulent taking. A vessel may properly be said to be plundered, not only if openly attacked and robbed, but if property be taken from her furtively, in the night time, or after she has been abandoned by the crew. And I cannot doubt, that within the true meaning of this word, the evidence not only warranted, but required the verdict. The motion for a new trial is accordingly overruled.

Case No. 16,052.

UNITED STATES v. The PITT.

[2 Wheeler, Crim. Cas. 602.]

District Court, D. Delaware. 1818.

NAVIGATION LAWS—FORFEITURES FOR VIOLATION —STIPULATION BONDS.

[Vessels and cargoes libeled for forfeiture under the navigation act of April 18, 1818 (3 Stat. 432), which excludes from our ports all British vessels arriving from any colony which is closed by the British navigation laws to American vessels, may be delivered to the claimants upon a stipulation bond for their appraised value, as in other cases in admiralty, there being nothing in the statute indicating an intent to alter the practice of the courts in this respect.]

[These were libels filed respectively against the British sloop Pitt, her tackle, etc., and against the goods, wares, and merchandise laden on board of her, alleging a violation of the navigation act of April 18, 1818, and praying condemnation of both vessel and cargo.]

The preliminary question of the right of the claimants to a delivery of the vessel and cargo on stipulated bonds, was argued before FISHER, District Judge, by Mr. Read, Dist. Atty., on the part of the United States, and by Mr. Rodney, on the part of the claimants.

As the judge briefly recites the arguments of counsel in the opinion here given, they are omitted in their proper place.

FISHER, District Judge. The case now before this court arises on two libels filed on the part of the United States against the sloop Pitt (a British bottom), her tackle, apparel, and furniture; and also against her cargo, consisting of 46,000 lbs. of cocoa, a small number of raw hides, and seventy sticks or pieces of fustic. These libels are instituted upon an act of congress of the 18th of April last, entitled "An act concerning navigation." The act was passed with

a view to exclude from the country, after the 30th of September last, all vessels owned by British subjects arriving from a colony which, by the British navigation laws, is closed against vessels owned by citizens of the United States. In case of its violation, the act inflicts a forfeiture of vessel and cargo. In these cases, claims have been put in by Messers. Lewis, Haven and Co., merchants of Philadelphia, the consignees of the sloop and cargo against which the prosecutions are instituted. A preliminary question, of great importance, is submitted to the decision of this court, on a motion made by the claimants' counsel, praying an order for the delivery of the vessel and cargo, on bonds for their apprised value. To me it is a subject of regret that this question has not arisen in some other district, and been decided by a judge, to whose opinion the utmost deference would have been paid. As, however, this has not occurred, I must tread the unbeaten path, and dispose of the question to the best of my ability and judgment.

It is contended, on the part of the United States, that if the property in the present instance be delivered, the spirit of the law, which goes to exclude British bottoms arriving from prohibited ports, will be effectually defeated, that the defective apprisement of the property will be an encouragement to vessels of this description to enter our ports, and that thus the navigation act will be set at defiance, and become a dead letter; that if the property be perishable, which is admitted in the present case, a sale of it ought to be ordered by this court, and the proceeds of such sale should be retained in court in usum jus habentis; that the cases of delivery heretofore allowed by the practice of this court, were between the United States and their revenue officers, and our own citizens, and are distinguishable from the prosecutions which may arise under the navigation act, framed as it is, to shut our ports effectually against those British colonies which our vessels are not permitted to enter, by the laws of trade of the British government.

The argument on the part of the claimants is that it would be against equity to enforce a sale of property, which may have arrived innocently in our ports; that such a course would be presuming an intention to violate our law, when in fact no such intention had actually existed, that the practice of this court has heretofore been in accordance with the claimants' motion for a delivery of the property, and in cases, too, of goods prohibited by our restrictive laws, and not dutiable under any statute of congress; that the goods in the present case are dutiable provided they do not arrive from ports prohibited to our citizens by the ordinary laws of navigation of the British government; and that the fourth section of the act, on which the present libels are founded, recognizes the provisions and proceedings of the revenue laws of the United States, from the inception to the close of the prosecutions, which may be instituted under it.

In the case under consideration we are exercising the powers of a court of admiralty on the instance side of it, which generally, and, perhaps, always, proceeds in rem. We are now in a course of proceeding against a thing that is prohibited from entering our ports, by our navigation act. The confiscation or restoration of this rem or thing, will eventually be the subject of our consideration and decree, when the case shall be heard upon its merits. The question at present, therefore, is, shall we receive in court a substitute for this thing, or shall we retain and order it for sale, for the use of the party, in whom the right may ultimately be decided? It was the practice of this court, and of all the district courts of the United States, during the late war, to deliver vessels and cargoes on stipulation bonds, or on the claimant giving what is called in the books upon admiralty practice, a fide jussory caution. The Delaware district led the way to this practice, by the introductory decree in the case of U. S. v. The Good-Friends, Stephen Girard, claimant [Case No. 15,227]. The decree in that case became the law of the country (in prosecutions under the restrictive laws) by its adoption in every district of the Union. There was nothing to be found in our restrictive laws, either favoring or disallowing such a course; but it was viewed as being in accordance with the admiralty practice of England, on the instance, and very frequently on the prize side of that court. This practice was there adopted, as far back as the 11th of April, 1780, as appears from Marr. Forms, p. 5. See a decree for delivery on bond, in same authority, pages 221–223. How much longer the delivery of vessels and cargoes on bond had been adopted by the English admiralty, I have not now the means of ascertaining, since the first order of the kind, within my research, is the one first above cited. But I was of opinion, in the case of U. S. v. The Good-Friends [supra], and I still retain the same opinion, that that part of the 89th section of the collection law [1 Stat. 695], relating to delivery on bond, was framed with a view to what had been understood to be the usual course of admiralty practice. I could discover nothing in the cases commonly called the Amelia Island Cases, or in any prosecution arising under the restrictive laws, which ought to distinguish them from those of ordinary seizure and prosecution under the revenue laws of this country. It was under this conviction that this court formed its decree for delivery on bond in the case of The Good-Friends. The court was strengthened in its decision of that case, by the authority of the case of Jennings v. Carson, 4 Cranch [8 U. S.] 23. In that case, Chief Justice Marshall, in speaking of the

constitution and character of a court of admiralty, remarks as follows: "The proceedings of that court are in rem, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and claimant are both actors. They both demand from the court the thing in contest. It would be repugnant to the principles of justice, and to the practice of courts, to leave the thing in possession of either of the parties, without security, while the contest is depending." Does the navigation act contain any provision by which the practice of the courts should be remodelled, or in any wise altered, in relation to delivery of vessels and their cargoes on stipulated bonds? The spirit of the act is, no doubt, as has been contended, to exclude British bottoms from our ports, in case such bottoms came from colonies interdicted to the citizens of this country. But how will the spirit of this act be infringed by this court pursuing a practice, which has received the sanction of every district in the union, and which practice congress has not modified or abolished, by any provision of the navigation act? Had a new course been prescribed, this court would have considered itself bound to conform to legislative direction, and to refuse the application now made, though founded on a practice adopted upon much and able discussion, and after mature reflection. The only argument attempted to be given why the spirit of the act will be eluded by a delivery on bond is that defective appraisements will be made, and that they will operate as so many encouragements to the introduction of future vessels, in violation of the act. To this argument I respectfully reply that if defective or improper appraisements should be made, this court will be ever ready to afford that redress which is amply within its power, namely, by setting aside the appraisements, and appointing new appraisers as often as corruption or misconduct may have exhibited an inadequate estimate of the property. A vigilance of this kind will always secure an ample substitute for the thing proceeded against, which will remain within the power of the court, to respond to the United States, for the breach of their statute, made by the lawless intrusion of a vessel of a prohibited character. But will it be equitable to order the sale of a vessel and cargo, when possibly she might have entered our waters without any intention of violating the navigation act? Might not a sale operate as a premature penalty on an innocent person, and a decree of restoration remit to him the scanty proceeds of a hurried sale of his property? While in the case of a condemnation, the bonds will afford to the prosecution ample amends for the violation of a public and beneficial law.

Lastly, this court is of opinion, that the fourth section of the navigation act, recognizing, as it does, the course of proceeding prescribed by the revenue laws, in terms at once broad and comprehensive, (and inclusively, too, from the commencement to the close of the prosecution) impliedly, at least, adopts the provisions of the 89th section of the collection laws in relation to the delivery on appraisement and bond, and as holding nothing restrictive of any practice of the judiciary heretofore existing on the subject of delivery on bonds, is discoverable in the navigation act, the inference is a fair one that no alteration of such practice was in the contemplation of congress when the act was passed.

The decree of this court therefore is that the sloop Pitt, her [illegible] apparel, and furniture, together with her cargo, be delivered to the claimants, on their securing duties payable by law, entering into bonds to respond the appraised value, &c. &c.

Case No. 16,053.

UNITED STATES v. PITTMAN.

[3 Cranch, C. C. 289.] [1]

Circuit Court, District of Columbia. April Term; 1828.

CRIMINAL LAW—ARRAIGNMENT.

A prisoner arraigned for felony is to be placed in the criminal box, or dock, at the time of arraignment, but need not hold up his hand when called, if he admits himself to be the person indicted.

[Followed in U. S. v. Pittis, Case No. 16,038.]

Indictment for shooting John Corse, with intent to disfigure, maim, and kill him. The prisoner requested that he might be permitted to plead without going into the criminal dock, in which prisoners usually stand when arraigned, and which is set apart for that purpose. The attorney for the United States did not assent to it.

Mr. Neale, for the prisoner, cited Burr's Case, [Case No. 2,186], in which the arraignment was dispensed with.

THE COURT (nem. con.) said, that according to the practice in this court, and of other courts of criminal jurisdiction, for the purpose of preserving order and regularity, a certain place in court is assigned in which persons are to be placed by the marshal, to be arraigned. The record states that he is brought to the bar in the custody of the marshal, and the court think proper to adhere to the practice.

The prisoner then went into the prisoner's box. THE COURT told him that if he acknowledged himself to be the person indicted, he need not hold up his hand. He was then arraigned, and pleaded not guilty.

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

Case No. 16,054.

UNITED STATES v. The PLANTER.

[Newb. 262.] [1]

District Court, D. Missouri. March, 1852.

PROSECUTIONS FOR PENALTIES—INFORMERS—LIABILITY FOR COSTS—SHIPPING—ENROLLMENT AND LICENSE.

1. The eighth section of the act of 28th of February, 1799 [1 Stat. 626], in relation to prosecutions upon a penal statute, by an informer, contemplates an action in the name of the informer alone, as well as in the name of the United States, to the use, in whole or in part, of an informer.

2. If the informer, for whose use the suit is prosecuted, in whole or in part, is not an officer of the United States, the United States cannot be liable for costs in the cases mentioned in the said eighth section.

3. The informer is liable, although the United States may be a party on the record.

4. The court may require an informer to give security for costs, and in case of refusal, strike his name from the record.

5. An enrollment and license, duly executed, does not require delivery to give it validity.

6. Where a license was duly executed, sealed, signed, dated and numbered, but not delivered until a month thereafter, *held*, that it was a valid license from its date.

In admiralty.

John D. Cook, Dist. Atty., and Lyman D. Norris, for the United States and informer.

Benjamin F. Hickman, for owner of boat.

WELLS, District Judge. A libel was filed against the steamboat Planter for a violation of the act of congress approved 7th July, 1838 [5 Stat. 304], "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." The libel states, that "the attorney of the United States for the said district of Missouri, upon the information on oath of Peter V. Skillman, now here in the name and on behalf of the United States, and on behalf and to the use of the said Peter V. Skillman, gives the court to understand and be informed," &c. An affidavit is filed with the libel by said Skillman, which sets forth that "in the name and on behalf of the United States of America, as well as in the name and on behalf of Peter V. Skillman, who presents to the court here this information, now here giveth the court to understand and be informed," &c. The second section of the above recited act provides that a fine of $500 shall be paid by the owners of any steam vessel which navigates the rivers, &c., without first obtaining a license therefor, "one-half for the use of the informer."

On filing the libel, no security for costs was given by the informer, and the owners, after filing their answer, moved the court for a rule on the informer to give security for costs. The United States appeared by the district attorney, and the informer by his proctor. The motion was opposed by the proctor of the informer.

By the 8th section of the act of 28th February, 1799 (1 Stat. 626), it is provided, that "if any informer on a penal statute, and to whom the penalty or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or shall be nonsuited in the same, or if upon trial judgment shall be rendered in favor of the defendant, unless such informer be an officer of the United States, he shall be alone liable to the clerks, marshals and attorneys for the fees of such prosecution; but if such informer be an officer whose duty it is to commence such prosecution, and the court shall certify there was reasonable ground for the same, then the United States shall be responsible for such fees." See, also, the 5th section of the act of 8th May, 1792 (1 Stat. 277).

The statute contemplates not only prosecutions in the name alone of the informer, but also those in the name of the United States to the use in whole or in part of an informer, "to whom the penalty, or any part thereof, if recovered, is directed to accrue. If such informer be an officer whose duty it is to commence such prosecution, and the court shall certify there was reasonable ground for the same, then the United States shall be responsible for the same." It will also be seen that in case of an informer who is not an officer (which is the case here), the United States are not liable, and therefore if the informer be not liable, no costs can be recovered, no matter how malicious or vexatious the prosecution may be. The Antelope, 12 Wheat. [25 U. S.] 559. "It is a general rule (says the supreme court) that no court can make a direct judgment or decree against the United States for costs and expenses in a suit to which the United States is a party, either on behalf of any suitor or any officer of the government.

I think it appears from the above that an informer is liable, although the United States may be a party on the record, and also that the United States are not liable in this case. Can the court require him to give security for costs? 2 Browne, Civ. & Adm. Law, 356. "If both parties appeared on the appointed day, each was to give security stipulatio, or satisfactio; the plaintiff that he would prosecute his suit and pay the costs, if he lost his cause; the defendant that he would continue in court, and abide the sentence of the judge, i. e. bail to the action." This was the ancient civil law. The same practice prevails in the admiralty courts, on the instance side, or in other words in cases like the one under consideration. Id. 410, 411; Conk. Adm. 463, 464.

"In a suit in rem both parties are actors." Serg. Const. Law, 234. "All persons interested in the cause of action, may be joined as libelants." Dunl. Adm. Prac. 95. In this case the informer has an interest, the same as that of the United States, as he receives

[1] [Reported by John S. Newberry, Esq.]

half the penalty, that is $250. It will be seen by reference to that part of the libel and affidavit above set forth, that he is made a party—a party on the record—and would be entitled to his part of the penalty when brought into the court by the marshal, and a decree or judgment would be given against him for costs if unsuccessful. His interest is separate and distinct from that of the United States, each being entitled to $250.

But to settle all controversy in regard to the matter, and for the information of all concerned in similar suits, the court made a general rule requiring an informer to give security for the costs when the libel is filed, and also providing that if not given when the libel was filed, a rule might be made on him to give such security; and if not given, that he should not be further recognized by the court as informer, and that his name should be stricken out, and that he should receive no part of the fine or penalty. Under this rule he was required to give security for costs, and being in court and declining to give such security, the rule was enforced against him. It will be seen that this proceeding leaves the United States free to prosecute either in the first instance, without an informer, or to prosecute after his name is stricken out. The necessity of establishing such rules and practice, and requiring security from informers, became manifest during the present term of the court. Eleven libels were filed against steam ferry boats for this term, by informers, without security for costs, and the boats arrested. No evidence was offered or alleged to exist, showing that they had been employed in any navigation other than that of ferries under licenses from state authority.

In the case of U. S. v. The James Morrison [Case No. 15,465], this court held that ferry boats were not liable for the penalties imposed by the act of 1838, above cited; the case was taken by appeal to the circuit court, and there affirmed. The opinion of this court in the case of U. S. v. The James Morrison [supra] was published, as was also the decision of the circuit court, affirming its judgment.

The circuit court is the court of last resort in such case. In the face of these decisions these eleven suits were brought. The suit then proceeded in the name of the United States alone. The libel was for running the boat without a license. The answer of the owners set up and exhibited a license upon its face, good in all respects. It appeared in proof that the owners had executed their bond according to law, and applied for license after the enrollment of their boat, which license was made out on the books of the office, by the surveyor and inspector, signed, sealed, dated and numbered; and the same on a separate sheet, also signed, sealed, dated and numbered. When the owners called at the office afterwards, it appeared that there had been no account or payment of the hospital dues: that the account could not at that time be made out, as the boat had, a short time before, been sold and transferred to the present owners, who did not know how many hands had been employed by the former owners, nor how long the boat had run, both of which it was necessary to know and state in writing: that a person rendering a false account was subject to a fine: that the former owners were absent, and therefore the information could not be obtained. Under these circumstances, the surveyor declined handing over the paper made out on the separate sheet, but gave the owners permission verbally to make the voyage they were prepared for; and on their return, the former owners being still absent, they made another voyage. For these two voyages this libel suit was commenced. On the day the writ was served, but after the service, the paper was delivered. The surveyor was not bound to grant license until the hospital dues were paid.

He states in his evidence that the enrollment and license were duly executed on the day they bear date, but the certificates were not delivered until afterwards; thus, treating the record in his office as the enrollment and license, and the papers delivered as evidence thereof. Be this as it may, he states positively, that the bond was given and the license was duly executed, was sealed, signed, dated and numbered; and the only question which can be raised is, "was delivery of the license necessary to give it validity?" He could grant a license before the hospital dues were paid, and the effect of which perhaps would be to make himself personally responsible for them; and this was his own understanding of the matter, as appears from the evidence of the chief clerk in his office.

A deed is an instrument executed by a private citizen, and is or was formerly only known to be his act and deed, because he delivered it as such. He has no public seal by which it can be known, and anciently when this law was established, not one person in a hundred, perhaps, could write his name; and his private seal was the impression of his tooth, or some other impression equally unknown to the public. Delivery is therefore essential to give it validity; and it takes effect only from delivery. 2 Black. Comm. 306. It is not thus in regard to the acts of public officers, attested by public seals, and recorded in public records in public offices.

Where is the law to make delivery essential to their validity? I confess I have never seen such law, and certainly none was produced or cited. In the case of Marbury v. Madison, 1 Cranch [5 U. S.] 177, 1 [Pet.] Cond. R. 273, the supreme court of the United States says: "But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidence of

the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions the sign manual of the president and the seal of the United States are those solemnities. This objection does not touch the case."

This was said by the court in answer to an objection, that delivery was essential to give validity to a commission. I have not been able to discover any difference which can be material in this respect, between a commission and a license; neither of them is a deed made by a private citizen, which can only be known to be his act, by his having delivered it as such. Both are acts of public officers, in their official capacity; both have their sign manual and public seals, and both are recorded in public records in public offices; both are letters patent, or of the nature of letters patent. Blackstone (2 Comm. 346) speaking of letters patent, says: "These grants, whether of lands, honors, liberties, franchises or aught besides, are contained in charters or letters patent, literal patentees, so called because they are not sealed up, but exposed to open view, with the great seal pendent at the bottom, and are usually directed or addressed by the king to all his subjects at large." This is precisely the case with commissions and licenses. They are both grants. A commission grants the right to hold and discharge the duties of a certain office. A license grants authority to do a particular thing—in this case to carry on the coasting trade. They are both open letters addressed to everybody and under public seals.

If an original license were lost, could a copy from the record be evidence? Certainly not, without proof that the original was delivered, if such delivery be necessary to give it validity; yet such copy is, I believe, uniformly received in evidence without such proof of delivery.

Let us see the effect in the present case, of the doctrine that a license is invalid until delivered. It was not delivered until one month after it was executed. The bonds executed by the owners are conditional that the boat shall not, during the continuance of the license, be engaged in any trade whereby the revenue of the United States shall be defrauded, and shall not be used for any other vessel, or in any other employment than as specified in the license. They were not in force until the license took effect. If suit were brought for a breach during the month, the action would be defeated, by showing that the license had not been delivered. The license is granted for one year. If it have no validity until delivered, that would be considered its date, and it would run one month into the next year. If it commenced at its date, but yet was inoperative, it would be a license for eleven months only. The law requires that a record should be made of the licenses granted. This record would be false, if the license did not take effect for one month after being granted and recorded. The law also requires the licenses to be numbered, commencing with the year, and copies sent to the register of the treasury. Both the numbers and copies sent would be false if the license had no validity until delivered. If a suit were brought for running without a license after the expiration of a year from its date, it might be defeated by showing that the license commenced only from delivery, and the year from that time had not expired. The effect would be to falsify the record of the surveyor's office, and the records of the treasury department, and introduce confusion and uncertainty into all the public business relating to our commerce and navigation.

If, on the other hand, the hospital dues be not paid, the surveyor is not bound to grant the license; if, however, he should do so, he may, perhaps, become responsible for them, but the non-payment would not avoid the license, and the owners would still be held liable for them.

For the above reasons, the court orders and decrees that the libel be dismissed, the bond given by the owners canceled, and the informer pay costs up to the time when his name was stricken out as informer.

Case No. 16,054a.

UNITED STATES v. PLATT.

[1 Betts, D. C. MS. 9.]

District Court, S. D. New York. 1840.

CUSTOMS DUTIES—FRAUDULENT ENTRIES—FORFEITURES AND PERSONAL PENALTIES—REPEAL OF STATUTE—LIMITATIONS.

[1. Section 66 of the act of March 2, 1799 (1 Stat. 677), which provides, as a punishment for making entries under fraudulent invoices, that the goods, "or the value thereof to be recovered of the person making entry," shall be forfeited, was not impliedly repealed, at least so far as concerns the personal penalty, by any of the subsequent acts, and is still (1840) in force.]

[2. An intent to evade the payment of duties is essential to the maintenance of a prosecution for the personal penalty, and failure to aver the scienter renders the declaration fatally defective on demurrer; but the plaintiff will be allowed to amend as a matter of course.]

[3. It is not necessary to aver that the goods were invoiced below their actual value, for the statute requires the invoice to be at the "actual cost," by which is meant the purchase price.]

[4. The statute leaves it to the government to elect whether it will proceed for the forfeiture of the goods or for the personal penalty, and there is no requirement that there should be an attempt to proceed in rem, before a personal action can be maintained.]

[5. The limitation of three years contained in section 89 of the act was repealed and superseded by section 3 of the act of 1804 (2 Stat. 290), which declares that any person incurring any fine or forfeiture, "under the revenue laws of the United States," may be punished within five years, "any law or provision to the contrary notwithstanding."]

B. F. Butler, for the United States.
F. Cutting, for defendant.

BETTS, District Judge. This is an action of debt, brought under the 66th section of the act of March 2, 1799, to recover the value of goods imported by the defendant [John Platt] as a forfeiture declared by that act. The declaration is in 41 counts, upon so many different importations and entries made by the defendant in this port at different periods between the first day of September, 1834, and the 20th of March, 1839. The averment in each count is in substance that the respective entries were made in conformity to invoices produced by the defendant to the officers of customs, and that the goods were invoiced below their actual cost at the place of exportation, with intent to evade the payment of duties thereon.

The action was commenced in September, 1839. The defendant pleads the general issue to all the counts, and the statute of limitations to all charging the entry to have been made more than three years previous to the commencement of this suit, to which plea the plaintiffs demur. A general demurrer is also interposed by the defendant to all the counts. The validity of the two latter pleadings is now the subject of inquiry.

The defendant's demurrer rests upon two grounds: (1) That the 66th section of the act of 1799 is repealed, and (2) that, if the section is in force, the declaration is defective in substance, and that the plaintiffs can claim no judgment under it against the defendant. The 66th section being the substratum of the action, the leading inquiry in the case will be whether that provision is now in force. The enacting clause directly applicable to this issue is "that if any goods, wares or merchandize of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares and merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited"; and the argument is that the provisions of various subsequent acts of congress (of 1818, c. 74, § 11 [3 Story's Laws, 1682; 3 Stat. 436]; of 1823, c. 147, §§ 13, 14 [3 Story's Laws, 1887; 3 Stat. 735, c. 21]; of 1828, c. 55, § 9 [4 Stat. 274]; of 1830, c. 147, § 4 [Id. 410]; and of 1832, c. 224, § 14),—by legal implication abrogate so much at least of the act of 1799 as subjects the importer to a personal penalty. These subsequent enactments have been carefully collated with the 66th section by Judge Hopkins in a recent case (U. S. v. 25 Cases of Cloth [Case No. 16,563]) and the conclusion to which he arrives is that the section remains in force even in respect to the forfeiture of the goods. If his reasoning is sound in respect to that branch of the section, it is of stronger force in regard to the personal penalty, because the subsequent enactments from which the repeal of the 66th section is sought to be deduced have all relation to the goods,—to the effect of a false valuation or invoice upon the importation itself. I do not feel called upon to weigh the very able reasoning of the judge upon the latter point, for even if his conclusion in that particular should be adopted here, or should be found not in correspondence with the decisions of this court or the circuit court of this circuit heretofore made on the same subject (and which might conclude this court), they would come clothed with impressive influence in elucidation of the other branch of the section, which has never been before brought in review in this court. No direct repeal of the 66th section is asserted, and the implication which it is supposed establishes such repeal is raised from after-enactments providing remedies and pointing out a course of procedure which it is asserted are inconsistent with the provisions of that section. Congress designates an alternative penalty for the offences created by the section,—i. e. the forfeiture of the goods, or the value thereof, to be recovered of the person making entry. These penalties are distinct and positive in their character, so that the modification or repeal of the one need not necessarily affect the validity and operation of the other. No one would contend, if congress at the next session had repealed the personal penalty, that the forfeiture of the goods was also abrogated as a necessary incident. So even of criminal offences, made punishable by fine or imprisonment, an after-act, withdrawing imprisonment or modifying the fine, is not regarded as affecting the other branch of the punishment.

These principles show that to derive a repeal of such alternative penalties by implication from subsequent provisions of law, those after-enactments must have relation to both branches of the penalty or the offence itself, upon which they are founded. The most careful examination of the acts subsequently passed has not enabled me to discern any provision having a necessary application to this personal penalty, or the basis on which it is founded. The goods are made subject to various processes of interpretation, to enhanced valuation and imports, and the party importing them to an examination on oath, but in every instance for the purpose of ascertaining whether the duties should not be increased beyond the amount payable upon the invoice or entry, or whether the goods themselves should not be forfeited. Every enactment points to the representation of the importer at the custom house, whether by invoice or entry, as a cardinal fact, conducing to fix the fate of the goods, either to be subjected to increased duties or to confiscation. The invoice is in no statute thrown out of view.

It is made an essential part of the importer's vouchers, and must be verified by

solemn oath, and, if not received with the goods, the party making the entry must swear he will produce it to the custom house whenever it comes to hand. The clear intent of congress, manifested in every import act, to hold the importer bound to exhibit a true invoice of his goods, and making the invoice a basis for entry or appraisement of the goods, supplies also a strong intendment that every section provided for securing the integrity of the instrument is to be continued and enforced. Congress might be induced from many considerations of policy or conveniency to waive the confiscation of goods because entered below their value, and be content with full duties thereon; but it is not to be inferred that such payment of duties would be regarded as expiating so gross a violence to the laws and the rights of the honest merchant, as making out and presenting a false invoice of goods with design to evade the payment of duties. To imply the repeal of a sanction thus fastened upon the party making the entry because a co-ordinate penalty attached to the goods so entered was modified or withdrawn would be giving an effect to such after-legislation more serious and broad than is recognized in any case cited on the argument which the court can discover. The judgment of the court in U. S. v. One Case of Hair Pencils [Case No. 15,924], on the 76th section, lays down principles in this respect as favorable to the defendant as any other decision of equally high authority, and the criterion pointed out by that decision is that the provisions of two acts upon the same subject-matter must be so differing that both cannot be carried into execution, in order to render the latter a repeal by implication of the former; and, applying that doctrine to this case, it is most manifest that no incompatibility or incongruity between the provision of the 66th section now under examination and any subsequent enactments interferes with its application or enforcement. I am accordingly of opinion that the personal penalty created by that section is now in force; and, the right of action therefore subsisting to the United States, the remaining considerations are whether it has been properly put in prosecution in respect to the form of proceeding and the period within which the action is brought. The objections to the structure of the declaration are that it does not aver the scienter of the defendant, or any mala fide intent on his part; that it does not aver the goods were invoiced below their actual value; nor that the collector had parted with possession of the goods when this suit was instituted.

The averments are so framed as to embody the provisions of the statute nearly in terms, and, though the general rule in pleading is that it is enough to follow the words of an act in setting out a cause of action or ground of defence (15 Johns. 188), yet in actions on penal statutes it is also a cardinal rule that every fact must be averred bringing the case within the intent of the act, and which is requisite to the support of the action. Com. Dig. "Action on Statute" (A, 3); Id., "Pleader" (C, 76); Goodwin v. U. S. [Case No. 5,554]. What circumstances, then, subject the party making an entry to a personal action for the penalty? The inverted form of expression used in the act may raise a doubt whether it does not look to the false invoice as the gist of the offence, and, when that is so constructed with design to evade the payment of duties, hold the goods entered or the party entering them subject to the penalty, without carrying forward the consideration of intent to the act of entry. It is certainly a familiar course of legislation to subject property to forfeiture in revenue cases, without regard to criminal participation of the owner in the act producing the forfeiture. The case before cited (U. S. v. One Case of Hair Pencils [Case No. 15,924]), is an instance of that mode of legislation; and there would therefore be no singularity in rendering the forfeiture of goods under the 66th section dependent upon the false invoicing, and a proceeding against goods might therefore be probably sustained without charging the owner with any fraudulent purpose himself, or knowledge of fraud in the act of his agents abroad. Does the act demand such construction when the action is against a party individually for the penalty? I have not been able to find any instance in the penal legislation of congress in respect to the revenue, which raises an offence against an individual and renders him punishable therefor where his criminal knowledge or intent is not made a cardinal ingredient: and I find that Judge Washington reads this section in the same sense.

In an action precisely similar to this, that judge decided that the offence in relation to the party was "the making of an entry upon an invoice below the actual cost with design to evade the duties," and held that the declaration was defective in substance for not containing an averment of such intent.

I think the language of the act will bear this interpretation and that even a construction more forced than that requires, might be sanctioned, to avoid the egregious injustice of subjecting a person to punishment for the fraudulent acts of another not charged to be known to or adopted by him. The declaration in this case charges that the defendant made entry, &c., and that the goods were invoiced in the invoice produced by the defendant in making the entry below their actual cost, with design to evade the duties. It does not aver that he made the invoice or participated in its preparation, and the penalty is demanded because of such entry, and for no other reason. The scienter or intent is no part of

the gravamen alleged against the defendant otherwise than in so far as he may by intendment of law stand chargeable with the fraudulent purposes of the one who invoiced the goods. The frame of the sentence is such as to admit without violence to the language the term "with design" to be applied distributively to the acts indicated and preceding it,—the one, that of invoicing the goods; the other, that of making the entry,—and it seems to me that the court is compelled to adopt such construction as it is at war with first principles to subject a party personally to the operation of punitive laws, who acts without a design to do wrong or knowledge of any transgression. It is therefore indispensable to the maintenance of a prosecution in personam for the penalty that the declaration should aver that the entry was made with design to evade the payment of duties. This defect is one of substance, and is fatal on general demurrer, or might be taken advantage of by writ of error. It is competent, however, to this court to permit an amendment of the declaration, and that will be allowed almost as matter of course, if there are not other objections which bar the action entirely.

The second objection, that the declaration does not aver that the goods were invoiced below their true value, cannot prevail. The uncertainty that rested on the construction of this part of the act of 1799, and which led to differing decisions before two eminent circuit courts (U. S. v. Sixteen Packages of Goods [Case No. 16,303], Goodwin v. U. S. [supra]) was fully removed by the decision of the supreme court. [U. S. v. Amedy] 11 Wheat. [24 U. S.] 410. Actual costs in the 66th section must be understood to import the purchase price, and an averment that the goods were invoiced below cost does not give place for the implication that they might be notwithstanding invoiced at the market value or to any other uncertainty. The declaration, therefore, by using the language of the statute, has made the charge with all the requisite precision and certainty, and it becomes matter of proof under that averment whether the invoice represents the true purchase price.

The third general objection to the sufficiency of the declaration is that there is no averment that the goods were not remaining in the hands of the collector when the suit was instituted. This objection rests upon the supposition that the present action is allowed only in case the one in rem cannot be pursued. It is very clear that these penalties are not cumulative, and, if one has been enforced, that would be a full bar to a suit for the others, by whichever mode of procedure the penalty was first recovered. But there is nothing in the statute indicating a priority of resort to the goods. Manifestly, an exception to an information against the goods that no suit had been brought for the personal penalty would be nugatory and inapt, and there is upon the statute no authority for demanding that the first proceeding shall be against the goods which would not equally require it against the person. The election is left uncontrolled to the government to adopt either remedy, and it is by no means a legal certainty that the greatest advantage would always result from forfeiting the goods. Especially if the value to be recovered of the person making entry is the value abroad, it might well happen that would largely exceed the saleable products of the goods where condemned; but, without regard to the consideration which remedy might be the most beneficial, it is sufficient upon the point to observe that the law has left an election to the government in that behalf, which the court is clothed with no power to counteract or limit. "All such goods, &c., or the value thereof, shall be forfeited," is the penalty demanded by the act and given to the government, and either may be prosecuted and recovered to the omission of the other. This is so upon the well-established principle that any one of various remedies may be employed where either will enforce the right or obtain the satisfaction to which the party is entitled. 1 Dane, Abr. 5; Smith v. U. S. [Case No. 13,122]. The penalty created by the act might be sued for by the common-law information or the ordinary action of debt. 1 Dane, Abr. 5; Ex parte Marquand [Case No. 9,100]; Bullard v. Bell [Id. 2,121]; The Nancy [Id. 10,008]; Adams v. Woods, 2 Cranch [6 U. S.] 336. Debt being the form of suit, will not vary the application of the statute of limitations, for that has relation to the offence itself, and not to the mode by which it is prosecuted. Id.

The defendant contends that the 89th section of the act of March 2, 1799, limiting actions for penalties under that act to three years, applies to this case, and bars all suits on entries made more than 3 yrs. before the commencement thereof. The argument for the United States is that the act of March 26, 1804, § 3, enlarges the limitation to five years. The two clauses collated read as follows: "That no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty of (qu. or) forfeiture was incurred." Act 1799; 3 Bior. & D. Laws, p. 222, § 89 [1 Stat. 696], "That any person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, tried and punished provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding. Act 1804; 3 Bior. & D. Laws, p. 611, § 3 [2 Stat. 290]. This latter section is included in an act entitled "An act in addition to the act entitled 'An act for the punishment of certain crimes against the United States,'" and

being passed in express relation to the act of 1790, the terms common to both acts are to be understood in the same sense. By comparing the two sections, it will be perceived that the act of 1804 has transcribed in substance that of 1790, with some slight inversion of the members of the section. The language applicable to the present inquiry is, "nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid." 2 Bior. & D. Laws, p. 99, § 31 [1 Stat. 119]. The case of Adams v. Woods, 2 Cranch [6 U. S.] 336, before cited, was an action of debt for a penalty given by the act of March 22, 1794. The defendant plead in bar the above limitation of the act of 1790. The attorney general demurred, and placed his objection to the plea principally upon the point that the limitation had reference to crimes, or to prosecutions conducted in a criminal form, by indictment or information, and did not apply to actions of debt.

The court, after consideration, decided that the act applied to every prosecution, trial or punishment, and was not limited to any particular mode of proceeding, and accordingly embraced the action of debt as well as informations, because almost every fine or forfeiture under penal statutes may be recovered indifferently in either form of suit. That therefore the act is not pleadable in bar of the particular action, but of the offence. The same interpretation must be given to the act of 1804. It cannot be restricted to the form of proceeding, but applies to the subject-matter. The party is exempt from the penalty after the limitation has attached, but it may be demanded against him by debt or information within that period. But it is urged that this case does not fall within the provision of the act of 1804, the penalties created by the act of 1799 having a special limitation affixed to them by that statute; and the provision in the act of 1804, being in pari materia with that of 1790, should be construed as having relation only to the cases governed by the limitation of that act; and the act of February 28, 1839 (9 Bior & D. Laws, p. 963, § 4 [5 Stat. 322]), is referred to as supporting the argument. This latter statute, it is admitted by the district attorney cannot supply the rule of limitation to the cases embraced within the pleadings, having been passed subsequetly to the expiration of the three years set up as a bar in those cases; but it is supposed to indicate the understanding of congress at the time that the laws then existing did not reach the cases provided for by it. There seems but feeble ground for this implication, nor, if it could be fairly raised, would it outweigh the direct adjudication of the supreme court in determining the import and operation of the antecedent laws. It is unnecessary to speculate upon the effect of a positive declaration by congress, in determining the meaning or application of a statute antecedent to such declaration, but this court would never attach to a mere inference or implication consequences outweighing the express decision of the supreme court upon the very subject. The act of 1839 may very properly be considered corresponding with that of 1790 as construed by the supreme court, and only extending the period of limitation from two to five years to that class of cases, and in this view of the operation it can afford no aid to the defendant in the interpretation he claims for the acts of 1799 and 1804. The argument must then rest exclusively upon the force and extent of the language used in the act of 1804, and whether it comprehends the cases provided for specifically by the act of 1799, or it is to receive such interpretation as to leave the latter in full operation. In its terms it applies to every fine and forfeiture incurred by breach of the revenue laws, and would indisputably embrace the penalties under the act of 1799, if no provision respecting them had been inserted in that act. The whole inquiry, then, is resolvable into this position: whether a subsequent statute does not necessarily repeal an antecedent one upon the same subject-matter, when the provisions of both cannot be executed. This point, it appears to me, is too firmly settled as a rule of construction to require any elucidation or discussion. The case U. S. v. One Case of Hair Pencils [supra], settles the principle at least for this court.

I am accordingly of opinion that the plea is bad in setting up the limitation of the act of 1799 as the bar in this case, and that the suit is to be governed in this particular by the act of 1804.

Judgment. Ordered, judgment for the defendant upon the demurrer as to so much of the plaintiffs' declaration as charges the offence against the defendant without also alleging that it was committed with intent or design to evade the payment of duties, &c., with leave to the plaintiffs to amend their declaration in this behalf within ten days after the rendering of this judgment. Ordered, judgment for the plaintiffs on the demurrer to the defendant's plea of the statute of limitations, and also on all the causes of demurrer alleged by the defendant against the plaintiffs' declaration other than the one above specified. And it is further ordered that the defendant have leave to plead over within ten days after the rendering of this judgment, and that the taxable costs of the defendant on the judgment in his favor be allowed and deducted from the costs taxed in favor of the plaintiffs on the judgment in their favor.

Case No. 16,055.

UNITED STATES v. PLUMER.

[3 Cliff. 1.] [1]

Circuit Court, D. Massachusetts. July 2, 1859.

SUPREME COURT—JURISDICTION IN CRIMINAL CASES.

A writ of error does not lie from the supreme court to the circuit court in a criminal case.

[Cited in Sanders v. State, 85 Ind. 326.]

This was a petition for the allowance of a writ of error in a capital case, and for stay of execution until a hearing could be had in the supreme court, on the alleged errors. Plumer, with three others, had been indicted, tried, and convicted in the circuit court, Massachusetts district, and sentenced to be executed.

The material facts of the record were as follows:

United States of America.

Circuit Court of the United States of America, for the District of Massachusetts.

At a circuit court of the United States of America, for the district of Massachusetts, begun and holden at Boston, within and for said district, on the 15th of October, A. D. 1858.

Before the Honorable Nathan Clifford, Associate Justice, and the Honorable Peleg Sprague, District Judge. . . . .

(Here follows the indictment.)

The record then proceeds as follows, namely:

At this present October term of this court, A. D. 1858, said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, were severally set to the bar, and had this indictment read to them; and thereupon they severally said that thereof they were not guilty; and thereof for trial put themselves upon God and their country; and Benjamin F. Butler and Charles P. Chandler were assigned by the court as counsel for said Plumer; F. F. Heard and F. W. Pelton were assigned as counsel for said Carther; Thornton K. Lothrop and J. Q. Adams were assigned as counsel for said Herbert; and J. Hardy Prince and Samuel M. Quincy were assigned as counsel for said Charles H. Stanley, otherwise called John W. Ballard; and said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, severally acknowledged that they had severally received a copy of the indictment, and a list of the jurors, agreeably to law, and more than two days before the date of their trial.

A jury was thereupon impanelled and sworn to try the issue, namely, John B. Chisholm, foreman, and fellows, namely, Willard Bacon, Daniel C. Bates, Lemuel Grant, Charles Humphrey, Asher Joslin, Charles B. W. Lane, Benjamin Norris, Hiel J. Nelson, William Parker, William Tinker, and Amasa Whiting, all of said district.

And the said jury afterwards returned their verdict that said Cyrus Plumer, otherwise called Cyrus W. Plumer, is guilty of murder as alleged in said indictment; and William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, are severally guilty of manslaughter; and thereupon said Cyrus Plumer, otherwise called Cyrus W. Plumer, by his counsel, moves the court for a new trial, as follows:

(Here follows the motion for a new trial; also the motion in arrest of judgment.)

The record then proceeds as follows, namely:

Time was allowed by the court for preparation of counsel therein, and the said motions were set down for hearing. And afterwards, at the same term, the counsel of said Plumer moved the court for leave to withdraw the said motions for new trial and in arrest of judgment. And said Cyrus Plumer, otherwise called Cyrus W. Plumer, having been brought into court, and being inquired of personally, asks that such leave may be granted and that the said motions may be withdrawn. Whereupon the court did grant him leave to withdraw the said motions, and the same were accordingly waived and withdrawn by said Plumer; said Plumer was then asked if he had anything to say why judgment of death should not then be pronounced against him. And having replied thereto fully, and no good cause appearing to the contrary, and all matters in the case having been fully heard and understood by the court, it is considered by the court that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be deemed guilty of felony, and that he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken back to the place from whence he came, and there remain in close confinement until Friday, the 24th of June next; and on that day, between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken thence to the place of execution, and that he be there hanged by the neck until he be dead.

The Petition.

United States of America.

Circuit Court of the United States of America, for the District of Massachusetts.

To the Honorable Nathan Clifford, one of the Justices of the Supreme Court of the United States, sitting within and for the District of Massachusetts.

Cyrus W. Plumer now imprisoned in the district aforesaid, under sentence of death

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

on a judgment, warrant, process, and proceeding of the said circuit court of the United States of America, for the district of Massachusetts, says that there is manifest error in the process, proceedings, premises, and judgment, and feeling aggrieved thereby, assigns as errors in said record, process, and proceeding the errors named and set forth in the paper hereunto annexed, marked "Assignment of Errors."

The said Cyrus W. Plumer, plaintiff in error, begs the court to certify the errors in said assignment named and set forth, and that he may have leave to enter the same in the supreme court of the United States at the next December term of said supreme court, and that execution and all proceedings in said case, and in the premises, may be stayed until a hearing is had in said court on said assignment of errors.

Cyrus W. Plumer.

Boston, June 30, 1859.

Assignment of Errors:

United States of America.

Circuit Court of the United States of America, for the District of Massachusetts.

Cyrus Plumer, otherwise called Cyrus W. Plumer, Plaintiff in Error, v. The United States of America, Defendant in Error.

And now, to wit, on the 30th of June, A. D. 1859, cometh the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in his proper person, who is now imprisoned in the district of Massachusetts, under sentence of death, on a judgment, warrant, process, and proceeding of the said circuit court of the United States of America, for the district of Massachusetts, and immediately saith that in the record and process aforesaid, and also in the giving of the judgment aforesaid, against him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, there is manifest error in these, to wit:

1. That in and by said indictment and record, there is no sufficient averment that the circuit court in which said indictment was returned and heard, had jurisdiction of the offence therein supposed to be charged.

2. That in and by said indictment and record, there is no sufficient averment that the person therein supposed to be injured was within, or under the protection of or jurisdiction of, the United States, or in the peace thereof.

3. That in and by said record it nowhere appears, or is set forth, that said Cyrus Plumer, otherwise called Cyrus W. Plumer, was informed of, or permitted to exercise, or did exercise, his constitutional right of challenge of the jurors returned for his trial.

4. That in and by said record it nowhere appears or is set forth that said Plumer was present, either at the impanelling of the jury that tried him, or at the time said trial was had, or said verdict was rendered against him.

5. That in and by said record it nowhere appears that said Plumer was permitted to be heard by said jury so impanelled, either by himself or his counsel; and that in truth and in fact said Plumer was not permitted to address the jury in his own proper person.

6. That said verdict of guilty was rendered upon all the counts of said indictment, while one or more of said counts are defective and insufficient in law to support any judgment.

7. That it nowhere appears in and by said record of what (if any) felony said Plumer was adjudged guilty.

8. That it nowhere appears by said record of what "felony" the court "deemed" or adjudged the said Plumer to be "guilty."

9. That it nowhere appears by said record for what "felony" said Plumer was sentenced to suffer death.

10. That it nowhere appears in and by said record that Plumer received sentence of death for the particular murder of which the jury had found him guilty; but only for "felony" indefinitely, the particular felony not being described or in any manner designated.

11. That the verdict is repugnant to the general averment and clause in the indictment giving the court jurisdiction.

12. That said indictment does not appear to be signed by the foreman of the grand jury.

13. That it does not appear that the verdict of said jury was rendered in open court, and in the presence of the defendant.

14. That said record is in other respects informal, insufficient, erroneous, and the judgment thereon void and of no effect.

15. That by the said record it appears that judgment upon the indictment aforesaid was given against him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in form aforesaid, whereas judgment by the said circuit court of the United States ought to have been given for the said Plumer that he be thereof acquitted and go thereupon without day. Therefore in that there is manifest error.

And the said Cyrus Plumer, otherwise called Cyrus W. Plumer, prays that the said judgment aforesaid, for the errors being in the record and process aforesaid, may be reversed and annulled, and absolutely be had for nothing, and that he may be restored to the common law of this land, and to all things which he hath lost on the present occasion.

Cyrus Plumer, otherwise called Cyrus W. Plumer.

Boston, June 30, 1859.

Benjamin F. Butler, Geo. W. Searle, and F. F. Heard, for petitioner.

C. L. Woodbury, U. S. Dist. Atty., and Milton Andros, Asst. U. S. Dist. Atty.

Mr. Searle's argument:

The first proposition we attempt to maintain is this, that, as the acts of congress now stand, the supreme court is constitutionally bound to take appellate jurisdiction, in all

cases whatsoever, both civil and criminal, arising under the constitution and laws of the United States, except where it has original jurisdiction, and that the decision of the supreme court (U. S. v. Moore, 3 Cranch [7 U. S.] 159), repudiating appellate jurisdiction in all cases, except where congress had specially granted it, was erroneous.

In other words, we attempt to maintain that the existing acts of congress, if rightly interpreted, make no "exceptions" whatever to the appellate jurisdiction of the supreme court, as conferred by the constitution; and that it is only by false interpretations, that those acts have ever been held to exclude from the appellate jurisdiction of the supreme court any case whatever, civil or criminal, arising under the constitution and laws of the United States, and not included in the original jurisdiction of that court.

This proposition, we claim, is established by the following arguments:—

1st. The entire jurisdiction, both original and appellate, of the supreme court of the United States is conferred by the constitution itself, and not by act of congress. Const. art. 3, § 2.

The language of the constitution on this point is:—

1. "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States," etc., etc.

2. "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

2d. The supreme court itself has acknowledged that at least its original jurisdiction was conferred by the constitution itself, and not by act of congress. Thus they say:—

"Of all the courts which the United States may, under their general powers, constitute, one only, the supreme court, possesses (an original) jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power (congress) that creates them." U. S. v. Hudson, 7 Cranch [11 U. S.] 32.

Here the court asserts that at least its original jurisdiction is derived immediately from the constitution. Yet its appellate jurisdiction is just as clearly conferred by the constitution as its original jurisdiction, as the clauses quoted from the constitution show.

The only difference in the two cases is this, that congress is authorized, if it see fit, to make "exceptions" and "regulations" as to the appellate jurisdiction, but have no such power in regard to the original jurisdiction.

Until "exceptions" are made by congress to the appellate jurisdiction conferred by the constitution, that jurisdiction includes all cases whatsoever, civil and criminal, arising under the constitution and laws of the United States, etc., except such as are included in the original jurisdiction.

The point we contend for is, that congress has no power whatever affirmatively to confer appellate jurisdiction on the supreme court. It only has a discretionary power to "make exceptions" to the general appellate jurisdiction conferred by the constitution, and also to "make regulations" by which this general appellate jurisdiction shall be exercised.

The supreme court itself virtually acknowledges this proposition. U. S. v. Moore, 3 Cranch [7 U. S.] 159.

Now we say that inasmuch as a general appellate jurisdiction in all cases, etc., whatsoever, except where the supreme court has original jurisdiction, is affirmatively conferred by the constitution itself; and inasmuch as congress has no power at all (on this precise point of the courts having appellate jurisdiction), save to "make exceptions" to this general appellate jurisdiction conferred by the constitution; and inasmuch also as all such "exceptions" are against equality and right, and adverse to the ascertainment of truth and the accomplishment of justice, and also adverse to uniformity and certainty in the law, all such "exceptions" must be expressly and affirmatively made. They cannot be implied from any acts of congress whatever, much less can they be implied negatively or unnecessarily from any acts of congress.

We now say further that congress has never expressly and affirmatively made any "exceptions" whatever to the general appellate jurisdiction conferred upon the supreme court by the constitution. The supreme court itself makes no pretence that any such "exceptions" have been expressly and affirmatively made by any act of congress.

All that congress has done is this: it has passed acts purporting affirmatively to confer upon the supreme court appellate jurisdiction in certain cases where the same jurisdiction had been previously conferred by the constitution.

All such grants by congress, of a jurisdiction already conferred by the constitution, and already possessed by the court, are obviously gratuitous, extra-constitutional, and void, since (it may be repeated) congress has no power to confer any appellate jurisdiction at all, but only to "make exceptions" to the appellate jurisdiction conferred by the constitution.

And yet, from these gratuitous, extra-constitutional, and void grants by congress of an appellate jurisdiction (already conferred by the constitution itself, and already possessed by the court) in certain cases, the

court has implied, and that too, negatively and unnecessarily, an "exception" to, or denial of, the appellate jurisdiction conferred by the constitution in all other cases.

And this negative and unnecessary implication from these gratuitous, extra-constitutional, and void grants by congress of an appellate jurisdiction in certain cases, constitutes the only ground on which the court now repudiates the appellate jurisdiction conferred upon it by the constitution in all other cases. U. S. v. Moore, 3 Cranch [7 U. S.] 159.

Now we insist that the appellate jurisdiction conferred upon the supreme court by the constitution itself—a jurisdiction so important, not merely to uniformity and certainty in the law, but also to equality, truth, justice, and right—cannot be taken away by any such negative and unnecessary implication, from extra-constitutional and void acts of congress; but that it can be taken away only by constitutional and valid acts of congress specially and affirmatively "making exceptions" to the general appellate jurisdiction conferred by the constitution.

But let us see what is the argument of the court in favor of this implication. We give their opinion entire:

Marshall, Circuit Justice, delivered the opinion of the court as follows:

"This is an indictment against the defendant for taking fees, under color of his office, as a justice of the peace, in the District of Columbia.

"A doubt has been suggested respecting the jurisdiction of this court, in appeals on writs of error, from the judgments of the circuit court for that District, in criminal cases; and this question is to be decided before the court can inquire into the merits of the case.

"In support of the jurisdiction of this court, the attorney general has adverted to the words of the constitution, from which he seemed to argue that as criminal jurisdiction was exercised by the courts of the United States, under the description of 'all cases' in law and equity, arising under the laws of the United States, and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those which might be brought on 'originally,' 'with such exceptions and under such regulations, as the congress shall make,' that the supreme court possessed appellate jurisdiction in criminal as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some one exception or regulation made by congress, which should circumscribe the jurisdiction conferred by the constitution.

"This argument would be unanswerable, if the supreme court had been created by law, without describing its jurisdiction. The constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject.

"But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.

"Thus the appellate jurisdiction of this court, from the judgments of the circuit courts, is described affirmatively. No restrictive words are used. Yet it has never been supposed that a decision of a circuit court could be reviewed, unless the matter in dispute should exceed the value of $2,000. There are no words in the act restraining the supreme court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may re-examine the decisions of the circuit courts, when the matter in dispute exceeds the value of $2,000.

"The court, therefore, will only review those judgments of the circuit court of Columbia, a power to re-examine which is expressly given by law (act of congress). On examining the act 'concerning the District of Columbia,' the court is of opinion that the appellate jurisdiction granted by that act is confined to civil cases.

"The words 'matter in dispute' seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of $100, yet that is, in the eye of the law, a punishment for the offence committed, and not the particular object of the suit. The writ of error, therefore, is to be dismissed, this court having no jurisdiction of the case." U. S. v. Moore, 3 Cranch [7 U. S.] 159.

This argument of the court has two palpable fallacies, inconsistent with each other, yet either of them sufficient to defeat the conclusion arrived at. The court attempt to blend these two fallacies. Or rather, they fly from one to the other, as occasion requires, as if to avoid being caught in either. The fallacies are these:—

1. One part of their argument seems to assume that the appellate jurisdiction of the supreme court is derived from the act of congress, instead of the constitution; and that the court can therefore have no appellate jurisdiction, except what the act of congress confers. Whereas the truth is that its appellate, like its original jurisdiction, is derived wholly from the constitution, and not at all from the act of congress; and consequently exists in all cases enumerated in the constitution, unless congress have "made exceptions," or taken it away in specific cases.

2. Another part of their argument seems to assume that their appellate jurisdiction is derived from the constitution; and that it therefore necessarily exists in all cases enumerated in the constitution, unless congress have "made exceptions" thereto. So far well. But they then proceed to say that, congress

having affirmatively described this appellate jurisdiction in civil suits, where "the matter in dispute exceeds the value of $2,000," this simple "affirmative description" of the jurisdiction in those cases "must be understood as a regulation under the constitution prohibiting" the appeal, not only in all civil suits for a less sum than $2,000, but also in all criminal cases whatsoever.

How monstrous this reasoning and conclusion are will be seen when it is considered that the "exceptions" and "regulations" which congress are authorized to make in regard to the appellate jurisdiction of that court are two wholly different things, and have wholly different objects in view. The object of the "exceptions" is to declare that the class of cases included in them shall not be appealed at all.

The object of the "regulations" is to prescribe the conditions under which, and provide the means by which, another class of cases may be appealed. There is, therefore, no analogy whatever between the "exceptions" and the "regulations" which congress are authorized to make. And yet the court have confounded the two; and solely on this confusion of the two they base their decision, withholding the appeal.

The language of the constitution is perfectly clear, as follows: "In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

It is here plain that the words "exceptions" and "regulations" mean two different things, because the sole object of the "exceptions" (nobody can doubt) is to particularize what cases shall not be appealed, whereas the "regulations" relate only to those cases that are to be appealed. This is certain, since it is "under" the "regulations" that cases are to be appealed.

Now contrast the language of the court with this clear language of the constitution. Thus the court say: "But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a 'regulation' under the constitution, prohibiting the exercise of other powers than those described."

Here the court ignore altogether the word "exceptions," as used in the constitution, and then assume that it is by "regulations" that certain cases are to be excluded from appeal. Whereas the language of the constitution is explicit, to wit, that it is by "exceptions" alone that cases are to be excluded from appeal, and that it is "under" (that is, in conformity with, or by means of) "regulations" that other cases are to be appealed.

Suppose the words "with such exceptions" had been left out of the constitution, and that the clause had read (as it then would have done) thus: "In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, under such regulations as the congress shall make."

Would congress then have been authorized to "except" any of the cases enumerated by the constitution itself from the appellate jurisdiction of the court? Plainly not. They would only have been authorized to make "regulations" "under" which all the cases enumerated by the constitution might be appealed.

If the words "exceptions" and "regulations," in this clause, had meant the same thing, the language of the constitution would not only have been tautological, but the powers granted to congress would have been widely different from what they are now. If, for example, the two words "exceptions" and "regulations" were to be held to mean the same thing, they must both be held to mean either "exceptions" or "regulations," for they could not mean the same thing, and yet mean both of these two different things. If then, the two words "exceptions" and "regulations" were held to mean only "exceptions," congress would have simply had the power to say that certain cases should not be appealed at all. They would have had no power to prescribe any "regulations" whatever, "under" which cases should be appealed. On the other hand, if the two words were to be held to mean only "regulations," then congress would have had no power to "make exceptions" of or to prohibit the appeal of any cases whatever. They could only have prescribed "regulations" "under" which all cases whatever might be appealed. But now, by giving different meanings to these two different words, congress gets two different powers, to wit, first, the power to forbid the appeal of certain cases; and, second, the power to prescribe the "regulations" "under" which all other cases may be appealed.

It being thus established that the words "exceptions" and "regulations," as used in this clause of the constitution, mean two wholly different things, and grant to congress two wholly different powers, there is left no foundation whatever for the decision of the court, that the regulations prescribed by congress, "under" which certain cases are to be appealed, must be considered as "exceptions" prohibiting the appeal of all other cases. These "regulations" apply only to the particular cases to which they purport to apply; and they leave all other cases to stand just as they would have done if the "regulations" had not been made.

These "regulations" governing the appeal in civil suits, where the matter in dispute exceeds $2,000, cannot legally be construed into "exceptions" prohibiting the appeal even of other civil suits, where less amounts are involved. Still less can they be construed into "exceptions" prohibiting appeals in criminal cases, which are not mentioned, and where not money, but life, liberty, and character are in issue. Such a construction would

not only be legally absurd, it would be morally atrocious.

To hold that a regulation prescribing the mode of appeal in a civil suit where $2,000 are at stake, shall, by implication, be deemed a prohibition upon any appeal in a criminal case, where one's life is at stake, would be an interpretation of law as ludicrous and grotesque as it would be brutal and inhuman. It is a maxim of universal application, that all interpretations are to lean to life and liberty. And neither the supreme court, nor any other decent court, has any excuse for disregarding, or for pretending ignorance of this maxim. And nothing, it would seem, but deliberate corruption would induce them to disregard it in this case.

If it be asked, what could have been the motive of congress in providing "regulations" under which the appeal of civil cases, where the amount involved exceeds $2,000, is to be made, unless it were to exclude all other cases from the right of appeal? One answer is, that we have nothing to do with the private motives of congress, but only with the legal effect of their enactments, the intentions they have legally conveyed. Another answer is, that it is presumable that congress may have thought some special "regulations" would be useful or proper in those cases, which would not be useful or proper in other cases.

But perhaps it will be asked, how can any case be appealed, except congress have first made "regulations" for its appeal? The answer is, that there are writs and forms of proceeding well known to the law, by which a superior court reviews the decisions of inferior courts; and the judiciary act of 1789, § 14 [1 Stat. 81], enacts: "That all the before-mentioned courts of the United States (including the supreme court) shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

This provision alone would be ample to enable the supreme court to take appellate jurisdiction in all cases tried in subordinate courts. In addition to all this, the fifth amendment to the constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law."

It would seem that no narrower interpretation could possibly be given to this provision, than that it secures to a defendant, in a criminal case, all processes known to the common law, and appropriate to his case. It includes, for example, trial by jury. No one will deny this. But it also as much secures all other common-law forms of proceeding, as it does this one of trial by jury.

This amendment is subsequent in date to the constitution, and annuls any part of that instrument that is inconsistent with it. It may be reasonably questioned, therefore, whether this amendment does not absolutely annul that portion of the constitution which gave congress any discretionary power whatever to withhold the right of appeal in any criminal case whatever. At any rate, it is clearly sufficient to condemn all such absurd and preposterous implications as that on which alone the supreme court have hitherto refused to take appellate jurisdiction in criminal cases.

There is something marvelous in the obstinacy with which the supreme court have refused to take this appellate jurisdiction in defiance of a plain mandate of the constitution itself, and in obedience only to an unnecessary implication drawn from an act of congress, which (in so far as it purports to grant what had been already granted by the constitution, appellate jurisdiction in any case) is gratuitous, extra-constitutional, inoperative, and, legally speaking, an entire nullity; and which, therefore, gives no color of authority for such an implication.

Mr. Heard's argument:

Mr. Heard followed upon the errors assigned, and commenced upon the thirteenth error, as follows: "13. That it does not appear that the verdict of said jury was rendered in open court, and in the presence of the prisoner." He cited Archb. Cr. Pl. (13th Ed.) 146, and contended that it must appear on the record that the verdict was rendered in open court and in the presence of the prisoner, and that in this the record was insufficient.

He next took up the twelfth error assigned, namely, "12. That said indictment does not appear to be signed by the foreman of the grand jury," which he contended was necessary, though no authority was found for this point at common law. Eleventh error. "That the verdict is repugnant to the general averment and clause in the indictment giving the court jurisdiction."

The clause referred to is made up of the last four lines in the body of the indictment, namely, "And the jurors aforesaid, upon their oath aforesaid, do further present, that the district of Massachusetts is the district into which said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, Charles H. Stanley, otherwise called John W. Ballard, were first brought after committing the aforesaid 'offence.'"

This point was argued at length, and the leading case in England was cited in its support. O'Connell v. Reg., 11 Clark & F. 155; also, Holloway v. Reg., 2 Denison, Crown Cas. 287. Mr. Heard contended that the letter "s" saved O'Connell, and that the principle applied in that case applies to the case at bar. He also contended that the word "offence" should have been in the plural, inasmuch as the several prisoners were indicted for several offences, as murder, manslaughter, etc.

The errors assigned from the seventh to

the tenth, inclusive, were then considered, which are in substance, that it nowhere appears of what felony, if any, Plumer was "adjudged" guilty, or "deemed or adjudged guilty"; or for "what felony he suffered sentence of death"; or that he was sentenced to death for the particular murder of which he was found guilty by the jury. Whart. Cr. Law (2d Ed.) 151.

The second error assigned was then considered, which was that there was no sufficient averment that the person alleged to be injured was under the protection or within the jurisdiction of the United States. Under the general assignment of other errors and informalities in the record, the counsel raised the point that the action of the court was improperly put in the past tense, while he contended that it should have been put in the present tense, that the action of the parties might be in the past or present; reading from Gabbett (volume 2, p. 563), who also cited, in support of this point, Rex v. Perin, 2 Saund. 393 (6th Ed.). He also cited the case of U. S. v. Bird [Case No. 14,597], in support of another error, that no averment of issue joined appeared upon the record, and read also from Archbold in support of the same objection.

Again, under the general assignment, that it did not appear of what jury a list was acknowledged to be received by the prisoners "more than two days before the day of the trial." The record of U. S. v. Bird [supra] was cited as being correct on this point. It was also stated this case was the first under the crimes act of 1790.

Mr. Butler's argument:

Mr. Butler then addressed the court upon the general question whether a writ of error would lie in a criminal case to the supreme court. He said that if the errors assigned seemed mostly verbal and immaterial, there was no situation in which a man might better be excused for criticising such errors than one where he was contending for his life. He knew of nothing better calculated to fit any person for a full and fair examination of this case, than reading the opinion of Lord Mansfield in the Case of Wilkes [4 Burrows, 2527]. In the sparsity of writs of error in the circuit court of the United States, a degree of inaccuracy had crept into their records.

He said he referred to the originals of our laws on crimes which were to be found in the common law of England, and remarked that our laws had been modified by statutes and conformed to the institutions of our country. He said that the laws of the United States recognized two kinds of murder: one was murder and piracy on the high seas; and the other was wilful murder, which might be committed in any place.

He then took up the first and second errors assigned, and contended that in the indictment and record there was no sufficient averment of the jurisdiction of this court over the case at bar, and contended that a charge of piracy and murder "on the high seas" would fall under the jurisdiction of every nation or any which should first come at the offender.

But in an indictment of murder simply, the rule is different. It asserted that "it was on an American vessel." He contended that this would never be explicit enough until the time when our country shall comprise the whole of America.

There was also no averment that the vessel was under the protection of the United States, or that it was in the lawful business of the United States, nor that Archibald Mellen was a citizen of the United States; and that for all the record contained, he might have been a pirate, there being no averment that the injured person was under the protection of the United States.

He said that he was doing his whole duty in attempting to raise a reasonable doubt in the mind of the judge, and he contended that the prisoner should have the benefit of such a doubt now as much as when he was before the jury upon a question of fact.

In the third assignment there was nothing to show that the prisoner was allowed the privilege of challenging the jurors by whom he was tried; and he said that in a broad view this was not merely a technical point, but might be of great importance to those who shall come after us, if ever, hereafter, in stormy times, the country should be cursed with a Jeffreys on the bench. In Massachusetts, he said the right of challenge was almost taken away, which had resulted from the gradual encroachments of the courts, as well in this country as in England.

The fourth and thirteenth errors assigned were then considered, that there was no averment that the defendant was present at the time of impanelling the jury, during the trial, or at the return of the verdict. And in connection with this the counsel referred to the general error that the record was put in the past tense, citing copious authorities in support of this allegation of error. By the present tense the whole proceedings were recorded as they came up.

The fifth assignment was, "That in and by said record it nowhere appears that Plumer was permitted to be heard by the said jury so impanelled, by himself or his counsel; and that in truth and in fact Plumer was not permitted to address the jury in his own proper person." He said that here there was a double assignment, an error of law and an error of fact; and he argued that an error of fact would lie in the supreme court.

The sixth error was, that said verdict of guilty was rendered upon all the counts of said indictment, while one or more of said counts are defective and insufficient in law to support any judgment. One good count, the counsel was willing to allow, was sufficient upon which to find a verdict, but that the particular count

on which the defendant is found guilty must appear in the record.

He then criticised the record in the errors assigned from the seventh to the eleventh assignments inclusive, as not expressing what felony the said Plumer was found guilty of, insisting that the statute in this regard was nomen collectivum, and only meant to express that the defendant should be found guilty of the felony with which the indictment charged him; and he believed that in this opinion he would be supported by every good lawyer, that "the felony of which he was convicted" should be entered on the record.

Mr. Butler continued his argument by dwelling upon the question of the power of the judge to stay the execution, believing that if it was in his power, it would be the pleasure of the judge. He argued this point briefly, when the judge said that he had no doubt of the power of the court.

In concluding this part of his argument, he said that he had labored to raise a reasonable doubt in the mind of the court, that in all this mass of errors there were some which should be corrected; and for himself and for his client he did not care whether his honor tried the case again himself with his associate justice, or whether it were taken to the supreme court.

He then passed on to speak of the possibilities of a "writ of error" under the constitution of the United States, reading from the constitution the appellate jurisdiction belonging to the supreme court, and citing various cases under it, and said that Chief Justice Marshall first suggested a doubt on the subject in 1805, the same justice having passed over the same point sub silentio in 1802. This was the case of U. S. v. Simms, 1 Cranch [5 U. S.] 252, and the opinion, the counsel believed, was given with a determination that the president should not appoint any judges to take a certain prisoner out of the hands of the court. He criticised this opinion fully, and declared that the great chief justice had confounded the regulations made for one purpose and the exceptions made for another. In continuing his remarks he cited [Clarke v. Bazadone] 1 Cranch [5 U. S.] 212; [Dorousseau v. U. S.] 6 Cranch [10 U. S.] 307; [U. S. v. More] 3 Cranch [7 U. S.] 159; The Young Mechanic [Case No. 18,180]; [Ex parte Crane] 5 Pet. [30 U. S.] 203, in which the point was ruled by obiter decisions merely.

In closing, Mr. Butler made an earnest appeal for the rights of the subject when prosecuted by the government. He declared that the criminal jurisdiction of the supreme court will have to be enlarged, so that the peace of the country and the rights of the citizen might be secured against the arbitrary decisions of political judges, by having such cases reviewed by the high court, consisting of learned judges from all parts of the country, who would not be swayed by local prejudice.

The argument was then concluded with an expressed desire that his honor would seal a bill of exceptions to the supreme court, to get the minds of that court upon the case.

CLIFFORD, Circuit Justice. Plumer, the petitioner, with three others, to wit, William H. Carther, William Herbert, and Charles H. Stanley, on the 30th of October, 1858, was indicted for the crime of murder committed on board the ship Junior on the high seas. He was charged as principal, and the other three were joined in the same indictment as principals in the second degree. They were all seamen on board the ship Junior, an American vessel employed in a whaling voyage, and the charge was that the prisoners, on the 26th of December, 1857, on the high seas, when the ship was in the Indian Ocean, out of the jurisdiction of any particular state, feloniously, wilfully, and of their malice aforethought, murdered Archibald Mellen, the master of the vessel. Having been first brought into the district of Massachusetts after committing the offense, they were indicted in the circuit court for that district, under the fourth section of the act of the 3d of March, 1825, and the petitioner was found guilty, by the verdict of the jury, of the crime as charged in the indictment, but the other three were found guilty of manslaughter, and not guilty of the principal charge. Subsequent to the verdict, and before sentence, the petitioner filed a motion for new trial, alleging errors in the rulings of the court, and also a motion in arrest of judgment, alleging defects in the indictment, but both motions were afterwards withdrawn by the advice of his counsel, and at his own personal request, made in open court. Pending those motions, further proceedings in the case were suspended, but when they were waived and withdrawn, the district attorney moved for sentence, and the prisoner was set at the bar for that purpose. Inquiry was then made of the prisoner by the clerk, pursuant to the order of the court, whether he had anything to say why sentence of death should not be pronounced against him; and the court having heard and attentively considered his reply, and perceiving nothing therein to create any doubt as to the legality of his conviction, proceeded to pronounce against him the sentence of death set forth in the record as required by law. Throughout the trial both judges of the circuit court were present, and every ruling and proceeding in the trial were fully approved by both judges. Application is now made to the presiding justice at chambers for the allowance of a writ of error from the supreme court to the circuit court to remove the cause into the supreme court for the correction of certain alleged errors in the record, process, and proceedings in the trial, as specified in the paper accompanying the petition, called the assignment of errors. Some of the alleged errors are substantially the same as those which were set forth in the motion for new trial, and others are substantially the same as those set forth in the motion previously filed in arrest of judgment, both of which were waived and withdrawn before sentence. As assigned in the paper filed with the petition, the errors are fifteen in number; and the several assignments have all been very fully and ably argued by counsel appearing in

behalf of the petitioner; but I do not think it proper to decide the questions presented in the assignment of errors, nor any one of them, as I am of the opinion that a writ of error will not lie from the supreme court to the circuit court in a criminal case, and consequently, that the judges of the circuit, whether sitting in court or at chambers, have no jurisdiction to grant the prayer of the petition. The power to allow a writ of error, after final judgment in a civil action, is impliedly vested in a judge of the circuit court by the twenty-second section of the judiciary act, subject to the conditions therein specified, and no doubt is entertained that the writ in all cases falling within that section, may be allowed by either of the judges of the circuit court, as well when the hearing is at chambers as when the application is presented in open court. An argument upon that point is unnecessary; but the prayer of the petition is denied expressly upon the grounds that the circuit court cannot grant a bill of exceptions in a criminal case, and that a writ of error from the supreme court to the circuit court will not lie to remove the judgment of the circuit court in such a case into the supreme court for re-examination. Bills of exceptions in the federal courts are required to be drawn as at common law, under the statute of Westminster II. (13 Edw. I. c. 31), passed in the year 1285, and of course they must be taken during the trial and before the jury retire from the bar, and must be seasonably sealed by the judge as therein required. 1 Pick. St. 206; 2 Tidd, Prac. 862; 1 Arch. Prac. (11th Ed.) 443; 2 Bac. Abr. 113.

Exceptions under that statute were never allowed in criminal cases in the courts of the parent country; and from the moment it was adopted as the rule of decision in the federal courts to the present time, its application, without any exception, has uniformly been confined to civil actions. 1 Chit. Cr. Law, 622; 1 Lev. 68; 1 Sid. 65; Rex v. Stratton, 21 Howell, St. Tr. 1187; U. S. v. Gibert [Case No. 15,204]; People v. Holbrook, 13 Johns. 90; Ex parte Barker, 7 Cow. 143; People v. Vermilyea, Id. 108; 1 Phil. Ev. 997.

Authority to grant writs of error to the circuit courts to remove criminal cases into the supreme court for re-examination in matters of law, might undoubtedly be vested in the justices of the supreme court, but the insuperable difficulty in the way of exercising any such power at the present time is, that congress has not conferred any such jurisdiction. Such judicial power as belongs to the United States was created by the constitution, and the provision is that it shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish; and the second section of the same article provides that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of congress, and treaties made or which shall be made under their authority, and to all the other cases and controversies therein enumerated, subject of course to the rule of construction and the limitation in the eleventh article of the amendments. Obviously, the words "all cases in law" are comprehensive enough to include criminal cases as well as civil actions, but the difficulty in assuming jurisdiction without an act of congress, arises from the provision contained in a subsequent clause of the same section, which will presently be noticed. Original cognizance of all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, is confided to the supreme court without any qualification; but the provision in respect to the appellate jurisdiction of that court is that "in all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." No dispute, it would seem, can ever arise as to the original jurisdiction of the supreme court, as it is conferred in unambiguous terms and without any qualification, and the cases to which it extends are specifically enumerated; but the language employed in describing the appellate jurisdiction of that tribunal, is not quite so cautiously guarded, and it is conferred subject to such exceptions as congress may make, and must be exercised under such regulations as congress may prescribe. Unexplained, it would extend in all cases to the facts of the case as well as to the law; but the next clause of the same section provides that the trial of all crimes, except in cases of impeachment, shall be by jury; and the seventh amendment ordains that no fact tried by a jury shall be otherwise re-examined than according to the rules of the common law. Parsons v. Bedford, 3 Pet. [28 U. S.] 447, 448. Exceptions to the appellate jurisdiction of the supreme court, as conferred in the second section of the third article of the constitution, it is conceded, may be made by congress, but the argument is that none have been made; and the petitioner insists that until exceptions are made by congress, the appellate jurisdiction of the supreme court extends to all cases whatsoever, civil or criminal, arising under the constitution and laws of the United States, except such as are included in the original jurisdiction of that court. Ingeniously put and well argued as the proposition has been, the court might hesitate to reject it, if the question was res integra; but it is not, as is very properly conceded by the petitioner. Even viewed as a theory of new impression, the argument in support of it is not satisfactory, as it assumes that the jurisdiction exists unless it be shown that it is excluded by some express exception in an act of congress. Separated from the closing sentence of the clause in question, the con-

struction suggested might be correct; but the whole clause must be read as it stands, and when so read it as clear that the appellate jurisdiction of the supreme court, if congress legislates upon the subject, must be exercised under such regulations as congress shall prescribe, as it is that the appellate jurisdiction is conferred with such exceptions as congress shall make. Undoubtedly, the powers of the supreme court, both original and appellate, are given by the constitution, and not by the judiciary act, as is sometimes supposed; but the appellate jurisdiction of that tribunal is limited and regulated by the judiciary act and other kindred acts upon the same subject. Had congress organized the supreme court without any regulations as to the manner in which the court should exercise its powers, the appellate jurisdiction of the court, as conferred in the constitution, would have been as untrammelled as its original jurisdiction has been throughout our judicial history. Difficulties and embarrassments for want of such regulations would undoubtedly have been encountered at every step; but the better opinion is, that congress cannot defeat the appellate jurisdiction of the supreme court by omitting to enact regulations for its exercise, as authorized by the constitution. Congress, it is true, has not declared in express terms that the appellate jurisdiction of the supreme court shall not extend to criminal cases, nor to civil actions or suits in equity where the matter in dispute, exclusive of costs, does not exceed the sum or value of $2,000; but congress has described affirmatively the appellate jurisdiction of that court, and that affirmative description has always been held "to imply a negative on the exercise of such appellate power as is not comprehended within it." U. S. v. More, 3 Cranch [7 U. S.] 170; Durousseau v. U. S., 6 Cranch [10 U. S.] 314.

Original cognizance, concurrent with the courts of the several states, is conferred upon the circuit courts, by the eleventh section of the judiciary act, of all suits of a civil nature, at common law, or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of $500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. 1 Stat. 78.

Unquestioned power is also conferred upon the supreme court by the twenty-second section of the same act, to re-examine upon writ of error final judgments in civil actions rendered in a circuit court, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000; and detailed regulations are enacted, prescribing the steps to be taken in suing out the writ and defining the manner of exercising the power, as contained in the same and subsequent sections of that act; but they all have respect to the removal of civil actions at common law, suits in equity, or causes of admiralty and maritime jurisdiction. Criminal cases are not even mentioned in those regulations, nor is any one of them of a character to be applied in the removal of an indictment or judgment in a criminal case, from the circuit court into the supreme court for re-examination. Viewed in the light of those regulations, as the case should be, the implication is very strong that congress at that time did not intend that the appellate jurisdiction of the supreme court, as therein described, should extend to any cases other than those to which those regulations applied; and the presumption that criminal cases were intentionally excepted therefrom is much strengthened by the fact that the original jurisdiction of the circuit courts over crimes and offences cognizable under the authority of the United States, is conferred by the same section in that act, which gives those courts original cognizance, concurrent with the courts of the several states, of suits of a civil nature at common law and in equity. 1 Stat. 78.

Ample provision was made in that act for the re-examination of final judgments and decrees in civil actions and suits in equity, and in causes of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000; but no provision is made for the re-examination of criminal cases, or of cases of a civil nature, of any kind whatsoever, where the matter in dispute is less than the sum or value prescribed in the twenty-second section of that act.

Alterations have since been made in the regulations upon that subject, such as substituting appeals in the place of writs of error for the removal into the supreme court of decrees in equity, and decrees in admiralty cases, and of prize or no prize, and for writs of error in revenue cases, irrespective of the amount in dispute, but none of the new regulations afford any support to the present application, or give any countenance whatever to the theory that a writ of error under any circumstances will lie in a criminal case to a circuit court. Repeated decisions of the supreme court have established the opposite rule, and those decisions have been too long acquiesced in as sound expositions of the judiciary act to be changed without an act of congress. Ex parte Kearney, 7 Wheat. [20 U. S.] 42; Ex parte Watkins, 3 Pet. [28 U. S.] 201; Forsyth v. U. S., 9 How. [50 U. S.] 571; In re Kaine, 14 How. [55 U. S.] 120; Ex parte Watkins, 7 Pet. [32 U. S.] 568; Ex parte Gordon, 1 Black [66 U. S.] 505; Bish. Cr. Proc. § 940.

Efforts have been made in congress at different periods to extend the appellate jurisdiction of the supreme court so as to include criminal cases, but the measure has never received much support, as it was fore-

seen that it would increase the business of that court beyond what the judges could accomplish, and would necessarily lead to such delays as would tend to defeat the great purpose intended to be accomplished in the administration of criminal justice.

Petition denied.

Mr. Butler.—I now make application for a writ of error coram vobis, returnable before the circuit court. [See Case No. 16,056.]

Judge CLIFFORD intimated that he was of the impression that in the practice of the circuit court, the writ coram vobis had been substantially superseded by the practice of a petition (with an assignment of errors annexed) to set aside the proceedings for informalities and defects in the record. It was then arranged that that course should be adopted, and the court agreed to hear the application, with Judge SPRAGUE, at Boston, on Tuesday morning next, at the circuit court room.

Case No. 16,056.

UNITED STATES v. PLUMER et al.

[3 Cliff. 28.] [1]

Circuit Court, D. Massachusetts. July 6, 1859.

CIRCUIT COURTS—CRIMINAL JURISDICTION IN ERROR — WRITS OF ERROR — CRIMES COMMITTED ON SHIPBOARD—INDICTMENT—CHALLENGES OF JURORS—LIST OF WITNESSES—SENTENCE.

1. A writ of error coram vobis does not lie in the circuit court in a criminal case, either from its own judgment or the judgment of the district court.

2. Being without any common-law authority to try or punish offenders, except for contempt, they cannot exercise any power in a criminal case not derived expressly or impliedly from an act of congress.

3. No authority has been given in the acts of congress to the circuit court to re-examine, by writ of error or in any other manner, the rulings or judgments of the district court in criminal cases. No such authority is given by the fourteenth section of the judiciary act.

4. By that section congress only intended to vest the power to issue such other writs in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued.

[Cited in Grantland v. City of Memphis, 12 Fed. 288.]

5. Difference between the writ of error coram nobis and the writ of error coram vobis explained and illustrated.

6. If the alleged error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it.

7. The indictment averred that the alleged crime was committed in and on board of a certain ship called the Junior, then and there owned by and belonging to the four persons therein named, all of whom are alleged to be citizens of the United States, and also contained the further allegation that all the criminal acts of the prisoner were committed within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of the court, and out of the jurisdiction of any particular state of the United States. *Held*, that there is a sufficient averment that the circuit court had jurisdiction, and that the injured party was within and under the protection of the United States, and in the peace thereof.

8. In this record it sufficiently appears that the prisoner was permitted his right of challenge.

9. By this record it sufficiently appears that the prisoner was present at the impanelling of jury, and when the verdict was rendered by the jury.

10. All the counts in this indictment *held* good; but granting that some are bad and some good, the verdict should stand.

11. The use of the past tense in this record is no valid objection to the record.

12. It sufficiently appears in and by the record that issue was joined.

13. When the docket entries show that the list of witnesses was furnished the prisoner in a capital case, and the record shows that prisoner acknowledged in open court, before the jury was impanelled, that he did receive it two entire days prior to that time, it sufficiently appears that such list was furnished as required.

14. It sufficiently appears in and by this record of what felony the prisoner was convicted and for what he was sentenced.

15. The designation "foreman," appended to the name of the person signing the indictment as such, is sufficient, as the designation "foreman" refers to the introductory clause of the indictment, and to the record, as verifying the legal inference that "foreman" means foreman of the grand jury.

The prisoner, with three others, was indicted in the circuit court for the district of Massachusetts, for murder on the high seas. Plumer was tried and convicted. Motions for a new trial and in arrest were filed, but they were afterwards waived, and Plumer was sentenced to be executed. A motion was now made for allowance of a writ of error coram nobis.

Benjamin F. Butler, George W. Searle, and F. F. Heard for plaintiff in error.

C. L. Woodbury, Dist. Atty., and M. Andros, Asst. Dist. Atty., appeared for the Government.

The indictment, record, and docket entries were thus:

The Indictment.

United States of America.

Circuit Court of the United States of America, for the District of Massachusetts.

At a circuit court of the United States of America, for the district of Massachusetts, begun and holden at Boston, within and for said district, on the 15th of October, 1858.

The jurors of the United States of America, within and for the district aforesaid, upon their oath, present:

That Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther,

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the 26th of December, 1857, with force and arms on the high seas and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior, then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, with a certain gun, called a whaling gun, then and there charged with gunpowder and three leaden bullets, which said gun he the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in both his hands then and there had, and held at and against the body of him the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there with the three leaden bullets aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, by him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there shot off, discharged, and sent forth as aforesaid, him the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and upon the left side of the body of him the said Archibald Mellen, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, then and there giving to him the said Archibald Mellen, then and there with the three leaden bullets aforesaid, so as aforesaid by him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there shot off, discharged, and sent forth out of the gun aforesaid, by force of the gunpowder aforesaid, in, upon, and against the left side of the body of him the said Archibald Mellen, and then and there penetrating into and through the body of him the said Archibald Mellen, one mortal wound, of which said mortal wound, the said Archibald Mellen, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, then and there on the said twenty-sixth day of December, in the year aforesaid, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Chares H. Stanley, otherwise called John W. Ballard, then and there on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought, were present, and then and there feloniously, wilfully, and of their malice aforethought, were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, then and there to do, commit, and perpetrate.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, him the said Archibald Mellen, did then and there, in the manner and form aforesaid, kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior,

then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there, with a certain instrument of wood and iron, called a "hatchet," which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there, in his right hand, had and held, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and upon the back of the neck of him the said Archibald Mellen, then and there feloniously wilfully, and of his malice aforethought did strike, thrust, and penetrate, then and there giving to the said Archibald Mellen, in and upon the back of the neck of him the said Archibald Mellen, then and there with the hatchet aforesaid, by such striking with the hatchet aforesaid, in the manner aforesaid, one mortal wound, of the length of three inches, and of the depth of two inches, of which said mortal wound the said Archibald Mellen, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, him the said Archibald Mellen, then and there, in the manner and form aforesaid, did kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior, then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there, with a certain instrument of wood and iron, called a hatchet, which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there in his right hand had and held, the said Archibald Mellen then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and upon the neck, back, and shoulders of him, the said Archibald Mellen, then and there, feloniously, wilfully, and of his malice aforethought did strike, thrust, and penetrate, then and there giving to the said Archibald Mellen, in and upon the neck, back, and shoulders of him, the said Archibald Mellen, then and there with the hatchet aforesaid, by such striking with the hatchet aforesaid, in the manner aforesaid, several mortal wounds,

to wit, one mortal wound in and upon the back of the neck of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches, and one mortal wound in and upon the back of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches, and two mortal wounds in and upon the left shoulder of him, the said Archibald Mellen, each of said two last-mentioned mortal wounds being of the length of three inches, and of the depth of two inches, of which said several mentioned and described mortal wounds, the said Archibald Mellen, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, him, the said Archibald Mellen, then and there in the manner and form aforesaid, did kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and on board of a certain vessel, the same then and there being a ship called Junior, then and there owned by and belonging to David R. Greene, Robert B. Greene, Dennis Wood, and Willard Nye, all citizens of the said United States, in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there a certain gun, called a whaling gun, then and there charged with gunpowder and three leaden bullets, which said gun the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in both his hands, then and there had and held at and against the body of him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, then and there feloniously, wilfully, and of his malice aforethought did shoot off and discharge, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there with the three leaden bullets aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, by him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, so as aforesaid shot off, discharged, and sent forth, him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and upon the left side of the body of him, the said Archibald Mellen, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound; and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States. and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, then and there with a certain instrument of wood and iron, called a hatchet, which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and

there in his right hand had and held, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and upon the neck, breast, shoulders, body, and back of him, the said Archibald Mellen, feloniously, wilfully, and of his malice aforethought did strike, then and there giving to him, the said Archibald Mellen, as well by the three leaden bullets aforesaid, so as aforesaid, by him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, shot off, discharged, and sent forth out of the gun aforesaid, by force of the gunpowder aforesaid, at and against the body of him, the said Archibald Mellen, in the manner and form aforesaid, as by the instrument of wood and iron called a hatchet, as aforesaid, several mortal wounds, to wit, one mortal wound in and upon the left side of the body of him, the said Archibald Mellen, and then and there penetrating into and through the body of him, the said Archibald Mellen; and one mortal wound in and upon the back of the neck of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and one mortal wound in and upon the back of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and two mortal wounds in and upon the left shoulder of him, the said Archibald Mellen, each of said two last-mentioned mortal wounds being of the length of three inches, and of the depth of two inches, of which said several mentioned and described mortal wounds, he, the said Archibald Mellen, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, on the said twenty-sixth day of December, in the year aforesaid, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, the said Archibald Mellen, did then and there, in the manner and form aforesaid, kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that Cyrus Plumer, mariner, otherwise called Cyrus W. Plumer, late of New Bedford, in said district, William H. Carther, mariner, otherwise called Richard Carther, late of New Bedford, in said district, William Herbert, late of New Bedford, in said district, mariner, and Charles H. Stanley, mariner, otherwise called John W. Ballard, late of New Bedford, in said district, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, with force and arms, on the high seas, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and on board of a certain American vessel, the same then and there being a ship called Junior, then and there belonging to a citizen or citizens of the said United States (whose name or names is and are to the jurors aforesaid as yet unknown), in and upon one Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there a certain gun called a whaling gun, then and there charged with gunpowder and three leaden bullets, which said gun the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in both his hands, then and there had and held at and against the body of him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there, with the three lead-

en bullets aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, so as aforesaid, shot off, discharged, and sent forth, him, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and upon the left side of the body of him, the said Archibald Mellen, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, and that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, then and there, with a certain instrument of wood and iron, called a hatchet, which he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, then and there in his right hand, had and held, the said Archibald Mellen, then and there being in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, in and upon the neck, breast, shoulders, body, and back of him, the said Archibald Mellen, feloniously, wilfully, and of his malice aforethought, did strike, then and there giving to him, the said Archibald Mellen, as well by the three leaden bullets aforesaid, so as aforesaid, by him, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, shot off, discharged, and sent forth, out of the gun aforesaid, by force of the gunpowder aforesaid, at and against the body of him, the said Archibald Mellen, in the manner and form aforesaid, as by the instrument of wood and iron, called a "hatchet," as aforesaid, several mortal wounds, to wit, one mortal wound in and upon the left side of the body of him, the said Archibald Mellen, and then and there penetrating into and through the body of him, the said Archibald Mellen; and one mortal wound in and upon the back of the neck of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and one mortal wound in and upon the back of him, the said Archibald Mellen, of the length of three inches, and of the depth of two inches; and two mortal wounds in and upon the left shoulder of him, the said Archibald Mellen; each of said last-mentioned mortal wounds being of the length of three inches, and of the depth of two inches, of which said several mentioned and described mortal wounds, he, the said Archibald Mellen, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, on the said twenty-sixth day of December, in the year aforesaid, instantly died. And that the said William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, then and there, on the said twenty-sixth day of December, in the year aforesaid, in and on board of the ship aforesaid, and on the high seas aforesaid, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States, feloniously, wilfully, and of their malice aforethought, were present, and then and there feloniously, wilfully, and of their malice aforethought were aiding, abetting, comforting, assisting, and maintaining the said Cyrus Plumer, otherwise called Cyrus W. Plumer, the felony and murder aforesaid, in the manner and form aforesaid, to do, commit, and perpetrate. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, feloniously, wilfully, and of their malice aforethought, the said Archibald Mellen, did, then and there, in the manner and form aforesaid, kill and murder. Against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present that the district of Massachusetts is the district into which the said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, Charles H. Stanley, otherwise called John W. Ballard, were first brought after committing the aforesaid offence.

A true bill. B. F. Copeland, Foreman.

Charles Levi Woodbury,
United States Attorney for the District of Massachusetts.

The Record.

At this present October term of this court, A. D. eighteen hundred and fifty-eight, said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, were severally set to the bar and had this indictment read to them; and thereupon they severally said that thereof they were not guilty; and thereof for trial

put themselves upon God and their country; and Benjamin F. Butler and Charles P. Chandler were assigned by the court as counsel for said Plumer; F. F. Heard and F. W. Pelton were assigned as counsel for said Carther; Thornton K. Lothrop and J. Q. Adams were assigned as counsel for said Herbert; and J. Hardy Prince and Samuel M. Quincy were assigned as counsel for Charles H. Stanley, otherwise called John W. Ballard; and said Cyrus Plumer, otherwise called Cyrus W. Plumer, William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, severally acknowledged that they had severally received a copy of the indictment, and a list of the jurors, agreeably to law, and more than two days before the day of their trial.

A jury was thereupon impanelled and sworn to try the issue, namely, John B. Chisholm, foreman, and fellows, namely, Willard Bacon, Daniel C. Bates, Lemuel Grant, Charles Humphrey, Asher Joslin, Charles B. W. Lane, Benjamin Norris, Hiel J. Nelson, William Parker, William Tinker, and Amasa Whitney, of said district.

And the said jury afterwards returned their verdict that said Cyrus Plumer, otherwise called Cyrus W. Plumer, is guilty of murder as alleged in said indictment; William H. Carther, otherwise called Richard Carther, William Herbert, and Charles H. Stanley, otherwise called John W. Ballard, are severally guilty of manslaughter. And thereupon said Cyrus Plumer, otherwise called Cyrus W. Plumer, by his counsel, moves the court for a new trial as follows:

(Here follow motions for new trial, and in arrest.)

Time was allowed by the court for preparation of counsel therein, and the said motions were set down for hearing; and afterwards, at the same term, the counsel of said Plumer moves the court for leave to withdraw the said motions for new trial and in arrest of judgment; and said Cyrus Plumer, otherwise called Cyrus W. Plumer, having been brought into court, and being inquired of personally, asks that such leave may be granted and that the said motions be withdrawn. Wherefore the court doth grant him leave to withdraw the said motions, and the same are accordingly waived and withdrawn by said Plumer; said Plumer is then asked if he had anything to say why judgment of death should not now be pronounced against him; and having replied thereto fully, and no good cause appearing to the contrary, and all matters in the case having been fully heard and understood by the court, it is considered by the court that the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be deemed guilty of felony, and that he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken back to the place from whence he came, and there remain in close confinement until Friday, the twenty-fourth day of June next, and on that day, between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, he, the said Cyrus Plumer, otherwise called Cyrus W. Plumer, be taken thence to the place of execution, and that he be there hanged by the neck until he be dead.

Among other entries of the clerk's docket were the following, namely: "No. 228. Oct. term, 1858. Oct. 30th. Indictment presented by the grand jury, Benjm. F. Copeland, Foreman. Nov. 1st. Copy of ind. given to each of the four prisoners; also list of petit jurors. Nov. 3rd. The court inquiring, all acknowledged that they had rec'd a copy of the indictment and jury list, and did not object to their arraignment. Dec. 2nd. Motion for a new trial filed, and motion in arrest of judgment, by Plumer. March 30th. The counsel for Plumer withdraws and waives his motion for new trial and in arrest of judgment. Plumer being brought into court asks leave to do so, and leave is granted by the court."

The Petition.

United States of America.

Circuit Court of the United States of America, for the District of Massachusetts.

To the Honorable the Justices of the Circuit Court of the United States of America, Sitting within and for the First Judicial Circuit, in the District of Massachusetts.

Cyrus W. Plumer, now imprisoned in the district aforesaid, under sentence of death, on a judgment, warrant, process, and proceeding of the said circuit court of the United States of America, for the district of Massachusetts, says that there is manifest error in the process, proceedings, premises, and judgment, and feeling aggrieved thereby assigns as errors in said record, process, proceeding, and judgment the errors named and set forth in the paper hereto annexed, marked "Assignment of Errors."

And said Plumer, by reason of the errors aforesaid, and other errors in the proceedings and record aforesaid, prays that the record and judgment be set aside, reversed, stayed, respited, reprieved, annulled, and held for naught, and that he be discharged thereof, and be suffered to go without day.

Cyrus W. Plumer.

Boston, July 2, 1859.

B. F. Butler,
F. F. Heard,
Geo. W. Searle,
Of Counsel.

United States of America.

District of Massachusetts, to wit:

Boston, 5th day of July, 1859.

Then personally appeared Cyrus Plumer, otherwise called Cyrus W. Plumer, and made solemn oath that all the errors in fact,

named and set forth in the "assignment of errors," hereto annexed, are true, and every statement of fact in said assignment is true in substance and effect.

Before me, G. D. Guild,
United States Commissioner.

Assignment of Errors.

United States of America.

Circuit Court of the United States of America, for the District of Massachusetts.

Cyrus Plumer, otherwise called Cyrus W. Plumer, Plaintiff in Error, v. The United States of America, Defendant in Error.

And now, to wit, on the 2d day of July, A. D. 1859, cometh the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in his proper person, who is now imprisoned in the district of Massachusetts, under sentence of death, on a judgment, warrant, process, and proceeding of the said circuit court of the United States of America, for the district of Massachusetts, and immediately saith that in the record and process aforesaid, and also in the giving of the judgment aforesaid, against him the said Cyrus Plumer, otherwise called Cyrus W. Plumer, there is manifest error in these, to wit:—

1. That in and by said indictment and record, there is no sufficient averment that the circuit court in which said indictment was returned and heard, had jurisdiction of the offence therein supposed to be charged.

2. That in and by said indictment and record, there is no sufficient averment that the person therein supposed to be injured was within or under the protection of or jurisdiction of the United States, or in the peace thereof.

3. That in and by said record it nowhere appears, or is set forth, that said Cyrus Plumer, otherwise called Cyrus W. Plumer, was informed of, or permitted to exercise, or did exercise his constitutional right of challenge of the jurors returned for his trial.

4. That in and by said record it nowhere appears, or is set forth, that said Plumer was present, either at the impanelling of the jury that tried him or at the time said trial was had, or said verdict was rendered against him.

5. That in and by said record it nowhere appears that said Plumer was permitted to be heard by said jury so impanelled, either by himself or his counsel; and that in truth and in fact said Plumer was not permitted to address the jury in his own proper person.

6. That said verdict of guilty was rendered upon all the counts of said indictment, while one and more of said counts are defective and insufficient in law to support any judgment.

7. Because all the acts of the court are stated in the past tense.

8. Because it does not appear on said record that issue was joined between the prisoner and the United States.

9. It does not appear on the record, that the prisoner received a list of the proper jurors as by law required.

10. That it nowhere appears in and by said record of what (if any) felony said Plumer was adjudged guilty.

11. That it nowhere appears by said record of what "felony" the court "deemed" or adjudged the said Plumer "to be guilty."

12. That it nowhere appears by said record for what "felony" said Plumer was sentenced to suffer death.

13. That it nowhere appears in and by said record that Plumer received sentence of death for the particular murder of which the jury had found him guilty; but only for "felony" indefinitely, the particular felony not being described in any manner designated.

14. That the verdict is repugnant to the general averment and clause in the indictment giving the court jurisdiction.

15. That said indictment does not appear to be signed by the foreman of the grand jury.

16. That it does not appear that the verdict of said jury was rendered in open court, and in the presence of the defendant.

17. That said record is in other respects informal, insufficient, erroneous, and the judgment thereon void and of none effect.

18. That by the said record it appears that judgment upon the indictment aforesaid was given against him. the said Cyrus Plumer, otherwise called Cyrus W. Plumer, in form aforesaid, whereas judgment by the said circuit court of the United States ought to have been given for the said Plumer, that he be thereof acquitted and go thereupon without day. Therefore in that there is manifest error.

And the said Cyrus Plumer, otherwise called Cyrus W. Plumer, prays that the said judgment aforesaid, for the errors being in the record and process aforesaid, may be reversed and annulled, and absolutely be had for nothing, and that he may be restored to the common law of the land, and to all things which he hath lost on the present occasion.

B. F. Butler, Geo. W. Searle, and F. F. Heard, for petitioner.

Charles Levi Woodbury, Dist. Atty., and Milton Andros, Asst. Atty., for the United States.

Mr. Searle, for the prisoner, contended that the petition and accompanying papers bring into controversy the validity and sufficiency of this record as a chronicle of legal justice, so formal and accurate as to justify the enforcement of its last, its highest, and its most awful penalty. In the unequal contest of the citizen with the government, it is his right, to the last breath in his body, to hold the line and the plummet to authority, and standing there, to insist that law shall be administered with all the forms and all

the circumstances of legal justice. Between that power and the prisoner stand the rights of an accused man. He is now held by the strong arm of might; that arm must be upheld by the law, or its grasp is a nullity; that arm becomes the arbitrary oppressor of the prisoner, and not the representative instrument of justice, unless thus strengthened. The law assumes now to enforce its terrible penalty; it assumes to take human life,—what man cannot give.

The criminal law always, in its worst days, had its theoretical and even its real offsets of benefits and privileges, which were secured to the victim as an inheritance. These have always made up the forms of the criminal system. It is only by due process of law that a man is to be punished. All of this cause has now passed into the record; justice must stand on that record: and its grasp is powerless unless the forms of justice sustain it. Arbitrary power is no attribute of that criminal arm.

We have thought it proper to bring this record to the attention of the court. Now, as the gibbet looks down on a powerless man, we ask the representative ministers of human justice to pause, and with us review this criminal record, to see to it from beginning to end that it shows the forms of justice in all its parts, to the end that, if it be found valid, the law shall have its course and be glorified,—if it can be glorified by human blood; but, if it be found not so, to the end also that the great axe be arrested, and stayed at least until it can rise and fall with law to sustain it. I am desired merely and strictly to open the errors, others are to enforce them. They need no statement in detail.

What must the criminal record show, and does this record come up to the standard? That is in substance the whole question here at issue.

I. What now is this record of which we speak so much? The record may, perhaps with sufficient accuracy, be denominated the contemporaneous history of a judicial proceeding from beginning to end. That record imports absolute truth, and for it there can be no intendment and no presumption. This record has gone into parchment. For to-day and all time that is the history of this cause. See Sayles v. Briggs, 4 Metc. [Mass.] 421; Co. Litt. 260a; Com. Dig. "Record," A, F; Fowler v. Byrd [Case No. 4,999a]; 7 Com. Dig. tit. "Record," A.

II. What must and should that record of a capital felony contain? We claim that the only reliable answer to that question is contained in this proposition, namely:—

The record should contain an exact and formal statement in the present tense of every fact necessary to show demonstrably that judicial proceeding right and proper in all its stages,—showing clearly, without equivocation, doubt, or uncertainty, every fact necessary to justify the final act of sentence. It must be as exact as an indictment; if so exact it is sufficient, if not so exact and definite it is insufficient. The circuit court is one of limited and specific jurisdiction. This record must affirmatively show all the allegations necessary for that specific jurisdiction. Dyson v. State, 26 Miss. (4 Cushm.) 362.

III. This record is so faulty, defective, and insufficient as to impose upon the judicial function the imperative duty of setting it aside as a nullity, recalling the sentence, and retrying the prisoner.

1. The record must show the verdict of the jury in all cases of capital felony to have been delivered in open court in the presence of the prisoner. Co. Litt. 227b; 3 Inst. 110; 2 Hawk. P. C. (Ed. 1824) c. 47, § 2; 2 Hale, P. C. 300; Bac. Abr. "Verdict," B; 2 Gabb. Cr. Law (Dublin Ed. 1843) 529; Archb. Cr. Pl. (London Ed. 1856) 146.

2. The fourth and sixth assignments are valid. The entry of the proceedings in the past tense is fatal on error. 2 Saund. 393; 2 Gabb. Cr. Law, 563. The moment the criminal record comes to the past tense in the chronicle of the acts going on at the trial, we lose on the record the personal presence of the prisoner, without which, in all stages of a criminal proceeding, it is an absolute nullity.

3. The seventh, eighth, ninth, and tenth assignments show that the record has no sufficient adjudication of guilt for the felony charged.

For all that appears on this record, Plumer may have been adjudged guilty of manslaughter; which sentence would not warrant the penalty of death. See form of entry of verdict on the record, in Archb. Cr. Pl. (1856) 147; also form of judgment, Id. 152.

IV. The criminal record once entered up, and the term of the court at which the record was made up being ended, that record becomes the property of the defendant, and in it he has a vested right; to it he and his posterity have a right to appeal in all coming time as the permanent history of the judicial proceeding; it cannot be altered or amended.

"When once the judgment is solemnly entered on the record, no court can make any alteration in it; but if any material defect appear on the face of it, it can still be reversed by writ of error." Archb. Cr. Pl. (Eng. Ed.) 153; Sayles v. Briggs, 4 Metc. [Mass.] 421.

"When proceedings have been entered upon the record, the common-law power of amendment ceases; for the judges at common law were prohibited from allowing alterations to be made in any record." Britton, Proem. 2, 2; Smith, Lead. Cas. Eq. (5th Ed.) p. 589, note 1; see Bull. N. P. 321; 3 Bl. Comm. 407; 1 Bac. Abr. tit. "Amendment," G. P. 167; 2 Sell. Prac. 458; Short v. Kellogg, 10 Ga. 182; Gibson v. Wilson, 18 Ala. 63; Id. 438; 2 Gude, Prac. 137; 1 Com. Dig. K, "Amendment"; St. 8 Hen. VI. c. 12.

The statutes of jeofails never extended at common law to the king's criminal process.

V. This petition with its assignment is the proper and established mode for reaching these questions in this court, and opens, like the general writ of error, "every substantial defect appearing on the face of the record"; including "irregularity in the verdict or judgment, or any manifest error on the face of the record." Archb. Cr. Pl. 161; 4 Bl. Comm. 391; 1 Chit. Cr. Law, 747; Pickett's Heirs v. Legerwood, 7 Pet. [32 U. S.] 144.

1. It has been already adjudicated, contrary to our hopes and against our confident expectations, that no writ of error lies from the supreme to the circuit court in any criminal case.

2. It must follow then, that this is the highest court of error in a criminal case, and the remedy in error must be open before it. That is to say, it having been held that no writ of error lies from the supreme to the circuit court in such a case as this, it must follow that the circuit court is the supreme court having jurisdiction: for before all supreme legal tribunals, from which there is no appeal, the writ of error coram nobis lies, in the very nature of things.

3. The final remedy in error somewhere, is a fundamental element in every judicial system in both civil and criminal cases. There can, in the very nature of things, be no complete judicial system without this final redress for judicial mistakes. Whether the given case is a proper one for the remedy is one thing, but that there is such remedy is inherent.

4. The locality of the redress must be in the highest court having jurisdiction of the subject-matter. If there is no remedy by error from the supreme to the circuit court in criminal cases, the circuit court is the highest court of criminal jurisdiction in such cases, and the writ of error coram nobis must be maintainable.

5. It is no answer to say that in this case some of the points were made and then waived on motion for new trial, or that all of them were open in arrest. All this is true of most questions raised in error.

6. Nor is it any answer to say that the circuit court, being created by statute, has no common-law jurisdiction or process, as it confessedly has the common-law procedure in pleading, practice, and evidence; and these questions plainly relate to procedure.

To an inquiry upon these several points, and to a more elaborate enforcement of these suggestions, my associates ask attention; and, that their better words may be heard, I give way to them.

Mr. Heard followed upon the same side. Most of his propositions are stated in the preceding case, and he supported them by the authorities there referred to, and many others to the same effect.

Mr. Butler then followed in vindication of the petitioner's right to the writ, and in support of the validity of the various errors assigned. He commenced by announcing what he claimed to be a canon of criticism and judgment upon a record in a case of capital felony in the United States courts, namely, that the record must be a memorial of all the proceedings of the court, and that nothing can be taken by intendment.

The United States were sometimes said to have no common law; but yet he claimed that they did have common law in definition, remedy, and procedure, though not in jurisdiction or power. It was not exactly the common law of England, but it might be well enough defined the common law of England as practised here. On this ground he supported and invoked the English decisions in cases of definition, remedy, and procedure. He then proceeded to discuss the validity of the errors assigned. If his canon was correct, he believed that the court must decide that this record was faulty to such a degree that they must set it aside.

He took up the errors assigned in the same order as that he adopted in arguing in support of the application in the preceding case, and he supported his propositions by the same authorities.

C. L. Woodbury, Dist. Atty., and Milton Andros, Asst. Dist. Atty., for the United States.

1. The process invoked is not included in the grant to this court by the process act. There is no criminal jurisdiction for the United States court in criminal matters.

2. The averments in the indictment regarding the nationality of the vessel are such that the jurisdiction of this court attaches. For the limitations which have been put upon this jurisdiction, see U. S. v. Bowers, 5 Wheat. [18 U. S.] 197. For those refused by the court, see the applications in Furlong's Case, Id. 203, and in U. S. v. Holmes [Case No. 15,382].

The distinction between piracy and murder was elaborately argued by Mr. Marshall, afterwards chief justice, in Nash's Case [U. S. v. Robins, Case No. 16,175], which see.

The act of 1825 [4 Stat. 115] was passed to distinguish piracy from murder. See Act 1790 [1 Stat. 131]; also 5 Wheat. [18 U. S.] 197.

The jurisdiction extends on board any vessel not belonging to a foreign nation, and this is the gist of Nash's Case. No American ship loses her nationality, except by a sale to a foreigner.

Statutes also extend to ships built after the act, or before the act, or ships forfeited for breach of laws and to foreign wrecked vessels.

The averments of residence and character of vessel are sufficient. Jurisdiction is matter en pais. Ship's papers are not decisive. U. S. v. Bowers, 5 Wheat. [18 U. S.] 199-204, 7th point, 206.

And the burden of proof is on the defend-

ant. Lyle v. Rodgers, 5 Wheat. [18 U. S.] 419.

Is the allegation that the owners were citizens of the United States sufficient? U. S. v. Furlong, Id. 203; U. S. v. Imbert [Case No. 15,438]. Jurisdiction is not limited to vessels owned by citizens of United States. Congress has police jurisdiction on the high seas, irrespective of the nationality of the vessel, under its power to regulate commerce. See U. S. v. Coombs, 12 Pet. [37 U. S.] 72–78. Acts 1820–1825 on slave-trade. Act 1807, § 7, vessels hovering on the coast to land slaves. [2 Stat. 428.] Act 1847, § 1, alien vessels depredating on our commerce when there is a treaty with their country. [9 Stat. 175.] Act 1804, § 1, on burning ships. [2 Stat. 290.] Act 1825, § 4, murder or stabbing where the party dies on land. See, also, section 5 [4 Stat. 115, 116]. So also in piracy, see below, and other offences against the law of nations. Prima facie, parol proof of the averment was sufficient. U. S. v. Peterson [Case No. 16,037]; U. S. v. Bowers, 5 Wheat. [18 U. S.] 204, 206. And the burden is afterwards on the defendant. Lyle v. Rodgers, Id. 419.

The regularity of the ship's papers has no relation under these acts (1825 or 1790) to the offence. U. S. v. Peterson [supra]; McClung v. Ross, 5 Wheat. [18 U. S.] 119; U. S. v. Bowers, Id. 204, 206; Lyle v. Rodgers, Id. 418; U. S. v. Holmes [Case No. 15,382].

The authorities cited for the prisoner, which refer to the forfeiture of ships, are not applicable, as the nationality remains unchanged by the forfeiture. Reference is made to the registry act, but it does not limit the scope of the acts of 1790 and 1825. Its objects are purely commercial. U. S. v. Gibert [Case No. 15,204].

Before CLIFFORD, Circuit Justice, and SPRAGUE, District Judge.

CLIFFORD, Circuit Justice. Prior to the filing of the petition in this case, the prisoner had been indicted and convicted, in the circuit court for this district, of the crime of wilful murder upon the high seas, and out of the jurisdiction of any particular state, and having waived and withdrawn the respective motions for new trial and in arrest of judgment, which he filed subsequent to the verdict of the jury, he had been sentenced by the court to suffer the punishment of death, as provided by the act of congress under which the indictment against him was found. 4 Stat. 115. Convicted, by the verdict of the jury, of the crime charged in the indictment, and having received the final sentence of the law, he was remanded to prison, under a warrant issued in due form for that purpose, where he remained awaiting the execution of the sentence, until the 2d of July, 1859, when the petition in this case was filed. Though the prisoner had withdrawn the motions usually employed in criminal cases to correct errors in the rulings and instructions of the court, and for arresting the judgment when the indictment is defective and insufficient, he still insists that there are defects and errors in the process and proceedings, and also in the record and judgment in the case, as set forth in the paper annexed to the petition, and marked "assignment of errors," and prays the court that "the record and judgment may be set aside, reversed, stayed, respited, reprieved, annulled, and held for naught, and that he may be discharged thereof, and be suffered to go without day." Eighteen supposed errors are set forth in the paper annexed to the petition, but they were classified at the argument under twelve heads, and it will be convenient for the court to follow the order adopted at the bar. Before considering the respective errors, however, as set forth in the paper before referred to, it becomes necessary to inquire and determine whether the circuit court possesses the power to re-examine, reverse, set aside, and annul its own judgments in such a case, in this form of proceeding. Nothing is better settled than the rule of decision that the circuit courts have no common-law jurisdiction in criminal cases, and it necessarily results from that proposition that the answer to the inquiry as to the power of the court to grant the prayer of the petition must depend upon the construction of the act of congress organizing the judicial system of the United States, and other kindred acts upon the same subject. U. S. v. Hudson, 7 Cranch [11 U. S.] 32; U. S. v. Coolidge, 1 Wheat. [14 U. S.] 415; U. S. v. Bevans, 3 Wheat. [16 U. S.] 336; Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 563.

Acts not previously defined as an offence against the authority of the United States cannot be punished as such, as the United States have no unwritten criminal code to which resort can be had as a source of jurisdiction in such cases. Conkl. Treat. 168. Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. Ex parte Boleman, 4 Cranch [8 U. S.] 93; U. S. v. Libbey [Case No. 15,597]; U. S. v. Wilson [Id. 16,731].

Circuit courts were created by the judiciary act, and they are courts of limited and special jurisdiction; and being without any common-law authority to try or punish offenders, except for contempt, they cannot exercise any power, in a criminal case, not derived expressly or impliedly from an act of congress. Exclusive cognizance of all crimes and offences cognizable under the authority of the United States was conferred upon the circuit courts by the eleventh section of the judiciary act, except in cases where the same act authorized the district courts to exercise

the same jurisdiction; and the same section provides that the circuit courts shall have concurrent jurisdiction with the district courts of the crimes and offences cognizable in the district courts. 1 Stat. 79. Those exceptions from the exclusive cognizance of the circuit courts over crimes and offences committed against the authority of the United States were comparatively few at that period of our history; but the third section of the act of the 23d of August, 1842, provides that the district courts shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, the punishment of which is not capital. 5 Stat. 517. Indictments for all offences against the United States may be found either in the district or circuit court, and may, on motion of the district attorney, and by the order of the court where pending, to be entered on its minutes, be transmitted from one court to the other for trial; except that indictments for capital offences found in either court are triable only in the circuit court; and, if found in the district court, they must be remitted to the circuit court for that purpose. 9 Stat. 72. Except as to capital offences, the circuit and district courts, in the exercise of jurisdiction in criminal cases, are courts of concurrent and co-ordinate powers, the former bearing no relation whatever to the latter as an appellate tribunal. The authority to re-examine, by writ of error, final judgments in civil actions, rendered in a district court, is conferred upon a circuit court where the matter in dispute, exclusive of costs, exceeds the sum or value of $50; but the acts of congress nowhere authorize the circuit courts to re-examine by writ of error, or in any other manner, the rulings or judgments of the district courts in criminal cases. District courts as well as circuit courts have power to grant new trials in all cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law, meaning the common-law courts of the state; and that power extends to the setting aside of verdicts in criminal cases as well as in civil actions in courts of original jurisdiction. New trials may be granted, in favor of the accused, to correct an erroneous ruling of the court in admitting improper testimony or in rejecting proper and material testimony, for misdirection of the court, or for the misconduct of the jury, or for newly discovered testimony, or because the verdict is against the evidence or the weight of the evidence, as in civil actions at common law. Judge Story held, in U. S. v. Gibert [Case No. 15,204], that a new trial could not be granted in a case where the punishment was death; but it is now everywhere held that a new trial may be granted in such a case, on the application of the accused. U. S. v. Williams [Id. 16,707]; People v. Morrison, 1 Parker, Cr. R. 625; 2 Benn. & H. Lead. Cr. Cas. 464; Reg. v. Scaife, 2 Denison & P. Crown Cas. 281; Campbell v. Reg., 11 Adol. & El. (N. S.) 814; King v. Reg. 14 Adol. & El. (N. S.) 31.

Effective means are provided and ample facilities afforded to the accused, in a criminal case, for testing the jurisdiction of the court, and the sufficiency of the indictment, as far as such objects can be accomplished in the same court, without any such resort as that which is proposed in the case before the court. Before pleading, the accused may, if he sees fit, move to quash the indictment, setting forth as reasons one or both of those causes, and if that motion is overruled, he may demur to the indictment either generally or specially; and the settled practice of the court is, that if the demurrer is overruled, the judment of the court, if the charge is of the grade of felony, shall be respondeat ouster, as at common law. Both of these remedies are open to the accused before he is required to plead to the merits, and after verdict, if he does not prevail before the jury, he may file a motion in arrest of judgment, alleging the same defects; and the rule is equally well settled that such a motion, like a demurrer, not only calls in question the jurisdiction of the court, and the sufficiency of the indictment, but extends also to any error in law which is apparent in the record.

Since the decision in the preceding case, [Case No. 16,055] it may be assumed without further argument that a writ of error from the supreme court to the circuit court, or from the circuit court to the district court, will not lie in any criminal case, because there is no provision in any act of congress authorizing any such proceeding, whether the charge be felony, or only a misdemeanor; but if it be true that a writ of error may be sued out in this case, to be heard in the circuit court where the trial was had, and where the judgment was rendered, then the same right may be exercised in every criminal case as well in the district court as in the circuit court; and the rule is just as applicable in misdemeanors as in the case before the court, which is expressly declared by the act of congress to be a felony. Either the right exists without any limitation, or it does not exist at all; and if it does exist, it may be exercised in every criminal case, whether the judgment was rendered in the district or circuit court, and whether the charge is a felony, punishable with death, or a mere misdemeanor. Seventy years having elapsed, or nearly so, since our judicial system was organized, the conclusion would seem to be a reasonable one that if there is any foundation for the right claimed to be exercised in this case, some trace of a prior exercise of it, or of a claim to exercise it in a criminal case, would be found in some reported decision of the circuit or district courts; but no such decision is referred to, nor is it even suggested in argument that any such right in a criminal case was ever before claimed in either of those courts. Errors of fact in the process issued in a civil action, or such as happened

through the fault of the clerk in the record of the proceedings prior to the judgment, might be corrected at common law by a writ of error sued out and returnable in the court where the action was commenced and where the judgment was rendered. When granted to re-examine a judgment rendered in the king's bench, the writ was called a writ of error coram nobis, because it was founded upon a record and process described in the writ as remaining "before us," in accordance with the theory that the sovereign of the kingdom presided in the court. 2 Tidd, Prac. (Am. Ed. 1856) 1137; Jaques v. Cesar, 2 Saund. 101, note 1; De Witt v. Post, 11 Johns. 460. Such writs might also be sued out in the common pleas for a like purpose, that is, for the correction of errors of fact in the process of a civil action, or such as happened in the record of the proceedings through the fault of the clerk; but the writ when sued out and returnable in the latter court was denominated a writ of error coram vobis, because the writ was directed to "you and your associates," meaning the chief justice and the other justices of that court. 1 Archb. Cr. Prac. (6th Ed.) 504. Apart from the fact that these formal differences designated the particular court in which the judgment was rendered, and to which the writ was returnable, they were never of any practical importance, as the office of the writ of error was the same in both courts. Where the error is one of fact, and not of law, a writ of error coram nobis in the king's bench, or coram vobis in the common pleas, lies in the same court, as where the defendant, being under age, appeared by attorney, or where the plaintiff or defendant was a married woman at the commencement of the suit, or died before verdict, or before interlocutory judgment. 2 Tidd, Prac. 1137; 1 Arch. Cr. Prac. 504; 2 Sell Prac. 363.

Errors of the description mentioned are usually corrected in the federal courts on motion to amend, supported, if need be, by affidavit; but reported cases may be found in which it was claimed that a writ of error would lie in the same court to reverse the judgment on account of such defects. Instances of the kind are not numerous, but the practice is not entirely unknown, though it has never received the sanction of the supreme court. Picket v. Legerwood, 7 Pet. [32 U. S.] 144. Resort to that remedy has certainly been had in a few instances in the circuit courts in civil cases, but the writ of error is usually denominated a writ of error coram vobis, as it is directed to the justices of the court where the judgment was rendered; and all the authorities agree that if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it; and the supreme court has decided that it is not one of those remedies over which the supervising power of that court is given by law. Picket v. Legerwood, Id. 148; Waldron v. Craig, 9 Wheat. [22 U. S.] 576; 2 Sell. Prac. 399. Called by whatever name the writ may be, strong doubts are entertained whether the circuit courts are authorized to re-examine their own judgments even in civil cases in that mode of proceeding, as the judiciary act contains no regulations whatever for the exercise of any such power. Such a writ, that is, the writ of error coram nobis, will undoubtedly lie in the king's bench, as before explained, for the correction of errors of fact in the process, or for such as occurred through the misprision of the clerk; and it is equally clear that the power to revise such errors in that mode, extends in that court to criminal cases as well as to civil cases, and that when exercised in the re-examination of criminal cases, it extends to questions of law as well as questions of fact; but the better opinion is that the jurisdiction in criminal cases, except that it extends to questions of law as well as questions of fact, is no more comprehensive than in civil cases. Reg. v. O'Connell, 7 Ir. Law R. 356, 357; 9 Vin. Abr. 491; 1 Fitzh. Nat. Brev. 2. Proceedings in error under that process do not anywhere extend to the judgment in civil cases, as a writ of error for that purpose must be brought in another and superior tribunal. Picket v. Legerwood, 7 Pet. [32 U. S.] 148; Rolle, Abr. 746; Sell. Prac. 363; 3 Bac. Abr. 366, Error G, 366; 3 Bl. Comm. 407, note 3; 4 Petersd. Abr. 255, Error a, note 3.

Writs of error in case of treason or felony could never be sued out ex debito justitiæ and it was necessary at common law, even in cases below felony, to obtain the fiat of the attorney-general, before the proper clerk could issue the writ. 1 Chit. Cr. Law, 369; Rex v. Wilkes, 4 Burrows, 2551; Lavett v. People, 7 Cow. 340; Reg. v. Paty, 2 Salk. 503; 2 Gude, Prac. 219.

Applications for a writ of error were never granted at common law without being first subjected to some preliminary examination; and the same remark may be made of the practice in the state courts in all cases where the applicant stands convicted of an offence punishable with death. 1 Archb. Cr. Prac. 717. Direct authority to grant a writ of error in a criminal case is not conferred upon the circuit or district courts, nor is there an act of congress which contains any regulation upon the subject; so that if the right to the writ exists at all, it exists in every case, as a common-law right, whether the applicant was convicted and sentenced in the circuit or district court, and without any necessity that the writ should be previously allowed by the court or by the prosecuting officer. Dugdale's Case, 1 Dears. Crown Cas. 78; 2 Gude, Prac. 219; Reg. v. Paty, 2 Salk. 503; Archb. Pl. & Ev. (15th Ed.) 167. Authority to grant the writ of error in this case, it is contended, may be deduced from the fourteenth section of the judiciary act, which provides, among other things, that the federal courts "shall have power to issue writs of scire facias, habeas corpus, and all other

writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law"; but the jurisdiction of the court over the case, as given by the eleventh section of the act, was completed when the petitioner had been indicted, tried, convicted, and sentenced, and remanded to prison, and was there remaining awaiting the execution of the final sentence of the law, and the case had passed from the docket of the court. Other writs besides writs of scire facias and habeas corpus may be issued, it is said, though not specially provided for by statute, if they are necessary for the exercise of the jurisdiction of the court; and it must be conceded that such is the language of that clause of the section, but the very words of the section are, that such other writs may be issued when necessary for the exercise of their jurisdiction. Unless the writ is necessary to the exercise of jurisdiction already vested in the circuit court, the power to issue the writ cannot be deduced from that clause; but the uniform construction given to the provision is that congress only intended to vest the power to issue such "other writs" in cases where the jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued. M'Clung v. Silliman, 6 Wheat. [19 U. S.] 601; McIntire v. Wood, 7 Cranch [11 U. S.] 506; Kendall v. U. S., 12 Pet. [37 U. S.] 624.

Completed as the proceedings in the case were, the circuit court, at the date of this application, had no more power over it than if the indictment had never been found. Examined closely, it is quite clear that the theory of the petitioner does not assume that the writ is necessary to the exercise of any jurisdiction conferred by any other provision in any act of congress; but the argument is, that the clause in question confers the right to issue that writ, and that the power to grant the writ carries with it the power to exercise the jurisdiction under it as known and understood at common law. Grant that theory, and the consequence would be that the circuit courts would at once become courts of general jurisdiction, as the exceptions in the act of congress may be supplied by the act of the court in issuing the appropriate writ under that clause of the fourteenth section of the judiciary act. Apart from the power to issue "such other" writs in aid of jurisdiction already existing, there is no provision contained in the judiciary act which affords any support to the theory of the petitioner, nor does the act contain any regulations upon the subject; and the court is of the opinion that the construction attempted to be given to the clause referred to, is as unwarranted by its language as it is unsupported by the usages and practice of the circuit courts. Motions for new trial and in arrest of judgment are common in the circuit courts; but the settled practice is, that the latter as well as the former must be made before the sentence is pronounced. Such certainly was also the general rule at common law, but authorities are not wanting which assert the doctrine that the court might under special circumstances alter the sentence, or even arrest the judgment, without any motion being made, at any time during the same term, for good cause shown, or for errors apparent in the record. King v. Price, 6 East, 323; King v. Waddington, 1 East, 146; 1 Archb. Cr. Prac. & Pl. 186; State v. Harrison, 10 Yerg. 542; Rex v. Lookup, 3 Burrows, 1901; Miller v. Finkle, 1 Park. Cr. R. 374; Com. Dig. "Indictment," note; 1 Chit. Cr. Law, 663; Com. v. Hearsey, 1 Mass. 139; Rex v. Justices of Leicestershire, 1 Maule & S. 442; Holden's Case, 2 Leach, 1026. Extreme cases may be imagined where the court would be justified in exercising that extraordinary power, as if it appeared that the act of congress under which the indictment was drawn had been repealed, or if it appeared in a case like the present that the person alleged to have been killed was in full life. Influenced by that consideration, and in view of the fact that a motion in arrest of judgment as well as a motion for new trial was seasonably made in the case, and withdrawn and waived, the court will examine the several causes of error set forth in the assignment annexed to the petition. Causes one and two may be considered together, as they have respect to the jurisdiction of the court. They are as follows:—

1. That there is no sufficient averment in the indictment that the circuit court had jurisdiction of the offence alleged to have been committed by the prisoner. 2. That there is no sufficient averment therein that the supposed injured party was alleged to have been at the time within or under the protection of the United States, or in the peace thereof. Wilful murder, it is suggested, although committed upon the high seas, may not be cognizable in any circuit court of the United States, and the suggestion is doubtless correct; but the indictment in this case alleges in addition to those words, which are of essential importance, that the crime was committed "in and on board of" a certain ship called the "Junior, then and there owned by and belonging to" the four persons therein named, all of whom are alleged to be "citizens of the United States"; and the further allegation is, that all the criminal acts of the prisoner, including both the felonious assault, with malice aforethought, and the mortal wound which terminated the life of the deceased, were committed within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the said United States. Exception in point of fact is not taken to any of these general averments, but the real objection of the prisoner is, that the allegation that the ship is owned by and belongs to certain citizens

of the United States is not sufficient to show that the Junior was a ship of the United States within the meaning of the acts of congress giving jurisdiction to the circuit courts in criminal cases. He refers to the first section of the act requiring ships and vessels to be registered, and insists that the first four counts of the indictment are bad because they do not contain the allegation that the Junior was a ship of the United States, but those counts and each of them do contain the allegation that the ship was "owned by and belonging to" certain persons therein duly described by their appropriate names, and it cannot be doubted that those words constitute a sufficient averment as to the ownership of the vessel, and inasmuch as the persons named as such owners are alleged to be citizens of the United States, the argument that the national character of the ship is uncertain on the face of the indictment, is entirely unsupported, and without any foundation. 1 Stat. 287. Ships and vessels are required to be registered or enrolled, it is conceded, in order to be entitled to the benefits and privileges which the register and enrolment confer, but those documents are not indispensable in a prosecution for piracy or murder on the high seas, as the register or enrolment of the vessel may be in the name of one person while the property of the vessel is in another; and the rule is well settled that the property or national character of a vessel is matter in pais, and that it may be proved by parol testimony. U. S. v. Griffin, 5 Wheat. [18 U. S.] 205; U. S. v. Pirates, Id. 199. Indictments founded on the section under consideration must allege that the offence was committed out of the jurisdiction of any particular state as well as that it was committed upon the high seas, because those words are contained in the section defining the offence, and because the circuit courts have no jurisdiction of the crime of murder, even though the crime was committed on board a ship of the United States, as defined in the registry act, if the ship at the time was within the fauces terræ, as the enclosed or landlocked waters of a bay, creek, haven, or basin are not recognized, in criminal cases like the present, as forming a part of the high seas. U. S. v. Bevans, 3 Wheat. [16 U. S.] 386; U. S. v. Ross [Case No. 16,196]; U. S. v. Smith [Id. 16,337]; U. S. v. Robinson [Id. 16,176]; U. S. v. Grush [Id. 15,268]; U. S. v. Griffin, 5 Wheat. [18 U. S.] 205. Circuit courts, it must be conceded, do not possess jurisdiction of the crime of murder when committed on board a foreign vessel, except to a very limited extent, and never where the perpetrator of the crime, and the deceased, were both foreigners. On the contrary, the general rule is that such courts have no jurisdiction of the offence even when committed upon the high seas, except when committed on board a ship or vessel of the United States, unless it appears that the vessel was sailing under no national flag. But persons indicted under that section cannot be shielded from the punishment annexed to the offence, because the master of the vessel did not have on board the register or the enrolment of the vessel, nor can they be so shielded even if it appear that the vessel was never legally registered or enrolled, if she was owned by and belonged to citizens of the United States, and that the deceased as well as the prisoner was in and on board the vessel at the time the felonious homicide was committed. Proof of the most satisfactory character was exhibited to the jury that the deceased was a citizen of the United States, and that he was the master of the ship, duly appointed according to law; that the prisoner was in and on board the ship when he committed the felonious assault, and inflicted the mortal wound; that the ship was owned by and belonged to citizens of the United States residing at New Bedford, in this district; that she was duly registered at the custom-house in that collection district; that she sailed from that port on a whaling voyage; that the alleged offence was committed by the petitioner while the vessel was cruising for whales, in the Indian Ocean, under the protection of the flag of the United States; and the court is of the opinion that the allegations of the indictment are sufficient to warrant the introduction of those proofs, and consequently that there is no error in that part of the record. U. S. v. Pirates, 5 Wheat. [18 U. S.] 199. Suppose it was otherwise, still the judgment ought not to be arrested for that cause, as the fifth count of the indictment contains the allegation that the Junior was an "American vessel then and there belonging to a citizen or citizens of the United States." Two objections, however, are taken to that count, which will be briefly considered. 1. That the averment that the ship was an American vessel is not sufficient, as the words of the registry act before mentioned are "ships and vessels of the United States"; but there is no merit in the objection, as the two phrases are used indiscriminately in the acts of congress defining offences, and may well be regarded as synonymous in criminal pleading in the federal courts, as applied to ships and vessels belonging to private owners. 2. That the count is also bad because it alleges that the names of the owners of the ship are unknown, whereas their names are set forth in the four counts preceding; but the objection must be overruled, as the prosecutor is always allowed that privilege where the evidence is conflicting, or the real ownership is in any doubt. The next objection is founded on the third cause set forth in the assignment of errors, which is to the effect that the prisoner was not permitted to exercise his constitutional right of challenge to the jurors impanelled for his trial. Chal-

lenge for cause is doubtless a constitutional right, as without its exercise the prisoner might be deprived of an impartial jury, but the peremptory challenge is a privilege conferred by law, which may be enlarged, abridged, or annulled by the legislative authority. Twenty peremptory challenges, however, are allowed by law in the federal courts, to a prisoner charged with the crime of murder, and no trial in such a case would be a legal one if that privilege was not fully accorded to the prisoner. Four persons were joined in the same indictment in this case, and two counsel were assigned to each by the court, at their request, before they were required to plead to the merits, and they exercised the right of challenge to the full extent allowed by law, as was admitted by the counsel of the prisoner at the argument. They could not deny that fact; but the precise objection is that no such statement is set forth in the record of the case. Such facts are not usually set forth in the record, nor is it necessary that they should be where the right is fully enjoyed by the prisoner to his entire satisfaction and that of his counsel. Where objections are made, they should be entered in the minutes of the court, and if overruled, the court will save the question whenever thereto requested by the prisoner or his counsel. Causes four and sixteen will be considered together. They are as follows:—

1. That it does not appear by the record that the prisoner was present at the impanelling of the jury or at the trial; or, 2d, when the verdict was rendered by the jury. But it is not possible to sustain any one of those objections, as they are not correct in point of fact. By the record it appears that the prisoners were severally set at the bar, and had the indictment read to them, and that they severally pleaded that they were not guilty; that counsel were assigned to each as before explained; that they acknowledged that they had severally received a copy of the indictment and a list of the jurors, agreeably to law, and more than two days before the day of their trial; that a jury was thereupon impanelled and sworn to try the issue, and that the jury afterwards returned their verdict as set forth in the record. Tested by the record it appears that the whole proceedings took place on the same day, but the docket entries show the exact dates of the several steps in the trial, from the finding of the indictment to the verdict and sentence. Properly construed, the record does show that the prisoner was present at every stage of the trial referred to in those causes of error. The complaint is made, in the next place, that the prisoner was not permitted to address the jury in his own proper person; but the decisive answer to the complaint is that he never made any such request, nor did his counsel in any way signify to the court that he desired any such privilege. He was duly indicted by a grand jury; was informed of the nature and cause of the accusation; was furnished with compulsory process for obtaining witnesses in his favor; was confronted with the witnesses against him; was allowed to have the assistance of counsel, and was "permitted to make his full defence by counsel learned in the law." Two counsel were assigned to him of his own selection, and both were permitted to argue to the jury in the close.

Attention will next be called to the sixth cause of error presented by the prisoner, which is that the verdict was rendered upon all the counts of the indictment, and that one or more of the same were defective, and insufficient in law to support the sentence. Evidently the proposition concedes that some of the counts are good, and it may be added that the argument fails to convince the court that any one of them is bad. Grant, however, that one or more of the counts are bad, still as it is conceded that some are good, the court is of the opinion that the objection must be overruled. Undeniably the rule at common law was, that a valid judgment could not be given in a civil case on an uncertain verdict, and that a verdict must be regarded as uncertain if any part of the damages are referable to a bad count; but the rule as universally acknowledged in criminal cases was, "that if there is one good count to support the verdict, it shall stand good, notwithstanding all the rest are bad"; and that is the settled rule in the federal courts, and in all except one of the state courts. Peake v. Oldham, Cowp. 275; Rex v. Benfield, 2 Burrows, 980; Reg. v. Rhodes, 2 Ld. Raym. 886; Rex v. Hill, Russ. & R. 190; Reg. v. Ingram, 1 Salk. 384; Grant v. Astle, 2 Doug. 730; Young v. King, 3 Term R. 98; Rex v. Powell, 2 Barn. & Adol. 75; Rex v. Fuller, 1 Bos. & P. 180; Rex v. Mason, 2 Term R. 581. Where there are several counts, some bad and some good, it is competent for the court, though the verdict is general, to render judgment on the good counts only, but it is not indispensable that any such discrimination should be made, as the presumption of law is, that the sentence was awarded on the good counts. U. S. v. Furlong, 5 Wheat. [18 U. S.] 201; Josslyn v. Com., 6 Metc. [Mass.] 236; Jennings v. Com., 17 Pick. 80; U. S. v. Burroughs [Case No. 14,695]; Parker v. Com., 8 B. Mon. 30; 2 Whart. Cr. Law, § 3047. Special attention is called to the case of O'Connell v. Reg., 11 Clark & F. 155; but it is impossible to adopt that rule, as a different doctrine prevailed in the courts of that country, prior to that decision, for nearly two centuries; and when our ancestors immigrated here, they brought that rule with them as part of the common law, which cannot now be changed by the federal courts. Irvine v. Kirkpatrick, 3 Eng. Law & Eq. 17. Sufficient to say that the matter of complaint set forth in the seventh cause of error is contradicted by the record and the docket en-

tries. The allegation is that the acts of the court are stated in the past tense, but the theory of fact is not sustained in respect to any matter material to the validity of the judgment. Subsequent to the verdict the statement is, that the prisoner moves the court here that the verdict may be set aside, and a new trial granted for the causes therein set forth, numbered from one to ten inclusive, and that the prisoner after verdict and before judgment moves the court here that the judgment be arrested, etc., for the causes set forth in the motion filed at the same time, numbered from one to four inclusive, as appears by the respective motions on file. Time was allowed by the court for preparation, but the motions were set down for hearing at a given day. On the appointed day the counsel of the prisoner moved the court for leave to withdraw the motions, but the court refused to grant such leave until the prisoner was brought into court, and being inquired of personally, the record states that he "asks that such leave may be granted," etc., whereupon the court doth grant him leave to withdraw the said motions, and the same are accordingly waived and withdrawn. Continuing, the record also states, said Plumer is then asked if he has anything to say why judgment of death should not now be pronounced against him, and having replied fully, and no good cause appearing, and all matters having been heard and understood by the court, then follows the sentence of the court, which is in the usual form, and is expressed in the present tense. The eighth cause assigned is, that it does not appear that issue was joined between the prisoner and the United States; but it does appear that he was set at the bar for his arraignment; that the indictment was read to him, and that he said that thereof he was not guilty, and that for trial he put himself upon God and the country, which is all that is required in such cases. Prisoners indicted for the crime of murder are certainly entitled to a list of the jury summoned in the case, two entire days, at least, before the trial. The ninth error assigned is, that it does not appear by the record that such list was furnished as required; but the docket entries show that the list was furnished, and the record shows that the prisoner acknowledged in open court before the jury were impanelled, that he did receive it two entire days prior to that time. Following the order adopted at the argument, the tenth, eleventh, twelfth, and thirteenth causes of error will be considered together, as they in fact involve but a single proposition. Taken together they allege that the record does not show of what felony the prisoner was convicted, nor for what felony he was sentenced. The offence is fully set forth in each of the five counts of the indictment, and the record shows that the jury found him guilty upon all of the counts, which is a complete answer to the first branch of the proposition. Sentences of the kind when pronounced by the court, are addressed to the prisoner, and of course are spoken in the second person, but the practice is to record the same in the third person, as in this case. Omitting redundant words, the sentence as recorded is to the following effect: it is considered by the court that the said Cyrus W. Plumer be deemed guilty of felony, and that he be taken back to the place from whence he came, and there remain in close confinement until Friday, the 24th of June next, and on that day, between the hours of eleven o'clock in the forenoon and one o'clock in the afternoon, he be taken thence to the place of execution, and that he be there hanged by the neck until he be dead. Apart from the first clause no objection is taken to the sentence, and none can be, as it follows in every particular the form used in every capital case in this circuit since our judicial system was organized. Uncertainty is the foundation of the objection, but two answers may be made to it, either of which is conclusive: 1. That the clause of the sentence, that the prisoner be deemed guilty of felony, is surplusage, and forms no part of the sentence required by law. 2. That the language employed must be construed as applied to the indictment and verdict of the jury, which are set forth in the record, and that the language, when so construed, is certain and free from any ambiguity. Founded as the indictment is upon the fourth section of the act of the 3d of March, 1825, it is clear that the statement that the prisoner be deemed guilty of felony was wholly unnecessary, as it is but the repetition of the legislative enactment, and that it is no part of the judgment of the court.

The repugnancy of the verdict to the clause giving jurisdiction to the court, is the matter included in the fourteenth cause. Five counts are contained in the indictment, and the verdict is that the prisoner is guilty. Sentence was passed upon all the counts; and the argument is, that in comparing the verdict with the jurisdictional clause of the indictment, the legal conclusion is that the prisoner stands convicted of more than one offence, and consequently that the verdict is repugnant to that clause which alleges that the prisoner was "first brought into the district of Massachusetts after committing the aforesaid offence," not offences, as it should have been in order to correspond with the verdict of the jury. But such criticism is too technical to prevail even in criminal pleading, as the several counts are obviously founded on the same homicide. They set forth the killing of the same person, on board the same ship, on the same day, and by substantially the same means; and, if it were otherwise, the proper conclusion would be, that the word "offence" in the jurisdictional clause applied severally to the respective counts, and not collectively, as contended by the counsel of the prisoner. Indictments

must be signed by the foreman of the grand jury, but when the word "foreman" is appended to the name of the person signing the same as such, the signature is sufficient, as the designation "foreman" refers to the introductory clause of the indictment, and to the record, as verifying the legal inference that "foreman" means foreman of the grand jury. Remarks upon the last cause assigned, to wit, the eighteenth, are unnecessary, as it was conceded at the argument that it did not have respect to any defects, except such as are included in the special assignments to which reference has been made.

Case No. 16,057.

UNITED STATES v. PLYMPTON.

[4 Cranch, C. C. 309.] [1]

Circuit Court, District of Columbia. March Term, 1833.

OBTAINING MONEY UNDER FALSE PRETENCES—INDICTMENT—VENUE.

1. An indictment cannot be sustained in Washington county, D. C., for obtaining money by false pretences made out of the county.

2. Quære, whether it is not necessary that all the facts which constitute the offence should have occurred in the county where prosecuted.

[Distinguished in U. S. v. Henning, Case No. 15,349.]

Indictment [against William Plympton] for obtaining money by false pretences. It appeared that the false pretences were made in Baltimore, where the acceptances obtained thereby were made and paid, although the defendant obtained money upon them by getting them discounted in Washington county, D. C.

R. S. Coxe, for defendant, moved the court to instruct the jury that there was no evidence to sustain the indictment, which instruction THE COURT (THRUSTON, Circuit Judge, absent) refused to give; and also refused to instruct the jury that, if the false pretences were made in Maryland, they should find the defendant not guilty, although the money should have been obtained here upon the discount of the bills.

Verdict, guilty; but THE COURT (nem. con.) granted a new trial because the false pretences, if made at all, were not made in this county; and the bills were accepted and paid by the prosecutor, in Baltimore.

MORSELL, Circuit Judge, was inclined to think that if the money was obtained by the defendant in this county, it was sufficient to sustain the indictment.

THRUSTON, Circuit Judge, was of opinion that if the false pretences were not made in this county, the prosecution could not be supported.

CRANCH, Chief Judge, was inclined to the opinion, that all the facts necessary to constitute the offence must have occurred in this county.

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

Case No. 16,058.

UNITED STATES v. PLYMPTON.

[4 Cranch, C. C. 309.] [1]

Circuit Court, District of Columbia. March Term, 1833.

UTTERING FORGED PAPER — VENUE OF OFFENCE.

A forged paper, inclosed at Baltimore in a letter directed to a person in Washington, D. C., and put into the post-office at Baltimore, is not an uttering of the note in Washington.

[Cited in Palliser v. U. S., 136 U. S. 267, 10 Sup. Ct. 1037.]

Indictment [against William Plympton] for forgery, by altering two checks on the Baltimore Savings Institution, 27th August, 1831; and for uttering them, knowing them to be so forged. The counts for forging the checks were abandoned. Upon the counts for uttering, &c., the uttering, attempted to be proved, was by putting the altered checks, inclosed in a letter, into the post-office in Baltimore in Maryland, directed to Richard Wright, in Washington, D. C.; which was like the case of U. S. v. Wright [Case No. 16,773], at December term, 1821, and April term, 1822, in this court, where the forged paper was put into the post-office in Tennessee, inclosed in a letter directed to a person in Washington; in which case this court, upon a special verdict, decided that the uttering was not in Washington county.

Upon the authority of that case, THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury that the facts proved did not show an uttering in this county.

Verdict, not guilty.

Case No. 16,059.

UNITED STATES v. POAGE.

[6 McLean, 89.] [2]

Circuit Court, D. Ohio. April Term, 1854.

CRIMINAL LAW — EVIDENCE OF GOOD CHARACTER.

1. The defendant was intimately associated with the individual, who stole the letter containing a hundred dollar bank bill and a promissory note for eighty-two dollars. But he proved himself to be a man of irreproachable character and of high intelligence, by witnesses of undoubted respectability.

2. This would seem to be sufficient to protect him from suspicion, where no other fact is proved to implicate him.

3. He was formerly acquainted with Coyle in Virginia, who was, probably, the guilty party; and this may account for their intimacy.

Mr. Morton, U. S. Dist. Atty.

Mr. Pendleton, for defendant.

CHARGE OF THE COURT. This is an indictment against the derendant [Alpheus Poage], charging him with stealing from the mail, a certain letter, written by Nesbat, and

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

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

directed to George H. Calvert, Cincinnati, which contained a bank bill for one hundred dollars and a promissory note for eighty-two dollars. Mr. Nesbat being sworn states, that he lives in Kentucky, at the Dry Ridge post-office; that on the 6th of January last, the above letter was written by him, and directed to George H. Calvert, containing a hundred dollar note, and his own promissory note for eighty-two dollars. On the 11th of the same month, the note was presented to witness for payment by a young man at his residence, with whom defendant was in company. The boy appeared to be fifteen or sixteen years of age, who said he was connected with an insurance company, and was sent out to collect. The note he said had been received from Mr. Calvert. Witness paid the note in cash, except each took a pair of gloves from his store. The note appeared to have been endorsed by George H. Calvert. The witness lives thirty-four miles from Cincinnati, and the letter must have reached the city the day it was mailed. Two letters were sent in the same post bill. Witness thinks the words of the boy were, "We are connected with an insurance company." The name of the young man or boy was James C. Adams. On examination, the witness found the post bill in the Cincinnati post office. Henry G. Galt, a clerk in the post office, opened the packet, at the Cincinnati post office, which contained the post bill and the two letters. Calvert, to whom it was directed, never received it. Mr. Suffield, who works for Calvert, receives his letters from the post office, and did not receive this one. Mr. Jackson, kept the Farmer's Hotel in Covington last January. On the 11th of that month, defendant boarded with witness. On the night of the 10th of January, Coyle staid at his house, and registered his name Adams. He had been once before at the house of witness. Heard him say that he was acquainted with Poage in Virginia. They lodged in the same room the night of the 10th, and the next day they went to the country together in a buggy. On the 12th they returned at about ten o'clock. Mr. Beal, states, that on the 10th of January, he met Mr. Poage early in the morning, who helped witness make a fire, and remained until about 12 o'clock. After some time Poage and the boy came together to the house, at between one and two o'clock. The boy showed a note, and said he had traded a galvanized watch for it, and that if he did not collect the note he would not lose much. The witness identifies the note. When he saw it, it was not endorsed, and he observed to the boy, without the endorsement of Calvert he could not collect the note. The boy soon went out to get the note endorsed, and when he returned, he said that he had met the man, who endorsed it. Mr. Brown, says he first saw defendant at Cabell county, Virginia, and found him fifteen miles beyond Guyandotte. The defendant said that he had known Coyle at Staunton, but had not seen him for some time before he met him at Cincinnati. He said Coyle was in the printing office. Here the evidence of the prosecution closed. Mr. Moore, a citizen of Virginia, was acquainted with the defendant, near Staunton, Virginia. He was then engaged as engineer on a railroad, and was a man of good character and respectably connected. Mr. Harrill, from the same neighborhood, spoke of the excellent character of the defendant, and that he was employed as an engineer on a railroad. Messrs. Walker, Wilson and Marcus all testified to the good character of the defendant in Virginia, where he was engaged in most respectable employments. Some of the above witnesses had been members of the Virginia legislature, and all of them had the appearance of gentlemen, and were intelligent.

THE COURT observed to the jury, there can be no doubt, from the evidence, that the letter which contained the bank bill and the promissory note of Nesbat was stolen, and from the fact that Coyle had possession of the note and collected it, under false pretenses, he would be presumed to be the guilty person, if now on his trial. The only evidence against the defendant is, that he was associated with Coyle when he collected the note, and received a pair of gloves in the way of change. The association with Coyle before they rode out to Nesbat's and afterwards, lodging in the same room on the night of the 10th of January, was enough to excite suspicion against him. But his good character, being sustained by most respectable witnesses in Virginia, where the defendant was reared and respectably employed, should exonerate him from mere suspicion, founded on such circumstances. Good character can seldom fail to protect an individual from suspicion. A man of intelligence and reputable standing in society, is not likely to indulge in crime, or to do anything which shall forfeit his good name.

If the defendant had participated with Coyle in stealing the letter, he would without doubt have suggested to him, that the note must be endorsed, to enable him to collect it. If he was acquainted with Coyle in Virginia, their intimacy may be accounted for, without presuming any participation of the defendant in the crime charged. And you cannot find the defendant guilty, unless you shall find he participated in stealing the letter. The case is left with you, gentlemen, not doubting, that after deliberately weighing the testimony, you will come to a just conclusion.

Verdict of the jury, not guilty.

Case No. 16,060.

UNITED STATES v. POCKLINGTON.

[2 Cranch, C. C. 293.] [1]

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

CRIMINAL LAW—CONFESSIONS.

The confession of a prisoner, under hopes excited by the examining magistrate that his punishment would be thereby mitigated, cannot be given in evidence against him.

The prisoner [John Pocklington] was indicted for breaking open the storehouse of R. &. R. in Georgetown. He was examined before the mayor of that town, who informed him that one of the party had confessed a part of the charge; and that if he would confess candidly the truth, he would represent his case to the court, and it was probable his punishment might be thereby mitigated.

THE COURT refused to permit his confession, made under those circumstances, to be given in evidence.

Verdict, not guilty.

UNITED STATES v. POILLON. See Case No. 16,081.

Case No. 16,061.

UNITED STATES v. POLACK et al.

[Hoff. Land Cas. 284; [2] Hoff. Op. 32.]

District Court, N. D. California. Dec. Term, 1857.

MEXICAN LAND GRANTS — ABSENCE OF ARCHIVAL EVIDENCE—POSSESSION AND OCCUPATION.

When the archives contain no evidence or trace of the existence of a grant, the court will demand the fullest and most satisfactory proofs of possession and occupation during the existence of the former government, under a notorious and undisputed claim of title; and clear and indubitable evidence of the genuineness of the grant produced.

[Cited in Bouldin v. Phelps, 30 Fed. 567.]

Claim [by Joel S. Polack and others] for the island of Yerba Buena, or Goat island, situated in the Bay of San Francisco; confirmed by the board, and appealed by the United States.

P. Della Torre, U. S. Atty., and William Blanding, for appellants.

E. L. Goold, for appellees.

HOFFMAN, District Judge. The title of the claimants is derived from a grant alleged to have been made by governor Alvarado, Nov. 8th, 1838, to Juan José Castro. The authority under which the governor acted is a dispatch from the secretary of the interior to the governor of the Californias, dated July 20th, 1838, directing him to grant the islands on the coast in private ownership. There can be no doubt of the governor's authority to make the grant. The only dispute is as to its genuineness. Neither the petition of Castro nor any other document is produced from the archives. So far as appears, the records of the former government do not contain the slightest trace of the alleged transaction. Even the grant itself is not produced, and the claimants rely upon an alleged copy recorded in the recorder's office of this city in 1849. To prove the existence and genuineness of the original, the claimants have introduced a large number of witnesses. The United States have, on the other hand, sought to show that the grant was made by Alvarado, in the city of San Francisco, in the year 1848, and antedated. Juan José Castro, the original grantee, testifies that he presented a petition to the governor in November, 1838, at Santa Barbara, and that the grant was issued in that month; that he put sheep, goats and hogs upon the island, and retained possession of it until 1848, when he sold it to Jones for $1,000, which was paid to him in the presence of one G. H. Nye; that Alvarado and Maria C. Miranda were present when the deed was made. He adds, "If the grant was not recorded in the archives, it was the fault of the officers, not mine." The witness further states, that at the time of the sale to Jones, he delivered to the latter the original petition and grant, and all the papers relating to the title. It may be observed, in passing, that it is strange that the grantee should have had possession of the original petition—a document which was usually retained by the government, and constituted a part of the expediente on file in the archives. It is also strange that Jones, when he delivered in 1849 (not 1848, as stated by Castro) his papers to be recorded, should have omitted this document, so important to show the regularity of the proceedings. Governor Alvarado testifies in positive terms that he made the grant in 1838. That the copy produced is a substantial copy of the grant made by him, and that he was present, together with J. B. R. Cooper and his wife, when Castro executed the conveyance to Jones. Joaquin Castro, brother of the grantee, deposes that he saw the grant in the possession of the grantee in 1838 or 1839; that it was on common paper; that he read it, and that the paper produced is a copy of it substantially; that he saw his brother take some sheep in a boat to put them on the island, and that he saw the remains of a house he built there in 1843 or 1844. José Castro testifies that he was at the office of Gov. Alvarado, in Santa Barbara, in 1838, where he accidentally saw lying on the table a grant which he examined, and found to be a grant of the island of Yerba Buena to Juan José Castro. Jesus Maria Castro testifies, that in the year 1838 his brother Juan José, the grantee, went to Santa Barbara to see Gov. Alvarado, and when he came back he brought a concession for the island; that

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

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

in 1839 he saw the paper in his mother's hands; that all the papers relating to their rancho were in a little box; that on looking them over, he saw amongst them the title to Yerba Buena. It was signed by Gov. Alvarado, but had no seal. The witness states that he does not know whether his brother was in possession of the island when the Americans came; that he told him (witness) that he was going to put some sheep and hogs upon it. Antonio Ortega testifies, that in 1840 he asked for the island of Yerba Buena, that Gov. Alvarado said he could not give it to him, as he had already granted it to Juan José Castro; that afterwards in 1840, he with one Guerrero were in the house of a man named Hinckley when Juan José Castro arrived in a boat from San José with some hogs; that Hinckley asked what he was going to do with them, to which he replied that he was going to keep them on the island; that Hinckley asked if he would sell the island; that he said "Yes, for $3,000;" that he heard Castro tell many persons he had a title to the island. José Jesus Pico testifies that he was at the mission of San Antonio in 1839; that Juan José Castro came from below and stopped at his house; that this was in July or August of 1839; that while talking together of lands and ranchos, Castro showed him a concession of the island of Yerba Buena; that he read it—it had no seal, it was on white paper, and had a written and not a printed heading, and was signed by Gov. Alvarado.

The above are all the witnesses who testify to having seen the grant before the date of the sale to Jones, Dec. 7th, 1848. Henriques, who was the clerk to whom Jones, in 1849, delivered the grant and conveyance for record, testifies that he took particular notice of the paper; that it was Mexican paper and had a departmental stamp. Jesus Maria Castro says the title he saw had no seal. Pico says it had no heading or habilitacion. Juan José Castro says the copy produced is "an accurate copy;" but it has neither heading nor seal. Joaquin Castro says it was on common paper. It could therefore have had neither heading nor seal. José Jesus Pico says it was on white paper, and had a written and not a printed heading. That he did not pay any attention to any other part than the governor's signature, the name of the island and the heading of the paper, "as all concessions are alike." And finally, Gov. Alvarado describes it as being issued "in the usual form." These discrepancies are certainly calculated to suggest a doubt as to the reliability of the witnesses. That this concession was not "in the usual form," or like all other concessions, is obvious. Its language and form are peculiar. It contains no conditions. It refers to the superior order of Aug. 18th, 1838, instead of the laws of 1824 and the regulations of 1828. It is not signed by the secretary. It contains no direction "that a note be taken in the corresponding book." It has no seal, and has no heading or habilitacion, nor any note of the fact that common paper was used for want of stamped paper. It is difficult to imagine how the witnesses, if they really saw and if they recollect accurately the contents of the paper, could have supposed such a concession to be like all others, or "in the usual form." It is not meant, however, that there is anything conclusive in these inaccuracies. It is possible that they may have seen the title, remembered the names of the grantor, the grantee and the island, and have failed to remember precisely whether the grant had a seal or a heading. It is only when they undertake to speak positively on these points, and are found to be inaccurate, that a doubt as to their good faith is suggested. The concession is dated November 8th, 1838. Jesus Maria Castro testifies, as has been stated, that in 1838 his brother went to Santa Barbara to see Gov. Alvarado, and when he came back brought a concession for the island with him. Gov. Alvarado swears that he did not see Castro in Santa Barbara at the time of making the grant. And José Jesus Pico says that in July or August of 1839, Castro stopped at his house at the mission of San Antonio, on his way back from Santa Barbara, when he took out of his pocket, or out of the "traps" on his horse, the concession which he showed to the witness. The witness is positive as to the year 1839, and thinks that it was in July or August. If then, as Jesus Maria Castro testifies, the grantee went to Santa Barbara to procure the grant in 1838, and of course before its date, Nov. 8th, and if he, on his return from Santa Barbara in July or August, 1839, showed it to Pico, he must have taken eight or nine months to perform the journey. It would seem that so long an absence from his home could hardly have been forgotten by the grantee or his brothers; neither of them, however, mention this protracted absence, and Juan José Castro testifies that he presented a petition to Gov. Alvarado at Santa Barbara, in Nov., 1838, and that the land was granted at the date of the concession.

On the part of the United States, the principal witnesses are G. H. Nye and J. H. Brown. Nye testifies that he saw Alvarado sign a paper which he understood to be a grant of the island of Yerba Buena. That this was done at the house of John Cooper, commonly called "Jack the Soldier;" that Cooper, Alvarado, Castro, Tolivia, Jones and witness were present; that he met Jones on the way to Cooper's whither he (witness) was going to get a saddle; that he interpreted the document to Jones; that he made no remark about its being antedated; that Tolivia was asked to sign as a witness, but declined, saying he would not put his name to a false document; that but one document was made out on this occasion; that he was not asked to sign as a subscribing witness.

He further states, that after the conclusion of the business, Jones took the paper and went away; that when passing Leidesdorff's house, Jones rubbed his hands against an adobe wall, and then rubbed the paper between them, and that being asked the reason, he replied that it was to give the paper the appearance of age; that he accompanied Jones to his house, and soon after Alvarado, José Castro and the alcalde came in and the transfer to Jones was made. This witness was reëxamined in open court, after the case was removed on appeal. He then stated that the paper to which he referred was a deed from Castro to Jones, and that he saw but one document, and that it was signed by Castro and Alvarado. Jones' name was mentioned in it. The witness repeats the account of Jones rubbing the paper with his hands to give it an ancient appearance, and adds that afterwards Alvarado and Castro met at Jones' house, when the alcalde was called in, and the paper was signed by him. That the paper signed by the alcalde was the same paper he had seen at Cooper's house. Juan B. R. Cooper and Tolivia have both been called as witnesses by the claimants. Whatever the nature of the transaction at Cooper's house was, they are by Nye himself stated to have been present. In the copy of the deed to Jones, the name of Cooper and that of his wife, Cecilia Miranda, appear as subscribing witnesses. Cooper denies all knowledge of the ante-dated grant. He relates the circumstances of the interview, that some money was paid, and that he and his wife were called to sign a paper as witnesses; that he thinks it was a transfer or receipt for money. Tolivia Fanfaran testifies that he was present at the sale of the island by Castro to Jones; that Gov. Alvarado drew up a paper for the sale; that he was not asked to sign as a witness, nor did he decline to do so, as stated by Nye, and that the whole transaction, so far as he knew, was fair and honest.

The above testimony, with that of Alvarado, by whom, of course, the fabrication of the grant is denied, is all that relates to the transaction at Cooper's house. The theory of the United States rests on the testimony of Nye, uncorroborated, except indirectly by Brown, as will presently be noticed. Captain Nye's testimony is by no means reliable. He is shown to have sustained injury by a fall which has seriously impaired his faculties; and the evidence by him is contradictory. That a paper was drawn up and money paid by Jones at Cooper's house, is admitted. That Castro, Alvarado, Cooper, Nye, Cecilia Miranda and Tolivia were present, is also clear. The deed to Jones, a copy of which is produced, bears the signatures of Cooper, Nye, Cecilia Miranda and Alvarado. Cooper and Alvarado both swear that they signed as witnesses the paper drawn up on the occasion referred to. And Nye himself says there was but one paper, and that it was signed by Alvarado and Castro. If this be so, the paper must have been the deed to Jones, and not the grant, which was necessarily signed by Alvarado alone. If Tolivia was asked to sign, as stated by Nye, it must have been the deed he was requested to witness, and not the grant. To ask him to witness a grant by the governor, purporting to have been made ten years previously, would have been absurd. The only hypothesis on which we can suppose the grant to have been fabricated, as stated by Nye in his first deposition, is, that both the grant and the deed were drawn up at the same time. But Nye is positive that only one paper was drawn up, and this in his second deposition he states to be the deed. The story told by this witness is so confused, improbable and inconsistent and it is contradicted by so many witnesses, that it is impossible for the court to found a judgment upon the assumption of its truth. J. H. Brown testifies that he kept the City Hotel in this city, and while behind the bar heard a conversation between Alvarado and Jones, which was interpreted by Captain Nye. That the former agreed to make a title to Castro, by whom a deed should be given to Jones. That $2,000 was at first demanded, and subsequently $1,600 was agreed upon. That they agreed to meet at John Cooper's to prepare the papers. This witness describes with much particularity the place where the parties stood, and states that he attended on the court compulsorily, and only in obedience to the subpœna; that he never had heard what Nye had testified; that he had stated the circumstances three years ago to one Thompson, who was purchasing an interest in the island. Captain Nye, who was recalled after the deposition of Brown, emphatically denies ever having interpreted between Alvarado and Jones, as stated by Brown, as does also Governor Alvarado. To corroborate the proofs of the existence of the grant before 1848, the claimants have called W. H. Richardson, who swears that in 1839 he heard that Castro had a grant for the island; and Albert Packard, who testifies that in 1847 he made a translation of a grant for Yerba Buena to one of the Castros, of which he believes the paper produced to be a copy. Roland Gelston swears that in 1847 Jones asked him his opinion of its value, and stated that he had seen a grant for it to Castro. Manuel Torres testifies that on his arrival here in 1843, he asked Juan José and Joaquin Castro to whom the island belonged, and that Juan José said it was his. William Reynolds states that he was on the island in 1845, for the first time; that he there met with one Jack Fuller and Captain Hinckley; that Fuller said that the goats on the island belonged to him and one Spear, and they were on the island by permission of the owner, who was one of the Castros; witness does not recollect which. William F. Swazey, notary public, states that

in 1846 he knew Spear intimately; that he frequently talked of the goats he had on the island; and that he always was led to believe from his conversations with Spear, Fuller and others that the title to the island was in one of the Castros, and that such was his impression from general report. On the other hand, Samuel Brannan, who came to San Francisco in 1846, Sherreback, who came here in 1841, Buckelew, Leavenworth and Captain Halleck testify that they never heard of the grant until 1848. Leavenworth was alcalde up to August, 1849, and from his position may be supposed to have had some means of information. Sherreback swears that on his first arrival in 1841 he had three or four men cutting wood on the island for his ship; that there were no houses on it from 1841 to 1845; that he never heard of a title to the island until August or September, 1848, when Jones told him he had purchased it from Alvarado. The witness is positive that Jones said he purchased it from Alvarado, and that Castro's name was not mentioned. He also states that he has seen Alvarado and Jones conversing together at his house several times, and that Nye interpreted between them—as Jones did not speak one word of Spanish. That on one occasion Jones, Alvarado and Nye came out of the sitting-room together; that Alvarado and Nye went away, but Jones stopped to pay for the refreshments they had had; and that Jones then stated he had bought the island from Alvarado. If this account be true, it disproves the testimony of Nye and Alvarado, who both deny ever having had such interviews. With regard to Jones' inability to speak "one word of Spanish," Sherreback is contradicted by Colonel Stevenson, who says that Jones spoke Spanish as well as Americans generally do; that Jones was an educated man, etc.

George Patterson, who came to this country as a sailor before the mast, and now keeps a bar for retailing liquor, says that he was on the island in 1840; that from that time until 1848 he has been there repeatedly; that he saw no cattle or cultivation of any kind, nor heard of any title until 1848; heard that Jones had a title, but never heard that Castro had; knows that Castro had a title to an island adjoining the Peralta claim, called "Brooks' Island"; that Fuller and Spear had goats on Yerba Buena island; and that in 1842 two men named Cozzens and Smith had sheep upon it. He never saw a hog upon it. The credibility of this witness is somewhat impaired, however, by his statements on cross examination respecting his intimacy with Castro, with whom he was evidently unable to communicate, as he cannot speak Spanish; by his denial that Dowling, who is principally interested in defeating this claim, ever spoke to him about the testimony he was to give, although he was subpœnaed by Dowling, and has since been twice at his house; and by his statement that when told the district attorney wanted to see him, "he could not imagine what it was for," &c., &c. Benjamin R. Buckelew testifies that at the end of 1848 or beginning of 1849, he had "a very distinct conversation" with Jones respecting the island. That he, witness, expressed, as he had previously done, his doubts whether Jones would get it acknowledged by the United States; that Jones asked his reasons: to which he replied, that Jones and himself and all the old settlers knew it to be vacant land; that Jones replied, "that would make no difference, as he had the title so fixed and fastened that the United States could not avoid acknowledging it." The witness adds that he frequently stated to Jones that if any one had a right to the island it was Fuller and Spear; that they were in possession of it when he and Jones came to the country, and up to 1848. He further states that up to 1848, there were no buildings on the island. Captain Halleck, who came to this country in 1847 as an officer of engineers, testifies that it became his duty to examine into and report upon the titles of places to be reserved for army and navy depots; that after inquiry, he found no title or claim to Yerba Buena Island, and reported it as vacant. He also states, that in a conversation with Jones in 1850, he mentioned to him the reports that the title was made in this town in 1850 and antedated, and that he subsequently admitted the fact. This admission was made, however, after Jones had sold the island, and cannot be received in evidence. The witness also states, on his cross examination, that amongst those of whom he inquired as to the existence of a title to the island, was W. A. Richardson; and that from no source did he learn that any existed, nor did he hear of any until the end of 1848 or beginning of 1849. It is to be remembered that Richardson swears that Castro built a house on the island; that he knew of the grant to Castro; and that he had Indians on it whenever he saw it—the last time being in 1841. A report made by Captain Halleck to Assistant Adjutant General Turner in 1847, is produced, in which Yerba Buena is mentioned, and a recommendation made that measures be taken to secure a title to it and other military points mentioned. Yerba Buena is certainly not in this report stated to be "vacant public land." If Capt. Halleck alludes to this report as that wherein he reported the island vacant, he is evidently mistaken. There is nothing however in the language of the report, or the suggestion that a title should be secured to the island, which is necessarily inconsistent with the idea on the part of the writer that the land was vacant. But whatever errors the witness may have fallen into with regard to the contents of his reports, it is almost impossible that he should be mistaken as to the fact which he states so positively, that he did not hear of any title to the island. He swears that Richard-

son, then collector of the port under the Americans, accompanied him and Capt. Warner to Angel island, Alcatras and Point Caballos; and that he showed them where to land on Yerba Buena island. As the object of these visits was to examine the sites, and the officers were directed to obtain information as to the titles of the various military points, it is impossible that they should not have been informed by Richardson of the title to Yerba Buena island, if the latter had then heard of any; nor is it conceivable that if informed by Richardson of Castro's title, Capt. Halleck should have forgotten it. The conflict, therefore, between Capt. Halleck's testimony and Richardson's is irreconcilable, unless we suppose Richardson, when inquired of by Halleck, to have willfully and without an object stated that there was no title, knowing all the time that, as he has since sworn, Castro had a title, and had built a house for Indians upon it.

Much other testimony has been taken in this case which I do not think it necessary particularly to examine. On reviewing the whole testimony, it is impossible not to feel that the claim set up is liable to the gravest suspicion. The only witnesses who pretend to have seen the grant before the American occupation differ from each other on all points except those essential to be established, viz., the names of the grantor and the grantee and of the island. The existence of the grant seems to have been known to but a very small number of people, and to have been unknown to persons such as Buckelew, Sherreback, Brannan and Leavenworth, who would probably have heard of it. The grant itself is not produced, that its genuineness might be judged of on inspection. No trace of its existence, or of any application for it, appears in the archives. There has been no occupation of the land, even if the claimants' witnesses are believed, which could be deemed to amount to a possession of it, or even to the assertion of a claim to it. The claimants' own witness, Ortega, testifies that in 1840 he applied for a grant of the island, which Alvarado refused. Admitting this to be true, it proves that Ortega at least thought it vacant—an idea incompatible with the exercise by Castro of open and notorious proprietary rights.

If the only question in the case was—"Have the United States proved the grant to have been fabricated in Cooper's house in 1848," perhaps, under the proofs, the answer would be in the negative. But amidst all the inconsistencies, contradictions and retractions in the depositions of Capt. Nye, he constantly adheres to the story of Jones rubbing the paper to give it an appearance of age. This story he repeats in his second deposition, although obviously willing at that time to qualify as far as possible his former testimony. It is told with a circumstantiality which gives to it the air of a narrative of an actual occurrence. The mental imbecility which the claimants have been at pains to prove, though it might lead him to confound one paper with another, would hardly allow him to invent such an incident, or after so long an interval to repeat the invention with so much accuracy. Brown, too, corrroborates his story. He is positive and clear, nor has his character been impeached. That Alvarado, Castro, Nye and Jones were present at the hotel, though positively denied by Alvarado, is testified to by Sherreback; and the suggestion that their conversation might have related to the mistaken date of the superior order under which Alvarado acted, and which was misunderstood, or has been misrepresented by Brown, admits that Alvarado has sworn falsely in denying that such interviews ever took place.

It seems to me that the case is one in which the court should require, before pronouncing in favor of the claim, either record evidence from the archives of the former government, or at least that proof of the genuineness and date of the grant afforded by a notorious and unequivocal occupation of the land and the assertion of a right of ownership to it. It is not pretended, or at least no proof whatever has been offered to show, that an expediente of the proceedings with reference to the grant ever existed. The petition itself was, if Castro is to be believed, delivered first to him, and then by him to Jones. It is unaccountable that it should not have been recorded with the other papers. The book mentioned in Capt. Folsom's deposition as having been burnt, contained merely a note or list of titles. No evidence is offered that this grant was among the number. Had a note been taken of it in the "corresponding book," a memorandum to that effect would in all probability have been made at the foot of the grant by the secretary, as was usual. But this grant contains none such, nor is it even signed by the secretary. The authority under which the governor acted directed him to grant "de acuerdo" with the departmental assembly. It would seem, therefore, that their concurrence or approval was required in this as in ordinary colonization grants. From 1838 to 1846, while the assembly was in session, it was never presented to that body. The only explanation offered is that given by Alvarado, viz.: That the assembly resolved "that the governor should act under the order without further advice from them." No resolution to this effect is produced. The fact rests on the bare statement of Alvarado. As against the Mexican government, this grant, even if genuine, is barren of all equities. The object of the superior order of the twentieth of July, 1828, was to protect the islands on the coast from settlement by foreign adventurers, and from becoming a resort for smugglers. It is difficult to see how placing a few sheep and hogs upon this island, supposing it to have been done, could have in any degree fulfilled the intentions of the granting power. If occupation and settlement were required in any case, it would seem that in a grant made under the motives and policy which dictated this, they should surely have been insisted on. That the island was never occupied by the grantee is, I think, established beyond reasonable doubt. Even his own brother is unable

to state whether he ever took possession of it. From 1840 to 1847 no one was living on it. Capt. Nye swears that he has known it twenty-two years, and that in 1836 he put goats upon it. From these is probably derived its popular name of "Goat Island." The fact of Castro's placing hogs and sheep upon it, if he in truth did so, can neither be regarded as any substantial settlement or occupation, nor even as evidence of the assertion of a title to it in himself. If then the concurrence of the assembly be deemed to have been necessary to fully transfer the title of the Mexican nation to the grantee, the grant unapproved would constitute an inchoate or imperfect title, and the fulfillment of the implied conditions and the performance of the acts which constituted the only consideration for it, would seem necessary to perfect the equity of the grantee and entitle him to demand a confirmation at the hands of this or the former government. But this objection to the claim it is unnecessary further to consider, for the claim must be rejected on other grounds. In the recent case of U. S. v. Cambuston [20 How. (61 U. S.) 59], it is clearly intimated by the supreme court that in cases like that under consideration, record evidence of the grant should be produced, or its absence satisfactorily accounted for. Neither has been done in this case. The case presented is not that of a Californian, found at the acquisition of the country living on his rancho, under a claim of title notorious and undisputed, and who merely asks the United States to recognize his rights. On the contrary, the application is for a title from the United States to parties who have never inhabited, occupied or cultivated any portion of the land solicited. Engaged as this court has been for several years in the investigation of these cases, it is idle to disguise the fact already notorious in the country and so often painfully apparent to the court, that the parol testimony by which these claims have been sought to be established, is in many instances utterly unreliable. The best if not the only tests of the genuineness of an alleged grant are to be found in the record evidence contained in the archives, and in the fact that the land has been occupied under a notorious claim of title recognized by the former government. Under the decision of the supreme court in the case of U. S. v. Fremont [18 How. (59 U. S.) 30], the latter of these tests cannot in general be applied; for the non-occupation can usually be excused or accounted for by parol proofs. The later case of U. S. v. Cambuston [20 How. (61 U. S.) 59] seems to indicate that the supreme court are resolved to apply the former test with rigor. But at least it may be asserted with confidence, that where there is no trace of the grant in the archives, no possession or unequivocal claim of ownership during the continuance of the former government, and the grant itself is not produced, the court should demand the clearest and most indubitable proofs of the genuineness of the title. If such be not offered, and if the testimony as in this case be conflicting and unsatisfactory, it is the duty of the court to pronounce the claim not proved. Such, after the most careful consideration, I feel to be my duty in the case at bar.

UNITED STATES v. POLER. See Case No. 16,075.

Case No. 16,062.

UNITED STATES v. POLHAMUS et al.

[13 Blatchf. 200.] [1]

Circuit Court, S. D. New York. Nov. 19, 1875.

NEW TRIAL — WEIGHT OF EVIDENCE — ACTION TO RECOVER EMBEZZLED MONEYS.

1. A paymaster in the army speculated in stocks, employing the defendants as his brokers. To make good his losses, and pay his obligations to the defendants, he embezzled funds of the United States, intrusted to him, and remitted to the defendants at least $358,000 of government funds, of which sum at least $93,000 had been sent in his official checks upon the assistant treasurer of the United States, in the city of New York, payable to the order of the defendants, and the residue in currency, or in checks on private bankers or on national banks. This suit was brought to recover the amount so received by the defendants, on the ground that they knew that the money was the money of the government, and had been improperly used, or that they received the money with notice of facts from which they could only properly infer that the paymaster was unlawfully expending the funds of the government in payment of his private debts. The jury found for the defendants. On a motion for a new trial, made by the plaintiffs, on the ground that the verdict was so against the evidence, or against the weight of evidence, that it was apparent that the jury were influenced by mistake, sympathy or prejudice: *Held*, that the motion must be granted.

2. The motion would not be granted if the claim were solely for the amount sent otherwise than in official checks.

3. The jury were properly charged, that, where a trustee delivers, in payment of his individual debt, property which is stamped with the insignia of ownership as trustee, the creditor takes the property with notice of the trust, and at his peril, if he does not make suitable inquiry as to the right of the trustee thus to dispose of the property.

4. The defendants, in explanation, gave evidence that their business was large, and that their time was so engrossed that they could not examine checks, and that they endorsed checks without looking at the face of the check, and that, therefore, they did not know that these were sub-treasury checks. The court was of opinion that the case, so far as it concerned such checks, turned, in the minds of the jury, on such evidence, and that the magnitude of the amount involved in the suit, and the serious detriment which would accrue to the defendants from a verdict against them, while such a verdict would be of very slight value to the plaintiffs, in consequence of the insolvency of the defendants, had some influence on the minds of the jury.

---

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

[This was an action by the United States against James A. Polhamus and Eugene J. Jackson to recover a sum of money received by the defendants, which had been embezzled from the government. Heard on a motion for a new trial.]

Henry E. Tremain, Asst. U. S. Dist. Atty.
Roger A. Pryor, for defendants.

SHIPMAN, District Judge. Major J. Ledyard Hodge, a paymaster in the United States army, commenced, in the year 1863, to speculate in stocks in the city of New York, employing the defendants as his brokers. These stock speculations were at first of comparatively small amount, but increased, after the year 1867, until they had attained very large magnitude. From time to time they resulted very disastrously to Major Hodge, who, in order to make good his losses, and pay his obligations to his brokers, embezzled the funds of the United States, with which he was intrusted, until the deficit was discovered in the month of September, 1871, when he was dismissed from office, and pleaded guilty to charges of embezzlement. It was satisfactorily ascertained, either from his own confession, or by evidence derived from an examination of his accounts, that at least $358,000 of government funds had been remitted by him to his brokers, of which sum at least $93,000 had been sent in his official checks upon the assistant United States treasurer, in the city of New York, and the residue had been sent in currency, or in checks upon private bankers, or upon national banks. The checks upon the assistant treasurer bore respectively the following dates, and were for the following amounts: December 15th, 1865, $5,000; September 25th, 1869, $20,000; September 27th, 1869, $13,000; September 28th, 1869, $15,000; and July 18th, 1870, $40,000. An action of indebitatus assumpsit was thereupon commenced by the United States against the defendants, for the recovery of the amount which had been thus received by them, upon the ground that they knew that the money was the money of the government, and that it had been improperly used by Major Hodge, or that they received the money with notice of facts from which they could only properly infer that the trustee was unlawfully expending in payment of his private debts the funds of his cestui que trust. This action was tried before a jury, who returned a verdict for the defendants. The government thereupon filed a motion for a new trial, upon the ground that the verdict was so against the evidence, or against the weight of evidence, in the cause, that it was apparent that the jury were influenced by mistake, sympathy or prejudice, and upon the ground that the charge and rulings of the court were erroneous.

Upon the point that the verdict was against evidence, it is not strenuously urged that, as to the amount which was sent in currency, or in private checks, the evidence against the defendants was of such uniform character as to demand a new trial, though it is claimed that the verdict was against the weight of evidence in respect to those sums; but it is claimed that, as to the $93,000 which was sent and received in official drafts upon the sub-treasury, the jury mistook the charge of the court, and rendered a verdict palpably in violation of the evidence which was introduced. If the claim of the government against the defendants had been solely for the amount which was sent in currency, or in unofficial checks, I do not think that a court would be justified in directing a new trial. As to the amount which was sent in official checks, the case rested upon different principles from those which appertained to the residue of the plaintiffs' claim. These checks were the checks of Major Hodge, as paymaster of the United States army, upon the well known depository of the funds of the government, to the order of the defendants, and were sent directly to the payees, in payment of the private debts of the drawer, and were collected and credited upon the account of Major Hodge. Upon this part of the case, the court charged the jury in conformity with the rule of law, that, when a trustee delivers, in payment of his individual debts, property which is stamped with the insignia of ownership as trustee, the creditor takes the property with notice of the trust, and, if it is received without making suitable inquiry as to the right of the trustee thus to dispose of the property of the cestui que trust, the recipient takes it at his peril. He is guilty of negligence if no suitable inquiry is made. The general rule was laid down with sufficient fullness. But, the fact that the property bears upon its face the evidence that it is owned by the seller or the payer, as trustee, is not conclusive upon the liability of the defendant, who is always at liberty to show that he did make suitable inquiry. If he receives property which is known to be trust property, he is prima facie liable to the cestui que trust, and the burden is thrown upon the defendant of explaining his conduct to the satisfaction of the jury. The defendants in this case offered evidence which was proper to go to the jury in explanation and justification of their acts. They gave evidence that their business during the period which was included in their transactions with Major Hodge, was enormously large; that their time was so engrossed that they could not examine checks; that checks were endorsed, when presented to them, by the person whose business it was to make the deposits, without examination or without reading, or looking at the face of, the check; and, therefore, that they did not know that these were sub-treasury checks. I have reason to know that the case, so far as it concerned this class of remittances, turned, in the minds

of the jury, upon the evidence which was thus offered by the defendants, of their want of knowledge upon whom the checks were drawn. I was of the opinion, at the time of the trial, that the case was not such as to justify a direction to the jury to find a verdict for $93,000 in favor of the plaintiffs. There was a question of fact which involved a large amount of property, and which involved, to some extent, the character of the defendants, which was proper to be submitted to a jury. I am still of the opinion that it should have been so submitted, or else that the principle of trial by jury is not to be regarded. But, I am of opinion, after careful consideration of the case, that the evidence was such that the supervisory power of a court should be interposed, and that the facts should be submitted to the scrutiny of another jury. It is not necessary for me to consider the subject of new trials upon the ground that the verdict was against the weight of the evidence. The principles of law are well known. It is sufficient for me to say, that if the plaintiff in this case was an individual cestui que trust, whose property had been thus placed by an unworthy trustee in the hands of the defendants, I should not feel satisfied that my duty had been discharged until I had remitted the question to the test of a new trial; and, although the treasury of the government is in the annual receipt of millions, and a favorable verdict for the amount which is at stake will perhaps be of no serious benefit to the United States, while a verdict against the defendants may have the effect of permanently crippling those whom financial reverses have already rendered insolvent, yet it is the duty of a court to regard solely its obligations as a court of justice, and not to be swayed by the comparative effect of its decisions upon the parties. The magnitude of the amount which is involved in this case, and the serious detriment which would accrue to the defendants from a verdict against them, while such a verdict would be of very slight value to the plaintiffs, I think had some influence upon the minds of the jury.

I have doubted whether the discretionary power of the court should be exerted in favor of a new trial, when an exceedingly intelligent and capable jury had once rendered a verdict, after an absence of only fifteen or twenty minutes, and when, in consequence of the insolvency of the defendants, a different verdict, if it should be rendered, would in all probability be of no pecuniary value to the United States, but I am satisfied that these considerations are subordinate to those which I have already stated.

The plaintiffs also moved for a new trial upon the ground of error of law in the charge and rulings of the court. It is not necessary to consider these questions, in view of the disposition which has been made of the motion

The motion for a new trial is granted.

Case No. 16,063.

UNITED STATES v. The POLLY AND JANE.

[2 Hall, Law J. 458.]

District Court, D. New York. Aug. Term, 1809.

EMBARGO—LADING WITHOUT INSPECTION.

[A vessel is liable to forfeiture under the statute of January 9, 1808 (2 Stat. 506), for taking on goods exceeding $400 in value in the aggregate, without permit and inspection, although they were taken at different times and places, and at no one time to the amount of $400 in value.]

[This was a libel of forfeiture against the sloop Polly and Jane for alleged violation of the embargo law of January 9, 1808 (2 Stat. 506).]

In this case the libel also charged a lading without permit and inspection, and it appeared in evidence that goods of a greater value than $400, were so taken on board the sloop, as composing her cargo for an intended illicit voyage, but that the lading was effected at different times and places and at no one time to the amount of $400 worth.

His honour held the different ladings of the cargo as aforesaid to be a continuation of the same transaction and one offence; and that the aggregate value of the goods so laden exceeding in amount the sum of $400, the vessel, &c. became liable to forfeiture.

Condemned.

Case No. 16,064.

UNITED STATES v. The POLLY AND NANCY.

[1 Hall, Law J. 483.]

District Court, D. Pennsylvania. Sept. 9, 1808.

EMBARGO—CARRYING PROHIBITED GOODS.

[Sea stores and provisions are not to be considered as a part of the cargo, so as to be forfeitable under the act of January 9, 1808 (2 Stat. 507), along with goods which the ship was prohibited from taking by the statute.]

This libel was filed by Mr. Dallas, the district attorney, against the schooner Polly and Nancy, John Russel, master, a British owned vessel, and her cargo, seized by the collector for a breach of the laws relating to the embargo, by taking on board prohibited goods.

Mr. Hopkinson appeared for the master, who was also the owner of the vessel; alleged that the illegal act was committed without the knowledge or approbation of his client; but submitted to the condemnation of the vessel and cargo, excepting the sea stores and provisions.

After hearing Mr. Dallas, on the one side, and Mr. Hopkinson, on the other, THE COURT decided that upon general principles, as well as upon the particular words of the fifth section of the act of the 9th of January, 1808 [2 Stat. 507], the sea stores and provisions could not be considered as a part of the cargo, liable to forfeiture.

Case No. 16,065.

UNITED STATES v. POMEROY.

[3 N. Y. Leg. Obs. 143.]

District Court, N. D. New York. July 10, 1844.

POST OFFICE LAWS — SENDING LETTERS BY EXPRESS.

A person who sends a packet of letters by a passenger in a railroad car over a post road, without the knowledge and against the consent of the owners of the car and their agents, is not subject to the penalty imposed by the nineteenth section of Act Cong. c. 275 [3 Story's Laws, 1990; 4 Stat. 107, c. 64].

[Followed in U. S. v. Hall, Case No. 15,201.]

Joshua A. Spencer, U. S. Dist. Atty.

S. Stevens and M. T. Reynolds, for defendant.

CONKLING, District Judge. This is a penal action [against George E. Pomeroy], founded on the nineteenth and twenty-fourth sections of the act regulating the post office department, passed March 3, 1825. By the nineteenth section it is enacted, that no stage or other vehicle, which regularly performs trips on a post road, or on a road parallel to it, shall carry letters: that for a violation of this provision, the owner of the carriage or other vehicle, shall incur the penalty of fifty dollars: Provided, that it shall be lawful for any one to send letters by special messenger. By other sections of the act many other acts are prohibited, and declared punishable. And the twenty-fourth section provides in general terms, that every person who, from and after the passage of this act, shall procure, and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes according to the provisions of this act.

The declaration contains twenty counts, each charging the defendant with having procured. advised, and assisted a certain vehicle, to wit, a railroad car, performing regular trips on a railroad, in this district, such road being a post road, to convey letters contrary to the form of the statute. The evidence in behalf of the United States, assuming that the witnesses are entitled to credit, establishes the fact that many letters were received by the agents of the defendant, for the purpose of being conveyed, and were in fact conveyed for hire by his agents, acting under the name of messengers, on the roads designated in the declaration, in the cars of the owners of the roads; and the evidence tends to prove that this was done with the knowledge of the defendant,—its sufficiency for this latter purpose being, however, denied by the counsel for the defendant. On the other hand, it appears that the defendant's messengers travelled on the roads in question merely in the character of passengers, purchasing tickets for that purpose from time to time, and that the owners of the cars and their agents were ignorant of the fact of their having letters in charge. It is moreover admitted by the district attorney, that in order to subject the owner of a vehicle to the penalty provided by the nineteenth section of the act, it must appear that letters were conveyed in such vehicle with his knowledge and assent; and that no penalty has therefore been incurred under that section by owners of the cars now in question.

Under this state of the case I am called upon by the defendant's counsel to instruct the jury, among other things, that in order to render a person liable to the penalty provided by the twenty-fourth section of the act, it must be shown that by his procurement, assistance or advice, some other person has committed the act forbidden by the nineteenth section; and that the plaintiffs have therefore failed in point of law to establish a right of recovery. This proposition has been strenuously and very ably contested by the district attorney, who insists that the offence described in the twenty-fourth section taken in connection with the nineteenth section, is a distinct and independent offence, which may be committed by one person without the participation or agency of any other person. This is not a new question, though it is one of recent origin in the courts. It was involved in the case of U. S. v. Adams [Case No. 14,421], tried nearly a year ago in the district court for the Southern district of New York, though from the report of the case read yesterday by the defendant's counsel, the question does not appear to have been very distinctly presented to the court. The opinion of the court is however understood to have been favorable to the construction of the law insisted on by the defendant's counsel in the present case. But the case of U. S. v. Kimball [Id. 15,531], tried a few months since in the district court for the Massachusetts district, turned directly upon this question. The opinion of his honor, Judge Sprague, upon it, after argument, is elaborate, and apparently well considered; and it was in accordance with the instructions now asked by the defendant's counsel. He held that a person who sends a letter by a passenger in a railroad car is not liable to the penalty provided by the twenty-fourth section of the act, unless the owner of the car is liable to the penalty provided by the nineteenth section. The case was carried to the circuit court by writ of error, and the decision of the district court was affirmed by Mr. Justice Story. If these had been the only decisions upon this question I should have felt little hesitation in yielding to their authority. But a contrary decision having lately been made by the learned judge of the Eastern district of Pennsylvania, in the case of U. S. v. Fisher [Id. 15,100], and, as it would seem also from an imperfect report read by the district attorney, by the district court for the district

of Maryland, in the case of U. S. v. Gilmour [Id. 15,208], I have felt it to be my duty to consider the question as an original one, and especially to scrutinize the conflicting judicial opinions pronounced in the Cases of Kimball and Fisher,—these opinions having, as it is understood, been published under the sanction of the learned judges themselves. In doing this, I have been essentially aided by the luminous arguments of the learned counsel by whom this trial has been conducted.

I had read the opinion of the judge of the Massachusetts district upon its first appearance two months ago, and was forcibly impressed with the course of reasoning by which his decision was fortified, and, as I have already intimated, should not have hesitated to acquiesce in it, had there been no conflicting decision, and but for the forcible argument of the district attorney in the present case. My attention has therefore been chiefly directed to the reasoning of his honor, Judge Randall, and that of the district attorney. The learned judge, in assigning his reasons for the conclusion at which he had arrived, is reported to have said, that "offences even of the highest grade, may be committed through the medium of an innocent agent, and the employer be answerable as principal, even although not present when the act was committed. Thus," he adds, "one who employs an idiot or a child, under the age of discretion, to do an unlawful act, is liable to punishment for it, although the act was done in his absence." This is undoubtedly sound doctrine; but I am not able to perceive any propriety in its application to the case in question. The reason why one who employs a child or an idiot, or instigates a mad man to commit a crime, is himself directly responsible as principal, instead of being but an accessory before the fact, is, that the immediate actor is irresponsible. For every offence committed, some one must necessarily be amenable as the principal offender. In the cases supposed by the learned judge, if the intermediate agents were accountable for their acts at all, it could only be as principals; but being irresponsible, he by whom their acts were prompted, is justly substituted in their place,—just as one who should maliciously unchain a wild beast in the midst of a populous town would be held accountable, as principal, for the injury which should accrue. But the reasons of this doctrine do not exist when the unlawful act is perpetrated by a person who is himself amenable to the law for his acts, and therefore the doctrine itself is inapplicable to such a case. The owner and conductor of the railroad car were such persons; and if they committed the act forbidden by the nineteenth section, they were responsible for it as principals.

But it was conceded that in the eye of the law they did not commit it,—and justly,—because, according to an old and well established legal maxim, it is the mind and not the act which constitutes the criminal. Neither was it pretended that the act prohibited by the nineteenth section—that of conveying letters in a vehicle regularly performing trips on a post-road—was committed by the defendant. The charge against him was that he procured and advised or assisted another to commit it. But a charge against one person of having advised and assisted another to commit an offence not in fact committed by him, involves in my judgment a degree of inconsistency wholly irreconcilable with that precision and certainty which the law demands in the administration of penal justice, and which are essential to the security of the citizen. Besides if the principles applied by the court in the Case of Fisher, had really been applicable to such a case, the defendant ought to have been prosecuted, not under the twenty-fourth section, for procuring, advising and assisting, &c., but under the nineteenth section, for actually conveying the letters. By this means the inconsistency just mentioned, at least, would have been avoided. It was further remarked by the learned judge, as appears by the report, that while it was true that penal statutes were to be construed strictly, they were "not to be construed so strictly as to defeat the obvious intention of the legislature, when that intention can be collected from the words used in the act." This position, in its just sense, is also incontrovertible; but in my opinion it does not warrant the decision in support of which it was adduced. The question was, whether a person who sends a packet of letters by a passenger in a railroad car over a post road, without the knowledge and against the consent of the owners of the car and their agents, is within the words of the act. I think there are no words in the act descriptive of such person.

No doubt the design of the act was to secure to the United States, so far as could be done without improperly trenching upon the freedom of the citizen, the entire emoluments arising from the transportation of letters on post roads. But this design, however obvious, does not authorize the judicial branch of the government to extend the act to descriptions of persons not embraced within its terms, however strongly and mischievously their acts may tend to defeat its design. It often happens that what the courts, in giving a construction to statutes, are bound, by the settled rules of interpretation, to consider the intention of the legislature, falls far short of the general policy and objects of the act. This remark may be well illustrated by reference to the 3rd section of the amendatory post office act of 1827 [4 Stat. 238], by which it is made penal to "set up any foot or horse post for the conveyance of letters or packets upon any post road." Now, it is very clear that the transportation of letters in railroad cars drawn by steam, is in direct conflict with the de-

sign of this prohibition; and yet it seems to be agreed on all hands that no penalty is incurred under it by the conveyance of letters in this mode, because the act contains no words descriptive of such an offence. For the same reason, the act of 1825 ought not, as I think, to have been construed to embrace the Case of Fisher. If congress had really intented to prohibit the conveyance of letters by passengers, it would have been easy, by apt terms, directly and plainly to declare such intent. The practice of sending letters by passengers in the public conveyances on post roads, has always and notoriously prevailed, and must have been known to congress in 1825. Until recently, letters were thus sent only occasionally, and were taken in charge, not for hire, but as a mere act of kindness or of social obligation. While the practice was thus restricted, it may reasonably be supposed that congress did not deem it necessary or just to interfere with it. The practice has now, on some of the principal post roads, become a regular systematized business, carried on for profit. But I cannot acquiesce in the argument that its extension has altered its legal nature or enlarged the jurisdiction of the courts. If it has become an evil requiring correction by the public authority, it is the province of the legislature to apply the remedy.

The district attorney relies chiefly on the term "procure," and his argument is, that, however it may be with the words "advise and assist," there is no absurdity in the charge against the defendant, of having "procured" the car to carry letters, because by paying his passage he acquired a right to a seat, and then used this right for the purpose of carrying letters. In my judgment this is an unwarrantable interpretation of the word "procure," as used in the act. It can, in my opinion, no more be applied to an inanimate thing, than the words "advise or assist," with which it is associated. It does not mean, to obtain or get possession of; but to induce, by persuasion, bribery, or by other means, acting on the will of an intelligent being. It is admitted that the offence described in the nineteenth section can only be committed by the wilful act of some person; and I hold it to be clear that no penalty can be incurred under the twenty-fourth section, except by procuring, advising or assisting the commission of that offence. Upon the whole, therefore, I shall consider it my duty to instruct the jury upon this point in accordance with the request of the defendant's counsel.

Another, and far more important question has been raised, viz.: whether the constitution confers upon congress the power to restrain a private citizen from carrying letters in competition with the mail of the United States. But upon this, as well as upon the other points relied on by the defendant's counsel, it is unnecessary to express any opinion, and I therefore forbear to do so.

Case No. 16,066.

UNITED STATES v. POMPEY.

[2 Cranch, C. C. 246.] [1]

Circuit Court, District of Columbia. May Term, 1821.

SLAVERY.

Quære, whether an indictment will lie, at common law, for enticing away a slave.

Indictment [against the negro Pompey] at common law for enticing away a slave belonging to Judge Washington.

Verdict, guilty, and the jury assessed the fine at $50.

THE COURT (THRUSTON, Circuit Judge, absent) were doubtful whether the indictment could be supported in law; but as there was no motion in arrest of judgment, it was entered up for the fine as assessed by the jury. See 1 Hayw. 13; 2 Hayw. 106.

Case No. 16,067.

UNITED STATES v. POND.

[2 Curt. 265.] [2]

Circuit Court, D. Massachusetts. May Term, 1855.

INDICTMENT FOR MISDEMEANORS—MOTION TO QUASH—OFFENCES UNDER POSTAL LAWS—OPENING LETTERS.

1. A defect, pleadable only in abatement, is not ground for quashing an indictment.

2. In indictments for misdemeanors, it is sufficient to lay the charge in the words of the act of congress describing the offence, unless it appears, those words include cases not intended by the legislature to be embraced within the laws; in that event the indictment must show the case to be one not thus excluded.

[Cited in U. S. v. Henry, Case No. 15,350; Dewee's Case, Id. 3,848; U. S. v. Quinn, Id. 16,110; U. S. v. Winslow, Id. 16,742; U. S. v. Noelke, 1 Fed. 432; U. S. v. Britton, 107 U. S. 662, 2 Sup. Ct. 518.]

[Cited in State v. Miller, 60 Vt. 92, 12 Atl. 526.]

3. The twenty-second section of the act of March 3, 1825 (4 Stat. 109), makes it an offence to open a letter which has been in a post-office, before delivery to the person to whom it is directed, with intent to obstruct his correspondence or pry into his business or secrets, though the letter was not sealed, and was not, at the time, in the lawful custody of any person, and even though it was written by the defendant himself. Nor is it necessary that the name to which the letter was addressed, should be the true name of the person for whom it was intended.

[Cited in U. S. v. McCready, 11 Fed. 229.]

4. In such an indictment it is not necessary to allege any venue of the unlawful intent, nor to allege that the opening was unlawful, nor that A. B., to whom the letter was addressed, was a real person, if it be alleged that the letter was opened with intent to obstruct

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

[2] [Reported by Hon. B. R. Curtis, Circuit Justice.]

A. B.'s correspondence, or pry into his business or secrets, because it will intended he was a real person.

[Cited in U. S. v. Driscoll, Case No. 14,994; Re Coleman, Id. 2,980; U. S. v. Safford, 66 Fed. 945.]

This was a motion to quash an indictment under the 22d section of the act of March 3, 1825 (4 Stat. 109), for the government of the post-office department, &c. The indictment, omitting the merely formal parts, was as follows:—"That on the fifteenth day of September, in the year of our Lord one thousand eight hundred and fifty-four, one Abel Pond, at Holliston, in said district, did then and there open a certain letter directed to one 'Ebenezer H. Currier, Esq.' which letter had been in a post-office of the said United States, namely, in the post-office of the United States at Holliston, in said district of Massachusetts, and did so open the said letter before it had been delivered to the said Currier to whom it was directed, and did so open the said letter with a design to obstruct the correspondence, and to pry into the business or secrets of another, namely, of the said Ebenezer H. Currier, said letter not containing any article of value."

The motion was as follows: "And now before pleading, the above-named defendant comes and moves the court, that the indictment found against him at this term of the court be quashed,—for the following reasons: (1) That he is not named therein with any addition of mystery, degree, or occupation; nor with any addition of the town or place of which he is a resident. (2) Because admitting all the facts stated in the indictment, it does not charge the defendant with any criminal offence; more particularly in that it does not set forth that defendant unauthorizedly or unlawfully opened the letter in question; in that it does not allege that the letter was sealed, or that the opening was by means of any breaking, tearing, or cutting; in that it does not allege that the letter as aforesaid was at the time of said opening in the custody of any postmaster, letter carrier, or other person having lawful charge of the letter of another; in that it does not exclude the idea that said letter was the property and belonged exclusively to the defendant, and that he was lawfully opening it at the time of said opening; in that it does not allege that there was any such person in existence as Ebenezer H. Currier, to whom said letter is alleged to have been addressed; in that it does not aver an intent unlawfully or unauthorizedly to obstruct the correspondence, or to pry into the secrets of said Currier, (supposing that there was such a person in being at that time, for whom said letter was intended,) and that it does not generally exhibit and set forth facts enough to constitute any offence against the laws of the United States. (3) Because there is no venue or time laid to the allegation of the intent."

Geo. Bemis, for the motion.
Dist. Atty. Hallett, contra.

CURTIS, Circuit Justice. Without expressing any opinion respecting the necessity of an addition of the mystery or degree of the defendant, in an indictment, I think the first cause assigned insufficient to support the motion. The want of an addition, or a wrong addition, when required, is ground for a plea in abatement only. 2 Hawk. P. C. c. 23, § 125; 2 Inst. 670; Rex v. Warren, 1 Sid. 247; Rex v. Checkets, 6 Maule & S. 91. A motion by a defendant to quash an indictment, must be founded on defects which would make a judgment against him, on that indictment, erroneous. Bac. Abr. "Indictment," K; 2 Hawk. P. C. c. 25, § 146; Com. Dig. "Indictment," H. And there are many cases where the court, in the exercise of its discretion, refuses to quash an indictment even for defects which would cause an arrest of judgment. Bac. Abr. "Indictment," K. In Rex v. Wheatley, 1 Wm. Bl. 275, Lord Mansfield said: "If any distinction is made between quashing and arrest of judgment, that of quashing is the strongest way; because the indictment must be very grossly bad to have the court quash it at once." A defect only pleadable in abatement, and which is cured by pleading over, is not ground for quashing an indictment.

The cause secondly assigned, if found correct, would be sufficient In examining it, it must be remembered that this is an indictment for a misdemeanor, created by statute; and that, in general, it is sufficient to describe such an offence in the words of the statute. U. S. v. Mills, 7 Pet. [32 U. S.] 138. This indictment follows the words of the statute. It is sufficient, therefore, unless the words of the statute embrace cases which it was not the intention of the legislature to include within the law If they do, the indictment should show this is not one of the cases thus excluded. In the case of The Mary Ann, 8 Wheat. [21 U. S.] 389, speaking of an information, Mr. Chief Justice Marshall said: "If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature;" and this is only another mode of expressing the same rule which I have stated above.

To apply these rules to this case; the first objection is that the indictment does not allege that the defendant unlawfully opened the letter in question. But, following the words of the act, it does allege such facts as, if true, amount to an unlawful opening; for it avers the letter was opened before it reached the person to whom it was addressed, with intent to obstruct the correspondence and pry into the business or secrets of

another. This intent renders the opening of such a letter unlawful, and it would add nothing material to call it so. The court takes notice of its illegality. The next objection is the want of an allegation that the letter was sealed. I am of opinion that opening such a letter, though unsealed, with the intent charged, is an offence against this act, and therefore it was not necessary to allege it to have been sealed.

It is further objected that it is not alleged that at the time of the opening, the letter was in the custody of any postmaster, letter carrier, or other person, having lawful charge of the letter. The words of the act do not require that the letter, when opened, should be in the lawful custody of any one; but only that it had been in the post-office, or in the custody of a mail carrier, and was opened before delivery to the person to whom directed. And I do not perceive sufficient reason, why the language should not be literally construed. If a letter should be obtained by fraud or theft from a post-office by one person, and opened by a second, with design to pry into the business or secrets of another, or obstruct his correspondence, I think it would be an offence within this act. And so in any other case which has occurred to me, of a lawful or unlawful custody at the time of the opening, with such intent. But it is said the indictment does not exclude the idea that the letter was written by the defendant, and belonged to him at the time it was opened.

I think it does; for the intent charged in the indictment could hardly exist, if the defendant wrote the letter. Such a case, of a person opening a letter which he had himself written with intent to obstruct the correspondence, or pry into the business or secrets of another, cannot reasonably be supposed possible. But if it were possible, I do not know on what ground I could say it is not within this act. True, the mere opening of a letter by him who wrote it, and put it into the post office, is an innocent act. It may be done to correct a mistake, or for many proper reasons. But doing it for an improper and wicked motive may well enough be declared criminal; and if the legislature use language broad enough to embrace such a case, and it can be proved, in point of fact, in my opinion it must be deemed within the law, and subjects the offender to punishment.

It is further urged, the indictment should have alleged that Ebenezer H. Currier, to whom the letter was directed, was a real person. This proceeds upon one of two grounds; the first is, that letters addressed to real persons, under fictitious names, are not within the protection of the act. I do not think so. Many lawful reasons may exist for writing and receiving such letters. A desire to avoid publicity, though it generally accompanies crime, is also quite consistent with innocence. Much lawful and important correspondence is conducted under fictitious addresses. Nothing is more common than to see requests to address a particular number, or one or more letters of the alphabet. I do not consider it necessary that the address on the letter should have been the true name of any person. The other ground is that it does not appear that the letter was addressed to any real person, by a fictitious or real name. But the indictment charges an intent to obstruct the correspondence, and pry into the business and secrets of one Ebenezer H. Currier. This cannot be proved without showing that there is a real person in existence capable of having correspondence, and business, and secrets, affected by the letter in question, but also that his name is Ebenezer H. Currier. In an indictment for larceny, the property is laid in J. N. I never saw an averment made that J. N. was a real person. The allegation imports it, for none but a real person can hold property. So here the allegation that Ebenezer H. Currier had business, and secrets, and correspondence, imports that he was a real person.

The last objection is, that there is no venue, or time, laid to the allegation of intent. But venue and time are laid to the act of opening, and I am of opinion it was not necessary to lay them to the intent, which it is averred accompanied the act of opening, and so must necessarily have had its existence when and where the act was done.

The motion to quash is overruled.

Case No. 16,068.

UNITED STATES v. POPE et al.

[Hoff. Land Cas. 141.] [1]

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

MEXICAN LAND GRANTS.

The validity of this claim fully established.

[Claim of Joseph Pope and others, heirs of Julian Pope, deceased, for the Rancho Locoallomia, consisting of] two leagues of land in Napa county; confirmed by the board, and appealed by the United States.

William Blanding, U. S. Atty.

McDougal, Aldrich & Sharp, for appellees.

HOFFMAN, District Judge. In September, 1841, Julian Pope applied to General Vallejo for an order for the provisional occupation of the premises now claimed. The land having been reported vacant, permission to occupy and to apply for the usual title was given to the applicant. Julian Pope accordingly petitioned the government for a grant, and on the thirtieth of September, the usual title was issued by Jimeno, giving to Pope the place called Locoallomia, of two sitios de gañado mayor. The above facts are estab-

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

lished by the grant, which is produced and duly proven, and by the expediente, which is found in the archives, and a copy of which duly certified is on file.

Case No. 16,069.

UNITED STATES v. POPE.

[24 Int. Rev. Rec. 29; 3 Cin. Law Bul. 30.] [1]

District Court, D. Massachusetts. Jan. 8, 1878.

EXTRADITION—ARREST IN ONE DISTRICT FOR TRIAL IN ANOTHER—INDICTMENT AS EVIDENCE.

1. Where a person is arrested and brought before a judge or commissioner to be held to bail for trial in another district, a certified copy of the indictment found in such other district is competent evidence against the defendant; but if such indictment be so inconsistent that an impossible offence is set forth therein, it is not evidence authorizing such judge or commissioner to hold the defendant to bail.

[Cited in U. S. v. Brawner, 7 Fed. 88; U. S. v. Rogers, 23 Fed. 661.]

2. The indictment in this case charged in substance that on the 10th day of June, 1874, in Louisiana, the defendant and others conspired to defraud the United States by procuring to be entered against the United States in the court of claims, an unjust judgment on the 18th day of May, 1874, and further sets forth that such judgment was in fact rendered on said 18th day of May *Held*, that such indictment is no evidence of guilt.

At law.

P. Cummings, Asst. U. S. Atty.

C. Allen, for defendant.

LOWELL, District Judge. On the 6th day of June, 1876, an indictment was found in the circuit court of the United States for the district of Louisiana against August P. Noblom, Henry Peychaud, Theodore Valiade, and Robert H. Shannon, of the district of Louisiana, George Taylor and Oliver S. Lovell, of the District of Columbia, and Frederick G. Pope of the district of Massachusetts, alleging: That the defendants in and within the state and district of Louisiana, on the 10th day of June, 1874, conspired together with one Bouchard and others unknown to the grand jurors, with the intent and purpose to cheat and defraud the United States of the sum of $296,000; that in 1869 said Noblom together with one Bellocq and one Roy, claiming to be copartners in New Orleans under the firm of Bellocq, Noblom & Co., presented to the court of claims at Washington a petition which is fully set forth in the indictment. Its substance is that the petitioners had, before April, 1861, made large advances on 1,851 bales of cotton which had afterwards been seized, in April and May, 1863, by the military authorities of the United States, and sold by the treasury agents, and the proceeds paid into the treasury of the United States; that the cotton was never abandoned nor forfeited, and was not liable to confiscation under any act of congress and the petitioners claimed the proceeds of said cotton, or at least the amount of their advances, averring that they had never aided the Rebellion. The indictment proceeds to set out that a supplemental petition was filed in the court of claims by the defendant Peychaud, averring himself to be the assignee in bankruptcy of said firm, and repeating the allegation of the original petition; that issues were framed on this last petition, and the same was pending in the court of claims at the December term, 1873; that the defendants and the other conspirators at Louisiana on the 1st day of June, 1874, aforesaid, as the means of carrying out their conspiracy conspired to prosecute said action in said court of claims to a final judgment by false testimony to be presented to said court and thereby to procure an unjust judgment to be rendered against the United States for $296,000, and cause it to be executed and the money paid,—the conspirators well knowing that said petitions were in all material respects untrue, and that no judgment ought to be rendered thereon against the United States; that Peychaud at Louisiana, September 10, 1874, in pursuance of the conspiracy, permitted the action to be prosecuted to final judgment, which judgment was duly made and entered at Washington, May 18, 1874. It then sets out the judgment in favor of Peychaud as assignee in bankruptcy of said firm for the proceeds of 1,542 bales of cotton amounting in all to $296,064; that Peychaud, knowing the judgment to be wrong, etc., demanded and procured payment; that his comrade, Taylor, knowing, etc., agreed to receive part of the proceeds, etc. That the defendant Valiade (without date), gave testimony which was false; finally that the defendant, Pope, in October, 1873 (in fact, 1872), in pursuance of the conspiracy gave a deposition in Boston authenticating a certificate made by him in 1863, that as captain in a regiment of volunteers and by order of his commanding officer, he had seized four bales of cotton belonging to P. Noblom and deposed that the certificate was true, whereas he well knew that it was false and untrue and a fabrication of his own, and that it was made to aid the defendants in their conspiracy to obtain an unjust judgment in the court of claims.

The defendant, Pope, was complained of before Mr. Commissioner Hallett some months since in behalf of the United States, who asked that he might be ordered to give bail for his appearance at New Orleans to answer to the said indictment. After a hearing the commissioner discharged the defendant. Lately a fresh complaint was made before the district judge, and a hearing was had. The United States introduced a certified copy of the indictment, and evidence tending to identify Pope as the per-

[1] [3 Cin. Law Bul. 30, contains only a partial report.]

son indicted. The defendant produced evidence tending to show that he had not been in Louisiana since 1866, at the time he left the army; that he had seized a large amount of cotton in 1863 by order of his superiors, who required him to give receipts therefor when demanded; that he was not known or believed to be a friend of Noblom, and was known to have expressed publicly before the magistrate when his deposition was taken in October, 1872 (not 1873), his disbelief in the loyalty of the claimants. All this evidence for the defendant was objected to by the district attorney, and was admitted only de vene.

From the very great pressure of business in the court this case has been delayed longer than I intend that any case shall be if I can prevent it. I know of no statute which authorizes the warrant of any court of the United States to be served on a defendant out of the district in which the indictment is found in any criminal case; though all witnesses and defendants in some few civil cases may be so served with process. I mean there is no statute which in terms authorizes such a warrant, and the weight of opinion is decidedly against the existence of such a power. See In re Alexander [Case No. 162], and the cases and opinions there cited; U. S. v. Haskins [Id. 15,322]; U. S. v. Yacobi [Id. 15,460]; opinions of Miller and Love in Re Bailey [Id. 730]. In these cases and all others that I have seen the mode adopted to procure the attendance of a defendant who is found out of the district where the offence is said to have been committed, is to apply to a commissioner or judge under the judiciary act, section 33 (1 Stat 91), now re-enacted in Rev. St. § 1014, and produce before him the evidence of criminality precisely as if the defendant's crime was alleged to have been committed within the district. Such applications are very common, and such is the case now before me. The usual course is to produce either witnesses or affidavits in behalf of the United States. It has been seriously doubted whether a copy of an indictment is evidence in such an examination. I decided in Alexander's Case, ubi supra, that it is. This was a very convenient decision for the United States and a sound one, but it rests rather on long usage than on any principle of law, because, generally speaking, an indictment is evidence of nothing but its own existence, unless there is some statute giving it a greater effect. It is but secondary evidence after all, or rather a statement of the result of evidence, and the better practice is to give primary evidence of criminality.

In extradition between the United States and other nations copies of the warrant and of the depositions on which it was founded are made evidence. Rev. St. § 5271. And in extradition between the states a copy of the indictment or of an affidavit is sufficient. Rev. St. § 5278. In both these classes of cases the executive authority, whether of the state or nation, has an ultimate discretion whether to surrender the supposed criminal or not; and they often refuse, though the papers are in due form and unimpeached, if there is good reason to believe that some ulterior object or sinister design is concealed under the regular forms. Examples of this are historical. Congress not having seen fit to authorize a bench warrant to issue out of the court in which the indictment is found, it becomes the duty of the magistrate to examine the evidence carefully as in any domestic case. Remarks of an eminent judge on this point will be found in Re Buell [Case No. 2,102]. In that case Judge Dillon, affirming Judge Treat, refused to issue his warrant, though the defendant was admitted to have written and published a criminal libel, because it did not clearly appear that he had published it in the District of Columbia, where the indictment had been found. When a fresh indictment was found, Judge Treat refused a warrant because the court in which the indictment was pending did not appear to have jurisdiction of the charge. Same case, note at end. Judge Blatchford refused such a warrant though everything was regular, and the information appeared valid, because he held that the law authorizing such an information was unconstitutional. In re Dana [Case No. 3,554]. Judge Withey refused to hold for trial a defendant who had been sent to his district by the judge of another district upon evidence which was merely the copy of an information not under oath. U. S. v. Shepard [Id. 16,273].

The only evidence in behalf of the government in this case is a copy of the indictment. It was proved by clear and uncontradicted testimony that this defendant was not in Louisiana when he is alleged to have conspired with the others to cheat the United States. Assuming that there may be a constructive presence in Louisiana of a person actually in Boston, there is no evidence of it in this case. The indictment nowhere states, excepting argumentatively, that any of the papers, affidavits, petitions, or anything else were false and fraudulent; but I should not regard that as very important in a case of this sort, where the indictment is merely evidence. It is open to more serious objections. Briefly stated, it charges the defendants with conspiring, June 10, 1874, to recover a judgment, which was entered May 18, 1874; and it charges this defendant with giving a deposition in 1873, which both sides admit he gave in 1872, to aid a conspiracy which was not formed until June, 1874. The indictment being filed June 6, 1876, it is likely that the conspiracy is laid June 10, 1874, to avoid the bar of the statute of limitations, which was probably supposed to protect the defendants in two years, though the statute of April 13, 1876, which

had not then been published, extends it another year. The conspiracy, if there were one, would probably be formed before the false petition was filed in the court of claims in 1869, and must have been formed before May 18, 1874, when that court gave the judgment which it was the object of the conspiracy to procure. However this fact may be, the allegation of the date of the conspiracy involves the indictment in contradictions which, if they are errors, must be corrected by evidence, and none is offered. The indictment itself must stand or fall by its own dates; and if they are repugnant or insensible the pleading is fatally defective. Com. v. Hitchings, 5 Gray, 482; U. S. v. Fox [Case No. 15,156]. So where it is produced as evidence it must be consistent and sensible, or it fails to prove guilt. Upon fresh evidence the government can apply again, as they have already applied twice, for an order for bail or committal. The evidence for the defence, though I consider it admissible, has not affected my decision.

I hold that Mr. Hallett was well warranted in discharging the defendant if the evidence before him was a copy of the indictment, as I suppose it was. The indictment charges the defendant with the impossible crime of conspiring in June to procure a false judgment to be entered in the preceding May, and to have done acts in October to aid a conspiracy which was formed in the following June. It is therefore worthless as evidence of a conspiracy, just as an affidavit would be which contained such inconsistencies. Whether, if these were proved to be clerical errors, it would be my duty to send the defendant to be tried in another district I do not intend to decide. It might possibly be so if it were shown that a fresh indictment might be found upon the evidence before me.

Defendant discharged.

Case No. 16,070.

UNITED STATES v. PORTE.

[1 Cranch, C. C. 369.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

PUBLIC STATUTES—BANK CHARTERS—LARCENY OF BANK NOTES—INDICTMENT.

1. If a statute makes it felony to steal the notes of any particular incorporated bank, the statute, by which that bank was incorporated, thereby becomes a public statute.

2. An indictment upon the Maryland act of 1793 (chapter 35), making it felony to steal the notes of any bank established by a charter from the government of the United States, or of some individual state of the United States, must state of what bank the notes were, and whether incorporated by the United States or by an individual state. It is not sufficient to make the averment in the terms of the act.

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

Indictment [against Henry Porte] upon the Maryland statute of 1793 (chapter 35) for stealing bank-notes, charging the prisoner with stealing the "notes of some bank established by a charter from the government of the United States or of some individual state of the United States."

Mr. Morsell, for the prisoner prayed the court to instruct the jury that they must be satisfied, by the evidence, that the notes were of some bank having a charter from the United States, or from some particular state; that the act of incorporation, or charter of such bank must be produced properly authenticated; and that the statute-book is not sufficient evidence of a private statute.

Mr. Jones, for the United States, admitted that the jury must be satisfied by the evidence that the notes stolen were the notes of some bank incorporated, &c., but contended that, as in this country charters could only be granted by a legislative act, they were public laws, of which the courts were bound to take notice.

THE COURT (nem. con.) was of opinion that the supplementary act of April, 1792 (chapter 1), making it felony to steal the notes of the Bank of Baltimore, makes the original act of incorporation (Act 1790, c. 5) a public statute.

Verdict, guilty. But, upon motion, THE COURT arrested the judgment, because the indictment did not state of what particular bank the stolen notes were, nor whether the bank was incorporated by the United States, or by a particular state. DUCKETT, Circuit Judge, absent.

Case No. 16,071.

UNITED STATES v. PORTER.

[Nowhere reported; opinion not now accessible.]

Case No. 16,072.

UNITED STATES v. PORTER.

[2 Cranch, C. C. 60.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

INDICTMENTS FOR MISDEMEANOR—COMPETENCY OF WITNESSES—BARRATRY—LIMITATION—INDICTABLE FRAUD—ATTORNEYS—DISBARMENT.

1. Two or more counts for misdemeanor may be joined in one indictment.

2. The person defrauded is a competent witness for the prosecution, upon an indictment for the fraud.

3. Upon an indictment for barratry, no evidence can be given of specific acts, without notice.

4. Notice given after the commencement of the trial, is too late.

5. A witness is incompetent, who has been convicted of a conspiracy to defraud the creditors of an insolvent debtor.

[Cited in dissenting opinion in Green v. Superior Court, 78 Cal. 566, 21 Pac. 541.]

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

6. A grand juror may be required to testify as to the evidence given before the grand jury.

7. The act of congress of 1790 [1 Stat. 112], limiting prosecutions for misdemeanor to two years, is applicable to common-law misdemeanors in the District of Columbia.

[Cited in U. S. v. Watkins, Case No. 16,649; U. S. v. Six Fermenting Tubs, Id. 16,296.]

8. Fraud is not indictable, unless it concern the public, or be committed by false tokens, or false pretences.

9. The court will strike an attorney from the roll, for malpractice, although it be not indictable.

[Cited in Ex parte Burr, Case No. 2,186. Cited in brief in Bradley v. Tochman, Id. 1,788.]

The defendant [James A. Porter] was an attorney of this court. The indictment contained five counts. 1st. For barraty; 2d, 3d and 4th, for being a common cheat and swindler, and fraudulently getting into his possession the property of his client, Jenkins; and 5th, for conspiracy with one McCutchen, to defraud McCutchen's creditors, by means of his discharge under the insolvent law.

F. S. Key, for the traverser, moved the court to quash the indictment, on the ground that it contained various counts requiring different judgments. Young v. Rex, 3 Term R. 98, 101, 106. Although this is not a good ground for arresting the judgment, it is good ground for quashing the indictment. The judgment for barratry, is fine and imprisonment, and incapacity to pursue his profession. Upon the counts for swindling, if the offences come under the statutes of 32 Hen. VIII. c. 1, of false tokens, or 30 Geo. II., of false pretences, they may be punished by fine, imprisonment, or pillory, or whipping, or transportation, or other corporal punishment, except death; and upon the count for conspiracy, there would be a villanous judgment. He also contended that the 2d, 3d, and 4th counts ought to be quashed, because they charged only a civil injury, not a public offence. A mere falsehood, or simple fraud, is not indictable. There must be a false token, or a false pretence. They charge that the traverser, under the pretence of being the attorney of Jenkins, fraudulently extorted and obtained the property mentioned. That was not a false pretence, for he was his attorney. The indictment must set forth the pretence, and aver it to be false. No fraud is indictable at common law, unless it be of a public nature, and effected by means which a prudent and intelligent man could not avoid. 4 Bl. Comm. 134; 1 Hawk. P. C. 193, c. 73, § 8; Rex v. Lara, 6 Term R. 565; East, P. C. 816; Rex v. Wheatly, 2 Burrows, 1128; 2 Hale P. C. 182, 184; 2 Hawk. P. C. (fol. Ed.) 226, c. 25, § 59; 1 Hale, P. C. 668; Trem. P. C. 104; Reg. v. Daniel, 1 Salk. 380; People v. Babcock, 7 Johns. 201; J'Anson v. Stuart, 1 Term R. 753; Rex v. Osborn, 3 Burrows, 1697. If an indictment for an offence, which was an offence at common law, concludes contra formam statuti, but the case is not brought, by the indictment, within the statute, it shall be quashed, and the party will not be put to answer it as an offence at common law. 2 Hale, P. C. 171.

Mr. Jones, contra. It is not a matter of discretion with the court to quash an indictment. The only authority cited is the dictum of Judge Buller, in Young v. Rex, 3 Term R. 98. There is no rule which prohibits the joinder of two counts for misdemeanor in one indictment. The judgments on these counts would not be inconsistent. The court may remove an attorney from practice upon conviction of any offence. But if the court has a discretion to quash this indictment, they will not, when the facts charged touch the character of one of its officers, who may be removed upon proof of those facts, although they should not amount to a crime in legal acceptation. But the court has no discretion to quash the indictment, unless it plainly appears that no judgment can follow conviction. The opposite counsel have mistaken the nature of the indictment. It is not under the statute of false tokens, or false pretences; it is for being a common barrator, and a common cheat and swindler.

THE COURT (FITZHUGH Circuit Judge, absent) quashed the 3d and 4th counts, but refused to quash the 2d, as they deemed it important to ascertain the truth of the charges against the traverser, who was an attorney of the court.

Upon the trial, Mr Jones, for the United States, offered to examine Jenkins as a witness.

Mr. Key, for the traverser, objected that he was the person supposed to be cheated, and had suits now pending against the traverser for the same property of which he is supposed by the indictment to have been cheated by the traverser. No witness can be permitted to invalidate an instrument signed by himself. Walton v. Shelley, 1 Term R. 296. Nor can the person whose name is supposed to have been forged, or whose property may be prejudiced by the forgery, be permitted to prove it by his own testimony. 2 Hawk. P. C. 433, bk. 2, c. 46, § 24. Nor can the person cheated be a witness to prove the cheat. Rex v. Whiting, 1 Ld. Raym. 396; McNally, Ev. 105, 124. So in U. S. v. Maxwell, for bigamy, at December term, 1810 [Case No. 15,749], the court rejected the testimony of a witness,—called to prove the first marriage, and who had a suit depending against the prisoner for goods furnished to his first wife.

Mr. Jones, contra. The case of Walton v. Shelley has been overruled by Jordaine v. Lashbrooke, 7 Term R. 601; and the rule, as to interest, is that if it be not a necessary and certain interest, it does not disqualify the witness. The objection is generally to his credit. The case of forgery is an exception to the general rule. Peake, Ev. 93-95;

Abrahams v. Bunn, 4 Burrows, 2255; Smith v. Prager, 7 Term R. 60; Bent v. Baker, 3 Term R. 27.

Mr. Key, in reply. There is no case overruling that of Rex v. Whiting. In the cases cited there was no civil suit pending. 1 McNally, Ev. 106, 107.

THE COURT (FITZHUGH, Circuit Judge, absent) was of opinion that Jenkins was a competent witness, and that the objection went only to his credit.

Mr. Jones, for the United States, then offered evidence upon the first count, which charged the defendant as a common barrator.

Mr. Key objected that no evidence can be given of specific acts of barratry, without notice.

Mr. Jones then offered in evidence an agreement between defendant and one Thomas Herty to commit barratry, and a letter, as general evidence; not of any specific item.

THE COURT said that the agreement and letter were premature evidence, before evidence had been given to any particular act of barratry.

Mr. Jones then offered Herty as a witness.

Mr. Key objected that he was incompetent because he had been convicted of a conspiracy to defraud the creditors of McCutchen, which is an infamous offence. It is the crimen falsi. The infamy is in the offence, not in the punishment. 1 Hawk. P. C. 178, 193 (fol. Ed.) c. 72; 1 McNally, Ev. 206; 1 Hale, P. C. 306; Peake, Ev. 86; Chater v. Hawkins, 3 Lev. 426; Rex v. Ford, 2 Salk. 690.

Mr. Jones, in reply No common-law offence is sufficiently infamous to exclude a witness, unless it be one to which the common law has annexed an infamous punishment. The crimen falsi, is only where forgery or perjury is charged; or a conspiracy to charge a person with forgery or perjury.

THE COURT, however, was of opinion that Herty was not a competent witness. The conviction and judgment upon the indictment for conspiracy with McCutchen to defraud his creditors by secreting property on taking the oath of an insolvent debtor, is a conviction of an infamous crime. It partakes of the crimen falsi.

Mr. Jones then offered to examine Mr. S. H. Smith, the foreman of the grand jury, to prove what the defendant stated and confessed before the grand jury on an examination before them.

Mr. Key objected that the grand jurors are bound to secrecy by their oath. 1 McNally, Ev. 253; Burr's Trial (reported by Carpenter) vol. 3, p. 289.

THE COURT (nem. con.) overruled the objection.

Mr. Jones then offered the defendant's receipt for papers, &c. from Jenkins, dated more than two years before the indictment.

Mr. Key and Mr. Caldwell, for the defendant, objected under the act of congress of 30th of April, 1790, § 32, which limits the prosecution to two years, and contended that this paper was not evidence upon that part of the indictment which avers that he fraudulently obtained possession of Jenkins's property.

But THE COURT (nem. con.) said that the gist of the indictment was the fraudulent application of, and refusal to account for, the property; and permitted the paper to be read.

Mr. Key then objected to evidence of acts of fraud committed more than two years before the finding of the indictment, and relied upon the 32d section of the act of congress of April 30, 1790, "for the punishment of certain crimes against the United States." 1 Stat. 112.

Mr. Jones, contra. The act of congress does not apply to this case. It relates only to cases within the jurisdiction of the circuit courts of the United States, and punishable by those courts. It does not apply to jurisdictions created subsequent to that act, nor to any offences but those which are created by the laws of the United States. The courts of the United States have no common-law criminal jurisdiction.

THE COURT (FITZHUGH, Circuit Judge, absent) was clearly of opinion that the act of congress of the 30th of April, 1790, § 32, applied to the case; and instructed the jury that they could not find the defendant guilty upon evidence of acts of fraud committed more than two years before the finding of the indictment.

After the trial had occupied one day, a notice of the particular acts of barratry intended to be proved was delivered to the defendant's wife.

THE COURT said it was not reasonable notice. 1 Hawk. c. 81, § 13; J'Anson v. Stuart, 1 Term R. 754.

Verdict, guilty, on the 2d count. The attorney for the United States, entered a nolle prosequi upon the other counts.

THE COURT (FITZHUGH, Circuit Judge, doubting,) upon the defendant's motion, arrested the judgment, upon the ground that the fraud was not of a public nature; and not perpetrated by means of false tokens, or false pretences; they ordered the defendant's name to be stricken from the roll of attorneys of this court.

Case No. 16,073.

UNITED STATES v. PORTER.[1]

[2 Dall. 345; Whart. St. Tr. 174.]

Circuit Court, D. Pennsylvania. 1795.

JURORS—CHALLENGE.

Indictment for high treason, committed in the county of Allegheny in the state of Penn-

[1] [This was one of the trials arising out of the so-called Whiskey Insurrection occurring in western Pennsylvania in the year 1794. For a full account of the proceedings see U. S. v. Insurgents, Case No. 15,443.]

sylvania, by levying war against the United States. After a long examination of witnesses it was discovered, that the defendant, though he was at Couche's Fort, had taken no part in the insurrection; that, in fact, he was not the person, liable to the charge, but another person of the same name; and, thereupon, the jury, by direction of THE COURT, found a verdict of not guilty.

The only occurrence, therefore, which it is material to notice on this trial, was the following: There were two of the petty jury (Thomas Coates and William Callady) who being called, and not challenged, alledged sickness in excuse for not serving, and they were, for the present, set apart: But the whole pannel having been eventually drawn out of the balloting box, without furnishing twelve names unchallenged, and those jurors persevering in their excuse, the counsel for the prisoner retracted his challenge of another juror, who was, thereupon, qualified by order of THE COURT.

Case No. 16,074.

UNITED STATES v. PORTER.

[Brunner, Col. Cas. 54; [1] 3 Day, 283.]

Circuit Court, D. Connecticut. 1808.

EVIDENCE—CONTRACT IN WRITING—HOW PROVED—INDICTMENT—MATERIAL ALLEGATIONS.

1. Where a party states a contract which from evidence exhibited on the trial appears to have been in writing, he must either produce it or show that it is not in his power to produce it; otherwise, no proof of its execution or contents will be received.

[Cited in U. S. v. Brown, Case No. 14,666.]

2. An allegation in an indictment which is not impertinent or foreign to the cause must be proved, though a prosecution for the same offense might be supported without such allegation.

This was an indictment charging "that before, on, and ever since the 1st day of February last, the public highway from the city of New York, on the road through Danbury, Litchfield, and Farmington, and from thence to Hartford, by force of the several acts of the congress of the United States relating to postoffices and post-roads was made, and still is, a post-road designated for the transportation of the public mails of the United States; and during all the period from and after the 1st day of December, in the year 1806, until the 1st day of April, in the year 1807, certain persons were, in virtue of the provision of the said several acts of the said congress of the United States, authorized, employed, and bound by contracts lawfully made by and with the postmaster-general of the United States, to transport and carry the said public mails of the United States from the said city of New York to the city of Hartford, and from thence back to said city of New York, on the route through Danbury, Litchfield, and Farmington; that on the 31st day of January now last past, in a certain four-wheeled carriage for that purpose provided, and drawn by four horses, they, the said persons so as aforesaid by the said postmaster-general authorized and employed, were, in compliance with and fulfillment of their said engagements, transporting a public mail of the United States from the city of New York to said city of Hartford, one Isaac Kellogg, a mail carrier, lawfully employed, and sworn to a faithful discharge of his said duty as such, as the laws of the said United States require, then having the care and charge of the said mail, carriage, and horses, so as aforesaid used and employed in the transportation of said public mail; that at Farmington aforesaid, on the 31st of January and 1st of February now last past, Joseph Porter of Farmington aforesaid, being not ignorant of but well knowing all the facts hereinbefore stated, with intent unlawfully and wilfully to obstruct, retard, hinder and stop the passage of said public mail of the United States, then and there, with force and arms, did seize and stop said horses and carriage in which said mail was then deposited; and with like force and arms, violence and strong hand, did seize the said Isaac Kellogg, then having the care and charge of said public mail, transported as aforesaid, and then in the act of driving and guiding said horses, and transporting said mail in the public highway, and on said post-road, on the route aforesaid; and said driver, horses, and carriage, with said public mail, did stop and forcibly drag said mail carrier from said carriage, and then, at Farmington aforesaid, him, the said mail carrier, with said public mail of the United States, and horses and carriage used in transporting the same, did knowingly and wilfully obstruct, stop, and detain for a long time, to wit, for the space of more than fifteen hours; contrary to the form, force, and effect of the act of congress of the United States in such case made, and then in force, entitled 'an act to establish the postoffice of the United States.'" 4 Stat. 102.

The District Attorney and Mr. Wolcott, for the United States.

Goodrich, Daggett & Dwight, for defendant.

Before LIVINGSTON, Circuit Justice, and EDWARDS, District Judge.

The defendant pleaded not guilty.

The district attorney offered a witness to prove the contract with the postmaster-general for the transportation of the mail, stated in the indictment. He was sworn and was about to testify to the terms of the contract, when

LIVINGSTON, Circuit Justice, inquired if it was in writing.

The witness answered, yes.

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

Daggett, for defendant, objected to any parol evidence of this contract, insisting that the writing itself ought to be produced.

The district attorney said it was in the hands of one Ely of New York, who refused to give it up, and we could not compel him to produce it.

LIVINGSTON, Circuit Justice, said Mr. Attorney had shown that it could be produced; he had named the person who had it, and stated where he lived. Mr. Attorney ought to have compelled Ely to attend and produce the contract. Nothing is clearer than that proof of the contents of a writing cannot be received, unless it be shown that it could not be produced.

PER CURIAM.—The evidence offered is inadmissible.

Wolcott, for the prosecution. We shall take this ground, that the allegation in the indictment of a contract with the postmaster-general is mere surplusage, and consequently that no proof of it is necessary. The words of the statute are, "that if any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offense, pay a fine," etc. 4 Stat. 104, § 3. That the mail should be carried in pursuance of a contract with the postmaster-general is a qualification not found in the statute. The mail is, in fact, carried on some of the most important routes in the United States, without any previous contract. It is so carried between Baltimore and Philadelphia, and between the city of Washington and New Orleans. There cannot be a doubt whether if the mail be obstructed on these routes the penalty shall accrue. If we prove all that is necessary to subject the defendant, there must be a verdict against him whether other matters stated in the indictment be proved or not.

Daggett, in reply. This allegation is not impertinent matter; it is in no sense foreign to the cause. The obstruction contemplated by the statute is of a mail carried by the direction and under the authority of the postmaster-general. The indictment sets forth the manner in which such direction was given, in which such authority was derived. Now, though this allegation be more particular than it was necessary it should be, yet having been made it must be proved. This is the rule even in civil cases. Bristow v. Wright, Doug. 665. It applies more strictly in criminal cases.

EDWARDS, District Judge, was of opinion that no prosecution for obstructing the passage of the mail could be supported without showing a written contract with the postmaster-general.

LIVINGSTON, Circuit Justice, inclined to think that an indictment might be so framed as to subject the defendant without proof of a written contract; yet as this indictment states a contract which is not impertinent or foreign to the cause, he was clearly of opinion that it ought to be proved. The court will be more strict, he added, in requiring proof of the matters alleged in a criminal than in a civil case.

The district attorney rose and said he would enter a nolle prosequi

LIVINGSTON, Circuit Justice, observed that the defendant was entitled to a verdict of acquittal if he wished it.

The defendant's counsel said he wished for a verdict.

LIVINGSTON, Circuit Justice, then addressed the jury thus: No evidence at all being adduced against the defendant, it will be your duty, without leaving your seats, to find a verdict of not guilty.

The jury immediately found a verdict accordingly.

Indictment, material allegations in, must be proved. See State v. Stebbins, 29 Conn. 471; U. S. v. Brown [Case No. 14,666]; citing case in text approvingly.

Case No. 16,074a.

UNITED STATES ex rel. MURPHY v. PORTER.

[2 Hayw. & H. 394.] [1]

Circuit Court, District of Columbia. Oct. 31, 1861.

WRIT OF HABEAS CORPUS—SUSPENSION BY PRESIDENT—ENLISTMENT OF MINOR.

1. In this case President Lincoln had suspended the writ of habeas corpus, as a military necessity within the District of Columbia, and just prior to such suspension, Justice Merrick had issued the writ upon the petition of the father of James Murphy, who had enlisted into the military service of the United States, in the 12th regiment of New York volunteers, while under the age of eighteen years, for that reason asking for the discharge of said son from said military service, and made the said writ immediately returnable before him.

2. The marshal of the district was directed not to execute the writ upon Provost-Marshal Porter, and to make return. That he was ordered by the president of the United States not to serve the same, as the writ of habeas corpus had been suspended as regards soldiers in the army of the United States, within said district, by the order of the president.

3. In this case appears the reasons assigned by Justice Merrick for his non-appearance in court, upon the further consideration of the case and the protests of Judges Dunlop and Morsell against the action of the military authorities in thus interfering with the process of the court.

The application is as follows:

"To Col. S. S. Walrath, of New York 12th Volunteers. Your petitioner represents that his son James Murphy enlisted in your regiment of New York 12th volunteers, at Syracuse, New York, in Captain Church's Company H, and is now in your regiment in said company, as he is informed at Fort Onandago, where your regiment is now encamped. And your petitioner further represents that

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

at the time his said son enlisted it was without his knowledge or consent, and that at the time he resided with your petitioner in the village of Manlius, Onandago county, and came to Syracuse and enlisted in said company, and when your petitioner found it out he tried to get him discharged, and tried to get him to return home. Your petitioner further says that at the time his said son enlisted he was only of the age of about 17 years, and will not be 18 until 12th day of April, 1862, being born in 1848. And your petitioner further represents that his said son is now anxious to return, and your petitioner is desirous of having him discharged from said company and regiment."

D. D. Foley, for petitioner.

C. C. Carrington, for Geo. W. Philip, deputy marshal.

Petition for the writ of habeas corpus:

"To the Honorable Wm. Merrick, Judge of the Circuit Court of the D. C.: Your petitioner, John Murphy, father of James Murphy, respectfully represents that his son James enlisted into the service of the United States, in the state of New York, on or about the month of May, 1861, without the knowledge or consent of his said father; that the said James Murphy is under the age of 18 years, and that he is now in the custody of the provost-marshal [Andrew Porter] in said military service contrary to law. Your said petitioner therefore prays that your honor award to him a writ of habeas corpus directed to the said provost-marshal, or such other person in the District of Columbia as has the said James Murphy in his custody, requiring him to bring the body of the said Murphy before your honor to inquire into the cause of his detention, and grant such relief to your said petitioner as may be lawful and just. D. D. Foley, Attorney for Petitioner."

On the back of the petition was written the following:

"Let the writ issue as prayed, returnable before me at the city hall immediately. Wm. M. Merrick, A. J. October 19, 1861."

Letter of Judge Wm. M. Merrick:

"On Saturday, the 19th of October, 1861, Mr. Foley, a lawyer of this city, called upon me with a petition supported by affidavit in proper form, praying for a writ of habeas corpus to the provost-marshal, requiring him to produce before the undersigned one John (James) Murphy, who it was alleged was a minor under the age of eighteen years, and illegally detained by said provost-marshal as an enlisted soldier of the United States. The order was given by me to the clerk, who issued the writ in the usual form. I was informed by Mr. Foley on the afternoon of Saturday, that by reason of the many engagements of the deputy marshal of the D. C., he himself took the writ and served it, as by law he rightfully might do, upon the provost-marshal, Gen'l A. Porter; that when he delivered the writ to the provost he was told by him that he would consult the secretary (I think he said the secretary of state) whether he should respect the writ or not, and that he, Mr. Foley, must consider himself under arrest, but for the present he might go at large, as upon his parol. Later in the afternoon Mr. Foley again called at my house with one or two other persons, one I think was represented as the elder brother, or some man relative of the boy Murphy, and desired to know whether he were now to consider the boy as finally discharged and at liberty to return home to his friends, inasmuch as he had been dismissed from the guard house. I declined to make any suggestion to him in the premises, and told him that whatsoever I did in the matter must be done judicially, and after facts had been spread before me upon affidavit, and the appropriate motion, if any, made thereon; and that as the court would meet on Monday morning, the 21st, in regular term, I should adjourn all proceedings under the writ into court for the advice and action of the whole court. He stated that he would reduce all the facts to writing, make affidavit, and file them, for that he expected to be arrested. He then withdrew. On Monday morning, just before the meeting of the court, I went into the clerk's office, asked Charles McNamee, the deputy clerk, if Mr. Foley had filed any affidavits in the case; he examined the papers and reported there was none. I then directed him to endorse upon the papers that they were by my orders adjourned into court for its future action. After the adjournment of the court I was informed by a member of the bar that about eleven o'clock that morning Mr. Foley had been arrested and placed in the guard house by order of the provost-marshal, and he announced his purpose of applying for his release. I told him that whatever application he had to make must be in writing, upon proper affidavit, and that as the whole court is in regular session he must make it to that court in full sitting, and he withdrew to confer with some of his brother lawyers upon his course. After dinner I visited my brother judges in Georgetown, and returning home between half past seven and eight o'clock found an armed sentinel stationed at my door by order of the provost-marshal. I learned that this guard had been placed at my door as early as five o'clock. Armed sentries from that time continuously until now have been stationed in front of my house. Thus it appears that a military officer against whom a writ in the appointed form of law has issued, first threatened with and afterwards arrested and imprisoned the attorney who rightfully served the writ upon him. He continued, and still continues, in contempt and disregard of the mandate of the law, and has ignominiously placed an armed guard to insult and intimidate by its presence the judge who ordered the writ to issue, and still keeps up this armed array at his door, in defiance and contempt of the justice of the land. Under the

circumstances I respectfully request the chief judge of the circuit court to cause this memorandum to be read in open court, to show the reasons for my absence from my place upon the bench, and that he will cause this paper to be entered at length on the minutes of the court alongside the record of my absence, to show through all time the reason why I do not, this 22d of October, 1861, appear in my accustomed place. W. M. Merrick. Assistant Judge of the Circuit Court of the District of Columbia."

The reading of the communication (from Judge Merrick) having been concluded, DUNLOP, Chief Judge, announced that the two remaining judges (himself and MORSELL, Circuit Judge) had, after consultation, decided that the letter should be filed as requested by Judge Merrick, and it was so ordered. They also thought it might, as the writ (of habeas corpus) had been regularly issued, to state that the matter was now before the court to be tried. The statement of their brother judge presented a case where the progress of law is obstructed. It was the duty of the court to afford the remedy, and, if the facts are as stated, to cause the law to be respected. As the provost-marshal had obstructed a process of this court, it would order a rule to be served on General Andrew Porter, to appear before the court and show cause why an attachment for contempt should not issue against him. Judge MORSELL said that this was a palpable and gross obstruction to the administration of justice, to prevent a judge of this court from taking his seat because he issued a writ just such as the law requires. The placing of a sentinel before Judge Merrick's house was evidently for the purpose of embarrassing him in this particular subject, and to prevent his appearance in court. He (Judge MORSELL) would make the rule broader so as to have the provost satisfy the court as to both matters. The court has its duty to do, a duty the judges are sworn to do, and that duty is the administration of justice according to law. What is the real state of things? If martial law is to be our guide, we look to the president of the United States to say so. He (Judge MORSELL) did not pretend to controvert the right of the president to proclaim martial law, but let him issue his proclamation. The judges have their duty to do under the law, and are liable to be punished if they do not do it. "I intend to do my duty, and vindicate the character of this court as long as I sit here. I am an old man."

The following notice was written off by the judge:

"In the Circuit Court of the District of Columbia: The clerk is directed to file the letter of Judge Merrick, addressed this day to the chief judge of the court. And it is ordered this 22d day of October, 1861, that a rule to show cause be issued against General Andrew Porter, provost-marshal of the District of Columbia, requiring him, on or before the 26th of October, 1861, to show cause to this court why an attachment of contempt should not issue against him for obstructing the process and course of justice and administration of it in this court, in the particulars set forth in Judge Merrick's letter, that a copy of said letter accompanying the rule to show cause, and that the same be returnable on Saturday, the 26th of October, at 10 a. m. of that day, at the court-room in the city hall, Washington. By order of the court.

"Test: John A. Smith, Clerk."

In the circuit court on Saturday, October 26, 1861, Judges DUNLOP and MORSELL being present, THE COURT asked the clerk if there had been any return to the writ issued against General Porter, the provost-marshal of this city. The clerk answered there was none. Mr. Carrington, the district attorney, presented in behalf of the deputy-marshal (Mr. Philips) a paper, with the affidavit of Mr. Philips, stating that the rule had not been served, because he had been ordered by the president not to serve it, and because the privilege of the writ of habeas corpus had been suspended for the present by the president, in regard to soldiers in the army of the United States, within the District of Columbia:

"To the Honorable, the Judges of the Circuit Court of the District of Columbia: George W. Philips, in whose hands the rule hereinafter mentioned was placed as deputy-marshal, respectfully represents to your honors that he did not serve the rule issued by your honorable court on the 22nd day of October, 1861, to be served on General Andrew Porter, provost-marshal of said district, because he was ordered by the president of the United States not to serve the same, and to report to your honorable court that the privilege of the writ of habeas corpus has been suspended for the present, by order of the president of the United States, in regard to soldiers in the army of the United States within said district, and that he respectfully disclaims all intention to disobey or treat with disrespect the orders of this honorable court. G. W. Philips."

"District of Columbia, Washington County, to wit: On the 26th of October, 1861, personally appeared in open court, George W. Philips (above named) and made oath in due form of law, that the matters and things stated in the foregoing and annexed answer are true. George W. Philips.

"Test: John A. Smith, Clerk."

Mr. Carrington offered to submit an argument in behalf of Mr. Philips.

THE COURT announced that it did not propose to take any steps against Mr. Philips, but, as the return presented a grave question, THE COURT desired to hold it under advisement.

October 30, 1861.

DUNLOP, Chief Judge, after holding the above under advisement, announced the de-

cision of the court in the case, as follows: The return made by deputy marshal the 26th of Oct., 1861, we will order to be filed, though we do not doubt our power to regard it as insufficient in law, and proceed against the officer who has made it. The existing condition of the country makes it plain that that officer is powerless against the vast military force of the executive, subject to his will and order as commander-in-chief of the army and navy of the United States. Assuming the verity of the return, which has been made under oath, the case presented is without a parallel in the judicial history of the United States, and involves the free action and efficiency of the judges of this court. The president, charged by the constitution to take care that the laws be executed, has seen fit to arrest the process of this court, and to forbid the deputy marshal to execute it. It does not involve merely the question of the power of the executive in civil war to suspend the great writ of freedom, the habeas corpus. When this rule was ordered to give efficiency to that writ, no notice had been given by the president to the courts of the country of such suspension here, now first announced to us, and it will hardly be maintained that the suspension could be retrospective. The rule on this case, therefore, whatever may be the president's power over the writ of habeas corpus, was lawfully ordered, as well as the writ on which it was founded. The facts on which the rule was ordered by the court are assumed to be true as respects the president, because the president had them before him, and has not denied them, but forbade the deputy marshal to serve the rule on General Andrew Porter. The president, we think, assumes the responsibility of the acts of General Porter, set forth in the rule, and sanctions them by his orders to Deputy Marshal Philips not to serve the process on the provost marshal. The issue ought to be and is with the president, and we have no physical power to enforce the lawful process of this court on his military subordinates against the president's prohibition.

We have exhausted every practical remedy to uphold the lawful authority of this court. It is ordered, this 30th day of October, 1861, that this opinion of the court be filed by the clerk, and made a part of the record, as explaining the grounds on which we now decline to order any further process in this case.

MORSELL, Circuit Judge, submitted the following: As a member of this court, and on its behalf, I wish it understood that notwithstanding the blow levelled at this court, I do distinctly assert the following principles: (1) That the law in this country knows no superior. (2) That the supremacy of the civil authority over the military cannot be denied; that it has been established by the ablest jurists, and, I believe, recognized and respected by the great father of the country during the Revolutionary War. (3) That this court ought to be respected by every one as the guardian of the personal liberty of the citizen, in giving ready and effectual aid by that most valuable means, the writ of habeas corpus. (4) I therefore respectfully protest against the right claimed to interrupt the proceedings in this case.

UNITED STATES (PORTER v.). See Case No. 11,290.

UNITED STATES v. PORTER. See Case No. 14,820.

Case No. 16,075.

UNITED STATES v. POTTER.

[Boyce, U. S. Pr. 98.]

Circuit Court, N. D. New York. June Term, 1858.

WITNESSES — SUBPŒNA AND ATTACHMENT — PRACTICE.

[Where a witness living in another state and district fails to obey a subpœna, and an attachment is issued for him, such attachment should be directed to the marshal of the court issuing the same, and not to the marshal of the district where the witness may be found.]

[In this case a witness residing in the state of Michigan was subpœnaed on behalf of the United States, and failing to attend, the district attorney asked for an attachment against him. The attachment was issued to the United States marshal for the Northern district of New York. It was objected that this practice was not regular.]

NELSON, Circuit Justice. The power to issue an attachment for defaulting witnesses is incident to the power to serve a subpœna, in criminal cases, beyond the limits of the district, and in any other district of the Union (1 Stat. 335, § 6); and our practice has been uniform to issue the attachment to an officer of the court, and not to an officer in the district or state in which the witness may be. The subpœna is also issued to such officer. This seems to be indispensably necessary in order to ensure the execution of process. The officer in a foreign district cannot be made responsible to the court issuing the precept, and, if he could, it would be impracticable, or attended with great delay and expense. I have always regarded the court under the 6th section above referrred to, as possessing jurisdiction for the purpose of issuing and enforcing the execution of a writ of subpœna in criminal cases throughout the Union; and that it is competent to send its own officer for this purpose into any part of it; and that this is the only reasonable and practical mode of carrying into effect the power thus conferred.

Case No. 16,076.

UNITED STATES v. POTTER et al.

[7 Reporter, 675;[1] 25 Int. Rev. Rec. 138, 186; 11 Chi. Leg. News, 256.]

Circuit Court, D. Minnesota. 1879.

FEDERAL OFFICERS—APPOINTMENT OF AGENTS BY HEADS OF DEPARTMENTS—WITHHOLDING SALARY—PAYMENT OF WARRANTS.

1. The head of a department of the federal government is authorized, in the administration of the duties of his office, to employ agents, and to determine when an exigency arises demanding their employment.

2. Section 1766, Rev. St., authorizing the salary of an officer in arrears to be withheld, forms no part of the contract with the sureties of such officer. Nor do sections 300, 307, 308, Rev. St., in relation to the payment of warrants after three years from issuance, form any part of such contract.

[This is an action on an official bond dated August 4, 1871, by Potter, as disbursing agent of the United States at Pembina. He retired from the office June 30, 1874. The principal item in controversy was a charge against Potter of $1,500, a draft for which sum was transmitted to him May 17, 1871, to cover disbursements for the quarter ending June 30, 1871, the facts concerning which sufficiently appear in the opinion of the court. It was contended on the part of the defendant, McIlrath, who was surety on Potter's bond, that he is not liable for this sum, on the grounds that there is no statutory authority for the appointment of disbursing agents, or for their giving bonds; that Potter's wrongful acts, if any, and the government's loss, occurred after the retirement of Potter from office; that the payment by the government of the money covered by the draft more than three years after its date was irregular and unlawful; and that, after Potter was known by the accounting officers of the treasury to be in default to the amount of the draft, they continued several years, contrary to the provisions of section 1766 of the Revised Statutes, to pay him his salary and commissions to an amount in the aggregate greater than that claimed by the government.][2]

W. W. Billsen, for the Government.

Geo. L. & Chas. E. Otis, for McIlrath.

NELSON, District Judge. The head of a department of the government is authorized in the administration of the duties of the office to employ agents and determine when an exigency arises demanding their employment. The law of 1854 (Rev. St. § 3614) recognizes the right and provides for a bond to be given by the agent for the faithful discharge of his duties. The act of March 3, 1849 (Rev. St. § 3617), required payment of all moneys received by Potter into the treasury "without abatement or reduction," and it became a necessity to appoint him a disbursing agent. He was appointed an agent for payment of salaries, commissions, incidental and other expenses of his office as receiver, and that of the office of register for the Pembina land district, so called. He made, on April 6, 1871, an estimate for salaries, fees, and commissions for the quarter ending June 30, 1871, in the sum of $1,500, and a treasury warrant dated May 17, 1871, was forwarded him. He received the warrant, did not pay commissions out of the moneys called for, never returned it, but charged himself in his report to the government with the amount, and on July 1, 1874, after his term of office expired, by indorsement passed it out of his control. His sureties are liable for government moneys received during his term of office, and his neglect to account for and pay over is a breach of trust and a failure "faithfully to execute and discharge the duties of his office," which was guarantied by them. Section 1766, Rev. St. U. S., authorizing the salary of an officer in arrears to be withheld, forms no part of the contract with the sureties. This statute was passed to secure and protect the government, and insure punctuality on the part of public officers, and although it in strong language inhibits the payment of salaries to any person in arrears, yet if an unauthorized payment is made by the proper officer, whose duty it is to pass upon and allow salaries, the government is not responsible for the misconduct of such officer, and the sureties are not discharged on that account. [U. S. v. Van Zandt] 11 Wheat. [24 U. S.] 184; [U. S. v. Curry] 6 How. [47 U. S.] 106; [Gibbons v. U. S.] 8 Wall. [75 U. S.] 274.

The certified transcript of Potter's accounts as disbursing agent shows a balance due the government, and that the warrant remitted to him during his term of office was not used in making disbursements for the government. This warrant not being presented for payment within three years after it issued, under sections 300, 307, 308, Rev. St., was subsequently paid from the moneys in the "outstanding liability account." It is charged this payment was illegal and the draft "died" in Potter's hands, and the holder at the time of payment was his agent, and the treasurer should have liquidated Potter's delinquent account by giving him credit for the return of the draft, and not paid it. I cannot agree to this view of the case. These sections, like others in respect of the duties of government officials, form no part of the contract with sureties upon an official bond. They establish the mode of payment of a class of outstanding drafts upon the treasury unpresented within the time specified, and designate, for the convenience of the government, the requisite procedings to obtain the money and the fund out of which payment is to be made. These laws are not passed to protect sureties, but to better

[1] [Reprinted from 7 Reporter, 675, by permission.]

[2] [From 11 Chi. Leg. News, 256.]

secure the government. Laches is not imputable to the government. [Dox v. Postmaster-General] 1 Pet. [26 U. S.] 318; [U. S. v. Boyd] 15 Pet. [40 U. S.] 208; [U. S. v. Van Zandt] 11 Wheat. [24 U. S.] 190; [Bank of U. S. v. Dandridge] 12 Wheat. [25 U. S.] 81; [U. S. v. Nicholl] Id. 505; [U. S. v. Kirkpatrick] 9 Wheat. [22 U. S.] 720; [U. S. v. Buchanan] 8 How. [49 U. S.] 105; [Gibbons v. U. S.] 8 Wall. [75 U. S.] 274; [U. S. v. Powell] 14 Wall. [81 U. S.] 502; [Jones v. U. S.] 18 Wall. [85 U. S.] 663.

[Let judgment be entered in favor of plaintiff for the sum of $1,500, with 6 per cent. interest from August 15, 1874, with costs.[1]

Case No. 16,077.

UNITED STATES v. POTTER.

[6 McLean, 182.] [2]

Circuit Court, D. Michigan. Oct. Term, 1854.

CRIMINAL LAW — NEW TRIAL — NEW EVIDENCE — SEALED VERDICT—POLLING JURY.

1. Where, in the opinion of the court, the evidence preponderates in favor of the verdict, the court will not set it aside on the ground of testimony subsequently submitted, impeaching the credibility of one of the witnesses.

[Cited in Lowry v. Mt. Adams & E. P. Incline Plane Ry. Co., 68 Fed. 829.]

2. Where a cause has been closed at the evening of adjournment, and the parties agree to a sealed verdict, and the jury come in with a sealed verdict, to which all their names are appended, the court will not permit the jury to be interrogated as to their finding, but will order each juror to be asked, whether or not the sealed verdict is or is not his verdict; and on every juror replying that it is, will direct it to be recorded as such.

[See Case No. 16,078.]

[This was an indictment against Erastus Potter. For opinion on motion in arrest of judgment, see Case No. 16,078.]

Mr. Hand, for the United States.

Lathrop & Van Arman, for defendant.

WILKINS, District Judge. Five reasons are placed on record, why the court should grant a new trial. The first four were not pressed in the argument, and are certainly not founded either in law or in the facts of the case. That the court erred in refusing parol testimony of that which was matter of record by law, and which was in the power of the defendant to produce, might well be abandoned, when well considered. That the verdict was against the evidence of the case, or without evidence.

But I do not yield my assent to the proposition that either of these counts are essentially defective. It is conceded that the prosecutor cannot, in the same count, charge different offenses in the alternative, as, for instance, that the defendant did this, or did that, because, in pronouncing judgment, there would be no certainty in the finding of the jury, and consequently no basis of record for the sentence of the court. But I am inclined to question the construction of the statute, which makes two offenses, where but one was evidently contemplated. The statute declares cutting, or procuring to be cut, one offense, i. e., cutting, on the principle that the procurer is the doer; aiding or assisting one offense, as he who aids is of identity with him who assists; and removing or procuring to be removed, another offense. A count for aiding or assisting, would certainly not be defective, because aiding is assisting, and assisting is aiding. And so, in contemplation of law, he who procures or causes the cutting, is of identity as to the offense with the actual cutter, as, by the subsequent language, the latter is an offender, under the appellation of "being employed in cutting." But it is unnecessary to consume time on this particular exception, as the third count is, in the opinion of the court, entirely unexceptionable.

Motion to arrest overruled.

Case No. 16,078.

UNITED STATES v. POTTER.

[6 McLean, 186.] [1]

Circuit Court, D. Michigan. Oct. Term, 1854.

CRIMINAL LAW — ARREST OF JUDGMENT — INDICTMENT.

1. Where an indictment contains several counts, one of which is good, the judgment will not be arrested, although the other three are bad.

2. It is not charging an offense in the alternative, where the language describes the same offense. Cutting, or causing to be cut, is one offense by the statute of 1831 [4 Stat. 472].

[Cited in brief in U. S. v. Bridges, Case No. 14,644.]

[Cited in brief in State v. Moore, 61 Mo. 278.]

[See Case No. 16,077.]

[This was an indictment against Erastus Potter for cutting timber on government lands.]

In arrest of judgment.

Mr. Hand, for the United States.

Mr. Lathrop, for defendant.

WILKINS, District Judge. The reasons set forth in this case, why the judgment should be arrested, are the same as in Thompson's Case [Case No. 16,490], with this exception, that it is further objected to this indictment, that three of the four counts charge the offense in the alternative. The third count, which charges the defendant with taking and removing timber, is unobjectionable, and will sustain the indictment, as the verdict is general. If one of several counts in an indictment is good, on a general verdict the judgment cannot be arrested. Such is the ruling in the courts of the United States. It was given in evidence, that the defend-

[1] [From 11 Chi. Leg. News, 256.]

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

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

ant built a shanty on the corner of lot No. 23, described in the indictment; that he was on the sections cutting; that he admitted to one Alexander Johnston, when on his way up to the place where the timber was cut, in the month of February, 1852, "that he was going up a-logging;" that one Dobbin was hired by him to move his tools, with which the timber had been cut and removed; that logs, numbering more than 800, were cut; that defendant hired men to bring or haul them to the river; that he claimed them as his; and that they were cut from the lands described in the indictment. Such being the evidence of Johnston, Dobbin, Bean, and Risdon, how is it possible for the court to entertain, for one moment, the proposition that there was no evidence to sustain the verdict. There was evidence submitted by the defendant, that he was in the employment of one McNeel, who owned lands adjoining, and that the cutting on the government lands was through ignorance and by mistake; and the court charged the jury that if they believed such to be the case, they should acquit. Mr. Samuel Potter, the brother of the defendant, was the only witness to this point, and, it seems, the jury did not believe the defense in this respect sustained.

The court entertains no doubt whatever, but what the jury were right, in the preponderance they gave to the evidence. But if I thought otherwise, I could not interfere. The jury had all the facts fully before them, and they had the right to credit or discredit the witnesses, and give such weight to the testimony as they believed it fairly entitled to. In such a case, the rules of law and the purposes of justice, do not call for the interposition of the court. A court is not authorized in setting aside the verdict of a jury, unless in a clear case of wrong, and where manifest injustice will be done, by sustaining the verdict of the jury. It is not how the judge considers the testimony, or the impression in his mind, that had he been on the jury, he would have found a different verdict, that should lead to the granting of a new trial. The two departments of trial are distinct. The province of the jury should not be ruthlessly invaded; and, unless he is satisfied from a careful examination of all the evidence, that the verdict cannot be right, it should not be disturbed by the judge.

Another ground is urged, based upon the affidavit of the defendant, stating that, "when the jury came in with a sealed verdict, it was opened and read: that something was then said between the court and counsel, as to the effect of the verdict's specifying on what count or counts, they found the defendant guilty. That one of the jury said in open court, and before the verdict was recorded in substance, 'that the jury had spoken of that, but had not acted upon it, or come to any conclusion whether he was guilty upon one or all of said counts.'" With this affidavit, by no means accurate or corresponding with the recollection of the court, is there a sufficient foundation laid for a new trial? The case had been given to the jury in the evening, and the defendant assented that they might seal their verdict, and bring it in in the morning. They did so, and on the opening of the court, the jury being present in their seats, and being called over by the clerk, the sealed verdict was handed in, signed by each juror; saying "that they found the defendant guilty in manner and form as he stands charged in the indictment, and assessed the damages at $83." After the clerk had read it, one of the counsel for the defendant, addressing the court, desired to know whether the jury applied their verdict to all the counts or any one count in particular. This remark elicited the opposition and comment of the district attorney; when one of the jurors observing that they had not considered a finding on each count necessary, the court stopped any further altercation by directing the verdict to be recorded as written out and signed by the jury, the paper itself to be filed for further reference; and on the application of defendant's counsel, the jury to be polled. The record shows the result. "And the jurors aforesaid, being each separately interrogated by the court, whether the foregoing verdict is his verdict as it stands recorded, each for himself separately answers, that it is." What more is necessary? Where is there room to doubt the action of the jury? Is it not their verdict, twice solemnly assented to by them in open court; once by their names recorded by each in his own hand-writing, and filed on record; and again as solemnly in the presence of the defendant, proclaimed by each juror, as his separate act, and as such, recorded on the journal of the court?

Wherefore should such a verdict be set aside? For irregularity? Whose? It was no error of the jury in writing out their verdict, and if they had changed their minds since that act, it was competent to retract or express such change, when specially interrogated by the court. That they adhered to their written opinion was not error. New trial refused.

[Subsequently a motion in arrest was overruled. See Case No. 16,077.]

Case No. 16,079.

UNITED STATES v. POWELL.

[65 N. C. 709.]

Circuit Court, D. North Carolina. June Term, 1871.

OFFICE AND OFFICER — DISQUALIFICATION BY ENGAGING IN REBELLION—CONSTITUTIONAL LAW.

[1. One who, as constable of a county in North Carolina, took an oath to support the constitution of the United States, and afterwards engaged in the Rebellion, is disqualified by the fourteenth amendment, unless relieved in the manner provided, to hold any office, state or national, and is therefor indictable under section

15 of the act of May 31, 1870 (16 Stat. 140), for subsequently accepting the office of sheriff.]

[2. The expression "engaged" in insurrection, as used in the amendment, implies a voluntary effort to assist the insurrection, and acts done under compulsion of force, or of a well-grounded fear of bodily harm, do not come within the operation of the provision.]

[3. Accepting and holding the office of justice of the peace under the Confederate government was not, of itself, sufficient evidence of engaging in the insurrection.]

[Indictment of Amos S. C. Powell for accepting the office of sheriff when disqualified from holding office by the 14th amendment to the constitution of the United States.]

This was an indictment under the 15th section of the act of congress of the 31st May, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union and for other purposes." [2] The indictment charged that the defendant knowingly accepted and held office under the state of North Carolina, to which he was ineligible under the provisions of the 3d section of the 14th amendment of the constitution of the United States. A witness, in behalf of the prosecution, testified that the defendant, prior to the commencement of the late Rebellion, held and exercised the duties of the office of constable, in Sampson county, to which office it was shown, by the records of the court of Sampson county, the defendant had been first appointed by the county court, upon a failure to elect by the people, and subsequently was elected by the people as the law provided; and in both instances qualified by taking the oaths required by law. Another witness, in behalf of the government, testified that in 1863 he (the witness) was a captain and was recruiting a company for the Confederate service, at Wilmington; that defendant came to him, and proposed to enlist in his company, provided he would accept a substitute, and relieve him from duty; that the defendant did enlist in the service, and tendered a substitute, as agreed upon, and, therefore, he granted to the defendant a certificate of exemption, as provided by a Confederate law. The prosecution further proved that the defendant applied for and received the appointment of justice of the peace for Sampson county in 1863, and qual fi d as such; that he had been elected sheriff of Sampson county in the year 1868, and qualified, and continued to perform the duties of the sheriff up to the present time.

The defendant offered a witness to prove that after the passage of the conscript laws by the Confederate government, and when the authorities had commenced to enforce the same, he was notified by the conscript officer, in his county, that he would be required to perform such service; that a day and place had been fixed for the meeting of conscripts, and he had been notified to attend; that he became alarmed, being averse to such service, volunteered to enable him to offer the substitute, and thereby obtain exemption for himself.

This evidence was objected to by the prosecution as irrelevant, but was admitted by the court.

The defendant offered further to prove by witnesses, who lived in the same county, and near him during the Rebellion, and with whom he frequently conversed during the time the conscript law was being enforced in this county, and about the time the substitute was furnished by him, that he was opposed to the Rebellion, and his opposition to serving in the army. This was also objected to by the prosecution, but was received by the court.

The counsel appearing for the government asked the court to instruct the jury that the office of constable before the war was such an office as rendered those who had held it, and thereafter engaged in the Rebellion, ineligible to any office now, by the provisions of the 3d section of the 14th amendment, unless relieved, as that amendment provides.

The counsel for the government further asked the court to instruct the jury that if the defendant had before the Rebellion so held the office of constable, and thereafter volunteered, though he offered a substitute, and did no actual military service himself, and though his purpose may have been to avoid the service, that he engaged in the rebel service within the meaning of the constitution; and further asked the court to instruct the jury that if the defendant (having been constable as aforesaid) accepted the office of justice of the peace under the rebel government of North Carolina, though he may have performed no duty as justice promotive of the Confederate cause, that the acceptance of the office, and taking the oath required of such office, was such aid or engaging in service of the enemies of the United States as disqualified him from holding the office of sheriff, without the relief required by law.

Dist. Atty. Starbuck and Bragg & Strong, for the United States.

Battle & Sons, for defendant.

Before BOND, Circuit Judge, and BROOKS, District Judge.

BOND, Circuit Judge (charging jury). The facts in this case have been plainly presented and thoroughly argued to you, and it remains only for the court to instruct you upon one or two strictly legal points, to enable you to find a true verdict. And in the first place, gentlemen, if you find from the evidence that before the late war the defendant held the

[2] "Section 15. And be it further enacted, that any person who shall hereafter knowingly accept or hold any office under the United States, or any state to which he is ineligible under the third section of the fourteenth article of amendment of the constitution of the United States, or who shall attempt to hold or exercise the duties of any such office, shall be deemed guilty of a misdemeanor against the United States, and, upon conviction thereof before the circuit or district court of the United States, shall be imprisoned not more than one year, or fined not exceeding one thousand dollars, or both, at the discretion of the court."

office of constable in the state of North Carolina, and took the oath to support the constitution of the United States required of such office, and subsequently engaged in the Rebellion, it is necessary for you to know whether or not he is within the meaning of the provisions of the act of congress, under which he is now indicted.

The words of the statute, gentlemen, are broad enough to embrace every officer in the state. There can be no office which is not either legislative, judicial, or executive; and there can be no question, it seems to the court, but that, unless it be possible to find some external reasons for giving this broad language a narrower meaning, it embraces every office in the state. But we can find no such reasons. The act, to be sure, is primitive, and it is argued that it was passed to punish those high in authority in the rebellious states at the time of the outbreak of the Rebellion, for their bad faith toward the government they had sworn to support, and was not intended to reach those who had minor offices. But while the act is primitive in its character, it was passed at a time when congress was endeavoring to restore order and government throughout the rebellious states; and it was thought that in this effort those who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again until congress saw fit to relieve them from disability.

The words of the act were made just exactly comprehensive enough to include such persons, and, in the opinion of the court, embrace the office of constable, which is an executive office, and in North Carolina, at the time defendant held it, was limited in its exercise and jurisdiction by county lines only.

If you find that the defendant did hold the office of constable before the war, and took the oath to support the constitution of the United States, you must, before you find him guilty under this indictment, find a further fact, and that is, that he engaged subsequently in insurrection and rebellion against the United States. To establish this the prosecution offers evidence to prove two facts, which, if you find to be true, the question arises, do these amount in law to engaging in rebellion or insurrection? The first is, that in February or March, 1863, he furnished a substitute for himself to the Confederate army. This fact, if proved without explanation, would, of itself, gentlemen, be sufficient to show the defendant was engaged in the Rebellion. But the defendant alleges, and offers evidence to show, that he did not do this voluntarily. That he was himself enrolled, and was about conscripted, and was overcome by force, which he could not resist, and the question is whether, if you find the facts alleged by the defendant to be true, these exceed or justify his conduct in law.

We are of opinion, gentlemen, that the word "engage" implies, and was intended to imply, a voluntary effort to assist the Insurrection or Rebellon, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. But it is not every appearance of force nor timid fear that will excuse such actual participation in the Rebellion or Insurrection. Defendant's conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape nor resist. And further, the defendant's action must spring from his want of sympathy with the insurrectionary movement, and not from his repugnance to being in an army, merely.

When you have determined these facts, gentlemen, and have applied the law as we have stated it to these two points, you will have no further difficulty, for, although it is further alleged by the prosecution that the defendant held a commission of justice of the peace in 1865, under the Confederate government, we are of opinion that he might well have held that office without giving adherence or countenance to the Rebellion. It was absolutely necessary that during that commotion there should have been some to preserve order and to restrain the vicious and licentious, who, without this, would have taken advantage of the turmoil to pillage and destroy friend and foe alike. He was a mere peace officer, and unless it be shown that under his commission the defendant did some act in aid of the Insurrection or Rebellion, the fact that he was justice of the peace is of no consequence in the determination of his guilt or innocence under this indictment.

Take the case, and remember that every reasonable doubt is to be given in favor of defendant, and by reasonable doubt we do not mean every indefinite uncertainty of mind which you may feel, but such a doubt as you can give a reason for or such a doubt as a reasoning man would entertain after careful consideration of the proof.

Case No. 16,080.

UNITED STATES v. POWER.

[14 Blatchf. 223.] [1]

Circuit Court, S. D. New York. May 16, 1877.

NATURALIZATION BY STATE COURTS—WHAT COURTS COMPETENT.

It is provided by section 2165 of the Revised Statutes of the United States, that an alien may be admitted to be a citizen of the United States by "a court of record of any of the states, having common law jurisdiction, and a seal and clerk." A city court, which is a court of record and has a seal and a clerk, and has conferred upon it, by a statute of New York, all the power and jurisdiction of justices of the peace, and all jurisdiction and power, within the city, of the marine court in the city of New York, and whose judge is clothed with all the

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

powers of a county judge and of a judge of the supreme court of the state at chambers, and which has civil jurisdiction in all actions for the recovery of money, when the amount recovered does not exceed $1,000, is a court having common law jurisdiction, within the meaning of said § 2165.

[Cited in Ex parte Tweedy, 22 Fed. 85.]

[Cited in Re Dean, 83 Me. 489, 22 Atl. 387.]

[This was an indictment against Martin Power upon the charge of perjury. Heard on demurrer.]

William Burke Cochran, for defendant.

Benjamin B. Foster, Asst. U. S. Dist. Atty.

BENEDICT, District Judge. The prisoner is indicted under section 2165 of the Revised Statutes of the United States, for perjury committed by him in making an application to be naturalized before the city court of Yonkers. A demurrer to this indictment brings before the court the question, whether the city court of Yonkers had jurisdiction to entertain the prisoner's application to be made a citizen of the United States. If that court has not such jurisdiction, the indictment charges no offence, and the prisoner must be discharged.

The provision in the laws of the United States, upon this subject, is to be found in section 2165 of the Revised Statutes, where it is enacted, that an alien may be admitted to become a citizen of the United States, upon making certain declarations on oath before "a court of record of any of the states, having common-law jurisdiction, and a seal and clerk." It is conceded, that the city court of Yonkers is a court of record, and that it has a clerk and a seal, but the question is, whether it is a court having common-law jurisdiction, within the meaning of the statute of the United States, above quoted. The jurisdiction of the city court of Yonkers is to be found in the laws of the state of New York. Chapter 866 of the Laws of 1872 confers upon that court all the power and jurisdiction of justices of the peace, and all jurisdiction and power, within the city of Yonkers, of the marine court in the city of New York, and it clothes the judge of that court with all the powers of a county judge and of a judge of the supreme court of the state at chambers. In addition to these powers, chapter 61 of the Laws of 1873 confers upon this court civil jurisdiction in all actions for the recovery of money, when the amount recovered does not exceed $1,000. It is manifest, that, by virtue of these statutory provisions. the city court of Yonkers is authorized to exercise some common-law jurisdiction, that is, it has jurisdiction to hear and determine causes which were cognizable by the courts of law, under what is known as the common law of England, although it has not jurisdiction of all such causes. It will be noticed, however, that the statute of the United States does not require of courts authorized to entertain applications for naturalization, that they shall have all the jurisdiction possessed by any court of law. If the court may exercise any part of that jurisdiction, it is within the language of the statute, and within its meaning, as well. Thus, the courts of Massachusetts, in Ex parte Gladhill, 8 Metc [Mass.] 168, held the police court of Lowell to be a court exercising a common-law jurisdiction, and, therefore, authorized to entertain applications to be made citizens of the United States, because it was by law authorized to "hear and determine all complaints and prosecutions, in like manner as justices of the peace," with "jurisdiction of all civil suits and actions cognizable by a justice of the peace." The reasoning of this decision was adopted by the circuit court of the United States for the First circuit, in Ex parte Cregg [Case No. 3,380], where, upon the same ground, the police court of Lynn was held, by the circuit court of the United States, to be a court having common-law jurisdiction, within the meaning of the United States statute. A like conclusion was reached by the supreme court of New Hampshire, in respect to the police court of Nashua. and upon the same ground. State v. Whittemore, 50 N. H. 245. In re Connor, 39 Cal. 98, a similar question in respect to tne county courts of California was considered, and it was there adjudged, that a court having jurisdiction to prevent or abate a nuisance was a court exercising common law jurisdiction, within the meaning of this statute of the United States. The court, in the case, say it is not necessary to have "jurisdiction over all classes of common law actions," and that "the act of congress does not require that the courts shall have all the common law jurisdiction which pertains to all classes of cases." See, also, the meaning given by the supreme court of the United States to the words "common law," as used in the constitution of the United States. Parsons v. Bedford, 3 Pet. [28 U. S.] 433, 446.

In the light of these decisions there seems to be no reason for doubting that the language of the statute is sufficiently broad to permit the city court of Yonkers to hear and determine the prisoner's application to be made a citizen of the United States. This is the only question that has been presented for my consideration, and, entertaining the opinion above expressed, I must overrule the demurrer, and direct the prisoner to plead to the indictment.

Case No. 16,081.

UNITED STATES v. POYLLON et al.

[1 Car. Law Repos. 60.]

District Court, D. New York. Nov., 1812.

EMBARGO LAWS—ACTION OF DEBT ON BOND—PENAL ACTION.

[An action of debt upon a bond given under the embargo laws. and conditioned that the cargo laden upon a vessel should be landed in some port of the United States, is, in effect, a penal

or criminal action, as the right of recovery rests upon the violation of positive statutory prohibitions; and hence the jury in such an action are judges both of the law and the facts.]

This was an action of debt, on a bond for the sum of 23,000 dollars, given in December, 1808, under the first embargo law, conditioned, that a cargo of cotton, laden on board the schooner Clarinda, bound for Boston, should be landed in some port of the United States (dangers of the seas excepted). The defendants, Kip and Adams, one owner of the cargo, and the other master of the vessel, were principals, and the other defendants merely sureties in the bond.

In support of their plea, that the cargo was prevented from being re-landed in the United States by the dangers of the seas, the defendants produced one William Lea, who testified that he sailed about the 15th of December, 1808, in the British schooner Hercules, bound to St. John's, N B.; that on Wednesday, the 28th of said month, saw the Clarinda, crossing Nantucket shoals, hoist a signal of distress; upon which the Hercules, being seven or eight miles ahead, slackened sail; and when the Clarinda came up, Adams, the master, requested aid to save his vessel and cargo and the lives of his crew. The schooner Clarinda being in a sinking condition, the cotton was unshipped and taken on board the Hercules; being then about 20 miles from the land, and the Clarinda full of water up to the hatches, it was found necessary to abandon her. Upon his cross-examination, he stated that the Hercules, after passing through Hellgate, came to anchor about night; the next morning got under way, and proceeded as far as New-London, put in there, the weather being squally, and remained two or three days. That the Hercules next put into Tarpaulin Cove, on account of the weather being foggy, and lay there also two or three days; and on the third day proceeded to Holmes's Hole, where she continued several days, when he thinks she might have proceeded. That on the 27th the Clarinda also arrived there, and the captains of both vessels, with the supercargo of the Clarinda, went ashore together. The next morning the Hercules sailed, and was followed in about an hour afterwards by the Clarinda. The Hercules outsailed the Clarinda, so as to leave her nearly out of sight, except with a spy-glass, but did not shorten sail on that account until the signal of distress, which happened about one o'clock; and about 11 o'clock, the captain of the Hercules ordered the ballast to be levelled, and a chest, with two casks of water, to be removed from the run; and about 4 o'clock p. m. the vessels came along side of each other.

The defendants resting their evidence here, Baldwin, for plaintiff, opened; and, admitting that the Clarinda had twice struck,—once in coming out of New-London, and again off Connecticut Point,—proceeded to shew that the loss was notwithstanding fraudulent and by design; and for this purpose called one Daniel Boyles, who testified that he was a seaman on board the Clarinda during the said voyage; that they first fell in with the Hercules at Holmes's Hole, but had previously put into New-London and Tarpaulin Cove; that when at this place, Capt. Adams, seeing a vessel coming at a distance, said to the supercargo, Kip, "That is not the vessel"; and, again, when they descried the Hercules at Holmes's Hole, he heard Capt. Adams exclaim, "That is the vessel!" He further testified that the Clarinda first began to leak the day of their leaving Holmes's Hole, and was pumped dry by 10 o'clock in the morning; that when they went to dinner, she leaked again, upon which he wanted to try the pumps, but the captain or mate told him not to do it, but go and coil the cables and rigging; that he advised the captain to run her ashore on Nantucket Shoals, as she leaked so badly; but he replied, "We will go on board that schooner," meaning the Hercules, then in sight, and which had waited for them on perceiving their signal of distress. He gave it as his opinion, that the leak was occasioned by design, and not accident. On his cross-examination, he stated that he had been maintained three or four years by the custom-house at five dollars per week, to give testimony in this cause, and that Mr. Schenck paid his salary. A protest was also produced, in which he joined with the rest of the crew, attributing the leak to her striking on the rocks.

The plaintiffs next produced in evidence a petition presented by the defendants, Poillon, Busze, and Bergh, to the secretary of the treasury, for relief against the bonds in question, with their examination taken before Judge Tallmadge on that occasion, in which they confessed that they "believed" the loss to have happened by "fraud of the master and supercargo," but had "no knowledge" that such was the case.

The defendants' counsel opposed the introduction of this evidence, on the ground that the petitioners had objected at the time to being examined as to their "belief," but were forced to do it or to withdraw their petition. The court, however, admitted it.

The evidence being closed, Messrs. Baldwin and Ogden, in favor of the plaintiff, addressed the jury in a very able manner; and, bringing before them in a clear and luminous point of view, all the evidence which tended to establish their case, besought them to decide impartially between the two parties; and reminded them that they sat there, as jurors, not as legislators, and whatever might be their individual opinions as to the expediency of any particular law, still it was their duty, as good citizens, to support and execute it.

Mr. Griffin then alone summed up the evidence on the part of the defendants, with his usual animation and impressiveness.—(Col. Burr confining himself merely to the reading

of some law to the court, and making a few appropriate remarks thereon.)—After an appeal to the sympathy of the jury, by shewing that a verdict for the plaintiff would be equivalent to a sentence of perpetual imprisonment on his unfortunate clients, as they were utterly unable to satisfy it with their property, he proceeded, in substance, as follows:

That the question to be decided was whether the Clarinda had been lost by the perils of the seas; that the present suit, though in form a civil action, was in effect a penal or criminal action, inasmuch as the plaintiff's right to recover (if at all) must be founded on the violation of a positive statute of the United States; and that his clients, therefore, standing in the doubly favored situation of defendants in a criminal or penal action, and sureties for others, were entitled to the judgment of the jury on both the law and fact, and to the benefit of all those mild and favorable rules and maxims which had been established by the benignant genius of the "common law," in the construction of the law and evidence.

The loss being proved to have happened at sea, it should be presumed that it had been occasioned fairly by the perils of the sea; fraud should not be intended, but must be strictly proved. How do the United States prove fraud in this instance? They cannot do it by endeavoring to impress into their service the enforcing act, which requires that the loss should be proved by all the crew (if living, and the proof of their death should lie on the defendants). To apply this law to the case arising under a different law, and before its enactment, would be to convert it into an ex post facto law; and however agreeable this might be to some gentlemen, by putting money into their pockets, and enabling them to ride in their carriages, and keep town houses and country seats, it will never be sanctioned, or tolerated by this court or jury. But, the plaintiffs triumphantly ask why, even if not bound to do so, we did not produce the mate and crew of the Clarinda. The answer is at hand—and when heard will be approved by the heart and judgment of every man: We were not rich enough to keep them here. They are scattered, perhaps, to the four winds of Heaven, by their different pursuits, or by the terrible penalties of the embargo law and its horrid train shaking over their heads. Our "poverty, not our will," consented to their departure. We have always been anxious to meet the trial. It might have been tried before, and had it not been thus long delayed, our witnesses would not have been thus scattered. Let not then what was our misfortune, be imputed to us a fault.

Do they prove the fraud by the movements of the Hercules? Are we to be answerable for them, even were they extraordinary or suspicious? But it was not at all extraordinary that a strange vessel, navigated by strangers, and in a strange and intricate sea, at an inclement season of the year, should frequently retire into port for shelter and safety; nor is it at all remarkable or suspicious that a cautious commander should level his ballast when passing over shoals.

Is the fraud proved to your satisfaction by Boyles, the great champion of the custom-house? How painful soever it may be to my feelings to speak harshly of the motives or conduct of a fellow-creature, I am compelled, by professional duty to my clients, to say this man stands before you convicted of perjury, either now or in his protest made at St. John's. Which is the most probable? Then, when by the loss of the vessel his pay had ceased; when if he had suspected any fraud he must have glowed with indignation at the conduct of the men who had thus wantonly endangered his life and put an end to his earnings; and when he nevertheless declared under oath that he verily believed the leak and subsequent loss of the Clarinda was occasioned by striking on the rocks?—Or, is he now perjured, when he comes before you, and audaciously contradicts his solemn protest, after being three or four years maintained by the custom-house at five dollars a week? On the rotten testimony of this man, I would not, gentlemen, condemn a dog to one day's imprisonment—much less would I consign four fellow-citizens to imprisonment for life, or at the mercy of the executive. I have no fear for the result of your decision. By the acquittal of the defendants, you will this day teach the gentlemen of the custom-house that this practice of maintaining witnesses at enormous wages for a length of years is equally useless and abominable.

Lastly, is the fraud proved by the extorted confession of the defendants' belief? It was no admission of facts; for they knew of none to admit, but such as they had already in the honesty of their hearts fully disclosed. But on what did they found their belief? Not on information derived from Kip or Adams; for it is not even to be imagined that these men would say to them thus: "You have benevolently become our sureties, and we, to repay your kindness, have acted like villains, have fraudulently destroyed the vessel, carried the cargo to a foreign country, and thereby subjected you to all the penalties of the law." Their belief was more probably founded on the hue and cry, the declarations and threats of the custom-house officers. In a moment of despondency they have perhaps imagined and believed whatever was most disastrous, and with a vague hope of mercy, indiscreetly avowed their fluctuating belief. To turn such confessions against them is cruel and ungenerous in the extreme. It is what every mind amongst you would revolt from without hesitation. But whatever may have been their belief—whatever may have been your own, uncertain belief, you must not judge according to that. You are sworn to decide upon the evidence; and the evi-

dence must be strong and conclusive before you can conscientiously pronounce a verdict of guilty.

Is fraud to be inferred from the manner in which the vessel was lost? It appears that she began to leak and had four feet of water in her hold, when the Hercules was out of sight, except with a spy-glass, and they were distant many miles from land. Would men lightly expose their lives to such danger, with the weight of a guilty conscience hanging on them? And what are the assignable inducements to encounter these perils? The profits on a few bales of cotton, purchased by the certain loss of the vessel. You will reject them as insufficient, and will not suspect that fraud could have existed where there was so little motive for it.

Baldwin & Ogden, for the United States.
Radcliffe, Griffin & Burr, for defendants.

VAN NESS, District Judge (charging jury), said, among other things, that this was in its nature and essence, though not in its form, a penal or criminal action; and they were therefore entitled to judge both of the law and the fact; and that the enforcing act could not apply in this case.

The jury retired, and, after being out between one and two hours, agreed upon a verdict for the defendants, which was sealed up, and the next morning opened and pronounced in court.

Case No. 16,082.

UNITED STATES v. PRATT.

[2 Am. Law T. Rep. (N. S.) 238.]

District Court, E. D. Michigan. April, 1875.

OFFENCES AGAINST POSTAL LAWS—SCURRILOUS COMMUNICATIONS.

A. mailed a postal card directed to B., having written upon it certain words which imputed illicit intercourse to C. and another, but in which no epithet, in the form of a substantive or adjective, was used. *Held*, that the offence was within the terms of section 3893 of the Revised Statutes.

[Cited in U. S. v. Britton, 17 Fed. 733.]

This was a motion to quash an indictment. The prisoner was charged with the offence of depositing and causing to be deposited in the post-office for mailing, a postal card, upon which was written indecent epithets, contrary to the provisions of section 3893 of the Revised Statutes, which reads as follows:—"No obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where or how or of whom or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal card upon which, indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, any of the herein before mentioned articles or things, or any notice or paper containing any advertisement relating to the aforesaid articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of the herein before mentioned articles or things, shall take or cause to be taken from the mail any such letter or package, shall be deemed guilty of a misdemeanor," &c.

The prisoner was charged with having mailed, at Jackson, a postal card, addressed to Geo. A. Mills, of Reilly, Muskegon county, Mich., upon which was written the following: "Jackson, Dec. 8th, 1874. To Mr. Mills: How does you and Mrs. (giving name) get along, that you show your private letters to and persuade her to stay away from her little ones. Your taste must be low after she has been catched locked up in a room with a man that had funny curly hair and such funny eyes. My advice to you is not to read her any more of your private letters; she will expose you." Pasted upon the back of this card, and in immediate proximity to the writing, was a picture representing the head of a colored man.

It was argued, by the counsel for the prisoner: (1) That the section relied upon by the government provides no punishment for the mailing of scurrilous postal cards. (2) That the matter written upon the postal card in question contains no "indecent epithets," and therefore is not within the statute.

Henry M. Cheever, for the prisoner.
J. W. Finney and H. H. Swan, Asst. U. S. Dist. Attys.

BROWN, District Judge. The section under which the indictment in this case is framed contains two distinct clauses, one prohibitory and the other penal. The prohibitory clause provides that the following articles shall not be carried in the mails: First, no obscene publication or picture; second, no article or thing intended for the prevention of conception or procuring of an abortion; third, no article or thing intended for an immoral use; fourth, no advertisement or notice giving information how or where either of the things before mentioned may be obtained or made; fifth, no envelope or postal card containing indecent or scurrilous epithets. The penal clause imposes punishment in terms for the following offences: Depositing for mailing or delivery any of the herein before mentioned articles or things, or any notice or paper containing any advertisement relating to the aforesaid articles or things; second, taking from the mail any

letter or package in pursuance of any plan or scheme for disposing of any of the herein before mentioned articles or things.

It is claimed by the counsel for the prisoner, and argued with great ingenuity that the words "articles or things" mentioned in the penal clause refer only to the "articles or things" described by that name in the prohibitory clause, and set forth in the second and third subdivision of this clause, as above pointed out. Section 3895 provides that "all letters, packets, or other matter which may be seized or detained for violation of law shall be returned to the owner or sender, or otherwise disposed of;" and it was claimed that congress intended simply to empower postmasters to seize postal cards upon which indecent or scurrilous epithets are written, but did not intend to punish the mailing of them. Had the words "articles or things" not appeared in the prohibitory clause of the statute, it would scarcely have been argued that a postal card was not an article or thing within the meaning of the penal clause, and the only question is whether, by using those words in the prohibitory clause, congress designed thereby to restrict the application of the penal clause. Clearly it has not done so in terms. If congress has failed to provide a punishment for the sending of scurrilous postal cards, it has also failed to provide one for the articles mentioned in the first and fourth subdivisions, namely: obscene publications and pictures, as well as cards, advertisements, and notices giving information where these things may be obtained or made. It would also follow that the word "things," in the fourth subdivision, would be restricted to the things mentioned in the second and third subdivisions, and that the sending of advertisements or notices where indecent publications and pictures might be obtained would not be illegal. A reference to the history of the postal card system, and the evident design of the enactment in question, will show that the objection is wholly untenable. Although postal cards have been in use for a very few years their great convenience has made them universally popular as means of sending short messages to correspondents and of circulating business advertisements. At the same time, as they are in the nature of an open letter, the temptation afforded by the fact that they may be read by anybody has subjected them to great abuse, and in England has caused the abolition of the whole system to be seriously discussed. Congress evidently designed by this section to prohibit this abuse, and to punish the sending of all indecent and scurrilous matter through the mails, so far as it had the power to do this without violating the sanctity of private correspondence.

So far as I am able to ascertain, the section in question has received judicial construction in but one case, namely, U. S. v. Bott [Case No. 14,626], where it was held, that under the clause punishing the sending of "articles designed for the prevention of conception or the procuring of abortion," the defendant could not show that the article deposited would not, in fact, have any tendency to produce this effect, and that its harmless character was known to him when he deposited it, it being sufficient that the article, when deposited, was put up in a form described in and manner calculated to insure its use for that purpose. It was also assumed in this case, though the point was not discussed, that it was also a misdemeanor to mail any advertisement or notice, giving information where any such article could be obtained, and that it was immaterial whether, in fact, the article or thing was at the place designated.

I can see no good reason why congress should not punish the mailing of the articles specified in the first, fourth, and fifth subdivisions, as well as those specified in the second and third. Indeed the offence of sending scurrilous postal cards is more purely personal, more exasperating to the receiver, and more likely to lead to bad blood and to breaches of the peace than any other specified in the act. Had the words "articles or things" been contained in the subdivisions immediately preceding the penal clause, there might be some foundation for the claim that it referred only to them; but I cannot believe that congress intended to select out from the middle of the prohibitory clause certain offences, and provide a punishment for them, without expressing such intent in clearer words than it has done in this section. It would certainly be a forced construction of the law to hold that congress did not intend to punish the mailing of obscene publications, when by section 1785 it imposes a penalty upon employés of the government who aid and abet persons engaged in dealing in, sending or receiving them, thus punishing the accessary, but allowing the principal to escape. I have been somewhat aided in the interpretation of this act by the case of U. S. v. Hartwell, 6 Wall. [73 U. S.] 385. The prisoner in that case was charged with embezzlement, under the act of 1846 [9 Stat. 63], known as the "Subtreasury Act," the 16th section of which provided: (1) That if any officer to whom it applied should convert to his own use, except as permitted by the act, any public money, every such act should be deemed an embezzlement. (2) That if any officer charged with the disbursement of public money should take a false voucher, every such act should be deemed a conversion of the amount specified. The penal clause then follows: "And any officer or agent of the United States, and all persons participating in such act, being convicted before any court, shall be sentenced," &c. It was held that this clause was to be taken distributively, and that it was clearly intended to apply to all the acts of embezzlement specified in the sec-

tion, to those relating to moneys in the first category, as well as those relating to vouchers in the second.

Further objection is made to this indictment that the writing upon the postal card contains no "indecent epithet," within the proper meaning of the term. The word "epithet," as defined in dictionaries, is apparently limited to adjectives and nouns, expressive of some character, quality, or attribute. In the earlier edition of Webster it is extended to nouns as well as to adjectives; in the later editions, however, it seems to be confined to adjectives, the exact meaning of the word is discussed there, and its use in the sense of "phrase," "name," or "expression" is pronounced improper. Now if the court were confined, in the interpretation of this section, to the strict grammatical definition of the word "epithet," I should be of the opinion that the writing upon this card contains no indecent epithet. Obviously, however, it could not have been the intent of congress that the word should receive this restricted meaning, or that the conviction or acquittal of a prisoner should depend upon the fact whether he employed adjectives or verbs to express his indecent or scurrilous ideas. Clearly, to call a man a "thief," or "thieving rascal," would be within the statute. Would it not be equally within the intent of the statute to say of him that he is in the habit of stealing? It is unnecessary here to decide whether the words "indecent and scurrilous epithets" were intended to include all indecent and scurrilous expressions or language —such for instance as threats couched in indecent terms, although there is much force in the argument that congress intended to prohibit the use of postal cards for the purpose of sending any indecent expressions. I am clearly of the opinion that it was not intended to confine the use of the words to nouns or adjectives; but that any form of expression which imputes to a person any indecent or scurrilous characteristic or quality is within the statute. The original signification of the word "epithet" is sometimes "put upon," "attributed," "charged," or "imputed," whatever might be the form of words employed. It so happens that adjectives are most frequently used for this purpose, and hence the meaning of the word has been gradually restricted to nouns and adjectives, and, finally, according to the present usage, to adjectives alone. The gist of the word "epithet" in this section is the thought or imputation conveyed by the words employed, and not the particular parts of speech used to convey it. I am satisfied that congress did not intend to employ the word "epithet" in its restricted sense, and my only doubt is whether the statute was not intended to embrace all scurrilous and indecent communication.

I think the jury are at liberty to infer, from the postal card in question in this case, that the writer intended to impute to the woman whose name is mentioned an illicit connection with a colored man, and hence that it contains an indecent epithet within the meaning of the statute. It is true that penal statutes must be construed strictly. That is, as observed by Mr. Justice Story, in U. S. v. Winn [Case No. 16,740]: "That penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport; but where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. But where a word is used in a statute which has various known significations, I know of no rule which requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the word which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." While the liberty of the citizen is not to be taken away by an application of the statute to cases not clearly falling within the intent of the legislature, society also has its right, and the beneficent purpose of penal laws should not be frittered away by a rigid adherence to literalisms and grammatical definitions. In Winn's Case, above cited, the word "crew," as applied to seamen, was held to include the first mate; and in Hartwell's Case, supra, a clerk in the office of the assistant treasurer was held to be an officer within the meaning of the sub-treasury act. See, also, The Industry [Case No. 7,028]; U. S. v. Mattock [Id. 15,744]; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; The Enterprise [Case No. 4,499]; U. S. v. Hartwell, supra. The motion to quash must be denied.

Case No. 16,083.

UNITED STATES v. PRENTICE et al.

[6 McLean, 65.] [1]

Circuit Court, D. Illinois. Oct. Term, 1853.

UNITED STATES MARSHALS — SUIT ON OFFICIAL BOND—RIGHT OF SET OFF—LIMITATION OF ACTIONS.

1. In a suit brought by the United States against the marshal and his sureties, on his bond for the recovery of moneys collected in divers executions, issued at the suit of the United States, the defendants attempted to set off the items of an account, contained in a treasury transcript, which had been disallowed; but which transcript reserved a balance due the government, over and above such items, without including any of the moneys claimed in this

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

suit. It was held that the set off could not be allowed.

2. It makes no difference that the marshal might be able to plead the statute of limitation to a suit brought for such balance.

3. When a debtor has a set off equally applicable to the demands against him, the court will apply it according to the equity between the parties.

4. Besides, the marshal had presented this account to meet another claim of the government not included in this suit.

5. The statute of the state can have no influence on this question; it depends upon the act of congress.

6. There is no law of congress regulating set off in suits against officers; but several statutes imply that set off may be allowed.

At law.

Mr. Williams, U. S. Dist. Atty.

Lincoln & Logan, for defendant.

DRUMMOND, District Judge. This is an action brought by the plaintiffs against [William] Prentice and his sureties for the recovery of moneys which the former had received upon sundry executions in favor of the United States, and which had come to his hands as marshal. The declaration only counts upon breaches of the bond, because the marshal has collected money which he never paid over. After the plaintiffs had introduced the various executions which are mentioned in the declaration, with the endorsements made on them by the marshal, the defendants offered an account of the items which they claimed as a set off in this suit, amounting to the sum of fourteen hundred dollars, and then offered a transcript from the treasury department, to show that the items claimed as a set off were disallowed. The defendants insisted it was competent evidence for that purpose. By agreement, the whole transcript was admitted subject to the opinion of the court upon the effect to be given to it. The transcript shows a balance of more than $2,000 against the marshal, so that if the $1,400 were allowed as a set off in this case, there would still be, according to the transcript, a balance of more than $600 due the government.

I am of the opinion that the account cannot be allowed as a set off, in this case. The government has not seen fit to sue the marshal on the account which contains these disallowed items, but has brought suit for money collected on divers executions. The government can properly object to this account in this suit, because it was presented by the marshal as a charge against the government, in another claim with which the subject matter of this suit has no concern. The defendants insist upon the set off here; because to the other claim, if suit is brought, they purpose pleading the statute of limitation. But this ground will not help them in this case. It would seem to be inequitable to suffer the defendants to avail themselves of an account which shows that so far from there being any set off for claims against the government, there is a balance against the marshal, independent of the amount in controversy here. Where a debtor has a set off equally applicable to two demands against him, he cannot select on which of the demands he will apply it; but the court will apply it according to the equity between the parties. See Tallmadge v. Fishkill Iron Co., 4 Barb. 392, which was a suit in equity, and which cites Collins v. Allen, 12 Wend. 356, which was a suit at law, where a party had two claims—a note and an account—against a man, and transferred the note overdue, he holding claims against the man sufficient to meet a set off which was attempted to be put in in a suit on the transferred note. It was held it was not a good set off, in that suit. But here there is great reason for saying that the marshal himself elected to apply the account offered, as a set off to another claim of the government against him, different from the one in suit here. And it would be manifestly unjust to allow him now to withdraw this account from that claim because it may be barred by the 4th section of the act of April 10, 1806 [2 Stat. 374].

The statute of the state can have no influence on this question. It is something which depends entirely upon the acts of congress. No state law can affect the question of set off, in suits by the government against its officers, because the rule on the subject must be uniform throughout the United States. U. S. v. Robeson, 9 Pet. [34 U. S.] 323. The courts have frequently allowed claims as set off against the government, which were not strictly legal, provided they were due ex equo et bono. U. S. v. McDaniel, 7 Pet. [32 U. S.] 1.

It is to be regretted that there is no act of congress regulating set off in suits brought by the government. There are, however, various acts, such as the 3d and 4th sections of the act of March 3, 1797 (1 Stat. 514), and others—which imply that set off may be allowed.

Being of opinion that the defendants are not equitably entitled to the set off they claim, the judgment must be for the plaintiffs.

Case No. 16,084.

UNITED STATES v. PRESCOTT.

[2 Abb. U. S. 169;[1] 2 Biss. 325; 9 Am. Law Reg. (N. S.) 481; 4 N. B. R. 112 (Quarto, 29); 18 Pittsb. Leg. J. 21.]

District Court, D. Wisconsin. June Term, 1870.

BANKRUPTCY—INDICTMENTS.

1. In an indictment under section 44 of the bankrupt act of 1867 [14 Stat. 539], it is not sufficient, either as to the proceedings or the jurisdiction of the court in bankruptcy, to rely merely upon a general averment. All matters necessary to constitute the offense as defined by the act must be pleaded.

[Cited in U. S. v. Penn, Case No. 16,025; U. S. v. Myers, Id. 15,848.]

[1][Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

2. The description of the goods, in an indictment under the act, should be as definite as in a declaration in trover.

3. The word "feloniously" should be omitted in indictments under the act. The offenses made indictable are misdemeanors.

4. In drawing indictments, figures should not be used for dates.

5. Drawing indictments under the bankrupt act of 1867,—explained.

[Cited in Globe Ins. Co. v. Cleveland Ins. Co., Case No. 5,486; U. S. v. Myers, Id. 15,848.]

Motion to quash an indictment.

The defendant was indicted under section 44 of the bankrupt act, for fraudulently obtaining goods on credit; and now moved to quash the indictment upon grounds which appear in the opinion.

James G. Jenkins, for the motion.

G. W. Hazleton, Dist. Atty., opposed.

MILLER, District Judge. The first count of the indictment charges that on a certain day mentioned. in the district court of the United States for the district of Wisconsin, under and pursuant to an act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, proceedings in bankruptcy were duly commenced against Alphonso Prescott, Leander F. Snyder, and R. H. Lovell (whose full Christian name is to the said grand inquest unknown), as insolvent debtors, and partners under the name of Prescott, Snyder & Lovell, who thereupon afterwards, to wit, on a certain day mentioned, were adjudged bankrupts; that prior to the dates last aforesaid, and within three months before the commencement of said proceedings in bankruptcy, to wit, on August 16, 1869, within the jurisdiction of this court, and at and in the district of Wisconsin, the said Alphonso Prescott, Leander F. Snyder, and R. H. Lovell, then and there representing themselves to be associated together as copartners, under the firm of Prescott, Snyder & Lovell, and holding themselves out as wholesale merchants, and jobbers of boots and shoes, under the false color and pretense of carrying on business and dealing in the ordinary course of trade of wholesale boot and shoe merchants and jobbers, did then and there wrongfully, unlawfully, and feloniously obtain on credit, from one Lyman Dike, certain goods and chattels, to wit, a large quantity of boots and shoes, of the value of five thousand dollars, with the intent then and there, by the obtaining of said goods and chattels, to defraud the said Lyman Dike, contrary to the statute of the United States in such case made and provided, and against the peace and dignity of the United States of America. There are other like counts of the indictment, except as to the names of persons from whom goods had been obtained by defendants.

It is alleged in the motion to quash the indictment that it is defective in not setting forth the manner in which the proceedings in bankruptcy were commenced, and also in the description of the goods, &c.

The court exercises jurisdiction in bankruptcy as limited by the act; and proceedings must be commenced and prosecuted substantially as the act directs. Neither as to the proceedings nor the jurisdiction of the court in bankruptcy, is it sufficient in an indictment under the act to rely merely upon a general averment. All matters necessary to constitute the offense must be pleaded. It is not sufficient, as in this indictment, to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven in order to convict, that a petition in bankruptcy was presented to the district court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction. Of the bankrupt consolidated act of 12 and 13 Vict., section 44 of the act under which the indictment in question was framed, is almost a literal copy. Several decisions of courts in England, as to requirements in the prosecution and trial of indictments under their act, were made and published before the passage by congress of our bankrupt act, and to which I refer as proper for consideration: Reg. v. Lands, 33 Eng. Law & Eq. 536; Reg. v. Ewington, 41 E. C. L. 178; Rex v. Jones, 24 E. C. L. 156. It must appear that the bankrupt obtained goods within three months of the bankruptcy, by means of a representation which he knew to be false, that he was carrying on business and dealing in the ordinary course of trade, and such representations must be actually made by him. Reg. v. Boyd, 5 Cox, Cr. Cas. 502.

The description of the goods obtained by defendants is too uncertain; instead of a large quantity of boots and shoes, a certain number of pairs of boots and also of shoes, or a certain number of packages in boxes of boots and also of shoes, should be described. This could be ascertained from the bills of sale. The description of the goods in an indictment should be as definite as in a declaration in trover.

The word "feloniously" should be omitted in indictments under the act. The offenses made indictable are misdemeanors. And in drawing indictments, figures for dates should not be used.

This being the first indictment in this court under the bankrupt act, I have prepared this opinion as a guide to the district-attorney in future. The indictment will be quashed. Order accordingly.

Case No. 16,085.

UNITED STATES v. PRESCOTT.

[2 Dill. 405.] [1]

Circuit Court, D. Minnesota. 1872.

BANKRUPT ACT—INDICTMENT—EVIDENCE.

The compulsory examination of a bankrupt under oath cannot be given in evidence against him on a criminal proceeding.

Indictment under section 44 of the bankrupt act [of 1867 (14 Stat. 539)], charging the defendant with disposing of his property with intent to prevent it from coming into the possession of the assignee in bankruptcy. The defendant had, before being indicted, been compelled to submit to an examination under section 26 of the act, and that examination was reduced to writing and signed by the bankrupt. On the trial of the indictment the district attorney offered in evidence to establish the fraudulent disposition of the property charged in the indictment the above mentioned examination of the defendant in bankruptcy.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. It is our opinion that the evidence offered is not competent. The general rule certainly is that evidence given or statements made by a party under compulsion or order of court tending to criminate himself cannot be put in evidence on a criminal proceeding against him. Reg. v. Garbett, 1 Denison, Crown Cas. 236. This case falls within this principle. Evidence excluded.

Case No. 16,086.

UNITED STATES v. PRESSY.

[1 Lowell, 319.] [2]

District Court, D. Massachusetts. April, 1869.

PEDLERS — LICENSE AND SPECIAL TAX — INDICTMENT.

A pedler who has duly applied to the assessor for a license in April, is not indictable for carrying on business without payment of the special tax, between the 1st and 7th days of May, before the tax was, in the usual course of business, assessed upon him for that year, if he intended during that time to pay the tax when it should be assessed, although when the tax bill was presented him on the 21st of May he refused to pay it, having stopped business on the 7th.

The defendant [Samuel J. Pressy] was indicted under the seventy-third section of the act of 1864, as amended by that of July 13, 1866 (14 Stat. 113), for carrying on the trade or business of a pedler of the third class without paying the special tax imposed on that business by the same statute. The evidence tended to show that the defendant had duly paid his tax for 1867, and that in April, 1868, he duly applied to the assessor of internal revenue of his district to pay the special tax for that fiscal year, beginning with May 1, 1868; that four or five days afterwards he sold out his business, and had not carried it on since. The taxes were usually assessed about the 20th of May in each year, and the bills were sent in on the next day. The defendant's bill was sent him as usual, but he had neglected and refused to pay the tax, and was indicted in January, 1869.

M. F. Dickinson, Jr., Asst. U. S. Dist. Atty.
S. E. Floyd, for defendant.

LOWELL, District Judge, ruled that if the defendant had been guilty only of a neglect or refusal to pay his tax after he had ceased to carry on the business, he was not, for that alone, liable to indictment under the section cited. That the offence described in the law was the carrying on a trade or business without payment of a tax, and if the defendant, when he carried on the business before his tax was levied, had no intent to defraud the government, he could not be lawfully convicted. His application to be assessed was all that he could do, or was bound to do, until the bill was rendered. So that, while many defendants had been rightly convicted under this section who had never been assessed for a tax, because the failure to assess them arose out of their own wrong in not making application to the assessor, and therefore they could not be heard to object the want of assessment; yet this stringent penalty was not intended for delinquent taxpayers merely as such, if they had been guilty of no act or omission at the time they carried on their business. The government officers, in adopting what appeared to be a reasonable and perhaps necessary practice of giving credit for the tax for twenty days while their lists were preparing, did not thereby expose all tradesmen to indictment who took advantage of that credit.

The district attorney declined to go to the jury on the question of intent, and the defendant was acquitted.

Case No. 16,087.

UNITED STATES v. PRESTON et al.

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

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

WRIT OF ERROR—RECORD—DUTY BONDS—PAYMENT BY SURETIES—SUBROGATION.

1. Where irregularities appear in records coming from the district to the circuit court, this court will in future decide on the record

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

[2] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

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

alone, disregarding the parol admissions of the parties.

2. Under the sixty-fifth section of the duty act of March 2, 1799 [1 Stat. 676], the surety having discharged the bond for duties to the United States, is entitled to no other advantages secured to the United States, except the preference and priority reserved to the United States to be first paid out of the estate of the principal. He is not entitled to proceed against the person and effects of executors and assignees in the cases mentioned in this section; to require special bail; to demand judgment at the first term; to sue in the federal courts when the parties are citizens of the same state.

[Cited in U. S. v. Ryder, 110 U. S. 740, 4 Sup. Ct. 201.]

[Cited in Grove v. Little, 11 Leigh, 195; Jackson v. Davis, 4 Mackey, 199; Zook v. Clemmer, 44 Ind. 29.]

3. Where the surety has paid the bond, he cannot maintain assumpsit in the name of the United States, against the assignees of the principal. The only remedy is for money laid out, &c. on the bond in his own name, under the privilege granted to him by the sixty-fifth section.

[Cited in U S. v. Ryder. 110 U. S. 740, 4 Sup. Ct. 201.]

4. Where one obligor, though a surety, pays the bond, he cannot maintain an action on it in the name of the obligee against his co-obligors, nor an action for money laid out and advanced, except in his own name.

[Cited in Edgerly v. Emerson, 23 N. H. 560.]

Error to the district court of the United States for the district of Pennsylvania.

It appeared from the agreement of counsel, that a suit was brought in the court below by the United States against Joseph and Thomas Lea, and Perrit their surety, upon a duty bond, upon which a judgment was rendered, and the amount of it was paid by the surety, to whom the bond was surrendered for his reimbursement out of the estate of Joseph Lea, in the hands of the defendants, voluntary assignees of all his estate. [Case unreported.] The present action was assumpsit, brought in the name of the United States against the assignees [Preston and Bunker], but intended for the use of the surety; and upon a motion of the plaintiff's counsel to the court below to have the suit so marked, the court dismissed the suit. The counsel entered into a written agreement, in which certain questions are stated for the decision of the appellate court, which will appear in the opinion given by that court.

For the plaintiff it was contended, that under the terms "advantage, preference or priority," in the sixty-fifth section of the collection law of March 2, 1799 (1 Story's Laws, 631 [1 Stat. 676]), the surety is entitled to every advantage reserved to the United States by that section, and consequently may sue in the federal court, and may demand a trial on motion at the return term of the writ. (2) That the assignees can not make any equitable defence in this suit, which they could not set up against the United States. He cited the following cases: 2 Ves. Sr. 622; 1 Atk. 135; 1 Ch. Obl. R. 64; 1 Johns. Ch. 413; 17 Mass. 464; 2 Bin. 382; 2 Bos. & P. 268; 1 East, 220; 1 Caines, 122; Poth. pt. 2, c. 3, § 5; Id. c. 6, § 6; Id. pt. 3, c. 1, art. 6, § 2.

On the other side, it was insisted, that the debt to the United States having been paid by the surety, this suit, which is assumpsit, could not be maintained in the name of the United States, and further, that the only advantage intended by the sixty-fifth section of the collection law to be granted to the surety, is that of preference to be paid out of the effects of the principal in the hands of his assignees or executors. They cited 1 Serg. & R. 339; Whart. Dig. 315, § 65; Winchester v. Hackley, 2 Cranch [6 U. S.] 342; Clason v. Morris, 10 Johns. 524, 539, 546.

WASHINGTON, Circuit Justice. This case comes before the court upon a writ of error to the district court. It was an action of assumpsit brought in that court in the name of the United States against Jonas Preston and Nathan Bunker, voluntary assignees of the estate and effects of Joseph Lea, in which a declaration was filed containing three counts. The first is for money had and received by the defendants from the estate and effects of Lea, to the use of the United States. The second is upon insimul computassent. The third count is special. It states, that on the 10th of August, 1822, the said Lea was indebted to the United States in a certain sum for duties, for the payment whereof he had executed a bond to the United States; and on the same day, the said Lea, being insolvent, made a voluntary assignment of all his estate and effects to the defendants, who accepted the assignment, by means whereof they received enough of the estate and effects of the said Lea to pay his said duty bond to the United States; in consideration whereof, and of the preference, priority, and advantage of payment by act of congress in such case made and provided, the defendants undertook and promised the United States to pay them the said sum due by Lea, out of the estate and effects so assigned to them. The conclusion of the declaration is in the usual form.

The plea of the general issue being filed, the district attorney, at a subsequent term, moved, in behalf of the United States, that this suit should be marked, to the use of John W. Perrit, the surety in the duty bond, and that it be proceeded in accordingly for his use, with the preference, priority, and advantage of the United States. This motion was overruled, and judgment was entered for the defendants; whereupon it was agreed by the counsel, that a writ of error should be sued out from the circuit court, and that the questions to be determined by that court should be, first, whether Perrit, the surety, might sue and recover in the district court, in the name of the United States, with the preference, priority, and advantage, by law secured to them? And, secondly, whether the defendants were entitled to make any

equitable defence against the plaintiffs in this action, other than such as might be made against the United States?

Intending to confine my opinion to the questions which the counsel have agreed to submit to the court, or rather, to the first, I shall notice the loose and irregular manner in which this cause comes from the district court, with no other view but to condemn it. In the first place, it is to be remarked that, although the parties were at issue on the general plea, yet no trial appears to have been had, but judgment was entered (no doubt by the argument of counsel) for the defendants, upon a collateral motion, unconnected with the merits of the issue in the cause. In the next place, the payment of the bond by the surety to the United States, although all important to entitle him to recover, is no where stated in the record, and it is only from the information given to the court by the counsel, on both sides, that I know that to be the fact. It is obvious, in short, that the case is brought up, with a view to obtain the opinion of this court upon what must appear to me to be abstract questions; although they would seem to be connected with the real merits of the cause, not from the record, but from the arguments and the admissions of the counsel. These observations are intended to bring about more precision and strictness in the practice, for the purpose of preventing disappointments and injury to the parties; as I shall feel it to be my duty, in future, to decide causes coming here from the district court, upon the record, and upon that alone.

The first question propounded on this record, depends for its solution upon the true construction of the sixty-fifth section of the act of congress, commonly called the "Collection Law," passed the 2d of March, 1799. It enacts that, in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debts due to the United States, on duty bonds, shall be first satisfied; and that any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt due to the United States, from such person, or estate, being first duly satisfied and paid, shall become answerable in their own persons and estate for the debt so due to the United States, or so much thereof as shall remain due and unpaid; and actions at law are directed to be commenced against them for the recovery of the same. After providing that, in all suits by the United States for the recovery of duties, or pecuniary penalties, special bail shall be required; the act proceeds to provide that, in the cases before mentioned, if any surety in such duty bond, his executors, administrators, or assignees, shall pay to the United States the money due upon such bond, he and they "shall have and enjoy the like advantage, priority, or preference, for the recovery and receipt of the said moneys, out of the estate and effects of such insolvent or deceased principal as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits upon the said bond or bonds, in law or equity, in his, her, or their own name, or names, for the recovery of all moneys paid thereon." As the surety, after he has discharged the bond, is to enjoy the like advantage for the recovery and receipt of the money so paid, out of the estate and effects of the insolvent as is secured to the United States, it becomes material to inquire, what is the advantage secured to the United States? and I feel strongly inclined to the opinion, that the advantage spoken of is nothing more than the preference and priority reserved to the United States by the preceding part of the section. It was earnestly insisted upon by the counsel for the plaintiff, that, under this expression, the surety was entitled, in addition to the privilege of priority of payment, to call upon the collector forthwith to cause a prosecution to be commenced for the recovery of the money due to him; to proceed against the person and effects of executors and assignees, in cases where they have paid any debt of the insolvent, previous to that due to the surety being first satisfied; to require special bail in such action; to demand judgment on motion at the return term of the writ, unless the defendant shall make oath that an error has been committed in the liquidation of the duties demanded upon the bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector, prior to the commencement of the return term; to recover interest at the rate of six per cent. per annum, from the time the bond became due, until payment thereof; and finally, to bring his suit in the federal court.

I think there are many serious objections to this construction of the section. What, for instance, has the collector to do with the prosecution of a suit, the fruit of which is not to go into the public treasury, but into the pocket of a private individual? As a public officer, and on the score of duty, he is enjoined to cause suits to be instituted on certain bonds due to the United States, with the history of which he is well acquainted, having been the agent in taking them, and is therefore enabled to give the necessary instructions to the law officer of the government, in case objections to a recovery should be made by the obligors. But what knowledge can he have of the transactions between the surety and his principal? and why should he be required to conduct a suit, which can be so much better managed by the person alone interested in the event of it? Again, what part of this section is it which grants to the surety the advantage reserved to the United States of proceeding against

the person and effects of the executors or assignees, where they have paid any debt of the insolvent, previous to that due to the plaintiff being first satisfied? The recovery of the surety, spoken of in this section, is to be out of the estate and effects of such insolvent or deceased principal, and not out of the effects of his executors or assignees. It would seem as if congress intended to leave the surety to such remedy as a court of law or equity might afford him, as a privileged creditor, in case of an improper disposition of the estate of the insolvent, by those to whom the management of it was entrusted.

As to the right of the surety to require special bail, and to recover legal interest upon the money paid for the principal, no provision, in favour of the surety, was necessary, as he would, of course, be entitled to the former in an action upon the bond, and to the latter, either in the name of interest, or of damages. The provision respecting special bail, where the United States were plaintiffs, was necessary from the circumstance that pecuniary penalties are embraced in the same sentence which speaks of duty bonds, in suits for the recovery of which special bail could not regularly have been demanded; and the provision respecting interest was probably made for the purpose of fixing a uniform rate of interest to be paid on duty bonds throughout the United States.

The important advantages, after all, which are claimed for the plaintiff under this section, are (1) the right to demand judgment on motion, at the return term of the writ; and (2) to bring his suit in a federal court.

As to the first, it is apparent that great injustice might be done to the defendant by extending this extraordinary privilege to the surety. As between the United States and the principal, it can seldom happen that the latter can have any other defence than to prove a mistake in the liquidation of the duties, and to prove payment of the bond. The legislature would seem to have contemplated no other than the first, by providing for a continuance only when the defendant shall make oath that such an error has been committed, of which he had notified the collector prior to the commencement of the return term. But the defences of the defendants to the suit of the surety may be various, requiring time to put in proper pleas, and to prepare for the trial. He may have paid the debt to the United States; the plaintiff may have reimbursed himself out of property pledged to him for his indemnification; he may have offsets to oppose to the claim; the value of the property assigned to the defendants, or of the assets in the hands of the executors, may fall short of the sum demanded, &c. It is correctly admitted by the counsel for the surety, that these defences may be made by the defendant; and if this be so, how can they be effectually made, if the plaintiff may ask for judgment at the return term of the writ? But what satisfies my mind entirely that this advantage was not intended to be granted to the surety is, the indulgence allowed to the defendant to put off the trial, upon his taking the prescribed oath, in order that he may have an opportunity of diminishing the amount of the bond by showing an overcharge of the duties for which the bond was taken. But could such a defence be made by the principal, or his representatives, against the surety, who, ignorant of a mistake, which it was the duty of the principal to get corrected, had paid the full amount of the bond? I very much doubt if it could be admitted.

(2) As to the jurisdiction of the federal courts in suits by the surety, the question is not whether it ought to have been granted, as to which I entertain no doubt, but whether it is in fact granted by this section? The expressions, as to the United States, are, that the collector shall cause a prosecution to be commenced "in the proper court, having cognizance thereof." This might be either a federal or a state court. But the jurisdiction of the federal court was not reserved to the United States by this section, but by the judiciary law of 1789. Had the expressions before quoted been repeated in relation to the suit of the surety, would it have conferred jurisdiction upon the district or circuit court? I think it would not. They are not intended, or used, for the purpose of conferring jurisdiction upon any court, but merely to direct that the suit shall be brought in the proper court which then had cognizance thereof. But the district court had not then cognizance of this suit, it being between citizens of the same state. In every instance where congress has conferred jurisdiction upon a federal court, in cases arising under a law of the United States, it has been by terms clearly pointing out the particular court which was to exercise it. I refer particularly to the patent act, the copyright act, and the act incorporating the Bank of the United States.

My opinion, therefore, as to the construction of this section is, that the term "advantage" is used as synonymous with "preference and priority," which, in reference to the subject of insolvency in the principal, are clearly synonymous. A preference of payment is nothing more or less than a right to be first paid, and a right of priority is a preference of payment before the other creditors of the insolvent; and such a preference or priority is an advantage enjoyed by the United States, and is by this section conferred on the surety. Had the legislature intended to bestow upon the surety all the advantages secured and reserved to the United States, it is not likely that such an intention would have been expressed by the terms "the like advantage, preference or priority." But if I should be wrong in this interpretation of the section, I feel no hesitation in deciding that the present action cannot be main-

tained, either in a federal or state court. It is exposed to at least one fatal objection, which is, that it is an action by the United States to recover against the assignees of the principal in a bond, a debt which, it is admitted, had been paid by another obligor in the same bond. This would have been no objection to the suit of that other obligor upon the bond, because the sixty-fifth section of the above act authorizes him to maintain such a suit for the recovery and receipt of the money so paid to the United States, out of the estate and effects of the principal.

Nor is the question altered by the motion which was made in the district court "to mark the suit to the use of the surety in the duty bond," because I hold it to be perfectly clear, that where one obligor, though a surety, pays the bond, he cannot maintain an action upon the same bond in the name of the obligee against his co-obligor; nor can he maintain an action for money laid out and advanced for his principal, to recover the money so paid, except in his own name; for to him alone the debt is due. To be sure, the assignee of a chose in action, not assignable at law, must bring his suit in the name of the assignor, because the debt, though in equity due to the assignee, is, in the view of the law, due to the assignor, and the assignee, until the courts of law assumed an equitable jurisdiction over the case, for the purpose of protecting his interest, was obliged to resort to a court of equity. But in the case now under consideration, the legal remedy, either on the bond or for money paid, laid out and expended for the insolvent, is in the surety, and the United States, the nominal plaintiffs, have no right, either legal or equitable, to maintain this suit.

The second question stated for the opinion of the court, is not very intelligible to my mind, as I do not well understand what is meant by an equitable defence to a legal action, which this unquestionably is. If the particular defence which was intended to be set up had been stated, the solution of the question might have been attended with less difficulty. In its present shape it has too much the appearance of an abstract question to justify the court in attempting to answer it. At all events, an answer to it is rendered unnecessary by the decision upon the first point.

The judgment of the district court must be affirmed with costs.

Case No. 16,088.

UNITED STATES v. PRICE.

[3 Hall, Law J. 121.]

District Court, D. New York. 1810.

SUMMONING JURY IN FEDERAL COURTS — COMPLIANCE WITH STATE LAWS—CHALLENGE TO ARRAY—PRACTICE.

[1. The provision in the judiciary acts, requiring jurors to be designated in the federal courts, as nearly as practicable, in the same manner as in the state courts, does not require a compliance with the state laws when in the opinion of the court it is wholly impracticable to do so.]

[2. The provision in the statute that jurors shall be returned, as there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, etc., leaves it entirely discretionary with the court to give or not to give any directions as to the place from which the jurors shall be summoned. If defendant desires that such directions should be given, he should apply to the court therefor. In the absence of such application, it is no ground of challenge to the array that the marshal has summoned the jurors according to his own will.]

At the district court of the United States, held before his honor, TALLMADGE, District Judge, which commenced its sessions on the fourth instant, several of those suits which have been instituted to recover penalties under the embargo laws were noticed for trial. Among others the cause of the United States against Edward Price, which was an action of debt to recover against him, as master or person having charge of the schooner Regulator, or as being knowingly concerned in the lading of the said vessel, penalties for loading in the nighttime, without a permit, and without the inspection of the proper revenue officer. A great part of the jury which appeared to serve at this court were from Orange, a county fifty or sixty miles from the city, from whence they had been summoned by the marshal without any official direction of the judge, and were selected by the mere will of the marshal, without any attempt having been made to conform to the mode of forming juries in the courts of this state. By the judiciary act of the United States, passed in 1789 [1 Stat. 73], it is enacted "that jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each state respectively, according to the mode of forming juries therein then practised, so far as the laws of the same should render such designations practicable by the courts of the marshals of the United States; and that the jurors should have the same qualifications as are requisite for jurors by laws of the state of which they are citizens, to serve in the highest courts of law of such state, and should be returned as there should be occasion for them from such parts of the district, from time to time, as the court should direct, so as should be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services." This law as to the mode in which jurors were to be designated refers to the time when it was passed, but, alterations having been afterwards made in the mode of selecting jurors in several of the states, and particularly in our state, by an act which provided that jurors in this state should be selected by ballot from a list annually returned to the clerk's office of every county, by certain

persons designated in the law; congress, in May, 1800 [2 Stat. 82], passed a law, which, so far as relates to the mode of selecting jurors, is nearly in the words of the law of 1789, and declares that jurors to serve in the courts of the United States shall be designated by lot, or otherwise, in each state or district, respectively, according to the mode of forming juries to serve in the highest courts of law therein, then practised, so far as the same shall render such designation practicable by the courts or marshals of the United States. But the United States' law of 1789, so far as it relates to the courts directing from what part of the district the jury shall be taken, remains unaltered.

On Tuesday last, the district attorney moved to bring on the trial of the above-mentioned cause, when Mr. Griffin and Mr. Colden, who were of counsel for the defendant, filed a challenge to the array, alleging that the jurors were not legally returned, because they had been summoned by the marshal of his mere arbitrary will; that they had not been returned from a part of the district directed by the court. To this challenge the attorney of the United States demurred ore tenus; that is to say he made a parol declaration that no legal objections to the jury were shown by the defendant's challenge. The counsel for the defendant insisted that the attorney of the United States ought to be compelled to put his demurrer in writing, but the court determined, that a parol demurrer was sufficient, and the court also decided that the attorneys might immediately proceed to argue on the demurrer whether there was cause of challenge which they accordingly did.

The attorney of the United States contended that it was impracticable to select the jury by ballot, as was practised by the courts in this state, or in anywise to conform to the state laws in this respect; that the part of the United States law which provides for the jurors being returned from such part of the state as should be directed by the judge, was a provision merely intended for the ease and convenience of jurors, and gave the parties no rights; besides, that though the act of congress authorized the court to direct from whence the jury was to come, this authority was only to be exercised on application of the party who desired it to be executed, and the defendant having made no application to the court, he was not to be allowed to make the want of its direction an objection to the jury; and, lastly, the attorney of the United States insisted that the jury had been summoned according to what had been the practice of the court from its institution.

The counsel for the defendant insisted that as the attorney of the United States had demurred to the challenge, and took no exception to its form, he admitted the facts. He had admitted therefore that the jurors had not been elected by ballot according to the state laws as far as was practicable, and that they had not been summoned from a part of the district directed by the court; that therefore the only inquiry was, whether the laws of congress required that these things should be done, and the defendant had nothing to do but appeal to the statute book; that if the attorney relied on the impracticability of conforming to the practice under the state laws, he ought to have pleaded to the challenge, or have moved to quash it; but as the court had decided that it was now proper to discuss the points which the attorney had been permitted to state, the defendant's counsel would, in behalf of the defendant, answer the arguments which had been offered by counsel for the plaintiffs.

The defendant's counsel then proceeded to state that, as to the manner of electing the jury, it was to be observed, that the act of congress did not require a full compliance with the state laws; that the great object was to preserve to suitors in the courts of the United States, as far as was practicable, the invaluable right of having the jurors elected by ballot, and that this was by no means impracticable; that in every clerk's office, in the state, there was a book containing the names of the freeholders in the county qualified to serve on juries; that the judge might have directed from what county the jury should have been summoned, that the marshal might have applied to the clerk of that county for a copy of his list of freeholders; from that list he might have made his ballots, and he might have balloted for the panel in the presence of the judge or the clerk of this court, which would have been a very near approximation to the mode of electing jurors for the state courts; or the marshal, with the assistance of his deputies, might have made a list of freeholders in any part of the district that the court might have designated, and then there would have been no difficulty in making the ballot. But, at any rate, no sufficient reason had been offered for the neglect of part of the act which requires the court to direct from what place the jury should be taken. The terms of the law of congress left no discretion with the court in this respect. The words of the statute are not that the court "may," but that the court "shall," direct from what part of the district the jurors shall be returned. That it was absurd to say, that the defendant in such cause was to apply for the direction of the court, because jurors were summoned to try all the causes which might be brought on at a sitting; and, if such an application was to be attended to from each defendant, there might be as many panels returned as there were causes. That the defendant might not have had an opportunity of making such an application; for that the process to summon the jury might have been issued and executed before he received notice that his cause was to be tried. Besides, that it was a general principle, that the plaintiff

must take care that the jurors that appeared, as well in respect to the manner of their being chosen as to their qualifications, were proper to try his cause, and if they were not, the defendant might take advantage of it, as was every day's practice for defendant to do. As to the former practice of the court, the defendant's counsel observed, that that ought to have no influence on his honour's decision, because it was well known that until very lately the causes which were submitted to a jury in this court were very few, and comparatively of very little consequence, and were seldom of a nature to excite any fears that the jury might have a bias to the one side or the other. That therefore the manner in which jurors had been selected had never excited any attention; but at this time the case was very different, for it was not an exaggeration to say that there were now millions depending on the event of suits which had been instituted for breaches of the embargo laws. That it was well known that libels were now upon the records of the court which proceed upon the ground that the president's proclamation of the 19th April last, opening the intercourse with Great Britain, was an illegal act. That he had no authority to issue it. That therefore it was a mere nullity, and that, of course, the nonintercourse act of the 1st of March, with all its denunciations of penalties and forfeitures, had always been in full force. That if the courts were to be of this opinion, there was hardly a merchant in the United States who was not at the mercy of the executive officers of the government, who might not have their property seized, and who might now be prosecuted in suits of this nature for enormous penalties. It became therefore now of the utmost importance to see that all the cautions which the laws had provided for an impartial selection of jurors should be observed. That the questions between the government and the citizens which were to be decided in this court under the embargo laws it was well known had greatly excited the public mind. It would hardly be denied that many might be found in the district who were so blinded by their political prejudices and by their passions, that they would never acquit a political opponent accused of a breach of the embargo laws, which were so dear to those who favor them; at the same time it was not meant to be denied, but that men might also be found as prejudiced against convicting. If then a marshal might run from one end of his district to the other to select just whom he pleased for trials of this nature, it was in fact putting it in the power of an individual to determine who should be convicted, and who acquitted, in the courts of the United States.

The counsel of the defendant called the attention of the court to the constitution of the United States and its amendments. The first provided that the trial of all crimes shall be by jury. But it being feared that this inestimable right was not sufficiently guarded by this simple provision, the seventh article of the amendment provides, that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. The counsel then asked whether it was possible to suppose, that the framers of the constitution or of its amendments could have imagined, that notwithstanding the provisions, a citizen might be subject to trial for his life, even by a jury selected at the mere will of a marshal who might be his prejudiced political opponent or his bitterest enemy. Had a defendant, the counsel asked, any security for an impartial jury in cases like this, where the jurors may be selected at the mere will of an officer holding his commission, at the pleasure of the officer of the government, at whose instigation the suit is instituted, and who has an eventual pecuniary interest in the conviction of the defendant; for if the penalties which are demanded in these cases are to be levied on execution, the marshal's share of them will be no inconsiderable fortune.

The counsel for the defendant both declared, that the attempt they made in this case was merely with a view to secure to suitors in this court the benefits of those provisions of the state laws which were so well calculated to guard against corruption and partiality, and which, perhaps, was a greater improvement in jurisprudence, than the institution of trial by jury itself. That in what they had said respecting the marshal and jurors, they referred entirely to what might be, without intending any insinuation as to what was or had been. That as to the present marshal, they had never heard anything to his prejudice, and they did not know anything of the jurors, from a distant part of the district, who were on the panel.

When the United States attorney had said a few words in reply to the arguments of the defendant's counsel, the judge told him it was unnecessary for him to proceed, as the court was satisfied on the subject.

We shall not attempt to detail the reasons his honour gave for his decision, for fear of mistakes. He, however, exactly agreed with the attorney of the United States in all points. He thought it was wholly impracticable to have any ballot or to conform in any respect to the state laws. That it was discretionary with the court to give or not, at its pleasure, any direction as to the summoning the jury; and that if a defendant was desirous that a direction should be given, it was his business to apply for it, and the judge ordered the clerk to enter on the minutes the demurrer of the attorney of the United States, and that, upon hearing counsel thereupon, the court gave judgment in favor of the United States. So that, according to the decision, the marshal of the United States in all cases, whether civil or criminal, whether the life or property of a defendant is concerned, or

whether the defendant be his friend or enemy, has an uncontrollable power of selecting whom he pleases for jurors.

It would really seem a little difficult to reconcile the entries which appear on the records of the court with the provisions of the constitution and laws of the United States. The laws require that the jurors shall be selected, as far as is practicable, by ballot, and that they shall be taken from a part of the district designated by the court. The defendant alleges by his challenge, that neither of these provisions have been complied with.

The attorney of the United States by his demurrer admits these allegations to be true, and yet the judgment of the court is that the jury have been legally summoned.

Case No. 16,089.

UNITED STATES v. PRICE.

[2 Wash. C. C. 356.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

DEPOSITIONS—VACATING COMMISSION.

A commission, which had been executed and returned, was set aside because it had been opened by one of the officers of the government, before it came into the hands of the clerk.

[Suit by the United States against Price's administrator.]

Rule to show cause why the commission for taking depositions should not be accepted as duly returned, or be sent back for a more regular return. The commission, in consequence of a misdirection of it by the commissioners, had been opened first by the secretary of war, and afterwards by some other officer of the government, before it came to the hands of the clerk of the court.

BY THE COURT. This rule was granted on account of the irregularity in opening the commission, as to which there is no doubt. If the objection had been to the execution of it, the rule would not have been granted. Let it be set aside. Issue a new commission, to which the original papers attached to the old commission, may now be annexed.

Case No. 16,090.

UNITED STATES v. PRICE.

[2 Wash. C. C. 460.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

BILL OF EXCHANGE DRAWN BY PUBLIC AGENT — CONSIDERATION.

1. A bill of exchange was drawn by a public sub-agent, on the general agent of the United States, and payment of the same was at first refused, but it was afterwards made to the defendant, and soon after, it having been discovered that the sub-agent, who drew the bill, was unfaithful, notice was given by the general agent to the defendant, who held the money, as administrator of the payee, not to pay it over, as it was claimed by the United States.

2. Though a bill drawn for value received, might, prima facie, be considered as drawn upon a consideration, yet, when a strong ground is laid to show a want of consideration, the defendant ought to show that value was given for the bill.

One Taylor, a deputy military agent of the United States, at New-Orleans, drew two bills of exchange, for fifteen hundred dollars each, as agent, on Mr. Leonard, of Philadelphia, principal agent, in favour of one Elkin, who endorsed the same in blank, and they were brought by O'Neil to Philadelphia, and presented to the drawee for acceptance. The drawee, suspecting something wrong from the heavy drafts of Taylor, refused to accept, until he should receive from the secretary of war orders to do so. O'Neil expressed great anxiety to get the bills accepted, and offered him, as a premium, to accept, first two and a half per cent., and then one hundred dollars, which were refused with disdain. O'Neil then informed Leonard that he was about to leave town, and should deposit the bills with the defendant, Price, to whom he requested him to pay their amount. Leonard, afterwards receiving orders from the secretary of war to pay the bills, did so, within the days of usance; but, in a day or two after, hearing that Taylor was dead, and his suspicions of foul play being strengthened, he called upon Price, and requested him to repay the money, offering to re-deliver the bills to him. Price declined this, acknowledging that he still had the money; but apprehending that he might be answerable to O'Neil for the same, resolved to retain it until it should be determined who was entitled to it. O'Neil having afterwards died, Price took out letters of administration upon his estate. It was proved that Taylor was a sot and gambler, and played at the house of Elkins and O'Neil, who were partners in the business of gambling. That Taylor had before drawn bills on Leonard, in their favour, which they sold in the market at a great discount. There were other circumstances proved, tending to throw suspicion over the fairness of this transaction.

WASHINGTON, Circuit Justice, then charged the jury, and stated, that although, prima facie, a bill drawn for value received, might be considered as drawn for consideration, yet, that when so strong a ground was laid, as is done in this case, to show the want of consideration, and to warrant the belief that these bills were drawn by a profligate public officer, to satisfy gambling debts, to those who were the payee and endorser of the bill, it behoved the defendant to clear the case of these suspicions, and to show that value was given for them. The evi-

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

dence is certainly very strong in this case, against the fairness of the consideration paid by Elkins as well as by O'Neil. Of all this, however, the jury are the proper judges.

The jury found for the defendant.

Case No. 16,091.

UNITED STATES v. PRIMROSE.

[Gilp. 58.] [1]

District Court, E. D. Pennsylvania. Feb. 27, 1829.

SURETY ON REVENUE BOND — LIABILITY OF ADMINISTRATRIX—PLENE ADMINISTRAVIT.

In a suit of the United States, against the administratrix of a surety in a revenue bond, brought thirteen years after the breach, and twelve years after she had settled her administration account, without having had previous notice of the bond or forfeiture, she was held to be entitled to judgment, on pleading want of assets and fully administered.

[This was a suit by the United States against Violet Primrose, administratrix of John Primrose, deceased.]

This case was submitted to the court on the pleadings.

Mr. Ingersoll, U. S. Dist. Atty.

A. Randall, for defendant.

HOPKINSON, District Judge. Suit was brought on a bond dated on the 19th April, 1815, executed by John Primrose, in his life time, as surety for one Daniel Simpson, with a special condition, according to an act of congress, passed the 18th January, 1815, entitled "An act to provide additional revenues for defraying the expenses of government, and maintaining the public credit, by laying duties on various goods, wares and merchandise, manufactured within the United States." 2 Story's Laws, 1471 [3 Stat. 180]. The declaration charges that the said Simpson did not conform to the requisitions of the said act of congress, and the conditions of his said bond, and the breach is laid on the 1st of May, 1815. On the 27th May, 1815, a few weeks after the execution of the said bond, Primrose died. His widow, the present defendant, administered to his effects, and immediately called, by a notice published in the papers of this city, on all persons having any claims on the estate, to present their accounts. The administratrix then proceeded in regular course, to file and settle her accounts in the register's office; which settlement, in August, 1816, was duly and finally confirmed in the orphans' court. By this settlement a balance appeared to be in her hands of two hundred and twenty-nine dollars, and ninety-one cents. The debts due from the intestate far exceeding this sum, the administratrix, according to the law of Pennsylvania, applied to the orphans' court to appoint auditors to apportion and distribute this balance among the creditors, according to their respective rights. No further proceeding appears to have taken place on this application; for, in fact, the whole balance had previously, to wit, on the 29th July, 1816, been paid into the hands of William Delany, attorney at law, and acting for the creditors. According to his receipt the money was paid to them, "to be distributed according to the claims of the creditors, on the adjustment of the proportions." Mr. Delany has been dead several years, but several receipts have been found among his papers for sums paid to creditors, as their dividends of the estate. Things remained in this situation until the 11th March, 1828, nearly thirteen years, when the present defendant received a note from the district attorney, claiming the penalty of the bond, to wit, three hundred dollars, which was followed by this suit, brought to May sessions, 1828. This was the first knowledge the administratrix had of the existence of the bond. The declaration recites the bond, and the condition, and alleges the breach in the same words. The defendant pleads "nil debet," which puts the alleged breach in issue; but it is now admitted that the bond was forfeited. She further pleads "want of assets, and fully administered before she received notice of the obligation mentioned in the declaration." This exposition of the circumstances of the case, is sufficient to show that no devastavit has been committed; and the defendant is entitled to a judgment.

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

UNITED STATES (PRINCE v.). See Case No. 11,425.

Case No. 16,092.

UNITED STATES v. PRIOR.

[5 Cranch, C. C. 37.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

INDICTMENT — JOINDER OF OFFENSES — LARCENY AND RECEIVING STOLEN GOODS—CONFESSIONS.

1. A count for stealing, and a count for receiving stolen goods, may be contained in the same indictment, and the attorney for the United States will not be put to his election upon which to proceed.

2. The whole confession must be given in evidence, if any part is given, but the jury have a right to judge for themselves of the truth thereof, or of any part of it.

Indictment. The first count was for stealing the goods of one Eckloff. The second count was for receiving them, knowing them to be stolen.

Brent & Brent, for defendant, contended that the court ought to oblige the attorney for the United States to elect the count upon which he would proceed; and they cited Russell on Crimes.

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

THE COURT (MORSELL, Circuit Judge, absent) refused.

R. J. Brent contended that the confession of the defendant must be taken altogether; and that if there is no evidence to contradict any part of the confession, the attorney for the United States cannot be permitted to argue to the jury that any part of the confession is false.

CRANCH, Chief Judge, said that the question has often been made in this court; and the court had always decided, that the whole confession must be given in evidence to the jury; but that they had a right to judge for themselves of the truth of it, or of any part of it. See Starkie, pt. 4, p. 48.

Verdict, not guilty.

Case No. 16,093.

UNITED STATES v. PROUT.

[1 Cranch, C. C. 203.] [1]

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

NUISANCE—DISORDERLY HOUSE.

The selling of spirituous liquors to negroes, in a public manner, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes it a disorderly house.

[Cited in State v. Crawford, 28 Kan. 733.]

[This was an indictment against W. Prout.]

THE COURT, in answer to a question from the jury, instructed them that the selling of spirituous liquors to negroes in a public manner, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes it a disorderly house. Verdict for United States.

The defendant had not an ordinary license. Fined $100.

Case No. 16,094.

UNITED STATES v. PROUT.

[4 Cranch, C. C. 301.] [1]

Circuit Court, District of Columbia. March Term, 1833.

FORGERY—EVIDENCE—COMPARISON OF HANDWRITING—SLAVERY—ENTICING AWAY.

1. Comparison of hands is not evidence to prove forgery. Witnesses skilled in handwriting will not be permitted to give their opinion, upon inspection of the papers, whether the forgery was done by the defendant.

2. A count under the Maryland act of 1796 (chapter 67, § 19), for giving a pass to a slave, is bad if it do not aver that the master or owner was thereby deprived of the service of his slave. But upon conviction of a free person on an indictment under the tenth section of the Maryland act of 1751 (chapter 14), for enticing a slave to run away, and who actually ran away, the offender may be fined under the nineteenth section of the Maryland act of 1796 (chapter 67), without an averment of loss of service.

The defendant [John W. Prout] was tried, upon two indictments, by the same jury. The first indictment was for forging a certificate of freedom under the seal of this court.

Upon the trial, Mr. Key, U. S. Atty., offered to show to the jury, the prisoner's signature, written in the presence of the marshal, and to allow them to compare it with the handwriting of the forged certificate, and cited 4 Starkie, Ev. 570.

But THE COURT (nem. con.) rejected the evidence.

Mr. Key then offered to submit the papers to a witness skilled in handwriting, and to give the opinion of the witness in evidence, whether the paper was forged by the prisoner.

But THE COURT (nem. con.) refused; and upon that indictment the jury found the prisoner not guilty.

The second indictment had two counts. The second count in that indictment was under the Maryland act of 1796 (chapter 67, § 19), for giving a pass to the slave of one Lucy Miller, without averring that she thereby was deprived of the service of her said slave.

THE COURT said that this count was insufficient, and instructed the jury that the United States could not recover judgment upon it; and the jury found the prisoner not guilty on that count.

The first count of the second indictment was upon the Maryland act of 1751 (chapter 14, § 10), by which it is enacted, "that if any free person shall entice and persuade any slave within this province, to run away, and who shall actually run away, from the master, owner, or overseer, and be convicted thereof by confession, or verdict of a jury upon an indictment or information, he shall forfeit and pay the full value of such slave, to the master or owner of such slave, to be levied by execution on the goods, chattels, lands, and tenements of the offender, and in case of inability to pay the same, shall suffer one year's imprisonment without bail or mainprise." This first count of the second indictment charged that the defendant, "being a free person, did, on," &c., "at," &c., "entice and persuade a certain slave named Joseph Dozier, the property of Lucy R. Miller, of Washington county, the said slave then and there being in the said county, to run away, which said slave did then and there actually run away from his said mistress and owner, against the form of the statute," &c.

Upon this first count of the second indictment the jury found the prisoner guilty; and his counsel, Mr. W. L. Brent, moved the court in arrest of judgment as to any fine or corporal punishment. The conviction only gives the owner a right to recover the value of the slave, by a new action founded upon the verdict.

Mr. Key, contra, contended that the court must hear evidence of the value, and then render judgment according to the statute,

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

for the value thus ascertained by the court. 11 Petersd. 718.

Mr. Miller, being sworn to testify to the court, stated the value of the slave to be $600. The slave, however, has been recovered by the owner, and the expense of recovering, and loss of service, were much less than the value of the slave.

CRANCH, Chief Judge, after a considerable investigation of cases analogous to this, suggested the following judgment (see Act Md. 1751, c. 14, § 10): Whereupon, all and singular the premises being by the court here seen and understood; and it further appearing to the court here that the said slave in the said first count in the said indictment mentioned, is of the full value of six hundred dollars current money of the United States: It is considered that the said United States recover against the said John W. Prout the sum of six hundred dollars, and the further sum of ——— for their costs, &c., the said sum of six hundred dollars being the full value of the said slave, to be paid to the said Lucy R. Miller in the said first count in the said indictment mentioned; she, the said Lucy R. Miller, being the mistress and owner of the said slave. The said sum of six hundred dollars to be levied by execution on the goods, chattels, lands, and tenements of the said John W. Prout; and in case of his inability to pay the same, then that the said John W. Prout shall suffer one year's imprisonment from this 4th day of May, 1833, without bail or mainprise. See Co. Ent. 368, b; Rastell's Ent. 218–220, tits. "Detinue," "Judgment," 5, 6, 8–13, 16–18, "Chattel," "Detinue of Chattels"; Rastell's Ent. 211, b, "Execution in Detinue," 216, b, "Execution," 8.

THE COURT, however (CRANCH, Chief Judge, contra) gave judgment for a simple fine of $50, under the act of 1796 (chapter 67, § 19).

CRANCH, Chief Judge, was of opinion that the prisoner could not be punished under that act, because there was no averment of loss of service; which averment the court, on the trial, had deemed so necessary that they had instructed the jury that the United States could not recover upon the count founded thereon.

Case No. 16,095.

UNITED STATES v. PRUSSING et al.

[2 Biss. 344;[1] 12 Int. Rev. Rec. 34; 2 Chi. Leg. News, 385.]

District Court, N. D. Illinois. July Term, 1870.

INTERNAL REVENUE—VIOLATION OF LAWS—MANUFACTURE OF VINEGAR.

1. A certain percentage of alcohol being produced in the manufacture of vinegar, such manufacture is within the prohibition of the 4th section of the act of July 20, 1868 [15 Stat. 126].

2. Any mash, wort or wash from which alcohol might be separated by distillation is "fit for distillation," even though such distillation might not be profitable, and the alcohol is never released from its impure state, but kept down by a sour ferment.

3. The intent of the act is to require all the alcohol used in any of the manufactures of the country to be so separated that the tax can be assessed and collected thereon.

4. Congress has the power to compel all parties using alcohol to use tax-paid spirit, instead of generating it within the mass where it is to be subsequently used.

This was in indictment against the defendants, Prussing and Hitz, for having made and fermented on premises other than a distillery duly authorized by law, to-wit: in the vinegar factory of said Prussing, a molasses wash, fit for distillation and the production of spirits. By agreement of the parties the case was submitted to the court for trial without a jury.

J. O. Glover, U. S. Dist. Atty.

I. N. Arnold and Leonard Swett, for defendant.

BLODGETT, District Judge. Although in this case there is some conflict of testimony, mainly as to the ferment used in making the wort, or wash, described in the indictment, yet, in the view I take of the case, I propose to dispose of it upon the facts developed by the defendant's testimony, which are substantially these: The defendant, C. G. E. Prussing, is a vinegar manufacturer in this city, and has been so engaged for many years past. Prior to the passage of the revenue law of July 20, 1868, and after the passage of the act of congress levying excise duties upon distilled spirits, he manufactured vinegar by distilling a grain mash, such as is used by distillers for the production of spirits, but instead of using a distiller's worm by which the vapor is condensed into spirits, the vapor was conducted directly into a tub of prepared water, where it was condensed until the requisite amount of alcoholic infusion was obtained, when the wash thus prepared was passed through the generators and converted into vinegar. At the time the act of July 20, 1868, was under consideration in congress, and about the time it took effect, he, Prussing, was in Europe, and on receiving from the defendant Hitz, who was his general superintendent in the business here, a copy of the proposed law, he wrote to Hitz that the distillation must cease as soon as the law went into effect, and that from that time forward he must manufacture vinegar by fermenting a molasses wash made in the proportion of one barrel of molasses to twenty barrels of water. Hitz, on receiving this instruction, consulted with Dr. Mahla, a leading chemist of this city, who, after some examination of the law, suggested the propriety of using vinegar or sour beer as a ferment in the wash, instead of using yeast, and in accordance with this suggestion the manufacture has since been carried on by making a wash in the proportion mentioned, and producing a fermentation by the addition of the necessary quantity of sour beer, that is,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

about one-third of a barrel of sour beer to a twenty-barrel tub of molasses and water.

The question to be considered and determined in this case is, whether the making of such a wort or wash is a violation of the 4th section of the act of congress above referred to. The portion of said act bearing upon this question is as follows: "Distilled spirits, spirits, alcohol and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxyde of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, including all dilutions and mixtures of this substance, and a tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance either in the process of original production or by any subsequent process; and no mash, wort or wash fit for distillation or the production of spirits or alcohol shall be made or fermented in any building or any premises other than a distillery duly authorized according to law, and no mash, wort or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person other than an authorized distiller shall by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort or wash; and no person shall use spirits, or alcohol, or any vapor of alcoholic spirits in manufacturing vinegar or any other article or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery, and the tax thereon paid. Any person who shall violate any of the provisions of this section shall be fined for every offense not less than $500, nor more than $5,000, and imprisoned for not less than six months, nor more than two years; provided that nothing in this section shall be construed to apply to fermented liquors." 15 Stat. 125.

On the trial, the evidence of the three leading chemists of this city, namely, Drs. Mahla, Blaney and Mariner, was taken, all of whom concurred in testifying that the fermentation of any saccharine substance generated alcohol, and that acetic acid, or vinegar, could only be produced from such substances by first converting the saccharine matter into alcohol, and that the wash in question would contain about 4½ or 5 per cent. in volume of alcohol; that on being thus produced by fermentation, the alcohol existed as such in the wash, and that the process of distillation was only a mechanical method of separating the spirits from the other substances contained in the wash, the alcohol being the product of the vinous fermentation; that the use of a sour ferment, like sour beer or vinegar, caused the alcohol thus evolved to change more rapidly into acetic acid than yeast, and Dr. Mahla testified that the only object of using the sour ferment was to make a wash which would sour or acidify so rapidly as that it would be practically unfit for distillation and the production of alcoholic spirits; that is to say it could not be profitably distilled. The vinous fermentation by which alcohol is produced is the same whether generated by yeast or either of the sour ferments mentioned, the only difference being in the rapidity of acidification after the alcohol is generated. All agree that for the purpose of distillation for the production of spirits for the market this sour ferment essentially injures the wash or wort, although alcohol can be obtained, and was obtained by two of these chemists, on analyses from the wash described in the proportion of about four and one-half and five per cent. in volume to the whole quantity. Yet the quality of the alcohol thus obtained was much deteriorated by the amount of acetic acid which had already formed by the change of a portion of the alcohol to acetic acid and all concurred in the statement that the acidification or acetic decay, as some of them termed it, took place much more rapidly by the use of the sour ferment than by the use of yeast, but that before the acetic acid could be produced the saccharine matter must first become alcohol. In other words, it is evident from the proof that the use of the sour ferment does not prevent the production of alcohol, but only causes it to change into acetic acid more rapidly after it is produced. The same quantity of alcohol is evolved by one ferment as the other.

The question then turns upon the meaning of the words "fit for distillation," as used in the law above quoted. Certainly, according to the evidence, the wort or wash thus made, contains alcohol, which might be separated by distillation. Whether it could be profitably separated or not would depend on circumstances, such as the condition of the grain and other markets, the demand for the alcohol or the purpose to which it was to be applied after being produced. The alcohol is generated and brought into existence in the mass of the wort or wash by the process of vinous fermentation. Is the question of its fitness for distillation to be determined by the fact of whether it can be profitably separated from the mass by distillation or not?

The law declares that the tax shall attach to this substance "as soon as it is in existence as such," whether it be subsequently separated "as pure or impure spirit or be immediately or at any subsequent time transferred into any other substance, either in the process of original production or by any subsequent process." It would seem, then, that the purity or impurity of the spirit produced is not the test or criterion by which the fitness of the wash for distillation is to be determined, because the tax attaches to the spirit, whether pure or impure. So, too, the tax attaches to the spirit on its production, although it may be immediately or at any subsequent time transferred or changed into any other substance, either in the process of original production or by any subsequent process. Here the alcohol is generated and brought into existence as such, and by the

peculiar qualities of the ferment used is rapidly, although not instantly or immediately, changed into acetic acid. I conclude, then, that the phrase "fit for distillation" is not synonymous with the phrase "fit for profitable distillation," but that it means capable of distillation and of the production of pure or impure alcoholic spirits.

The real question is, what did congress intend by this specific prohibition of the making of such wort or wash in a place other than a distillery. The obvious intent of the law was to levy a tax for revenue purposes upon all alcohol and alcoholic spirits entering into the composition of any of the known articles of manufacture in the country, and to require that the alcohol thus produced should be produced in authorized distilleries, where it could be measured and gauged, and its manufacture properly supervised by the revenue officers. The evidence shows clearly that alcohol is necessary for the manufacture of vinegar, and though the evidence shows that the defendants do use spirits that have paid the tax in their factory, yet I can see no reason why, if they can make a wash of saccharine material strong enough to produce four per cent. of alcohol, they may not make it strong enough to produce six or even ten per cent., and thus avoid the use of any distilled spirits, and prevent the receipt of any revenue from this source. The manufacture of vinegar by the vaporization of alcohol generated in such wash or mash as has been previously used by Prussing or other manufacturers prior to the passage of the act of July 20, 1868, is prohibited by this act, and the obvious intent of this law was to require all alcohol used in any of the manufactures of the country to be so separated as that a tax could be assessed and collected thereon. For many of the purposes of manufacture where a small proportion of alcohol only is demanded, the requisite amount could undoubtedly be generated by fermentation within the mass where it was to be subsequently made available; and were persons engaged in the manufacture of such articles to be allowed to generate their alcohol by fermentation without carrying the process forward to the separation of the alcohol by distillation, a large amount of the revenue derivable from the tax on alcoholic spirits would be lost to the government. That, at least, seems to have been the view taken by congress, and it is only for the court to inquire what congress meant. It is certainly within the power of congress to prohibit the production of alcohol in any except specified ways, and to throw such checks and guards around the production of this substance as to compel all parties using it to use tax-paid spirits, instead of generating the spirit, as in this case, within the mass where it is to be subsequently used, and there allowing it to remain or be changed as the case may be. The very clause under which this indictment is found sustains the view which I have taken of the object of the whole section. Why make it a highly penal offence to make any mash, wort, or wash in a place other than a distillery, unless it was intended to prohibit the production of the alcohol which would be generated in such wort, mash, or wash? The making of the wort, mash or wash in such place could produce no injury to any one except by reducing the demand for alcohol to the extent to which it might be thus generated and used.

It is contended on the part of the defense, that the proviso to the section, "provided that nothing in this section shall be construed to apply to fermented liquors," authorized the fermentation of this wash, as shown in the proofs. But to my mind this saving clause of the section is intended to apply only to manufacturers of ale, beer, etc., and to protect them from the penalties of this section.

I therefore conclude after careful study of the law, that it was the intent of congress to prohibit absolutely the fermentation of any compound whereby alcohol should be evolved, unless the same was done in an authorized distillery. Taking this view of the law, I am obliged to find the defendants guilty.

[At the conclusion of this opinion it was intimated by the court and the United States attorney that this was not a case that called for the infliction of the punishments prescribed by law, but that the defendants should have an opportunity to adjust the matter at Washington.] [2]

Case No. 16,096.

UNITED STATES v. PRYOR.

[3 Wash. C. C. 234.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

TREASON—FURNISHING PROVISIONS TO ENEMY.

1. Indictment for treason, in adhering to the enemy; charging the defendant, inter alia, with going from the British squadron to the state of Delaware, with intention to procure provisions for the squadron.

2. The going from the British squadron to the shore, for the purpose of peaceably procuring provisions for the enemy, did not amount to an act of treason; as this conduct rested in intention, which is not punishable by our laws.

3. Aliter, if a person has carried provisions towards the enemy, with intent to supply him, though that intention should be defeated.

4. If the intention of the defendant had been to procure provisions for the enemy, by uniting with him in hostilities against the citizens of the United States, his progressing towards the shore would have been an overt act of adhering to the enemy, though no other act was committed.

---

[2] [From 12 Int. Rev. Rec. 34.]

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

This was an indictment for treason. The first four counts, charged the prisoner [William Pryor] with adhering to the enemy, giving them aid and comfort; by taking on board at Philadelphia a cargo of provisions, and carrying it to the squadron which blockaded the Delaware, in April, 1813. The other counts charged the defendant with the same species of treason, by going from a British seventy-four, whilst lying in Delaware Bay, to the shore of the state of Delaware, with intention to procure provisions for the blockading squadron. The evidence given in behalf of the prisoner, so completely exonerated him from any treasonable conduct, under the counts which charged him with having adhered to the enemy in this district, that these counts were abandoned by the prosecuting officer, in his summing up to the jury. As to the court charging him with overt acts of treason, committed in Delaware Bay, and on the Delaware shore, the evidence was as follows: The prisoner, having, on his passage from Philadelphia to New York, loaded with flour, been chased by a British vessel of war, and captured, about forty miles to the north of the capes, was conducted, with the prize, to Commodore Beresford, who then commanded the British squadron in the Delaware Bay. He was received on board as a prisoner, where he met with many of his countrymen in the same unhappy situation. It appeared, that he frequently conversed with his fellow-prisoners upon the subject of attempting their escape; but the difficulties which seemed to attend every plan he proposed, appeared to be insurmountable. At length he inquired of one of the prisoners, if he could conduct him to any part of the Delaware shore, where he could obtain a parcel of bullocks for the use of the ship; and was answered in the affirmative. He then obtained a number of men from the commodore, to accompany him on shore for the purpose of obtaining live stock; and also a flag of truce, which was taken into the vessel which was to carry them to the shore. The men who accompanied him, took their arms and ammunition along with them. When they landed on the Delaware shore, the prisoner who had attended Pryor as a guide, deserted, whilst affecting to go after a parcel of cattle, seen at a distance. The prisoner, together with a British lieutenant, went about two miles into the country, and stopped at a house, where the former endeavoured to purchase some bullocks or other live stock, and urged strongly his request, that the countryman would sell to him, by stating his unhappy situation as a prisoner, separated from his family, who resided in Massachusetts; and that by obtaining the articles which he sought to purchase, it would be in his power to ransom, not only himself, his vessel and cargo, but his fellow-prisoners, from captivity. All his efforts, however, to procure provisions by purchase, proved abortive; and no attempt was made, or hinted at, in the most remote manner, to obtain them by force or intimation. In the course of that evening, whilst supping at the farmer's house, the militia made their appearance; and the prisoner, with his companion, were seized and sent to the governor of Delaware, who ordered them to Philadelphia, where Pryor underwent an examination, and was committed for trial. It appeared fully in evidence, that when he first landed, he inquired of a countryman, (from whom also he endeavoured to purchase provisions, professing the same motives which he afterwards urged to another countryman, as above stated,) out of the hearing of the British officer, whether there was any of the militia at hand; and being answered that they certainly would assemble at a particular place called the "Landing," he requested, and strongly urged the countryman, to accompany him to that place, with which he complied. It was near the Landing that he was taken. The commanding officer of the militia who took the prisoner, observed a party of the British soldiers, who had accompanied him on the shore with a flag, and approached them with a view to learn what were their intentions. He found them with arms in their hands, and at his request they accompanied him to the place where the militia were stationed, amongst whom they distributed all the ammunition which they had brought on shore.

It was stated by one witness, the man who came on shore to guide the party to the bullocks, that the prisoner informed him, before they left the seventy-four, that the flag was to be taken on board of the boat, to be used only in case they should be overpowered by the persons they might meet on the shore; and that in fact, it was not hoisted at the mast-head, at any time on their passage to the shore, or after they came to anchor. Two other witnesses proved, that they looked from the shore at the vessel, and could not see the flag. On the part of the prisoner, it was proved, by one witness who went in the vessel to the shore, that the flag was hoisted when they set sail, and continued so during the whole time previous and subsequent to their coming to anchor. In corroboration of this, a correspondence between the governor of Delaware and Commodore Beresford, was given in evidence, in which the former inquired into the cause of the landing which had been made, and complained of the conduct of those who had done so, in coming armed, whilst they pretended that they had come under the protection of a flag. The latter answered, that they had been sent with a flag, for the purpose of purchasing provisions; and he condemned the officer who commanded the party, for taking arms with him.

Mr. Dallas contended, that though the prisoner failed in his design of obtaining provisions for the enemy, after he landed in Delaware, yet, as his intention was treason-

able, his getting into the boat and proceeding to the shore, in order to carry that intent into execution, was an overt act of adhering to the enemy. But, if not so, his going in hostile array, with a design to use the protection of the flag, only in case of the party being overpowered by the Americans, the proceeding a single step in execution of such an intention, was an overt act. He insisted, that, upon the evidence, it did not appear, that the flag was at any time hoisted. As to the motives attributed to the prisoner for engaging in this unlawful enterprise, viz. the obtaining the means of ransoming himself, or of escaping, they would not, if proved, be sufficient to excuse him from the charge of treason.

WASHINGTON, Circuit Justice (charging jury). That the prisoner went from the British seventy-four to the shore, with an intention to procure provisions for the use of the enemy, is incontestibly proved, and, indeed, is not denied by his counsel. If this constituted the crime of treason, the motives which induced him to attempt the commission of it, and by which there are the strongest reasons to believe he was most sincerely actuated, would certainly palliate the enormity of it. But the law does not constitute such an act treason, even although these motives had not existed; and, although intentions and feelings as disloyal as ever stained the character of the most atrocious traitor, were proved against the prisoner. Can it be seriously urged, that if a man, contemplating an adherence to the enemy, by supplying them with provisions, should walk towards the market-house to purchase, or into his own fields to slaughter whatever he might find there, but should, in fact, do neither one or the other of the intended acts, he has committed an overt act of adhering to the enemy? Certainly not. All rests in intention merely, which our law of treason in no instance professes to punish. Carrying provisions towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention. In such a case, the motives which induced the prisoner to use his exertions to procure provisions, would take from his conduct every possible imputation of disloyalty and disaffection to his country. The intention to procure the means of effecting the liberation of himself and his fellow-prisoners, had it even been carried into execution, would have been an honest and generous one; even although the law should not have excused the act. If the object of the prisoner was to break his parole, after he had got to land, and to escape; it is one which would not meet our approbation. We can never be the apologist of disingenuous conduct, let who will practise it; and we are firmly of opinion, that nations, as well as individuals, will always find their best interests to be promoted by fidelity to their engagements, and by manifesting a disposition, too proud to descend to artifices to deceive even an enemy. But, although, as moralists, we cannot approve of an intention in the prisoner to violate the promise he had plighted to the enemy, yet, as judges, we must pronounce, that by doing so, he would have offended against no law of his country. But, if the intention of the prisoner was to procure provisions for the enemy, by uniting with him in acts of hostility against the United States or its citizens, which is chiefly pressed against him by the district attorney; then, indeed, it must be admitted, that his progressing towards the shore, was an overt act of adhering to the enemy, although no act of hostility was in fact committed.

But how stands the evidence as to this fact. The only witness who proves any thing in relation to such an intention, is the black man who was applied to by the prisoner, to conduct him to some place where bullocks might be procured; and he states, that the prisoner told him that the flag was only to be used, in case it should be necessary to shield the party against superior numbers. Now, this is so highly improbable, that it is fair to conclude, that the witness must have misunderstood what the prisoner said to him. The prisoner could not have been ignorant of what every person must know, that no officer, in any army, would dare to violate a flag of truce, by attempting, under any circumstances, to use it as a cover for acts of hostility. No officer would expose himself to the punishment which the laws of war would compel his superiors to inflict upon him, and which it would be their interest not to disregard, if they meant, on any future occasion, to claim the immunities annexed to a flag of truce.

But it is denied, that this vessel, during her passage to the shore, or during her stay near to it, hoisted the flag, or appeared to seek its protection. The evidence of the same black man to this effect, is flatly contradicted by the pilot, who was on board during the whole time; and who declares, that it was flying at the mast-head during her passage to, at, and from the shore; and that many American vessels, which passed her, and who might otherwise have been seized as good prize, were suffered to proceed without inquiry or molestation. In short, during the whole time that this party was absent from the ship of war, all was peace with them. But what seems almost to conclude this point, is the official declaration of Commodore Beresford to the governor of Delaware, that this vessel went to the shore under the protection of a flag, with a view to purchase provisions. Now, this evidence is not to be discredited by saying that it proceeded from an enemy; because, all civilized

nations are bound to give credit to the official declarations of the commander of the enemies' forces. There is no American, who would not feel a just indignation, if a British officer should venture to question the veracity of an American commanding officer, in relation to a fact which he stated officially as being within his own knowledge. There is no doubt, that accompanying the flag by armed men, was an irregularity; and Commodore Beresford very properly censures the officer who commanded the party, for carrying arms. Nevertheless, no act of hostility was attempted, nor is there the slightest reason to believe, that any was meditated by the prisoner, or by any of the party.

Upon the whole, it is the opinion of the court, gentlemen, that the undertaking of the defendant to procure provisions from the shore, for the use of the enemy, and his proceeding to the shore with this intent, as laid in the eighth and ninth counts in the indictment, did not amount to overt acts of treason.

The jury, without leaving the bar, found a verdict of not guilty.

NOTE. It being the wish of the counsel for the prisoner, to try fairly all the charges which could be brought against him, to prevent his being sent to Delaware to be tried again, for the treasons alleged to have been committed in that state, no observations were made in the charge, upon the form of the eighth and ninth counts in this indictment; but the case was considered in the same manner, as if they had charged the prisoner with an intention to procure provisions by force, leaving the prisoner to move in arrest of judgment, if a verdict had been found against him.

Case No. 16,097.

UNITED STATES v. PUMPHREYS.

[1 Cranch, C. C. 74.] [1]

Circuit Court, District of Columbia. March Term, 1802.

CRIMINAL LAW—EXTORTED CONFESSION.

Extorted confession is not evidence against the prisoner.

Indictment for stealing.

THE COURT instructed the jury that no confession, extorted from the prisoner, by threats of punishment, or obtained by the promise of reward or favor, was evidence against him. 4 Bl. Comm. 357.

Case No. 16,098.

UNITED STATES v. PUSEY.

[6 N. B. R. 284.] [2]

Circuit Court, E. D. Michigan. March 5, 1872.

BANKRUPTCY—FRAUDULENT DISPOSITION OF GOODS—INDICTMENT.

That clause of section 44 of the United States bankrupt act of 1867 [14 Stat. 539] which punishes by imprisonment any fraudulent disposition of the goods of a debtor obtained on credit and remaining unpaid for, within three months next before the commencement of proceedings in bankruptcy, is constitutional and valid. Motion in arrest of judgment on this ground denied, and defendant sentenced to one year's imprisonment.

[Cited in Re Reiman, Case No. 11,673; Re Jackson, Id. 7,124.

The defendant was tried and convicted on an information under that clause of section 44 of the bankrupt act of 1867 which provides "that from and after the passage of this act if any debtor or bankrupt * * * shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods and chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court in the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years." The ground of the motion in arrest is that the above clause of section 44 is unconstitutional and void. There was another ground of motion stated, but it was not insisted on upon the argument. The argument in support of the motion is: first, that the clause in question assumes to punish an offense committed before commencement of proceedings in bankruptcy, and is therefore not a law necessary and proper for carrying into execution the power of congress to establish uniform laws on the subject of bankruptcy; and, second, that it is an ex post facto law.

Mr. Brown (Newberry, Pond & Brown), for the motion.

Mr. Swan, Asst. U. S. Atty., opposed.

LONGYEAR, District Judge. Among the powers of congress enumerated in the constitution (article 1, § 8), are, "to establish * * * uniform laws on the subject of bankruptcies throughout the United States," and, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." Under the first power named congress established the bankrupt law of 1867. If, therefore, the clause of section 44 in question, is a law "necessary and proper" for carrying the bankrupt law into effect, it comes within the latter power named, and is constitutional and valid; otherwise it is not, because then it is a mere police regulation relating exclusively to the internal trade of the states, and does not come within the power of congress. U. S. v. De Witt, 9 Wall. [76 U. S.] 41.

Under the first proposition of the argu-

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

[2] [Reprinted by permission.]

ment in support of the motion, it is important to bear in mind the distinction between the subject matter, bankruptcy, in regard to which congress is empowered to legislate, and the means, machinery or practice congress has prescribed for carrying that power into effect. It is with the former, the subject matter, we have to deal here, and not with the latter, any further than it may come in question incidentally. What then is "the subject of bankruptcy?" What does it include? What realm do laws upon that subject occupy? And what are necessary and proper laws for carrying such laws into effect? The Federalist (No. 32) alludes to the constitutional power of congress to establish uniform laws of bankruptcy as a power intimately connected with the regulation of commerce, and for the prevention of frauds. 2 Story, Const. § 1105. It is intimately connected with the regulation of commerce because it has for its subject the relation of debtor and creditor—a relation growing out of commercial transactions, and often, and it may be said to a very large extent, between citizens of different states, and, in fact, between citizens of the United States and those of foreign countries. That it is a power for the prevention of frauds on creditors has always been assumed whenever it has been exercised, and I believe has never been questioned. (See the former acts of 1800 and 1841, as well as the present act of 1867.) To this end these laws are made to reach back of the commencement of proceedings to defeat frauds, and, in fact, to constitute acts frauds, which by the laws of the states, and but for the bankrupt law itself, were entirely valid. Story on the Constitution (section 1106) says: "It may be stated that the general object of all bankrupt and insolvent laws is, on the one hand, to secure to creditors an appropriation of the property of their debtors pro tanto to the discharge of their debts, whenever the latter are unable to discharge the whole amount; and on the other hand, to relieve the unfortunate and honest debtors from perpetual bondage to their creditors, either in the shape of unlimited imprisonment to coerce payment of their debts, or of an absolute right to appropriate and monopolise all their future earnings." A very compact and pointed description, or definition of a bankrupt law occurs in the debates on a bankrupt bill in the house of representatives in eighteen hundred and eighteen. It was there said: "Perhaps as satisfactory description of a bankrupt law as can be framed is, that it is a law for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies in the sense of the constitution, is a law making provision for cases of persons failing to pay their debts." 4 Elliot, Deb. 282. The "subject of bankruptcy," in a general sense, concerns the relation of debtor and creditor, and in a particular and no doubt stricter sense, concerns such relation in cases where the debtor is unwilling or unable to pay his debts. Laws upon that subject have for their object the appropriation, either voluntarily or by compulsion, of the debtor's property to the payment of his debts, pro tanto, or in full, as the case may be, and the relief of honest debtors. To accomplish this object these laws are made to operate upon, affect and control the relations of the parties, so as to limit and circumscribe the rights of the debtor in, and his control over, his property, and the rights of others dealing with him, in regard thereto, in many particulars, before any proceedings in bankruptcy shall have been commenced by or against such debtor. Of this nature are the provisions of sections thirty-five and thirty-nine, invalidating preferences under certain circumstances when made within four months, and certain payments, sales, transfers, etc., when made within six months before commencement of proceedings; and all assignments, gifts, sales, conveyances or transfers, with intent to delay, defraud or hinder creditors, made at any time after the passage of the act. There are other provisions of the same nature, but the above are sufficient for illustration. The power of congress to enact the provisions giving the act the operation and effect just mentioned (and I am not aware that their right to exercise that power has ever been questioned), is derived solely from their general powers under article 1, § 8, of the constitution, to make all laws necessary and proper for carrying into effect their power to establish laws on the subject of bankruptcy. It is to this same general provision of the constitution that we must look for the power of congress to make the law in question. It must be found there or it does not exist at all.

One object to be attained by the enactment of a bankrupt law, as we have seen, is the appropriation of the debtor's property to the payment of his debts. And this may be said to be the principal or primary object of all such laws. The relief of the debtor, although an important consideration, is really but incidental to the other. Story, Const. § 1106. Is the provision in question a law "necessary and proper," within the meaning of those words as used in the constitution, for carrying into effect the bankrupt law, and the object and purpose of its enactment? The meaning of the words "necessary and proper" has been judicially determined by the supreme court on full discussion and deliberation to be "needful," "requisite," "essential," "conducive to." McCulloch v. Maryland, 4 Wheat. [17 U. S.] 418. See, also, Story, Const. §§ 1248–1255, citing the above and other authorities, where the subject is very fully considered and the same construction maintained. In McCulloch v.

Maryland [supra], Chief Justice Marshall, in delivering the opinion of the court, says: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Here, as we have seen, the end sought is the appropriation of the debtor's property to the payment of his debts. The clause in question is for the prevention of frauds by debtors on their creditors, by which that end may be defeated or impaired. It certainly does not need argument to show that the provision is a means clearly conducive, and plainly adapted, to the end sought.

But it is claimed in argument, first—that the provision in question purports to punish an offense committed before commencement of proceedings in bankruptcy, and that, therefore, it can have no connection with the bankrupt act; and, second—that such offense (as is charged in the information in this case) is one committed by a debtor merely, one who may or may not become a bankrupt, and that, therefore, it has no connection with the act; and that for both reasons the offense concerns the internal trade of the states alone, and is not within the power of congress to be created or punished.

I think the ground occupied by the first objection is much too narrow. The proceedings in bankruptcy do not constitute the end to be accomplished by a bankrupt act. They constitute the machinery, so to speak, by which that end is to be obtained, viz.: the appropriation of the debtor's property to the payment of his debts. Therefore the prevention of the fraud denounced by the provision, being, as we have seen, conducive to that end, it can make no difference whether it relates to a fraud committed before or after the machinery provided for the accomplishment of the end is set in motion.

The second ground is more difficult of solution. The person who may commit the offense is described in the act as "any debtor or bankrupt," and in the case under consideration the defendant is described in the information as a debtor merely. In the English bankrupt acts, from which the provision in question was no doubt taken, the word "bankrupt" only is used, the word "debtor" having been added in our act. In order to be a bankrupt a person must first be a debtor. But a bankrupt, in the sense of the English act, as well as of our own, is a debtor, and something more. He is a debtor who has committed an act of bankruptcy, declared to be such by the bankrupt law. Rex v. Jones, 4 Barn. & Adol. 345; 24 E. C. L. 156; Reg. v. Lands, 33 Eng. Law & Eq. 536; Buckingham v. McLean, 13 How. [54 U. S.] 167; In re Black [Case No. 1,457]; In re Craft [Id. 3,317]. A "debtor" may or may not be a bankrupt. But, from the fact that both words, "debtor" and "bankrupt," are used, and in the disjunctive, it must be held that the former is used in the provision in question, as descriptive of a person who is a debtor, but who has not, at the time of committing the offense, become a bankrupt. And it is on this account, principally, that the difficulty arises. This difficulty, however, is only apparent, as we shall presently see. It grows less when we consider what, as we have already seen, is included by the expression "subject of bankruptcies," as used in the constitution—that in a general sense it concerns the relation of debtor and creditor, a relation existing largely between citizens of different states, and so, nearly related to, in fact constituting a branch of those great commercial relations over which the power of congress is also extended. True, the expression has a limited signification, that is, that it concerns the relation of debtor and creditor in cases where the debtor is unable or unwilling to pay his debts, yet it none the less concerns the relation of debtor and creditor, the limitation being in the instance only, and not in degree. And when we also consider that the leading object of a bankrupt law is the appropriation of the debtor's property to the payment of his debts, and to that end the prevention of frauds, reaching back of the commencement of proceedings, as the present law does (sections 35 and 39), and as the previous laws of 1800 and 1841 did, and invalidating and annulling contracts and transactions on that ground (some of which, but for the bankrupt law, were valid when made), within certain specified periods of time, and, in some instances, at any time after the passage of the act; and this, so far as I know or can ascertain, without question, or even a doubt suggested as to the constitutional power of congress so to enact. And the difficulty grows still less, in fact vanishes, when the foregoing considerations are taken in connection with the fact that the ascertainment whether the act described constitutes a crime is made to depend upon the debtor's committing some act of bankruptcy, on account of which he shall be declared a bankrupt, within so short a time after doing the act specified as to afford a reasonable presumption that he contemplated bankruptcy (or committing an act of bankruptcy, which is the same thing, as we have seen), when he did the act specified. The time specified in the provision is "within three months next before the commencement of proceedings in bankruptcy." Commencement of proceedings in bankruptcy is the fil-

ing of a petition for adjudication of bankruptcy by or against a debtor, upon which such debtor shall be adjudicated a bankrupt. Section 38; In re Patterson [Case No. 10,815]. If the petition is filed by the debtor, then that is the act of bankruptcy whereby he acquires the legal status of bankrupt. Section 11. If the petition is filed against the debtor, then the act or acts by which he acquired that status, and on account of which he is adjudged a bankrupt, must have been committed before the filing of the petition. So that in either case the debtor must have committed an act of bankruptcy within three months after the act specified in order to bring the case within the law.

Suppose congress had, in lieu of the present form of expression, provided that in order to constitute the specified act as an offense, it should be committed by a debtor contemplating, or in contemplation of bankruptcy; then I apprehend there could be no question of the constitutionality of the provision. But is not that the force and effect of the provision as it now stands? If congress had enacted as above supposed, it would have been left to courts and juries to determine what would constitute proof of contemplation of bankruptcy. Like all other questions of the intent or animus of the acts and conduct of persons, it would very rarely admit of direct proof, but in most cases would necessarily depend upon circumstantial evidence. There are provisions of the act by which the fraudulent character of transactions is expressly made to depend upon their having been had "in contemplation of bankruptcy." In such cases it has always been held that the fact that the transaction was had by a debtor at a comparatively recent period of time before becoming bankrupt, is presumptive evidence of the transaction having been had in contemplation of bankruptcy—stronger or weaker, as the time was more or less remote. But this leaves the matter to depend largely upon the uncertain and varying opinions of different judges and juries, and perhaps the fluctuating opinions of the same judges—an element which ought not to exist in penal enactments. Congress has, therefore, seen fit in the enactment in question, to withhold this question from courts and juries, and by express enactment to establish a rule as to the time, which shall be at once uniform and conclusive.

It was said in argument, that from the reading of the provision in question, it is not the doing of the act specified that constitutes the offense, but the commencement of proceedings in bankruptcy, by or against the offender. From the views already advanced the answer to this obejction is obvious. If the debtor commits the act specified, and at any time within three months thereafter, commits an act, on account of which he is liable to be declared by the court to be a bankrupt, he is, as we have seen, conclusively presumed to have committed the act in contemplation of committing an act of bankruptcy, and the offense is complete, upon committing the former act, whether proceedings for adjudication of bankruptcy are commenced within three months or not, except in the single instance where the act of bankruptcy is the commencement of such proceedings by the debtor. But the offense cannot be prosecuted unless such proceedings are commenced within three months. In this respect it is a limitation merely.

It was also objected in argument that the limitation to three months is purely arbitrary, that it might just as well be three years, or thirty years. That would simply be an abuse of power, which we have no right to presume any congress would be guilty of. Story on the Constitution (section 1252), citing the Federalist, Nos. 33, 34, says: "There is always some chance of error, or abuse of every power; but this furnishes no ground of objection against the power. * * * The remedy for any abuse or misconstruction of the power, is the same as in similar abuses and misconstructions of the state governments. It is by an appeal to the other departments of the government; and finally to the people, in the exercise of their elective franchises." And finally, the same objection might be made to sections 35 and 39, and to all limitation laws, which no one would think of making at this day.

From what has been said and written by early commentators, and by high authority, in regard to the power of congress over bankruptcies as well as from the nature of the subject itself, there is some ground for assuming that it extends to the regulation of all the relations of debtor and creditor, for the prevention of frauds, and otherwise, to the end of placing all creditors of the same debtor, not expressly preferred, upon one broad basis of equality, and of securing the honest appropriation of a debtor's property, not expressly exempted, to the payment of his debts, either with or without the commission of an act of bankruptcy, or whether bankruptcy was or was not in contemplation. But in this case it is unnecessary to go to that extent, and I therefore leave the point undecided.

Upon all considerations, I hold that the first ground of argument against the unconstitutionality of the law is untenable.

The second ground of the objection is, that the provision in question is an ex post facto law, and therefore unconstitutional, in this, that it purports to punish an act as an offense which was not such at the time it was committed. As we have already seen, the act which this provision purports to punish is an offense, when it is an offense at all, the moment it is committed. It is made necessary, it is true, to resort to the subsequent acts of the perpetrator, to ascertain the criminal character of such former act; but when thus ascertained, it relates back to the committing of it. Such subsequent acts do not invest such former act with any element it did not pos-

sess when it was committed, but simply ascertain what its elements were from the beginning. An ex post facto law, however, is, in common acceptation, a law enacted after the fact. Here the law was in existence at the time the act complained of was committed. The objection, therefore, is not germane.

The second ground of objection is, therefore, also untenable.

While the powers of the general government are all derived from the constitution, the powers of each branch, the legislative, the executive and the judicial, are entirely separate and distinct from each other. And while the judicial branch, under its powers to expound the law, possesses the power to annul legislative acts on the ground of unconstitutionality, it will never exercise that power except in cases entirely free from all reasonable doubt. So that if I even entertained doubts in this case, which I do not, I should still be obliged to hold the law valid.

The law in question is one that strongly commends itself to favor. A proper and enlightened enforcement of it, must tend largely to strengthen credit and inspire confidence in commercial transactions—consummations highly worthy of the fostering care of the government, especially in a country like ours, where credit enters so largely in the business transactions between merchants and traders. The creditor, when he parts with his property, necessarily relies largely upon the honesty and good faith of his debtor—that the latter will do nothing intentionally which shall impair his ability to pay at maturity, or failing to do so, that shall interfere with the honest appropriation of his property to the payment of his debts. It is both a moral and a legal right of the creditor so to rely, and it is both a moral and a legal obligation and duty of the debtor to observe that right, and nothing in my opinion will conduce more to its observance than a rigid enforcement of the law in question. Let it come to be understood that it is a crime for a debtor wilfully and intentionally to violate the faith and betray the confidence placed in him, constituting as they do, in most cases, the very foundation of his credit, a crime for which severe and certain punishment will be inflicted, and I firmly believe that we shall have less of fraud, and fraudulent practices—that corrupt and debilitating disease with which the body commercial has always been afflicted.

This case was transmitted from the district to the circuit court, on account of the novelty and importance of the questions here involved, in the hope that a hearing of this motion might be had before a full bench. But on account of the extensive and laborious duties of the circuit judge on his too large circuit, the end sought was found to be impracticable without considerable delay. I have, therefore, by the consent and acquiescence of all parties concerned, heard the motion without his valuable aid. I have, however, availed myself of opportunities to consult with him, and have laid the views expressed in the foregoing opinion before him, and I am authorised by him to say that he fully concurs in the result at which I have arrived.

The motion in arrest of judgment must be denied, and judgment must pass upon the verdict.

The defendant was sentenced to one year's imprisonment.

UNITED STATES (PUTNAM v.). See Case No. 11,484.

UNITED STATES (PYE v.). See Case No. 11,488.

Case No. 16,099.

UNITED STATES v. QUANTITY OF DISTILLED SPIRITS.

[4 Ben. 349.] [1]

District Court, S. D. New York. Nov., 1870.

INTERNAL REVENUE—PERSONATION OF BONDSMAN — ESTOPPEL — AGREEMENT WITH THE UNITED STATES DISTRICT ATTORNEY—COMPROMISE.

1. A surety, who had signed a stipulation for the release of property seized at the suit of the United States, and against whom judgment had afterwards been entered up, and an execution issued, applied to open the judgment, and set aside the execution, on two grounds: (1) That he signed the bond on the representation that it should also be signed by one S., and that it was not signed by S., but by one B., who falsely personated S. (2) That, after his property had been seized under the execution, it was agreed between him and the United States district attorney, that, if he would give certain information against two other parties, his property should be released; and that he gave the information, and the parties were indicted, and thereupon his property was released, but had now been seized again on an alias execution: *Held*, that it appeared, on the facts, that the surety was not only aware of the personation of S. by B., but himself procured such personation, and that therefore, B. was, to all intents and purposes, S., as against the surety and his liability on his bond.

2. His alleged agreement with the district attorney was not established, but, if it was, it would not avail him as a legal ground for the interposition of the court. The agreement set up being a compromise of a case arising under the internal revenue laws, would not be valid without the concurrence of the commissioner of internal revenue, the secretary of the treasury and the attorney general.

[This was an information against a quantity of distilled spirits, etc., found at Fifty-Fifth street, between Tenth and Eleventh, avenues.]

Robert N. Waite, for the motion.

T. Simons, Asst. U. S. Dist. Atty.

BLATCHFORD, District Judge. This is a motion by Henry Stubbin, one of the sureties or stipulators for value on the bond or stipulation given on the release of certain of the property seized in this suit, to open the judgment entered against him herein, and to set aside the execution issued therein, as

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

against said Stubbin. The grounds set forth in the moving affidavit, made by Stubbin, for granting the relief sought, are: (1) That he executed the bond at the solicitation of one of the real owners of the property seized, and on his representation and assurance that the other surety named in the bond should be a well known and wealthy man named Michael Shafer, that he, Stubbin, and a man who called himself Michael Shafer, and to whom Stubbin was introduced, and with whom he then went to the place where the bond was executed, executed the bond, that he, Stubbin, subsequently ascertained that the man who called himself Michael Shafer was not of that name, but that his real name was Morris Brockman, and that he had falsely personated Michael Shafer, and executed the bond with him, Stubbin, by a false and forged name. (2) That, after his property had been seized, under the said execution, he called with his counsel at the office of the United States district attorney, and made a representation of the foregoing facts, and, after two or three interviews with three of the assistant district attorneys, and one interview with the district attorney, it was agreed, that, if he would give all the information he possessed, and render what aid he could to the government, in a prosecution, at that time intended to be instituted against two persons for conspiracy to defraud the government, the execution against his property should be withdrawn, and he should never be disturbed in his quiet and peaceable enjoyment of the same; that, thereafter, criminal proceedings were commenced against such two persons, and he, Stubbin, was used as a witness against them, and did everything required of him by the government, and an indictment, on his evidence, and other testimony, was found against such persons, and was still pending against them; that, immediately after such agreement was made, the execution against him was withdrawn, and the keeper in charge of his property was removed, and he supposed that the proceedings against him were ended and determined; but that an alias execution had been issued, under which a deputy marshal had again seized his property, and the keeper had been placed in charge of it, and the district attorney had expressed his determination to sell the property.

Voluminous testimony has been taken, under an order of reference, in respect to the matters set up, as grounds for granting the motion. The result of a careful examination of such testimony leads to the undoubting conclusion, that, in respect to both of such grounds, the matters of fact alleged by Stubbin are not proved. On the contrary, the evidence shows satisfactorily, that Stubbin knew, when he signed the bond, and when the man who called himself Michael Shafer signed the bond, that such man was not Michael Shafer, but was really Morris Brockman, and permitted, and indeed himself procured, such man to represent himself to the officers of the government as Michael Shafer, and to execute the bond as Michael Shafer. This being so, such man was, to all intents and purposes, Michael Shafer, as against Stubbin and Stubbin's liability on the bond.

As to the agreement with the officers in the district attorney's office, the extent of it is evidenced by the written instructions given at the time by the district attorney to the marshal, which were only to the effect, that the marshal was to withdraw his keeper from the premises of Stubbin, and order such keeper to visit such premises occasionally, to see that all was right.

But, even if such agreement as set up were proved, it would not avail Stubbin, as a legal ground for the interposition of the court, The agreement set up is substantially a compromise of the claim against Stubbin. The enforcement of the claim was to be perpetually stopped in consideration of something to be done by Stubbin, other than paying the claim. The case being one arising under the internal revenue laws, and the suit having been commenced, no compromise of the case could be made without the concurrence of the commissioner of internal revenue, the secretary of the treasury and the attorney general. Act July 20, 1868, § 102 (15 Stat. 166); 12 Op. Attys. Gen. U. S. 536, 552.

The motion is denied, and the stay of proceedings must be vacated.

Case No. 16,100.

UNITED STATES v. QUANTITY OF DISTILLED SPIRITS.

[6 Int. Rev. Rec. 188.]

District Court, S. D. New York. Nov. 1867.

FORFEITURE OF SPIRITS IN BOND.

[Spirits in bond may be forfeited for non-compliance with the provisions of the internal revenue laws.]

In the case of the United States against a quantity of distilled spirits and other property found at No. 194 East Twenty-Fifth street, an action to forfeit the property for non-compliance with the provisions of the internal revenue law in relation to distilled spirits, tried in the United States district court, before BLATCHFORD, District Judge, and a jury, the jury, after a short absence, found a verdict for the government condemning the property. The question of the validity of the recent regulation adopted by Commissioner Rollins, that spirits in bond should not be forfeited, was brought up in the case. A portion of this property being in bond, the claimant's counsel requested the judge to charge the jury that since the making of that regulation, spirits in bond could not be forfeited. THE COURT, however, declined so to charge, holding that the question of forfeiture must be determined by the law, and that under the law spirits in bond could be forfeited

UNITED STATES v. QUANTITY OF DISTILLED SPIRITS. See Cases Nos. 11,493-11,495.

Case No. 16,101.

UNITED STATES v. QUANTITY OF DISTILLED SPIRITS AT NO. 133 MOTT ST.

[See Case No. 11,495.]

Case No. 16,102.

UNITED STATES v. QUANTITY OF MANUFACTURED TOBACCO.

[10 Ben. 9.][1]

District Court, S. D. New York. June, 1878.

BONDS—SURETY—NOTICE OF DECREE — APPROVAL OF SECURITY ON APPEAL.

In an action against property for violation of the internal revenue laws, L. appeared as claimant of the property seized and gave a stipulation with O. as surety in which L. was named as proctor of the claimant. The decree in the district court being in favor of the United States, L. took the case by writ of error to the circuit court, and gave his own personal bond on the writ of error, which was approved by the judge in the usual form. The decree was affirmed by the circuit court and a writ of error was taken to the supreme court, on which L. again gave his personal bond without surety by consent of the district attorney; and this bond was also approved by the judge in the usual form. The supreme court affirmed that decree and a final decree was entered, and an order was made that notice be given to the sureties on the first stipulation to perform their stipulation or show cause why execution should not issue against them. Other proctors had during the progress of the cause been substituted for S. and this notice was served on such other proctors, who had agreed to notify O. of the entry of any decree. They failed to do so, however, and O. had in fact no notice, and an order was made by default that execution issue and it was issued accordingly. O. thereupon applied to open the default and to be allowed to come in and show cause and that the execution be set aside, claiming that the taking of the bonds on the appeals without surety and with the approval of the district attorney had discharged him, and that L. had given to the plaintiff $75,000 in government bonds as further security, which bonds it was alleged had been stolen: *Held*, that the default against the surety might be opened if he had shown any meritorious defence, but that the facts put forward by him furnished no defence against his liability on the stipulation.

D. McMahon, for petitioner.

Mr. Hill, Asst. U. S. Dist. Atty.

CHOATE, District Judge. This was an information for violation of the internal revenue laws. The claimant, C. N. Lilienthal, gave a stipulation for value with one Olwell as one of his securities in the sum of $104,000. The stipulation was in the usual form and named Stephen D. Stephens, Jr., as proctor for the claimants, to whom notice of the order or decree of this court or the appellate court was to be given. The decree in this court being for the plaintiff, the claimant took the case by writ of error to the circuit court and gave his own personal bond on the writ of error, which was approved by the judge in the usual form, he being then responsible for the amount. The decree in the circuit court was for the plaintiff and the claimant took the case on writ of error to the supreme court and gave his own personal bond on the writ of error without surety. [Case unreported.] On this bond the district attorney made the following endorsement: "I agree to accept the foregoing bond of the claimant without sureties as a sufficient bond to secure costs in the supreme court on a writ of error to the circuit court in this action and as establishing the present sufficiency of the claimant and his responsibility for the amount of the value of the property condemned secured by bond in the district court, but not to affect the obligation of such bond on the claimant and sureties thereon." And the attorneys for the claimant wrote under this endorsement: "The foregoing bond is understood by the obligor to be given on the terms and with the effect mentioned in the foregoing acceptance of the United States attorney." This bond was also approved by the judge in the usual form.

The supreme court affirmed the decree below and a final decree was entered and an order was made that notice be given to the stipulators in the stipulation given in this court to perform their stipulation or to show cause why execution should not issue against them. The notice was given, not to Stephens, who is named as proctor for the claimants in the stipulation, but to other proctors who had been substituted for him as proctors for the claimants and had carried on the defence of the subsequent proceedings.

It appears by the affidavit of Olwell that he had made an arrangement with these substituted proctors to be notified by them whenever they received notice of the entry of the decree, but they failed to give him notice and he had no notice in fact, and the substituted attorneys of the claimant did not attend upon the return of the order to show cause.

Olwell, one of the sureties in the stipulation, now moves to open the default and to be allowed to come in and show cause why execution should not issue against him, and he also moves that the execution be set aside. If the surety showed any meritorious grounds on which if the default were opened he could be relieved, it would be proper to grant the motion to open the default, as it appears that he had no notice in fact. There was no irregularity in serving the notice on the substituted proctors for claimants. They were the proper persons to receive the notice. The surety so understood it himself, as is shown by the arrangement made with them for notice from them to him.

The only grounds on which upon the merits the surety claims to be relieved are:

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

that the plaintiff by taking the bonds of the claimant without sureties on the appeals discharged the sureties in the stipulation; secondly, that the qualified consent or acceptance endorsed by the district attorney on the bond given on error to the circuit court discharged the sureties in the stipulation; and thirdly, that the giving by the claimant to the plaintiff of $75,000 in government bonds as further security after the execution of the stipulation, which further security it is alleged was exacted by the plaintiffs as a condition to their giving their consent to the claimant's continuing his business, discharged the sureties in the stipulation.

As to the first and second grounds it is clear that the bonds taken complied with the statute, which provides that "every justice or judge signing a citation or any writ of error, shall, except, etc., take good and sufficient security." Rev. St. § 1000. The question of the sufficiency of the security must be determined by the judge. Brockett v. Brockett, 2 How. [43 U. S.] 258. There is no statute requiring one or more sureties if the bond offered is approved as sufficient. And if the bond is approved as sufficient it is immaterial that the district attorney may have assented to it, or may have given a qualified or restricted assent.

The position taken by Olwell is that by taking bonds without sureties and bonds thus assented to by the district attorney without his (Olwell's) assent, the terms of the undertaking in which he was bound as surety were altered, or at least that there was an implied covenant on the part of the United States with him that they would not take any proceedings with the principal which would increase the risks of the sureties or affect their remedy against the principal; that when Olwell entered into the stipulation for value it contemplated that he must pay when the district court rendered judgment of condemnation, or when the appellate court so ordered, if any appeal intervened;—that the appeal contemplated was the usual appeal with the usual security to stay the judgment, if there should be a stay, as provided for under existing laws; that it contemplated the giving of bonds on appeal with sufficient sureties, whose obligations would enure to the benefit of the sureties in the stipulation given below as between them and the principal.

If the petitioner were entirely correct in his view of the rights of the surety as to the implied covenant that the bond on appeal should be a proper bond according to existing law, it is entirely clear that the appeal was in the usual form and the security taken on appeal was such as existing laws provided for. It is not necessary therefore to consider whether the mere neglect of the government to enforce the decree below pending the appeals would have discharged the surety if it had appeared that one of the bonds given on appeal had been defective and such as would not operate as a supersedeas.

As to the alleged deposit of bonds, if it was made and the bonds were afterwards stolen, as the affidavits tend to show, it is not perceived that the deposit or the loss of the bonds can have had any effect upon the obligation of the sureties in this stipulation.

Motion denied.

UNITED STATES v. QUANTITY OF MANUFACTURED TOBACCO. See Cases Nos. 11,499, 16,104, and 16,106a.

Case No. 16,103.

UNITED STATES v. QUANTITY OF RAGS.

[77 Int. Rev. Rec. 123; 7 Am. Law Reg. (N. S.) 369.]

Circuit Court, S. D. New York. April, 1868.

VIOLATION OF INTERNAL REVENUE LAWS—ILLICIT DISTILLERY.

[Personal property found in buildings which are in the same enclosure with a building in which an illicit distillery is carried on, and in such juxtaposition to it that the owners thereof could not be ignorant of the existence of the still, is subject to forfeiture under section 48 of the internal revenue law.]

This was an action under the 48th section of the internal revenue law [13 Stat. 240], to forfeit certain personal property, upon the following state of facts: One Young owned a brick house situated upon the part of a city lot; against the rear wall of which a stable had been formerly erected. The adjoining lot was also owned by Young, and had been covered with a wooden building having wide doors at each end constructed and used for a livery stable. The rear of both lots was enclosed together by a single fence across the two, thus forming one enclosure, from which the only access to the street for vehicles was through the livery stable; a small gate opened from the yard in the rear of the lots, and a swinging door had been constructed opening from the rear stable building to the brick house in front; another door opened from the side of the brick house into the livery stable. Young occupied the front brick building as a junk-shop, and leased the livery stable to one Sherman for a livery stable, and since that he leased the rear stable to other parties. It appeared that the rear doors of the livery stable were, on Thursday prior to the seizure, found fastened by a spring lock capable of being opened without a key; the snow in the rear then gave evidence of the passing of persons from the livery stable to the rear stable, and in the rear stable was an illicit still with mash in fermentation; on Friday the still was in operation; on Saturday night the officers made a descent upon the place. The lock upon the rear door of the stable was found to have been changed. The distillery was then in full operation under the care of two men both of whom fled through the swinging door into the junk shop, and

thence to the street, where one was arrested. No claim was interposed for the distillery property, but Young claimed the personal property seized in the junk-shop, and Sherman the horses, &c., seized in the livery stable. Both claimants denied any knowledge of the existence of a still in the rear stable. There was evidence that the smell of distillation in the rear building would necessarily be detected throughout the whole place. There was no evidence that either of them was interested in the still.

BENEDICT, District Judge, held, that under section 48 of the internal revenue law, the juxtaposition of the property proceeded against in the same place, or within the same enclosure with the illicit still, was sufficient to forfeit it; provided the owners of the property knew of the existence of the illicit still in the rear stable, and that under the evidence in the case the jury would not be warranted in finding that the existence of the illicit still was unknown to the owner of the place and the keeper of the livery stable. A verdict was accordingly directed in favor of the government.

Case No. 16,104.

UNITED STATES v. QUANTITY OF TOBACCO.

[Affirming Case No. 16,105. Nowhere reported; opinion not now accessible.]

Case No. 16,105.

UNITED STATES v. QUANTITY OF TOBACCO.

[5 Ben. 112; 3 Int. Rev. Rec. 158.] [1]

District Court, S. D. New York. May, 1871.[2]

INTERNAL REVENUE—EVIDENCE—FRAUDULENT INTENT—SALES—MANUFACTURED GOODS.

1. A fraudulent intent in respect to a particular importation of goods may be legitimately inferred by a jury from a previous fraudulent intent and previous fraudulent acts, shown in respect to previous importations.

2. The same kind of evidence is legitimate in prosecutions for the forfeiture of property under the internal revenue acts.

3. The internal revenue act of March 3d, 1865 [13 Stat. 468], which went into effect on the 1st of April, 1865, imposed a tax of thirty-five cents a pound upon certain tobacco, upon which the previous act had imposed a tax of twenty-five cents a pound. On the 31st of March, 1865, L., a tobacco dealer in New York, entered upon his sales-book a sale of about $60,000 worth of such tobacco to K. & W., who gave him their check for the amount. Two or three days afterwards he gave to K. & W. his check for the same amount. The tobacco never passed into the possession of K. & W., but L. kept it on his own premises, treated it as his own, and disposed of it as such. In connection with that alleged sale, he entered a quantity of the tobacco in the tax-book, at that date, and returned it as sold: *Held*, that, under the 94th section of the act of June 30th, 1864 [13 Stat. 264], it was illegal for L. to return that tobacco for tax, because it was not sold, nor was it "removed for consumption," under the 91st section of the same act.

4. The fact of this tax of twenty-five cents having been paid on this tobacco by L., under the above circumstances, was no reason for his not returning for tax a sale of a portion of it in April and May, 1867, although the tax upon such tobacco had at that time been reduced to fifteen cents a pound, by the act of July 13th, 1866 [14 Stat. 98], notwithstanding the provision of the 70th section of the latter act.

5. Under the 90th section of the act of 1864, as amended by the 9th section of the act of July 13th, 1866, a manufacturer of tobacco is required to keep a book showing the goods manufactured by him as well as the goods he has sold.

6. Manufactured goods, under that section, means goods the manufacture of which is completed, so that the goods are in a condition to be sold.

[Cited in U. S. v. 16 Barrels Distilled Spirits, Case No. 16,300.]

7. It appeared to be the manner of doing business in the warehouse of L., to enter for tax on a certain day a large mass of tobacco, which was then taken down stairs into the retail counter department, where it was sold at retail, no record being kept of such sales: *Held*, that this was an illegal mode of doing business; that there was no sale when the property was taken to the retail counter; and that, under the 90th section of the act of 1864, as amended by the act of July 13th, 1866, a record of the sales at the retail counter should have been kept, and an abstract of such sales returned by the 10th day of every month.

[This was an information of forfeiture against a quantity of tobacco claimed by C. H. Lilienthal.]

Thomas Simons, Asst U. S. Dist. Atty.

Thomas Harland, Benjamin K. Phelps, and Daniel G. Rollins, Jr., for claimant.

BLATCHFORD, District Judge (charging jury). This case has occupied your attention for a long time, this being the nineteenth day since we entered upon its consideration. It is one of a class of cases which, as you have perceived, requires, in its examination by the counsel, the court and the jury, the exercise of patience and forbearance, in investigating matters of great tediousness. The consumption of time is inseparable from the character of the inquiry, and was, in my judgment, absolutely necessary. The trial was commenced in the expectation and with the intention, on the part of the district attorney, of saving the time of the court and jury from being taken up with an examination of the books, if an accurate transcript and faithful representation of their contents, made out of court, could be presented. But, on an examination, it was quite apparent that the "callings," as they have been denominated, which were made and were sought to be put in evidence, were not reliable. That fact was admitted by the dis-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 13 Int. Rev. Rec. 158, contains only a partial report.]

[2] [Affirmed by circuit court; case not reported.]

trict attorney. Therefore, great injustice would have been done to the claimant, if those "callings" had been put before the jury as a true transcript of the books, instead of having in evidence the books themselves. Moreover, an examination of the books by witnesses on the stand, in the presence of astute counsel on both sides, and of the court and jury, clears up everything as we proceed, and leaves nothing vague or doubtful. If any difficulty or embarrassment arises, the proper witness is on the spot to explain it. We have had an examination of these matters in Mr. Lilienthal's establishment, under circumstances the most favorable for the investigation, in a court of justice, of questions of this kind. We have had the gentlemen most intimately concerned in and connected with these transactions, the parties themselves who made the entries in the books, Mr. Denneker and Mr. Davis, gentlemen of intelligence, and who have given their testimony in a manner, so far as imparting information is concerned, entirely satisfactory to the court and the counsel, and, I doubt not, to yourselves. Again, all the books that have been called for have been presented. The district attorney, versed in these matters, has been assiduous, persevering and untiring. The counsel for the defence are gentlemen more eminently qualified for an investigation of this kind than any counsel at the bar, one of them having heretofore held the high position of deputy commissioner of internal revenue, under the government of the United States, and the others having fitted themselves for these investigations by long service in the district attorney's office, in the prosecution of like matters on behalf of the government. Therefore, nothing has been wanting, in this case, to the elucidation of the truth, so far as it can be ascertained from the books kept by Mr. Lilienthal, and from the testimony of his foreman and others in his establishment. And it is a result of this entire and thorough competency of the counsel on both sides, that that happens in this case, which rarely happens in any case tried before this court or any other court, that the court is able to assent, and does assent, as I shall hereafter state to you, to all the propositions of law presented on both sides of this case, as requests to the court to charge the jury, leaving merely a question of fact for your consideration. And I desire, gentlemen, to say to you, in the outset of my remarks, that it is for you solely, under your oaths, in the discharge of your duties as jurors, to pass upon that question of fact, uninfluenced, in your determination, by any suggestion or opinion that you may suppose the court holds on any matter of fact, taking the law as given to you by the court, and exercising your own independent, unbiassed, uninfluenced judgment upon the facts, to come to a righteous conclusion.

The issue in this case is a very plain one. The prosecution is founded on the 48th section of the act of June 30th, 1864, as amended by the 9th section of the act of July 13th, 1866 (14 Stat. 111), a section enacted at a comparatively early day in the history of the internal revenue acts of this country, and which has remained on the statute book, with some modifications, ever since, and has been enforced in a great many cases. Its provisions are these—that where any property, subject to a tax under a law of the United States, is found in the possession of any person with intent to sell it, or remove it, or dispose of it, without paying the tax upon it, or without having the tax paid upon it, or with intent to defraud the internal revenue laws of the United States, such property, so found, under such circumstances, in the possession of any person, with such intent, shall be forfeited to the United States, and may be seized, as this property was in this case, and be proceeded against in the manner in which this property is being proceeded against in this suit. The same section provides, that if any raw materials are found in the possession of any person, he having the intent, in respect to them, when they are so found in his possession, of manufacturing them into articles subject to tax, in respect to which articles he intends that the tax shall not be paid, or that the revenue shall be defrauded, such raw materials shall be forfeited to the United States. The same section goes on to provide, that, under such circumstances, not only shall the articles subject to tax, and the raw materials, be forfeited, but all personal property, of any kind whatsoever, found on the same premises where such offending articles, so to speak, are found, shall be forfeited. There has been seized, in this case, not only tobacco in a manufactured state, subject to tax, but also a large quantity of raw materials—raw tobacco, and other raw materials—and a large quantity of personal property connected with this establishment. The report of the appraiser values the entire property at $104,000. In that amount it was bonded, and delivered to the claimant, and the government accepted what it regarded as a satisfactory bond, in place of the property. It is this $104,000 worth of property, consisting generally of tobacco subject to tax, raw materials, and other personal property, found in this establishment, that is the subject of this suit.

It is for the government to satisfy you that this property was in this establishment, with the intent mentioned, in respect to it, on the part of those in whose custody and control it was. For the purpose of making the matter clearly definite, I will read the language of the statute: "All goods, wares, merchandise, articles or objects on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within the control, of any person or persons, for the purpose of being sold

or removed by such person or persons in fraud of the internal revenue law, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the commissioner of internal revenue for that purpose, and the same shall be forfeited to the United States, and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to avoid the payment of said tax, and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure, where such articles or such raw materials shall be found, may also be seized by any collector or deputy collector, and the same shall be forfeited as aforesaid." The district attorney has stated to you, in his summing up, the various grounds upon which he claims the forfeiture of the property seized, that is, the various grounds upon which he maintains that he has proved the existence of this intent, in respect to the taxable tobacco and the raw materials and other property seized in the factory of Mr. Lilienthal. As you have seen, the testimony is entirely testimony in regard to what are alleged to have been previous acts of omission and commission, on the part of Mr. Lilienthal and persons in his establishment, in respect to the conduct of their business at previous times, in relation to the internal revenue laws of the United States. That is a class of evidence which, as has been expressly adjudicated, in many cases, by the supreme court of the United States, is perfectly competent and legitimate evidence from which to infer a fraudulent intent in respect to existing property. It has been held in respect to the importation of goods at the custom house, that a fraudulent intent in respect to a particular importation of goods may be legitimately inferred by a jury from a previous fraudulent intent and previous fraudulent acts, shown in respect to property previously imported through the custom house. There is a large class of cases on that subject, and the doctrine has been recently applied to an action under the internal revenue laws, by the circuit judge of this circuit, in a case in the Northern district of New York, in regard to distilled spirits. It is, therefore, a class of evidence that can be legitimately appealed to, and is appealed to, in all cases of this kind. Sometimes it is accompanied by other evidence, in respect to an existing intent, in regard to property seized. Sometimes property seized is found concealed, and, to support the idea that fraud was intended in regard to it, previous fraudulent acts are given in evidence. Sometimes, as in this case, the evidence consists almost entirely of testimony in regard to previous acts, and to what is claimed by the district attorney to have been the fraudulent intent existing in such previous acts.

I shall call your attention particularly to the various matters that are relied on by the district attorney. The first one is in regard to what is called "extra long smoking tobacco," a species of tobacco in regard to which it may be generally stated, that it has in it a very large proportion of stems. It is a kind of tobacco which, according to the evidence, was manufactured in this establishment, as a part of its ordinary business, prior to the 1st of August, 1866, at which date commenced this series of returns, seventeen in number, which are the main subjects of consideration in this case. It is a species of tobacco that was manufactured previous to that time, and returned month by month in the monthly returns. That date is taken in this case, because it is the date when the act of July 13th, 1866, changing the rate of duty on various descriptions of tobacco, went into operation. Previous to that time, the act imposing a tax on tobacco was the act of March 3, 1865 (13 Stat. 469). That act of March 3, 1865, divided smoking tobacco into two classes, for taxation. One class, made exclusively of stems, was taxed fifteen cents a pound; and smoking tobacco of all kinds not included and provided for under the fifteen cents clause, was taxed thirty-five cents a pound. It appears, from the evidence, that the "extra long smoking tobacco" so made in this establishment prior to August 1st, 1866, and so being made in it when the act of July 13th, 1866, was passed, had been, up to the 1st of August, 1866, returned by Mr. Lilienthal as "smoking tobacco," under this thirty-five cents clause, and not under the fifteen cents clause. Not being made exclusively of stems, it was not liable to the fifteen cents tax, and, therefore, it was liable to the thirty-five cents tax. It also appears that, for some twenty days or so after the 1st of August, 1866, when this new law of July, 1866, went into effect, this "extra long smoking tobacco," which had, before August 1st, 1866, been returned at thirty-five cents, was returned by Mr. Lilienthal as liable to a tax of forty cents, under a clause in the act which so went into effect August 1st, 1866, and was returned by him under the head of "chewing tobacco." The reason stated by the claimant for returning such tobacco as "chewing tobacco" is, that there was no place to insert it in the form of return, except under the head of "chewing tobacco." It had, however, been previously returned as "smoking tobacco," and it was called "smoking tobacco" in the price lists issued by the claimant. After it had been returned for some twenty days after the 1st of August, 1866, as liable to a tax of forty cents a pound, it was at all times thereafter returned by the claimant as liable to a tax of fifteen cents a pound. It was continued at that rate throughout all the returns, down

to the 31st of December, 1867, and all the smoking tobacco of every kind that was returned by the claimant in all the returns made by him during all the seventeen months, was returned at fifteen cents a pound, and no smoking tobacco was returned at forty cents a pound. There was no class of thirty-five cents smoking tobacco in the act of July, 1866. The only classes of smoking tobacco in that act were these two—smoking tobacco, sweetened, stemmed or butted, forty cents per pound; and all smoking tobacco not sweetened, nor stemmed nor butted, including that made of stems or in part of stems, and imitations thereof, fifteen cents per pound. A great deal was said in this case, on the argument to the court, as to the proper construction of the act of July, 1866, in regard to the tax on this "extra long smoking tobacco." You will recollect that, during the greater part of the seventeen months after the 1st of August, 1866, all except a very small portion of the time, at the commencement, this "extra long smoking tobacco" was prepared by putting into it rather more stems, say ten pounds more in every ninety pounds of product, than they had been in the habit of putting in before the 1st of August, 1866. It always had had a large proportion—not a preponderance—of stems in it, although it was not made exclusively of stems. I do not consider it necessary, in this case, to determine what is the proper interpretation of this fifteen cents clause in the act of July, 1866, or under what head in that act, as a matter of law, this "extra long smoking tobacco," manufactured in the manner described by Mr. Denneker, properly falls. The facts, to recapitulate them, about which there is no dispute, in regard to this "extra long smoking tobacco," are, that at the time this act of July 13th, 1866, went into effect, Mr. Lilienthal was manufacturing this "extra long smoking tobacco;" that, previous to that time, he had returned it at thirty-five cents a pound, as "smoking tobacco," under the act of March 3, 1865; that, after the act of July, 1866, went into effect, and until about the 20th or 21st of August, 1866, he returned it at forty cents a pound; and that, after that time, the mass, if not all of it, during the entire residue of the seventeen months, was returned at fifteen cents a pound, there being no difference whatever in the tobacco during all the periods when it was so returned at the several rates of thirty-five, forty and fifteen cents, except that, during almost all of the seventeen months, commencing with August, 1866, it contained, in every ninety or one hundred pounds, ten pounds more of stems than it had, before August, 1866, been in the habit of containing. The quantity of it in the returns for such seventeen months was quite large. The district attorney claims that the average was about five thousand pounds a month; and, at all events, the quantity was considerable.

The district attorney has addressed to you an argument for the purpose of showing that, no matter what the interpretation of the act of July, 1866, may properly be, the conduct of Mr. Lilienthal in regard to this "extra long smoking tobacco" shows an intent on his part throughout to defraud the government in regard to the tax upon such tobacco. It is for you to say whether you believe that he has established the proposition for which he contends. The theory on the part of the defence is, that, because this tobacco had some stems in it, it was liable to a tax of fifteen cents a pound; that, at all events, Mr. Lilienthal, reading the law for himself, had a right to think that it was capable of a double interpretation; and that there could be no fraudulent design or intent on his part, until his attention was in some way called to the subject, or until the matter had been judicially determined. The district attorney on his part, contends, that if, to put any stems whatever into the tobacco, reduces it to a fifteen cents tax, it makes no difference how much stems there are in it, whether more or less; and that, therefore, the testimony in regard to putting more stems into this tobacco, has no bearing upon any honest transaction in regard to this matter. In other words he claims, that if the ground taken by Mr. Lilienthal at the time, that this tobacco was liable to the fifteen cents tax, because it had some stems in it, was correct, and that all tobacco, under the act of July, 1866, which had any stems in it, or was made in part of stems, was liable to fifteen cents a pound tax, and not forty cents, then it was absurd to put in any more stems, because the quantity of stems that was in already was entirely sufficient to bring the tobacco within the fifteen cents tax. It is for you to say what force and weight you will give to this argument. In that connection, the district attorney calls attention to the fact, that, all through the seventeen months, all the smoking tobacco that was returned by Mr. Lilienthal was returned at the fifteen cents rate, and none was returned at forty cents a pound. He also claims, that the books of Mr. Lilienthal show, that Mr. Lilienthal had a purpose to benefit himself, and not to deal honestly with the government, in this—that what was returned by him at forty cents a pound, during the short time he returned it at that rate, after the act of July, 1866, went into operation, appears by the books to have been sold at seventy cents a pound, and, when he returned the tobacco at fifteen cents a pound, thus reducing the tax by twenty-five cents a pound, he reduced his price to the purchaser by only ten cents a pound, for the same tobacco, with the same increased quantity of stems in it, thus making to himself a clear difference in his own favor, as is claimed, of fifteen cents a pound, out of the twenty-five cents a pound reduction in the tax. That is claimed by the district attorney to be

a circumstance to be taken into consideration. It is also claimed by the district attorney, that there is no evidence to show that the government had any information until February, 1867, as to how this "extra long smoking tobacco" was made; that, at that time, when such information was communicated to Mr. Van Wyck, the collector, as is shown by his letter of March, 1867, to the internal revenue office, he supposed the state of facts to exist which is disclosed in that letter, namely, that the identical stems which were taken out of the tobacco for the purpose of being subjected to this treatment, which would assimilate them to leaf tobacco in appearance and, perhaps, in flavor, were put back with the leaves from which they were taken; that the internal revenue office, when, in August, 1867, it replied to the letter of Mr. Van Wyck, acted upon that idea, and in this way—that, while the act of July 13th, 1866, said that smoking tobacco stemmed should pay a tax of forty cents a pound, the commissioner of internal revenue stretched a point in favor of the tobacco manufacturers, by saying to them: "Although you take away physically the stems from the leaves, in the course of your manufacture, so that, in one sense, the tobacco is stemmed, nevertheless, for the purpose of giving you the privilege of putting those stems through this manipulation, we will consider that that tobacco is not stemmed, provided you put back those identical stems with the leaves to which they belong." The district attorney also contends, that, inasmuch as the claimant returned this tobacco, under the act of 1865, at the rate of thirty-five cents, and then returned it for a little while, under the act of 1866, at forty cents, and then changed the rate to fifteen cents, he has not shown honesty and good faith, because it does not appear that he laid all the facts before the internal revenue department, and asked what the tax on the tobacco should be, but put it down, month after month, at fifteen cents a pound, without raising the question whether the rate ought not, perhaps, to be forty cents. These I understand to be substantially the views urged on the part of the government in regard to that question. You will perceive that those views are, as I said before, entirely irrespective of any determination, as a matter of law, as to what in fact the tax on that tobacco was: and it is for you to say what inference you will draw from all this testimony, in regard to the intent Mr. Lilienthal had in respect to this "extra long smoking tobacco." The question applies to the entire series of months from August, 1866, to December, 1867. This seizure took place in March, 1868; and it appears, from the inventory of the property seized, that there was among it a considerable quantity of "extra long smoking tobacco," some of it loose, and some of it in papers. These are all the remarks which it seems necessary to make to you in regard to this "extra long smoking tobacco."

The next subject is the Orinoco tobacco, which was sent to California in April and May, 1867—on the 13th of April 3,600 pounds, and on the 29th of May 3,400 pounds. It is admitted, that this tobacco was not returned for tax at that time—April and May, 1867. There is no dispute that it was sent out of the establishment at that time; that it was removed for sale at that time; that it was sent to California to be sold at that time; and that it was not put into any return at that time. If it had been put into a return at that time, there is no dispute that it would have come under the fifteen cents tax, under the act of 1866, because it was tobacco which had not been in any manner stemmed. It was leaf and stem together, just as it grew, pressed into a mass, into a cake. Not having been stemmed, it was not subject to a duty of forty cents a pound, and it fell directly under the fifteen cents clause, as smoking tobacco, not stemmed. The history of that tobacco, as developed, is this: It was returned for tax, as a portion of a larger mass of the same description of tobacco, Orinoco tobacco, on the 31st of March, 1865, the day before the 1st of April, 1865, and the day before the act of March 3d, 1865, went into effect. That act of March 3d, 1865, imposed a higher tax upon that description of tobacco than it had been previously subject to under the act of June 30th, 1864. Under the act of June 30th, 1864, that tobacco was liable to a tax of twenty-five cents a pound. The provision of that act was—"Smoking tobacco, manufactured with all the stem in, the leaf not having been butted or stripped from the stem, twenty-five cents per pound." Under the act of March 3d, 1865, which was to go into effect on the 1st of April, 1865, this tobacco, which, up to the close of the 31st of March, 1865, was liable to a tax of twenty-five cents a pound, would have been liable to a tax of thirty-five cents a pound, being an increase of ten cents a pound. Mr. Lilienthal at that time went through the process that was developed on the trial, and stated by himself in his testimony of entering upon his sales book a sale, or a transaction as a sale, of the mass of the Orinoco tobacco of which this 7,000 pounds, which were afterwards sent to California, in April and May, 1867, formed a part, and of a large quantity of other tobacco, in all some $60,000 worth, to a house in this city, Kearney & Waterman. Kearney & Waterman gave him their check for that amount, and, two or three days afterwards, he gave to Kearney & Waterman his check for the same amount. The tobacco was not removed from his establishment, and never passed into the possession of Kearney & Waterman. Mr. Lilienthal kept it on his own premises, and, after he bought it back, (as the expression is), he treated it as his own, and disposed of it as such. In connection with such alleged sale in that way to

Kearney & Waterman, on the 31st of March, 1865, Mr. Lilienthal put that Orinoco tobacco into the tax book, at that date, at the rate of twenty-five cents a pound, and returned it as sold. He told you frankly on the stand, that he went through this operation because, under the law of 1865, there was going to be a higher duty on such tobacco. He kept the tobacco on hand so long that there came another change in the law, and, by the time he sent it to California, if he had not paid any tax on it before, he would have had to pay on it a tax of only fifteen cents a pound. It is my duty to say to you, that that transaction was utterly illegal. The 94th section of the act of June 30th, 1864, under which Mr. Lilienthal was acting at the time he returned this tobacco for tax, on the 31st of March, 1865, before the act of March 3d, 1865, went into effect, provided as follows: "Upon the articles, goods, wares and merchandise, hereinafter mentioned, except where otherwise provided," which includes this tobacco taxable at twenty-five cents a pound, "which shall be produced and sold, or be manufactured or made and sold, or be consumed or used by the manufacturer or producer thereof, or removed for consumption or for delivery to others than agents of the manufacturer or producer, within the United States or territories thereof, there shall be levied, collected, and paid the following duties, to be paid by the producer or manufacturer thereof." It is perfectly clear that that transaction was no real sale of the property. It was not intended to be a sale. It was, as it has been well characterized here, a perfect sham, from beginning to end. Now, it was illegal to return the Orinoco tobacco for tax, because it was not sold, nor was it removed for consumption. The words "removed for consumption," in the act of 1864, are defined by the provisions of the 91st section of the same act. The property must be removed from the premises of the manufacturer in good faith, with a then present intention to have it consumed, as against the will of the manufacturer and owner of it, giving a right to another person to put it into consumption, or the property in it must in some way be changed, or it must be sent for sale on commission, or, in some way or other, an intention to put it into the category prescribed by the act must be manifested in regard to it. But this property, you will remember, remained on the premises of Mr. Lilienthal, not disturbed in any manner, and was returned for tax under the circumstances stated.

It is claimed, on the part of the defence, that, inasmuch as the tax of twenty-five cents a pound had once been paid on this Orinoco tobacco, there was no obligation on the part of Mr. Lilienthal to make a subsequent return of it, and to pay another tax on it; and that this was the case, a fortiori, if, as was the fact, at the time the tobacco was sent to California, the tax on it would have been fifteen cents a pound. In this connection, reference was made to the following provision in the 70th section of the act of July 13th, 1866, which went into effect on the 1st of August, 1866, and was in force when this Orinoco tobacco was sent to California, in April and May, 1867: "All manufactures and productions on which a duty was imposed by either of the acts repealed by this act" (which embraces the provisions imposing duties on tobacco contained in the previous act of June, 1864, which was the act in force when this tobacco was returned for tax on the 31st of March, 1865), "which shall be in the possession of the manufacturer or producer, or of his agent or agents, on the day this act takes effect, the duty imposed by any such former act not having been paid, shall be held and deemed to have been manufactured or produced after such date." The defence contends, that the duty on this tobaccco had been paid, within this provision. But that is not the law. The law says—all manufactures "on which a duty was imposed," "the duty imposed" by the act of 1864 not having been paid. Now, no duty was imposed upon this Orinoco tobacco. A duty was imposed upon it only when it was sold in good faith or removed for consumption. There was no duty imposed upon it at the time it was returned for tax at twenty-five cents a pound. The claimant had no right to return it at twenty-five cents, particularly when it is acknowledged by himself, on the stand, that he did so for the purpose of getting rid of the coming thirty-five cents duty, and when, therefore, it is clear that there was an intent to commit a fraud on the government. The act of 1866 only applies to the payment of a duty which has been imposed. Otherwise, a party would be able to take advantage of his own wrong, by paying a tax of twenty-five cents a pound for the purpose of getting rid of a tax of thirty-five cents that was going into effect the next day, and paying the tax when the law gave him no right to pay it, and afterwards to say that, because he had paid it, there was no intent to defraud the government, and that thus the fraud so committed was condoned. The law is not so. The law merely says, that if a tax which has been imposed has been paid, no tax can be collected again on the same article. You are to consider the question not solely in the light of the fact that the law happened to be altered again, and the duty to be reduced from thirty-five cents to fifteen cents a pound, before the tobacco was sent to California, but, also, in the light of what Mr. Lilienthal did, and what his intent was, in regard to the tobacco, as bearing upon his intent in regard to the tobacco found in his possession when his establishment was seized.

The district attorney has called your attention, very properly, to the fact, that the law,

in all its provisions, aims at this—that manufacturers of tobacco shall not be allowed to aggregate in their establishments large quantities of tax-paid goods. An account is to be kept of goods sold, as they are sold and removed. They are to be removed from the premises—removed for consumption. They are not to be returned in masses, at the pleasure of the manufacturer at a given time, without being disturbed in any manner or removed from his establishment, so that he may be enabled to have on hand a large mass of goods, from which he can say, at any time, that any particular goods sold which cannot be traced were taken. These considerations, addressed to you, are considerations of force, and are to be taken into view by you in judging of the intent with which a manufacturer aggregates upon his premises, without removing therefrom, a large quantity of tax-paid goods, such a practice being against all the provisions of the law, and directly unlawful in respect to this Orinoco tobacco so returned for tax on the 31st of March, 1865.

The next subject in regard to which the district attorney claims that a fraudulent intent is shown on the part of Mr. Lilienthal, is in respect to the account which, by the 90th section of the act of 1864, as amended by the 9th section of the act of 1866, is required to be kept by every tobacco manufacturer. We have had exhibited here all the books on the subject kept in this establishment. They appear not to be blank forms printed, but to be entirely in writing. This one is headed—"Account of tobacco and snuff sold by C. H. Lilienthal in the year 1867." The heading is all in writing. This one that preceded it appears to have a heading in print. But, in regard to both of them, it may be said, that they embrace nothing but goods sold. They in no manner embrace, or pretend to embrace, goods manufactured. The earlier book is headed—"Quantity of tobacco and snuff sold and consumed, and removed for sale or consumption from the factory;" and the later book is headed—"Account of tobacco and snuff sold." In regard to this matter the law is explicit. It requires every manufacturer of tobacco, snuff or cigars, to "keep in book form an accurate account of all the articles aforesaid thereafter purchased by him, the quantity of tobacco, snuff, snuff-flour or cigars, of whatever description, manufactured, sold, consumed or removed for consumption or sale, or removed from the place of manufacture." It is perfectly clear that in this case, no such book was kept by Mr. Lilienthal, and no book showing in any manner the manufactured goods, but showing only those that were sold. "Manufactured" goods means goods the manufacture of which is completed, so that the goods are in a condition to be sold, and so that all that needs to be done, if a purchaser asks for them, is to deliver them. No account of such goods was kept. When the manufacturer comes to make up his abstract and hand it in to the assessor, he is not required to hand in an abstract of goods manufactured. He is required to hand in only an abstract of goods purchased, sold or removed. But Mr. Lilienthal, as you perceive, had, in the abstracts returned by him, a column for goods manufactured, as well as one for goods sold and removed for sale. He had no book, however, from which he could obtain any entries to put into the column of goods manufactured, because no such book was kept, and therefore, that happened which you naturally expect would happen. He filled up the column of goods sold, in the abstract furnished to the government, from the book, kept by him, of goods sold; and, when he came to fill up the column of goods manufactured, having no record of them, he put down, in every case, as manufactured, the same quantity which he put down as sold.

It was a clear violation of law, not to keep an account of goods manufactured. The reason why the law requires this book of goods manufactured to be kept, although it does not require the abstract returned by the tenth day of each month to set forth the goods manufactured, is, that the manufacturer is required to furnish a statement or inventory every January, setting forth all the property he has on hand in his business, and what portion of the goods was manufactured or produced by him, and what portion was purchased from others. Therefore, unless a record be kept of goods manufactured, it is impossible for the manufacturer to comply with the law, by handing in every January a true statement of all the goods on hand, specifying which of them were manufactured or produced by him, and which of them were purchased.

The district attorney has also called your attention to the inventories furnished by Mr. Lilienthal, for 1867 and 1868, and to what he claims are discrepancies between them and the monthly returns made to the government. It is for you to say what inference you will draw therefrom with regard to any intent on the part of Mr. Lilienthal. The twelve returns for 1867, in respect to chewing tobacco, correspond throughout, in the columns for manufacture and sale, so many pounds being manufactured, and the same number of pounds being sold, in the same month. As a matter of course, the quantity of manufactured chewing tobacco set forth as on hand in the inventory of 1868 ought not to have been greater or less than the quantity on manufactured chewing tobacco set forth as on hand in the inventory of 1867; and yet the district attorney states that the two inventories differ in that respect. So, in regard to fine-cut shorts, the two columns for manufacture and sale are alike in the twelve returns for the year 1867, and yet the two inventories do not correspond in respect to fine-cut shorts. So in regard to smoking tobacco, the district attorney claims there

is a like discrepancy. He also claims, that the Orinoco tobacco, if it was sold and bought back, ought to have been returned as purchased goods on hand on the first of January, 1867, whereas he claims it was not so returned. All these circumstances are commented upon by the district attorney, for the purpose of inferring from them an intent on the part of Mr. Lilienthal throughout, in the manner in which he kept his books, and in the manner in which he returned for tax, under the act of 1865, the tobacco which he had on hand when that act went into effect, and in the fact that he kept on hand a large quantity of tax-paid tobacco, contrary to the policy of the law, not to deal honestly with the government, but to violate the law, and thence of inferring a fraudulent intent in regard to the goods on hand in his establishment when it was seized.

The last subject to which attention was called by the district attorney, was the result of the examination of the books of the claimant. It appears from them, in respect particularly to that which occupied so much time in the investigation—the Orinoco tobacco, and the Killikinnick tobacco—that there are large quantities of granulated tobacco found in the order books that are not found, in the same specific items, in the tax books, and large quantities of granulated tobacco returned for tax in the tax books, which cannot be identified with any specific items in the order books. A great many items were identified, and, in regard to those which could not be, you will recollect the testimony of Mr. Denneker. When asked: "Where did the granulated tobacco come from which filled the orders in the order books, which cannot be identified as items in the tax books?" It was part, he said, of a large mass that had been entered for tax on a certain day, and taken down stairs into the retail counter department. Under the law, that was a wholly illegal mode of doing business. Mr. Lilienthal had no right arbitrarily to take a quantity of Killikinnick tobacco and return it for tax, and remove it down stairs into his retail counter department, or into any other part of his premises, and peddle it out by the pound from day to day for an indefinite period of time. When it was so entered for tax, as I stated before in regard to the Orinoco tobacco, it had not been sold, and it was not removed for consumption, within the law. Removing it from up stairs to down stairs was not a removal for consumption, within the meaning of the statute. In addition to that, it is admitted that, when tobacco so taken in masses, and returned for tax, and then taken down stairs to the retail counter, was sold at the retail counter afterwards, no record of those sales was kept, in any manner whatever. The 90th section of the act of 1864, as amended by the act of 1866, requires, that a record shall be kept of all sales, and that an abstract of such sales shall be returned by the tenth day of every month. This property, when it was taken from up stairs to the retail counter room, was not sold by Mr. Lilienthal to anybody. It was not sold to himself. It was not removed from his premises for consumption. It was taken from up stairs and brought down stairs, and, when it was so sold over the counter, no record of it was kept, in utter violation of the statute, and no abstract of it was returned, in violation of the statute. Mr. Lilienthal arbitrarily took three hundred or four hundred pounds and returned it for tax to-day, and then carried it down stairs, and then kept no record whatever of its subsequent sale. So that the purpose of the law was defeated by this transaction, because the government could have no means, when it got hold of Mr. Lilienthal's books, of tracing the sales of the tobacco. The fact that the government has been foiled in tracing such sales has been demonstrated here, because, no record of the sales having been kept, whenever any order which was found in the order book could not be identified with an item in the tax book specifically returned as so many pounds, Mr. Denneker testified that the order was filled out of the masses of tobacco which so went down stairs to the retail counter. The business, therefore, was conducted in such a manner as to deprive the government of what the law designed to provide, namely, a check over the transactions of tobacco manufacturers.

I have thus gone over the books of the claimant. It was necessary that I should show you what are violations of the law, in order that, if you should come to the conclusion, from the evidence, that such violations of law, in point of fact, took place, and that they showed an intent on the part of Mr. Lilienthal to defraud the revenue, you might have before you the law and the facts from which the district attorney claims that you have a right to infer a fraudulent intent on the part of Mr. Lilienthal, in respect to the tobacco on hand at the time of the seizure. I do not design to intimate any opinion whatever in regard to any intent on the part of Mr. Lilienthal in respect to these matters. But the facts in this case are undisputed. There is no serious contest about a single fact, except in regard to the every point of the law—the intent. On the part of the claimant, it is claimed, that the investigation before you has shown that, in point of fact, the government has not proved that it has been deprived of any tax; and, also, that it has been shown affirmatively, by an examination of the books, that the government has received all the taxes to which it was entitled, upon all goods which passed out of the establishment of Mr. Lilienthal prior to the seizure. You have heard all the evidence and the summing up on that subject, and it will be for you to say what is your belief on that subject, as bearing on the question of Mr. Lilienthal's intent in respect to the goods seized.

I shall now read to you the instructions prayed by the claimant. The instructions of law are twelve in number, to all of which I

assent. The thirteenth and fourteenth instructions, which are requests to charge as to the facts, I decline to charge, as not being questions of law.

The first proposition on the part of the claimant is this, and I assent to it: "If the jury shall believe that the returns for taxation of the tobacco known as 'extra long smoking tobacco,' between August, 1866, and the date of seizure, were made in good faith, and with an honest belief on the part of Mr. Lilienthal and his agents concerned or employed in the preparation of said returns, that said tobacco was liable to the fifteen cents rate of duty, and to no other or higher rate, then, even though said tobacco was by law liable to the forty cents rate of duty, the jury cannot, for that cause, find a verdict for the government, under section forty-eight."

The second proposition is this: "In order to forfeit the property proceeded against in this action, or any part thereof, the jury must be satisfied, either, first, that, at the time of the finding thereof," that is, on the 25th of March, 1868, "the manufactured articles, or some of them, were held by the persons in whose possession they then were, with a purpose, then existing, of selling or removing the same in fraud of the internal revenue laws, or with a design, then existing, to avoid payment of the taxes imposed thereon; or, second, that the persons in whose possession the raw materials were found, held them, at the very time of such finding, with intent to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax." That is correct.

The third proposition, to which I assent, is this: "Fraudulent intent and fraudulent acts long prior to the time of the finding and seizure of the property in this action, (if any such existed), cannot warrant a verdict of condemnation, unless accompanied or supported by evidence of fraudulent intent or fraudulent acts at a period nearly coincident with the time of seizure, and, if the jury believe that, for the ten months next prior to the seizure, the claimant properly made returns, and paid taxes upon his manufactures, they may fairly infer therefrom a discontinuance of any fraudulent intent which he might have had previously."

The fourth proposition I assent to: "Even if the jury find that a fraudulent intent existed in the mind of Mr. Lilienthal at the time of making the return of the Kearney & Waterman tobacco, so called, in March, 1865, that fact of itself would not justify them in finding the existence of a fraudulent intention on his part in respect to the property proceeded against, at the time that property was found or seized."

The fifth proposition I assent to: "If the jury should find that a fraudulent act was committed by Mr. Lilienthal in 1865, in respect to property then in his possession, this alone, unless supported by other evidence, is not sufficient to warrant them in finding the existence of a fraudulent intent on his part in regard to the property found in his possession in 1868, and will not justify a verdict of condemnation."

The sixth proposition I assent to: "The act of July 13th, 1866, did not require manufacturers of tobacco to make return to the assessor of the quantity of tobacco manufactured by them."

The seventh proposition I assent to: "If the jury shall find, as a fact, that Mr. Lilienthal made returns of goods manufactured by him, from month to month, in no other way than by reporting the amount of such goods sold or removed within the same periods respectively, that fact is no evidence to support a verdict of condemnation, unless the jury shall believe that that mode of making returns was adopted or used with fraudulent intent on the part of Mr. Lilienthal, or of the persons employed in making such returns." The mere fact amounts to nothing, unless you shall believe that there was a fraudulent intent in connection with it.

The eighth proposition I assent to: "If the jury find that Mr. Lilienthal failed to make return of all the goods sold which he had purchased of other manufacturers, such failure is no evidence to support a verdict of condemnation, unless it was with a fraudulent intent on the part of Mr. Lilienthal, or of the persons employed in making such returns."

The ninth proposition is this: "If the jury shall find that, in 1865,"—this is the Kearney & Waterman transaction again—"Mr. Lilienthal returned for taxation, and paid a tax of twenty-five cents per pound upon, thirty-four hundred pounds and thirty-six hundred pounds of tobacco shipped in 1867 to W. T. Coleman in California, then he became liable to no additional tax by reason of said shipment of said tobacco at that time." There is no doubt about that. If the government should sue Mr. Lilienthal to-day for fifteen cents a pound tax on that tobacco, it would be a perfect defence for him to show that he had paid twenty-five cents a pound tax upon it.

The tenth proposition I assent to: "If the jury shall find that, at the time of the shipment of the thirty-four hundred pounds and thirty-six hundred pounds of tobacco, in 1867, to W. T. Coleman in California, the claimant believed that all the tax due thereon to the government had already been paid, then his failure to return said tobacco for taxation upon said shipment is no evidence of fraudulent intent on the part of the claimant." That is a correct proposition. If you believe that Mr. Lilienthal, with his knowledge of that transaction of 1865, with the view of it held by him, which he testified to here, believed that the tax was due to the government at the time he paid it, he could have had no fraudulent intent; and it is for

you to say what his belief was, in regard to its bearing upon the question of intent, but it must, as I have said before, have been a payment of a tax which Mr. Lilienthal honestly believed at the time he was bound to pay, and not a payment of a tax merely, because it was going to be raised the next day to thirty-five cents a pound.

The eleventh proposition I assent to: "The words, 'in fraud of the internal revenue laws,' as used in the forty-eighth section of the act of June 30th, 1864, are simply equivalent to the words, 'in fraud of the internal revenue.'"

The twelfth proposition I assent to: "Acts in violation of the internal revenue laws are not acts in fraud of the internal revenue laws, within the meaning of section 48, unless such acts are accompanied by an intent to defraud the United States." That is an abstraction which I certainly should not care to dissent from.

The other two propositions are questions of fact, addressed to me, to charge you that there is no evidence of this or that, which I decline to charge.

The propositions on the part of the government are substantially what I have already stated, but I will go over them, for the purpose of saying that I assent to them.

"First. If the jury find that the books, exhibits Nos. 138 and 138a, were kept by Mr. Lilienthal, or his agents, as and for the account in book form required to be kept by the provisions of the ninetieth section of act of June 30th, 1864, as amended by the ninth section of the act of July 13th, 1866, and that the said Lilienthal and his agents have therein kept no account of the quantity of tobacco or snuff manufactured by said C. H. Lilienthal at his factory in Washington street, from August 1st, 1866, to January 1st, 1868; that quantities of tobacco and snuff were removed for sale and removed from the said place of manufacture during said period, and that no account of the tobacco and snuff so removed was kept, as of removals thereof, and no accurate account of the tobacco and snuff so removed was kept in any manner in said books;"—that refers to the sales over the retail counter, of which no record was kept as sales—"that large quantities of granulated tobacco, and other descriptions of tobacco, manufactured, were sold by Mr. Lilienthal during said period, and that no account of such sales, as sales, was kept in those books; that quantities of purchased and manufactured tobacco were sold and removed from the said premises during the period from August 1st, 1866, to December 1st, 1867, and that no accurate account of such sales or removals was kept in said books; that exhibits numbered 1 to 17, both inclusive, were furnished to the assistant assessor of the district by said C. H. Lilienthal or his agents, as true and accurate abstracts of all such sales and removals, and were not true and accurate abstracts thereof;"—that means, not that they were not true and accurate abstracts of the books which Mr. Lilienthal kept, not that Mr. Denneker did not transfer them accurately from his tax book into the return, but that they were not, as recorded by Mr. Davis, true and accurate abstracts of the actual transactions—"that the annual inventories, exhibits 18 and 19, were made out and delivered by said C. H. Lilienthal to the assistant assessor of the district, severally, as true statements and inventories of the matters and things therein contained, as required by the said 90th section, as amended as aforesaid; that it appears, from said inventory and abstracts, that much more chewing tobacco and fine shorts was manufactured in said manufactory during the year 1867, than was declared upon said abstracts to have been manufactured; that a large quantity of smoking tobacco manufactured on said premises had been sold or removed during the year 1867, which had not been returned for taxation upon the said abstracts, and of which no account was contained therein, or in the said books, exhibits Nos. 138 and 138a—then, the burden of proof is upon the claimant to satisfy the jury that the tobacco so manufactured on said premises, and sold or removed, without due account, return and entry made thereof in the said books and abstracts, in the manner required by law, was not so sold and removed in fraud of the internal revenue laws, and with intent to evade the taxes thereon; and, if the claimant shall not have so satisfied the jury of his intent respecting the same, the jury may infer that the claimant's intent in respect of the same was fraudulent, and that his possession of the goods in suit was with the like intent."

I also charge the second proposition: "If the jury find that, prior to August 1st, 1866, when the act of July 13th, 1866, went into effect, changing, in some respects, the rates of taxation on manufactured smoking tobacco, a brand of smoking tobacco known as 'extra long smoking tobacco' had been manufactured by C. H. Lilienthal, by cutting together stripped or stemmed leaf, and stems, in certain proportions, and had been sold and returned for taxation by him as 'smoking tobacco,' subject to a tax of thirty-five cents per pound, under the existing law; that, from the time said act of July 13th, 1866, went into effect, the said 'extra long smoking tobacco,' manufactured as aforesaid, was entered by said Lilienthal in the account required to be kept in book form, by the ninetieth section of the act of June 30th, 1864, as amended by the ninth section of the act of July 13th, 1866, of sales and removals of manufactured tobacco, as 'chewing tobacco,' and was returned upon the abstracts of said accounts required to be furnished monthly to the assistant assessor of the district, by said section, as 'chewing tobacco,' subject to a tax of forty cents per pound, under the provisions of said act of July 13th, 1866; that, after the

said 1st day of August, 1866, said C. H. Lilienthal varied the process of manufacturing said 'extra long smoking tobacco,' by merely increasing the proportion of stem, and, from the 21st day of August, 1866, in each monthly return during the years 1866 and 1867, returned for taxation sales and removals of large quantities of the 'extra long smoking tobacco' so manufactured, as 'smoking tobacco,' subject to a tax of fifteen cents per pound, under the provisions of said act of July 13th, 1866; that the said 'extra long smoking tobacco' returned as 'chewing tobacco,' for taxation, at the rate of forty cents per pound, was sold at seventy cents per pound, and the said 'extra long smoking tobacco,' returned as 'smoking tobacco,' for taxation, at the rate of fifteen cents per pound, was sold at the rate of sixty cents per pound; that no officer of internal revenue was advised by C. H. Lilienthal, or his agents, of the said practice of returning the said 'extra long smoking tobacco,' for taxation, at fifteen cents per pound; that the commissioner of internal revenue had published his instructions and opinion that tobacco so manufactured was subject, under the said act of 1866, to the tax of forty cents per pound, as 'smoking tobacco,' and never directly or indirectly countenanced or sanctioned the practice of said C. H. Lilienthal in returning the said 'extra long smoking tobacco;' and if the jury believe, from these facts, that said Lilienthal and his agents made the said change in the process of manufacturing the said 'extra long smoking tobacco,' and the said change in the manner of returning the same for taxation, during the said period from August 1st, 1866, to January 1st, 1868, for the purpose of selling and removing the same in fraud of the internal revenue laws, and with intent to evade the payment of taxes thereon, then they would have a right to infer that the claimant and his agents had the like intent with respect to the property in suit."

I believe those are all the considerations which it is necessary to present to you in regard to this matter. You have listened patiently to the evidence, and to the summing up of the counsel, which has been exceedingly clear and thorough on both sides, and it is for you to say, on your oaths, what you believe to have been the intent of Mr. Lilienthal in respect to this property so seized. If the government has not made out, to your satisfaction, that such intent to commit a fraud upon the law, or to evade the payment of taxes, in respect either to the goods on hand, or to the goods to be manufactured out of raw materials on hand, existed on the part of Mr. Lilienthal at the time the goods were seized, your verdict will be for the claimant.

Mr. Rollins (counsel for the claimant), after taking several exceptions to the charge, said: Your honor charged our 10th request, as requested, but, in commenting on it, you stated to the jury, that, if they should find that Mr. Lilienthal believed that he was bound to pay that tax in March, 1865, and did pay it, then his failure to return the tobacco for tax in 1867 was no evidence of fraudulent intent. I take exception to that part of your honor's charge, and request your honor to charge, that, if Mr. Lilienthal believed that he had a right to pay, independent of any question whether he was bound to pay, the fact that he did not subsequently pay in 1867 is no evidence of fraudulent intent.

THE COURT.—That is a new proposition, and is not embraced in the one you handed to me.

Mr. Rollins.—I ask your honor so to charge.

THE COURT.—I do so charge—that, if Mr. Lilienthal believed honestly, when he paid that tax, on the 31st of March, 1865, that, as between him and the government, he, as a tobacco manufacturer had, at that time, a right to pay that tax, there was no fraudulent intent in his so doing. There is no doubt of that.

Mr. Rollins.—I also take exception to your honor's charging as requested by the district attorney, in both instances. We endeavored to embrace in our requests all we deemed important, but one thing is suggested by your honor's charge, which, I have no doubt, your honor will charge, and that is this—that, if the jury shall believe that the mode of returning for taxation the goods sold over the retail counter, by returning them at the time they were transferred to such retail counter, was adopted for the convenience of the claimant, and used without any fraudulent intent on the part of Mr. Lilienthal or his agents in his business as a manufacturer, such fact furnishes no evidence in support of a verdict of condemnation in this case.

THE COURT.—Yes, that is true. The mere naked fact that that was unlawful does not amount to anything; but if, it being so unlawful, the jury believe there was a fraudulent intent in so doing, it is to be taken into consideration. If the jury believe there was no fraudulent intent in it, it is not to be taken into consideration.

Mr. Rollins.—We made no request to charge as to the rate of tax that was really due on the "extra long smoking tobacco," and we are inclined to think that the proposition of your honor, that it makes no difference, for the purposes of this case, what the rate of tax was, is correct, but, at the same time, as this case involves such a large sum of money, we are unwilling that any failure on our part to take proper exceptions should occur, and, therefore, we ask your honor to charge as follows: "If the jury find that, in the process of manufacturing the 'extra long smoking tobacco,' a portion of the stem was removed from the leaf, and an amount of stem fully equal to or exceeding the quantity removed was subsequently, during said

process, added to and intermingled with the leaf, so that, in point of fact, the manufactured product was composed of both stem and leaf, and so sold, that tobacco was, between August, 1866, and the date of seizure, liable to a tax of only fifteen cents per pound, and was properly returned at that rate."

THE COURT.—I refuse to charge that.

Mr. Rollins.—To which refusal I except. I also ask your honor to charge, "that the 'extra long smoking tobacco,' if manufactured in the manner testified to by Mr. Denneker, was smoking tobacco made in part of stems, and was liable, under the act of July 13th, 1866, to a tax of fifteen cents per pound, during all the time subsequent to August 1st, 1866, and prior to the date of the seizure of the property proceeded against in this action."

THE COURT.—I decline to charge that.

Mr. Rollins.—To which I except. I also ask your honor to charge, "that, if the 'extra long smoking tobacco' returned as liable to the fifteen cents rate, was manufactured in the manner stated in the testimony of Mr. Denneker, and contained a quantity of stem as great as, or greater than, that which grew with the leaf contained in said tobacco, then the said tobacco was liable, between August 1st, 1866, and the time of the seizure of the property herein proceeded against, to the fifteen cents tax, as returned."

THE COURT.—I decline to charge that.

Mr. Simons, Asst. Dist. Atty.—As they have taken formal exceptions, we wish to do the same on our part. We ask your honor to charge as follows, which is the converse of their proposition on the law point: "That the tobacco manufactured by C. H. Lilienthal, and sold by him, from the 1st day of August, 1866, through the years 1866 and 1867, under the name of 'extra long smoking tobacco,' and returned for tax as 'smoking tobacco,' at the rate of fifteen cents per pound, was smoking tobacco stemmed or butted, within the meaning of the provisions of the ninety-fourth section of the act of congress, approved June 30th, 1864, as amended by the ninth section of the act of congress, approved July 13th, 1866, and subject, by such provisions, to a tax of forty cents per pound on such sales."

THE COURT.—I decline so to charge; and I refuse to charge in accordance with any of the propositions respecting the proper rate of tax on the "extra long smoking tobacco," not that I agree with, or dissent from, any of such propositions, but because I do not suppose it to be necessary for the purposes of this case so to charge.

The jury returned a verdict in favor of the government, condemning the property seized.

[Motions for new trial and in arrest of judgment were subsequently overruled. See Cases Nos. 16,106 and 16,106a.]

All the rulings of the court, in its charge, were affirmed by the circuit court (Woodruff, Circuit Judge), on writ of error, in December, 1872. [Not reported.]

Case No. 16,106.

UNITED STATES v. QUANTITY OF TOBACCO.

[6 Ben. 68.][1]

District Court, S. D. New York. May, 1872.[2]

INTERNAL REVENUE—TAX ON TOBACCO—PRETENDED AND ACTUAL SALE—EVIDENCE OF PREVIOUS EVASIONS OF THE REVENUE LAW—INTENT.

1. Under the 90th and 94th sections of the internal revenue act of June 30, 1864 (13 Stat. 224), as amended by the act of July 13, 1866 (14 Stat. 150), and the 61st and 84th sections of the act of July 20, 1868 (15 Stat. 152, 153), a completed sale or a completed removal of manufactured tobacco is a necessary preliminary to the accruing, assessment and payment of the tax upon it.

2. But the provision in the 48th section of the act of 1864, as amended by the act of 1866, which provides for the forfeiture of goods "on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws," does not require that there should have been a completed sale or removal of such goods.

3. The provision in the said 48th section, in respect to the forfeiture of raw materials, is not dependent on the provision in regard to taxable articles, so as to make the forfeiture of the raw materials dependent on their being seized in the possession of a person in whose possession forfeitable taxable articles are found.

4. Under the said 48th section the corpus delicti is the possession of the specified property with the specified fraudulent purpose or design, without the doing of any overt act in respect of it

5. Evidence of the manifestation of a like fraudulent intent at prior times, in respect to kindred matters, may be offered to prove the existence of the fraudulent purpose or design mentioned in the 48th section, as to the articles in question.

[Cited in brief in Doane v. Lockwood, 115 Ill. 491, 4 N. E. 500.]

6. Under the 94th section of the act of June 30, 1864, above cited, as amended by the 9th section of the act of July 13, 1866, tobacco made of leaves from which part of the stems had been removed, and to which an equal proportion of other stems, prepared in a certain way, had been added, and which had not been sweetened, was taxable at forty cents a pound, after the 1st of August, 1866.

7. A manufacturer of tobacco made a pretended sale of a quantity of tobacco on the day before an act increasing the tax on it went into effect, and paid the tax as on a sale. The increased tax went into operation, and was afterwards reduced again below the former rate. After the reduction he sold the tobacco, but made no return of the sale and paid no tax on it: *Held*, that the transaction was illegal, and that the manufacturer had no right to pay the tax when he did.

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

[2][Affirmed by circuit court; case unreported.]

8. It was also the course of business, in his establishment, to remove from the wholesale department to the retail department a quantity of tobacco at once, and to make a return and pay tax on it as one sale, and not to make any record, or return or pay any tax on the actual sales of it in the retail department: *Held*, that this was an illegal mode of doing business, and that it was for the jury to say what was the intent of the manufacturer in adopting that mode.

[This was an information of forfeiture against a quantity of tobacco, charging a violation of the internal revenue laws. A verdict of condemnation was returned by the jury (Case No. 16,105), and the claimant has now moved for a new trial.]

George T. Curtis, for claimant.
Thomas Simons, Asst. U. S. Dist. Atty.

BLATCHFORD, District Judge. The first four grounds urged, on the part of the claimant, as a reason for granting a new trial in this case, are, that the court erred "in instructing the jury that they could find a verdict in favor of the United States on the issue made by the information and answer, without any proof, on the part of the United States, tending to show that any taxes had become due, or had been imposed, upon the manufactured tobacco seized on the claimant's premises, and without any proof, on the part of the United States, tending to show that the claimant had sold, or removed from his premises for consumption, or was, at the time of the seizure, engaged in selling or removing from his premises for consumption, any of the manufactured tobacco so seized;" and "in instructing the jury, in the absence of any proof that taxes had become imposed on the said manufactured tobacco, and that the claimant had sold or removed, or was engaged in selling or removing, any part of the same, without paying such taxes, that the jury could infer, from previous alleged evasions, or attempts at evasion, of the revenue laws, by the claimant, an intent to sell or remove the said manufactured tobacco without paying the taxes that might become due thereon, and, from such intent, so found, find a forfeiture of the said manufactured tobacco so seized as aforesaid;" and "in instructing the jury, in the absence of any proof that the claimant had sold or removed, or was engaged in selling or removing, any manufactured tobacco on which taxes had been imposed by law, without paying, and without intending to pay, the said taxes, that they could infer, from previous alleged evasions, or attempts at evasion, of the revenue laws, by the claimant, a purpose to sell or remove the manufactured articles which he might thereafter make from the raw materials seized, without paying the taxes that would become due thereon, and, from such purpose, so found, find a forfeiture of the said raw materials;" and "in refusing to give to the jury the instructions prayed for in the 13th and 14th of the claimant's prayers for instructions, and in giving to the jury the 1st and 2d of the instructions prayed for by the district attorney."[3]

The 13th and 14th of the claimant's prayers for instruction were as follows: "(13) That there is no evidence, in this action, that, at the time of the finding or seizure of the property in this action, the claimant had not paid all the taxes due on all the goods, wares, merchandise, articles, or objects, which had been, before that date, manufactured at his factory and sold or removed therefrom. (14) That there is no evidence, in this action, that any goods, wares, merchandise, articles, or objects on which taxes were imposed by the provisions of law, manufactured at the factory of Mr. Lilienthal, were ever sold or removed by him, or by any other person, in fraud of the internal revenue laws, or with design to avoid payment of said taxes."

The prosecution in this suit is founded on that part of the 48th section of the act of June 30, 1864, as amended by the 9th section of the act of July 13, 1866 (14 Stat. 111), which is in these words: "All goods, wares, merchandise, articles, or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district * * * and the same shall be forfeited to the United States; and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure, where such articles, or such raw materials, shall be found, may also be seized by any collector, or deputy collector, as aforesaid, and the same shall be forfeited as aforesaid." It is claimed that the court put an erroneous construction upon these provisions of the 48th section, in its charge to the jury.

The point of the objection to the construction which the court gave to the section is, that the fact, or the corpus delicti, to be proved, under the section, is not a mere state of mind, or intent, on the part of the person in whose possession the goods, &c., or the raw materials, are found, to commit, at some time, the wrongful act, as against the government, specified in the section, but is the doing of a certain act, with a certain intent. It is conceded, that, if merely such intent is the thing to be proved, the evidence

[3] For the 1st and 2d instructions prayed for by the district attorney, and here referred to, see [Case No. 16,105. See, also, Id. 16,106a.]

given in this case as to the former wrongful acts and omissions on the part of the claimant, was not only competent, but was sufficient, if believed by the jury, to establish the intent mentioned in the section and averred in the information. The trial was conducted throughout on the principle, that, to recover, it was only necessary for the government to prove the possession by the claimant, at the time of the seizure, of the manufactured goods and the raw materials, and the finding, in the prescribed situation, of the other personal property proceeded against, and the fact that the manufactured goods were taxable goods, and that the claimant intended to manufacture the raw materials into taxable goods, and that he had the fraudulent intent specified in the section in respect to such taxable goods, manufactured and to be manufactured. It is contended that this view of the statute is erroneous; that the proper construction of so much of the section as precedes the provision in regard to raw materials is, that, when any goods, &c., such as are described, have had taxes imposed on them by the operation of the law, they shall be forfeited if they are sold or removed without the payment of such taxes; that, by the 94th section of the act of June 30, 1864, both as it originally stood (13 Stat. 264), and as amended by the 9th section of the act of July 13, 1866 (14 Stat. 128), taxes do not become payable on manufactured tobacco, until it is sold, or consumed or used by its manufacturer, or removed for consumption, or for delivery to others than agents of the manufacturer within the United States, and, by the 90th section of the said act of June 30, 1864, as amended by the 9th section of the said act of July 13, 1866 (14 Stat. 125), the tax imposed on the manufacturer of tobacco, snuff and cigars, is held to accrue upon the sale or removal from the place of manufacture, unless removed to a bonded warehouse; that the words, in the 48th section, "found in the possession, or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons," are equivalent to the words "found in the act of being sold or removed," because the tax is imposed in consequence of the sale or removal, and not in consequence of the existence of the purpose to sell or remove; that there must have been a sale or removal, or the goods must be found in the act of being sold or removed, for them to be in the condition prescribed of being goods "on which taxes are imposed by the provisions of law;" that there can be no purpose to sell or remove in fraud of the law, or with design to avoid the payment of taxes, without an overt act of sale or removal done or attempted, because the overt act of sale or removal is what causes the taxes to be imposed, and the taxes the payment of which it is supposed there is a design to avoid, are taxes which have accrued or are accruing by the act of sale or removal; that, as a mere purpose in regard to sale or removal does not impose taxes on the goods, and no taxes are imposed until there is an act of sale or removal, done or attempted, the words, "avoid payment of said taxes," can only apply to taxes which have become payable; that a purpose to defraud the revenue of something can only exist in respect to something to which the revenue is at the time entitled; that, in respect to so much of the 48th section as relates to raw materials, and to tools, &c., the provisions mean, that, where a case of forfeiture exists, as specified in the preceding part of the section, in respect to goods on which taxes have become payable, not only may such goods be forfeited, but also all raw materials found in the possession of the same person in whose possession such goods are found, he intending to manufacture such raw materials into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax, and also all tools, &c., in the place, &c., where such articles or such raw materials are found; that the clauses making up the provisions for forfeiture are not to be read disjunctively, but connectedly, the forfeitures being connected with each other and succeeding each other, when manufactured articles, raw materials, and tools, &c., are seized in the hands of the same person; and that the purpose of the act is to have a statute applicable to all manufacturers whose productions are liable to pay taxes, whereby, whenever any taxes have become due on any of the manufactured articles, and they have become liable to seizure and forfeiture under the 48th section, in the hands of the manufacturer, not only may they be seized, but his raw materials may be seized and forfeited, if his intent is to make them into taxable articles, and to sell or remove such articles without paying the tax on them, and all tools, &c., found on the same premises, may be seized and forfeited.

In support of the views urged on the part of the claimant as to the proper construction of the 48th section, it is alleged, that, if that section makes a mere intent a cause of forfeiture, it is the first time, in the history of such legislation, that a mere intent has been made a cause of forfeiture. It is also urged, that there is no reason to suppose that congress intended to make the possession of property, the mere possession of which generally is innocent, coupled with an intent to do something wrongful with it at some future time, a cause for the forfeiture of such property; and that a statute which should authorize the seizure and forfeiture of such property, on proof merely of an intent to violate the law in dealing with it in a certain manner at a future time, would be an unreasonable seizure, and in violation of the fourth amendment to the constitution of the United States.

Not only does the 90th section of the act of 1864, as amended by the act of 1866, before referred to, provide, that "the tax imposed upon the manufacturer of tobacco, snuff and cigars shall be held to accrue upon the sale or removal from the place of manufacture, unless removed to a bonded warehouse," but the 61st section of the act of July 20, 1868 (15 Stat. 152, 153), provides, that "upon tobacco and snuff which shall be manufactured and sold, or removed for consumption or use, there shall be collected and assessed the following taxes," and the 81st section of the last named act (Id. 160), contains the same provision in regard to cigars. So, also, by the 94th section of the act of 1864, as amended by the act of 1866, before referred to, taxes do not become payable on any of the manufactured articles specified in that section, until they are sold, or consumed or used by the manufacturer, or removed for consumption. It is quite apparent, from these provisions, that a completed sale, or a completed removal, of the manufactured article, is a necessary preliminary to the accruing, assessment and payment of the tax upon it. Until such completed sale or completed removal has taken place, the manufacturer is not compellable to pay the tax, and it has not accrued so as to be capable of being assessed and collected. If, then, the words "taxes are imposed," in the 48th section, require that the taxable article shall have been sold or removed, so as to cause the tax to have accrued and to be payable upon it, and if those words are equivalent to the words "have accrued and become payable," it is difficult to see how such article can ever be found in the hands of its manufacturer, with the intent to sell or remove it with design to avoid payment of the tax, so as to be subject to forfeiture in his hands, under that section. The section would, under such circumstances, be wholly inapplicable to manufactured articles in the hands of their manufacturer, where the application of the section is most beneficial, and would only apply to such articles after they had gone into the hands of purchasers from him.

The meaning of the words "taxes are imposed," as used in the 48th section, may be deduced from the meaning of the word "imposed," and of kindred words, where used in other portions of the internal revenue laws. Thus, the language, before cited, of the 90th section of the act of 1864, as amended by the act of 1866, is, that "the tax imposed" on the manufacturer of tobacco shall "be held to accrue upon the sale or removal from the place of manufacture." Here, the word "imposed" clearly means "declared to be collectable." The tax declared to be collectable on manufactured tobacco is to be held to accrue and become assessable and payable, on the sale or removal of such tobacco from the place of manufacture. In analogy to this use of the word "imposed," it is proper to say, that, where, in the 48th section, the words "articles on which taxes are imposed by the provisions of law" are used, they mean "articles on which taxes are, by the provisions of the law, declared to be collectable, when such articles shall be sold or removed."

Again, the provisions of a subsequent part of the 48th section show what the word "imposed" means, in the previous part of that section, and what the words "subject to tax" mean, in the clause in reference to raw materials intended to be manufactured "into articles of a kind subject to tax." The section, after the forfeiture clauses, proceeds to say: "Any person who shall have in his custody or possession any such goods, wares, merchandise, articles, or objects, subject to tax, as aforesaid, for the purpose of selling the same, with the design of avoiding payment of the taxes imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of taxes fraudulently attempted to be evaded, to be recovered in any court of competent jurisdiction." If, in this clause, the words "articles subject to tax" are held to mean "articles on which taxes have accrued and become payable, because of a sale or removal," the clause can have no applicability to a manufacturer of the articles. But, the good sense of the words means "articles on which taxes are declared to be collectable," and, in respect to those, if the purpose exists of selling them with the design of avoiding payment of the taxes "imposed thereon" that is, payment of the taxes declared to be collectable thereon, the penalty attaches. So, the raw materials are materials intended to be manufactured into articles of a kind on which taxes are declared to be collectable. There is every reason to suppose that the word "imposed," in respect to taxes on articles, in the two places in which it is used in the 48th section, and the words "subject to tax," in respect to articles, in the two places in which those words are used in that section, mean the same thing: and there is no reason to suppose the contrary. If that be so, then the words "subject to tax" cannot mean "on which taxes have accrued and become payable because of sale or removal," because, in respect to the clause regarding raw materials, the manufactured articles have no existence, so as to be taxable. The fact, that the expression is "articles of a kind subject to tax," can make no difference, for, the second time the words "subject to tax" are used, the expression is "subject to tax as aforesaid," and the only time the expression "subject to tax" is previously used in the section is in the form of words "of a kind subject to tax."

In order to maintain the theory of the claimant, that the words "are imposed" mean "have accrued and become payable," it is also necessary that the further view should be maintained, that the three clauses of forfeiture are to be read connectedly, and not disjunctively. But, it would seem to be a

conclusive objection to reading the clause in regard to raw materials otherwise than disjunctively in respect to the first clause, that the clause in regard to raw materials says, "all raw materials found in the possession of any person or persons," &c., and does not say, "all raw materials found in the possession of such person or persons," &c., referring to the person or persons in whose possession the articles on which taxes are imposed are found. The words of the statute are, "on which taxes are imposed by the provisions of law." It is reasonable to suppose that the word "imposed," in the connection in which it is found in this clause, is used in the same sense in which it is used, in a like connection, in other provisions of the same statute, and in kindred provisions of other revenue laws. On examination, it will be found, that the word "imposed," in such connection, is not used in the act of June 30, 1864, and in other revenue laws, in the sense contended for by the claimant. The 173d section of the act of June 30, 1864 (13 Stat. 304), speaks of "the duty imposed by any existing law," and of no duty having been "imposed" "by any former act," and of the duty "imposed" "by the terms of this act;" and the same terms are used in the 70th section of the act of July 13, 1866 (14 Stat. 173). The 176th section of the said act of 1864 (13 Stat. 305) speaks of a "tax or duty" "imposed by law." The 96th section (Id. 272) speaks of materials "upon which no duties have been imposed by law." The 97th section (Id. 273) speaks of "duties imposed by law enacted subsequent" to the making of a contract, on articles to be delivered under such contract. The 16th section of the act of March 3, 1865 (Id. 486) speaks of the "duty imposed by any previous act." Section 10 of the act of July 13, 1866 (14 Stat. 150) provides, that "no manufactured wire shall pay a greater tax than that imposed on number twenty wire gauge." Section 11 of the act of March 2, 1867 (Id. 476) speaks of the "taxes now imposed by law" on manufactures of iron. The 1st section of the act of March 2, 1867 (Id. 559) speaks of "the duties now imposed by law" on the articles mentioned in that section; and the 2d section of the same act (Id. 561) speaks of "the duties heretofore imposed by law" on certain articles. The language, before referred to, of the 90th section of the act of June 30, 1864, as amended by the 9th section of the act of July 13, 1866 (Id. 125), is very marked, in this respect, where it says, that "the tax imposed upon the manufacturer of tobacco" "shall be held to accrue upon the sale or removal from the place of manufacture," clearly showing that, when the tax or duty is spoken of as "imposed" by the statute, that means that it is declared to be collectable when some event specified shall occur, although the tax or duty does not accrue or become payable on the particular article until the occurring of the event. Many similar instances could be referred to, of such use, in revenue laws, of the words "imposed by the provisions of law," and like words, in respect to taxes and duties.

A use of the words "subject to duty or taxation under the provisions of this act," analogous to the use, in the 48th section, of the words "subject to tax," may be found in the 37th section of the act of June 30, 1864 (13 Stat. 238), where provision is made that revenue officers may enter, in the day time, all places where any articles "subject to duty or taxation under the provisions of this act are made, produced, or kept, to examine them, or the accounts required to be kept by their manufacturer respecting them." Under this provision, most certainly, the officers are not restricted to entering a tobacco manufactory, only when the articles made there have been sold or removed, so that the tax has accrued on them.

A reading of the 48th section, giving the usual accepted meaning to the words found therein, seems to me to lead conclusively to the view, that congress intended to forfeit taxable articles, when held, especially by their manufacturer, for the purpose of being sold or removed in fraud of the revenue laws, or with design to avoid the payment of the taxes which would accrue thereon by reason of such sale or removal, and also to forfeit all raw materials when held by a person intending to manufacture them into taxable articles for the purpose of fraudulently selling such articles, or with design to evade the payment of the taxes which would accrue thereon when sold or removed, and also to forfeit all personal property found in the place where any such articles, or any such raw materials, are found; and that possession, with the specified purpose, design or intent, is all that is necessary to work the forfeiture. The provision, in the same section, that the possession of the taxable articles, for the purpose of selling them, with the design of avoiding payment of the taxes, shall subject the possessor to a penalty of not less than double the amount of taxes fraudulently attempted to be evaded, is in harmony with the provisions in regard to forfeiture. The possession for such purpose renders the possessor liable to a penalty of double the amount of the taxes which, on a sale, would accrue on the articles. Such taxes are fraudulently attempted to be evaded when the articles are held for such purpose.

The legislation of congress on the subject shows a uniform design in harmony with this view. The 114th section of the act of July 1, 1862, the first internal revenue act (12 Stat. 487), provided, that "all articles upon which duties are imposed by the provisions of this act, which shall be found in the possession of any person or persons, for the purpose of being sold by such person or persons in fraud thereof, and with the design to avoid payment of said duties, may be

seized by any collector or deputy collector who shall have reason to believe that the same are possessed for the purpose aforesaid, and the same shall be forfeited to the United States; * * * and any person who shall have in his possession any such articles, for the purpose of selling the same, with the design of avoiding payment of the duties imposed thereon by this act, shall be liable to a penalty," &c. The 48th section of the act of June 30, 1864, as originally passed (13 Stat. 240), carried out the same principle, by re-enacting the provisions of the 114th section of the act of 1862, and extending them, by providing for the forfeiture of raw materials intended to be manufactured into articles to be sold in fraud of the internal revenue laws, or with design to evade the payment of duties imposed by the provisions of law, and for the forfeiture of all personal property found in the same place with the articles on which duties are imposed, and intended to be used by the possessor of such raw materials in the fraudulent manufacture of such raw materials. The section was amended by the act of July 13, 1866, to read as before recited, being made more stringent as respected personal property, so as to cover all personal property found in the same place with either the articles or the raw materials, and without reference to the intended use of such personal property.

No direct adjudication is found as to the construction of this section, in respect to the point taken by the claimant. Yet many condemnations have been decreed under it, both in this court and in other courts, where the point was as open and proper to be taken as in this case. But it does not seem to have been raised. There are, however, several cases where the language of the court indicates the view, taken by it of the general scope of the section. In U. S. v. One Still [Case No. 15,954], Mr. Justice Nelson says, that the 48th section is very comprehensive, and was so designed, and that the reason for the seizure of the articles on which taxes are imposed by law, and of the raw materials, is, "for the fraudulent intent of the person in the possession or control of them, that is, an intent to defraud the public revenue by evading the tax." In U. S. v. Thirty-Six Barrels [Id. 16,468], Judge Woodruff says, that the object of the 48th section is "to enable the government to anticipate and prevent the sale or removal, and to proceed to a forfeiture before the overt act of fraud is perpetrated;" that "it is enacted in view of the very great difficulty, if not impracticability, of following distilled liquors, after sale or removal, or of identifying them, if found, and, also, in view of the ease with which they may be passed into the hands of bona fide purchasers;" that "the fraudulent intent or design" of the person in possession of the spirits "is the cause of forfeiture;" that the object of the statute is to "prevent the accomplishment of meditated evasion and fraud;" that "it should be construed, so far as a fair interpretation of its language will permit, in a manner adapted to effect the purposes of its enactment;" that the section "has respect to the intentions, purposes, and designs of the party" in possession, which intentions, purposes, and designs are "the ground of the forfeiture, entirely irrespective of the difficulties which may lie in the way of accomplishing his intention;" and that the terms of the section must not receive "a narrow construction," "not called for by their fair, natural, and legal meaning," but must be construed "so as most effectually to accomplish the intention of the legislature in passing it." The principles laid down by the supreme court of the United States, in its decision in the recent case of U. S. v. 100 Barrels, 14 Wall. [81 U. S.] 44, seem to me to fully sustain the construction I place upon the provisions of the 48th section.

There seems to me to be no warrant for saying that there is any evidence to be found, in the 48th section, of any intention to make the provision in regard to raw materials dependent upon, and connected with, the provision in regard to taxable articles, and to make a forfeiture of the raw materials depend upon their being seized in the possession of a person in whose possession forfeitable taxable articles are found. The language manifests a plain intention that all raw materials found in the possession of any person who intends to manufacture them into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of taxes thereon, shall be seized and forfeited, without reference to the question whether manufactured articles of a kind subject to tax are or are not found in the possession of the same person. In such case, all personal property whatsoever, found in the same place, building or inclosure where the raw materials are found, may be seized and forfeited. In the present case, the raw materials were found in the possession of the claimant, and the bill of exceptions states that there was evidence tending to show that he intended to manufacture them into articles of a kind subject to tax by the provisions of the internal revenue law in force at the time, and shows that evidence was given tending to show that the claimant had the purpose of fraudulently selling the manufactured articles to be made out of such raw materials, and designed to evade the payment of the taxes thereon. Such evidence was, in my judgment, sufficient to warrant the verdict condemning the raw materials. If they were properly condemned, then all the taxable manufactured articles, and other items of property, that were seized, were properly condemnable under the description of "all personal property whatsoever," because they were found in the same place with such raw material. In this view, it is of no importance whether any manu-

factured articles on which taxes had in fact accrued, were or were not found in the possession of the claimant.

Criticism is made on the fact, that the information, after averring the seizure, states that, "prior to said seizure, taxes were imposed, by the provisions of law, upon the said tobacco," that is, the manufactured tobacco, "and the same, being so subject to the payment of taxes as aforesaid, were found," &c.; and, it is urged, that this language of the pleader shows that he interpreted the 48th section as requiring that taxes should have accrued and become payable on such manufactured tobacco, and that, having alleged this fact, it ought to have been proved, and was not proved. But the averment is not fairly susceptible of this interpretation. It goes on to say that such tobacco was found in a certain possession, for a specified purpose, against this 48th section. It refers to the section as the foundation of the forfeiture. As the section does not require that the tax should have accrued or become payable, the words "subject to the payment of taxes as aforesaid," having reference solely to the expression immediately preceding, that taxes were imposed on the tobacco by the provisions of law, are equivalent to no more than the expression "subject to tax as aforesaid," which, as has been shown, is only a synonym for the words "on which taxes are imposed by the provisions of law." The allegation, that, "prior to said seizure, taxes were imposed by the provisions of law" on the manufactured tobacco seized, is equivalent to no more than the allegation, that, when such tobacco was seized, it was an article of a kind on which, under the law, a tax could accrue without its being further manufactured.

Legislation equally stringent with that found in the 48th section, for the purpose of preventing meditated fraud, is to be met with in various parts of the internal revenue laws. The 43d section of the act of July 20, 1868 (15 Stat. 142), provides, that any railroad company, or transportation company, or person, who shall have in possession, with intent to transport, or to cause or procure to be transported, any empty distilled spirits cask having on it a brand or stamp required by law for a cask containing distilled spirits, shall forfeit $300 for each such cask had in possession with such intent. The 72d section of the same act (Id. 156) provides, that any person who shall give away or accept any empty stamped tobacco- or snuff-box, shall be fined $100 and imprisoned for not less than twenty days and not more than one year. The 89th section of the same act (Id. 162) provides, that any person who shall receive, give away, or have in his possession, any cigar tax stamp removed from any box of cigars, shall be deemed guilty of a felony, and fined not less than $100 nor more than $1,000, and imprisoned not less than six months nor more than three years. As, under the 48th section, the corpus delicti, and the only one, is the possession of the specified property, with the specified fraudulent purpose or design, without the doing of any overt act in respect of it, there is no reason why the general principle, that intent may be proved by proving manifestations at prior times of like fraudulent intent in respect of kindred matters, should not be applied to the proving of the fraudulent purpose or design mentioned in the 48th section. In Wood v. U. S., 16 Pet. [41 U. S.] 342, 361, it is said, that, whenever a fraudulent intention is to be established, collateral facts tending to show such intention are admissible proof. The principle was applied by Judge Woodruff in U. S. v. 36 Barrels [Case No. 16,469], and in U. S. v. 18 Barrels [Id. 15,033]. In the present case the seizure took place on the 25th of March, 1868, and the testimony as to the intent of the claimant in respect of the taxable tobacco and the raw materials seized, was entirely testimony in respect to previous acts of omission and commisison in his establishment, in conducting its business, in its relations to the internal revenue laws, which acts were claimed to have been in violation and fraud of such laws, and to have had in them a fraudulent intent on the part of the claimant. Those acts are concisely summed up in the two requests to charge on the part of the government. They consisted of a failure to keep the required account of tobacco and snuff manufactured from August, 1866, to January, 1868; of the removal for sale, and the removal from the place of manufacture, during that period, of quantities of tobacco and snuff, without any account thereof being kept, as of removals, and without any accurate account of the tobacco so received being kept in the statutory books; of the sale, during that period, of large quantities of manufactured tobacco, without any account of such sales, as sales, being kept in such books; of the sale and removal from the claimant's premises, during all but the last month of that period, of quantities of purchased manufactured tobacco, without any accurate account of such sales or removals being kept in such books; of the rendering to the assistant assessor, during the whole of that period, of untrue and inaccurate abstracts of such sales and removals; of the manufacture of much more chewing tobacco and fine cut shorts in the claimant's manufactory, during 1867, than was declared, on such abstracts, to have been manufactured; of the sale and removal, during 1867, of a large quantity of smoking tobacco, manufactured on said premises, which was not returned for taxation on said abstracts, and of which no account was contained therein or in the statutory books; and of certain acts of the claimant (set forth in the second request to charge on the part of the government, before recited) in respect to the manufacture of "extra long smoking tobacco," and in respect to returning it for tax-

ation, during the period before mentioned, evincing not only a purpose of selling and removing such tobacco in fraud of the internal revenue laws, and an intent to evade the payment of taxes thereon, but resulting in the commission of such fraud and the evasion of the payment of a large amount of taxes.

In respect to all of these acts, except those relating to the "extra long smoking tobacco," the court charged the jury, that, if they believed such acts were done by the claimant, the burden of proof was on the claimant to satisfy them that the tobacco so manufactured on his premises, and sold or removed without due account, return or entry being made thereof in such books and abstracts, in the manner required by law, was not so sold and removed in fraud of the internal revenue laws and with intent to evade the taxes thereon; and that, if the claimant had not so satisfied the jury of his intent respecting the same, they might infer that his intent in respect of the same was fraudulent, and that his possession of the goods in suit was with the like intent. In regard to the acts relating to the manufacture of the "extra long smoking tobacco" and the returning it for taxation, the court charged the jury, that, if they found that such acts were done by the claimant for the purpose of selling and removing such tobacco in fraud of the internal revenue laws and with intent to evade the payment of taxes thereon, they would have a right to infer that the claimant and his agents had the like intent with respect to the property in suit. Elsewhere the court charged the jury, in substance, that, if the acts of the claimant between August, 1866, and January, 1868, in respect to the "extra long smoking tobacco," showed an intent to defraud the government in regard to the tax upon such tobacco, and if his acts during the same period in regard to what was called the Orinoco tobacco, such acts being contrary to law, showed an intent to defraud the government, and if his acts in violating the law in regard to the keeping of the statutory books, and the unlawful and irregular character of the inventories and returns he made, showed an intent not to deal honestly with the government, but to violate the law, the jury had the right to infer that a fraudulent intent existed in regard to the goods on hand in his establishment when it was seized. I perceive no error in these instructions. In criminal cases, the law presumes every unlawful act to have been criminally intended until the contrary appears, and throws on the accused the burden of disproving the intent; and the same presumption arises in civil actions, where the act complained of was unlawful. 1 Greenl. Ev. § 34. In Cook v. Moore, 11 Cush. 213, the question was whether, to prove a wilful concealment of property by the defendant with a fraudulent purpose, contrary to the bankruptcy act of 1841, it was competent to show an intent, prior to the passage of that act, to defraud the plaintiff of his debt by a fraudulent concealment and conveyance of property. The court held that it was. They say: "Whenever the intent of a party forms part of the matter in issue, upon the pleadings, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the party in doing the acts in question. The reason for this rule is obvious. The only mode of showing a present intent is often to be found in proof of a like intent previously entertained.

Particular objection is made to the instruction as to the burden of proof, contained in the first prayer on the part of the government. The acts recited therein were unlawful acts, contrary to the statute, and, therefore, presumed to result in defrauding the government. The instruction was, that, if the unlawful sales or removals of the tobacco, from August, 1866, to January, 1868, were proved, and the unlawful neglects in respect to the not entering such sales and removals in the books, abstracts and returns were proved, then, as the legal presumption therefrom was that such sales and removals took place in fraud of the internal revenue laws, and with intent to evade the taxes on the tobacco, the burden of proof was on the claimant to satisfy the jury that such sales and removals were not in fraud of such laws and with intent to evade such taxes; and that, in view of such legal presumption, if the claimant had not rebutted it, the jury had a right to infer a fraudulent intent in respect to such sales and removals, and also to infer that the claimant's possession of the goods in suit was with the like intent. In addition to the observations already made, I regard the propriety of this instruction as having been sanctioned by Judge Woodruff in U. S. v. 18 Barrels [Case No. 15,033], where, only slight evidence having been given, in behalf of the government, tending to show that the claimant of distilled spirits had not made true and exact entry and return, it was held that this cast the burden on the claimant, to show that he had complied with the statute. In U. S. v. Brewery Utensils [Id. 14,641], it was held by Judge McCandless, that, from a neglect by a brewer to obey the law, an intent to evade its provisions would be presumed, in the absence of any explanation. See, also, Clements v. Moore, 6 Wall. [73 U. S.] 299; The Luminary, 8 Wheat. [21 U. S.] 407; The Slavers, 2 Wall. [69 U. S.] 350, 366, 375.

As to the 13th and 14th of the claimant's prayers for instructions, if they are understood as raising the question of the proper construction of the 48th section, that has been passed upon. If they are understood, as it appears from the bill of exceptions the court understood them at the trial, as involving propositions of fact, as to the evidence, addressed to the court, and which were solely questions for the jury, there was no error in declining to charge in accordance with them.

This disposes of all the questions involved in the first four grounds urged as reasons

for granting a new trial. It is proper to say, that the point now raised, as to the construction of the 48th section, was not in fact presented to the mind of the court at the trial, and was not raised at the trial otherwise than as it may seem to be involved in some of the exceptions to the charge, and in some of the exceptions to refusals to charge in accordance with requests on the part of the claimant, and which exceptions present it, if at all, in ambiguous language, capable as well of another interpretation as of an interpretation that they raise this point; and that the point is raised by counsel who took no part in the trial.

The fifth ground urged for a new trial is, that the court erred "in instructing the jury that it was immaterial to any issue in this case, what was the lawful rate of tax payable on the said 'extra long smoking tobacco,' embraced in seventeen returns made by the claimant, and in not instructing the jury that the lawful rate of tax payable on the said tobacco was fifteen cents per pound." It is contended, for the claimant, that this tobacco was made partly of leaf and partly of stems, all chopped up together, not sweetened, and put up and sold as smoking tobacco, the stems having undergone a secret process of dyeing, to assimilate them in color to the leaf; that, as it was made in part of stems, it was, under the 94th section of the act of June 30, 1864, as amended by the 9th section of the act of July 13, 1866 (14 Stat. 133), subject to a tax of only fifteen cents per pound; and that the claimant violated no law in returning such tobacco for tax at fifteen cents per pound. If the lawful rate of tax on such tobacco from and including August 1, 1866, to and including January 1, 1868, embracing the period during which the claimant returned it at fifteen cents per pound, was greater that that rate, it follows that there was not, in the instruction, any error prejudicial to the claimant.

Under the 94th section of the act of June 30, 1864, as amended by the 1st section of the act of March 3, 1865 (13 Stat. 477), these were the taxes on manufactured tobacco other than snuff, cigars, and chewing tobacco: "On * * * all * * * kinds of manufactured tobacco, not herein otherwise provided for, forty cents per pound. On tobacco twisted by hand, or reduced from leaf into a condition to be consumed, without the use of any machine or instrument, and without being pressed, sweetened, or otherwise prepared, thirty cents per pound. * * * On smoking tobacco of all kinds, and imitations thereof, not otherwise herein provided for, thirty-five cents per pound. On smoking tobacco made exclusively of stems, and so sold, fifteen cents per pound." Under those provisions, this "extra long smoking tobacco" was subject to a tax of thirty-five cents per pound. The act made the tax only fifteen cents per pound on smoking tobacco made exclusively of stems, made of the inferior part of the tobacco leaf, and having none of the leaf part in it; while on all other manufactured tobacco it imposed taxes of thirty, thirty-five and forty cents per pound. The same distinction is found in the 94th section of the act of June 30, 1864, as originally enacted (Id. 270), where smoking tobacco made exclusively of stems is taxed fifteen cents per pound, and all other manufactured tobacco has taxes imposed on it of twenty-five and thirty-five cents per pound; and in the 75th section of the act of July 1, 1862, as amended by the 1st section of the act of March 3, 1863 (12 Stat. 717), where smoking tobacco prepared with all the stems in, or made exclusively of stems, is taxed five cents per pound, and all other manufactured tobacco fifteen and twenty cents per pound; and in the 75th section of the act of July 1, 1862, as originally enacted (Id. 463), where smoking tobacco made exclusively of stems is taxed two cents per pound, smoking tobacco prepared with all the stems in, five cents per pound, and all other manufactured tobacco, ten, fifteen, and twenty cents per pound.

Such was the course of legislation on this subject. The 9th section of the act of July 13, 1866 (14 Stat. 133), further amended the 94th section of the act of June 30, 1864, by providing that, on and after the 1st of August, 1866, the following should be the taxes on manufactured tobacco: "On snuff, manufactured of tobacco, or any substitute for tobacco, * * * forty cents per pound. On * * * all * * * kinds of manufactured tobacco, not herein otherwise provided for, * * * forty cents per pound. On tobacco twisted by hand, or reduced from leaf into a condition to be consumed without the use of any machine or instrument, and without being pressed, sweetened or otherwise prepared, and on fine cut shorts, * * * thirty cents per pound. On fine cut chewing tobacco, whether manufactured with the stems in or not, or however sold, * * * forty cents per pound. On smoking tobacco, sweetened, stemmed or butted, * * * forty cents per pound. On smoking tobacco, of all kinds, not sweetened, nor stemmed, nor butted, including that made of stems, or in part of stems, and imitations thereof, * * * fifteen cents per pound." In these provisions, there is the same indication of an intention to tax at a low rate tobacco either made wholly of stems, or having in it all its natural stems, and to tax all other tobacco at a higher rate, the former being taxed at fifteen cents per pound, and all other manufactured tobacco being taxed at thirty and forty cents per pound.

This "extra long smoking tobacco," being manufactured tobacco, was, if not otherwise provided for in the act, taxable at forty cents a pound. So, also, if it was smoking tobacco stemmed or butted, it was taxable at forty cents a pound. It is insisted by the claimant, that, having some stems in it, and not being sweetened, it was taxable at

fifteen cents a pound, on and after August 1, 1866. The bill of exceptions shows that the mode of making this "extra long smoking tobacco" was, to take the entire tobacco leaf, and remove from it from one-half to three-fourths in length of the woody central stem that runs through the leaf from end to end, so as to leave in the leaf at its top not enough stem to be noticeable in the product after cutting, and then to cut up together the residuary leaf with stems previously soaked in a certain dye stuff without being sweetened. Prior to August 20, 1866, for several years, the proportion of such residuary leaf to such dyed stem was seven pounds of the former to two pounds of the latter, and, after that date, the proportion of such residuary leaf to such dyed stem was two pounds of the former to one pound of the latter. It having been ascertained, by experiment, that the average proportion, by weight, of the butts or portions of stem extracted from the leaf, in making this tobacco, was one-fourth of the weight of the entire leaf, it was intended, in making this tobacco, after August 20, 1866, to cut up, with a given weight of the residuary leaf, at least as much dyed stems as would equal in weight the average quantity of stems taken out of the leaf. When ready for sale, the stem was not distinguishable from the leaf. In the understanding of tobacco manufacturers, leaf tobacco is "stemmed" when the whole of the central stem has been removed from the leaf; and it is "butted," when the thick end or lower portion of the stem is drawn out of the leaf, leaving more or less of the upper part of the stem still in the leaf. It was not practicable, in the process actually employed by the claimant, to restore or replace the identical portions of stem extracted from the leaf. All of such tobacco returned by the claimant for August, 1866, after the 20th, and for the sixteen succeeding months, was returned by him as liable to a tax of fifteen cents per pound, under the act of July 13, 1866, and was classified, in the returns, as "smoking tobacco, not sweetened, stemmed or butted, including that made of stems," and he paid taxes on it at that rate only.

The contention, on the part of the claimant, is, that the statute says that smoking tobacco made in part of stems, that is, smoking tobacco having in it some stems, and not sweetened, shall pay a tax of only fifteen cents per pound; that this tobacco had some stems in it, and, therefore, was made in part of stems, and was not sweetened; and that, consequently, it was liable to a tax of only fifteen cents per pound. It is urged, for the claimant, that it is immaterial, under the statute, whether the identical stems were put back with the residuary leaf, or whether an equal quantity of stems was put back with it, or whether the same proportion was maintained, in the ultimate product, between stem and leaf, that existed in the tobacco as grown; and that, as long as the tobacco is not sweetened, and is smoking tobacco, and is made wholly of stems, or partly of stems and partly of leaf, it is within the fifteen cents a pound clause.

An analysis of the provisions of the statute will aid in ascertaining its meaning. The words "on smoking tobacco, sweetened, stemmed or butted, a tax of forty cents per pound," mean, "on smoking tobacco manufactured from leaf tobacco which has been sweetened, or stemmed, or butted, a tax of forty cents per pound." The words, "on smoking tobacco, of all kinds, not sweetened, nor stemmed, nor butted, * * * a tax of fifteen cents per pound," mean, "on smoking tobacco manufactured from leaf tobacco which has not been sweetened, and has not been stemmed, and has not been butted, * * * a tax of fifteen cents per pound." This last clause embraces, also, smoking tobacco "made of stems, or in part of stems, and imitations thereof." This "extra long smoking tobacco" was made from leaf tobacco which had been butted, stems separately prepared being afterwards added to the residuary leaf. As smoking tobacco manufactured from butted leaves it was within the forty cents a pound clause. If it had had no separate stems added to the residuary leaf, but had been made solely of the residuary leaf left after butting, it would have had in it at least one quarter in length of the central stem left in the leaf after butting, and thus would have been made "in part of stems," and so been subject to the fifteen cents a pound clause, under the reading of that clause contended for by the claimant, although, being smoking tobacco merely butted, it would clearly have been within the forty cents a pound clause. A construction of the fifteen cents a pound clause, which would put such butted tobacco within that clause, when it is manifest the intention was that it should be solely in the forty cents a pound clause, cannot be admitted, if both clauses are capable of such a construction as will not allow any one article to fall within both of them. I think that the forty cents a pound clause as to smoking tobacco manifestly includes all smoking tobacco in which sweetened leaf is a constituent, and all in which stemmed leaf is a constituent, and all in which butted leaf is a constituent. In direct contradistinction to this, the fifteen cents a pound clause says that smoking tobacco made of tobacco leaves in their natural state as to stem and leaf, and not at all sweetened, and in which stemmed leaf is not a constituent, and in which butted leaf is not a constituent, shall pay only fifteen cents a pound tax. It will not do to go outside of the plain language of the statute to open wide a door to fraud, by saying that you may butt the leaves, and then restore other butts equal in quantity to the removed butts, and call the product tobacco not butted; or stem the

leaves, and then restore other stems equal in quantity to the removed stems, and call the product tobacco not stemmed. The stem is the least valuable part of the tobacco. It is allowed to be cut up in and with and as a part of the leaf as it grew, as smoking tobacco, at the low rate of tax. If it is so cut up, there is sure to be in the product a certain average quantity of stem. If the stem or butt is allowed to be removed, what is left becomes at once more valuable than the whole was, and liable to the forty cents a pound tax; and it cannot for a moment be supposed that congress intended that the putting back a part of the removed stem or butt should reduce the tobacco to the fifteen cents a pound clause, while the manufacturer would be able to impose on the public by selling the product as one of a quality taxable at forty cents a pound.

In view of these considerations, and in harmony with them, an interpretation can be given to the words, "including that made of stems, or in part of stems, and imitations thereof," entirely consistent with the language, and not open to the objection of including within the fifteen cents a pound clause smoking tobacco already clearly put into the forty cents a pound clause. The stems being the least valuable part, congress first provided, in the fifteen cents a pound clause, that smoking tobacco made by cutting up the natural leaf, and, therefore, including all the stem which grew in the leaf, should pay only fifteen cents a pound. It then passed to an inferior grade of smoking tobacco, by providing that smoking tobacco made wholly of stems, without any admixture of leaf, should pay only fifteen cents a pound. It then passed to a still lower grade, by providing that smoking tobacco made, as to part of it, of tobacco stems, and, as to the rest of it, of imitations of tobacco stems, should pay only fifteen cents per pound. If the words "in part of stems" are to be so construed, as contended by the claimant, as to put into the fifteen cents a pound clause smoking tobacco having but a small quantity of stem in it, and the rest nearly all pure leaf, making a product nearly equal, perhaps, in quality, to stemmed leaf paying forty cents a pound, we not only have congress opening the way to the government's being defrauded readily of twenty-five cents a pound on large quantities of smoking tobacco, but we have it making an enactment which allows, as said before, smoking tobacco made of butted leaf and having in it some stems to be within both the forty cents a pound clause and the fifteen cents a pound clause. The words "in part of stems, and imitations thereof," would naturally indicate a lower grade of tobacco than that "made of stems," whereas, on the interpretation contended for by the claimant, a grade of tobacco nearly up to pure stemmed leaf may be included in the words "in part of stems." The words "in part of stems, and imitations thereof," have no other meaning than if they read "of stems in part and imitations thereof," that is, of stems partly, and, as to the rest of the constituents, of imitations of stems; and no other meaning than if they read "in part of stems, and in part of imitations thereof." The words are not happily chosen, but it is not possible, in my judgment, to give them a meaning which would allow this "extra long smoking tobacco" to have been subject to any other tax than that of forty cents a pound.

Not only is this construction in harmony with the prior legislation of congress in regard to manufactured tobacco, but subsequent legislation confirms these views. The 61st section of the act of July 20, 1868 (15 Stat. 153), imposes a tax of sixteen cents per pound "on all smoking tobacco exclusively of stems, or of leaf with all the stems in, and so sold, the leaf not having been previously stripped, butted, or rolled, and from which no part of the stems have been separated by sifting, stripping, dressing, or in any other manner, either before, during, or after the process of manufacturing, on all fine cut shorts, the refuse of fine cut chewing tobacco which has passed through a riddle of thirty-six meshes to the square inch, by process of sifting, and on all refuse scraps and sweepings of tobacco;" and on all other manufactured tobacco and snuff a tax of thirty-two cents per pound.

The court charged the jury, that it was not necessary to determine what was the proper interpretation of the fifteen cents clause in the act of 1866, or under what head in that act the "extra long smoking tobacco" fell. It also charged the jury, in accordance with the first proposition on the part of the claimant, that, if they should believe that the returns for taxation, of the "extra long smoking tobacco," between August, 1866, and the date of seizure were made in good faith and with an honest belief, on the part of the claimant and his agents concerned in the preparation of said returns, that said tobacco was liable to the fifteen cents rate of duty, and to no other or higher rate, then, even though said tobacco was, by law, liable to the forty cents rate of duty, the jury could not, for that cause, find a verdict for the government, under section 48. But the court refused to charge, as requested by the claimant, that the "extra long smoking tobacco," if composed of both stem and leaf, or if made in part of stems, or if it contained a quantity of stem as great as, or greater than, that which grew with the leaf contained in said tobacco, was liable to a tax of only fifteen cents per pound. Although it may have been erroneous to charge the jury, as was done in substance, that it was immaterial to any issue in this case what was the lawful rate of tax on the "extra long smoking tobacco," yet, as such lawful rate was, in fact, forty cents a pound, the error, if any, was prejudicial only to the government, and not to the

claimant, and it was not erroneous to not instruct the jury that the lawful rate of tax payable on such tobacco was fifteen cents per pound.

The sixth ground urged for a new trial is, that the court erred "in instructing the jury that it was illegal for the claimant to return for tax the Orinoco tobacco in the bill of exceptions mentioned, under the circumstances therein mentioned," and "in instructing the jury that they could infer from the transactions in the bill of exceptions described an intent to defraud the revenue thereby." The facts in regard to this Orinoco tobacco, as set out in the bill of exceptions, are these: From a period prior to March, 1865, and down to April and May, 1867, the claimant had in his factory, stored in its lofts, 7,000 pounds of smoking tobacco, called "pressed Orinoco tobacco," manufactured by him, being leaves having all the stems in, and the leaves not having been sweetened or butted or stripped from the stems. In his monthly return for March, 1865, of sales and removals of manufactured tobacco during that month, he returned said 7,000 pounds as sold during that month, and subject to a tax of twenty-five cents per pound, under the act of June 30, 1864, and paid tax on it at that rate. In his book of sales, under date of March 8, 1865, appeared an entry of a sale of $60,000 worth of manufactured tobacco (including the said 7,000 pounds) to Kearney & Waterman, a commission paper house. A bill of the goods was made out to Kearney & Waterman, but the goods were never delivered to them, and were not removed from the factory. The claimant himself testified, that the goods were never intended to be delivered to Kearney & Waterman; that it was understood between him and Kearney & Waterman that the goods were sold and bought back; that this proceeding was for the purpose of returning the said goods as sold, in his monthly return for taxation for March, 1865, in order to avoid the payment of an increased rate of taxation to which said goods would be liable under the act of March 3, 1865, which was to take effect April 1, 1865; that, prior to said transaction with Kearney & Waterman, he consulted with some members of the senate committee on finance, and with several members of the house committee of ways and means, as to whether, in respect of goods on hand when the said act of March 3, 1865, should go into effect, he would have a right to return the same for taxation under the act of June 30, 1864, and was advised by them that he would have such right; and that he had no purpose to defraud the government, but considered that such a transaction warranted him in returning the goods as sold. The 7,000 pounds of Orinoco tobacco remained in the claimant's factory until April and May, 1867, when he sent it to California for sale. When it was so removed for sale he did not return it for taxation, and he did not keep any account, in the statutory book, of such removal for sale of such tobacco. If it had been then returned, it would have been liable to a tax of only fifteen cents a pound. Under the 94th section of the act of June 30, 1864 (13 Stat. 270), it was liable to a tax of twenty-five cents per pound, as "smoking tobacco, manufactured with all the stem in, the leaf not having been butted or stripped from the stem." By the amendment made by the 1st section of the act of March 3, 1865 (Id. 477), to the 94th section of the act of 1864, which amendment was to take effect on and after the 1st of April, 1865, it would have been liable to a tax of thirty-five cents per pound, as being smoking tobacco not made exclusively of stems. This rate of tax on it continued until August 1, 1866, after which date, by the amendment made to the 94th section of the act of 1864, by the 9th section of the act of July 13, 1866 (14 Stat. 133), the tax on it was fifteen cents per pound, as smoking tobacco, not sweetened, nor stemmed, nor butted; and that was the rate of tax on it in April and May, 1867, when it was removed to California for sale.

On this state of facts the court charged the jury, that this transaction of the claimant's was illegal; that it was illegal to return the tobacco for taxation in March, 1865, because it had not been sold or removed for consumption; that, under the 94th section of the act of 1864, under which the tobacco was returned for taxation in March, 1865, the tax of twenty-five cents a pound was leviable, collectable, and payable on the tobacco only when it was sold, or consumed or used by its manufacturer, or removed for consumption or for delivery to others than agents of the manufacturer within the United States or territories thereof; that there was no real sale of the tobacco in March, 1865; and that a removal for consumption, as defined in the 91st section of the act of 1864 (13 Stat. 263), required that there should be a removal of the tobacco from the premises of the manufacturer, in good faith, with a then present intention to have it consumed, as against the will of the manufacturer and owner of it. On the trial it was contended, for the claimant, that, as he had returned this tobacco in March, 1865, and paid a tax on it of twenty-five cents a pound, he was under no obligation to make a return of it afterwards and pay another tax upon it, especially if, at the time it was afterwards sold or removed for consumption, the tax on it was fifteen cents a pound; and that it was lawful for the claimant to return this tobacco for taxation in March, 1865, and pay a tax on it then. In support of these views, the 70th section of the act of July 13, 1866 (14 Stat. 173), was referred to, which was in force when this tobacco was removed from the claimant's factory in April and May, 1867. That section provides, that "all manufactures and productions on which a duty was imposed by either of the acts repealed by this act"

(which includes the provisions of the act of June 30, 1864, imposing duties on tobacco, and which were the provisions in force in March, 1865, when this tobacco was returned for taxation, and also includes the provisions of the 9th section of that act, as amended by the act of March 3, 1865, and which latter provisions were in force, taxing tobacco, from April 1, 1865, to August 1, 1866), "which shall be in the possession of the manufacturer or producer, or of his agent or agents, on the day when this act takes effect," August 1, 1866, "the duty imposed by any such former act not having been paid, shall be held and deemed to have been manufactured and produced after such date." The effect of this provision, in respect to this tobacco, was contended by the claimant to be, that, although this tobacco was in his possession, as its manufacturer, on the 1st of August, 1866, yet it could not be deemed to have been manufactured on or after August 1, 1866, because the duty imposed on it by the act of June 30, 1864, had been paid in March, 1865. But the court charged the jury, that, as no tax was leviable, collectable or payable on this tobacco, under the act of 1864, until it was sold or removed for consumption, the case was not one where a duty imposed by that act had been paid, within the meaning of the provision of the 70th section of the act of 1866; that the claimant had no right to return this tobacco for taxation at twenty-five cents a pound, especially when he acknowledged that he did so to get rid of the coming thirty-five cents a pound tax, and when he had an intent to commit a fraud on the government; and that the policy of the law was manifest, not to permit tax-paid goods, unsold, to be kept in masses on the premises of their manufacturer. In reference to this Orinoco tobacco, the court further charged the jury, as requested by the claimant, that, even if they should find that a fraudulent intent existed in the mind of the claimant at the time of making the return of such tobacco in March, 1865, that fact of itself would not justify them in finding the existence of a fraudulent intention on his part in respect to the property proceeded against, at the time that property was found or seized; that, if they should find that a fraudulent act was committed by the claimant in 1865, in respect to property then in his possession, that alone, unless supported by other evidence, was not sufficient to warrant them in finding the existence of a fraudulent intent on his part in regard to the property found in his possession in 1868, and would not warrant a verdict of condemnation; that, if he paid the twenty-five cents a pound tax on this tobacco in 1865, he became liable to pay no additional tax on it by reason of its shipment to California in 1867; that if, when he shipped it to California, he believed that all the tax due on it to the government had been paid, his failure to return it for taxation on such shipment was no evidence of fraudulent intent on his part; and that, if in March, 1865, when he paid the tax, he believed that such tax was due, he could have had no fraudulent intent, but it must have been the payment of a tax which he honestly believed at the time he had a right to pay, and not the payment of a tax merely because it was going to be raised the next day to thirty-five cents a pound.

It is contended, on the part of the claimant, that it was not unlawful for him to return this Orinoco tobacco for taxation in March, 1865, and pay upon it at that time a tax of twenty-five cents a pound; that the fact of the so-called sale to Kearney & Waterman is an immaterial and irrelevant fact; that the motive which governed the claimant in paying the tax before the 1st of April, 1865, instead of waiting until a future day, is immaterial; that he had a lawful right to pay it, even though he did so for the purpose of avoiding the higher duty that was to go into effect on the 1st of April, 1865; that any person holding property on which a tax will become due on the doing of some act by him, such as a sale or a removal of such property, may himself dispense with the doing of that act, and tender and pay the tax to the government; that the paying of the tax to the government is waiver of the necessity of doing the act on the doing of which the tax would properly accrue; that the act of sale or removal, considered as a prerequisite to the accruing of the tax, is an act not in the interest of the government, but an act in the interest of the tax-payer, and prescribed for his convenience, and, therefore, an act which he may disclaim or waive the doing of, by anticipating the payment of the tax; that no harm can result to the government from an accumulation of tax-paid manufactured articles in the hands of their manufacturer; and that what the claimant did in regard to this Orinoco tobacco has no tendency to show that he intended to commit a fraud on the government.

The proposition advanced on the part of the claimant is, that, although the statute provides that a certain tax shall become payable on manufactured tobacco when it shall be sold or removed, and the government cannot enforce the payment of such tax by the manufacturer until the tobacco shall be actually sold or removed, the manufacturer may lawfully pay the tax on it, as sold or removed, although it is not sold or removed. Of course, if he may do so at all, he may do so in view of the coming into operation of a higher tax on the article, and thus secure an advantage over other manufacturers, in respect of tobacco in fact sold or removed after the coming into operation of the higher tax. In this case, the claimant made a false representation to the government. He returned the tobacco as sold when it was not sold. The return was sworn to as true when it was not true; the

tax was received on the faith of the representation that the tobacco had been sold; the tax could not accrue until the tobacco had been sold or removed; an increased tax of ten cents a pound was to go into effect the next day; and it is seriously contended that this was a lawful and honest transaction, that the claimant was only waiving and dispensing with a restriction that was for his benefit and convenience, that, if he chose to pay the tax without selling or removing the tobacco, the government has no cause of complaint, and that there was nothing in the transaction showing an intent to defraud the government. No principle that has ever been applied to the interpretation of a revenue statute sanctions this doctrine. There is a mutuality in the provisions for taxation. The government can enforce the tax only under certain circumstances. The non-payment of it is unlawful only when those circumstances exist. E converso, the payment of it is lawful only, when those circumstances exist. Otherwise, the claimant would have had a right to compel the officers of the government to receive the tax although the tobacco had not been sold or removed. He did not, however, claim any such right at the time. He falsely represented that the tax had in fact accrued because the tobacco had been sold. He paid the money on that false pretence. There was no power in the collector to receive the tax, except as a tax on tobacco sold. If the tobacco had been sold afterwards, at a time when the tax on it was thirty-five cents a pound, the government could not have been prevented from collecting the additional ten cents a pound tax on it, by the fact that the twenty-five cents a pound had been received on it by the collector, on the false representation that it had been sold before that amount had been paid on it.

The course pursued by the claimant in regard to this Orinoco tobacco was not warranted by any statute in force at the time of the transactions of March, 1865. The 70th section of the act of July 13, 1866 (14 Stat. 173), was enacted long afterwards. This Orinoco tobacco was in the possession of the claimant on the 1st of August, 1866, when that act took effect, but the duty imposed on it by former acts had not been paid, within the meaning of such 70th section. It was, therefore, to be deemed to have been manufactured on or after August 1, 1866. In the special sense in which the word "imposed" is used in the 70th section, in connection with the words "not having been paid," the tax may properly be said not to have been "imposed" in such special sense, by the 1st of August, 1866. The provision means, that, where the tax, declared by the former act to be collectable, has been paid when enforceable and payable, the taxable articles in the hands of a manufacturer on the 1st of August, 1866, on which such tax has so been paid, shall not be deemed to have been manufactured on or after the 1st of August, 1866; but, otherwise, they shall. In this sense, the word "imposed" may properly be regarded as having a different meaning, in the phrase, "the duty imposed by any such former act not having been paid," from that which it has in the 48th section of the act of June 30, 1864, where it is used merely in the phrase, "imposed by the provisions of law," without any reference to the payment of the tax or to the time when it becomes payable. The succeeding provision in the 70th section of the act of 1866, to the effect, that "whenever, by the terms of this act, a duty is imposed upon any articles, goods, wares, or merchandise, manufactured or produced, upon which no duty was imposed by either of said former acts, it shall apply to such as were manufactured or produced, and not removed from the place of manufacture or production, on the day when this act takes effect," shows the intention of congress in respect to the whole subject. It was, that where manufactured articles were taxable by former laws, and the taxes had accrued and been paid on them, they should not be taxable under the new law; that where they were not taxable by former laws, they should, if taxable by the new law, be so taxable, although manufactured before the new law went into effect, provided they were not removed from the place of their manufacture at the time the new law went into effect; that where accrued taxes had been paid on manufactured articles taxable by the former laws, such articles should not be regarded as manufactured under the new law; and that where manufactured articles not taxable by the former laws had been removed from the place of their manufacture, they should not be regarded as manufactured under the new law.

I see, therefore, no error in the instruction to the jury that it was illegal for the claimant to return the Orinoco tobacco for tax, in March, 1865, under the circumstances set forth in the bill of exceptions, and no error in instructing them that they could infer from the transactions in respect to such tobacco an intent to defraud the revenue thereby, especially in view of the fact, that the court, in compliance with the fourth prayer of the claimant, instructed the jury that the existence of a fraudulent intent in the mind of the claimant, at the time of making return of this tobacco, in March, 1865, would not of itself justify them in finding the existence of a fraudulent intent on his part in respect to the property in suit, and that the court, in compliance with the fifth prayer of the claimant, instructed the jury that the commission of a fraudulent act by the claimant in 1865, in respect to property then in his possession, was not, alone, unless supported by other evidence, sufficient to warrant them in finding the existence of a fraudulent intent on his part in regard to the property in

suit, and that the court, in compliance with the third prayer of the claimant, instructed the jury that fraudulent intent and fraudulent acts long prior to the time of the seizure of the property in suit, would not warrant a verdict of condemnation, unless supported by evidence of fraudulent intent or fraudulent acts at a period nearly coincident with the time of seizure, and that, if, for the ten months next prior to the seizure, the claimant properly made returns and paid taxes upon his manufactures, the jury might fairly infer therefrom a discontinuance of any fraudulent intent which he might have had previously.

The seventh ground advanced for a new trial is, that the court erred "in instructing the jury that, because the claimant did not keep in book form a separate account of the tobacco manufactured by him in 1867 and 1868, he committed a violation of law from which the jury could infer an intent to sell the manufactured tobacco seized in this case without paying the taxes that might be due thereon, &c." It is admitted, by the claimant, that the 90th section of the act of June 30, 1864, as amended by the 9th section of the act of July 13, 1866 (14 Stat. 124), provides, that every tobacco manufacturer shall keep in book form an accurate account of the quantity of tobacco he manufactures, and shall return a sworn inventory every year of the quantity of tobacco held or owned by him on the 1st day of January in such year, setting forth the various kinds of articles manufactured by him separately from those purchased by him, and shall return monthly a sworn abstract of his purchases, sales and removals. The section goes on to provide, that, in case of refusal or neglect to return the inventory, or the abstract, or to keep the account, the manufacturer shall forfeit $500, to be recovered, with costs of suit. It is contended, that because this penalty is imposed for a neglect to keep the account in book form of manufactured tobacco, therefore, the fact of such neglect cannot be resorted to as collateral evidence from which to infer an intent to defraud, within the 48th section, in respect to the property in suit; and that, because the neglect to keep such an account is not an offence of the same class or character with the offence sought to be established under the 48th section, it cannot be resorted to as collateral evidence, in regard to an intent respecting the property in suit. The court charged, that the claimant violated the law in not keeping an account of goods manufactured by him, and that the keeping of such account was necessary in order to enable him truly to make up the annual inventory required to be returned. This neglect in keeping the account, in connection with certain alleged discrepancies between the inventories for 1867 and 1868 and the monthly returns, and with the transactions in regard to the Orinoco tobacco, and with the accumulation in the hands of the claimant of a large quantity of tax-paid tobacco manufactured by him, which had never been sold or removed, were submitted to the jury as circumstances which, if proved, warranted the inference of an intent throughout, on the part of the claimant, not to deal honestly with the government, but to violate the law, and also the further inference that he had a fraudulent intent in regard to the goods in suit. Under the rule before stated in regard to what is proper evidence on the question of intent, I see no error in these instructions. All the unlawful acts and omissions of the claimant as a manufacturer of tobacco, in the discharge of his duties as such towards the government under the internal revenue laws, were proper evidence to be taken into consideration by the jury, and if they believed, from the evidence, that, by such acts and omissions, he intended to defraud the government, they had a right to infer a like intent in regard to the property in suit. The instructions throughout proceeded upon the express statement to the jury that unlawful acts and omissions were nothing, unless the jury believed that there was in them an intent to defraud.

The fact of the imposition of a penalty for the mere neglect to keep the account, without any intent to defraud, cannot have the effect to remove from consideration the intent in a neglect, if such intent was one to defraud; and an intent to defraud in neglecting to keep an account of goods manufactured, is an intent of no different quality, class or character from an intent to defraud in selling or removing manufactured goods without paying the taxes on them.

The eighth ground for a new trial is, that the court erred "in instructing the jury that it was illegal for the claimant to return for tax the goods removed from his manufactory to his retail department, before such goods had been actually sold." The instruction was, that it was unlawful for the claimant to return for tax, on a certain day, a quantity of tobacco manufactured by him and not sold or removed from his premises, and then take it into his retail department on the same premises, and sell it by retail there over his retail counter, without keeping any record of such sales, and without returning any abstract of such sales. It was shown that the claimant had done this. This instruction involves the same question before considered in regard to the right of the claimant to pay taxes at his pleasure on masses of tobacco manufactured by him and not sold or removed; and the further question of his right to sell tobacco manufactured by him, and not before sold or removed, and to omit any record or return of it as sold when it was in fact sold, because he had previously falsely returned it as sold or removed. In this connection, the court instructed the jury that, if they should believe that the mode of returning for taxation the goods sold over the retail counter, by returning them at the

time they were transferred to such retail counter, was adopted for the convenience of the claimant, and used without any fraudulent intent, in the business of the claimant, as a manufacturer, such fact furnished no evidence in support of a verdict of condemnation in this case; that the mere fact that what the claimant did was unlawful amounted to nothing; that if, it being so unlawful, the jury believed there was a fraudulent intent in it, it was to be taken into consideration; and that, if the jury believed there was no fraudulent intent in it, it was not to be taken into consideration. It appears, by the bill of exceptions, that the government gave evidence tending to prove that, during the period from August 1, 1866, to January 1, 1868, large quantities of manufactured tobacco were sold and removed from his factory by the claimant, without due return thereof for taxation and payment of the taxes thereon, as required by law. In view of this fact, and of the neglect of the claimant to keep or return any account of the sales of the goods so removed to his retail department, as sales therein, and of the untruth of his returns, returning, as sold or removed, goods which were not sold and were not removed from his premises, or, in the sense of the law, from the place, street or number where his manufacturing of them was carried on, and of the opportunities for fraud afforded by the course adopted by him, it was for the jury to say what was the intent of the claimant in adopting such course, as bearing on his intent in reference to the goods in suit.

I have reviewed this case at great length because of the large amount of property involved in it, its importance to the parties, and the earnestness with which the grounds urged for a new trial were pressed upon me by the learned counsel for the claimant. But I am unable to see that any error was committed in any of the particulars urged, and, therefore, the motion must be denied.

[A motion in arrest of judgment was also overruled. Case No. 16,106a. Upon appeal the judgment was affirmed by unreported decisions of the circuit court. See Id. 16,104, 16,104a.]

Case No. 16,106a.

UNITED STATES v. QUANTITY OF TOBACCO.

[5 Ben. 457; 16 Int. Rev. Rec. 132; 15 Int. Rev. Rec. 19.] [1]

District Court, S. D. New York. Jan. 19, 1872.[2]

INTERNAL REVENUE—FORFEITURE—FORM OF VERDICT.

1. In an action brought to forfeit, for violation of the internal revenue acts, a quantity of manufactured tobacco, and a quantity of raw materials, and certain tools and other property, the jury rendered a verdict "in favor of the United States, condemning the goods." On a motion to arrest judgment on the verdict: *Held*, that the verdict was a verdict in favor of the United States on each of the three issues presented to the jury.

2. The words "condemning the goods" did no harm, but might be rejected as surplusage.

3. Under the 32d section of the act of September 24, 1789 (1 Stat. 91), the court was authorized to give judgment as the right appeared, without regarding any imperfection or want of form in the verdict, if such had existed.

[This was an information of forfeiture against a quantity of tobacco claimed by C. H. Lilienthal. Upon the trial a verdict of condemnation was returned. Case No. 16,105. A motion for a new trial was afterwards denied (Case No. 16,106), and the claimant has now moved in arrest of judgment.]

George T. Curtis, for the motion.

Thomas Simons, Asst. U. S. Dist. Atty., opposed.

BLATCHFORD, District Judge. This is an information brought by the United States, in a cause of seizure on land, under the internal revenue laws of the United States. The information alleges, that, on the 25th of March, 1868, a collector of internal revenue, who is named, "seized the following described property, for a forfeiture incurred under the laws of the United States, that is to say, a quantity of manufactured tobacco, and certain tools, vessels, utensils, implements, instruments, etc., etc., being all the personal property found at the tobacco manufactory of C. H. Lilienthal, 221 Washington street, and now has the same in custody within such Southern district, as forfeited to the United States for the following causes: That, prior to said seizure, taxes were imposed by the provisions of law upon the said tobacco, and the same, being so subject to the payment of taxes, as aforesaid, were found by the said collector in the possession and custody, and within the control, of some person or persons to the said attorney unknown, for the purpose of being sold and removed by such person or persons in fraud of the internal revenue laws, and with design to avoid payment of said taxes, against the 48th section of the act of congress, approved June 30th, 1864, entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' as amended by the act of July, 13th, 1866; that the said articles of raw material were found in the possession of some person or persons to the said attorney unknown, the said person or persons then and there intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, and with design to avoid the payment of said tax, against the 48th section aforementioned, as amended as aforesaid; that the said tools, implements, instruments, and per-

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 15 Int. Rev. Rec. 19, contains only a partial report.]

[2] [Affirmed by the circuit court. Case unreported.]

sonal property were found in the place or building, and within certain yards and enclosures, where said tobacco and said raw materials were found as aforesaid, whereby they became liable to forfeiture by the provisions of the 48th section aforesaid, as amended as aforesaid." The information then avers, that, "by reason thereof, and by force of the statutes in such case made and provided, the aforementioned goods, wares, and merchandise became and are forfeited to the use in the said statutes provided." The prayer is, "that due process issue in that behalf, as well of attachment to bring said property within the custody of the court, as of monition to all parties in interest; * * * and, due proceedings being had thereon, that, for the causes aforesaid, the said goods, wares, and merchandise be condemned by decree of forfeiture, and the proceeds of the sale, or such other disposition thereof as the court shall direct, distributed according to law." On the 4th of April, 1868, a claim to the property seized was filed, entitled, "A quantity of manufactured tobacco, &c., &c., found at No. 221 Washington street, asm. The United States." The claim says: "And now, Christian H. Lilienthal, owner of the abovenamed property, intervening for the interest of himself in the said property, appears * * * and makes claim to the said property, &c., as the same are attached by the marshal, under process of this court, at the instance of the United States; and * * * avers that he was in possession of the said property at the time of the attachment thereof, and that he is the true and bona fide owner of the said property, and that no other person is the owner thereof; wherefore, he prays to defend accordingly." The monition to the marshal commanded him to attach the property, by commanding him to attach "the said goods, wares, merchandise, and articles," which were thereinbefore described by the same words as in the information. The return of the marshal was, that he had attached "the quantity tobacco, &c.," described in the monition. The answer, which was filed on the 4th of June, 1868, says: "And now, Christian H. Lilienthal, the claimant of the said goods, wares, and merchandise, for answer to the libel of information filed against the same, comes and answers the said information as follows: The said claimant denies that the said goods, wares, and merchandise, or any part thereof, became or are forfeited in the manner and form in the said information alleged." On the 13th of April, 1868, an order was made, entitled in the case as one against "a quantity of manufactured tobacco, &c., factory of C. H. Lilienthal, 221 Washington street," appointing three appraisers, on motion of the counsel for the claimant, "to appraise the value of the property proceeded against herein," and directing that "the said property" be released to the claimant on his filing due claim and giving bond in double the appraised value, to be approved according to law. The report of the appraisers, entitled in the case as one against "a quantity of manufactured tobacco, &c., found at the factory of C. H. Lilienthal, No. 211 Washington street," and filed May 1st, 1868, says: "The undersigned, having been duly appointed and sworn as appraisers to appraise the value of the property proceeded against herein, do report that we have examined and appraised said property, and do find that said property (as per schedule hereto annexed) is worth the sum of one hundred and four thousand three hundred and ninety-one dollars seventy-eight cents ($104,391 78)." A schedule of appraisement of values by items is annexed to the report. On the 12th of June, 1868, an order was made, entitled in the case as one against "a quantity of manufactured tobacco, &c., found in the factory of C. H. Lilienthal, 221 Washington street," ordering, on the motion of the proctor for the claimant, that "the said property" be released to the claimant upon his giving bond in the appraised value, to be approved according to law, instead of in double that amount.

The issues joined in the cause were tried before the court and a jury, and the minutes of the court, of the 8th of May, 1871, state, that, after the charge of the court to the jury, they retire, and, upon their return, say, "that they find for the United States, condemning the goods, and so they say all:" and that then it was ordered that the claimant have thirty days from that date to make a case, or turn the same into a bill of exceptions. [See Case No. 16,105.]

No judgment has yet been entered on such verdict, and now the claimant moves that judgment on the information be arrested, and that the trial be declared to have been a mistrial, (1) because no verdict of the jury was recorded or filed before the jury were discharged; (2) because no verdict of the jury was returned before the jury were discharged; (3) because, when the jury returned into court, after considering of their verdict, and were inquired of, by order of the court, if they had agreed upon their verdict, it appears by the minutes of the clerk that the answer was, "They find for the United States, condemning the goods," and no other or different answer was made by the jury before they were discharged, and no other or different record was made thereon before the jury were discharged, and the jury were discharged and separated immediately after they had made the answer aforesaid, and the answer of the jury, so minuted, is not, and was not, a verdict upon the issues put to the jury under the information and the answer or pleas of the claimant, lawful and sufficient to authorize the rendition and entry by the court of a judgment of forfeiture of the property seized, or any part thereof.

The objection is, not that the verdict received and recorded—that the jury "find for the United States, condemning the goods"—was not received, and recorded in those words, by

the court, in the minutes, before the jury separated or were discharged, but, that such verdict is not a verdict on which a judgment of forfeiture of the property seized, or any part thereof, can be rendered by the court.

The ground urged in support of the motion is, that, by the pleadings, three distinct issues were raised: one as to the manufactured tobacco; one as to the articles of raw material; and one as to the tools, implements, instruments, and personal property; that the answer denies a forfeiture of the property, or of any part of it, in manner and form alleged in the information, and therefore traverses each allegation of the information; that the verdict does not find the facts of each or of any one of the issues on which the judgment of forfeiture depends; and that the verdict does not embrace enough to enable the court to amend it, or to render a judgment in accordance with the issues. It is claimed, as a rule of law, that, where the issue involves facts which govern the right of the plaintiff to have judgment in his favor, the verdict must find those facts, or no judgment can be rendered; and that, in the present case, the verdict finds no fact whatever under either of the distinct issues. It is also claimed, that, although, under the 32d section of the act of September 24th, 1789 (1 Stat. 91), the court has the power to cure defects in the forms of verdicts, the verdict must be substantially sufficient to enable the court to render a judgment in accordance with the issues; that the statute cannot reach this case; that the verdict does not enable the court to see that the jury intended to find one, or two, or all three of the issues for the United States; that the verdict is as consistent with a finding of one only, as with a finding of two or three, and as consistent with the finding of all as of one; that, to enter a judgment of forfeiture of all the three kinds of property, on the assumption that there was but one issue, which comprehended all the property seized, and that such issue has been found for the United States, would contradict the pleadings, the evidence, and the justice of the case; that, under the information, and according to the statute, the raw materials cannot be forfeited because the manufactured articles are proved to be subject to forfeiture, nor can the tools, &c., be forfeited because the manufactured articles and the raw materials are forfeited, unless it is proved that the tools, &c., were found in the same place with the manufactured articles or the raw materials; that, although there was evidence, on the trial, that the claimant was a manufacturer and seller of articles of a kind subject to tax, and that articles of such a kind were found in his possession, and that he had, in regard to them, an intent to sell them without paying the tax on them, the verdict does not find any one of those facts, or contain anything that enables the court to see that the jury intended to find those facts; that, although there was evidence, on the trial, that raw materials of the kind used by the claimant in his business were found in his possession, and that he intended to manufacture them into articles of a kind subject to tax, and intended to sell such articles without paying the tax on them, the verdict does not find any one of those facts, or show that the jury intended to find for the United States on the issue as to the raw materials, because their verdict is just as good for the first issue as for the second; that, as to the tools, &c., there was no evidence that they were found in the same place with the manufactured articles or the raw materials, and the verdict finds nothing that enables the court to see that the jury intended to find the third issue for the United States; that, if the jury had said that they had found for the United States on all the issues, the verdict, though bad in form, could have been cured; that the verdict does not affirm, or purport to affirm, all the issues, and the court cannot conjecture that the jury intended to affirm all the issues; that the substantial meaning of the verdict is not manifest, as it might have been returned on only one issue as well as on two or three issues, and the court has no means of determining on which issue to render judgment; and that the indeterminate character of the verdict further appears by the words, "condemning the goods," leaving it doubtful whether the jury intended all the articles seized, or a part only, and, if a part only, which part, there having been evidence which, under the instructions of the court, might have warranted a verdict for the United States on the first issue, or on the second issue, but no evidence that would have warranted a verdict for the United States on the third issue.

I have detailed at some length the views urged on the part of the claimant, in order that it may be seen that they are understood. But I am unable to appreciate their force, as applied to the facts of this case. It is entirely clear, that "the property" and "the personal property" spoken of in the information as seized, and "the aforementioned goods, wares, and merchandise" spoken of in the information as forfeited, and "the said property" against which the information prays for process, and "the said goods, wares, and merchandise" which the information prays may be condemned, and "the above named property" and "the said property" spoken of in the claim, and "the said goods, wares, merchandise and articles" and "the personal property" spoken of in the monition, and "the quantity tobacco, &c.," spoken of in the return to the monition, and "the said goods, wares and merchandise" spoken of in the answer, and "the property proceeded against herein," and "the said property" spoken of in the order of April 13th, 1868, and "the property proceeded against herein" and "said property," spoken of in the report of the appraisers, and "the said property"

spoken of in the order of June 12th, 1868, are expressions, all of which comprehend the same identical articles and quantity of property, namely, the property alleged in the information to have been seized "for a forfeiture," and to be in custody "as forfeited to the United States," and set forth in the schedule annexed to the report of the appraisers, and which the information prays may "be condemned by decree of forfeiture." The information, in specifying the causes of forfeiture, assigns the statutory causes to the three several descriptions of property seized —the manufactured tobacco, the articles of raw material, and the tools, implements, instruments and personal property found in the same place with the manufactured tobacco and the raw materials. The claimant claimed all the property that was seized and attached, and against which the information was directed, and answered as to the whole of such property, calling it "the said goods, wares and merchandise," and denying that it became or was forfeited. This was a denial that any of it was forfeited—a denial that any one of the three several causes of forfeiture specified in the information in regard to the three several classes of property seized, existed. It was these three issues that were tried. It was necessary for the government to prove the affirmative of each issue, in order to have a verdict condemning all the property seized. If it proved the affirmative of any particular issue, it would have a verdict condemning the property embraced in such issue. It is admitted there was evidence given tending to prove the affirmative of each of the first two issues. But it is denied that there was any evidence given that the "tools, implements, instruments and personal property" embraced in the third issue were found, as the information alleges, "in the place or building, and within certain yards and enclosures, where said tobacco and said raw materials were found as aforesaid," that is, as before alleged in the information, "at the tobacco manufactory of C. H. Lilienthal, 221 Washington street." This is an error of fact. The bill of exceptions, settled, signed, and filed in the case, states, that, "to maintain the issues on the part of the United States, the district attorney gave evidence tending to show that the claimant was a manufacturer and seller of tobacco in the city of New York, at and for a long time prior to the seizure in the information set forth, namely, prior to the 25th day of March, 1868, and that, at the time of the seizure, the claimant had in his possession, at his manufactory at Nos. 217, 219, and 221 Washington street, New York, the several quantities of manufactured tobacco and of raw materials, and the other personal property described in said information, and attached by the marshal, and claimed and released to the claimant as aforesaid." The words, "other personal property described in said information," mean the personal property other than the manufactured tobacco and the articles of raw material covered by the first and second issues, and mean the "tools, implements, instruments and personal property" covered by the third issue. The statement of the bill of exceptions is, that the evidence tended to show that, at the time of the seizure set forth in the information, that is, the seizure of all the personal property found at the manufactory of the claimant, 221 Washington street, he had in his possession, at such manufactory, all the property described in the information under the three heads. This necessarily means, that all of such property was found and seized at such manufactory, as one place or building.

There being evidence, then, to warrant a finding for the United States on each of the three issues, the jury returned a general verdict, saying, that "they find for the United States, condemning the goods." This verdict can mean nothing else than that they find for the United States on each and all of the issues. The words, "condemning the goods," create no uncertainty. The information asks that all the property, calling it "the said goods, wares and merchandise," "be condemned by decree of forfeiture." The claimant defended the property, by his answer, by the description of "the said goods, wares and merchandise." The word "goods," in the verdict, can mean, in reason, nothing else but all the property covered by all three of the issues. "Condemning the goods" means "condemning the property proceeded against herein." A verdict for the United States as to all the property was, necessarily, a verdict of condemnation. The words, "condemning the goods," do no harm. Still, they may be rejected as surplusage, if necessary. Under the evidence, a general verdict for the United States was perfectly good. This was such a verdict, whether the words, "condemning the goods," be retained or rejected. Such a verdict covered all the issues, and found all and each of them in favor of the United States.

A reference to the bill of exceptions shows that no other interpretation can be put upon the verdict than that which I have given to it. The court, after calling the attention of the jury to the statute on which the information was founded, the 48th section of the Act of June 30th, 1864, as amended by the 9th section of the Act of July 13th, 1866 (14 Stat. 111), stated to them, that there had been seized in the case, in addition to the manufactured tobacco and the raw materials, a large quantity of personal property connected with the establishment, the whole valued by the appraisers at $104,000, and that it was such property, consisting of the three classes, "found in this establishment," which was the subject of the suit; that the facts in the case were undisputed; that there was no serious contest about a single fact, ex-

cept in regard to the very point of the law—the intent; and that, if the government had not made out, to the satisfaction of the jury, that the intent to commit a fraud on the law, or to evade the payment of taxes, in respect either to the goods on hand, or to the goods to be manufactured out of the raw materials on hand, existed on the part of Mr. Lilienthal at the time "the goods" were seized, their verdict would be for the claimant. There was no exception, on the part of the claimant, to any portion of these instructions, and the jury found "for the United States, condemning the goods." It cannot be doubted that this is a verdict on which a judgment of forfeiture can be entered against all the property seized. The word "goods" was used in the pleadings, and by the court in its charge, and by the jury in their verdict, as synonymous with the words, "property proceeded against herein."

The verdict did not vary from the issue, nor did it fail to find the entire issue. It was a general verdict, and not a special verdict. There is nothing to show that all the jurors did not find each of the issues in favor of the government, as, under the instructions and the evidence, they were warranted in doing. It was not necessary for them to say that they found each of the issues in favor of the government. Moreover, on the evidence in the case, the jury could not find an intent in regard to either the manufactured tobacco or the raw materials, which did not exist in regard to both, and, under the statute, the existence of the forbidden intent in regard to either condemns all personal property found in the same place. The issue was, therefore, really a single one in regard to the intent respecting the manufactured tobacco and the raw materials, and there was no other issue of fact to be considered by the jury.

But, in any event, this would be a proper case for the court, under the 32d section of the act of September 24th, 1789 (1 Stat. 91), to give judgment according as the right of the cause in law appears, without regarding any imperfection, defect, or want of form in the verdict, and to amend any such imperfection, defect, or want of form. Roach v. Hulings, 16 Pet. [41 U. S.] 319; Parks v. Turner, 12 How. [53 U. S.] 39. I do not mean, however, to suggest, that the verdict in this case was not a proper verdict, or was not a general verdict, or was not proper in form as a general verdict, or that a general verdict was not the proper verdict to be rendered in this case.

The form of verdict rendered and entered in this case is that which has been used for many years in this court, in cases where a general verdict for the United States, in a suit in rem on a seizure of property on land, is proper. It seems to me to be correct in form, and not open to criticism.

The motion in arrest of judgment is denied.

This decision was affirmed by the circuit court on writ of error. [Case unreported.]

Case No. 16,107.

UNITED STATES v. The QUEEN et al.

[4 Ben. 237;[1] 12 Int. Rev. Rec. 42.]

District Court, S. D. New York. June, 1870.[2]

INFORMATION AGAINST BRITISH VESSEL AND HER MASTER—SMUGGLING—AMENDMENT—JURISDICTION—TRIAL BY JURY—JOINDER.

1. An information was filed against the steamship Queen and her master, alleging that the vessel belonged, in whole or in part, to a citizen or citizens of the United States, and charging that certain merchandise, not included in the manifest on board, had been imported by her into the United States, contrary to section 24 of the act of March 2, 1799 [1 Stat. 644], which, for such offence, imposes upon the master a forfeiture equal to the value of the goods not included in the manifest, and that, by section 8 of the act of July 18, 1866 [14 Stat. 180], the vessel is holden for the payment of the penalty against the master, and becomes liable to be seized and proceeded against, by libel, to recover the same, in this court. The answer of the owners of the vessel denied the allegations of the information, and especially that they were citizens of or residents in the United States, and excepted to the information as alleging no cause of action against the vessel, inasmuch as it did not show that the master or owners of the vessel had been convicted of the acts complained of. The answer of the master also denied the statements of the information and excepted to it, in that it did not set forth a joint cause of action against the vessel and the master, and in that parties were improperly joined, and in that the parties joined were entitled to different modes of trial, and in that this action could not be sustained against the vessel and the master jointly. The suit, as to both vessel and master, was tried before the court without a jury, as a civil cause of admiralty and maritime jurisdiction: *Held*, that it was clearly proved that the violation of the law set forth in the information was committed.

2. The vessel was a British vessel, and as, under the law, it is immaterial whether the offending vessel is a vessel of the United States or a foreign vessel, the information might be amended without terms, in respect to the ownership of the vessel, and by averring a violation of section 25 of the act of 1866, which extends the provisions of the act of 1799 to vessels owned, in whole or in part, by foreigners.

3. The court had jurisdiction to enforce the penalty against the vessel, in such a proceeding as this, without a trial by jury.

[Cited in U. S. v. The Missouri, Case No. 15,785.]

4. The vessel might be proceeded against for the penalty, irrespective of any proceeding against the master.

[Cited in The Helvetia, Case No. 6,345. Followed in Pollock v. The Sea Bird, 3 Fed. 575; The Paolina S., 11 Fed. 174. Cited in The Sidonian, 38 Fed. 442.]

5. The suit to recover the penalty against the master was a suit at common law, and he was entitled to a trial by jury, under the seventh amendment of the constitution of the United States.

6. The right to recover against the vessel in the present form of proceeding was clear, and, as the answer of the master excepted to the information on the ground that the suit could not be maintained against the vessel and master jointly, and because they were entitled

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

[2] [Affirmed in Case No. 16,108.]

to different modes of trial, and the answer of the vessel did not except to such joinder, the information would be dismissed as to the master, and a decree entered against the vessel.

In admiralty.

William Stanley, Asst. U. S. Dist. Atty.

Charles Donohue, for master and claimants of the vessel.

BLATCHFORD, District Judge. This is an information filed on the 13th day of February, 1869, by the district attorney, on behalf of the United States, against the steamship the Queen and Francis Grogan, her master. It alleges, that the vessel is within this district, on waters navigable from the sea by vessels of ten or more tons burthen, and is under seizure by the collector of customs for the city of New York. It also alleges, that the information is filed in a cause, civil and maritime, of forfeiture, for breach of the revenue laws of the United States. The articles of the information set forth: (1) That, on the 9th of February, 1869, the vessel was a vessel belonging, in the whole or in part, to a citizen or citizens, inhabitant or inhabitants, of the United States, and Grogan was the master or person having charge or command of her. (2) That, on that day, sundry merchandise, which is specified, of the value of $2,440, was imported and brought into the United States, in the vessel, which merchandise was not included in the manifest on board, as required by the twenty-third section of the act of March 2, 1799 (1 Stat. 644), contrary to the twenty-fourth section of said act; that thereby Grogan forfeited and became liable to pay the said sum of $2,440, the value of the said merchandise; that the premises are within the admiralty and maritime jurisdiction of this court, and that, by reason thereof, and by force of the eighth section of the act of July 18, 1866 (14 Stat. 180), the vessel is holden for the payment of the penalty against the master, and became liable to be seized and proceeded against summarily, by libel, to recover the same, in this court. The information prays for a decree for the forfeiture against Grogan and against the vessel, for $2,440, as a lien thereon, and that the vessel may be condemned and sold to satisfy the lien.

The National Steamship Company, as owners of the vessel, answer the information and say, that they are a British corporation, and are subjects of Great Britain, and are not citizens of or residents in the United States. They deny the statements of the information and except to it, by their answer, in that it does not set up a cause of action against the vessel, and in that it does not shew that the master or owners of the vessel, or either of them, has or have been convicted of the acts complained of, and allege that no cause of action arises against the vessel until such conviction.

The answer of Grogan denies all the statements of the information, and excepts to it, in that it does not set forth a joint cause of action against the vessel and Grogan, and in that parties are improperly joined, and in that the parties joined, under the cause of action stated, are entitled to separate modes of trial, and in that this action cannot be sustained against them jointly.

The twenty-third section of the act of 1799 provides, that no merchandise shall be brought into the United States from any foreign port or place, in any vessel belonging, in the whole or in part, to a citizen or citizens, inhabitant or inhabitants, of the United States, unless the master or person having the charge or command of such ship or vessel shall have on board a manifest in writing containing, among other things, a just and particular account of all the merchandise taken on board of such vessel. The twenty-fourth section of the same act provides, that if any merchandise shall be imported or brought into the United States in any vessel belonging, in the whole or in part, to a citizen or citizens, inhabitant or inhabitants, of the United States, from any foreign port or place, which shall not be included or described in a manifest on board, agreeably to the directions in the twenty-third section, in every such case the master or other person having the charge or command of such vessel, shall forfeit and pay a sum of money equal to the value of such goods not included in such manifest.

By the twenty-fifth section of the act of July 18, 1866 (14 Stat. 184), as amended by the third section of the act of February 18, 1867 (Id. 394), it is provided, that on and after the 1st day of March, 1867, the several provisions of the said act of March 2, 1799, relating to manifests, shall apply as well to vessels owned, in whole or in part, by foreigners as to vessels of the United States. The eighth section of the same act of July 18, 1866, provides, that in any case where a vessel or the owner, master or manager of a vessel, shall be subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily, by libel, to recover such penalty, in any district court of the United States having jurisdiction of the offence.

The case was tried before the court without a jury, as a cause on the instance side of the admiralty court. It was so tried as respected both the vessel and Grogan. It was proved, beyond question, that the violation of the twenty-third and twenty-fourth sections of the act of 1799, set forth in the information, was committed. It was not shown, as alleged in the information, that the vessel was a vessel of the United States, and it was shown that she was a British vessel. But, as, under the law, it is immaterial whether the offending vessel is a vessel of the United States or a foreign vessel, the in-

formation may, if desired, be amended, without terms, under the authority of rule 24 of the rules in admiralty prescribed by the supreme court, in respect to the averment of the ownership of the vessel, and, also, by averring a violation of the twenty-fifth section of the act of 1866, as well as of the other statutory provisions referred to in the information.

The ground taken in defence, at the hearing, was, that no joint cause of action is given by the statute against the vessel and her master; that the intention of the statute is only to make the vessel a security for the penalty denounced against her master; that the cause of action is not one within the admiralty and maritime jurisdiction of this court; that the statute does not authorize the enforcement of the penalty in admiralty; that the penalty cannot be recovered from the master personally without a trial by jury is given to him; that a recovery must be had against the master, for the penalty, before the vessel can be proceeded against for it; and that, if this suit be dismissed as to the master, it must be dismissed as to the vessel.

As respects the vessel, I am satisfied that this court has jurisdiction, to enforce the penalty against her, by a proceeding such as has been taken in this case, without a trial by jury being necessary.

The information alleges that the vessel is under seizure by the collector. The act of 1866 does not say that the vessel shall be forfeited, but that she shall be holden for the payment of the penalty. There is to be a forfeiture sub modo, to the extent of the payment of the penalty, and she may be "seized and proceeded against summarily, by libel, to recover such penalty, in any district court of the United States having jurisdiction of the offence." The case is made by the information one of forfeiture and seizure. The vessel is alleged to be in this district, on waters navigable from the sea by vessels of ten or more tons burthen, and under seizure for the forfeiture created by the violation of the statutes to which the information refers. This court has, by the ninth section of the judiciary act of September 24, 1789 (1 Stat. 77), exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen, within this district. Under this provision, it has always been held, that, in cases of seizure on land, the right of trial by jury exists, although the proceedings in the suit are otherwise in general conformity to the course in admiralty; but that, where the seizure is made on navigable waters, the course of admiralty may be strictly observed. Union Ins. Co. v. U. S., 6 Wall. [73 U. S.] 759, 764.

Nor have I any doubt that the vessel may be proceeded against, for the penalty in question irrespective of any prior or contemporaneous proceeding against the master therefor. The objection that a proceeding against the master must precede a suit against the vessel was considered and overruled by Judge Benedict, in a case which arose under the same statutes as those involved in this case. The Missouri [Case No. 9,652].

The remaining questions are, as to whether there can be a joint suit against the vessel and the master, and as to whether the master is entitled to a trial by jury, and as to whether this suit, if not maintainable as to both vessel and master, can be dismissed as to the master, and yet a decree be rendered in it against the vessel.

As regards the enforcement of the penalty against the master, he is entitled to a trial by jury. The seventh amendment[9] to the constitution of the United States provides, that, in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. The expression, "suits at common law," as there used, means all civil suits, in which legal rights are to be ascertained and determined, which are not of equity or admiralty jurisdiction, whatever may be the peculiar forms of such suits. Parsons v. Bedford, 3 Pet. [28 U. S.] 433, 447. The ninth section of the judiciary act of September 24, 1789 (1 Stat. 76, 77), declares, that the trial of issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury. The suit against the master, under the statute in question, for the penalty imposed, is not made by statute cognizable in admiralty, nor is there any provision that the penalty may be recovered against the master summarily, by libel, as there is in respect to the vessel. It is contended, on the part of the United States, that, as the bringing in of the goods by the vessel, in the prohibited manner, while she was under the command of the master, is made, by the statute, the foundation for the forfeiture by the master of a sum of money equal to the value of the goods, and as, by the act of 1866, the vessel is to be holden for the payment of the penalty imposed on the master, the master must be suable therefor in the admiralty quite as much as the vessel is; that the cause of action is as fully a maritime one in respect to the master, as it is in respect to the vessel; and that the case is one where jurisdiction in personam against the master exists in this court, within the decision in the case of New Jersey Steam Nav. Co. v. Merchant's Bank, 6 How. [47 U. S.] 344, 392. The answer to this view is, that no such jurisdiction or form of remedy is given, by any act of congress, against the master, as is given by the eighth section of the act of

1866, against the vessel. U. S. v. Three Hundred and Fifty Chests of Tea, 12 Wheat. [25 U. S.] 486, 498. No authority has been cited to show that any statutory penalty has ever been recovered by a suit in personam, in the admiralty, in a case like the present, and I must hold that the right to recover the penalty from the master must be enforced by a suit at common law, and that he is entitled in that to a trial by jury.

As the right to recover against the vessel, in the present form of proceeding, is clear, and as the answer of the master excepts to the information on the ground that the suit cannot be sustained against the vessel and the master jointly, for the reason that the parties joined are entitled to separate modes of trial, and as the claimants of the vessel have not excepted, by their answer, or by any other form of pleading, to such joinder, but only except, by their answer, that the information sets forth no cause of action against the vessel, and does not show that the master has been convicted of the acts complained of, the information will be dismissed as to the master, with costs, and a decree will be entered against the vessel for the $2,440, with costs.

[Upon an appeal to the circuit court the libellants were held entitled to a decree against the vessel, with costs. See Case No. 16,108.]

Case No. 16,108.

UNITED STATES v. The QUEEN.

[11 Blatchf. 416;[1] 19 Int. Rev. Rec. 14.]

Circuit Court, S. D. New York. Dec. 24, 1873.[2]

SMUGGLING—INFORMATION OF FORFEITURE—PROSECUTION OF MASTER—KNOWLEDGE OF MASTER.

1. Under sections 23 and 24 of the act of March 2, 1799, (1 Stat. 645, 646,) and sections 8 and 25 of the act of July 18, 1866, (14 Stat. 180, 184,) the United States may proceed in rem, against a vessel, to recover a penalty for importing or bringing goods into the United States, which are not included or described in the manifest, according to the course of proceeding in a cause in admiralty, and may proceed against the vessel immediately and directly, without the delay incident to the previous prosecution of the master of the vessel, to recover such penalty.

[Cited in Pollock v. The Sea Bird, 3 Fed. 575. Followed in The Paolina S., 11 Fed. 174. Cited in The Sidonian, 38 Fed. 442.]

2. Where a suit in admiralty is brought against such vessel and her master jointly, to recover such penalty, it is proper to dismiss the suit as to the master, on the ground that he is entitled to a trial by jury, and to proceed with it as against the vessel.

[Cited in Hatch v. The Boston, 3 Fed. 809.]

3. In such a suit, proof that the master of the vessel had no actual knowledge that the goods were on board is not sufficient to exempt the vessel from liability.

[Cited in U. S. v. Curtis, 16 Fed. 189.]

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

[2] [Affirming Case No. 16,107.]

[Appeal from the district court of the United States for the Southern district of New York.]

[This was an information of forfeiture against the steamship Queen for alleged violation of the revenue laws. On appeal from the district court. See Case No. 16,107.]

Thomas Simons, Asst. U. S. Dist. Atty.
Charles Donohue, for claimants.

WOODRUFF, Circuit Judge. The decision of this court in U. S. v. The Missouri [Case No. 15,785], must be taken as settling, in this court, that the proceedings herein were rightly prosecuted in the court below as a cause in admiralty, and according to the course of proceeding in such a cause. The case of Union Ins. Co. v. U. S., 6 Wall. [73 U. S.] 759, 764, sustains the jurisdiction, and approves that course of proceeding.

I think it clear that the government, under the acts of March 2, 1799, and July 18, 1866, (1 Stat. 645, 646, §§ 23, 24; 14 Stat. 180, 184, §§ 8, 25,) are at liberty to proceed against the vessel immediately and directly, without the delay incident to a previous prosecution of the master, to recover the penalty for importing or bringing goods into the United States, which are not included or described in the manifest. The extension of the act of 1799 to foreign vessels would, in general, prove idle and fruitless, if they could not be proceeded against before such a recovery. At the termination of a suit against the master the vessel would not be here. The purpose to charge the vessel with the penalty, and the express declaration, not only that the vessel "shall be holden for the payment," but that she "may be seized and proceeded against summarily," both indicate an intent that she may be proceeded against so soon as the violation of the law appears.

The amendment of the proceedings by discharging the master, on the claim that he was entitled to a trial by jury, was not erroneous. Courts of admiralty have a large discretion to amend their proceedings and conform them to the justice of the case before them; and the correction of the supposed error in including the master in the same suit wrought no injustice to the claimants. On the contrary, had the technical objection that the libellants, having erroneously joined the master, were concluded, been suffered to prevail, the vessel would have wholly escaped the liability which the statute imposed upon her.

On the merits, I must adhere to the observations made on deciding the case of U. S. v. The Missouri, above referred to. I do not think that the acts above referred to can be made practically useless and inefficient for the purposes of their enactment, by a construction which makes proof that the master had no actual knowledge that the goods were on board sufficient to exempt him from the penalty and the vessel from any responsibility. The averment made by an amend-

ment of the answer allowed in this court, that the master had no means of knowledge of the importation, was not sustained by any evidence. The case stands on the naked statement of the master, that he "did not know of the goods on board and not on the manifest." This language is itself equivocal. It may mean that, although he knew that the goods were on board, he did not know that they were not on the manifest. To this it is sufficient to say, it was his duty to see that they were on the manifest. But, taking the testimony to mean distinctly that he did not know that the goods were on board the vessel, that is not enough, in my opinion, to exempt the vessel from liability. If it were to be so held, the door to smuggling would be open so wide that these statutes would be a dead letter.

If it be conceded, that, when, notwithstanding a faithful exercise of his authority and control over the lading of his ship, and his right to exclude all goods not subjected to entry upon the ship's papers, parcels were fraudulently concealed, so that he could not discover them in person, nor by the aid of his subordinates, the penalty could not be enforced against him, (see U. S. v. The Stadacona [Case No. 16,371]), even that concession would not avail in this case. The custom house officers had no difficulty in finding these goods. And, as suggested by the court, in the case of U. S. v. The Missouri, if the manifest was made and filed in good faith, without knowledge that the goods were on board, the master is furnished, by the act of 1799 (section 24), with an opportunity to correct the mistake, by showing that the defect in the manifest was owing to a deceit and fraud practised on himself. Any other construction of the act would relieve the master and the vessel from liability, although every officer on board except the master knew that the goods were on board, and were parties to the attempt to introduce them in violation of law.

The libellants are entitled to a decree, with costs. [Case No. 16,107.]

Case No. 16,109.

UNITED STATES v. QUEEN.

[3 Cranch, C. C. 420.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

ADMINISTRATORS—ACTION ON BOND.

The act of assembly of Maryland of 1720 (chapter 24), respecting suits upon administration bonds, before return non est or fi. fa. against the executor or administrator, is in force in the county of Washington, D. C.

[Suit by the United States, for the use of Robinson, against N. L. Queen.]

Debt on the administration bond of George Lindsay's administratrix. Plea, that there was no return of non est on a capias ad respondendum, nor of a fieri facias against the administratrix, as required by the Maryland act of 1720 (chapter 24). General demurrer.

THE COURT rendered judgment upon the demurrer for the defendant, being of opinion that the act of 1720 is still in force, notwithstanding the act of 1798, c. 101, subc. 8, § 9, which authorizes an execution against the administrator, upon the report of the auditor, ascertaining the plaintiff's proportion of the assets. (THRUSTON, Circuit Judge, absent.)

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

Case No. 16,110.

UNITED STATES v. QUINN.

[8 Blatchf. 48; [1] 3 Am. Law T. Rep. U. S. Cts. 180; 12 Int. Rev. Rec. 151.]

Circuit Court, S. D. New York. Nov. 2, 1870.

ELECTIONS—VIOLATION OF REGISTRATION LAWS—INDICTMENT—CONSTITUTIONAL LAW.

1. The 20th section of the act of May 31, 1870 (16 Stat. 145), providing for the punishment of persons who illegally register, or attempt to register, at a registration of voters for an election for a representative in congress, and enacting that a registration made under the laws of a state shall be deemed to be a registration within such act, is not invalid, as being an infraction of the constitution of the United States.

2. Such section does not establish a test of the qualification of an elector, or affect such qualification, and is not repugnant to article 1, § 2, of the constitution, which prescribes the qualifications of electors of members of the house of representatives.

3. Authority to enact such section is derivable from article 1, § 4, subd. 1, of the constitution, which provides, that congress may, at any time, by law, make or alter regulations as to the time, place and manner of holding elections for representatives in congress, and from the last subdivision of article 1, § 8, which provides, that congress shall have the power to make all laws necessary or proper for carrying into execution powers thereinbefore given.

4. Article 1, § 5, subd. 1, of the constitution, which provides that each house of congress shall be the judge of the elections, returns and qualifications of its own members, commented on.

5. The offense created by such 20th section being a misdemeanor, it is sufficient, in an indictment, to describe it in the words of the statute, adapted to the particular circumstances involved in the offense charged.

6. The averments, in the indictment in this case, as to the existence and action of the board of inspectors of registry, upheld as sufficient, on demurrer, the court taking judicial notice of the statutes of New York in respect to such board, such statutes being referred to in the indictment.

7. No suggestion being made to the court that the defendant had any defense to the indictment, judgment absolute was rendered against him on the overruling of a demurrer to the indictment.

This was an indictment against the defendant [Terence Quinn], founded on the

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

20th section of the act of May 31, 1870 (16 Stat. 145). It contained thirteen counts. The first count alleged, "that, under and in pursuance of acts of the legislature of the state of New York, a board of inspectors of registry, theretofore, in pursuance of said laws, duly appointed, and at the times hereinafter stated, duly acting for the Fourteenth election district of the Sixteenth ward, of the city of New York, in the county of New York, in said state of New York, and in the district and circuit aforesaid, and duly organized, did, at the said election district, on the certain days for that purpose prescribed by the laws of the state of New York, commencing the eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy, proceed to make a list of all persons qualified and entitled to vote in the said election district, and to enrol such applicants for registration as should be qualified voters in the said election district at a general election of officers by the people of the state of New York, to ensue in the said state of New York, on the eighth day of November, in the year of our Lord one thousand eight hundred and seventy, at which general election, among other officers, a representative in the congress of the said United States, for the Sixth congressional district of the state of New York, was to be elected, and at the said election district voted for; that Terence Quinn, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy, at the Southern district of New York, and within the jurisdiction of this court, the said last mentioned day being one of the said prescribed days, appeared at the said election district of the Sixteenth ward of the city of New York, in the county and state of New York, and in the district and circuit aforesaid, before the said board of inspectors, then and there proceeding as aforesaid to make the list aforesaid, and to enrol as aforesaid, and did wilfully, and unlawfully, and knowingly apply to the said board to have his said name entered upon the list aforesaid of qualified voters aforesaid, and the said board of inspectors did thereupon, on the said Terence Quinn applying as aforesaid, then and there place his said name upon said list of qualified voters, he, the said Terence Quinn, not then and there being lawfully entitled to be registered therein, then and there, against the peace of the said United States, and their dignity, and against the form of the statute of the said United States, in such case made and provided." The second count alleged, "that, at the Fifteenth election district of the Sixteenth ward of the city of New York, in the county and state of New York, and in the district aforesaid, at a registration of voters in the said election district, for an election for a representative in the congress of the United States, which said registration was then and there made under the laws of the state of New York, and which said election was to be held on the eighth day of November, in the year of our Lord one thousand eight hundred and seventy, and at which said election a representative in congress for the Sixth congressional district of the state of New York was to be elected, and, at the said election district, the same being part of said congressional district, to be voted for, Terence Quinn, yeoman, late of the city and county of New York, in the district and circuit aforesaid, at the Southern district of New York, and within the jurisdiction of this court, did unlawfully, knowingly, and wilfully, fraudulently register, and cause his name to be entered upon the list of voters in the said district, as a voter residing in said election district, and entitled by law to vote therein for a representative in the congress of the United States, whereas the said Terence Quinn did not then and there reside in the said district, as he, the said Terence Quinn, well knew, and was not, by reason of said non-residence, a lawful voter in said district, or entitled to be registered as a voter, as he then and there well knew, then and there, against the peace of the said United States, and against their dignity, and against the form of the statute of the said United States in such case made and provided." The third and fourth counts were like the second, except as to the number of the election district. The fifth count alleged, "that heretofore, to wit, on the eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy, at the city and county aforesaid, and in the Southern district aforesaid, a registration of voters for an election for representatives in the congress of the United States, and for a general election to be held on the eighth day of November, in the year of our Lord one thousand eight hundred and seventy, at which election a representative in congress was to be chosen, in and for the Sixth congressional district of said state, in which said congressional district the Sixteenth election district of the Sixteenth ward of said city and county was, and is, situated, and is a part, was held under and pursuant to the laws of the state of New York, in and for the said Sixteenth election district of the Sixteenth ward of said city and county of New York, for which registration of voters, proper officers had been and were appointed to receive the applications of persons lawfully entitled to vote at the said election district, and to register and make lists of the names of such persons, pursuant to the provisions of the laws of the state of New York, which said officers were then and there acting as a board for the purpose of receiving, registering, and entering upon such list the names of such persons, the said Terence Quinn, not being a resident of said election district, and not being lawfully entitled to be registered therein, and not being

a voter therein, with intent then and there to deceive, injure, and defraud the lawful electors of said district, and the good and lawful people of the said state of New York, did then and there wilfully, knowingly, and fraudulently appear before the said officers, being such board, and cause and procure his name to be entered and registered upon the list of voters of said election district, as one of the persons entitled to vote therein at the aforesaid election district, wherefore the jurors aforesaid, upon their oath aforesaid, say, that the said Terence Quinn did, at the time and place aforesaid, unlawfully and fraudulently register in the election district aforesaid, against the peace of the said United States and their dignity, and against the form of the statute of the said United States in such case made and provided." The sixth and seventh counts were like the fifth, except as to the number of the election district. The eighth count alleged, "that, under and in pursuance of acts of the legislature of the state of New York, a board of inspectors of registry, theretofore, in pursuance of said laws, duly appointed, and, at the time hereinafter specified, duly acting, for the Fifteenth election district of the Sixteenth ward, of the city of New York, in the county of New York, and in the district and circuit aforesaid, and duly organized, did, on certain days for that purpose prescribed by the laws of the state of New York, commencing the eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy, proceed to make a list of all persons then qualified and entitled to vote in the said election district, and to enrol such applicants for registration as should be qualified voters in the said election district, at a general election of officers by the people of the state of New York, to ensue on the eighth day of November, in the year of our Lord one thousand eight hundred and seventy, at which general election, among other officers, a representative in the congress of the said United States for the Sixth congressional district of the said state of New York, was to be elected, and at the said election district voted for; that Terence Quinn, yeoman, late of the city and county of New York, in the district and circuit aforesaid, heretofore, to wit, on the eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy, at the Southern district of New York, and within the jurisdiction of this court, he, the said Terence Quinn, not then and there residing at a house numbered one hundred and fifty-six, in West Nineteenth street of said city of New York, the day last aforesaid being one of the prescribed days of registration as aforesaid, appeared in his proper person before said board of inspectors, proceeding, as aforesaid, to make the list aforesaid, and to enrol as aforesaid, and did wilfully, knowingly, and unlawfully and falsely say and represent to said board that he then and there resided at said house, numbered one hundred and fifty-six, and in West Nineteenth street, of said city of New York, and did apply then and there unlawfully, knowingly, and wilfully, to said board proceeding as aforesaid, to place his name upon said list and enrolment as residing in said house, numbered one hundred and fifty-six, in West Nineteenth street, of the city of New York, and, upon such application, the said board did then and there place his name upon said list and enrollment, and thereunto placed said number one hundred and fifty-six, in West Nineteenth street, as the residence of said Terence Quinn, whereas, in truth, the said Terence Quinn did not reside at said house and number, as he well knew; and so the jurors aforesaid say, that the said Terence Quinn did, on the day and in the year aforesaid, and in manner and form aforesaid, and at an election as aforesaid, fraudulently register, then and there, against the peace of the said United States, and their dignity, and against the form of the statute of the said United States, in such case made and provided." The ninth and tenth counts were like the eighth, except as to the number of the election district. The eleventh count contained the same allegations as the eighth as to the board of inspectors of registry, and then averred that the defendant, "having been theretofore, to wit, on the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and sixty-six, at the court of general sessions, in and for the city and county of New York, duly convicted of an infamous crime, to wit, the crime of an attempt at grand larceny, the same then being a felony by the laws of the state of New York, and the said Terence Quinn not then and there having been pardoned for said offense and conviction, or restored by pardon to the rights of a citizen, and then and there well knowing that, by reason of the premises, he was not a qualified voter at said election, or entitled to registration as a voter at said election, did then and there knowingly, and unlawfully, and wilfully apply to said board to place his name upon said list as a legal and qualified voter, and, upon such application, the said board did then and there place his name on said list as aforesaid, whereas, in truth and in fact, the said Terence Quinn was not a lawful voter, and was not entitled to be registered as aforesaid; and so the jurors aforesaid say, that the said Terence Quinn did, on the day and in the year aforesaid, and in manner and form aforesaid, and at an election as aforesaid, fraudulently register, then and there, against the peace of the said United States, and their dignity, and against the form of the statute of the said United States, in such case made and provided." The twelfth and thirteenth counts were like the eleventh, except as to the number of the election district. The defendant demurred to the indictment.

The 20th section of the act of May 31, 1870, was as follows: "If, at any registration

of voters, for an election for representative or delegate in the congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead or fictitious, or fraudulently register, or fraudulently attempt to register, not having a lawful right so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register, from duly exercising such right; or compel or induce, by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote, or aid, counsel, procure, or advise any such voter, person or officer to do any act hereby made a crime, or to omit any act, the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to punishment and prosecution therefor, as provided in section nineteen of this act for persons guilty of any of the crimes therein specified: provided, that every registration made under the laws of any state or territory, for any state or other election at which such representative or delegate in congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made for the purposes of any state, territorial or municipal election." The punishment provided in section nineteen was, "by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court," and the payment of "the costs of prosecution."

Edwin W. Stoughton and George T. Curtis, for defendant.

Noah Davis, U. S. Dist. Atty.

Before WOODRUFF, Circuit Judge, and BLATCHFORD, District Judge.

WOODRUFF, Circuit Judge (orally). The demurrer to the indictment now before the court, which was the subject of discussion at our yesterday's session, presents two questions. The first is, whether the law of the United States under which the indictment is found is constitutional, or, in a more general form, whether it is a valid enactment, it being assailed, however only upon the ground that it is an infraction of the constitution of the United States. The second is, whether the indictment sufficiently charges an offense under the law. The court will not endeavor to discuss with great minuteness or particularity these two questions. The shortness of the interval which has elapsed since the argument closed has precluded the elaboration of an opinion upon the points which are raised.

Had the court entertained serious doubt of the correctness of the conclusions which they have reached, they would have taken time for greater deliberation, and, if it seemed to them fit, would have endeavored to throw light upon the subject by an extended discussion. But, entertaining no doubt, and deeming it unnecessary and unprofitable that the progress of the public business should be delayed for the purpose of indulging in an elaborate exposition of constitutional or other law, we feel not only at liberty, but constrained, to confine ourselves to a very brief statement of the leading grounds upon which the conclusions which we have reached must rest.

First, then, as to the constitutionality of the act in question. It is important, perhaps—certainly we deem it wise in approaching that subject—to state just what the question is which we are called to consider, and to what a narrow point of inquiry the questions involved in the present demurrer bring us. The section of the act of congress upon which this indictment is found is single. It is a single section of a single statute. Its validity involves the consideration of no other sections of the same or other statutes. Its discussion does not bring into view numerous questions which were alluded to in the progress of the argument, which might or might not be fit subjects for discussion, if other statutes or other sections of the present statute were before us for review.

Without reading the section under which this indictment is found at length, or attempting to speak of it in technical terms, it must suffice to say, that it is an act which makes a fraudulent registration, or a fraudulent attempt to register, by a person not having a legal right so to do, for the purposes of an election of a member of congress, a crime against the United States of America; and the validity and constitutionality which we are to consider, rests upon the single question—Has congress the power, under the constitution, to declare a fraudulent registration, or a fraudulent attempt to register, for the purpose of voting for a representative or delegate in congress, a crime against the United States? We therefore enter into no consideration of various topics which were alluded to, referring to other details of other laws, or of the act of which this section is a part.

There are four provisions of article 1 of the constitution of the United States, reference to which is pertinent to the inquiry before us, namely:

Section 2: "The house of representatives

shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Section 4, subdivision 1: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators."

Section 5, subdivision 1: "Each house shall be the judge of the elections, returns, and qualifications of its own members."

Section 8, last subdivision: "The congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Does the act in question infringe the provision of the constitution which I have read, which provides that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature? It is argued with great ingenuity and ability, that the act in question infringes that clause of the constitution, because it seeks to establish a test of qualification—seeks to affirm the evidence of qualification—and, by so doing, ex vi termini, imposes qualification itself. We apprehend that that argument rests upon no solid basis. The act in question neither professes, nor, by any implication, can it, we think, be construed to affect the qualification of any elector anywhere. It imposes no duty to register. It prohibits no registration that is required in the state in which the elector seeks to exercise his franchise. It touches no qualification of the elector in any other respect. It leaves the power of the state to prescribe the qualifications of electors for the most numerous branch of the state legislature, in the largest and fullest extent, untouched and unaffected. It says, and only says, that, when the qualification of registration is imposed by the state law, (leaving the expediency or wisdom of such a law entirely to the judgment of the state), it shall be an offense against the laws of the United States to contribute, by fraud and violation of the state registry laws, to the sending of a representative to the congress of the United States who is not clothed with the authority which a true expression of the popular will would give; and that is all.

But, it is said, that congress, having nothing to do with the question of qualification, cannot treat of the subject of qualification at all; and that, to require that the elector shall have the qualification which the state law imposes, and make his voting or registration an offense if he has not that qualification, is, on the part of congress, to impose a condition itself on the right to vote. The court do not feel called upon to say, however little doubt they may feel upon the subject, whether or not the congress of the United States might, if they saw fit, make it a condition, throughout these United States, that all who come to elect members of the house of representatives shall first register their names. We do not conceive that that question is involved; but, that the prescription of such a condition is no infringement of the elector's right to vote, we have no doubt, and we refer, with confidence and with satisfaction, to the constitution of the state of New York, as the exposition of the views of her people and her legislature, at least, upon that precise question. It is provided, in her constitution of 1846 (article 2, § 1), that "every male citizen of the age of twenty-one years who shall have been a citizen for ten days, and an inhabitant of the state one year next preceding an election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote, at such election, in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people"—a declaration of qualifications, and the sole qualifications, which, under the constitution of the state of New York, it is competent to prescribe. And the framers of this same constitution, not deeming this unqualified declaration of the qualification of voters to be infringed in any degree, have, in section 4 of the same article, provided, that laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established. Our reflections lead us, therefore, to the conclusion, and without hesitation, that the prescription of a mode of ascertaining and certifying the qualification of him who shall present himself to exercise the elector's privilege, is no infringement of the clause that declares what shall constitute the requisite qualification, and is no attempt to prescribe to the states—to this state or to any other state—any condition for the exercise of the right of suffrage, and no attempt to prescribe the qualifications of an elector. If we are right in this, then the second section of the first article of the constitution is no impediment to the legislation of congress upon this subject.

The next clause of the constitution to which we refer—section four, subdivision one—declares, that the times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators. Upon this affirmative provision of the constitution, and in support of the legislation which is now assailed, it is insisted, that this clause of the constitution warrants the passage of the

act in question, on the one hand, while, on the other, it is denied, first, that this section includes the authority claimed, and second, that the authority attempted to be exercised is within it.

The framers of the constitution of the United States placed its government, all its strength and vigor, and all its permanent capacity for usefulness to the people, for whom it was made, in the votes of the people themselves. The debates in the convention by which the constitution was framed, and the discussions which were had by way of exposition when the constitution was presented to the states for their acceptance, both of which were cited to us in the argument, show, in the fullest manner, that those framers of the constitution did not, for one moment, lose sight of the indispensable condition—on which alone a government of the people could be safe to the people themselves or could secure the beneficent ends for which it was instituted—that her popular vote should be the true expression of the opinions and choice of the electors. Hence, we say, this section four, subdivision one, of the first article of the constitution; and hence, as was aply and clearly exhibited in the argument of the learned counsel for this defendant, the framers of the constitution—either through an apprehension that, in some possible change of events, the states might become indifferent to the general good, and so neglect their duty, or warned, perhaps, by experience had, under the previous articles of confederation, on that subject, or with wisdom forecasting the possibility that, at some distant period, circumstances might arise in some state, in which obstacles would be interposed to the full and fair expression of the popular voice, and, so, conscious that the very preservation of the government itself, for all its useful ends, demanded that its perpetuation through a popular vote should be secured—by this first subdivision of the fourth section conferred power upon congress for that self-preservation. Time might some where be so arranged, and for some end other than the well-being of the whole nation, that the popular voice might be denied a full expression. Place might be so fixed as in that mode to defeat the general and the indispensable purpose. The manner of holding an election might be such as to operate to prevent an open, fair expression of the popular voice. Or—to use an illustration freely used in the discussions had when those men who went into the various states and elsewhere wrote in explanation of the provisions of the constitution, that the people might understand it—elections might be so conducted, either through an indifference of the states or otherwise, that the general government might find itself unsupported by the very people in whose will the foundations of the government rested. Hence, we say, the scheme pointed out by this first subdivision of section four, and hence, we say, the explanations which were given by the great and good men who expounded it.

It seems to me that we ought to pause but a moment upon the suggestion, that, in the enforcement of a law such as we have now before us for consideration, intended to secure an election of members of the house of representatives by the giving of all legal votes and by the giving of none that are fraudulent, the government of the United States has no interest. "The government of the United States"—what is that? It may be conceded to be an artificial thing, which men call "the government," and which is sometimes looked upon as the source as well as the exhibition of power, and not capable of interest more than it is of thought or feeling. But, the government of the United States, in the true sense, is the people of the United States, one and all, throughout the length and breadth of the land. And the people of the United States, here and everywhere, have not only an interest, but an interest that is vital, in the preservation of their institutions and in the preservation of all that is pure, just and honest in the popular vote, on which, for their safety and security, their institutions and their government rest.

Now, it is conceded, if I have rightly apprehended the arguments that have been addressed to us, to be within the constitutional grant of power to congress, to proceed, under this power, to regulate the time, place and manner of holding elections, and to make such regulations as to each, that all the electors in every state shall have full and fair opportunity to declare their will. And the illustration chiefly used in the discussions to which I have referred, was an illustration drawn from the supposition, that, possibly, the intervention of congress to secure that end might become necessary. It is important that no one who is not an elector shall be permitted to defeat the will of those who are, by interposing his vote at such elections. It is equally important that no one shall be permitted to deposit more votes than he is entitled to. And both these possible evils rest precisely upon the principle on which it was declared that this clause might be useful, and the exercise of the power might become necessary, in order that all legal voters should have full and fair opportunity to deposit their votes. The court are not able to see the difference in principle between a regulation to enable all to vote who are entitled to vote, and a regulation to prevent men from voting who are not entitled, or to prevent men from voting more times or in more places than one. If not, then the power to do the one involves the power to prohibit the others. The power to make a regulation that shall secure to every man entitled to vote a safe and convenient exercise of his privilege, involves the power to

see to it that no one who is not entitled to vote shall be permitted to exercise that right. All this leaves, as I have already stated, the subject of the qualification of electors untouched—leaves the laws of the states—leaves the laws of the state of New York—to operate in their full force. Though it be true that the laws of the state of New York cannot be relied on as the source of authority, or as giving any vigor to the enactment, yet, if it be necessary to refer the power of congress to pass this enactment to a grant to be found in the constitution, wholly independent of state authority, then the court must say that it has it in the section before us. And, if it be true, that the existence of that power in congress is exclusive, so that, when exercised, it takes the place of existing state law and the imposition of state penalties, be it so. This involves no new principle. The court and the people of this country have long been familiar with the doctrine which is now conceded, and, indeed, insisted on here, that the legislation of congress on the subjects intrusted to it by the constitution is exclusive.

This brings within view another consideration connected with this subject—that, for eighty years, as is urged, congress has not seen fit to exercise the power which is conferred by the first subdivision of the fourth section. On that subject, two observations are pertinent. The first is, that failure to exercise the power hitherto is shown, by the history of this government, to furnish no argument against its existence. The debates to which I have referred, the discussions to which I have referred, all breathe the confidence the framers of the constitution had, not only in the patriotism, but in the intelligence and wisdom and fidelity, of the people of the states. In the congress of the United States, which was convened and has continued to be convened from that time onward, that same confidence that the people of the states would, on this subject, make all due and needful regulations, has been exhibited. If it be true that the time has come which the contemporaneous expositors of the constitution contemplated as possible and designed to anticipate and guard against, in which it would be expedient for congress to intervene and exercise the power, then that time has come, the anticipation of which furnished the occasion and the ground for introducing this clause into the constitution. Whether that time has come, in which just apprehension warrants legislation—whether occasion, therefore, exists, which makes it best and wisest that congress shall exercise the power, is a question with which a tribunal of justice has nothing to do. Of that, congress is the sole and proper judge.

The other observation having reference to this lapse of time which I propose to make is this—that there are numerous powers conferred by the constitution upon congress, which, for a time, remained dormant in their hands. There are powers which even now remain dormant in their hands; and the history of adjudication on this subject shows it to have been well established by decisions of the supreme court of the United States, that the circumstance that states have legislated, and legislated through periods of years, upon a subject, without question, and without interference by congress, in no degree impairs the force of the constitutional grant to the congress of the United States, and their neglect to exercise the power in no sort defeats the power itself. On the contrary, until the congress of the United States acts in the exercise of the power—until then, the states, in matters not directly inhibited, legislate, and their legislation has full force and validity. When the act of congress comes, then that act is exclusive. And again, therefore, I say, if it be true, if the argument be sound, that the power of the state of New York to punish cannot co-exist with the power of congress to impose punishment under the law which we have before us, then the exclusive legislation of congress must prevail; and it is reasoning reversely to assume or to argue that the two cannot co-exist, that the legislation of the state does exist, and that, therefore, the act of congress cannot stand. It is reversing the order of argument. The true statement is this: If the two cannot co-exist, the act of congress is controlling, and the state law gives way. Perhaps I have not done justice to the argument as it was presented; but these observations seem to me pertinent to one of the views which was presented to us in the discussion.

I have anticipated, in what I have said, the force and effect of the last subdivision of the eighth section of the first article—the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." If, according to the view which we take of the section already considered, congress has power to regulate the time and manner of holding elections, so as to secure as well a full and fair opportunity to vote at all elections for members of congress, as also to see to it that no one fraudulently exercises the privilege of voting, then it follows, under such subdivision, that congress has the power to pass all laws which shall be necessary to give effect to those regulations; and we know of none so efficient as to add the sanction of a penalty.

There is another section upon which I desire to make a single observation—section five, subdivision one: "Each house shall be the judge of the elections, returns, and qualifications of its own members." We do not think it necessary to rest our views of the constitutionality of the law upon that section, and yet the argument, to our minds, is plausible in a high degree, if, indeed, we ought not to regard it as satisfactory alone considered, namely, that when the constitution confers

upon each house the power to judge of the elections, returns, and qualifications of its own members, and then authorizes congress to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested in any department of the government, it authorizes congress to make such laws touching the conduct of elections and returns, as will operate, first, to furnish to each house of congress appropriate evidence of the validity of the commission or appointment of any man who comes there claiming the right to a seat, and, second, to prohibit the intervention of any obstacle which might embarrass or prevent the exercise of the right of each house to judge of the election of any man who claims a right to a seat. It is familiar to us all, that, when a contest arises—I refer to this as the practical exposition of the subject—congress feels itself at liberty to probe the matter of the election of a representative to its very foundation, and to look through and beyond all forms of authentication and certificate, and inquire and determine the actual fact, whether or not he who claims a seat is entitled thereto; and our statute book contains numerous provisions having for their object the facilitating of the inquiry. Can it be, that when congress is clothed with full power to pass all laws to carry into effect this power conferred upon a department of the government, it may not make it an offence against the laws of the United States to effect a fraudulent registration, which is to stand as prima facie evidence that the vote which is cast is a legal and proper vote? I will not enlarge upon that branch of the subject, but there are considerations tending strongly to the inference, that the power contained in the last two clauses which I have named, is full and ample to sustain the constitutionality of the section on which this indictment is founded.

Our conclusion, then, is, that the section of the act in question upon which this indictment rests—the twentieth section—which assumes the power of congress to make it an offence against the laws of the United States to fraudulently register, is a constitutional enactment.

The next inquiry is, whether the indictment in question is a sufficient indictment under the act. That question involves no constitutional considerations. It involves no principles that are not generally applicable to an ordinary inquiry into the sufficiency of indictments. And, in reviewing this subject, and looking at the history of adjudications, particularly in the United States courts, but sustained by the courts of the states of New York and of Massachusetts, and others, we find ourselves in no doubt. This being a misdemeanor created and declared by statute, it is sufficient to describe the statutory offence in the words of the statute itself—in the words of the statute, adapted, of course, to the particular circumstances involved in the offence which is charged. This doctrine seems to us abundantly sustained by decisions. U. S. v. Bachelder [Case No. 14,490]; U. S. v. La Coste [Id. 15,548]; U. S. v. Pond [Id. 16,067]; U. S. v. O'Sullivan [Id. 15,974]; U. S. v. Wilson [Id. 16,730]; U. S. v. Mills, 7 Pet. [32 U. S.] 138; Campbell v. People, 8 Wend. 636. The case of U. S. v. Wilcox [Id. 16,692], has singular significance in reference to a branch of the discussion upon this point. In that case, a man was indicted for perjury under the statute, for taking a false oath before a commissioner, which indictment was held insufficient because the commissioner was described as "a commissioner of the United States"—a description of so general a character as not to import an authority to administer an oath. But, notwithstanding the indictment was held insufficient, the court took occasion to say, that, setting forth the commission, or the particular powers of the commissioner, or the source whence they were derived, is not necessary, provided he is alleged to hold an office which apparently confers upon him the authority to administer the oath in the particular case specified, and that, that being done, the general allegation that he had competent authority to administer the oath, is sufficient.

This indictment, in our view, follows the words of the statute. Its departures are not properly departures. They are adaptations of the charge to the particular facts alleged, and, within every view, they are in substantial conformity to the statute.

It is suggested by my associate, and very properly, that it becomes a necessary part of our judicial duty, in construing this indictment, and in applying the inquiry whether it is substantially in conformity with the statute, that we take judicial notice of the statutes of the state of New York, which are referred to in the indictment itself.

Upon both of the points, therefore, involved in the discussion, we are of the opinion that the indictment should be sustained, and that the demurrer of the defendant should be overruled.

No suggestion being made to the court that the defendant had any defence to the indictment, judgment absolute was rendered against him on the demurrer, and he was sentenced to two years' imprisonment in the Albany county penitentiary, and to pay the costs of prosecution.

Case No. 16,111.

UNITED STATES v. QUITMAN.

[2 Am. Law Reg. 645.]

Circuit Court, E. D. Louisiana. July, 1854.

NEUTRALITY LAWS—POWER OF FEDERAL COURTS—BONDS TO OBSERVE LAWS—GRAND JURY.

1. A judge of the United States has power, on just grounds of suspicion, to require bond to observe the neutrality laws.

2. A grand jury charged with inquiring as to the existence of an organization whose object was the invasion of the territory of a friendly power, presented that the principal witnesses examined before them, and who were rumored to be the leaders in the unlawful enterprise, had refused to answer questions propounded to them on the subject, on the ground that it would criminate themselves. The grand jury also presented that, though they were unable to elicit any facts on which to base an indictment, or to show the existence of any actual military organization, yet that they believed that some such organization was in contemplation. *Held*, that there were sufficient grounds for requiring from the parties who declined to testify before the grand jury, bonds to observe the neutrality laws of the United States.

CAMPBELL, Circuit Justice. This case originated in a requisition by the court upon the defendant [John A. Quitman] to show cause why he should not give a bond to observe the laws of the United States in reference to the preservation of their neutral and friendly relations with foreign powers, contained in 3 Stat. 447.

The occasion for this requisition was made by a report of the grand jury, of which the following is an extract: "Report of the Grand Jury.—The grand jury beg leave to report to your honor that, in the discharge of the duty confided to them by the court, they have cited from among their fellow citizens a number of persons as witnesses to testify, and to prove from them, if possible, evidence in relation to the rumor in this city of an expedition, said to be on foot, the tendency and purpose of which would be to violate the neutrality laws of the United States. Among the witnesses cited were several whose names figured most prominently with the rumored expedition; and from the refusal of some of them to testify (as is known to the court) on the ground they could not do so without criminating themselves under the ruling of the court, the obvious inference left upon the minds of the grand jury was, that those rumors were not altogether without foundation; and from collateral evidence brought to their notice in the course of the investigation, they are further left to infer that meetings have been frequently held upon the subject of Cuban affairs, and that what are termed 'Cuban Bonds' have been issued, that funds have been collected, either by contributions, sale of these bonds, or promises to pay, to a very considerable amount, which was, or would be hereafter, at the disposal of whomsoever might be chosen to the command of an expedition purporting to be in aid of the Cuban revolutionists; but from a strict and searching investigation of the witnesses through the district attorney, the grand jury have been unable to elicit any facts upon which to found an indictment against any one. Although the grand jury strongly incline to the opinion that these meetings and collections of funds have for their end the organization of an expedition either for the purpose of assisting in a Cuban revolution, or of making a demonstration upon that island, yet the plan, whatever it may be, seems altogether in the prospective, and, aware as we are, that a great deal has been said and written about the extensive and formidable preparations on foot for the purpose of revolutionizing Cuba, we believe it has been very much overrated and magnified—nothing like a military organization or preparation having been brought to our notice."

At the time the report was made, the name of the defendant was returned with others who had declined to answer the interrogatories of the jury, and a printed statement of the facts which had occurred while he was before the jury has been filed. By that statement it appears that a printed circular, marked "private and confidential," signed by J. S. Thrasher as "corresponding secretary" of an association, was handed to the witness, was examined by him, and he was asked for an account of the meetings and proceedings described in it. That the witness declined to give information because his answers would criminate him. The printed circular referred to is also filed. It discloses the facts of several meetings in New Orleans, for the purpose of considering upon the means of liberating Cuba from the government of Spain; that there is a junto which acts in the name of "Frec Cuba" and represents its "aspirations;" that this junto has collected a large sum of money ($500,000), and holds intercourse with military men in the United States, relative to that object; that it issues bonds in the name and upon the pledge of the independent island and proposed government, and makes contracts with citizens of the United States to be trustees and treasurers of the movement, and to take the military control of it It contains the contract of a board of American trustees to hold its money, and the declarations of an eminent military leader, who agrees to take the command of the expedition when a million of dollars are collected. That the meetings are all in the design of fulfilling this requisition of this leader, whose name is not given. The bonds are issued to the subscribers at one-third their par value, and the military leader is pledged, should the expedition prove successful, to employ his influence to procure their assumption as a public debt of "Free Cuba." The circular discloses the fact that Cuba is in no condition to effect her own liberation; that the strength of the government and the vigilance of its police exposes every revolutionary movement in the island to defeat. The whole plan is addressed to citizens of the United States, and is for their execution. The military chief, selected from the United States, is the soul of the enterprise. The defendant is known to be an accomplished soldier, having a large share of the public confidence, and especially of those states which border on the Gulf of Mexico. The report of the grand jury is, "that his

name has figured prominently with the rumored expedition," and for that reason he was cited to afford evidence "in relation to the rumor in this city of an expedition, the tendency and purpose of which would be to violate the neutrality laws of the United States." The circular I have described was handed to the defendant, and was inspected by him, and it contains a description of a person and the report of a speech, which, perhaps, might be attributed to the defendant without great injustice, whenever the fact is ascertained that he would consent to implicate himself in an enterprise like that set forth. The defendant confessed the fact of a connection of a kind which rendered it a matter of impropriety for the grand jury to press any question upon him relative to the details of the movement. "The obvious inference," say the grand jury, "is that these rumors were not altogether without foundation," and they find from other evidence, that an expedition is on foot, "for the purpose of assisting a Cuban revolution, or of making a demonstration upon the island."

The questions presented to the court are, is there a reasonable ground for the belief that the defendant is connected with the preparation of such an enterprise? Does the existence of such a suspicion impose a duty upon the court? The defendant contends that I have no right to rest any proceeding upon the inference of the grand jury, or to deduce any conclusion unfavorable to him from this conduct. The constitution of the United States does not allow the examination of a witness in any criminal case against himself, except with his consent. The common law of evidence extends the exemption, and he is not required to answer in any case either as a witness or a party, the effect of which answer might be to implicate him in a crime or misdemeanor, or subject him to a forfeiture. Burr's Case [Case No. 14,692e]; Cloyes v. Thayer, 3 Hill, 564. This privilege belongs exclusively to the witness. The party to the suit cannot claim its exercise, nor object to its waiver by the witness. 2 Russ. Crimes, 929; People v. Abbot, 19 Wend. 195. The witness asserts this privilege on oath. The assertion is direct and positive that his answer will implicate him in a prosecution or forfeiture, and the court accepts his declaration without an inquiry as to what his answer will be. The inquiry of the court is, may the answer be such that it can be used as evidence against him? If the witness claims the privilege falsely and corruptly, he is guilty of perjury, and if by his falsehood he deprives a party of the benefit of necessary testimony, he is answerable for the damage he occasions in a civil action. Poole v. Perritt, 1 Spears, 128; Warnen v. Lucas, 10 Ohio, 336. The profound author of the "Treatise on Judicial Evidence" inquires whether, if all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first which they would have established? Innocence can have no advantage from it; innocence claims the right of speaking, must speak, while guilt alone invokes the security from silence. The supreme court of Ohio say, in the case last cited, "For a witness to refuse to testify, because his testimony may criminate him, is at once to pronounce his own turpitude. Not one man in a thousand would, without reason, venture upon so perilous a situation." It was for a time supposed that questions addressed to a witness tending to criminate him, could not be propounded. This notion has been discarded, and the witness is driven to plead his exemption. When this plea is made in the case of third persons, no inference can be drawn unfavorable to the parties to the record. The plea is not theirs, and their suit should not be affected by the act of a stranger. 2 Starkie, N. P. 157, 158; 1 Russ. & M. 382, note. Though this doctrine is impugned by high authority. 2 Russ. 939; 1 Russ. & M. 382, note.

The case before me is not this case. The grand jury representing the United States, were taking an inquisition of the crimes against their authority, and were entitled to the information which their fellow citizens had. They have ascertained the existence of acts in violation of law. The defendant excuses himself from affording information he possesses, because his relations to those acts are such that his answers would criminate him. He has conducted himself so that an ordinary, but a most important duty cannot be fulfilled. It is my duty to afford to defendant every exemption that the laws have conferred. The constitutional exemption originated in the righteous abhorrence of our ancestors for the proceeding of those tribunals of the continent of Europe, where the rack and torture wrung from the accused, in the agony of their pain, words admitting guilt. I do not compel the defendant to answer.

It is said, that drawing a conclusion unfavorable to the defendant's innocence, from his refusal to answer, is equivalent to compelling a confession. The objection is specious, but without any application to the case in which it is preferred. The requisition upon the defendant involves no criminal prosecution nor charge of guilt, nor is the requisition a punishment. In the times of the Saxon constitution, every subject of England was held to give securities for his good behavior, who were to produce him to every legal charge; and if he did wrong, and escape, to bear what he ought to have borne. 1 Spence's Inquiry, 352, 3. Blackstone describes this as a preventive justice, "applicable to those as to whom there is a probable ground to suspect of future misbehavior." That the precaution spoken of is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended, or likely to happen, and

consequently is not meant as any degree of punishment. 4 Bl. Comm. 252; 1 Term R. 696, 700. The statute of Edward III. defined the powers of magistrates in the exercise of this jurisdiction. That statute invested justices with authority to take and arrest all those that they may find by indictment or by suspicion, and put them in prison, and "to take of all that be not of good fame, where they shall be found, sufficient surety and main prize of their good behavior;" "to the intent that the people be not by such rioters troubled, nor endangered, nor the peace blemished." The interpretations of this statute comprehend all whom the magistrate shall have just cause to suspect to be dangerous, quarrelsome, or scandalous. Hawk. P. C. bk. 2, c. 8, § 16. Dalton enumerated twenty classes of offenders who fall within it, including rioters, common quarrellers, such as lie in wait to rob, steal, make assaults, put passengers in fear, libellers, persons guilty of mischief to animals, and concludes whatsoever act or thing is of itself a misdemeanor, is cause sufficient to bind such an offender to the good behavior. Dalt. Just. 124. The cases in which this jurisdiction has been exercised are numerous. A person who said "he would do everything in his power to annoy another, short of actual violence," was held to give surety, the court declaring "we should be poor guardians of the public peace, if we could not interfere until an actual outrage had taken place, and perhaps fatal consequences ensued." "If a party inform the court or a justice of the peace, that he goes in fear and in danger of personal violence, by reason of threats employed against him, and pray protection of the court, the court, will grant it." 12 Adol. & E. 599. Nor will the defendant be allowed to controvert the facts or bring counter evidence. 13 East, 171. The whole rests on the principle that this is not a criminal proceeding, nor designed as a punishment. 1 Durn. & E. [1 Term R.] 700. I have thus traced the nature and extent of this jurisdiction in England, for the reason that it is the model upon which the same jurisdiction in Louisiana has been framed. Crimes, offences and misdemeanors mentioned in her statutes, and the modes of proceeding and rules of evidence, are construed, intended and taken with reference to the common law of England, except as otherwise provided. Rev. St. 213. Justices are allowed to take securities of the peace, when there is a just cause to apprehend that a breach of the peace is intended. Rev. St. 220, § 48. The laws regulating the internal police of the state, under the title "vagrants, vagabonds, and suspected persons" (Rev. St. 587 et seq.), confer a jurisdiction similar to that described by Hawkins and Dalton, under the statute of Edward III. Persons found under circumstances of suspicion, and whose conduct awakens apprehension for the security of property or of life, or for the maintenance of order and decorum, persons whose conduct jeopards the tranquility of society, or the supremacy of laws, are subject to arrest, under these statutes, and may be held to security or sent to the house of correction. I find no words in any English statute or commission more broad and comprehensive. It is true that these statutes affect the loitering, idle, vagrant and pauper population, and seem to have been framed for that class. But the law is not a respecter of persons, and if the proud and powerful place themselves, by crime, in the ranks of the suspicious, or vagrant, the law does not regard their pride or power. The supreme court of Louisiana, at an early period, exercised the power in question in a case of libel, and rested upon common law authorities. Nugent's Case, 1 Mart. (La.) 103. The authority of this court is derived from the act of congress of 1793 (1 Stat. 609, c. 82). The judges of the supreme court by that act "have power and authority to security of the peace, and for good behaviour in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective states in cases cognizable before them." Crimes against the United States are ascertained from their statutes. Those laws, like the laws of the states, are designed to secure the public peace and to promote domestic tranquillity. The powers granted to the justices of the supreme court extend only within the limits of that department of the public order which has been committed to the oversight of the federal government. The assembly of a body of men for the purpose of disturbing the peace of a city, or to invade private property, or to assail a particular person, would be an unlawful assembly or court, or if followed by an unlawful act, a riot under state laws. And first in the list of the offences described by Dalton and Burns, which fall within the remedial statutes we have considered, are those. By the treaties with Spain and by the neutrality laws, the United States have placed the territories of that kingdom under their protection against military and naval expeditions or enterprises from their borders or conducted by their citizens. They are in our peace; the attempt of a citizen to disturb that peace, by beginning, or setting on foot, or providing means for a military or naval expedition, is a breach of that peace. The statute pronounces those acts to be misdemeanors. The most restricted construction of statutes which authorize the requirement of securities for good behaviour must comprehend the cases arising under this statute.

The question now arises, under what circumstances can this requisition be made? The authorities say, "that the justices have power to grant it either by their own discretion or upon the complaint of others; yet that they should not command it, but only upon sufficient cause seen to themselves or upon the complaint of other very honest or

credible persons." Hawkins and Blackstone define the discretion to be a legal discretion, to be put in exercise upon a just cause of suspicion. The facts disclosed in the report of the grand jury, with the explanatory evidence accompanying that report, leave me no room for hesitation or doubt. I have set forth at large the reasons for the judgment I have given, that there may be no misconstruction nor mistake of the grounds upon which this court acted. I have explained, in the charge addressed to the grand jury, my sense of the importance of the act of congress involved in this discussion, and my opinion of the policy in which it is founded. The honor of our country, the fair repute of its citizens, in my opinion, require an exact observance of that act. It is a law binding upon our whole people, and the principles, which justify its violation, menace the order and repose of the whole confederacy. But if my opinions were the reverse of what they are, in the position I occupy, I have but a single duty to perform. To the full extent, and no further, of the powers conferred upon me, I must enforce its execution. The defendant has, before a portion of this court, declared his inability to fulfill the public duty of affording information of practices involving a breach of the laws. That this inability arises from some undisclosed connection with those who are thus engaged. The president of the United States has admonished the country that there is danger of a violation of these important statutes, and the grand jury, after a patient investigation, certify that this admonition has a legitimate foundation. Public rumor has attached suspicion to the name of the defendant, according to the certificate. I will say with the chief justice of England, already quoted, "We should be poor guardians of the public peace, if we could not interfere until an actual outrage had taken place, and, perhaps, fatal consequences ensued."

Case No. 16,112.

UNITED STATES v. RADOWITZ.

[8 Reporter, 263.] [1]

Circuit Court, S. D. New York. June 30, 1879.

EVIDENCE—TRANSCRIPT OF AUDITOR'S BOOKS.

In an action for moneys alleged to have been paid to defendant by mistake of a government disbursing officer, a transcript of the books of the second auditor's office is not competent evidence. Section 886, Rev. St., applies only to suits against persons accountable for public moneys as such.

[Appeal from the district court of the United States for the Southern district of New York.]

Action for moneys alleged to have been paid to a defendant by mistake of a government officer. In the court below a verdict for the defendant was directed. [Case unreported.]

WAITE, Circuit Justice. It was not error to exclude the certified transcript from the books of the second auditor's office as evidence. Section 886 of the Revised Statutes relates to suits against persons accountable for public money as such. Radowitz was sued for money alleged to have been paid him by mistake by one of the disbursing officers of the government. The records of the treasury department contain no evidence of any transaction between him and that department directly. All payments to him were made by paymasters in the army, and the entries in the second auditor's office were made from vouchers furnished by these paymasters, showing the manner in which they had disposed of the public moneys placed in their hands. If these vouchers are correct the account against Radowitz is properly stated, but if not it is wrong. The accounts which have been stated from the vouchers cannot be of any use upon the trial of such an issue. Neither was it error to exclude the vouchers as evidence of actual payment when it appeared affirmatively that Radowitz had never received the money. The judgment below should not be reversed until it is made affirmatively to appear that it was wrong. As the bill of exceptions confessedly does not contain all the evidence, I must assume there was enough to justify the court in directing a verdict for the defendant.

Judgment affirmed.

[1] [Reprinted by permission.]

Case No. 16,113.

UNITED STATES v. RAGSDALE.

[Hempst. 479.] [1]

Circuit Court, D. Arkansas. April, 1847.

INDIAN TRIBES—ADOPTION OF WHITE MAN—CONSTRUCTION OF PENAL STATUTES.

1. A white man who is incorporated with an Indian tribe at mature age, by adoption, does not thereby become an Indian, so as to cease to be amenable to the laws of the United States.

2. He may, however, by such adoption, become entitled to certain privileges in the tribe, and also make himself amenable to their laws and usages.

3. Therefore, the second article of the treaty of Washington, of the 6th of August, 1846, between the United States and Cherokee Indians (9 Stat. 871), had the effect to pardon an offence previously committed by an Indian, in the Cherokee country west of Arkansas, against a white man who had been adopted by that tribe, and become a part of it.

4. The case of U. S. v. Rogers, 4 How. [45 U. S.] 571, cited.

5. In the construction of penal statutes, it is a general rule that an offender who is protected by its letter, cannot be deprived of its benefit, on the ground that his case is not within the spirit and intention of the law.

[Cited in Cory v. Carter, 48 Ind. 337.]

[1] [Reported by Samuel H. Hempstead, Esq.]

6. Where there is no ambiguity there is no room for construction.

Indictment [against Thomas Ragsdale] for murder.

S. H. Hempstead, U. S. Dist. Atty.

Daniel Ringo and F. W. Trapnall, for prisoner.

Before DANIEL, Circuit Justice, and JOHNSON, District Judge.

JOHNSON, District Judge. Thomas Ragsdale, a Cherokee Indian, has been indicted in this court for the crime of murder, charged to have been committed upon a certain Richard Newland, a white man, in the country now occupied by the Cherokee Indians. After putting in the general issue of not guilty, the defendant has pleaded three additional pleas: in the first of which he avers that the said Richard Newland, in the year 1835, legally intermarried with a Cherokee woman, who was a member and citizen of the Cherokee tribe, in their country east of the Mississippi; and according to the laws and usages of the Cherokee Nation, said Newland was incorporated into and became a citizen of said tribe, for all the purposes of citizenship, and by virtue of said marriage became and was entitled to all the rights and privileges, civil and political, which belonged to any other citizen of said Nation. That when the United States removed the said tribe to their country west of the Mississippi, in the year 1838, said Newland was removed with them, and received from the United States his transportation money, rations, and year's subsistence after arriving in the country assigned to them west of the Mississippi, as a citizen and member of said tribe. That after said Newland was removed to the Cherokee country west of the Mississippi, he was and continued to be by virtue of his marriage and in accordance with the constitution, laws, and usages of said Nation, until the time of his alleged murder, entitled to all the rights and immunities, civil and political, which appertained to any and all other citizens of the tribe, and was subject and amenable to the laws and regulations of the Cherokee Nation. That said Newland, at the time of his said supposed murder, was an individual of the Cherokee Nation, within the meaning of the second article of the treaty made and concluded at Washington on the 6th day of August, 1846, between the United States and the Cherokee Nation of Indians; and that the murder of said Newland, if committed at all by the defendant, which he denies, was an offence by a citizen of the Cherokee Nation against an individual thereof, within the meaning of the said second article of said treaty, and was thereby fully and for ever pardoned.

The motion to strike out this plea made by the district attorney, is in the nature of a demurrer, and admits it to be true, for the purposes of this investigation. The second article of the treaty of Washington, of the 6th of August, 1846, contains the following provision: "All difficulties and differences heretofore existing between the several parties of the Cherokee Nation are hereby settled and adjusted, and shall, as far as possible, be forgotten, and for ever buried in oblivion. All party distinctions shall cease, except so far as this may be necessary to carry out this convention or treaty. A general amnesty is hereby declared. All offences and crimes committed by a citizen or citizens of the Cherokee Nation against the Nation, or against an individual or individuals, are hereby pardoned." Acts Cong. 1846, 9 Stat. 871. The only material inquiry presented by this plea is, whether the person charged in the indictment with the commission of the crime, and the person against whom it was committed, were, at the time, citizens or individuals of the Cherokee Nation, or tribe, for if they were, it is manifest that the offender has received a full and plenary pardon, by virtue of the second article of the treaty, above cited. The defendant Ragsdale is averred in the indictment to be an Indian of the Cherokee tribe, and not a white man; and consequently he is a citizen of the Cherokee Nation. Thomas Newland, upon whom the murder is charged to have been committed by Ragsdale, is averred in the plea to have incorporated himself with the Cherokee tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country, and that by these acts he became a citizen or an individual of the Cherokee Nation.

The question here arises, Whether a white man can become a member of the Cherokee tribe of Indians, and be adopted by them as an individual member of that tribe? It is certainly true that the United States have never acknowledged or treated the native tribes of Indians as independent nations, nor regarded them as the owners of the territory they respectively occupied. On the contrary, they have always considered and treated them as dependent nations or tribes, subject to their dominion and control, and have exercised legislative power over them, by the punishment of crimes committed within their limits, no matter whether the offender be a white man or an Indian. But this dependent condition has never prevented them from having laws and usages, for their own internal government, and of adopting other persons as members of their tribe. This, however, is not an open question, but is expressly affirmed by the chief justice in delivering the opinion of the supreme court in the case of U. S. v. Rogers, 4 How. [45 U. S.] 571 [Case No. 16,187]. He uses the following language: "We think it very clear, that a white man who, at mature age, is adopted into an Indian tribe, does not there-

by become an Indian, and was not intended to be embraced in the exception above mentioned. He may, by such adoption, become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages; yet he is not an Indian, and the exception is confined to those who, by the usages and customs of the Indians, are regarded as belonging to the race. It does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them, both as regarded their own tribes and other tribes also, to be governed by Indian usages and customs." The above language is too clear to be misunderstood; that in the opinion of the supreme court, a white man may incorporate himself with an Indian tribe, be adopted by it, and become a member of the tribe. The plea avers that the said Newland did so incorporate himself, was adopted, and became a member of the Cherokee tribe of Indians, and continued to be a member thereof, to the time he is charged to have been murdered by Ragsdale.

The language of the treaty granting the pardon is clear, and free from ambiguity. Its language is, that "All offences and crimes committed by a citizen or citizens of the Cherokee Nation against the Nation or an individual or individuals, are hereby pardoned." It cannot be doubted that the latter clause of the above sentence means "against an individual or individuals of the Cherokee Nation." The offence of the defendant, then, is expressly embraced by the second article of the treaty granting a pardon, and the plea, if true, is a good bar to the indictment. It has, however, been earnestly contended on the part of the United States by the district attorney, that even admitting that the letter and words of the treaty apply to and embrace the defendant's case, that it is clearly not within the spirit and intention of the treaty. It is a sound rule in the construction of penal statutes, that if the case of the accused is clearly within the letter of a statute in his favor, the court will rarely, if ever, take his case out of it, upon the ground that it is not within the spirit and intent of the act. 4 Term R. 665; 6 Term R. 286; 1 Leach, 73; Dwar. St. 736; U. S. v. Wilson [Case No. 16,730]. The case must be clear and free from all doubt, to justify the court in making this construction. It is also a maxim of the law, that where there is no ambiguity, there is no room for construction. U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 95, 96. But looking at the spirit, object, and intent of the treaty, I can see no reasonable ground for the opinion that the crime charged against the defendant was not intended to be embraced. One great object of the treaty was the restoration of peace and harmony among the hostile parties of the Cherokee tribe, who by their conflicts and civil wars had disturbed the peace and threatened to deluge their land in blood; and to effectuate this desirable end a general amnesty of all past offences was declared, and as far as possible to be forgotten and buried in oblivion. In this plenary pardon to all native born Cherokees, why should it not also extend to adopted members of the tribe? After adoption they became members of the community, subject to all the burdens, and entitled to all the immunities of native born citizens or subjects; and it is reasonable, in my judgment, to suppose that they were intended to be included in the general amnesty.

The two remaining pleas are in substance a former trial, and acquittal for this offence under the Cherokee laws in the Cherokee country. These pleas are, in my judgment, clearly insufficient, upon the ground that the Cherokee court had no jurisdiction of his case. As for us, congress legislates for the punishment of crimes committed in the Indian country; that legislation is, in its nature, exclusive. The reasons upon which this position is based, I have not time at present to state, nor indeed do I deem it material, as I consider it free from doubt, and the reasons for it will suggest themselves to every reflecting mind.

The third and fourth pleas of former acquittal are ordered to be stricken out; but the motion to strike out the second plea of pardon is overruled. Ordered accordingly.

The prisoner was discharged on his plea of pardon.

Case No. 16,114.

UNITED STATES v. RAILROAD BRIDGE CO.

[6 McLean, 517;[1] 3 Liv. Law Mag. 568.]

Circuit Court, N. D. Illinois. July Term, 1855.

PUBLIC LANDS — MILITARY RESERVATION — ABANDONMENT AND SALE — PUBLIC ROADS AND BRIDGES—OBSTRUCTIONS TO COMMERCE—CONSTITUTIONAL LAW.

1. A military reserve may be abandoned by the government, when it becomes useless for public purposes, and by giving notice through the secretary of the treasury, now the secretary of the interior, it may be considered as a part of the public lands, from which it was temporarily reserved.

2. Such lands having been surveyed and offered at public auction, may be open to entry as other lands.

3. The reserve on Rock Island, though surveyed, never having been offered for sale at public auction, does not come technically within the act of 1852, authorizing railroad companies to locate their roads through the lands of the United States. The act of 1819 [3 Stat. 520], authorizing the sale of military reserves, &c., which had become useless, embraced only those lands which had been reserved and become useless, at the time the above act was passed. The power given to the defendant to construct the road and build a bridge across the Mississippi, is not controverted.

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

4. In all the Western states, within which there have been public lands, it has been the uniform practice to make public roads through the lands of the United States. This every state may do, under its power of eminent domain.

[Cited in Jones v. Florida C. & P. R. Co., 41 Fed. 72.]

[Cited in brief in Illinois Cent. R. Co. v. Chicago, B. & N. R. Co., 122 Ill. 476, 13 N. E. 140.]

5. And this power is exercised by a state, subject to no power vested in the federal government. The proprietary right of the United States can in no respect restrict or modify this exercise of the sovereign power by a state.

[Cited in Union Pac. Ry. Co. v. Burlington & M. R. R. Co., 3 Fed. 110; Illinois Cent. R. Co. v. Chicago, B. & N. R. Co., 26 Fed. 478; Union Pac. Ry. Co. v. Leavenworth, N. & S. Ry. Co., 29 Fed. 729.]

[Cited in People v. District Court (Colo. Sup.) 17 Pac. 301; Burt v. Merchants' Ins. Co., 106 Mass. 360; Flint & P. M. Ry. Co. v. Gordon, 41 Mich. 428, 2 N. W. 653; Simonson v. Thompson, 25 Minn. 453.]

6. It is essential to the welfare of the citizens of the states, that this power should be exercised.

7. So far as easements by establishing public roads, are concerned, within a state, by its legislature, the jurisdiction is exclusive.

8. The power to regulate commerce among the states is vested in congress, but the judicial power cannot act until congress shall prescribe the rule in regard to commerce.

[Cited in Gatton v. Chicago, R. I. & P. Ry. Co. (Iowa) 63 N. W. 595.]

9. Where there is an obstruction to commerce which operates to the irreparable injury of an individual, the court may act to prevent the injury.

10. This was the ground on which the jurisdiction was sustained against the Wheeling bridge, at the instance of the state of Pennsylvania.

11. And in a similar case, relief could be given to the United States.

12. But the facts in regard to the injury done to the land on Rock Island, do not authorize such an interference.

13. If the amount of injury were to be considered, to the land on Rock Island as alleged, the benefits conferred would be as five to one.

14. The bridges to be constructed over both branches of the Mississippi, at Rock Island, with the draws proposed, at the place selected, will not cause any appreciable obstruction to commerce.

[Cited in Baltimore & P. R. Co. v. Edmonds, 3 Mackey, 538.]

15. The bridge is thrown over a sluggish current more than half a mile below the rapids, which are only half the width of each of the two draws.

This is an application by the United States for an injunction against the Railroad and Bridge Company, to prevent them from constructing their railroad across Rock Island and bridges connected therewith, over both channels of the Mississippi river.

The Attorney General of the United States, and Mr. Hoyne, U. S. Dist. Atty.

Reverdy Johnson and Sargeant & Judd, for defendants.

BY THE COURT. The bill states that as early as 1812, the western extremity of Rock Island was occupied as a military post, called "Fort Armstrong"; that various buildings and fortifications were erected thereon by the United States, which were occupied for military purposes from 1816 to 1836, at which date it was evacuated by the troops of the United States, and ceased to be a military garrison. In April, 1825, the island was reserved for military purposes by the secretary of war, of which the commissioner of the general land office was informed, and by him due notice was given to the register and receiver of the land office in which the reservation was situated. By the order of the secretary of war in 1835, the whole of Rock Island was reserved for military purposes, and the register and receiver of the land office at Galena, a new land district, which included the island, were duly notified by the commissioner of the general land office. Since the troops were withdrawn from the island, it has been occupied, as the bill states, by the Indian Department, by the ordnance department, as a depot for arms, &c., and by agents of the quarter-master's department, for the protection of the property of the United States, up to the time of filing the bill. And the complainants allege, that the defendants have located their railroad over the island and by their agents have made large and deep excavations of earth and embankments, on the line of the road over the island, removing rocks and cutting timber, greatly to their injury and the injury of the soil, for which injuries no adequate remedy can be had by an action at law. And the complainants also allege, that preparation has been made by the company for the construction of a bridge over the western channel of the river, which will materially obstruct the navigation of steamboats, many of which ply upon the river, several hundred miles above Rock Island; that steamboats, in carrying on a commerce on the river, frequently take boats or barges in tow on each side of them, which would require a much wider draw to pass down the river than the one proposed to be made in the bridge, and that it would at all times be difficult and dangerous, from the rapidity of the current, for a steamboat to pass through the draw. On these grounds substantially, and on the ground that the power to regulate commerce among the several states is vested in congress, &c., an injunction is asked.

The defendants rely on two acts of the legislature of the state of Illinois, one dated in 1847, and the other in 1851, incorporating and authorizing them to locate a railroad, with one or two tracks, by the way of La Salle, from Chicago to the town of Rock Island, on the Mississippi river; and they allege that on the 17th day of January, 1853, the legislature of Illinois created the defendants a body corporate with power to build a railroad bridge across the Mississippi at or near Rock Island, or so much thereof as is

within the state of Illinois, and to connect by railroad or otherwise, with any railroads in the states of Illinois or Iowa, in such manner as shall not materially interfere with or obstruct the navigation of the river, &c. And the defendants set up the following report of the secretary of war, dated the 30th of December, 1847: "Sir,—In compliance with a resolution of the senate of the 22d instant, requiring the secretary of war 'to inform the senate, if Fort Armstrong, on Rock Island, in the state of Illinois, is now occupied as a fort; and if not, how long the same has been abandoned, in whose charge the same is, and on what terms; and also that he communicate his opinion, if the interest of the government requires that said site should be reserved from sale for military purposes,' I have the honor to transmit, herewith, reports from the adjutant general, the acting chief of ordnance, and the quarter-master general, containing the information desired; and to state that in my opinion, the interest of the government does not require that said site be longer reserved from sale for military purposes. (Signed,) Wm. L. Marcy."

The adjutant general reported that Fort Armstrong, on Rock Island, was evacuated May 4th, 1836, in pursuance of general orders, No. 9, dated January 25th of the same year. He says it was subsequently used by the ordnance department as a depot on a small scale for arms and munitions; but it is understood the stores were all removed some years since. Rock Island, he states, is not believed to be of any value for military purposes, and is considered as finally abandoned. The quarter-master general reported "that Fort Armstrong is now in charge of his department; and that Thomas Drane is employed at a compensation of sixteen dollars per month to take care of it." It is of no further use to the public as a military site, and he recommended that it be transferred to the land department. The chief of ordnance reported that as far as regards the ordnance department, he considered the reserve no longer necessary for military purposes. On the 11th of February, 1848, the secretary of war enclosed the above report to the secretary of the treasury, and says: "that the site of Fort Armstrong is no longer required for military purposes, and it is therefore hereby relinquished and placed at the disposal of the department which has charge of the public lands. (Signed) Wm. L. Marcy."

A return of the survey of the land on Rock Island, as public lands are surveyed by the surveyor general, is in evidence. Under the act of June 14th, 1809, which authorized the president of the United States to erect such fortifications as may be necessary in his opinion for the protection of the northwestern frontier, Fort Armstrong was built. But the reserve was not made in form until 1825, as above stated. By the act 3d March, 1819, the secretary of war was authorized, under the direction of the president, to cause to be sold such military sites belonging to the United States, as may have been found, or become, useless for military purposes. And the secretary of war is thereby authorized, on the payment of the consideration agreed for, into the treasury of the United States, to make, execute and deliver all needful instruments for transferring the same in fee, and the jurisdiction over the reserve ceded by a state shall cease. In 1830, the secretary of war instructed the adjutant general to write to Col. Mason, directing the sale of the reservation on Rock Island, on terms most favorable to the United States. In three or four months afterwards a telegraphic despatch postponed the sale "until further orders." By the act of the 4th of August, 1852 [10 Stat. 28], the right of way was given to all rail and plank roads or macadamized turnpike companies, that were or might be chartered over and through any of the public lands of the United States, &c., with the following proviso: "That none of the foregoing provisions of this act shall apply to, or authorize any rights in any lands of the United States, other than such as are held for private entry or sale, and such as are unsurveyed and not held for public use, by erection or improvement thereon."

The case involves several very important questions, some of which have not been heretofore raised for judicial consideration. The suit is brought by the general government, not in its sovereign capacity, but for the protection of certain public trusts, committed to it, which require, as is supposed, the exercise of the judicial power. This is more in accordance with the principles of our government, than a resort to military force. The president, under existing laws may remove trespassers from the public lands, by a military order, or by a civil action, or an indictment. Where a suit is brought by a state, or by the general government, it is subject to the forms of pleading and the rules of procedure applicable to suits between individuals; and wherever an injury is inflicted on the public rights protected by law, a remedy, civil or criminal, is given.

Congress has the exclusive power, under the constitution, to regulate commerce between two or more states, and it is contended that, in virtue of this power, the complainants have a right to maintain this suit, on the ground that the bridge proposed to be constructed will be an obstruction to commerce, and this presents a new question. The commercial power of the constitution is that which the federal government exercises in its sovereign and legislative capacity. It has regulated commerce on the Mississippi river and the other navigable rivers of the United States, so far as navigation by steamboats is concerned; and ports of delivery have been established. This regulation has extended on the Mississippi a great distance above Rock Island. But this commercial power can only be exercised and carried out by legislation;

and when this shall be done, any violation of the laws will subject the offenders to the penalties provided. The instrumentality of the judiciary can be invoked only by the government to give effect to its laws, civil or criminal, but the judicial power cannot precede that of legislation. The rule of action on all questions of policy, within the federal powers, must be prescribed by congress. There is no federal common law which pervades the Union, and constitutes a rule of judicial action. But in all the states the common law is in force, in a greater or less degree. Its existence and extent are shown by the statutes of the states respectively, and the usages of the courts. But there is no common law in regard to regulations of navigation. These must be adapted to the peculiar circumstances of a country, and the facilities which exist for traffic. In this respect, the legislation of congress is the only remedy known to the constitution. If it be admitted that the bridge would be an obstruction to the commerce of the Mississippi river, is there any power in the judiciary to remedy the evil? The commercial power is in congress, but until it shall prescribe the rule, the power is dormant. Congress has power to punish the counterfeiting of the current coin of the Union, the violation of the mail, and many other acts, but, until the law shall fix the punishment, the courts of the United States cannot punish. Neither can a proceeding by indictment or information be instituted in the judicial courts of the Union, without statutory authority. The law of redress must be enacted before redress can be given. In this respect, as a suitor, the government occupies the same position as an individual or a corporation. If there be an obstruction in or over a navigable water which injures private right, redress may be found by an action. On this ground the supreme court sustained the complaint of the state of Pennsylvania against the obstruction of the Wheeling bridge, because it was an injury to the line of transportation over its roads and canals, which it had constructed, and from which a revenue was derived. The state sued as an individual might have sued, on the ground of an injury, which, at common law, was irreparable. For such an injury the general government may obtain an injunction. But no such special injury to the property of the government is alleged in this case, except as to the reserved land on Rock Island, which allegations will be hereafter examined. The power to regulate commerce is not property, nor is it in this view a subject of judicial action where it has not been exerted.

Under the commercial power, congress may declare what shall constitute an obstruction or nuisance, by a general regulation, and provide for its abatement by indictment or information through the attorney-general; but neither under this power, nor under the power to establish post roads, can congress construct a bridge over a navigable water. This belongs to the local or state authority, within which the work is to be done. But this authority must be so exercised as not materially, to conflict with the paramount power to regulate commerce. If congress can construct a bridge over a navigable water, under the power to regulate commerce or to establish post roads, on the same principle it may make turnpike or railroads throughout the entire country. The latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former by the regulation of commerce upon the high seas and upon our rivers and lakes. If these limitations are to be departed from, there can be no others, except the discretion of congress. It is admitted, that in the regulation of commerce as a question of policy, the only limitation imposed by the constitution is, that no preference can be given to a port in one state over those of another.

Was Rock Island a military reserve at the time the alleged trespass was committed? That it was reserved for military purposes in 1825 is clear. The secretary of war, acting under the president, and by his authority, reserved it, and it was so entered on the books of the land offices at Edwardsville and Galena. And it was occupied as such until the year 1836, when it was abandoned as a military post; the troops were withdrawn, and sometime afterward the buildings were sold. The abandonment of Rock Island as a military post, and for all public purposes, was as complete as its reservation had been, by all the public authorities by whom it was selected or used. The suspension of the sale under the act of 1819 was ordered by Mr. Poinsett, secretary of war, not because it was wanted for public purposes, but on the ground that the act did not authorize its sale. On the 8th of November, 1838, he wrote to the general land office that "the reservation would not be sold under the above act, and that it was left to the general land office to take such measures for the sale of the reservation as it may deem proper under existing laws." In this view Mr. Poinsett was correct. The act referred to provided "That the secretary be, and he is hereby authorized, under the direction of the president of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found or become useless for military purposes." "And the secretary of war," the act provides, "is hereby authorized, on the payment of the compensation agreed for, into the treasury of the United States," to execute a deed, &c. This law, from its language, was not intended to be a general regulation; but authorized the sale of military reserves, which, at that time, had become useless. It changed the settled mode of selling public lands, as it authorized the secretary to sell for a price agreed on, which precludes, or at least renders unnecessary a sale by public auction, as the general law for the sale of the public lands re-

quired. This consideration, as well as the purport of the section, showed that it was not a general regulation, but was intended to operate upon military reservations which then existed and which were unnecessary.

The attorney-general contends that "the frequent interposition of congress, especially authorizing the sale of military reservations, negatives the idea that they could be sold without statute authority." When land has been purchased by the United States for military or other purposes, it is admitted the land cannot be sold without the special authority of congress. In such cases the purchase is made for a specific object, and being purchased with the consent of the state, under the federal constitution, there is a cession of jurisdiction as well as of property. Now, to transfer property so acquired and relinquish the jurisdiction, the authority of congress is indispensable. And this shows the reason why the act of the 28th of April, 1825 [4 Stat. 264], was passed. It provides in the first section, "that in all cases where lands have been, or shall hereafter be conveyed to or for the United States, for forts, arsenals, dock yards, light houses, or any like purpose, etc., which shall not be used as necessary for the purpose for which they were purchased or other authorized purposes, it shall be lawful for the president of the United States, to cause the same to be sold for the best price to be obtained, and to convey the same by grant or otherwise." Now, from this act it does not follow, that where the government reserves its own land from sale, for any public purpose. that a special act of congress after its abandonment is necessary for the sale of it. The president, under a general power given him by the act of 1808 [2 Stat. 496], selected a part of the land on Rock Island for a military site, on which Fort Armstrong was built. And when he finds the place no longer useful as a military post, or for any other public purpose, he has a right to abandon it, and notify the land offices where the reservation was entered. The entry on the books of the land offices within which the reserved site is situated, and the occupancy of the place by the government, are the only evidence of the reservation. And when this evidence is withdrawn, and the site is abandoned, the reserve falls back into the mass of the public lands subject to be sold under the general law. But before such land can be sold at private sale under the general system, it must, by proclamation, be offered at public auction. The proclamation should give notice of the sale of the reserved tract as other lands. In this mode, I think, the sale would be a valid one.

The right claimed in the case of Wilcox v. Jackson, 13 Pet. [38 U. S.] 509, was a preemption under the act of 1834, which declared that "no entry or sale of any land shall be made under the provisions of the act, which shall have been reserved for the use of the United States, or which is reserved for sale by act of congress or order of the president, or which may be appropriated for any purpose whatever." Before the entry was made as a pre-emptive right by Beaubin, a light house upon the reserve was built by the government, and the possession of it for public purposes had never been abandoned. Under the circumstances stated, Rock Island cannot be considered as a military reserve. The possession of it was abandoned, and the right of government released through the same authority, by which it was appropriated. And no act has been done by the government, by which a new appropriation of the ground for military or any other public purpose is shown or can be presumed. The buildings had been sold by the government. The sale of the reserve was suspended, it is presumed, because there was no power to sell by the war department under the act of 1819. That the suspension of the sale was in no respect influenced by a desire to retain Rock Island for any public purpose, appears by the subsequent action of the war department.

The next inquiry is, whether the land in question is within the provision of the act of congress of August 4th, 1852, which grants the right of way through the public lands to all roads, etc. The first section of that act grants right of way to "all railroads and McAdamized turnpike companies, that may be chartered within ten years, over and through any of the public lands of the United States, may be authorized by an act of the legislature of the respective states in which public lands may be situated," etc. To the 3d section of that act there are several provisos, the last of which is: "That none of the foregoing provisions of this act shall apply to or authorize any rights in any lands of the United States, other than such as are held for private entry and sale, and such as are unsurveyed and not held for public use by erections or improvements thereon." This act required the proper officers of such road to transmit to the commissioner of the general land office, "a correct plan of the survey of the road, together with the survey of sites for depots, which were granted on the line of such selection, which shall become operative." This survey of the road and of sites for depots on it, was transmitted to the commissioner of the general land office, as the act required. In a report of the commissioner of the general land office to the secretary of the interior, dated 19th of January, 1854, the commissioner says, by way of note: "As regards the right of way for the road, (now under consideration,) it is already granted by the general act entitled, 'An act to grant the right of way to all railroads,' &c." In the same report the commissioner states, "that several bills have been reported to congress

of late years, materially changing the mode of disposing of such reservations, which are now on special file." The opinion of the commissioner, as to the right of way or the necessity of legislation, before reserves can be sold, whether right or wrong, can have no influence in the decision of this case. A part of the land on Rock Island has been granted, and it is proposed to make, in addition, one or more private grants. This shows, at least, that the reserve does not, in the opinion of congress, remain to the extent of the island. Although this land cannot be now considered a military reserve, yet it is not "held," in the language of the law, "for private entry and sale." Under the general law, no public land can be so considered, which has not been offered at public auction, under the proclamation of the president In giving a construction to this act, the court is not at liberty to change the meaning by changing the copulative conjunction into a disjunctive. If effect could be given to the argument, in this respect, it would pervert the meaning of the act. But this reading, if it were admissible, would not change the effect of the act. Land is not held for private entry, which has not been offered at public sale; nor is land held for sale in the meaning of the law, which has not been so offered. It is true the land was directed to be sold under the act of 1819; but as that act did not authorize such a sale, the land cannot be considered to have been held for private sale. The other member of the sentence describing lands within the act is: "And such (lands) as are unsurveyed and not held for public use by erection and improvements thereon." Now this provision applies to the period of time, when the right is claimed by the railroad. The ground in question was appropriated for military purposes, but when the entry on the land complained of was made, it was not a military reservation; and any improvements thereon had been, not only abandoned and sold, but the former reservation was relinquished and annulled. To hold then, under the circumstances, that the land was still a military reservation for any public use, would disregard the facts in the case. Whether the government might not have again reserved the land for some public purpose is a question not involved in the decision. It would be in it, if there were any evidence that such reservation had been made. To presume such a reservation would be against the evidence.

The improvements under the above statute having been abandoned and sold, may be considered as not having been made, and so as to the reservation. But still the provision is not technically within the statute. It refers to lands "unsurveyed," and the lands on Rock Island have been surveyed. This is a technical objection, and to such objection some minds on the bench and at the bar are strongly inclined. My taste does not lie in this line, as it often defeats the great ends of justice, and preserves nothing of any value. The charter granted by the state of Illinois, to the defendants, authorizes them to locate and construct their road, to purchase the right of way, to condemn the land where necessary, and have the damages assessed as provided for in the charter. And in regard to the construction of a railroad across the Mississippi river, the company is vested with power to build, maintain, and use a railroad bridge over the river, or that portion of it which is within the jurisdiction of the state of Illinois, at or near Rock Island, in such manner as shall not materially obstruct or interfere with the free navigation of the river; and to connect by said road or otherwise, such bridge with any railroad, either in the state of Illinois or Iowa, terminating at or near said point; to unite or consolidate its franchises and property with any or all bridges or railroad companies in either of said states." That the state of Illinois had power to grant the charters for the road and bridge, has not been questioned. A doubt might once have been entertained, whether a state could, under the power of eminent domain, confer the power of appropriation to private companies; but this power has been so long exercised and acquiesced in, that it is now, probably, too late to question it.

Whether a state has power by an act of incorporation or otherwise, to authorize a rail or turnpike road through the lands of the United States, has not, it is believed, been raised or judicially decided. The first impression would be, probably, that a state cannot exercise such a power. But first impressions are rarely to be followed on constitutional questions. They should be deliberately and deeply considered, in relation to their bearing on the federal and state powers. That the federal government is one of enumerated powers is not controverted; nor that the states reserved to themselves all powers not conferred on the general government, absolutely or by necessary implication. In the admission of new states into the Union, compacts were entered into with the federal government, that they would not tax the lands of the United States. This implies that the states had power to tax such land, if unrestrained by compact. The constitution provides, "that congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under this provision congress organized territorial governments. Having power to sell the public lands, beyond the limits of any state, a territorial government was the only mode by which the purchasers and occupants of those lands could be protected in their rights of persons and property. Hence the implied power to establish such a government. The constitution was adopted a short time after the ordinance of 1787 was passed; and as that ordinance provided for

the government of all the territory owned by the United States, no express provision for a territorial government was deemed necessary. In that ordinance it was declared that the states to be formed out of the territory "should never interfere with the primary disposal of the soil by the United States, in congress, nor with any regulation congress may find necessary for securing the title in such soil to bona fide purchasers." Within the limits of a state, congress can, in regard to the disposition of the public lands and their protection, make all needful rules and regulations. But beyond this it can exercise no other acts of sovereignty which it may not exercise in common over the lands of individuals. A mode is provided for the cession of jurisdiction when the federal government purchase a site for a military post, a custom-house, and other public buildings; and if this mode be not pursued, the jurisdiction of the state over the ground purchased remains the same as before the purchase. This, I admit, is not a decided point, but I think the conclusion is maintainable, by the deductions of constitutional law.

Under acts of congress, trespasses on the public lands are liable to a civil or criminal prosecution. And yet the statutes of congress are numerous, giving the settlers upon those lands without authority (which makes them trespassers,) pre-emption rights. And this latter policy has become so popular as to induce settlers to take possession of the best portion of the public lands, before they are surveyed or offered for sale. This policy of punishing acts in some, which are rewarded in others, seems to be inconsistent. The only excuse for the provision is, that he who takes the timber from the ground, renders it less valuable and enriches himself; while the other settles on the land with the view of purchasing it. But he is not obliged to make the purchase, and while in possession he may take from it the most valuable timber.

[In the case of Johnson v. McIntosh, 8 Wheat. [21 U. S.] 543, it was held, "a state has a perfect right to legislate as she may please, in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise or alienation. But congress is invested by the constitution with the power of disposing of the public lands, and making needful rules and regulations concerning it."

[The proprietary right to lands in a state held by the federal government is, in many respects, similar to that of an individual. A compact may exempt the lands of either from taxation. An action may be brought by either, for an injury done to the soil or timber. A conveyance of the title is made by the federal government under its own laws, and by the individual under the law of the state. The principal distinction under the two proprietorships is, that the government makes the conveyance under its own laws, and sues in its own courts, whilst an individual proprietor conveys under the laws of the state, and prosecutes under those laws for an injury done. But the important inquiry is, whether the public lands are subject to the sovereignty of the state in which they are situated.] [2]

It is a fair implication, that if the state were not restrained by compact, it could tax such lands. In many instances the states have taxed the lands on which our custom houses and other public buildings have been constructed, and such taxes have been paid by the federal government. This applies only to the lands owned by the government as a proprietor, the jurisdiction never having been ceded by the state. The proprietorship of land in a state by the general government, cannot, it would seem, enlarge its sovereignty or restrict the sovereignty of the state. This sovereignty extends to the state limits over the territory of the state, subject only to the proprietary right of the lands owned by the federal government, and the right to dispose of such lands and protect them, under such regulations as it may deem proper. The state organizes its territory into counties and townships, and regulates its process throughout its limits. And in the discharge of the ordinary functions of sovereignty, a state has a right to provide for intercourse between the citizens, commercial and otherwise, in every part of the state, by the establishment of easements, whether they may be common roads, turnpike, plank or railroads. The kind of easement must depend upon the discretion of the legislature. And this power extends as well over the lands owned by the United States, as to those owned by individuals. This power, it is believed, has been exercised by all the states in which the public lands have been situated. It is a power which belongs to the state, and the exercise of which is essential to the prosperity and advancement of the country. State and county roads have been established and constructed over the public lands in a state under the laws of the state, without any doubt of its power, and with the acquiescence of the federal government. In this respect the lands of the public have been treated and appropriated by the state as the lands of individuals. These easements have so manifestly conduced to the public interest, that no objection, from any quarter, has hitherto been made. And it is believed that this power belongs to the states.

It is difficult to perceive on what principle the mere ownership of land by the general government within a state, should prohibit the exercise of the sovereign power of the state in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it. They encourage population, and in-

[2] [From 3 Liv. Law Mag. 568.]

crease the value of land. In no respect is the exercise of this power by the state inconsistent with a fair construction of the constitutional power of congress over the public lands. It does not interfere with the disposition of the lands, and instead of lessening enhances their value.

Where lands are reserved or held by the general government for specified and national purposes, it may be admitted that a state cannot construct an easement which shall in any degree, affect such purposes injuriously. No one can question the right of the federal government to select the sites for its forts, arsenals and other public buildings. The right claimed for the state has no reference to lands specially appropriated, but to those held as general proprietor by the government, whether surveyed or not. The right of eminent domain appertains to a state sovereignty, and it is exercised free from the restraints of the federal constitution. The property of individuals is subject to this right, and no reason is perceived why the aggregate property, in a state, of the individuals of the Union, should not also be subject to it. The principle is the same, and the beneficial result to the proprietors is the same, in proportion to their interests. These easements have their source in state power, and do not belong to federal action. They are necessary for the public at large, and essential to the interests of the people of the state. The power of a state to construct a road, necessarily implies the right, not only to appropriate the line of the road, but the materials necessary for its construction and use. Whether we look to principle, or the structure of the federal and state governments, or the uniform practice of the new states, there would seem to be no doubt that a state has the power to construct a public road through the public lands. A grant to this effect is sometimes made by congress, as in the act of 1852; but this does not show the necessity of such a grant. Generally, congress appropriates to the road a large amount of lands. The positions are believed to be irrefragable—first, that the right of eminent domain is in the state; and secondly, that the exercise of this right by a state is no where inhibited, expressly or impliedly, in the federal constitution, or in the powers over the public lands by that instrument, in congress.

If this view be correct, the question is narrowed to the simple inquiry, whether the construction of the road, through Rock Island, connected at both ends by bridges over both channels of the river, which include the island, will do an irreparable injury to the public land on the island. Several witnesses have been examined on this point, and, as usual, there are among them differences of opinion. But the weight of the evidence does not show an irreparable injury. On the contrary, it appears that the works complained of will add greatly to the value of the island. From the nature of the improvement, this is so palpable as to require no illustration. By the flow of the river, on either side of the island, its inhabitants are cut off from all intercourse with the shores, except by a ferry. But the bridges proposed, and the railway, will connect the island with both shores, and bring over it a line of travel for passengers, and for the transportation of merchandise, which must add several hundred per cent. to the value of the island and its products.

The testimony in regard to the obstructions to commerce by the proposed bridge, is contradictory. Many witnesses have been examined on both sides, and while those called by the plaintiffs say the bridge will, in a great degree, destroy the commerce of the river, those called by the defendants think it will be no material obstruction. This discrepancy manifestly arises from a mistake in the locality of the bridge. The defendants' witnesses live in the neighborhood of the structure, and speak of it as located, whilst the witnesses of the plaintiffs fix the bridge much higher up the river, and where, from the rapid current occasioned by the falls and the ledges of rock which confine the water to a width of sixty feet, at the foot of the rapids, there is a short turn to the left in the channel, very near the proposed bridge, which would render the passage through the draw, if not impracticable, extremely dangerous. But the experienced engineer, Mr. Brayton, who superintends the building of the bridge, has taken the soundings of the river, and surveyed and measured the distance on it from the side of the bridge to the falls, and above them. This work is laid down on a map which he refers to. He says: "From the bridge up and on the sides of the river there are two chains of rock which at the bridge are widest apart, and gradually converging as you ascend, until at the distance of about two-thirds of a mile above the bridge, the channel becomes quite narrow, not exceeding in width sixty feet; that this narrow opening is in nearly a right line with the channel, as it runs through said point to the proposed draw in the bridge." And it appears from the soundings that the bridge is thrown over the deepest water in that part of the river. The engineer says "the plan upon which the bridge is being constructed is a wooden superstructure, built upon Howe's patent, supported by two stone abutments and six piers, laid in water cement. The span between the piers is two hundred and fifty feet in the clear, except the draw. The draw is to be a turn-table draw, two hundred and eighty-four feet in length, supported in the center by a circular stone pier of solid masonry, leaving an opening on each side of such turn-table pier, one hundred and twenty feet in the clear. That such draw is over the main channel and deepest water of the river on the line where the bridge crosses;" and that it is the line of navigation uniformly taken by the boats running up and down.

Except the earth used for the embankment across the island for the road, but few of the materials for the work have been taken from the island. The rock on the island was unfit for masonry, and some of it has been used to fill up the unexposed part of the abutments of the bridge and a small amount of rif-raf work. The embankment is shown to be half a mile from the principal building at Fort Armstrong. Convenient passage ways have been made under the railroad, so that there is no obstruction to the passage from one end of the island to the other. It seems that about one hundred and fifty thousand dollars have been expended by the company on the road over the island, and on the bridges. Thirteen acres and a half of the land on the island appears to be occupied by the road. Several of the witnesses estimate the value of the land without the bridge and the road, at one hundred and fifty dollars per acre; the road being made, and the bridges, they suppose it will be worth one thousand dollars per acre.

One of the witnesses for the defendants states, that he has long acted as a pilot for steamboats and rafts over the rapids, and is well acquainted with the river; that for more than half a mile above the bridge, the channel from the draw up is straight, running to the opening in the rocks, known as "Shoemaker's Chain," and that the velocity of the current from the chain to the bridge, is little more than two and a half miles per hour. The piers, except where the draws are placed, are two hundred and fifty feet apart, which affords ample space for rafts, the bridge being elevated above low water some thirty-three feet, and twenty feet above high water. The falls, it would seem, must, from the rapidity, sinuosity, and narrowness of the channel, present the principal obstructions to the navigation of this part of the river. Rafts or barges attached to steamboats are loosened, before descending the falls, and they are floated down under the direction of a pilot. This, it is said, is never done in the night, unless the river is high. Whatever improvements may be made in widening this channel, it is hardly probable that it will be extended to double its present width, which would make it equal only to either of the draws below. And if this were done, the passage of the draws over a deep, straight and sluggish current, would be much safer than the rapids. Indeed, from the concurrent views of the witnesses who speak of the bridge where it is being constructed, there will be but little or no delay or hazard in passing the draws. If any injury should result to boats from any want of attention by the bridge company, or the structure of the draw, they being managed with reasonable care, an action at law may be resorted to, as in other cases of wrong.

Having considered this great case, in regard to the legal principles involved under the federal and state governments, the magnitude of the enterprise, the interest of the public in the road and in the commerce of the Mississippi river, I am brought to the conclusion that the complainants are not entitled to the relief asked; and, therefore, the motion for an injunction is overruled.

Case No. 16,115.

UNITED STATES v. RAMSAY.

[Hempst. 481.] [1]

Circuit Court, D. Arkansas. April, 1847.

MURDER—ACCESSORY BEFORE THE FACT—CRIMINAL JURISDICTION.

1. There is no act of congress punishing an accessory before the fact of murder, and an indictment for that offence will be quashed.

2. To commit murder and to be accessory to it, are different and distinct offences.

3. The courts of the United States are only authorized to try and punish such crimes as congress expressly, or by necessary implication, has designated and affixed known and certain penalties to, and such courts have no common law jurisdiction in that respect.

The indictment charged, in substance, that certain persons to the grand jurors unknown, in the Indian country west of Arkansas, feloniously, wilfully, and of their malice aforethought, murdered one Charles Butler, an Indian, and that John Ramsay, a white man, was accessory thereto before the fact.

E. H. English, for prisoner, filed a motion to quash the indictment, on the ground that there was no law of congress punishing the offence charged in the indictment, and this point he argued at length.

S. H. Hempstead, U. S. Dist. Atty., in his argument in opposition to the motion, insisted on the following points, namely: (1) The law of congress of the 30th of April, 1790, § 3, declares that the crime of murder shall be punished with death. Gord. Dig. 937 [1 Stat. 113]. (2) That if a statute enacts an offence to be felony, though it may mention nothing of accessories before or after the fact, yet virtually and consequentially they are included. 1 Russ. Crimes, 35; 1 Hale, P. C. 613, 614, 704; 3 Inst. 59. (3) That accessories before the fact and principals were subject to capital punishment at common law, and as the above act punishing murder, ex vi termini, embraces accessories according to a well-settled rule of construction; therefore, accessories before the fact must be punishable capitally under that law. 4 Bl. Comm. 39; 3 Inst. 188. (4) That the only reason originally for the distinction between principals and accessories was the benefit of clergy; but in contemplation of law and morals, the accessory before the fact is guilty of as deep enormity as the actual perpetrator of a murder, and therefore he ought to receive the same punishment. (5) That it cannot be supposed that congress meant to exempt accessories from punish-

[1] [Reported by Samuel H. Hempstead, Esq.]

ment, and the fact that there is no specific legislation with regard to them is almost conclusive proof that they were intended to be included in the general law against murder, and to receive the same punishment as principals.

JOHNSON, District Judge. It is true, as urged by the district attorney, that he who advises or counsels the commission of a murder, is, in point of morals, as guilty as the principal, and should, doubtless, be punished accordingly. In legal language, however, he is not guilty of murder, but is only accessory to it; and this distinction is preserved in all the books on criminal jurisprudence. It is said that the act of congress punishing murder necessarily embraces an accessory before the fact, and subjects him to the punishment of death. I cannot assent to the correctness of this position; but, on the contrary, applying the known rule that penal statutes must be construed strictly, I entertain no doubt that the point made by the prisoner's counsel is well taken and must be sustained. Certainly, to commit the crime of wilful murder, and to be accessory to it, are different offences; and in the trial of Burr [Cases Nos. 14,692-14,694a], for treason, Chief Justice Marshall very clearly lays down that proposition. That an accessory before the fact ought to be punished will not be questioned by any one, for he is, indeed, frequently involved in deeper guilt than the principal. This is a question, however, for the consideration of the legislative department, and this court is only authorized to try and punish such crimes as congress expressly or by necessary implication have visited with known and certain penalties, and the court has no common law jurisdiction in that respect. The defects in the Criminal Code of the United States, have been severely felt, but it is for congress, not this court, to interpose and apply the corrective; and as I should not feel warranted in pronouncing sentence of death on the prisoner in case of conviction, I shall sustain the motion to quash the indictment, and direct him to be discharged, regretting, at the same time, that there is no law to reach his case.

Prisoner discharged accordingly.

Case No. 16,116.

UNITED STATES v. RAND et al.

[4 Sawy. 272.] [1]

Circuit Court, D. California. July 30, 1877.

MARSHAL'S BOND—STATUTE OF LIMITATIONS.

Section 786 of the Revised Statutes, limiting the time within which actions must be commenced on marshal's bonds, does not apply to actions instituted by the United States.

At law.

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

John M. Coghlan, U. S. Atty.

Latimer & Morrow, for defendant.

SAWYER, Circuit Judge. This is an action upon a United States marshal's official bond. The sureties demur on the ground that it appears upon the face of the complaint that the action is barred by the statute of limitations. The defendant [Charles W.] Rand, as appears from the allegations of the complaint, went out of office on September 1, 1869; and the breach alleged is, that the amount claimed, about $900, was then in his hands, which he neglected and refused, and which he still neglects and refuses to pay to the plaintiff. The complaint was filed August 30, 1876, so that more than six years elapsed after Rand ceased to be marshal before this action was commenced.

The United States attorney makes the point that the statute of limitations, relating to marshals' bonds, does not apply to actions brought by the United States, but only to actions upon the bond in favor of private parties. Section 786 of the Revised Statutes provides "that no suit on a marshal's bond shall be maintained, unless it is commenced within six years after the right of action accrues, saving, nevertheless, the right of infants, married women, and insane persons, so that they sue within three years after their disabilities are removed." Section 784 authorizes persons injured by breaches of the conditions of marshals' bonds to institute suits thereon in their own names, and for their own use. It is insisted by the United States attorney that statutes of limitations do not embrace the government, unless specially named; that the United States is not named in this statute, and as there are private parties to whom the provision can apply, the ordinary rule upon the subject must prevail.

In Gibson v. Chouteau, 13 Wall. [80 U. S.] 98, the supreme court say that "the statutes of a state prescribing periods within which rights must be prosecuted are not held to embrace the state itself, unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included." In the provisions of the Revised Statutes, it is not pretended that the United States is "expressly designated." The form of expression is that usually adopted in statutes of limitations relating to actions upon contracts. I do not perceive that there is any reason for supposing the mischief to be remedied is of such a nature that the United States must necessarily be included, that does not apply with equal force to all cases of contracts with the government, and I know of no other bonds or contracts to which any statute of limitations is made applicable, except postmasters' bonds; and in this case, the limitation is made applicable to the United States in express terms. Rev. St. § 3838.

It was doubtless intended by these pro-

visions of the Revised Statutes to continue in force the provisions of the acts of congress as they before existed. By referring to the statute as it stood before the revision, it will be found that the latter part of section 783, sections 784–786, are copied from the act relating to marshals' bonds of April 10, 1806 (2 Stat. 372), and that they constitute the whole of that act. A consideration of the act as it originally stood, will afford the best means of ascertaining the meaning intended to be expressed. It will be seen that the whole subject-matter of that act is the rights of private parties in marshals' bonds. The first section requires all marshals' bonds to be recorded in the clerk's office, and provides that certified copies shall be competent evidence. This is to enable parties having an interest in the bond to obtain access to it, and make it easily available to them in instituting and maintaining their suits upon the bond. Section 2 gives a right to every party injured by a breach of the conditions to institute and maintain an action on the bond in his own name and for his own use. Section 3 provides for repeated actions till the amount of the bond is exhausted by the successive recoveries. And section 4 provides the time within which the actions must be brought, saving the rights of infants, femes covert and persons non compos mentis, until a specified time after the removal of the disability. The subject-matter of the fourth section, is evidently the same subject-matter as that embraced in the preceding sections, and there is nothing to indicate that it was intended to embrace any other.

Construing the whole act together, it is evident to my mind that it was only intended to give a remedy, in their own names, to private parties sustaining injuries from breaches of the conditions of marshals' bonds, and to limit the time within which the remedies provided should be pursued. There is no allusion whatever anywhere in the act to the rights of the United States in the bond.

As the provisions have been copied into the Revised Statutes, in the same language, the same construction must be given to them as is given to the act as it originally stood.

The demurrer is overruled, with leave to answer upon the usual terms.

UNITED STATES v. RAND. See Case No. 15,008.

Case No. 16,117.

UNITED STATES v. RANDALL.

[2 Cranch, C. C. 412.] [1]

Circuit Court, District of Columbia. May Term, 1823.

CRIMINAL LAW—DISCHARGE OF JUROR.

After the jury is sworn, in a capital case, and the cause has been opened, the court cannot, without the prisoner's consent, discharge a juror, at his own request.

Indictment [against the negro Randall] for a rape on Maria Scheals.

After the jury was sworn, and the attorney for the United States had advanced considerably in opening the case, John Morgan, a quaker, one of the jurors, asked the court to excuse him from serving on the jury in this case, as he could not, consistently with his feelings, serve in a case of life and death.

THE COURT (THRUSTON, Circuit Judge, absent,) said they could not now excuse the juror, without the consent of the prisoner; which was not given; and the juror was not excused.

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

Case No. 16,118.

UNITED STATES v. RANDALL.

[Deady, 524.] [1]

District Court, D. Oregon. Jan. 23, 1869.

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—PRESUMPTIONS—PEREMPTORY CHALLENGES—LARCENY FROM MAILS.

1. The verdict of a jury regularly given is presumed to be right until the contrary appears, and should be sustained by the court, if the evidence, by any fair construction, will warrant such a finding.

2. False and contradictory statements by the defendant about the material circumstances of the crime with which he is charged, are badges of guilt.

3. The falsification of records by the defendant, with reference to a matter in which he is charged or suspected of wrong-doing or liable to be so suspected or charged, is strong presumptive evidence of guilt.

4. Special circumstances not consistent with defendant's innocence, together with a particular opportunity and temptation to commit the crime charged, to be considered in support of verdict of guilty.

5. Section 2 of the act of March 3, 1868 (13 Stat. 500), regulating peremptory challenges in criminal cases, does not give the right to such challenge except in capital cases, because when the act was passed such right did not exist by law in any other cases, but was only permitted by rule of court.

[Cited in U. S. v. Coppersmith, 4 Fed. 200.]

6. When it appears from the evidence that the defendant has made a false statement about the circumstances of the commission of a crime, with which he is charged, he may show that he had good reason to believe at the time the statement was true.

7. Gold dust in packages not weighing more than four pounds and paying letter postage, is mailable matter, and whether it is not, under section 12 of the act of July 1, 1864 (13 Stat. 337), any person employed in the post-office who steals the same from a letter in the mail, is guilty of a crime.

[8. Cited in State v. Coosaw Min. Co., 45 Fed. 808, to the point that the courts of the United States take judicial notice of the acts of congress, and they need not be set forth or specially referred to in any proceeding before them.]

The indictment in this case was found under section 12, of the act of July 1, 1864

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

(13 Stat. 337), and filed in this court on November 11, 1868. It charges that on July 28, 1868, one Thomas Smith, of Auburn, in Baker county, Oregon, deposited in the post-office at Auburn, a registered letter numbered 36, enclosed in registered package envelope numbered 28; and that said registered letter contained 12½ ounces of gold dust, of the value of $200, the property of said Smith, and was addressed to Yee Kang, in San Francisco, and intended to be conveyed by post to said last mentioned place. That the defendant [E. G. Randall] on August 3, 1868, was employed in the postoffice at Portland, Oregon, being then and there postmaster thereof, and that on said day, said registered letter, registered and numbered as aforesaid, came into the possession of the defendant, who then and there unlawfully opened the same, and did steal therefrom the 12½ ounces of gold dust aforesaid, contrary to the form of the statutes, etc. On November 11, the defendant was arrested upon a bench warrant, and gave bail in the sum of $10,000, with two sureties.

On November 14, the defendant by his counsel demurred to the indictment, and for causes of demurrer specified: (1) That gold dust is not mailable matter, and the taking the same is not an offence against the laws of the United States; and (2) that the indictment contains two offences which are separate and distinct—namely, opening a letter and taking from the same an article of value. After a cursory examination of the subject, the demurrer was overruled, with the understanding that the first question made by it could be made in arrest of judgment, if necessary. The second question made by the demurrer was abandoned on the argument, and not particularly mentioned or considered in the disposition of it. Thereupon the defendant pleaded not guilty to the indictment. On Monday, November 23, a jury was formed in the case and heard it until the following Wednesday, when the case was given them in charge. On November 26, the jury being unable to agree, were discharged without giving a verdict. Thereupon, on motion of the defendant, the case was set for trial on Monday, January 4, 1869. On the last mentioned date, the case was, on the motion of the United States, continued until the Wednesday following, on account of the absence of a material witness. On Wednesday, January 6, a jury was formed in the case and heard it until the following Friday, when the case was given them in charge, and on the day following the jury returned into court, and gave their verdict that the defendant was guilty as charged in the indictment, and also recommended him to the mercy of the court. Thereupon, on motion of the United States, it was ordered that the defendant give bail with sufficient sureties in the sum of $15,000, and that in default thereof, he be committed in close custody; and the defendant gave bail accordingly. On motion of the defendant, it was ordered that he be allowed until Monday, January 11, to file a motion for a new trial and in arrest of judgment, or either of them.

On the last mentioned date the defendant filed a motion for a new trial, for the reasons and causes following: (1) That the evidence is insufficient to justify the verdict. (2) That the verdict is against law. (3) Error of law occurring at the trial, and excepted to by the defendant, namely: I. Refusing to allow defendant's peremptory challenge to Charles Sweigle, a juror. II. Refusing to admit the letter marked No. 3, from one Koontz, at Umatilla, Oregon, dated October 1, 1868, in evidence.

And also a motion in arrest of judgment—Because the facts stated in the indictment do not constitute a crime in this—that gold dust is not mailable matter.

Both motions were submitted by the defendant's counsel, with an appeal for delay in the consideration of them, to give counsel an opportunity to examine the subject, and also to give time to the defendant to obtain further testimony on his behalf. The application for delay was taken under advisement by the court until Saturday, January 16. On the last mentioned day the application for delay was refused by the court; and thereupon, the motions for new trial and in arrest of judgment were argued by counsel. The court took until Saturday, January 23, to consider the matter.

David Logan, for the United States.

William Strong and Joseph N. Dolph, for defendant.

DEADY, District Judge. Before proceeding to consider the motions made by defendant, I deem it proper to state briefly the reasons for refusing the application for delay on last Saturday. A court will not delay judgment indefinitely in any case, merely to give the defendant time to discover, or rather to try to discover new evidence on which to ask a new trial. Such an arbitrary exercise of power, it appears to me, would be an abuse of judicial discretion, amounting to a maladministration of justice. The defendant has not been hurried into this trial against his will and without due preparation. On the contrary, he has chosen his own time. The second trial was set for January 4, in the same term as the first, against the remonstrance of the United States attorney, who insisted that the case should go over to the March term, according to the usual practice of the court. At the same time, if there were any questions of law arising upon either of these motions, affecting the right and justice of the case, and about which there was room for serious doubt, it would be proper to continue the matter for further consideration and argument; and even to adjourn the case

into the circuit court, to await the presence there of the justice of the supreme court, assigned to this circuit. In the meantime, if the defendant, from any source not now apparent, should be able to discover any testimony, tending to show his innocence, he might have the benefit of his discovery on the hearing of his motion for new trial. With a view of giving the defendant the benefit of this delay, if it should appear there was good ground for it, the questions of law arising on these motions were carefully examined and considered. In my judgment they did not admit of serious argument or doubt. Therefore the application for delay was refused.

The motions must now be disposed of. The first ground of the motion for new trial raises the question: Is the verdict contrary to the evidence? The testimony given to the jury was sufficient proof of the following facts and circumstances: That on July 28, 1868, one Thomas Smith, being then postmaster at Auburn, Oregon, mailed at Auburn, for himself, 12½ ounces of gold dust of the value of $200, to Yee Kang, in San Francisco, and that Smith duly registered the letter containing the parcel of dust and numbered it 36, and enclosed the same in registered package envelope numbered 28, directed to Sacramento, Distributing Postoffice, Cal. That this registered package 28 arrived at The Dalles on the evening of Saturday, August 1, in good condition, and that the same was duly forwarded from thence, in the Portland pouch, in like condition, on Monday, August 3, to the office at Portland. That the mail from the Dalles to Portland was then carried by steamboat and railway, and usually arrived at Portland about the middle of the afternoon of the day on which it left The Dalles. That the mail from Portland to Sacramento was then carried in a through pouch under a brass lock, daily, and left Portland at or about 6 a. m., and then reached Sacramento in from 5½ to 6 days—the latter being the schedule time. That on August 10, registered envelope 28 with registered letter 36 enclosed, reached the office at Sacramento in bad condition—the end of the letter and registered envelope being torn open and the contents of the former abstracted.

These, in brief, are the facts proved concerning the mailing of the letter containing the dust and the loss of the latter while being conveyed by post from Auburn, Oregon, to San Francisco, California. The reasonable inference from these facts is, that the gold dust was taken from the letter by some one in the Portland office. Indeed, during the argument to the jury, counsel for the defendant substantially admitted this to be a correct conclusion. Now let us see what facts and circumstances were proven concerning the question of who took the dust from the letter. On August 17, the postmaster at Sacramento wrote to Mr. Quincy A. Brooks—at Portland—the special postal agent for Oregon, Washington and Idaho, enclosing registered envelope 28 and calling his attention to the matter. Owing to absence from home, Brooks did not receive this letter until about August 29. Thereupon he made minute of the affair and called upon the defendant at his postoffice, to learn what he could concerning the missing package in that office. The defendant or being requested by the agent, went to his record of registered matter in transit, accompanied by the latter, and examined it, particularly the page containing the entries of packages arriving from August 1 to 7 inclusive, and could find no entry concerning envelope 28. At the same time the agent looked over the defendant's shoulder, and could not see any entry concerning the package. The defendant then told Brooks that he recollected the package and that it passed the Portland office all right. On September 4, Agent Brooks sent a circular letter of inquiry (form 46) concerning envelope 28, to the postmasters on the route beginning with the one at Baker City—the first office west of Auburn—and directing each one to state in writing thereon what condition the envelope or package was in when it passed his office, if at all, and what he knew about the missing enclosure, and to then forward it to the next postmaster on the route, and so on to Sacramento, from which office the letter was to be returned by mail to Agent Brooks at Portland. In reply, the postmasters on the route between Auburn and Portland—seven in number—certified that registered package envelope 28, mailed at Auburn July 28, and directed to Sacramento, passed their respective offices in good order at the dates following—arrived at and left Baker City in mail pouch marked Umatilla, way, on July 29; passed Union on July 30; arrived at La Grande, evening of July 30, and left morning of July 31; passed Orodell on July 31; passed Cayuse on July 31; passed Umatilla on August 1; arrived at The Dalles on August 1, and left in Portland pouch for Sacramento, August 3. This circular letter with the foregoing endorsement on it reached the defendant not later than September 19. He did not, as therein directed, at once state in writing thereon his answer to the inquiry of the agent, and then forward it to the postmaster at Sacramento. But he retained the circular letter until October 12 or 13, when he mailed it to Sacramento, first making his statement thereon as hereinafter set forth. Early in the morning of Sunday, August 2, 1868, in the Blue Mountains, in the vicinity of Pelican ranch, and a few miles west of Orodell, and about fifty miles west of Auburn, and near a one hundred miles west of Umatilla, the mail, then being carried in a stage, on the route between Auburn and Portland, was robbed by armed men. In this robbery, registered package envelopes, numbered 26 and 30, and directed to Portland, and 31 directed to Sacramento, and 32 directed to Umatilla, were torn open and their contents abstracted.

The envelopes, except No. 32, came to Portland in due course of mail, without their contents, on the afternoon of Tuesday, August 4, and then passed into the possession of the agent. The one numbered 32, he soon after received. The news of this mail robbery and the opening of registered package envelopes therein, reached Portland, by telegraph from The Dalles, on the afternoon of Monday, August 3, and was published that afternoon in the Evening Commercial, a paper then published and circulated in Portland. About September 6, the defendant and Brooks met in the Portland postoffice, when the defendant, without being in any way interrogated upon the subject, said to Brooks, that he thought that registered package envelope 28 had been robbed in the Blue Mountain mail robbery above mentioned. About September 18, the defendant called upon Agent Brooks at his office in Portland, and asked to be shown envelope 28, and also the four envelopes which were torn open and robbed in the Blue Mountains. Brooks showed them to him and he made a minute of the examination and went away. About September 26, defendant told Agent Brooks that he was satisfied that envelope 28 was robbed in the Blue Mountain mail robbery, and that he could prove it.

In reply to the inquiry in the circular letter, the defendant stated as follows: "Post-Office, Portland, Oregon, Oct. 3, 1868. Reg. Pkg. Envelope No. 28 reached this office Aug. 4th; left on the morning of the 5th in locked sack marked Sacramento. Nothing unusual was noticed to create suspicion. (Signed) E. G. Randall, P. M." In this circular the word "passed" was first written and then a line drawn through it and the word "reached" written above it; and the figure 3 was first written after the word "Aug.," and afterwards the figure 4 written over and upon it. On October 9, the defendant, without being called upon by the duties of his office so to do, voluntarily wrote to the postmaster at Sacramento as follows: "Sir: From the enclosed letters, and those of a similar nature from postmasters along the route, I have reason to believe that registered letter 36 in Pkg. Envelope 28, mailed at Auburn, 28th July, for your office, was in the mail that was robbed August 2, but which passed this office without being detected. Yours respectfully, (Signed) E. G. Randall, P. M."

On November 10, Thomas Smith, the postmaster at Auburn, called on the defendant at the postoffice in Portland, to inquire about registered package envelope 28, and told the defendant the amount of gold dust in it when mailed at Auburn. Defendant then said to Smith that he remembered something about the envelope going through the Portland office, but that it was torn open at the time, and he thought it did not contain any package —that the contents were gone. That he ought to have stopped the envelope and called Brooks' attention to it, and that he thought he had done wrong. Smith then said, that if such was the case, the envelope must have been broken open at The Dalles, to which the defendant replied, that he did not know. On September 19, the defendant wrote to Thomas Smith at Auburn, concerning envelope 28, and also envelopes 30, 31 and 32 which were broken open in the robbery of the mail in the Blue Mountains. To this Smith replied under date of September 26, in which he stated substantially, that envelope 28 was mailed by himself on July 28, and contained $200 in gold dust, and that it could not have been in the mail that was robbed, unless it had been detained; and that he was afraid it had been robbed by some brother postmaster. That envelopes 30, 31 and 32 were mailed at Auburn on July 31, 1868, and that 30 and 31 were mailed by Chinamen, and each contained $50, and that 32 was mailed by himself, and contained $200 in gold dust. On September 21, defendant wrote to the postmaster at Baker City, and also to the one at The Dalles. Of the latter he asked the question—When did registered envelopes 30 and 31, mailed at Auburn July 31, pass your office? To this The Dalles postmaster replied on same sheet, by return mail—They arrived at this office on Monday, August 3, and left in Portland pouch, on Tuesday, August 4. Of the former the defendant asked the question—When did registered envelopes 28, 30 and 31, mailed at Auburn, July 28 and 31, pass your office? I desire to know if they were in the same mail. To this the postmaster at Baker City replied, on same sheet, under date of September 25, that envelopes 30 and 31 were forwarded from that office on August 1. Envelope 28 may possibly have been in same mail, but that it was entered on register of registered matter in transit on July 29, and was forwarded the day following. That 30 and 31 were entered on register on August 1, and were forwarded either the same or the following day.

The circular letter of Agent Brooks and the letter of the defendant, dated October 9, and addressed to the postmaster at Sacramento, and professing to cover letters from postmasters on the eastern end of the route, reached Sacramento by mail on October 19 —one month after the circular reached Portland. They were all immediately returned to Portland by mail—the circular being addressed to the agent. A few days before November 1, the agent found his circular and defendant's letter to the postmaster at Sacramento, with several letters to defendant from postmasters on eastern end of route, enclosed in an unsealed envelope, in his box at the Portland office, and addressed either to himself or defendant, he is not certain which. The agent took them into possession, and produced them on the trial. On the circular, and at the end of the last and incomplete line of the certificate of the post-

master at La Grande, there is written in pencil, the words—"arrived August 1, left August 2"—and at the left end of the certificate at right angles with the lines, in pencil also, the words—"left August 2." These words were not written by the postmaster at La Grande. They were not on the circular when it left Sacramento for Portland. They were on it when the circular was taken from the office by Brooks, and the writing strongly resembles that of the defendant's. The envelopes that were robbed in the Blue Mountain mail robbery, did arrive at La Grande on August 1, and departed August 2. The inference is reasonable that these words were clandestinely written upon the circular in the Portland office for the purpose of misleading the agent and others who might be engaged in the investigation, into the conclusion that envelope 28 left La Grande August 2, and was therefore robbed in the Blue Mountains, and not in the Portland office. The presumption is that the circular was addressed to Brooks at Portland, by the Sacramento postmaster. That was the direction of the circular. But the agent found it in his box in an unsealed envelope with letters belonging to the defendant. This being so, some one in the Portland office must have intercepted the circular, and taken it out of the envelope, and after making this interpolation in, or addition to the certificate of the postmaster at La Grande, placed it in the agent's box.

In August, 1868, the defendant was postmaster at Portland, and had been for the period of near three years. At that time he had two clerks in his employ—D. F. Fox and Lyman Chittenden. The former had been in the postoffice some time, and the latter since the June previous. The mail from The Dalles was usually opened upon its arrival in the afternoon, by Fox and Chittenden—the defendant being generally present, but seldom assisting in the opening or distribution. The Sacramento mail was made up the next morning before six o'clock, the hour of departure, by Fox and Chittenden, the defendant being very seldom present. The book containing the record of registered matter in transit, was in the special charge of the defendant, and was kept by him either in his private back office in an adjoining building, or in his desk in the front of the postoffice room. At the opening of the mails, it was customary for the clerks to lay all registered package envelopes one side of the table where they were sorting the mail, and the defendant, if present, took them for the purpose of making the necessary entry concerning them in the register. If the defendant was not present, one of the clerks took them and laid them on his desk in the postoffice for the same purpose. On November 14, Agent Brooks, acting under instructions from the department at Washington, took possession of the Portland office and official books and papers. Among these was the record of register matter in transit kept by the defendant, and examined by him and the agent with reference to envelope 28. This book the agent took into his private custody and produced it on the trial. It is not a book of the printed blanks such as the postoffice regulations require to be kept, but a common blank book of foolscap paper, ruled for the purpose. One page of it is covered with the entries made between August 1 and 7 inclusive of both dates. Only two packages are entered as arriving August 3, 1868, the one mailed at Fisher's Landing on the same day, and destined to San Francisco, and the other mailed at Salt Lake, July 14, and destined to Oregon City. Three packages are entered as arriving August 4—the first mailed at Sacramento, July 30, and destined to Sauvie's Island; the second, mailed at Rickreall, July 27, and destined to "Contract Office, Salt Lake;" and the third, mailed at Astoria, August 4, and destined to Salt Lake. No entry concerning envelope 28 is now apparent to ordinary observation, but between the two lines on which the entries are made concerning the second and third packages arriving on August 4, an entry has been made concerning envelope 28, and since erased. When attention is called to it, some portions of the entry can be distinguished and read with the naked eye, but with the aid of a magnifying glass, the whole entry can be readily made out. The month and the day of the month of this interlined and erased entry are indicated by the use of the points or marks which are ordinarily substituted for ditto, under the word "August" and figure "4." These are not erased. Then comes the number of the envelope (28), next the place of mailing (Auburn), then follows the date of mailing (the ditto marks for July and the figures 28), and lastly the place of destination (Sacramento). The "S" in Sacramento is a peculiarly shaped letter, and bears a striking resemblance to the other capital "S's" in the record, and also to those in the letters of the defendant to the postmasters at Baker City, The Dalles, and Sacramento. The letter "A" in Auburn is not a proper capital "A," but a small "a" enlarged, and used as a capital. Elsewhere in this record where "a" begins a word, it is written in the same way. The word "Auburn" occurs often in the record, and appears very much like the word "Auburn" in this erased entry. The fair inference is, that this entry was made after the one above and below it, or otherwise it would have been written upon a line and not between them, and from the same facts there is much reason to infer that the entry was not made when it purports—August 4—but afterwards. There can be no doubt but that this entry was erased after the one on the line below it was entered, for in making the erasure the tops of the capital letters in the words of "Astoria" and "Salt Lake," in the line below, were scratched off, and have since been touched up, but as the surface of the paper was broken by the erasing, the ink

used in amending these letters spread out, so that the amendments are very palpable.

These facts and inferences concerning the question who took the gold dust in the Portland office, are proven by the evidence of the prosecution, except the letter of the postmaster at Baker City to the defendant in reply to his, which was introduced by defendant. On the trial, neither party cast any suspicion upon Chittenden, but the defendant insisted that Fox alone committed the crime with which the former was charged. Upon this question other evidence was introduced by both parties, which I prefer, for the present, to state substantially, rather than to say what facts were or were not proven by it. On Thursday, November 12, the judge of this court, upon the application of the United States attorney, issued a warrant for the arrest of Fox as a material witness for the prosecution in this case, under section 7 of the act of August 8, 1846 (9 Stat. 73). On the same day, Fox gave bail to appear as a witness in the case in the sum of $5,000, with two sureties, one of them being his wife's brother, Dr. Jacob S. Giltner. Before daybreak the next morning, the other surety in the undertaking of bail surrendered Fox, and he has remained in the jail of this county, as a witness, ever since. Putnam Smith, a broker, being called by the defendant, testified, that on August 6, 1868, he purchased of some one, he did not know who, 12 ounces and six pennyweights of gold dust, for which he gave $15¼ an ounce. That he made an entry in his book of the purchase at the time, as of "mixed dust," by which he meant dust taken from different camps or diggings; and that he bought dust once of Fox, but could not say when or what amount. He could not say that it was in August, but thought it must have been before the state fair at Salem, in 1868, and that nothing was said by Fox as to where he got the dust. That on November 10, Fox came into his place of business and placed the following letter, enclosed in a sealed envelope and addressed to Put. Smith, on his desk, and went out without saying a word, O. B. Gibson being in the room at the time: "Portland, Tuesday Morning—Mr. Put. Smith, Dr. Sir: Randall tells me that that Regt. Package affair, has been taken before the grand jury. When called upon I must clear everything. Need I fear anything? Drop me a line, good Put., and oblige. Yours, to serve always"—without any signature. That this letter was written by Fox, was not seriously questioned. Being the statement of a person out of court, and not a party to the action, it was not admissible in evidence upon the trial of the defendant, but when offered by the defendant, the prosecution consented to its being read to the jury, and it was read accordingly. In answer to the testimony of Putnam Smith in regard to the purchase of gold dust, the prosecution proved by Thomas Smith that the gold dust stolen from envelope 28 was placer dust of superior quality and all from one diggings.

To show the guilt of the defendant, either singly or in conjunction with Fox, the prosecution called as witnesses, the wife of Fox and her brother, Dr. Jacob S. Giltner. The former testified, that a few days after the indictment was found and after Fox had been surrendered by his bail, she visited the defendant to ascertain if he was a friend of her husband's. In this conversation the defendant said to witness that if Fox would do as he had agreed or as his friends said he would, that defendant and his friends would be Fox's friends, but that if not, he could not expect any help from him. That gold dust was not mailable matter, and stealing it from the postoffice was not a crime. That defendant was not guilty and would be cleared. That Fox would be in trouble about it but a little while, as defendant had influence with the senators and would get him pardoned immediately. On the cross-examination this witness, when asked if defendant did not say, that if Fox would come out and tell the truth about it, the defendant and his friends would be Fox's friends, answered, "Yes." When asked again by the prosecution to state in her own words what defendant said to her in this particular, she replied substantially as at first—that if Fox would do as he had agreed or as his friends said he would, etc. The examination and cross-examination on this point was carried on some time without any change of result, the witness continuing to state on the examination what she did at first, and on cross-examination to answer "Yes" to the interrogative statement of defendant's counsel. Giltner testified that in the night of November 12, defendant came to his office and said that Fox had confessed, and that he had better leave on the steamer for Victoria and from there he could get to the Sandwich Islands. That witness had better get Fox out of the way, as it would be a disgrace to witness, his brother-in-law. That witness had better get Fox off on the steamer, and the one going to leave that night at four o'clock. Witness declined to follow defendant's advice, saying that he could not afford to pay Fox's bail of $5,000, and that he wanted him to tell the truth about it. Defendant then said to witness, that gold dust was not mailable matter, and that the case would be taken out of the United States court; but if this failed, then defendant and witness with their influence with Senators Williams and Corbett could get Fox pardoned. The defendant proved that neither the Wright nor Active were in this port on November 12, and that at that date no other steamers were running between this port and Victoria; and also that the defendant had maintained a good reputation for honesty in this community, in which he had lived for several years before this charge was made.

On the evening of Thursday, January 7,

at the close of the testimony, the defendant offered to read in evidence, for the purpose of impeaching a witness called by the prosecution, what purported to be the record of the conviction of one Jacob Giltner of a crime of counterfeiting, at Danville, Pennsylvania. The reading of the paper was objected to, because it lacked the certificate of the presiding judge to the attestation of the clerk. The court took the matter under advisement until the next morning, when counsel for the defendant asked leave to withdraw the offer to read the paper, which was allowed.

This is the case upon which the jury found the defendant guilty, and now the court is asked to set their verdict aside. If it is contrary to the evidence it ought to be set aside, but not otherwise. A verdict without evidence or against evidence, ought not to be allowed to stand in any court or case, but a verdict which is warranted by any fair construction of the testimony ought not to be set aside, although the court upon the same evidence would come to a different conclusion.

U. S. v. Martin [Case No. 15,731], was an indictment under the same statute substantially as this. The defendant being a mail carrier, was indicted for embezzling a letter from the mail bags in his custody containing bank notes. The evidence was wholly circumstantial, but the defendant was found guilty. A motion was made to set aside the verdict because it was contrary to evidence, which was denied, and the defendant sentenced to ten years' imprisonment. In considering the motion, Mr. Justice Holman, delivering the opinion of court, says: "In reviewing the verdict of a jury regularly given, the verdict must be presumed to be right until the contrary appears, and it should be sustained by the court, if the evidence, by any fair construction, will warrant such a finding. A court is not authorized to set a verdict aside simply because, if they had been on the jury, they would have found a different verdict. It is not sufficient that the verdict may possibly be wrong, but that, after giving a proper weight to all the evidence, it cannot be right. This verdict is given on what is called circumstantial evidence, and the court feel disposed to give due weight to the arguments which have been drawn from reported cases, where innocent individuals have been convicted and punished for supposed crimes, which were never committed or committed by others. These arguments show the necessity of extreme caution in convicting on circumstantial evidence, but do not prove that circumstances may not be sufficiently strong to authorize a conviction, or that circumstances are not to be relied on in proof of guilt. If a train of circumstances are not deemed sufficient to produce conviction, the penal laws in relation to many offences, especially these against the postoffice regulations, would be a dead letter." This is good law and sound sense, and the circumstances of the case in which it was delivered, make it particularly applicable in this case. This verdict was fairly given. There had been a former trial, so that the defendant was well informed of the nature of the evidence and arguments which would be used against him. He has had every facility and aid in making his defence that able counsel, wealth, zealous friends and position could give him or command. The jury were strangers to him, and as a whole as intelligent and respectable as I ever saw in this state or elsewhere.

Notwithstanding the proof, it is possible that the defendant is innocent. But absolute certainty is not required or attainable in matters depending upon human testimony or judgment. Moral certainty is all that is expected in the verdict of a jury. It will not be denied but that the circumstances proven point to the conclusion that either the defendant or Fox committed this crime singly, or that they were accomplices, and committed it together. The jury, having come to either of two of these conclusions, must have found the defendant guilty. They were the judges of what facts were proven, and of the proper inference to be drawn from them respecting the guilt or innocence of the defendant. This court cannot say that in deciding these questions they were clearly wrong, or that they acted contrary to the evidence, and therefore it ought not to disturb their verdict. Indeed I am constrained to think that the most reasonable conclusion from the facts and circumstances proven is, that the defendant, either alone or with the assistance of Fox, committed the crime.

Consider for a moment the extraordinary and inconsistent conduct of the defendant concerning the package from the time it reached his office until the time of his indictment and arrest. By the postoffice regulations he was required to register every registered package envelope that passed his office, and note its condition. If anything unusual appeared about the package, it was made his duty to notify the postal agent of it at once. According to the division of labor in the Portland office, the keeping of this register was the business of the defendant. No entry was made of the transit of this package through the office. This, although a circumstance to be considered, of itself concludes nothing. The defendant may have failed to register the package from mistake or carelessness, or it may not have reached his hands or come to his knowledge. But in any event, when called upon to give information concerning the matter, by the postal agent, he was required to tell the truth, and nothing but the truth, so far as he knew, and the presumption is that an innocent man would. On August 29, defendant said to Brooks, that he recollected the package and it passed the office all right. On September 6—That he thought the package was robbed in Blue Mountain mail rob-

bery. On September 26—That he was satisfied that package was robbed in Blue Mountain mail robbery, and that he could prove it. October 3, in writing on the circular letter—That the package reached the Portland office on August 4 and left on August 5—nothing unusual was noticed to excite suspicion—which was equivalent to certifying that the package passed in good order. October 9, in a letter to postmaster at Sacramento—That he had reason to believe that package robbed in Blue Mountain mail robbery on August 2, but passed Portland office without being detected. November 10, to Thomas Smith—That he remembered something of the envelope going through the Portland office, but that it was torn open at the time and he thought contents abstracted. Here are six different statements about this package, made by the defendant, not casually or inadvertently to strangers or unconcerned persons, but with more or less deliberation to officers of the postoffice department and the owner of the stolen dust, all of which were, as a matter of fact, false, and involved three different and irreconcilable accounts of the matter. The certificate endorsed upon the agent's circular was a deliberate official act in writing, done upon the requirement of a superior officer and under the solemn sanction of an official oath. There never was any ground for the defendant's believing or saying that the package was robbed in the Blue Mountains. On the contrary, at the time he made his certificate on the circular and wrote to the postmaster at Sacramento, he had positive evidence before him, in the letters from postmasters on the eastern end of the route and their official certificates on the circular, that the package reached Umatilla on Friday, July 30—two days in advance of the mail that was robbed and near a hundred miles west of the place of the robbery. The defendant's efforts to put the agent and the Sacramento postmaster on this false scent, betrays a consciousness of something wrong, and a fear of the truth. The package did reach the Portland office on August 3, and of this there can be no doubt. So the defendant, acting apparently under the influence of the fact, first wrote in his certificate. Afterwards he altered the date to August 4, so as, apparently, to make it possible that the package might have been in the mail that was robbed. The certificate should have stated the truth known to the defendant that his official register contained no entry of the package. These contradictions and misstatements and attempts at misleading the officers and person intrusted are all badges of guilt. But this is not all of the defendant's statements about the package. On the former trial, J. H. Koontz, the postmaster at Umatilla, in August, 1868, testified that in October he had a conversation with defendant upon the subject of registered package envelope 28, when the defendant said, "He remembered about the package, but had no note of it in his office, and that he thought contents either dropped or taken out at The Dalles." True, this testimony was not given to the jury that found this verdict, because the witness was unable to attend this trial on account of sickness. But in a motion to set aside a verdict and grant a new trial, it is proper to consider all the testimony that appears to exist in the case.

Then we come to the interlineation and erasure concerning envelope 28 in the record of registered matter in transit, kept by the defendant. This was an entry after the fact, and therefore suspicious. It was not in the book when examined by the defendant and Brooks on August 29, although it should have been made for nearly a month previous. The defendant then said there was no entry in the register concerning the package, and Agent Brooks looking on, over defendant's shoulder, saw none. The entry must therefore have been made long after the package arrived at the office, and after the inquiry had been set on foot as to what had become of it and who had stolen it. The register is an official book and kept for the public and subject to public inspection. The defendant is bound only to make true entries therein and those to be made contemporaneous with the fact to which they relate. He has no right to destroy the book or erase entries once made in it. The falsification of records, either by interlineations or erasures, with a reference to a matter, in which the party making such falsification, is suspected or charged or liable to be suspected or charged with neglect or wrongdoing, is strong presumptive evidence of guilt. This interlineation was a change of the record—an afterthought, as an answer to the suspicions which the defendant must have seen, were pointing towards his office as the place of the theft of the package. The erasure was another afterthought, so as to make the record comport with the later explanations of the defendant—that the package had been torn open and lost its contents or been robbed of them east of Portland. Such a statement would be flatly contradicted by the entry that the package had arrived in good order. Therefore it was erased. This, of course, was in legal effect and office understanding an entry of arrival in good order—because the entry said nothing to the contrary. That this interlineation and erasure were made by the defendant the jury might fairly presume from the fact of his having the special custody of the book, and it being his special business to make the entries therein. But the fact that sufficient remains of the entry, to show that it was in the handwriting of the defendant, puts the matter beyond dispute. It being shown to a moral certainty that the envelope arrived at the defendant's office with the package of gold dust, and that the latter was abstracted from the envelope while there, the circumstances of the false and contradictory statements of the defendant concerning the package, and the interlineation and erasure of the entry relating

to it, were sufficient to authorize the jury to conclude, that the defendant, either alone, or with the assistance of Fox, stole the dust.

As to the testimony of Mrs. Fox and Dr. Giltner, I have not taken it into account in the foregoing consideration. The jury within their power of judging of the credibility of a witness, and the true import of conversations which are based upon prior conversations, or occurrences known to both the witness and defendant, but only incidentally or imperfectly shown to them, might have fairly drawn some conclusions from the testimony of these witnesses, none of which would tend to show the defendant's innocence, but the contrary. For instance, the conversation between defendant and Mrs. Fox indicates that already some friends of the defendant had been trying to induce Fox to take upon himself the whole guilt of the crime, and thereby save the defendant harmless. In return, the defendant, by himself and friends, was to save Fox from actual punishment, either upon the plea that gold dust was not mailable matter, or by procuring him an immediate pardon. The interview between the defendant and Giltner points to the same conclusion. If the defendant was conscious of his own innocence and of Fox's guilt, the most natural and proper course for him to have pursued was to have complained of him, instead of furtively bargaining for Fox's testimony on his own behalf, upon the promise of procuring the former an immediate pardon—a promise which the defendant had neither the right to make nor the power to perform.

It is also proper to consider the fact that the robbery of the mail on August 2, was known to the defendant about the hour that envelope 28 came to his office. This may have suggested the feasibility of abstracting the contents of this envelope, and escaping detection by attributing the loss to the robbery. In pursuance of this plan, the envelope when relieved of its contents, would be detained over the next day, August 4, and started for Sacramento on August 5, so as to arrive at the latter place, in point of time, as if it had been in the mail that was robbed in the Blue Mountains. The accompanying "Return registered letter bill" would be detained also, so as to keep company with the registered envelope. This was easily done. There was no other envelope arrived at Portland in the mail of August 3, directed to Sacramento distributing postoffice, but No. 28. The return bill enclosed in a common envelope and similarly directed would necessarily be the one which related to envelope 28. This theory accords with the fact as to when the plundered envelope and return bill arrived at Sacramento. The usual time then occupied in making the trip between Portland and Sacramento was 5½ days. The schedule time was six. The envelope and letter bill reached Sacramento about one o'clock p. m. of August 10. If the envelope and letter bill had left Portland at six o'clock a. m. of August 4, then it would have been 6½ days on the way—more than the schedule time, and a full day more than the usual time. But supposing that they left in the mail of the morning of August 5, then the time consumed in the transit would be the usual time, at that season—5½ days. It being morally certain that envelope 28 and the return letter bill reached the Portland office, in good order, on the afternoon of August 3, and that they reached the Sacramento office, with the contents of the former abstracted, on the afternoon of August 10—after a period of 6½ days—it is a very reasonable conclusion, not only that the envelope was robbed in the Portland office, but that it and the letter bill were detained there for that purpose and on that account, from the morning of August 4 to that of August 5.

The letter of Fox to Put. Smith, to say the least of it, is evidence of more or less conference and confidence between the defendant and Fox on this subject. It would seem that they had a common interest in, or knowledge of the matter. The defendant seems to have been watching the action of the grand jury then in session engaged in the investigation of crimes, and the accusation of criminals. At this time, if defendant was wholly innocent, he must have been satisfied that some one in the office was guilty. He retained Fox in his employ—made no complaint against him—but communicated to him the private intelligence that the matter was to be taken before the grand jury, which the latter, in turn, hastened to communicate to the receiver of the dust, and ask his advice in the premises. This scrawl, read by the light of all the other facts in the case, indicates that Fox knew of this theft, and probably had been used as a tool to dispose of the stolen dust.

Besides all these, there are other circumstances which tend to support the hypothesis of the defendant's guilt. His detention of the circular letter for nearly a month, instead of answering the question propounded and sending it forward at once to Sacramento. He was not charged with the investigation of the matter, but was asked a question concerning his own office. If he knew nothing about the envelope, and there was no entry in the register concerning it, he should have certified so at once. Impliedly his certificate asserts that there was an entry concerning the envelope in his register, when there was not, unless it be the interlined and erased one. The letters which the defendant wrote to the postmasters, appear to have been written with a design to suggest that envelope 28 was in the mail robbery of August 2. The very fact that defendant stepped out of his sphere to write them at all, tends to show that he had some fear that if the investigation was left to the postal agent, it might not result as he, the defendant, desired it to do.

In the motion for a new trial, no objection is made to the ruling of the court refusing to

allow Fox's statement out of court, to be given in evidence. But in the argument of the motion and everywhere else, we are met with the plea that Fox has confessed the theft, and the defendant is not guilty. The fallacy of this must be apparent to every one who will dispassionately consider the matter for a moment. If Fox's admissions could be given in evidence to prove the defendant's innocence, when Fox was placed on trial he might show that these admissions were false, and were made for the purpose of wrongfully procuring the acquittal of this defendant, or he might show that he was many miles from the place when the crime was committed, and therefore it was physically impossible for him to have committed it. Upon the trial of defendant, Fox's statements out of court are mere hearsay. Besides Fox might confess his guilt in pursuance of an agreement with the defendant's friends, for the purpose of procuring the acquittal of defendant, for a consideration, or when in fact they were both guilty. Fox was the best witness as to what he knew, and if the defendant wanted it to go to the jury, he should have called him as a witness. On the first trial this was done. Fox answered all the questions asked him by defendant except two, which he declined answering on the plea that the answers might criminate himself. These questions were—Whether any package of gold dust came down in the mail bags from The Dalles about August 1? and, Whether he had any gold dust transactions with Put. Smith? For aught that appeared, this might have been a mere pantomime, enacted before the jury, in pursuance of a previous agreement, for the purpose of leading their minds to the conclusion that Fox was guilty, and the defendant not. To prevent this, the court instructed the jury that the defendant was on trial and not Fox, and if Fox declined to answer a question, as he might, no inference was to be drawn from the refusal, either for or against the defendant. On the second trial the defendant called Cartwright, the district attorney, as a witness, who swore that since the first trial, he had promised Fox, that if he would tell all he knew about the theft, and he should be satisfied he told the truth, he would make him a government witness, and he should not be prosecuted. For this reason the defendant declined to call Fox as a witness on the second trial, and the prosecution being satisfied to submit the case to the jury without his testimony, he was not examined at all. But counsel for the defendant, while acknowledging the correctness of the general rule laid down by the court on the question of admitting Fox's outside statements to the jury, on Randall's trial, still indirectly complain that they were not permitted to do so; even when they declined to call him, and let the jury hear his account of the matter, given under the sanction of an oath, and in the presence of the defendant. Either Fox would tell the truth as a witness or not. If he would, then the failure of the defendant to call him, gives reasonable ground to presume that his testimony would tend to convict the defendant. If, however, the defendant had reason to believe that Fox could not be trusted to tell the truth on the witness stand, then certainly, and independent of the fact that they are mere hearsay, the defendant ought not to ask his admissions or statements made out of court without the sanction of an oath to be received in evidence—admissions made too in pursuance of a promise from the defendant and his friends, to save Fox from punishment if he should get convicted himself on account of them.

The second ground of the motion for a new trial—that the verdict was against law—was not argued by counsel and needs no particular consideration by the court. Indeed, I am not certain as to what question is intended to be raised by it. The charge to the jury was in the main oral, and time will not permit its being written out now. No exception was taken to it by either party, and I understood from defendant's counsel that the defence was well satisfied with it. The verdict is not against the law given the jury by the court, for under the charge the jury were at liberty to find the defendant guilty or not guilty, according as the facts and the proper inferences from those facts might in their judgment require.

The first error of law alleged to have occurred at the trial, was the refusal of the court to allow the defendant's peremptory challenge to Charles Sweigle, juror. According to the rules and practice of this court, established since 1864, by the adoption of section 155 of the Criminal Code (Or. Code, p. 467), the defendant was entitled to six peremptory challenges, and no more. Before challenging Sweigle, the defendant had challenged peremptorily six jurors, which challenges had been allowed. At common law, strictly speaking, a peremptory challenge to a juror was not allowed in any case. But in progress of time a practice grew up to allow them, in favor of life, in capital cases. Beyond this, peremptory challenges were not allowed at common law. In modern times, in most of the United States, the practice or law has gone to the other extreme, so that the number of peremptory challenges allowed a defendant enables him, in many cases, to form a jury that is morally certain to acquit or at least to disagree.

By section 30 of the act of April 30, 1790 (1 Stat. 117), peremptory challenges in United States courts are limited to treason and other capital cases. The laws of the states allowing peremptory challenges in other cases do not apply, unless made a rule of court. U. S. v. Cottingham [Case No. 14,872]. The case last referred to arose under section 21 of the act of March 3, 1825, substantially the same as this. A clerk in the Albany postoffice was indicted for opening a letter and stealing

therefrom. The court, Mr. Justice Nelson presiding, held that the defendant was not entitled to any peremptory challenges under the laws of the United States, nor under the law of the state of New York, as the latter had not been adopted by the court. On March 3, 1868, an act was passed, "regulating proceedings in criminal cases and for other purposes" (13 Stat. 500). The second section of this act provides, that in capital cases the defendant shall have but twenty peremptory challenges, and the United States five; and, also, that "in a trial for any other offence in which the right of peremptory challenge now exists, the defendant shall be entitled to ten and the United States to two peremptory challenges." Heretofore this court has always construed this statute as not extending the right of peremptory challenge to any case not capital, on the ground that the right could not be said to exist when it was not given by law, but merely depended upon a rule of court. If otherwise, then this act, instead of establishing an uniform rule upon this subject, which appears to have been the object of it, would allow peremptory challenges in this state, because there is already a rule of court allowing them here, and exclude them in New York, because there is not such a rule there. This provision of the statute is evidently founded upon a misapprehension of the subject, and is nugatory. The question is a technical one and the decision of it in no way affects the justice of the case.

The second error of law alleged to have occurred on the trial, was the refusal to admit in evidence a letter of October 1, 1868, written by J. H. Koontz, and addressed to the defendant. Koontz was postmaster at Umatilla in the early part of August, 1868, but his brother, J. A. Koontz, was his deputy and performed the duties of the office. J. H. Koontz wrote the letter sometime after he had ceased to be postmaster. He was a witness at the former trial, but absent at this on account of sickness. The letter was offered in evidence to show that the defendant, when he wrote to the Sacramento postmaster under date of October 9—had reason to believe that envelope 28 was in the mail that was robbed August 2—did have a reason so to believe at that time, even if it was a mistake. The right to introduce this letter to show that fact was rested on the ground that this Koontz letter was enclosed in the letter to the Sacramento postmaster, and therefore entitled to be read as a part of that admission of the defendant. The court ruled that the defendant might read to the jury any letter that was enclosed in the one to the Sacramento postmaster, because the prosecution having read that to the jury the defendant was entitled to read the other as a part of the same statement or admission. The court also ruled, that any letter which the defendant sent the Sacramento postmaster with his of October 9 as the ground of his belief therein mentioned, might be read to the jury to show how far the defendant was warranted or justified in expressing the opinion or making the statement to the Sacramento postmaster that he did, but that information or letters not mentioned or disclosed at the time of making a statement in regard to envelope 28, could not be read by the defendant to the jury.

Taking these rules as a guide in the premises, the court refused the Koontz letter to be read to the jury, because it did not appear from the testimony that it was enclosed in the defendant's of October 9, addressed to the postmaster at Sacramento. This is the only ruling made in the case that upon reflection I am not satisfied with. The difficulty was in the facts and not in the law, and grew out of the indistinctness of the testimony as to what letters reached Sacramento with the defendant's, or in it; and as to how the letters of the defendant's were returned to the Portland office and came into Brooks' box. Lewis remembered but two letters in the Sacramento postoffice with the defendant's, and this is not one of them, though he knew there were others; and it might have been placed in the open envelope in Brooks' box by the defendant, without having been to Sacramento at all. Yet I am inclined to think that it would have been safer to have inferred that it was one of the inclosures in the defendant's letter, from the fact that it was found in company with it in Brooks' box after the return of the latter from Sacramento. But if this were an error of judgment, I am satisfied that it worked no possible harm to the defendant. It will not be contended that this letter in any way bears directly upon the question of the defendant's guilt or innocence. It was only offered to qualify the effect of a circumstance from which, with others, the jury were asked to infer the defendant's guilt. In other words, it was offered to prove that the defendant had good reason or some reason to write the postmaster at Sacramento that he believed envelope 28 was in the mail robbery of August 2, and therefore we are not to infer, because the envelope was not in the robbery, that he was telling a willful falsehood for the purpose of putting the department on the wrong scent, and keeping the pursuit from himself.

But the letter from J. H. Koontz does not show that envelope 28 was in the robbery of August 2, nor furnish any reason or ground for the defendant thinking or saying so. Here is the letter: "Postoffice, Umatilla, Oregon, Oct. 1st, 1868.—To E. G. Randall, P. M., Portland. Dear Sir: At the request of the P. M., I write you in answer to yours of Sept. 21. Reg'd Pkg., envelope No. 28 came to this office on the 1st of August, being Saturday, and left in the mail on Monday at the same time that those four packages left that were broken open and robbed on the morning of the 2d of Aug. The mails that arrive at this office Saturday lay over till Monday, and in

the meantime, on Sunday evening, another mail from east arrives, and both go down on Monday. I can't say certain that all went down in the same lock-sack, but such might have been the case, as we were sometimes compelled to put both mails together, in order to keep sufficient sacks to go on the two routes above, namely, Wallawalla and Boise City. So No. 28, mailed at Auburn July 28, left this office August 3." Now this letter says that envelope No. 28 reached Umatilla Saturday, August 1, and that the mail robbery took place on Sunday, August 2, in the Blue Mountains, near one hundred miles east of Umatilla. Can any one pretend that this is authority or even a decent excuse for the defendant's writing to the Sacramento postmaster that envelope 28 was in the mail that was robbed in the Blue Mountains of August 2? Certainly not. Besides, the defendant had made this statement to Brooks before he had any of these letters. Again, at the time the defendant wrote this letter to the postmaster at Sacramento, he had all the official statements of all the postmasters on the route before him, on the circular letter. These all concluded in stating that envelope 28 was two days ahead of the mail that was robbed, and that it left The Dalles for Portland in good order on the morning of August 3. This Koontz letter is a mistake in regard to envelope 28 not leaving Umatilla until August 3. It left on Saturday morning, August 1, and went to The Dalles by land. On the last trial, Koontz explained it in his testimony. The mail leaves Umatilla six times a week for The Dalles—Mondays, Wednesdays and Fridays by water, and Tuesdays, Thursdays and Saturdays by land. It comes up on opposite days. For instance, the land mail comes to Umatilla from The Dalles on Friday evening, and returns on Saturday morning, but not until the eastern stage comes in —which often comes in in the night. The mail is made up for The Dalles the next morning, and a letter that came in from La Grande on Friday evening, July 31, would be entered on the register as of Saturday, August 1, and go in The Dalles the same day. This was the fact in regard to envelope 28. J. H. Koontz was the postmaster, but his brother attended to the business, and when he wrote this letter, some time after he went out of office, he saw envelope 28 was registered on Saturday, August 1, and he inferred that it came on the evening of that day, and as there was no mail carried on Sunday, he rightly concluded from these premises, that it left for The Dalles on Monday, August 3, in same mail with robbed packages, but he was mistaken in his premises. But, be this as it may, the letter so far from countenancing the opinion that envelope 28 was in mail robbed in the Blue Mountains on August 2, shows directly the contrary—that the envelope was in Umatilla on August 1, from twelve to twenty-four hours ahead of that mail.

The motion for a new trial is overruled.

As to the motion in arrest of judgment, a statement of the statutes in regard to the matter and a few comments will dispose of it. Section 12 of the act of July 1, 1864 (13 Stat. 337), re-enacting section 21 of act of March 1, 1825 (4 Stat. 107), provides: "If any person employed in any department of the post-office establishment, etc., shall secrete, embezzle or destroy any letter, packet, etc., with which he or she shall be intrusted, or which shall have come into his or her possession and intended to be conveyed by post, etc., such letter, packet, etc., containing any note, bond, draft, check * * * or other article of value, etc., or if any such person, etc., shall steal or take any of the same out of any letter, packet, etc., such person shall, on conviction of any such offence, be imprisoned not less than ten years, not exceeding twenty-one years, etc." Tried by this definition, the act committed by the defendant was a crime. The defendant was a person employed in the postoffice. Envelope 28 came into his possession and was intended to be conveyed by post. It contained an article of value—12½ ounces of gold dust—and the defendant by the verdict of the jury is found to have taken the same out of such envelope or letter therein. Even if the statutes defining mailable matter do not include gold dust in the category, still the taking or stealing it from a letter in the mail by a person employed in the postoffice would be a flat violation of the section just read, and a crime. It does not follow that because an article is not enumerated as mailable matter that therefore it can be stolen from the mails by those interested with their conduct and transportation, with impunity, or in the pithy language of counsel for the United States, "because gold dust is not mailable, it does not follow that it is stealable." As argued by counsel for defendant, a postmaster might object to being responsible for articles not permitted to be carried in the mails, but no one should object that he is prohibited from stealing from the mails, whether the article be rightfully there or not.

Section 16 of the act of March 3, 1863 (12 Stat. 704), provides: "No postmaster shall receive to be conveyed by the mail any packet or package which shall weigh more than four pounds, except books published and circulated by order of congress." The reasonable inference from this section is, that the mailability of matter depends upon its weight, and not its kind or quality. To the same effect is section 25 of the same act, which reads: "On all matter not enumerated as mailable matter and to which no specific rates of postage are assigned, and which shall nevertheless be mailed, the rate, if the same shall be forwarded, is established at the rate of letter postages." Section 456 of the postoffice regulations prescribes: "Money and other valuables, sent

by mail are at the risk of the owner, but in case of loss the department will endeavor to discover the cause, and where there has been a theft, to punish the offender." These instructions being promulgated by the postmaster general, under authority of an act of congress, have the force of law. Section 32 of the act of March 3, 1863, authorized the postmaster general to establish a uniform plan for the registration of valuable letters. Under this system, envelope 28 was being carried, through the mails, when broken open.

In U. S. v. Marsellis [Case No. 15,724], on a special verdict, judgment of conviction was given against the defendant for taking two letters containing each a twenty-five cent piece in silver. The case was argued before Justices Nelson and Betts, and no question seemed to be made that it was not a crime to steal coin from the mails, because it was not mailable matter. This judgment was given in 1849, while the post-office act of 1845 [5 Stat. 748], which the defendant relies on, was in force. There is no statute of the United States which provides specifically that coin is mailable matter, any more than gold dust. Yet I apprehend that a packet of either of them, not weighing over four pounds and prepaid at letter postage rates, is mailable matter; and whether this be so or not, there can be no doubt but that it is a crime against the United States to take or steal either of them from the mails.

To conclude: after a long and careful examination of the case, I can find no sure ground upon which to question the legality or rightfulness of this verdict or to arrest or delay the judgment of conviction which the law declares shall be given against the defendant in consequence of it.

Sentence: Thereupon the district attorney moved for judgment, and the court asked the defendant if he had anything to say why sentence should not be passed upon him. The defendant rose and said: "Your Honor:—I am innocent of this crime, as sure as there is a God in Heaven, and every one connected with the prosecution knows this full as well as I do. It is the most damnable piece of persecution that was ever perpetrated against a white man. I feel certain that time will reveal my innocence and bring the guilty to justice."

The court then pronounced sentence as follows: You have been indicted by the grand jury of the district, for the violation of an important trust—the commission of a grave and serious crime. After a fair trial, in which you have had the aid of able, experienced and devoted counsel, and the sympathy and prayers of many warm friends, you have been found guilty as charged, by an honest and intelligent jury of your country. By a motion for a new trial, argued ardently and at great length in your behalf, the court has been compelled to review the testimony upon which this verdict was given. After a careful examination and consideration of the facts and circumstances proven against you, the court is bound to approve of the verdict and pronounce upon you the sentence which the law has provided for those who violate it. I will not harrow your feelings nor prolong this painful duty by indulging in any reflections or suggestions upon your present unfortunate condition and future prospects. The occasion will suggest to you and those present, all that I could say, and more. The jury have recommended you to the mercy of the court, and your former good reputation is in proof. So far as the court knows or can see, this is your first crime. The amount stolen is comparatively small, and no one but the Omniscient can know or estimate the force of the temptation which in an evil hour for yourself and friends, caused you to stumble and fall. The law provides that in the discretion of the court you may be sentenced to imprisonment at hard labor for a period not less than ten nor more than twenty-one years. In consideration of the circumstances just enumerated—particularly the recommendation of the jury and your past good reputation, the court has concluded to fix your imprisonment at the term of twelve years; and does now sentence you to be imprisoned at hard labor for the term of twelve years from this time. And as the legislature of this state has not yet provided for the admission of United States convicts into the state penitentiary, it is ordered that this sentence be executed in the jail of Multnomah county, so far as the discipline of such prison will permit, until the further order of this court, or it is otherwise by law provided.

Case No. 16,119.

UNITED STATES v. RANDALL.

[1 Spr. 546.] [1]

District Court, D. Massachusetts. March, 1853.

CUSTOMS LAWS—DUTY OF MASTER TO REPORT ARRIVAL—POWERS OF COLLECTORS.

1. By St. 1799, c. 22, § 36 [1 Stat. 655], the master of a vessel arriving from a foreign place, must repair to the office of the chief officer of the customs, and there make report to him.

2. The master is not in default, if there be no such office, or no person in attendance to receive the report.

3. An officer of the customs has no dispensing power, and cannot excuse any person for neglecting a statute duty.

4. But where that duty cannot be performed, by reason of the neglect of the officer to do that which is a prerequisite, the statute is not violated.

[Cited in U. S. v. Curtis, 16 Fed. 189.]

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

This was an information for a penalty under the United States act of 1799 (chapter 22) filed by the district attorney for Massachusetts, against the master of the brig Nitheroy, for not making a report of the arrival of his vessel to the deputy collector of the port of Holmes' Hole, in accordance with the 36th section of the above act.

G. Lunt, U. S. Dist. Atty.
N. Morse, for defendant.

SPRAGUE, District Judge. The 24th and 30th sections of the act under which the information is filed, seem to contemplate the boarding officer and the chief officer of the customs at the port at which the vessel arrives, as two different persons. Here those offices were united in the same person. That person went on board of the vessel upon her arrival, was informed by the captain of the place from which she came, and the time of her arrival, was informed, by the captain, of the place fest, and made a certificate on the original; and it appeared that for thirty years last past, not more than one master in thirty had made any other report of arrival. An officer of the customs has no dispensing power, and cannot excuse a party from duties required by statute; but here the government were to do certain things, by their officer, before the act required could be performed by the master. The master was to repair to the office of the chief officer of the customs, and make report to him. The designating a place as his office, by the chief officer of the customs, and the presence of some one authorized to receive the report, were necessary before the master was required to repair to the office and there make report. Whether any one could be authorized to receive such report, except the chief officer, need not now be considered. It was, by the statute, left to the officer to designate the place at which such report should be made; and whenever he does so, and is present at that place, and actually receives the report, the master cannot be required to make it at any other place. It is in the power of the officer to change the place of his office at pleasure, or he may discontinue his office either for a long or a short time, or on a particular occasion; and if he actually transacts the business of receiving the report at any place within his district, it must be considered that such place has been adopted by him, and that he has discontinued or changed any other office which he may previously have had; so that he either has no office to which the master can then repair and make the report, or that his office, for that purpose, is at the place where he actually transacts the business by personally receiving the report. And especially must this be so, when that is the place where the officer has been in the practice of transacting this business for at least thirty years. That this would be true, if the two offices were held by different persons, and the deputy collector should make it his invariable practice to go on board of every vessel, and there receive the report of her arrival, can hardly be doubted, whether he went at the same time with the inspector, or not. Nor does it make any difference that the deputy collector and inspector are united in the same person, and the business of both offices is transacted at the same time, viz., the receiving the report of the arrival, and the copy of the manifest and certifying the original. A penalty is claimed for not doing a vain and nugatory act. This claim the court will not sustain, unless compelled to do so by language in the statute, so clear, when applied to the subject-matter and the circumstances of the case, as to admit of no other fair and reasonable construction. The report which was actually made, accomplished all the purposes of the law, and a further report, merely of her arrival, would have been utterly useless. There was no violation of the statute, and no penalty incurred.

Case No. 16,120.

UNITED STATES v. RANDOLPH.

[1 Pittsb. Rep. 24; 1 Pittsb. Leg. J. 21.]

Circuit Court, W. D. Pennsylvania. May Term, 1853.

STATUTES — TITLE OF LAWS — OFFENSES AGAINST NATURALIZATION LAWS—FORGERY OF CERTIFICATE.

1. The title of an act of congress, when at variance with its provisions, deserves no consideration, though it may sometimes serve to explain a doubtful meaning of part of it.

2. Defendant was indicted under the thirteenth section of the act of congress of March 3, 1813 [2 Stat. 811], for forging, etc., a certificate of naturalization. *Held*, that the penalties provided in that section applied to that indictment, and that the district court had jurisdiction.

IRWIN, District Judge. The defendant was indicted in the district court, at May term last, "for wilfully and feloniously passing and uttering on the 11th of October, 1852, as true and genuine, a false, forged and counterfeit certificate of citizenship, purporting to be issued pursuant to the laws of the United States, and attesting that a certain John Gray had been admitted to become a citizen of the United States, he at the same time being an alien and a subject of the queen of Great Britain and Ireland." At the same term the court was moved to quash the indictment for the following reasons: (1) Because the district or circuit courts of the United States have no jurisdiction of the offence charged in said indictment. (2) No offence of the nature and character as alleged in said indictment is created by any act of congress. (3) Because said indictment charges the said alleged offence to be a felony. These points being new, and involving important matters, were removed to the circuit court for its opinion.

The offence charged is supposed to be em-

braced by the thirteenth section of the act of congress of the 3d of March, 1813, entitled "An act for the regulation of seamen on board the public and private vessels of the United States." That section is in the following words: "Sec. 13. And be it further enacted, that if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, any certificate or evidence of citizenship referred to in this act; or shall pass, utter, or use as true, any false, forged or counterfeited certificate of citizenship, or shall make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued, and to whom it may of right belong, every such person shall be deemed and adjudged guilty of felony; and on being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a period of not less than three, nor more than five years, or be fined in a sum not less than five hundred dollars, nor more than one thousand dollars, at the discretion of the court taking cognizance thereof."

From its having been intimated that the decision of this case will determine many other prosecutions of a similar nature with that now pending, the court has given the points certified full consideration. It has rarely happened in acts of congress, that subjects have been introduced of a nature widely different from that expressed in the title and it is conceded that if the several sections of an act can be reconciled with each other, and with the single purpose of legislation, as indicated in the title, that it would be wrong to infer that congress intended to embrace more than that purpose, although it may contain words susceptible of a different construction.

Before and during the last war with Great Britain, the impressment of seamen from American vessels, was a constant topic of discussion and controversy, which congress prospectively deemed it expedient to prevent, by passing the act of the 3d of March, 1813, which, with certain exceptions, makes it unlawful, after the war, to employ on board the public and private vessels of the United States, any persons except their own citizens, native or naturalized, and not the latter unless they should produce to the commander of the vessel, or the collector of the customs, a certified copy of the act by which he shall have been naturalized, the naturalization, and the time thereof.

The indictment, it is supposed, cannot be sustained by the thirteenth section of the act, for that, by looking to its general scope, subject-matter, and title, it must refer to seamen situated as the first eleven sections refer to, and to no other persons, and that although the words, "If any person shall falsely make, forge," etc., might be broad enough to include others than seamen, if standing unconnected with the particular subject of legislation, yet if connected with that subject, they should be so construed as to harmonize with it, without enlarging their meaning beyond the obvious provision of the act, and that to effect this object nothing more is necessary than to introduce the word "such" after the word "any," at the beginning of the section, and that the word "such" was probably accidentally omitted in framing the act.

If this were the only difficulty, the argument, if not conclusive, would be entitled to great weight; but it is proper to give effect to all the material words of one section of a statute, if they can be reconciled with or have an obvious reference to the words or enactment of another section, and whenever this can consistently be done, we are not at liberty to presume that congress intended to qualify or restrain the only meaning which the words employed naturally and grammatically import. Following this rule, and connecting the twelfth and thirteenth sections of the act, it will be apparent that the words in the thirteenth section, "If any person shall make, forge," etc., are intended to be general in their operations, and not confined to seamen employed in the public and private vessels of the United States.

The twelfth section provides: "Sec. 12. And be it further enacted, That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years, out of the territory of the United States."

The act of 1813 is the only one purporting to be general in its features, which requires a continued residence of five years, preceding admission to citizenship, a provision, it may be assumed, introduced as the best evidence of bona fide expatriation, and probably not admitting, by construction, a temporary absence, during the five years, out of the territory of the United States, which construction would include all persons besides seamen, who left the territory upon business for a temporary period. But to show that any temporary absence for any purpose, during the five years, would disqualify from naturalization, the twelfth section further provides that the alien must have resided in the United States, "*without being at any time during the said five years, out of the territory of the United States.*" It is not improbable that, to get rid of the injury and inconvenience which a general application of the words in italics might produce, a disposition was felt and perhaps judicially sanctioned, to limit the act of 1813 to seamen alone, and if so, and the intention of congress had not thereby been misinterpreted, there would not have been any necessity for any further legislation on the subject. But

to show that such could not have been the intention of congress, the act of the 26th of June, 1848, was passed, by which the words in italics were repealed, so that, after that time, there could be no foundation for an opinion, that the twelfth section embraced only a particular class of persons. Connecting it, then, with the thirteenth section, we cannot avoid the conclusion that the penalties presented in the latter apply to the indictment before us, and that the district court of the United States has jurisdiction of the offence charged.

The title of an act of congress, when at variance with its provisions, deserves no consideration, though it may sometimes serve to explain a doubtful meaning of part of it. In this case the body of the act shows that its title is singularly narrow, and that, besides being intended for the "regulation of seamen on board the public and private vessels of the United States," it introduced important enactments, in addition to the pre-existing naturalization laws, and that these additions are its main features, restricted, indeed, in all its sections, except the twelfth and thirteenth, to seamen; but as regards them making provisions far beyond mere "regulations." The excepted sections, as the court have construed them, are consistent with the object and provision of the rest, and in accordance with what may fairly be presumed to be the intention of congress by the repealing act of 1848, from which it may be inferred that the words "continued residence," do not, as it would be most unreasonable they should, deny the privilege of naturalization to one who, after his application to be admitted a citizen, should find it necessary to go beyond the limits of the United States before the time prescribed for naturalization.

It is ordered that this opinion be certified to the district court.

UNITED STATES (RANDOLPH v.). See Case No. 11,562.

UNITED STATES (RANSOM v.). See Case No. 11,574.

Case No. 16,121.

UNITED STATES v. RATHBONE et al.

[2 Paine, 578.] [1]

Circuit Court, S. D. New York. June Term, 1828.

CONSTITUTIONAL LAW—JURY TRIAL IN CIVIL CASES—WAIVER OF RIGHT—EFFECT OF STATE LAWS.

1. The right to trial by jury, secured by the constitution of the United States, is for the benefit of the parties litigating in courts of justice, and may be waived by them.

[Cited in Kearney v. Case, 12 Wall. (79 U. S.) 281.]

[Cited in Com. v. Dailey, 12 Cush. (66 Mass.) 83.]

2. Whenever a party is concluded by his own act, and held to have waived any right or privilege, such act should not be left doubtful, but should plainly and explicitly appear; and every reasonable presumption will be made against the waiver, especially when it relates to a constitutional right.

[Cited in Mehlin v. Ice, 5 C. C. A. 403, 56 Fed. 20.]

3. A state law cannot take away rights and privileges secured by the constitution and laws of the United States.

[Cited in St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132 (Gil. 99).]

4. The constitution and laws of the United States having secured to parties the right to trial of issues of fact by jury, the United States courts cannot deprive them of that right by referring such issues to referees.

[Followed in Howe Mach. Co. v. Edwards, Case No. 6,784. Cited in St. Louis Electric Light & Power Co. v. Edison General Electric Co., 64 Fed. 1004.]

[Cited in Holmes v. Hunt, 122 Mass. 520; St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132 (Gil. 99); Copp v. Henniker, 55 N. H. 214.]

5. The reference act of New York is not at variance with the constitution of that state.

[Error to the district court of the United States for the Southern district of New York.]

[This was an action by the United States against William P. Rathbone.]

THOMPSON, Circuit Justice. The general question presented by the record sent up from the district court is, whether that court had authority to order the cause to be referred to referees. It has been urged, however, on the part of the defendants in error, that this general question does not necessarily arise in this case, for that by the record it appears that the reference was by consent of parties, and not the act of the court. If such be the fair construction of this record, the judgment ought not certainly to be reversed. For, admitting the court had no authority to order the cause referred, yet there can be no doubt this could be done by the consent of parties. It is not a question of jurisdiction, but simply whether the parties will waive the right of trial by jury, and resort to that of trial by referees. The right of trial by jury, secured by the constitution of the United States, is for the benefit of the parties litigating in courts of justice, and is a privilege they may dispense with if they choose. This is a proposition too clear to require any argument or authority in support of it; but if any was wanted, it is found in the case of Bank of Columbia v. Okely, 4 Wheat. [17 U. S.] 235.

The first inquiry then is, whether it is fairly to be inferred from the record, that the reference was by consent of parties. If we look at the rule of court by which the reference was ordered, and which comes up as a part of the record in the court below, it will be seen that the cause was referred on the application of the defendants, and upon notice given to the opposite party of the intended motion; which clearly shows a hos-

[1] [Reported by Elijah Paine, Jr., Esq.]

tile proceeding, and is at war with any presumed consent. But if this rule is not to be taken as a part of the record, technically considered, still it appears to me that the record proper does not show such consent on the part of the plaintiffs below as to preclude them from taking the exception here. Whenever a party is concluded by his own act, and held to have waived any right or privilege, such act should not be left doubtful, but should plainly and explicitly appear. Every reasonable presumption should be made against the waiver, especially when it relates to a right or privilege deemed so valuable as to be secured by the constitution. The record, so far as it relates to the reference, states that, "it now appearing probable to the court here that the trial of the matters aforesaid, between the parties aforesaid, will require the examination of a long account, it is therefore ordered by the same court, now here, that the matters aforesaid, in controversy between the parties aforesaid, be and the same are referred, according to the statute in such case made and provided, to J. G. S., &c., referees agreed upon and named by the parties aforesaid, to hear and examine the matters aforesaid, and report," &c. The statute here referred to in the record must be the statute of the state, for there is no act of congress on the subject; and it is reasonable to conclude, from this form of record, that the state practice under that statute has been pursued throughout; and the record shows no more than that the parties agreed upon the referees. The appointment of referees was necessarily, in order of time, an act posterior to the order to refer, and does not imply an assent to such order. The record states that order to have been the act of the court, founded upon the fact that it appeared probable that the trial of the matters in controversy would require the examination of long accounts, and not upon the agreement or consent of parties.

The examination of long accounts is the ground upon which a reference is authorized, under the state law; and it was evidently this law and the state practice under it by which the district court was governed. That law could not, however, control the rights of parties in the courts of the United States, and take away privileges secured by the constitution and laws of the United States. I think, therefore, that the plaintiffs in error are not precluded by any consent they have given to the order of reference, from raising that objection here; and the question is open for consideration, whether the district court had authority to order the reference against the consent of either party. The convenience and utility of adopting this mode of trial by referees, where the controversy involves the examination of long accounts, have led me to look at the question with a wish to find the practice sanctioned by the constitution and laws of the United States, but have not been able to find any ground upon which such authority can be sustained. The constitution (Amend. art. 7) declares that, in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.[2] And the judiciary act of 1789 (2 Bior. & D. Laws, 60 [1 Stat. 73]) provides for the trial of issues of fact in all the courts of the United States, in conformity with this provision. The ninth section declares that the trial of issues of fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury. The twelfth section contains the like provision for trials in the circuit courts: "The trial of issues in fact in the circuit courts, shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury." And the thirteenth section declares that the trial of issues in fact in the supreme court, in all actions at law against citizens of the United States, shall be by jury.

These provisions are too plain to be mistaken, and too positive to be disregarded. If the power to order a cause referred to referees in any case whatever, is possessed by the courts of the United States, where is the limitation of that power to be found? There is no act of congress on the subject, even admitting the constitution not to stand in the way of such a law. There is no law restricting this power to cases involving the examination of long accounts; and if the power exists at all, it may be exercised in every case, and the trial by jury abolished by the courts. The thirty-fourth section of the judiciary act, which declares, "that the laws of the several states, except where the con-

---

[2] The provisions in the constitution of the United States, that no person shall be deprived of his property without due process of law; that private property shall not be taken for public use without just compensation; and that in suits at law, where the amount in controversy exceeds $20, the trial by jury shall be preserved, are restrictive only upon the general government and its officers. Livingston v. Mayor, etc. of New York, 8 Wend. 85. The trial by jury, secured by the constitution of this state, applies only to cases of trials or issues of fact in civil and criminal proceedings in courts of justice, and has no relation to assessments of damages of the owners of property taken for streets or other public use. The mode of ascertaining such damages belonging to the legislature, they may direct the assessment by a jury, or by commissioners. Id. The words, "by the law of the land," and "by due course and process of law," contained in the constitution, import a suit, trial and judgment, according to the course of the common law. Taylor v. Porter, 4 Hill, 140. The constitution of this state (article 7, § 2) relating to the right of a trial by jury, &c., has no reference to proceedings intended merely to prevent the commission of offences. Duffy v. People, 1 Hill, 355. A statute authorizing a magistrate, summarily and without jury, to convict one who has abandoned his family, of being a disorderly person, and to require from him sureties for good behavior, is not unconstitutional. Id.

stitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," has no application whatever to this case, so as to require the adoption of the state law on the subject. [Wayman v. Southard] 10 Wheat. [23 U. S.] 24; Serg. Const. Law, 149, 150, and cases there cited. And that law, at all events, falls within the excepted cases; the constitution and laws of the United States having provided for trial of issues in fact by jury, instead of by referees. How far this view of the case may affect the validity of the state law is a point not drawn in question, or intended to be considered. Although the constitution of the state of New York secures the trial by jury (article 41), it is a modified provision not at variance with the reference act; it declares, "that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established, and remain inviolate forever." And references were authorized under the colonial laws as early as the year 1768. See 2 R. L. 516, note, and Id. (U. S. Ed.) 517.[3]

In whatever light this case is considered, I can find no ground upon which the order of the district court, referring the cause to referees for trial, can be sustained. The judgment must, accordingly, be reversed, and a venire de novo issued returnable in this court.

[3] The right to refer is not unconstitutional. The provision in the constitution of the United States relates to such courts only as sit under the authority of the United States. As to the provision in the constitution of the state, requiring that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," the answer is, that references were sanctioned by statute, and practiced by the courts, long before the adoption of the constitution. Lee v. Tillotson, 24 Wend. 337. At all events, it is too late to object on the ground of unconstitutionality, when the parties have mutually consented to the reference in writing. Id. A reference can be had only in cases of accounts existing between the parties; actions of tort are not referable: Silmser v. Redfield, 19 Wend. 21. Where an action of tort is referred, and a report obtained, the plaintiff cannot enter a rule for judgment thereon, unless expressly authorized by the rule of reference; nor will the court, in an action of tort, review the doings of the referees. Id. If the trial requires the examination of a long account between the parties, although the action be covenant, it seems a reference would be ordered. Thomas v. Reab, 6 Wend. 503. In cross actions and cross applications for a reference, a joint reference will be made, and the referees authorized to hold their meetings so as to accommodate the parties. Hart v. Trotter, 4 Wend. 198. In an action upon a policy of insurance, if the defendants admit their liability for the loss, and the controversy relates only to items of injury, and the amount of loss sustained by the assured, the court will refer the matter to referees to adjust the amount. Samble v. Mechanics' Fire Ins. Co., 1 Hall, 560. In mixed questions of law and fact, where long accounts are involved, it is the practice of the court to hear the cause until the questions of law are disposed of, and then refer the accounts to referees. Id.

Case No. 16,122.

UNITED STATES v. RAVARA.

[2 Dall. 297;[1] 1 Whart. St. Tr. 90.]

Circuit Court, D. Pennsylvania. April Term, 1793.

JURISDICTION OF SUPREME AND CIRCUIT COURTS—CRIMES BY FOREIGN CONSULS—CONSTITUTIONAL LAW.

[The provision of the constitution which vests in the supreme court "original jurisdiction" in all cases affecting ambassadors, other public ministers and consuls, does not make that jurisdiction exclusive; and therefore, by the provision of the judiciary act (1 Stat. 73), which vests in the circuit courts jurisdiction of all crimes and offences cognizable under the authority of the United States, the latter courts have jurisdiction to try an indictment against a foreign consul for offences committed in this country. Iredell, Circuit Justice, dissenting.]

[Cited in Gittings v. Crawford, Case No. 5,465; U. S. v. New Bedford Bridge, Id. 15,867; Texas v. Lewis, 14 Fed. 67.]

The defendant, a consul from Genoa, was indicted for a misdemeanor, in sending anonymous and threatening letters to Mr. Hammond, the British minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money.

Before the defendant pleaded, his counsel (Heatly, Lewis & Dallas) moved to quash the indictment, contending that to the supreme court of the United States, belonged the exclusive cognizance of the case, on account of the defendant's official character. By the second section of the third article of the constitution, it is expressly declared, that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." By declaring in the sequel of the same section "that in all the other cases before mentioned the supreme court shall have appellate jurisdiction," the word original is rendered tantamount to exclusive, in the specified cases. But surely an original jurisdiction established by the constitution in the supreme court, cannot be exclusively vested by law in any inferior courts. The thirteenth section of the judicial act provides, that "the supreme court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party." This provision obviously respects civil suits; but the eleventh section declares, that "the circuit court shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United

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

States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." This is a criminal prosecution, not otherwise provided for; and if the jurisdiction can be exclusively vested in the circuit court, it destroys the original jurisdiction given by the constitution to the supreme court. In justice to the legislature, therefore, such a construction must be rejected; and the cognizance of the case be left, upon a constitutional footing, exclusively to the supreme court. The argument is the more cogent from a consideration of the respect which is due to consuls, by the law of nations. Vatt. Law Nat. bk. 2, c. 2, § 34.

Mr. Rawle, U. S. Dist. Atty., stated in reply, that there was a material distinction between public ministers, and consuls; the former being entitled to high diplomatic privileges, which the latter, by the law of nations, had no right to claim; and he contended, that the supreme court has original, but not exclusive, jurisdiction of offences committed by consuls; that the district court had jurisdiction (exclusively of the state courts) of all offences committed by consuls, except where the punishment to be inflicted exceeded thirty stripes, a fine of one hundred dollars, or the term of five months imprisonment; and that the circuit court had, in this respect, a concurrent jurisdiction with the supreme court as well as the district court. If indeed this is a crime "cognizable under the authority of the United States," it is within the express delegation of jurisdiction to the circuit court.

Before WILSON, and IREDELL, Circuit Justices, and PETERS, District Judge.

WILSON, Circuit Justice. I am of opinion, that although the constitution vests in the supreme court an original jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting a concurrent jurisdiction, in such inferior courts, as might by law be established. And as the legislature has expressly declared, that the circuit court shall have "exclusive cognizance of all crimes and offences, cognizable under the authority of the United States," I think the indictment ought to be sustained.

IREDELL, Circuit Justice. I do not concur in this opinion, because it appears to me, that for obvious reasons of public policy, the constitution intended to vest an exclusive jurisdiction in the supreme court, upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the constitution seems fairly to justify the interpretation, that the word "original," means "exclusive," jurisdiction.

PETERS, District Judge. As I agree in the opinion expressed by Judge WILSON, for the reasons which he has assigned, it is unnecessary to enter into any detail.

The motion for quashing the indictment was accordingly rejected, and the defendant pleaded not guilty; but his trial was postponed, by consent, till the next term.

[See Case No. 16,122a.]

Case No. 16,122a.

UNITED STATES v. RAVARA.

[2 Dall. 299, note.] [1]

Circuit Court, D. Pennsylvania. April Term, 1794.

INTERNATIONAL LAW — OFFENCES BY CONSULS — THREATENING LETTERS—JURISDICTION OF FEDERAL COURTS.

[A foreign consul, notwithstanding his official character, is indictable in this country, and triable in the federal courts, for the common-law offence of sending anonymous and threatening letters with intent to extort money.]

[This was an indictment against the consul from Genoa, for a misdemeanor in sending anonymous and threatening letters to various persons named, with a view to extort money. A motion to quash the indictment was heretofore overruled. Case No. 16,122.

[The defendant was defended on the following points:] (1) That the matter charged in the indictment was not a crime by the common law, nor is it made such by any positive law of the United States. In England it was once treason; it is now felony; but in both instances it was the effect of positive law. It can only, therefore, be considered as a bare menace of bodily hurt; and, without a consequent inconvenience, it is no injury public or private. 4 Bl. Comm. 5; 8 Hen. VI. c. 6; 9 Geo. I. c. 22; 4 Bl. Comm. 144; 3 Bl. Comm. 120. (2) That considering the official character of the defendant, such a proceeding ought not to be sustained, nor such a punishment inflicted. The law of nations is a part of the law of the United States; and the law of nations seems to require, that a consul should be independent of the ordinary criminal justice of the place where he resides. Vatt. Law Nat. bk. 2, c. 2, § 34. (3) But that, exclusive of the legal exceptions, the prosecution had not been maintained in point of evidence; for, it was all circumstantial and presumptive, and that too, in so slight a degree, as ought not to weigh with a jury on so important an issue. 2 Hale, P. C. 289; 4 Smol. Hist. Eng. p. 382, in note.

Mr. Rawle, in reply, insisted that the offence was indictable at common law; that the consular character of the defendant gave jurisdiction to the circuit court, and did not entitle him to an exemption from prosecution agreeably to the law of nations; and that the proof was as strong as the nature of the case allowed, or the rules of evidence required.

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

In support of his argument he cited the following authorities: 4 Bl. Comm. 142, 144; 1 Lev. 146; 1 Keb. 809; 4 Bl. Comm. 180; Strange, 193; 4 Bl. Comm. 242; Crown Cir. Comp. 376; Fost. 128; Leach, 204; [Respublica v. Teischer] 1 Dall. [1 U. S.] 338; 1 Sid. 168; Comb. 304; Leach, 39; Ld. Raym. 1461; [Respublica v. Sweers] 1 Dall. [1 U. S.] 45.

Before JAY, Circuit Justice, and PETERS, District Judge.

THE COURT were of opinion in the charge, that the offence was indictable, and that the defendant was not privileged from prosecution in virtue of his consular appointment. The jury, after a short consultation, pronounced the defendant guilty; but he was afterwards pardoned, on condition (as I have heard) that he surrendered his commission and exequatur.

As to the question of jurisdiction, see U. S. v. Worral [Case No. 16,766].

Case No. 16,123.

UNITED STATES v. RAWLINSON.

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

Circuit Court, District of Columbia. April Term, 1802.

INDICTMENT—NAME OF PROSECUTOR.

The name of a prosecutor must be indorsed on an indictment for keeping a bawdy-house.

Indictment [against Mary Rawlinson] for keeping a bawdy-house. It was questioned by the attorney for the United States, whether the name of Asa Hill, being a voluntary witness to the grand jury, ought not to be written at the foot of the indictment as a prosecutor, before it should be sent up to the grand jury.

THE COURT were of opinion that his name ought to be so written, but gave no direction.

Case No. 16,124.

UNITED STATES v. RAY.

[2 Cranch, C. C. 141.] [1]

Circuit Court, District of Columbia. June Term, 1817.

CORPORATIONS—POWER TO ISSUE NOTES.

1. The Independent Manufacturing Company of Baltimore might authorize their president and treasurer to issue promissory notes, having the form of bank-notes, in bona fide payment for materials furnished, and services rendered for the use of the company, if done without fraudulent intention.

2. But they had no right to pass them away for the purpose of putting them into circulation as a current circulating medium, and not in payment for materials, &c., for the use of the company in the ordinary course of their business as a manufacturing company, and, if so issued and passed by the defendant as a circulating medium, with intent to defraud or injure any person, he is guilty of an indictable offence.

This cause was, by consent, tried upon the presentment, which was in these words: "District of Columbia, Washington County Court, June Term, 1817. The grand jury for the body of the county aforesaid, on their oaths present Andrew Ray, of Baltimore, styling himself president of 'The Independent Manufacturing Company of Baltimore,' for fraudulently passing and attempting to pass certain promissory notes in the form and appearance of bank-notes, stating them to be payable to —— or bearer, by 'The Independent Manufacturing Company of Baltimore,' said Ray knowing such notes to be spurious and void; the funds and property of the said company not being bound to redeem or pay the same, they not being under the seal of the said company as required by their charter, on the information of John Peter, mayor of Georgetown, on or about the 29th of May last. John Ott, Foreman."

Mr. Law, for defendant, moved the court to instruct the jury, that the facts proved did not amount to any crime or offence.

Mr. Jones, for the United States, contended that the corporation had no power to issue such notes; that they could only contract under their corporate seal; or that if they can issue promissory notes, it can only be for the purchase of materials, &c., in the regular course of their business as manufacturers.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury, that if they should be of opinion, from the evidence in this cause, that the traverser gave the notes in the presentment mentioned, in bona fide payment for materials, or articles purchased by him as the agent and for the use of the manufacturing company in the presentment mentioned, or for services bona fide rendered for the use of the said company, or in payment of his expenses as agent of the said company; and that he was, by a vote of the directors of the said company, instructed to use the said notes in that manner: and that the said notes were signed by him as president, and by Edward Gillespie, treasurer of the said company, by an order of the said board of directors, and that he was appointed by the said company as their agent to make such purchases or payments; and that he as agent as aforesaid, in making such payment, had no intention to defraud any person, then he was guilty of no offence in so uttering or passing, or paying away the said notes. But if the jury should be of opinion, from the evidence in this cause, that the traverser passed away the said notes for the purpose of putting them into circulation, as a current circulating medium, and not in payment for goods, materials, services, or expenses for the use of the said company, in the ordinary course of their business as a manufacturing company, with a view to defraud or injure any person, then he was guilty of such an offence as would support an indictment.

Verdict, "Not guilty."

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

UNITED STATES (RAYMOND v.). See Case No. 11,596.

Case No. 16,125.

UNITED STATES v. READ.

[2 Cranch, C. C. 159.] [1]

Circuit Court, District of Columbia. Dec. Term, 1818.

LARCENY OF BANK-NOTES—RESTORATION TO OWNERS.

The court will not order stolen bank-notes to be restored to the person from whom they were stolen, they having been received bona fide by innocent persons in the way of business.

Indictment [against Betty Read] for stealing bank-notes, the property of Mr. Nottingham. Some of the notes, which were identified, had been passed to sundry persons, who received them innocently and bona fide in the way of business. Verdict, "Guilty."

THE COURT (THRUSTON, Circuit Judge, absent) refused to order such notes to be given up to Mr. Nottingham.

Case No. 16,126.

UNITED STATES v. READ.

[2 Cranch, C. C. 198.] [1]

Circuit Court, District of Columbia. April Term, 1820.

CRIMINAL LAW—BREAKING STOREHOUSE—LARCENY.

Upon an indictment for feloniously breaking the storehouse of Cook & Clare, and taking therefrom goods of the value of more than four dollars, contrary to the act of Virginia of the 26th of December, 1792 (section 2), which takes away the benefit of clergy, the jury may find the prisoner guilty of simple larceny.

Indictment [against William Read] for feloniously breaking the storehouse of Cook & Clare, and taking therefrom goods of the value of more than four dollars. The jury having inquired whether they might find the prisoner guilty of simple larceny upon this indictment,

THE COURT (MORSELL, Circuit Judge, doubting) informed them that they might.

The jury accordingly found the defendant guilty of stealing the goods, but not of breaking the storehouse.

Case No. 16,127.

UNITED STATES v. READING.

[Hoff. Land Cas. 18.] [2]

District Court, N. D. California. June Term, 1853.[3]

MEXICAN LAND GRANTS—CONFIRMATION.

When the conditions of a grant have been performed cy prés, though no approval has been given by the departmental assembly, the claim is entitled to confirmation.

[Claim by Pearson B. Reading for the Rancho Buenaventura, embracing a tract of six square leagues. Confirmed by the board of land commissioners, and appealed by the United States.]

S. W. Inge, U. S. Dist. Atty.
V. E. Howard, for appellee.

HOFFMAN, District Judge. Two objections to the confirmation of this claim are urged by the district attorney: (1) That the claimant had no capacity to take, being a foreigner. (2) That the conditions of the grant have not been substantially complied with.

First. The grant itself recites that the claimant was a naturalized Mexican citizen, at the time it issued, and it is shown that letters of naturalization were, in fact, issued to him. No fraud in obtaining them is pretended to have been committed by the claimant. Whether or not he was strictly entitled to receive them by Mexican law, is immaterial, for that question having been passed upon by Mexican authority, and the claimant in fact naturalized, it cannot now be contended that he was not, at the time of receiving his grant, a naturalized Mexican citizen. It is proper to observe that the proofs on this point were only furnished after the district attorney had taken his objection.

Second. With respect to the performance of the conditions, the proof shows that in August, 1845, less than one year after the date of the grant, the claimant went on the land, took possession, and selected a site for his house, which he left his servant to build. It was completed within a year, and inhabited until the person in charge was driven out by hostile Indians and the house burnt. A crop of wheat was raised on the land in 1845, and another in 1846; the latter was burnt with the house.

During the year 1845, Major Reading appears to have been called into service by General Sutter, in consequence of the political disturbances which then agitated the country. In 1846, he joined the Americans under Fremont, and continued in active service during the greater part of the year. In 1848, he returned to his rancho and has ever since resided on and cultivated it.

Under these circumstances, we look in vain for evidence of a willful abandonment of his grant, or even a neglect to perform substantially its conditions. The object of the Mexican government in making grants undoubtedly was to secure the cultivation and settlement of their vacant lands, and that object was attained in this case. Even if the conditions of the grant be construed to require the personal residence of the grantee on the land, the excuses shown by him for his omission to do so, are such as should in equity be received. In the year 1845 he was unex-

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

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

[3] [Affirmed in 18 How. (59 U. S.) 1.]

pectedly called upon to perform public duties which he had no right to decline; and the reasons for his neglect in 1846, are certainly such as should receive the favorable consideration of this government. Had no effort been made by the claimant to comply with the conditions of his grant, or had his only excuse been the existence of obstacles which equally existed and were known to him when he undertook their performance, the ruling of the supreme court in the case of U. S. v. De Villemont [13 How. (54 U. S.) 261], and other cases, would have compelled me to reject this claim. But under the facts as proved the case seems clearly within the principles laid down in Sibbald's Case, 10 Pet. [35 U. S.] 313. I think, therefore, that the partial performance of the conditions of this case within the time limited, and the excuses offered for the absence of full performance, are sufficient, under all the circumstances, to raise an equity in favor of the claimant, which entitles him to a confirmation.

[Upon an appeal to the supreme court the decree of this court was affirmed, Mr. Justice Daniel, dissenting. 18 How. (59 U. S.) 1.]

Case No. 16,128.

UNITED STATES v. REAGAN.

[15 Int. Rev. Rec. 8.]

District Court, D. Massachusetts. 1872.

INTERNAL REVENUE LAWS — LIQUOR DEALERS — KEEPING BOOKS.

1. A retail dealer in liquors who also purchases and sells malt liquors in quantities of more than five gallons at the same time is not required to keep the book provided for in Act July 20, 1868, c. 186, § 45 (15 Stat. 143).

2. The book is to be kept only by wholesale dealers in domestic spirits, and a person does not become such a dealer by taking out a wholesale license for selling ale, though he also sells domestic spirits at retail.

[This was an action at law against Robert Reagan to recover the penalty of $100, for alleged failure to keep the book required, in the case of a wholesale liquor dealer, by the internal revenue laws.]

E. P. Nettleton, Asst. U. S. Dist. Atty.

H. D. Hyde, for defendant.

LOWELL, District Judge. By section 1 of the act of April 10, 1869, c. 18 (16 Stat. 42), "every person who sells or offers for sale foreign or domestic distilled spirits, wine or malt liquors, in quantities of not less than five gallons at the same time, shall be regarded as a wholesale liquor dealer." By section 45 of the act of July 20, 1868 (15 Stat. 143), every wholesale liquor dealer must keep a book in a form to be prescribed by the commissioner of internal revenue, and make entry therein of all spirits received and sent out by him, with dates, names of buyers and sellers, gauge, proof, and many other particulars. This action is brought to recover the penalty of one hundred dollars for a neglect to keep the book; and it is agreed that the defendant had a wholesale dealer's license, but sold only ale in the quantity of five gallons or more, and sold domestic spirits by retail. The character of the required entries makes it plain that only wholesale dealers in domestic spirits are referred to in this section, and not those who buy and sell only ale, wine, and foreign spirits, nor those who deal by retail even in domestic spirits.

This defendant is not a dealer in domestic spirits by wholesale, and is, therefore, not within the section. It being admitted as it must be and always has been, that neither a wholesale dealer in ale nor a retail dealer in spirits is bound to keep the book, this case is ended, because there is nothing in the statute to impose any greater obligation in this respect on a person who carries on both trades than on two persons each of whom carries on one of them. This suit was brought to test the question, because some officers believed that the law was otherwise. But there is no ground for this opinion. The statute refers only to wholesale dealers in domestic spirits and to the entries of their business as such. The defendant is called a wholesale dealer, but the fact is that he deals by wholesale in malt liquors only. One suggestion is that he might enter his purchases as if he were a wholesale dealer, and then discharge himself by entering the same spirits as sold to himself. No doubt he might do so, but the law does not require it. He does not buy of himself, nor buy in one capacity and sell in another, nor become a wholesale dealer within section 45, by dealing largely in ale. The suggestion amounts to this—that he ought to keep half a book, though it is plain that he cannot keep a whole one, because all the sales of a retail dealer cannot possibly be entered on the book, and are not expected to be entered. There is no warrant of law for the suggestion. The simple fact is that for the purposes of assessment for special taxes, all persons are called wholesale dealers who sell either of several different articles in quantities of five gallons or more, but it is only those who deal in that way in spirits who are to keep the book; it is a mere verbal juggle to confound the two. The argument is, that because they are all called wholesale dealers in section 1 of the act of 1869, they must all be within section 45 of the act of 1868, though the terms of that section show with entire clearness that the definition is different.

It is said that the defendant has a right, under his license, to sell spirits as well as ale by wholesale. This is true, but until he does so he is not bound to the obligations of that situation. Judgment for the defendant.

Case No. 16,129.

UNITED STATES v. The RECORDER.

[1 Blatchf. 218;[1] 5 N. Y. Leg. Obs. 286; 17 Hunt, Mer. Mag. 394.]

Circuit Court, S. D. New York. July 2, 1847.

NAVIGATION LAWS — IMPORTATIONS OF COLONIAL PRODUCTS—CONSTRUCTION OF STATUTES.

1. The construction of the navigation act of March 1, 1817 (3 Stat. 351), is no longer an open one to the United States. The contemporaneous construction of the act, corroborated by an undeviating usage of thirty years, must now govern.

[Cited in Barney v. Leeds, 51 N. H. 266. Cited in brief in Burritt v. Commissioners of State Contracts, 120 Ill. 322, 11 N. E. 181.]

2. Therefore, as the United States have never, since the act of 1817, questioned importations of colonial products made in vessels of the mother country from her home ports, and as the secretary of the treasury, within six months after the passage of the act, instructed the collectors of the customs that the act allowed such importations, which instructions remained unaltered for twenty-five years, *held*, that the United States cannot now insist that the act does not allow the importation from London into New-York, in a vessel owned by British subjects residing in England, of goods, the growth, production or manufacture of the British East Indies.

3. If it were doubtful whether the trade in question was allowable under the act, or even if the intention of the act to the contrary were manifest, the contemporaneous exposition by the government, followed the concurrent practical construction, ought to govern.

4. But that construction was a correct one, and the act does not compel the productions or manufactures of the dependencies of Great Britain out of Europe, to be imported in vessels belonging to the place of production or manufacture.

5. The word "country" in the first section of the act, means the entire nation, and not merely a section or portion of territory belonging to the nation.

6. The act has in view foreign governments and nations, and their vessels, and not the localities within which the individual owners reside.

7. Nor does the act exact a direct trade from the port of production or of usual shipment, when the importation is in a vessel belonging to the country in which the goods are produced.

8. It does not appear that Great Britain prohibits the importation in vessels of the United States, of the productions of our territories or dependencies, shipped from a port of the United States to which they had been transported from the place of production.

9. Nor does it appear that vessels of the United States are prohibited by the British government from importing into this country from England, goods, wares or merchandise, the growth, production or manufacture of her East India dependencies.

This was a libel of information, which charged that the ship Recorder, not being a vessel of the United States, nor a foreign vessel truly and wholly belonging to the citizens or subjects of the British East Indies, on the 22d of May, 1847, imported from London into New York, various goods described, being the growth, production or manufacture of the British East Indies, from which place they had usually, since March, 1817, been shipped for transportation; by reason whereof, and by virtue of the act of congress of the 1st of March, 1817, the said ship, her tackle, &c., and the said cargo, became and were forfeited to the United States, and prayed process and a decree of condemnation, &c.

The claimants, averring themselves to be natural born subjects of the queen of Great Britain and Ireland, and resident in England, within the United Kingdom, pleaded specially to the libel, that the said ship, at the time, truly and wholly belonged to them, and still did; that the British East Indies were, at the time, provinces of, and part and parcel of the United Kingdom of Great Britain and Ireland, and of her majesty's dominions; and that the said goods were the growth, production and manufacture of the dominions of her majesty, and were received by them on board said ship, at the port of London, for transhipment to the port of New York; and averred their right to make such importation. The United States demurred to the special pleas, and the claimants joined in demurrer.

Benjamin F. Butler, U. S. Dist. Atty.

Francis B. Cutting, for claimants.

BETTS, District Judge. The question raised by the issue of law is, whether the trade in which this ship was employed, is inhibited by the act of congress "concerning the navigation of the United States," passed March 1, 1817 (3 Stat. 351).

The first section of the act provides "that after the thirtieth day of September next, no goods, wares, or merchandize, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture; or from which such goods, wares, or merchandize can only be, or most usually are, first shipped for transportation: Provided, nevertheless, that this regulation shall not extend to the vessel of any foreign nation which has not adopted, and which shall not adopt a similar regulation." The second section declares that the vessel and cargo coming into the United States in violation of those provisions, shall be forfeited.

It is not stated in the pleadings, nor was it admitted by the claimants on the argument, that Great Britain has adopted regulations similar to those established by this act; and the claimants, therefore, in strictness of law, may be entitled to the objection that the construction insisted on by the government does not bring the vessel and cargo within the condemnation of the statute. We think, however, that if the navigation laws of Great Britain, notoriously restraining the trade in American vessels with her colonies, within limits more strict than the regulations of this

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

statute, are not to be judicially noticed by the court, the provisions of the convention between the United States and Great Britain, of the 3d of July, 1815, must be regarded as part of the law of the case; and, in that convention, Great Britain reserves to herself, and adopts, by implication, regulations similar in this respect to those established by the act of congress in question. 8 Stat. 228.

It is admitted by the pleadings, that goods, wares, and merchandize, the growth, production or manufacture of the British East Indies, have, since the passage of the act of congress, been usually shipped for transportation from the ports of the East Indies. The district attorney, on the part of the government, accordingly contended, that the course of trade attempted in this instance, is prohibited to British vessels, first, by the direct language of the act of congress, and secondly, by its intent and policy, as gathered from antecedent and contemporaneous facts leading to its enactment.

We think, upon general principles of law, that the question as to the construction and bearing of the act of congress, in this respect, is no longer an open one to the government. In September, 1817, on transmitting the act to the officers of customs throughout the United States, the secretary of the treasury instructed them that "the term 'country,' in the first section, is considered as embracing all the possessions of a foreign state, however widely separated, which are subjected to the same executive and legislative authority. The productions and manufactures of a foreign state, and of its colonies, may be imported into the United States, in vessels owned by the citizens or subjects of such state, without regard to their place of residence within its possessions."

This exposition of the act does not appear to have been called in question or doubted by the United States until the 30th of June, 1842, when an opinion was given by the attorney general as to its meaning and operation, which, on the 6th of July, 1842, was transmitted by the secretary of the treasury to the collectors of the customs. The secretary, in his circular, instructs the collectors to be governed thereafter by the opinion of the attorney general, and "to take care that the penalties of the law are enforced in all cases coming under its provisions." The seizure in the present case is made in execution of those instructions. The attorney general intimates that the language of the first section of the act is not entirely free from ambiguity, but declares his opinion to be, "that it does not in any case authorize an indirect carrying trade by foreign ships." He says: "The proviso was intended to restrain the privilege extended to foreign vessels in the enacting clause. By this they are allowed, where they belong wholly to the citizens or subjects of that country of which the goods are the growth or manufacture, to bring these goods into our ports. By the proviso, this is confined to cases where a reciprocal privilege of the same kind is extended to our vessels." This interpretation of the act is entitled to the highest respect, and if we regarded it as removing or meeting the difficulties raised on this issue, we should give it the most careful consideration. We should probably feel considerable hesitancy in accepting, as the true key to the interpretation of the act, the idea put forth in the opinion, that the enacting clause extended a privilege to foreign vessels, and that the proviso confined it to cases where a reciprocal privilege of the same kind was extended to our vessels. It rather appears to us, that the natural reading of the act gives it a retaliatory and prohibitive character, restrained by the proviso from being enforced against any nation not having adopted like prohibitions or restrictions against the United States. But we forbear an examination of this point, because the case submitted to the attorney general had none of the features marking this. That was the case of a Belgian vessel which imported into the United States a cargo from Buenos Ayres, the product of the latter country; and the question to be decided was whether such indirect trade was open to her in articles of foreign growth or production. The attorney general was of opinion, that the act of the 1st of March, 1817, did not authorize it. The case would have been apposite, if the Belgian ship had been laden, at her home port in Europe, with productions of a Belgian colony or territory in the East or West Indies or in Africa, and if the United States were debarred from importing the same goods, except directly from the place of their production. There is no evidence before us that the treasury department, or the officers of the customs, have, since the act of 1817, arrested or questioned importations of colonial products, made in vessels of the mother country, from her home ports; and we must regard the contemporary exposition of the act given by the secretary of the treasury as the one acquiesced in and put in practice by the government from that period, except in the instance above referred to; and there is no evidence before us, that the attorney general's interpretation has ever been enforced in a case similar to this.

We hold the government, if not all other parties, to be now precluded, by that long usage and practical construction of the law, from questioning its correctness and disturbing the course of its execution. Admitting that, on the face of the act, it is doubtful whether the trade now attempted to be prosecuted can be allowed; or even conceding that the intention of the statute to the contrary is manifest, and that the treasury department misapprehended and misinterpreted its provisions, in the instructions of September, 1817, we think the settled rules of law, and the principles governing the interpretation of human language, with whatever solemnity and to whatsoever purpose it is employed, require us to adopt

and adhere to the contemporaneous construction, corroborated by an undeviating usage of thirty years, as that which must be applied to the statute and govern the case. We deem it unnecessary to state arguments or to analyze cases supporting this proposition. The principle is recognized and illustrated by the highest legal authorities. Dwar. St. 693; Bac. Abr. "Statute," I, 5; 3 Pick. 517. The supreme court of the United States has given the most solemn sanction to the doctrine, in declaring that a contemporary exposition of the constitution, practised and acquiesced in for a period of years, fixes its construction (Stuart v. Laird, 1 Cranch [5 U. S.] 299), and, in pronouncing the practical construction of a statute, to be the one which must be enforced, although clearly unauthorized by the terms of the law itself (McKeen v. Delancy's Lessee, 5 Cranch [9 U. S.] 22). In the first case, the period of acquiescence had been comparatively of short duration—about twelve years. The supreme court of Massachusetts, in a case most maturely considered, held that "a contemporaneous, is generally the best construction of a statute. It gives the sense of a community, of the terms made use of by the legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law." Packard v. Richardson, 17 Mass. 144; Rogers v. Goodwin, 2 Mass. 477.

The navigation law, adopted by congress in 1817, would be one eminently calculated to attract the notice of the business community. It provided for cases of deep public moment; and most especially has it tended to meet in some degree the embarrassment which our trade suffered from the navigation laws of Great Britain, and from her commercial regulations affecting intercourse with her colonies. These had been topics of agitating interest in the negotiations between the two countries preceding the war of 1812, and in those leading to the termination of that war and the adjustment of new relations of peace. The Fourteenth congress, which came into power with the close of the war, must have been strongly imbued with the common tone of feeling, and familiar with the state of those commercial regulations as enforced by Great Britain and with their effect upon the interests of the United States. The president, in his message to congress on the 3d of December, 1816, adverted in strong language to the state of trade with the British colonies out of Europe, its partial and injurious bearing on our navigation, and the refusal of that government to negotiate on the subject. The merchants of New-York and Portland memorialized congress on the subject, urging that importations of goods, &c., into the United States, should be prohibited, "except in vessels of the United States, or in vessels built by, and actually belonging to the citizens or subjects of the nation in which such articles have been produced or manufactured, &c." 11 Niles' Register (2d Sess.) 273; 14th Cong. Doc. No. 81.

It is not supposable, that in this aroused state of public opinion, the exposition placed by the secretary of the treasury on the act of March, 1817, could escape the notice of the executive and legislative branches of the government, and of the community at large; and that construction, therefore, under those circumstances, stands augmented with presumptions supporting its justness, stronger in force than even the lapse of thirty years' acquiescence. It is not to be credited that the president, congress, and the whole body of merchants, would permit an interpretation of the statute, which failed to carry out the spirit and meaning of its enactment, to govern our trade and revenues and it is difficult to put a case where contemporaneous construction could, with more confidence and justness, be relied upon as the expression of the true meaning of a law.

We feel, therefore, that we could, with great propriety, rest the decision of this case upon the application of that principle, as recognized and enforced in the authorities referred to, and supported by the special circumstances surrounding this law. But in a case presenting a question of grave import to our own mercantile interests, and also to the relations between the United States and Great Britain, we have considered it proper to examine with attention the statute itself, aided by the arguments of the respective counsel, and shall proceed to assign briefly the reasons leading us to the conclusion that the construction heretofore adopted is correct and should still be adhered to.

It seems to be maintained on the part of the United States, that the act should be understood to restrain the importation by British vessels, to articles, the production or manufacture of her European possessions, and to compel the productions and manufactures of her dependencies out of Europe, to be brought here in vessels belonging to the place of production or manufacture. This construction is founded upon the assumed import of the term "country," employed in the act, in connection with the supposed policy of the statute to establish a condition of reciprocity in respect to the navigation and trade of the country, where that was not already regulated by the convention of July 3, 1815.

It may be admitted that the term "country," used in the act, in its primary meaning, signifies place, and, in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections

or regions of the earth; but its metaphorical meaning is no less definite and well understood, and, in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes, not to refer to sacred writ, the word "country" is employed to denote the population, the nation, the state, the government, having possession and dominion over the country. Thus Vattel says: "The term country seems to be well understood by everybody. However, as it is taken in different senses, it may not be unuseful to give it here an exact definition. It commonly signifies the state of which one is a member." "In a more confined sense, this term signifies the state, or even more particularly the town or place of our birth." Vatt. Law Nat. bk. 1, c. 9, § 122. "When a nation takes possession of a distant country and settles a colony there, that country, though separated from the principal establishment or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws or treaties make no distinction between them, every thing said of the territory of a nation ought also to extend to its colonies." Id. bk. 1, c. 18, § 210. The whole of a country possessed by a nation and subject to its laws, forms it territories; and it is the common country of all the individuals of the nation. Id. bk. 1, c. 19, § 211.

It is very apparent, upon the provisions of the act of 1817, that congress understood and used the term "country" in the enlarged sense given by Vattel. Thus "nation," in the proviso to section 1, "foreign prince or state" in section 3, and "foreign power" in section 4, all represent, in their connection, the same idea as "country" in the first section. The special designation of "citizens or subjects," does not mark with more precision that the law had reference to political powers and agencies, than does the mere word "country,"—the thing containing, being, by a familiar form of speech, used for that which it contains; and besides, persons could, with no propriety of language, be styled "citizens or subjects of a country," without understanding "country" to mean the state or nation, and not merely a section or portion of territory belonging to the nation. So, in the preamble to the convention of 1815, "countries," "territories" and "people," are used by the two governments as having one import; and, in the first article, "territories" is employed as the correlative of "inhabitants." Other instances are frequent in our statutes and treaties and diplomatic correspondence, in which foreign countries and territories are referred to as the people, state or nation, occupying and governing them.

But, in the present case, it seems to us that the phraseology of the first section of the act, indicates, more distinctly even than the use of the ordinary word "country," that the regulation had a view to foreign governments and nations, and their vessels, and not to the localities within which the individual owners might reside or where the vessels might be employed. The expression of the law is: "In such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production or manufacture." It has been shown that, by the well known principles of public law, colonies are parts of the dominion and country of the parent state, and the inhabitants are her subjects and citizens. It follows, as a necessary consequence of that relationship, that there can be no citizens or subjects of the colonies, as distinct and separate from the mother country, and that they can possess no shipping, which, in its character, ownership or employment, will be foreign to other nations, in any sense other than as belonging to their common country. By the English law none but vessels wholly owned by British subjects resident within the British dominions, can be registered. Holt, Shipp. c. 2, §§ 3, 5; Wilk. Shipp. 240, 248. Congress thus most manifestly had reference to the nationality of vessels in the designation of them as "foreign," because the vessels must truly and wholly belong to citizens and subjects,—terms necessarily importing a state or government to which such owners appertain. This consideration, furthermore, supports the interpretation placed by the court upon the word "country," for the term is introduced into this law in connection with expressions demonstrating that the shipping interest and products of foreign states were in contemplation, and not merely of the parts or places where the products were grown or the ship owners resided.

The "Act to Regulate Trade in Plaster of Paris," passed March 3, 1817 (3 Stat. 361), strongly imports that the navigation act of the 1st of March, was intended to have application to the foreign state, and not to any of its particular members or parts, and is a significant exposition of its scope and purpose, as viewed by congress. The two enactments were of a kindred character in their subject matter, and the later one, if not both of them, was in effect aimed at the restrictions of the British navigation laws. There were circumstances in the regulation of the Nova Scotia plaster trade, particularly offensive to this country, and congress, two days after enacting the law in question, passed a special act providing: "That no plaster of Paris, the production of any country, or its dependencies, from which the vessels of the United States are not permitted to bring the same article, shall be imported into the United States in any foreign vessel." [3 Stat. 61.] It is to be remarked upon this statute, that it was wholly supererogatory, if the construction now claimed on the part of the United States for that of the 1st of March, is correct; because the interdiction of the prior law, being universal, would necessarily include this particular description of importation in foreign vessels, it being denied in return to vessels of

the United States. A strong presumption is thus afforded that congress did not intend, by the act of the 1st of March, to exact and enforce a reciprocity of privileges with foreign vessels, in the trade to and from foreign countries, in the sense of giving our vessels the right to bring foreign products from any port of a foreign country, from which the vessels of that country might import them. It denotes, moreover, that congress considered it necessary to designate dependencies as places of production, when it was intended to discriminate them from the mother country; and also impressively shows, that congress understood the antecedent act as authorizing the importation of plaster of Paris in foreign vessels, from countries and their dependencies from which the vessels of the United States were not permitted to bring the same article. That such was the understanding and aim of congress is more distinctly manifested by the act passed the succeeding session, and which will be adverted to hereafter.

The grievance under which our navigation labored was, clearly, not the carrying trade of the East India colonies of Great Britain, nor the direct trade between them and the United States. Those subjects were embraced in the then recent convention of 1815, and we had given and accepted stipulations regulating both. We yielded to Great Britain the exclusive right, as to us, to carry on the coasting and foreign trade to and from those dependencies, expressly agreeing that the vessels of the United States should not carry any article from the ports to which they were admitted, to any port or place except to some port or place in the United States where it should be unladen. Convention of July 3, 1815, article 3. In the message of the president to congress, and the memorials of merchants, before cited, no reference was made to British regulations of the East India trade, as injurious to us or objectionable. Nor was it suggested that the carrying trade of Great Britain from her colonies was cause of complaint on our part, further than that it indirectly aggravated the injury of our exclusion from the direct trade. But what Mr. Madison and the merchants pointed to as oppressive to our navigation, was its total exclusion from a direct trade with the colonies. The president said: "The British government enforcing now, regulations which prohibit a trade between its colonies and the United States in American vessels, whilst they permit a trade in British vessels, the American navigation suffers accordingly; and the loss is augmented by the advantage which is given to the British competition over the American, in the navigation between our ports and the ports in Europe, by the circuitous voyage enjoyed by the one and not enjoyed by the other." Message, Dec. 3, 1816. This wrong, of course, was committed in respect to other dependencies of Great Britain than the East Indies; for, the second section of the retaliatory act of April 18, 1818 (3 Stat. 432), specially passed to countervail the English colonial navigation laws (14 Niles' Reg. 111), saves all the provisions of the convention of July 3, 1815.

Congress, in the first measure adopted, seems to have stopped at the point of restriction to which our trade had been subjected by foreign powers, and to have intended the law to be applicable to all nations with whom we had commercial intercourse. They in substance adopted the English navigation act of 12 Car. II. c. 18. Reeves, Shipp. pt. 1, p. 107; 1 Chit. Commer. Law, c. 6. It was notorious that the operation of the act of March 1, 1817, under its proviso, would in effect be limited to British navigation. That this act was not designed to meet the mischiefs suffered by our trade under the regulations of the British colonial policy, is, therefore, indicated plainly by the subsequent act of March 3, 1817, and appears to us to be demonstrated by the provisions of the act of April 18, 1818, before referred to, and the two acts supplementary and in addition thereto, passed May 15, 1820, and May 6, 1822 (3 Stat. 602, 681). These statutes, containing the most rigorous inhibitions on the introduction, directly or indirectly, of the productions of British colonies into the United States, in British vessels, when not allowed to be imported in return with equal privileges in vessels of the United States, are plainly limited to the British West India and North American dependencies. Rep. of Comm., 11 Niles' Reg. 111. We think these various enactments, made under the suggestion of the executive, at the instance of our shipping merchants, accompanied by earnest diplomatic efforts and expostulations, in respect to the trade with the English dependencies in North America and the West Indies, conclusively support the meaning originally applied to the act of March 1, 1817, and which we adopt,—that it does not render illegal the trade attempted in this instance.

We perceive nothing in the provisions of the second clause of the first section of the act of March 1, 1817, bearing upon this question. The information avers that the productions of the East Indies have usually been first shipped for transportation from the ports of the East Indies, and the plea in substance admits the fact. Yet, as already indicated, the act, in our judgment, does not exact a direct trade from the port of production or usual shipment, when the importation is in a vessel belonging to the country in which the goods are produced. It places no limitation of place upon her right to bring the productions of her own country. If a foreign ship were to engage in such carrying trade, the act might probably require that her voyages should be from a home port, which should also be the country from which such goods, wares or merchandize can only be, or most usually are, first shipped for transportation. But we do not undertake to define the effect

or application of this clause, further than to say, that it does not restrain the exportation, in vessels owned by citizens or subjects of the country, to the port of production or usual shipment in that country.

We are also led to observe upon the proviso, that it does not appear from the pleadings, or any regulations of trade made by Great Britain which we have examined, that she prohibits the importation, in vessels of the United States, of the productions of our territories or dependencies, shipped from a port of the United States to which they had been transported from the place of production. Nor does it appear that vessels of the United States are prohibited by the British government, from importing into this country from England, goods, wares or merchandize, the growth, production or manufacture of her East India dependencies. As already intimated, therefore, there is ground for doubt, whether, upon the construction of the act assumed on the part of the government, a case is made showing any violation of its provisions by the importation in question.

Without adverting to many other topics of argument, opened by the case and discussed by counsel, the defence made by the special pleas is, in our judgment, a bar to the action; and the demurrers taken on the part of the United States must be overruled, and the vessel and her cargo be discharged from arrest and delivered up to the claimants.

[July 3, 1847. It being considered by the court, that the matter specially pleaded by the claimants to the libel and information filed in this cause, amounts in law to a bar thereof, and to the prosecution aforesaid for the matters in the said libel specified,—it is ordered by the court, that judgment be rendered for the claimants, upon the demurrer interposed on the part of the plaintiff to the plea aforesaid. It is further ordered by the court, that the said ship, her tackle, apparel and furniture, and the cargo in the pleadings specified, be discharged from arrest in this cause, and be delivered up to the claimants therein.] [2]

[Subsequently the collector of the port of New York made an application for a certificate of reasonable cause of seizure. The court decided that he was entitled to the certificate, although there had been laches in making application for the same. Case No. 16,130.]

Case No. 16,130.

UNITED STATES v. The RECORDER.

[2 Blatchf. 119.] [1]

Circuit Court, S. D. New York. Nov. 23, 1849.

NAVIGATION LAWS—SEIZURES BY COLLECTOR—CERTIFICATE OF PROBABLE CAUSE—COSTS.

1. Where a vessel was seized by a collector for an alleged violation of the navigation laws of the United States, but was discharged from arrest by this court on a hearing of the libel filed against her, on the ground that the statute had not been violated, and the collector afterwards applied to the court, under section 1 of the act of February 24th, 1807 (2 Stat. 422), for a certificate of reasonable cause for the seizure, and it appeared that the vessel was seized upon a construction of the statute adopted by the secretary of the treasury, in conformity with the opinion of the attorney-general, and that the collector acted under the instructions of the former officer in making the seizure: *Held*, that the certificate must be granted.

2. It makes no difference whether the collector acted under a mistake as to facts on which he had reason to rely, or as to the law.

3. A reasonable ground of suspicion is reasonable cause for a seizure.

[Cited in Averill v. Smith, 17 Wall. (84 U. S.) 93; Stacey v. Emery, 97 U. S. 646.]

4. Where the application for the certificate was not made until more than two years and four months after the decision of the cause, and until after the claimant had brought suit against the collector for the seizure: *Held* that, although the lapse of time was not a bar to the application, yet, as there had been laches in not making it until after the claimant had brought such suit and incurred consequent expenses, those costs must be paid him.

This was an application on the part of the collector of the port of New-York, for a certificate of reasonable cause of seizure. The application was made in pursuance of the provisions of the 1st section of the act of February 24th, 1807 (2 Stat. 422). The vessel had been seized by the collector as forfeited to the United States under the act of March 1st, 1817 (3 Stat. 351), for an alleged violation of that act, and a libel filed praying her condemnation. On demurrer to special pleas, the vessel was ordered to be discharged from arrest and delivered up to the claimants. [Case No. 16,129.] This application was not made until more than two years and four months after the decision of the cause, and until after the claimants had brought suit against the collector for the seizure.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The omission to apply for this certificate on the decision of the cause, or for the period which has since elapsed, is not set up as a bar to the application; and the motion must stand, as to its merits, on the same footing as if it had been made at the earliest appropriate opportunity.

The seizure of the vessel was made upon a construction of the act of March 1st, 1817, adopted by the secretary of the treasury, in conformity with the opinion of the attorney-general. This court decided, on the hearing of the cause, that there had been no violation of the statute, and discharged the vessel from arrest. The case turned upon the construction of the statute, and of the convention between the United States and Great Britain, of July 30th, 1815 (8 Stat. 228), and presented points of considerable intricacy and

[2] [From 5 N. Y. Leg. Obs. 286.]

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

difficulty. The official opinion of the law officer of the government to the head of a department, and the instructions of that department to the collector, afforded to that officer a fair reason for believing that the law had been infringed, and will, in a moral point of view certainly, excuse his having obeyed those instructions in seizing the vessel.

It makes no difference whether the collector acted under a mistake as to facts on which he had reason to rely, or as to the law. This has been explicitly settled by the supreme court. U. S. v. Riddle, 5 Cranch [9 U. S.] 311. The court say: "A doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact." A reasonable ground of suspicion, less than evidence which would justify a condemnation, is probable cause for a seizure. Munns v. Dupont [Case No. 9,926]; Locke v. U. S., 7 Cranch [11 U. S.] 339; The George [Case No. 5,328].

We think that the collector is entitled to a certificate of probable cause. But, as there has been laches in not applying for it until after suit has been brought by the claimants and expenses have consequently been incurred by them, we shall direct that those costs be paid them.

Case No. 16,131.

UNITED STATES v. RECTIFYING ESTABLISHMENT.

[11 Int. Rev. Rec. 46.]

District Court, N. D. Mississippi. 1870.

INTERNAL REVENUE—SPECIAL TAX—INFORMATION OF FORFEITURE.

1. In omission to pay taxes imposed by the revenue laws, intention to so omit or to defraud the United States, forms no part of the offence. The offence is constituted if it be averred and proved: 1st, that the business was carried on, and 2d, that the special tax was not paid.

2. To constitute a violation of section 44, Act July 20, 1868 [15 Stat. 143], it need only be proved that the business was carried on without payment of the special tax therein imposed. To a count alleging these facts, it is not a sufficient demurrer that it is not averred that said special tax was assessed, or that payment was demanded and refused, or neglected to be paid.

[This was an information of forfeiture against a rectifying establishment, and the fixtures, apparatus, and liquors found therein, which are claimed by S. Sloss & Co. On demurrer to the information.]

E. Hill, U. S. Atty.

Messrs. Inge, Beene, Reynolds, Boon, and others, for claimants.

HILL, District Judge. The questions now presented arise upon the demurrer of claimants to the information filed by the district attorney, on behalf of the United States.

The first and second counts, consisting entirely of recitations of the different provisions of the act approved July 20, 1868, imposing a tax on distilled spirits, tobacco, and for other purposes, need not be noticed.

The third count charges that said claimants were carrying on the business of rectifying spirituous liquors in their establishment seized, under the firm name and style of S. Sloss & Co., and were in November, 1868, furnished with the books required by the act of July, 1868, and that they knowingly and wilfully neglected and omitted to make the entries therein, as required by said act in section 45 thereof, and that thereby the property seized became forfeited to the United States. The causes of demurrer stated to this count are: 1. That no forfeiture is imposed by this section of said act. 2. That there is no time stated when the liquors were received, or sent out, for which the entries were omitted to be made. 3. That it is not stated from whom the liquors were received or to whom sent. It is admitted by the district attorney that section 45 does not make the forfeiture of the property a part of the penalty, but it is claimed that the omission stated does work a forfeiture under the 96th section of the act; but by reference to the provisions of that section, I am satisfied such is not the case. That section by its terms was intended only to embrace such portions of the act as required something to be done or forbid the doing of something, when the act done or omitted to be done was knowingly and wilfully done or omitted, and for the doing or omitting to do which no specific penalty was imposed by any other provision of the act. For the neglecting or omitting to make the entries required by section 45, the penalty is fixed by the section itself to be a fine of not less than one hundred dollars nor more than five thousand dollars, and imprisonment for not less than three months nor more than three years. Such being the case, the 96th section has no application to this offence, and this cause of demurrer is well taken; but the second and third causes are not well taken. It is not necessary to aver the time the liquors were received or sent out, or from whom received, or to whom sent; if the claimants made the proper entries, as they should have done, they have the proof to meet any charges of omission that may be attempted to be established by the proof; but for the first cause the demurrer to this count must be sustained.

The fourth count need not be noticed, it being only a recitation of the provisions of the 44th section of the act, the violation of which is averred in the fifth count.

The fifth count avers that said rectifying establishment was run and carried on by said S. Sloss & Co., from the 1st day of May, 1869, until the 1st day of July, 1869, without having paid the special tax imposed by the act approved July 20, 1868. The causes of demurrer to this count are: 1. That said count does not aver an intent to defraud the United States out of said tax. 2. That it is

not averred what particular tax was neglected to be paid. 3. That said count is too vague, general, and uncertain to require an answer. 4. That it is not averred that said special tax was assessed, or that payment was demanded and refused, or neglected to be paid. By reference to section 44, I am satisfied that three distinct offences are created. The second and third refer only to distillers, and need not be noticed here; the first is that any person who shall carry on the business of a distiller, rectifier, compounder of liquors, wholesale liquor dealer, retail liquor dealer, or manufacturer of stills, without having paid the special taxes required by law, shall for every such offence be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years; and further, that all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits or for the compounding of liquors owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in the store or other place of business of the compounder, or in any room, building, yard, or enclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, or interest of such person in the lot or tract of land in which said distillery is situated, etc., shall be forfeited to the United States. The forfeiture of the real estate is confined to distillers, but not so as to the spirits and apparatus for distillation, rectification or compounding of liquors found on the premises owned by the person carrying on either of the kinds of business enumerated. It has been earnestly urged by claimants' counsel, there is no violation of this section, unless there was an intention to defraud the United States out of the tax or some part of it; but this position is untenable. Some offences are by omission, others by commission; ordinarily the former is without intention, and most usually the latter is by intention. When intention constitutes the whole or in part the offence, it must be alleged and proved; but to constitute the offence charged in this count but two things are necessary to be averred and proved: First, the carrying on the business; and secondly, that the special tax was not paid as required by law. The second cause presents no greater difficulty; the special tax imposed by the act referred to is found in the 59th section, which is, for every 200 barrels or less, the sum of $100.50 on each barrel in excess of 200 barrels. To the third cause it may be said that there is no uncertainty or vagueness of which claimants can complain. The fourth cause presents a question of more difficulty. Although the ruling of one of my brother judges at first view would indicate that to create a violation of this section an assessment and neglect to pay the tax on demand are necessary, yet when that opinion is closely examined its principle will not apply to this case. That was in the case of a distiller who had given his bond, which had been accepted and approved, and secured the payment of the tax; and with all due respect for the learning and ability of the judge who decided the case, I must say his reasoning, even in the case stated, is far from convincing to my mind. It was with him, as he states, a question of first impression; he admits that the giving of the bond was a prerequisite to commencing business. I can see no distinction between giving of the bond and the payment of the special tax. Every man engaged in the business for which this tax is imposed is presumed to know the law, and that whether he rectifies much or little he must pay a special tax of one hundred dollars, and how much more depends upon quantity rectified, of which he is required to make his monthly reports, so that he himself knows at the end of each month what is due if anything. His books, if the proper entries are made, show exactly what is due; and if he commences without the payment of the one hundred dollars, or continues after the additional tax has become due, and without its payment, he renders himself liable to the penalties imposed. In considering these questions presented in this and similar cases, I have not turned a deaf ear to the earnest and zealous appeals made by the numerous and able counsel to the clemency of the court, to give the most liberal construction in favor of the manufacturers and dealers in spirituous liquors, and for the reason that a strict construction would not only ruin claimants and those engaged in the business, but would retard this kind of manufacture in the state. I regret exceedingly to witness the ruin of individuals, but all good men must regret still more to see the laws violated with impunity, and the tax-payers of the state and nation required to pay additional taxes for the purpose of making up for those who derive all the profits that others do, and neglect to pay their part to defray the expenses of the government which gives them the same protection. Without intending to be severe, I must say that the man engaged in making or handling an article, the use of which only tends to destroy the constitution and lives of his fellow men, would receive but little sympathy on the ground that if required to desist, it would be his financial ruin; and with all due respect for the many honorable men engaged in the manufacture and sale of spirituous liquors, it is apparent that the use of a very large proportion of the liquors made and used in this country not only ruins the consumer, but destroys the peace, happiness, and prosperity of all with whom he is connected. But little can be truthfully urged in behalf of the manufacture of the article in this state, at least when the grain that goes to make the liquor can be so much better applied to feed the hungry. Those who

see proper for the sake of the money, and no other object can be perceived, to engage in these pursuits, take upon themselves all the risks of a violation of the law; and if no penalties are imposed except those plainly provided in the law, they ought not to complain at its enforcement. The demurrer to the count is not well taken, and is therefore overruled.

The sixth count in substance, states that said claimants under the firm name of S. Sloss & Co., carried on said business as compounders of liquors, and also as wholesale dealers in liquors, without having paid the special tax therefor. The ground of demurrer stated is, that it charges two distinct offences, and that the pleading is therefore double. The averment that they carried on the business as compounders of liquors is simply surplusage. The act approved April 10, 1869 [16 Stat. 41], provides that all compounders of liquors shall be taken and held as rectifiers. The time charged in which the violation is alleged to have been committed was subsequent to the approval of the act; consequently that offence could not then have been committed, but that averment is regarded as surplusage. The count is good, as charging the parties with having carried on the business as wholesale dealers in liquors, without having paid the special tax therefor. The result, therefore, is that the demurrer to this count is not well taken and must be overruled.

The district attorney, if he desires it, may amend the sixth count by striking out so much of it as applies to the compounding of liquors. As before stated, the first, second, and fourth counts charge no offence, and require no answer, and may be regarded as surplusage, and can only become important as a question of costs, in the event that judgment should be rendered against the claimants for costs.

Case No. 16,132.

UNITED STATES v. RECTOR et al.

[5 McLean, 174.][1]

Circuit Court, D. Ohio. Oct. Term, 1850.

STATE AND FEDERAL COURTS—CONFLICTS OF JURISDICTION—CRIMINAL IN CUSTODY.

[When a person is in custody under the state authority, this court has no power to take the accused from such custody; nor has a state court power to remove, by a habeas corpus, a defendant from the custody of a court of the United States.]

[Cited in U. S. v. McClay, Case No. 15,660.]

[Cited in brief in Ex parte Holman, 28 Iowa, 94.]

The defendants [Nelson Rector and Smith A. Ellis] are charged, in this court, of counterfeiting the coin of the United States. They are now in jail, on a criminal charge under the process of the state court; and a motion is made in behalf of persons who were bail for their appearance at this term, for a habeas corpus to bring the defendants before this court, and from the custody of the state.

THE COURT said, where a person is in custody under the state authority, this court has no power to take the accused from such custody; nor has a state court power to remove by a habeas corpus a defendant from the custody of a court of the United States. A habeas corpus should be applied for to the state court with the view of bringing the defendants, by the order of that court, before this court, to answer the charges against them here; after which they can be remanded to the state court. Or, if the defendants shall be first tried in the state court, this court can direct a capias to the marshal to arrest them, so soon as they shall be discharged from their present imprisonment. Under the circumstances, no step will be taken against the bail in this court. After the release of the defendants from state custody, the bail here will be liable for their appearance. Their recognizance will be continued.

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

UNITED STATES (REDMAN v.). See Case No. 11,631.

Case No. 16,133.

UNITED STATES v. REDY.

[5 McLean, 358.][1]

Circuit Court, D. Ohio. Oct. Term, 1852.

CUTTING TIMBER ON PUBLIC LANDS—INDICTMENT.

1. Under the act of congress, it is not necessary to describe in an indictment for trespass on the public lands, every kind of timber that was cut.

2. It is sufficient to name one or more species, and in the words of the statute allege other timbers.

3. An indictment will lie for cutting timber on any of the public lands, though it may not have been reserved for naval purposes.

Mr. Mason, U. S. Dist. Atty.

Morton & Leland, for defendant.

OPINION OF THE COURT. This is an indictment for cutting walnut and other trees on the public lands of the United States. It was objected that no other timber except what is named in the indictment can be proved. But THE COURT held that under the allegation of other timber, proof other than walnut trees was admissible to the jury.

An objection was also made, that an indictment would not lie for a trespass on the public lands, unless such lands had been reserved for naval purposes. But THE COURT ruled an indictment could be sustained, under the decisions, for the cutting of timber on the public lands which had not been reserved for naval purposes.

THE COURT instructed the jury must be

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

satisfied that the person who cut the timber, was employed by the defendant, and that the timber was cut by his direction. If this be proved, the defendant is answerable, under the law, the same as if the defendant had in person committed the trespass.

The jury found the defendant not guilty.

Case No. 16,134.

UNITED STATES v. REED.

[2 Blatchf. 435;[1] 15 Law Rep. 428.]

Circuit Court, N. D. New York. Oct., 1852.

FEDERAL GRAND JURIES — SELECTION AND QUALIFICATIONS—STATE LAWS—CHALLENGES TO ARRAY —VENIRE—DISCRETION OF COURT—EVIDENCE BEFORE GRAND JURY—WITNESSES—OATH—FUGITIVE SLAVE LAW.

1. The judiciary act of September 24th, 1789 (1 Stat. 88, § 29), the act of May 13th, 1800 (2 Stat. 82), and the act of July 20th, 1840 (5 Stat. 394), adopt the state regulations respecting the procurement of grand and petit jurors to serve in the federal courts, and apply to those courts the state regulations respecting the qualifications and the exemptions of grand and petit jurors.

[Approved in U. S. v. Tallman, Case No. 16,429. Cited, contra, in U. S. v. Williams, Id. 16,716; U. S. v. Coppersmith, 4 Fed. 199; Brewer v. Jacobs, 22 Fed. 234.]

2. A challenge to a grand juror for favor, on the ground that he is the prosecutor or complainant upon a charge, or that he is a witness on the part of the prosecution, and has been subpœnaed or been bound in a recognizance as such, goes to the qualifications of the juror.

3. A challenge to the array of the grand jury in a given case, on the ground that they have been selected, summoned and returned by a person unfit to summon an indifferent jury in the case, touches the qualifications of the panel.

4. Therefore, state regulations respecting such challenges are applicable in the federal courts.

[Cited in U. S. v. Coppersmith, 4 Fed. 199; Approved in U. S. v. Tallman, Case No. 16,429.]

5. But peremptory challenges in criminal cases in the federal courts are regulated by the common law.

6. The absence of a venire for the summoning of a grand jury, in a case where it is required, is a ground of challenge to the array.

[Approved in U. S. v. Tallman, Case No. 16,429; U. S. v. Antz, 16 Fed. 123; U. S. v. Richardson, 28 Fed. 69.]

7. Challenges to the array of grand jurors are abolished by the laws of New-York, and are consequently also abolished in the federal courts in New-York.

[Cited in U. S. v. Tuska, Case No. 16,550.]

8. But still, where there has been any improper conduct on the part of the officers employed in designating, summoning and returning the grand jury, an accused person who is prejudiced thereby has his remedy by motion to the court for relief.

9. All objections, however, to the proceedings in the selection and summoning of grand jurors, over and beyond the right of challenge, are presented to the court for the exercise of its sound discretion, and, although there may be technical irregularities, it will not interpose, unless satisfied that the accused party is prejudiced by them.

[Approved in U. S. v. Tallman, Case No. 16,429; U. S. v. Terry, 39 Fed. 356.]

[Cited in People v. Lauder, 82 Mich. 135, 46 N. W. 964.]

10. Under the act of August 8th, 1846 (9 Stat. 73, § 3), providing that no grand jury shall be summoned in the federal courts except upon an order for a venire, to be made by a judge, a venire should be issued by the clerk of the court, in pursuance of the order.

11. A verbal order given by a judge to the clerk in such case is sufficient, though no order be filed or entered of record.

12. The omission to issue a venire in such case, if a ground of challenge to the array, and if taken advantage of at the proper time, is fatal to the pannel.

13. But, if not a ground of challenge, or if the time for making the challenge be passed, it is only a ground for a motion to set aside the pannel for cause.

14. The mere omission, however, to issue the venire, is not such cause, where the application is addressed to the sound discretion of the court.

15. By the law of New-York (2 Rev. St. p. 724, §§ 27, 28), persons "held to answer," that is, arrested and held to bail to appear at the term of the court at which the grand jury attends, to answer such complaints as may be presented against them, are the only persons who can challenge either the array of grand jurors, or the individual grand jurors for favor.

16. Where a party appeals to the sound discretion of the court to set aside an indictment for irregularities in drawing or summoning the grand jury, he must implicate the good faith of the officers concerned in discharging those duties.

17. Those officers, in New-York, are bound to use the state boxes and the state ballots in drawing grand jurors, as the same are furnished to them by the state officers, and have no right to change or alter either.

18. It is the uniform practice, in the federal and state courts, for the clerk and assistant of the district attorney to attend the grand jury and assist in investigating the accusations presented before them. That practice must be regarded as settled; but any abuse or improper conduct on the part of any person admitted to the grand jury, will be investigated by the court.

[Cited in State v. Baker, 33 W. Va. 322, 10 S. E. 640.]

19. The court has no power to inquire into the mode in which the examination of witnesses was conducted before the grand jury, for the purpose of invalidating an indictment.

20. It will inquire, however, into the manner of swearing the witnesses, when they are sworn in open court, and into the competency of the evidence, whether oral or documentary, and into the manner of authenticating the latter species of evidence.

21. Where witnesses before a grand jury are testifying in regard to facts about which they have previously made ex parte affidavits, it is not improper for them to consult those affidavits, to refresh their recollection; nor is there any objection to their swearing that certain facts, of which they have previously made statements on paper, are true.

22. Evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before a petit jury.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

23. On a criminal charge against several persons, for a participation in the rescue of a person from the hands of a public officer who held him in custody, the witnesses who were to testify before the grand jury were sworn in open court in the following manner: The clerk of the court was furnished with a general description of the persons accused—"The United States v. M. S. and Others"—and then administered to the witnesses this oath: "You, and each of you, do severally solemnly swear, that the evidence you shall give to the grand inquest touching charges against M. S., and others, concerning which you shall be interrogated, shall be the truth, the whole truth, and nothing but the truth. So help you God." Upon the testimony given under this oath, twenty-four bills of indictment were found against twenty-four different persons, one against each. No indictment was found against "M. S. and others," nor was any indictment found against any two persons jointly. On a motion by E. R., the defendant in one of the indictments, to quash it, on the ground that the oath was void as to him: *Held*, that the oath was free from objection.

24. A general oath to give evidence touching criminal charges to be laid before the grand jury, without reference to any particular person, is unobjectionable.

25. If the oath embraces one or more persons by name, whose cases are about to be laid before the grand jury, and in respect to which the oath is administered, and nothing more, evidence cannot be given under it in support of any accusation against others.

26. The court has no power to revise the judgment of a grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint.

[Cited in U. S. v. Terry, 39 Fed. 357.]

[Cited in brief in Com. v. Bannon, 97 Mass. 218.]

27. When, under section 6 of the act of September 18th, 1850 (9 Stat. 463), known as the "Fugitive Slave Act," a warrant is issued by competent authority, that is sufficient to justify the arrest and detention of the fugitive until he is discharged by due course of law, and any person concerned in rescuing or attempting to rescue such fugitive out of the custody of the law, subjects himself to the penalties of the act.

This was a motion to quash an indictment found in the district court at Buffalo, in November, 1851, and transmitted to this court. The indictment was founded upon the 7th section of the act of congress of September 18th, 1850 (9 Stat. 464), commonly called the "Fugitive Slave Act," and the alleged offence consisted in rescuing from the custody of the United States marshal, at Syracuse, Jerry, a person lawfully in his custody under that act, as a fugitive from service or labor. The indictment contained two classes of counts—one averring that the person rescued was held to service or labor in the state of Missouri, and was a fugitive from such service, and, as such in the lawful custody of the marshal when the rescue took place—and the other averring that the person rescued was an alleged fugitive from service or labor, and was, at the time of the rescue, in the custody of the marshal, under a warrant duly issued by a United States commissioner under said act, he having jurisdiction of the case, and proceedings being in progress before him under said warrant, to determine whether the person rescued was such fugitive or not. The motion was founded upon affidavits, and affidavits were read in opposition. The defendant [Enoch Reed] had not pleaded, but was now brought into court for the first time, and arraigned, nor had he been arrested, or held to answer in any way, before the indictment was found.

David D. Hillis, for defendant, stated two general grounds for the motion: (1) Irregularities in obtaining the grand jury by which the indictment was found. (2) Irregularities in the proceedings by and before the grand jury, after they were empanneled. Under the first point he was proceeding to urge: (1) that there were irregularities on the part of the deputy marshal at Buffalo, in drawing the grand jury; (2) that one of the grand jurors was a volunteer, not having been summoned by the deputy marshal; (3) that no order was made by the district judge for a venire to summon the grand jury, as required by the 3d section of the act of congress of August 8th, 1846 (9 Stat. 73); (4) that no venire or precept was issued by the clerk of the court to the marshal, authorizing him to summon the grand jury.

Before NELSON, Circuit Justice, and HALL, District Judge.

NELSON, Circuit Justice. A preliminary question suggests itself in this case, whether the provisions of the Revised Statutes of New York (2 Rev. St. p. 724, §§ 27, 28), prescribing the objections that may be taken to the organization of grand juries, are not binding on this court, and whether, under those provisions, we are not precluded from looking into the objections which are raised. The act of congress of July 20th, 1840 (5 Stat. 394), is the act now in force regulating the drawing and impanelling of grand and petit juries in the federal courts. That act adopts the state regulations, not only those existing when the act was passed, but any changes that might be thereafter made by the state in the mode of selecting and impanelling juries. That act also authorizes the federal courts to adopt the state regulations by rule, so far as it may be practicable to do so. And a rule (46) has been made by the district court for this district, under that act, adopting the regulations of the Revised Statutes, as respects the organization of grand and petit juries. The state law regulates the length of notice required for drawing grand jurors, the notice necessary in summoning them, their qualifications, and the numbers necessary to constitute a quorum for business, and to find a bill. For regulations as to these matters in the federal courts, we must look into the Revised Statutes. There, also, we find that the legislature has limited the objections that may be taken to grand jurors, either to the array,

or to any particular member. We desire the counsel to turn his attention to the point suggested, because, if we take the Revised Statutes as a guide in determining what objections may be looked into, the necessity of examining those now raised may be superseded. It is, therefore, proper to inquire whether we can go behind the indictment, and entertain objections to the organization of the grand jury beyond those which are prescribed by the state regulations.

Mr. Hillis read the sections of the Revised Statutes referred to (2 Rev. St. p. 724, §§ 27, 28):

"Sec. 27. A person held to answer to any criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpœnaed or been bound in a recognizance as such; and, if such objection be established, the person so summoned shall be set aside.

"Sec. 28. No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section."

By the law of New-York, certain preliminary notices are necessary in getting together a grand jury. Can these notices be entirely dispensed with, and a mere voluntary body come together as a grand jury, and yet no objection be afterwards made by a party indicted by such body? Suppose the case of a grand jury not drawn at all, but admitted to have been packed. Can a man indicted by it be cut off, by the provisions of the Revised Statutes, from raising the objection?

In the present case, a man served on the grand jury who was not summoned, and there was no order made by the district judge for a venire, and no venire issued to the marshal to summon the jury. The defendant had no notice of these irregularities before he was indicted. He was not bound over before indictment, and he now appears in court for the first time, and is arraigned. Is it a sufficient answer to his objections to say that he might have objected to any individual grand juror on the ground that he was a witness or prosecutor, and that, not having been present to challenge for those prescribed causes, he cannot now object for any others? If we are bound by the statute, a jury might be packed, because that is no ground of challenge under the statute; or half of the jury might be volunteers, instead of the jury being, as Chief Justice Marshall, in Burr's Case [Case No. 14,693], said it must be, the jury summoned; or less than the legal number of jurors might be impanelled. (NELSON, Circuit Justice. How far the Revised Statutes go upon the point of precluding objections other than those specified in the statute itself, is a question we desire to hear discussed. Are we tied down to the irregularities specified, or can we go into others?) A grand jury may have been drawn by a constable, or it may be confessedly corrupt. Are all these objections cut off by the statute of New York?

No case can be found in which a court has refused to look into the conduct of its own officers in drawing, summoning and impanelling a grand jury. People v. Hulbut, 4 Denio, 133, 136; 6 Car. & P. 90; People v. Jewett, 3 Wend. 314; and 6 Wend. 386; U. S. v. Coolidge [Case No. 14,858]; People v. McKay, 18 Johns. 212. The cases cited are authorities to show that a court will thus inquire when irregularities are brought to its notice.

The language of the Revised Statutes does not confine the party to the objections specified. It would be absurd for it to do so, where gross irregularities are perpetrated, and when, as here, a citizen applies for redress at the first opportunity.

It was decided by Chief Justice Marshall, in U. S. v. Hill [Case No. 15,364], in 1809, that neither the 29th section of the judiciary act of 1789 (1 Stat. 88), nor the act of May 13th, 1800 (2 Stat. 82), applied to grand juries in the federal courts. These acts prescribed the mode of procuring juries in all cases. They were amended by the act of July 20th, 1840, referred to, which speaks of "jurors to serve," &c. The language in all three of the acts is equally general, and, as the first two were held not to apply to grand juries, the last does not.

James W. Nye, on the same side.

The objections raised here ought not to be confounded with challenges or a right to challenge. Such right existed at common law. The statute has only pointed out what shall be causes of challenge in particular cases. The 27th and 28th sections referred to, limit the right of challenge to a person who is "held to answer," one recognised to appear at a given time and place, to answer any charge that may be preferred against him by a grand jury then and there to sit. If, in this case, the defendant had appeared at Buffalo, and objected to any grand juror for any cause specified in the statute, he would have been told that he had no right to be heard because he was not held to answer there. But, the want of a venire was not ever the ground for a challenge. (NELSON, Circuit Justice. It was a ground of challenge to the array.) Then, no one could take advantage of it, unless "held to answer." And the statute leaves it still the duty of the court, as it ever was, to see that all the steps taken in empanneling the grand jury were regular.

Our objection lies back of the grounds of challenge specified in the Revised Statutes. The proceedings of the grand jury were void for the want of a venire. The body which

found the indictment was no grand jury, but a tribunal unknown to our laws.

James R. Lawrence, Dist. Atty., and Joshua A. Spencer, for the United States.

The objections to the proceedings in empanneling the grand jury are merely a challenge to the array. If the statute of New-York regulates the challenge to the array in the federal courts, then all the objections fall to the ground. Because, if the challenge could not now be made directly, it cannot be made in an indirect way by a motion to quash.

Congress had power to say that these proceedings should be regulated by the state law, and the state had power to make the regulations it has made. The object of the law as to challenges was, that the proceedings should not be always open for a party to object to every little irregularity. And this is no hardship, because the trial before the traverse jury will always sufficiently protect the rights of a defendant.

It is said that the 27th section of the Revised Statutes referred to, only applies to persons brought into court on recognizance. But the 28th section applies to every person. "No challenge," that is, by any person, "shall be allowed," but for the two causes mentioned in the 27th section.

This regulation is, under the acts of congress and the rules of court made in pursuance thereof, applicable to the federal courts. Dist. Ct. Rule 46; Conk. Prac. (2d Ed.) 541; Cir. Ct. Rule 3, Id. 528.

The objections made here to the mode of designating the grand jurors, that one of them was a volunteer, that there was no order for a venire, and that there was no venire or precept, all come under the head of a challenge to the array, and are covered by the 28th section of the Revised Statutes.

Charles B. Sedgwick, in reply.

1. The act of congress of 1840 does not include regulations made by the state statute in regard to challenges, nor does the 46th rule of the district court apply to grand juries. 2. Admitting the 27th and 28th sections of the Revised Statutes to be applicable to the federal courts, they do not embrace the objections raised in this case.

Challenges both to the array and to the polls are to be taken before the swearing of the jury. A challenge to the array is made on account of favor, bias or relationship on the part of the officer who summons the jury, but never on account of any irregularity or want of process. There is a distinction between a challenge and a motion to set aside an indictment for irregularity. A challenge is to be brought before the court at a given point in the course of the proceedings, and to be then entirely disposed of. A want of process always appears by the record. A challenge does not. A want of process may be taken advantage of by error or certiorari; what is a ground of challenge cannot be. The want of a venire is not a ground of challenge to the array. 1 Chit. Cr. Law, 533; People v. McKay, 18 Johns. 212; Nicholls v. State, 2 Southard [5 N. J. Law] 539; Chase v. State, 1 Spencer [20 N. J. Law] 218; State v. Williams, 1 Rich. Law, 188.

The state statute limits the right of challenge to narrow bounds, and if, in consequence, all irregularities which occur before the grand jury are actually sworn are cut off, there is no way of reaching some of the worst evils. It is no answer to say that the rights of a party will be protected because he will have his trial before the petit jury. This view strikes at the provision of the constitution which requires a due presentment by a grand jury before trial. Every safeguard of the liberty of the citizen should be maintained, but, according to the construction of the prosecuting attorney, no forms are of any importance, if only the defendant be fairly tried by the petit jury.

If a venire is required, it is the foundation on which the grand jury stands. If it be wanting, there is no ground for challenge, but the grand jurors have no right to act, and their proceedings are a nullity.

Under the 27th section of the Revised Statutes, a person previously held by recognizance is the only one who can make the challenges specified. If it be held that that section embraces other persons, then those others would be cut off without an opportunity of making even the objections specified. It is said that the 28th section enlarges the exclusion. But, the two sections are to be construed together. If a person not held to answer cannot challenge or obtain relief by motion, but is shut out forever, then the provision of the constitution that a person charged with crime must be regularly presented by a grand jury, is entirely brushed away.

If, however, the court should be against us on these objections to matters occurring before the empanneling of the grand jury, we still have some objections to discuss in regard to matters which arose after the impanelling of the grand jury.

NELSON, Circuit Justice. We have looked into the question which we suggested to the counsel yesterday, and to which we desired them to turn their attention, and are prepared to express our opinion upon it. The question is, perhaps, somewhat a new one, in the aspect in which it has been presented. But the general principle, that is, the adoption of the state regulations in designating, summoning and returning grand jurors, is, so far as it is involved, not new, but has always prevailed in the federal courts since their organization. The judiciary act of 1789 (1 Stat. 88, § 29), the act of May 13th, 1800 (2 Stat. 82), and the act of July 20th, 1840 (5 Stat. 394), adopt the state regulations in respect to the procurement of grand and petit jurors to serve in the federal courts, and each of those acts, especially the act of 1840, applies to the federal

courts, in express terms, the state regulations respecting the qualifications and the exemptions of grand and petit jurors.

The question in the present case is, whether or not the provisions of the state act (2 Rev. St. p. 724, §§ 27, 28), which regulate the rights of a prisoner in the challenging of grand jurors, are applicable to the organization of grand juries in the federal courts. Those provisions are as follows:

"Sec. 27. A person held to answer to any criminal charge, may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpœnaed or been bound in a recognizance as such; and, if such objection be established, the person so summoned shall be set aside.

"Sec. 28. No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section."

We entertain no doubt that these two sections bear upon the question of the qualifications of grand jurors and their competency to serve as such. If this be so, it follows that the regulations prescribed by these sections come directly within the act of 1840, which, in express terms, adopts the state acts in regard to the qualifications and exemptions of grand jurors.

A challenge to an individual grand juror may be made on behalf of a prisoner, on the grounds that he has not the requisite freehold qualification, or that he is not of competent age, or that he has formed a fixed opinion of the guilt of the accused, or that he is his enemy, and various others which it is not necessary to enumerate. It is too obvious to require any argument that the challenges to an individual grand juror for favor, which are prescribed in the two sections in question, go directly to the qualifications of the juror as a fit and competent person to serve in that capacity.

The challenge to the array, at common law, or according to the English understanding and definition of that term, is founded on the allegation that the sheriff who summoned the grand jury was an improper and unfit person to discharge that duty, as by reason of his being related to one of the parties—his relationship to the prisoner being a ground of challenge on the part of the king—and it being a ground of challenge by the accused that the sheriff is his enemy, or that the relations between them are such that, in view of a proper administration of justice, the sheriff is not a proper person to summon the grand jury who are to be the triers of the accused. It being thus a ground of a challenge to the array, in a given case, that the jury have been selected, summoned and returned by a person unfit to summon an indifferent jury to sit and judge in the case, and it being the presumption that such a person would summon a jury not indifferent, but prejudiced, as respects the case to be heard, the challenge to the array, so authorized, necessarily, though perhaps more remotely, touches and reaches the proper qualifications of the panel to sit and act in the particular case.

So that, in point of law, as well as in truth, both the challenge to the favor and the challenge to the array, directly or indirectly, in each case, go to the determination of the proper qualifications of grand jurors, either as individuals or as a panel. And, if we are right in our premises, it follows that the two sections in question are directly within the act of congress of 1840, and are applicable in regulating the selection, summoning, returning and organization of grand juries in the federal courts.[2]

Whether the fact that a venire or a precept has not been issued by the proper authority in cases where it is required by law for the purpose of summoning and returning a grand jury, is a ground of challenge to the array, may be, perhaps, an open question, or one admitting of some observation and doubt. We are inclined to think, however, that if an objection were made on that ground, at the proper time, it might be made as a challenge to the array. Because, in judgment of law, if a grand jury has been summoned and returned by a person who is not authorized to designate, summon and return the pannel, the array of the jury thus summoned and returned would seem to be objectionable as a pannel, and therefore objectionable under a challenge to the array or to the pannel. If, then, the absence of a venire or of a precept,

[2] The principles here laid down are not applicable to peremptory challenges in criminal cases in the courts of the United States. Such challenges in those courts are regulated by the common law. U. S. v. Marchant, 12 Wheat. [25 U. S.] 480; U. S. v. Wilson [Case No. 16,730]. The acts of congress on the subject of jurors do not regulate peremptory challenges to jurors in criminal cases. The 29th section of the judiciary act of 1789 (1 Stat. 88) enacts that "jurors in all cases to serve in the courts of the United States," "shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state;" and the act of July 20th, 1840 (5 Stat. 394), provides that "jurors to serve in the courts of the United States, in each state respectively, shall have the like qualifications and be entitled to the like exemptions as jurors of the highest court of law of such state now have and are entitled to." A peremptory challenge not being made for any assigned cause, and having no reference to the qualification or exemption of the juror, the acts of congress above referred to do not cover it. And the 34th section of the judiciary act of 1789 (1 Stat. 92), which provides that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," does not apply to criminal cases. U. S. v. Reid, 12 How. [53 U. S.] 361. See U. S. v. Douglass [Case No. 14,989].

in a case where the law requires one, is a ground of challenge to the array, which we are inclined, upon principle, to think it is, the challenge is abolished by the 28th section of the statute referred to, and it is, consequently, also abolished in the federal courts.

It is very probable that the legislature of New-York were induced to abolish the challenge to the array on account of the change from the English mode in the system adopted for the purpose of designating and summoning grand jurors. In England, (and so it was in the federal courts until the act of congress was passed adopting the state regulations,) the sheriff, on receiving the venire, makes a selection of the jurors from the body of the county, at his discretion. Hence the importance that is there given to the proper qualifications of the sheriff, in respect to the parties concerned, to summon the jury; because, if he is disposed to summon one to accomplish a particular object, it is entirely within his power to do so. But, according to the system prevalent in the state of New-York, the law provides for the selection of the members of the grand jury with great care and particularity. In the first place, they are selected from the body of the county by the board of supervisors, and separate ballots containing their names are placed in a box kept by the clerk of the county, from which the requisite number are drawn by lot to form the jury, and the names so drawn are the persons to be summoned and returned. If, therefore, the law is complied with in the selection and summoning of grand jurors, none of the officers employed in the discharge of that duty can exercise any discretion whatever, and hence, no doubt, the legislature came the more readily to the conclusion that the right of challenge to the array was not of the same importance under our system as under the system that prevails in England.

We are quite free to say, however, that although the challenge to the individual members of the grand jury for favor is abolished, except in the two cases specified in sections 27 and 28 of the statute referred to, and although the challenge to the array is wholly abolished, it by no means follows that the accused has no remedy in a case where there has been any improper conduct on the part of the public officers employed in the designating, summoning and returning of the grand jury. If there has been any improper conduct on the part of those officers in performing that service, or if any fraud has been committed, through their instrumentality, in the drawing, summoning or organization of the grand jury, of course, the accused who may be prejudiced thereby has his remedy, by motion to the court for relief in consequence of such irregularity or fraud. Because, the selecting, summoning and returning of grand jurors are proceedings which are always under the general supervision and control of the court, and the court will guard them, and will see to it that no one shall be prejudiced thereby. The court has general power to preserve the pure administration of justice, and its sound discretion will always be exercised freely for the purpose of securing that end.

These objections, however, to the proceedings in the selection and summoning of grand jurors, over and beyond the right of challenge, are presented to the court for the exercise of its sound discretion. It will, therefore, look into the facts presented, on which a charge is made against the regularity of the proceedings in the selection and summoning of grand jurors in a given case, and will hear the explanations on the other side, and its judgment will be determined accordingly. If it sees that there has been improper conduct in the public officers, which has resulted prejudicially to the party accused, it is bound to set aside all the proceedings. On the contrary, although there may be technical objections to the proceedings in point of strict regularity, yet, unless the court is satisfied that they have resulted or may result to the prejudice of the party accused, it will not set them aside, because its interposition in the case will not be required on the ground of justice either to the accused or to the public.

We are inclined to think that the question, whether or not the absence of a venire, where it is required by law, forms a ground of challenge to the array, is of no practical consequence in this case; because, even if it were a ground of challenge to the array, and the party had not made the challenge, not having had notice of the facts on which it could be grounded, yet, if it could be shown that corruption or fraud had entered into the selection, summoning or returning of the grand jury, the court would hear an application for relief founded upon its power and duty to control and regulate the proceedings so as to prevent injury and oppression. The only difference between the two cases is, that where a challenge to the array is made, it is, if maintained, fatal to the pannel, and the pannel becomes invalid by operation of law; but, where the party is obliged to make a motion to set aside the pannel on the ground of improper conduct on the part of public officers, there is then no inflexible rule of law applicable to the case, but it rests in the sound discretion of the court to see that no injury results from the impropriety. The court will look, therefore, into the facts, to see whether there is any thing to satisfy their minds that the jury thus summoned is not a fit body to exercise the powers conferred upon it.

If the absence of a venire is not a ground of challenge to the array, the result is still the same. The conduct of public officers in summoning the jury, if improper, is not thereby protected, and the injured party has his remedy by motion. In either case, the appeal is to the discretion of the court.

The act of congress of 1840, in connection with the 46th rule of the district court for this district, provides for the designation, summoning and returning of grand jurors without any venire or precept of any kind. Such has been the practice in this district ever since the adoption of the 46th rule, no doubt on a sound construction of the act of 1840. That act conferred full authority on the district court to adopt the 46th rule, which simply requires a notice by the clerk, within a proper time, to the marshal, to summon the jurors. The marshal then draws and summons them according to the state regulations as far as practicable, and makes a return on the jury list, which is filed, and which furnishes all the authority necessary for impanelling the jury.

Were it not for the act of August 8th, 1846 (9 Stat. 73, § 3), no question would arise as to a venire. The act of 1846 changed the law as it then existed, but the obvious extent of that change, as designed by congress, and as appears from the face of the law, was to remove the necessity that previously existed of summoning a grand jury at every term of the circuit and district courts, with a view to diminish expenses. Therefore, the act provides that no grand jury shall be summoned for any term of a circuit or district court, unless the judge, in the exercise of his discretion, or on the application of the district attorney, shall order a venire to be issued to summon a grand jury. Now, although the purpose of that act was to get rid of the necessity for the regular attendance of a grand jury at every term, and it, therefore, devolves power on the judge to order a grand jury when necessary, yet it does provide in terms that a grand jury shall be summoned by an order for a venire, to be made by the judge. And, undoubtedly, in compliance with the terms of that act, a venire should be issued by the clerk of the court in pursuance of the order of the judge. For, although the act only says that there shall be an order for a venire, yet it implies that a venire shall issue in pursuance of the order.

In this case, a verbal order for a venire was given to the clerk. If he had fulfilled his duty he would have entered it on the records of the court. What the clerk does by the authority of the judge is done by the judge himself. It is not necessary that the judge should put an order on file, but an order, if entered by the clerk, is of the same effect as if it were entered by the judge with his own hand. Here, an order was made by the judge, and the only point of objection in the case is the omission by the clerk to issue a venire. If the omission of the venire were a ground of challenge, and the party had availed himself of it at the proper time, it would have been fatal. But, if not a ground of challenge, or if the time for making the challenge be passed, then it is only a ground for a motion to the court to set aside the pannel for cause shown. But, the mere technical omission on the part of the clerk to issue a venire is, of itself, no cause for the action of the court, where the appeal is not to the application of an unbending principle of law, but to the sound discretion of the court. The general principle is, that the omission of an officer to do his duty will not be allowed to operate to the prejudice either of an individual or of the public, unless it is shown to have operated to the prejudice of the party who complains of the omission.

It has been urged by the counsel for the prisoner, that the 27th and 28th sections of the statute referred to apply only to persons who have been arrested and held to bail to appear at the term of the court at which the grand jury attends, to answer such complaints as may be presented against them. That is true, and they are the only persons who can challenge either the array or the individual jurors for favor; because, these challenges must be made at the time the grand jurors are called and empanneled, and only those persons who are bound over to appear have the right or the opportunity to make either of these challenges. At common law, persons not bound over never had the right or the opportunity to challenge either the individual grand jurors or the array. Hence those persons could never avail themselves of any improper conduct in summoning or returning the grand jury, except by way of motion, addressed to the sound discretion of the court, to prevent any prejudice to the rights or interests of the accused.

From these views it results, that the question at this stage does not stand upon the doctrines applicable to challenges, but upon the allegation on the one side and the denial on the other, that the grand jury has been drawn, summoned and returned improperly or through fraud, and in a way that has resulted to the prejudice of the accused, and that the court is, therefore, bound, in the exercise of its sound discretion, to look into the proceedings. The question will turn on the aspect of the case as presented by the affidavits on the part of the accused and those upon the other side; and we shall be obliged to determine it upon our view, not of the technical irregularities and objections, but of the case generally, as respects justice between the individual and the public. If we shall be satisfied that there was nothing in these proceedings, although they may have been irregular, which could work to the prejudice of the accused, we cannot, in the exercise of a sound discretion, set them aside. If, however, we shall be satisfied that they have worked injustice, we shall be bound to interpose.

There are two or three questions presented by the counsel for the prisoner, which are not embraced in the view we have taken,

that the proceedings in question must be regulated by the provisions of the Revised Statutes of New York in respect to challenges. Those questions are founded on matters arising after the impanelling of the jury, and are open for observation, without regard to the application of any one of those provisions. Upon those questions we are, of course, disposed to hear any observations that counsel may desire to present, as we are also ready to hear any views they may desire to present in regard to any prejudice or injustice that has been suffered through the manner in which the jury has been designated, summoned and impanelled.

Hillis then proceeded to argue that the defendant might have been and was prejudiced by the mode of designating the grand jurors. (NELSON, Circuit Justice. The right of challenge in this case being cut off, the remedy of the party is narrowed to an appeal to the sound discretion of the court, in case any irregularities have occurred in drawing or summoning the grand jury, which may have operated to his prejudice. But the good faith of the officers concerned in discharging the duties of drawing and summoning must be implicated.) We insist that, if an officer puts himself in motion to summon a grand jury without a venire, the question of his good faith in doing so is involved. (NELSON, Circuit Justice. We have held that the question as to the venire is not open. The counsel, in order to avail himself of the ground left open, must present a case in which he implicates the good faith of the officers concerned in selecting, summoning and returning the grand jury.)

The box from which the ballots in this case were drawn, instead of having a small hole in its top for that purpose, had a sliding cover, and, when that was drawn out, the ballots were in full view of the person drawing. Nor were the ballots folded so as to render the names invisible, as required by the statute. 2 Rev. St. p. 721, § 6. These were irregularities which would almost surely work to the prejudice of the defendant, in a case where the officer drawing had any feeling in the matter. (NELSON, Circuit Justice. How can the officer be held responsible for the construction of the box and the formation of the ballots? He has no control over them. He is to take the box furnished by the state officers. He has no right to fold the ballots, or interfere with them in any way, except to draw them. He must take the state ballots. The act of congress having adopted the state box and the state ballots, and made it the duty of the officer to draw, we do not see how it can be objected that the ballots were drawn from that box and from among those ballots.)

I pass now to irregularities in the proceedings after the grand jury was sworn and empanneled.

A son of the district attorney, not sworn in any manner, was permitted to mix with the grand jury while it was in session, and to participate in the proceedings before it. Such a practice destroys the secrecy of the institution of the grand jury, which is its most important feature. No person should be permitted to be present at its sessions except the witnesses and the sworn officers of the court. (NELSON, Circuit Justice. The only point that can arise on this branch of the case is, whether the person admitted to the grand jury was guilty of any improper conduct while there, which operated unduly on the minds of the jurors. It is the uniform practice, in the federal and state courts, for the clerk and assistant of the district attorney to attend the grand jury, and assist in investigating the accusations presented before it. That has been the practice, to my knowledge, without question, ever since I have had any connection with the administration of criminal justice. In England, even the prosecutor may appear before the grand jury and aid the representative of the crown in respect to the evidence and the management of the case. We cannot, at this late day, overturn a uniform practice that has been settled for so long a time. You must assume that the attendance of the clerk of the district attorney before the grand jury, to aid in bringing out the testimony, is admissible. But, if any abuse has been committed by him, or by any other person, it is a proper subject for investigation by the court.) We charge no abuse, except the mere fact of his being present.

The next point is, as to the oath administered in open court to the witnesses who testified before the grand jury. They were sworn in this manner: "You, and each of you, do severally solemnly swear, that the evidence you shall give to the grand inquest, touching charges against Moses Summers and others, concerning which you shall be interrogated, shall be the truth, the whole truth, and nothing but the truth. So help you God." Upon the testimony given under this oath twenty-four bills of indictment were found against twenty-four different persons, one against each. No indictment was found against "Moses Summers and others," nor was any indictment found against any two persons jointly. Could any person who swore falsely against the defendant be indicted for perjury on this oath? The witnesses were not sworn at all so far as the defendant was concerned, and the indictment against him was found on testimony not on oath. Swith v. Clark, 12 How. [53 U. S.] 21; 1 Chit. Cr. Law, 322; U. S. v. Coolidge [Case No. 14,858]. The oath here was not a general oath, naming no person, and swearing the witnesses as to any matters they might be inquired of before the grand jury. But it was a particular oath, confined to a particular cause. And an indictment will be quashed unless the witnesses are regularly

sworn. 6 Car. & P. 90; State v. Roberts, 2 Dev. & B. 540; Whart. Cr. Law, 124; State v. Cain, 1 Hawks, 352; State v. Fellows, 2 Hayw. (N. C.) 340; People v. Hulbut, 4 Denio, 133.

Another objection we have to urge is, that ex parte affidavits were used before the grand jury instead of oral testimony. Those affidavits were made originally for the purpose of issuing warrants against the parties accused. On the examination of the parties after arrest, the same affidavits were again used. And they were used a third time before the grand jury, where they were read and the witnesses asked if the statements in them were correct. This was an irregularity. In an ex parte investigation as to a person not present, the witnesses should have been interrogated as to what they remembered concerning the transaction. (NELSON, Circuit Justice. Have you any authorities that go to permit an inquiry into the mode of proceeding before the grand jury in the taking of testimony, or into the weight or sufficiency of the testimony, for the purpose of invalidating an indictment? As regards the manner of swearing the witnesses, when they are sworn in open court, and the competency of the evidence, whether oral or documentary, and the manner of the authentication of the latter species of evidence, we can inquire. But, so far as regards the mode of conducting the examination of witnesses who are properly before the grand jury, we are aware of no principle which authorizes us to revise the proceedings of the grand jury. Now, the affidavits in question here were, as we understand it, used before the grand jury in the course of the examination of the witnesses themselves who made the affidavits. The witnesses were called to testify in regard to facts about which they had previously made affidavits. The affidavits were used to refresh their recollections and to save time. The witnesses, being present before the grand jury, were to be examined according to the discretion of that body, over which we have no control. It is no new practice for witnesses to consult, for the purpose of refreshing their recollections, statements which they have previously made, although they cannot swear from the statements. There is no objection, however, to the witnesses swearing that certain facts, of which they have previously made statements on paper, are true.)

Again. An ex parte affidavit, purporting to have been taken in Missouri, and to have been made by the alleged owner of Jerry, was the only evidence before the grand jury that Jerry was a slave, that he owed his alleged owner service, that he escaped from Missouri to New York, and that the person rescued was the identical Jerry who escaped. (NELSON, Circuit Justice. Evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before a petit jury. Lawrence.) The affidavit of the owner referred to was annexed to the warrant, and was the same affidavit that was used before the United States commissioner, and on which he issued his warrant in the case. It was produced before the grand jury by the commissioner himself, who was sworn as to the issuing of the warrant upon it, and the only object for which it was used before the grand jury was to show what the commissioner who issued the warrant had before him, with a view of showing that he had jurisdiction to issue it, and that it was valid in the hands of the officer, and that the rescue was in violation of the act. (NELSON, Circuit Justice. Can a motion to quash an indictment be made on the ground that the grand jury found it on insufficient evidence, or even without any evidence as to any particular point? Can you produce any authority for setting aside an indictment on that ground?) In Low's Case, 4 Greenl. 439, the affidavit of a grand juror was received to show that an indictment was found by less than twelve of the jury. In U. S. v. Coolidge [supra], an indictment was set aside on the ground that it was found on the evidence of witnesses who had not been sworn at all. (NELSON, Circuit Justice. In this last case, the inquiry was in regard to a fact that transpired, not before the grand jury, but in open court. HALL, District Judge. The affidavit of the party here, as to the alleged defect in the evidence before the grand jury, is merely on information and belief. If objection be made by the defendant, no affidavit of a grand juror, or of the district attorney, or of any person who was present before the grand jury, can be used to rebut it. If, in such a case, an affidavit on information and belief be held sufficient, every indictment must be quashed. I am aware of no case where any court has ever re-examined the evidence before a grand jury, to see whether it was sufficient. The result of such a practice would be, that in every case the court would be obliged to try a party on affidavits, on a motion to quash the indictment.) Affidavits of grand jurors are always admitted to sustain an indictment. Besides, in this case, the affidavits on the other side admit our allegation, as to the defect of evidence, to be true, by not denying it. (HALL, District Judge. Can you show, by authority, that the affidavit of a grand juror is competent for the purpose of showing that sufficient evidence was given to find the indictment? The position that your allegation is admitted because it is not denied, begs the question, which is, whether your affidavit is sufficient to call for either an admission or denial. You can have no legal information as to the fact that there was no evidence before the grand jury. The indictment itself is evidence that it was founded upon sufficient testimony, while you are speaking, upon information and belief and mere hearsay, on a subject as to which you can have legally no information. And this, you maintain, shall control an indictment

presented by a grand jury upon oath.) The doctrine suggested would go so far, if carried out, as to allow no remedy, even if it appeared that there was no proof at all before the grand jury on which to find an indictment.

Mr. Spencer, for the United States.

All the questions raised by the defendant have been disposed of except three. (1) As to the oath administered to the witnesses. (2) As to the affidavits used before the grand jury. (3) As to the want of sufficient evidence on which to find the indictment.

1. As to the oath, the argument for the defendant has proceeded on the assumption that a suit was pending between the government and the defendant, at the time the oath was administered. This is a mistake. The proceedings were merely initiatory. It was wholly unknown who would be implicated in the transaction.

The oath was equivalent to a general oath, which is sufficient. Ward v. State, 2 Mo. 120. It required the witness to speak the truth as to any matter about which he should be interrogated before the grand jury. The oath related to the matter, and it was not necessary it should be limited to any particular individual.

It is objected that separate bills were found against the several parties implicated. The transaction was a misdemeanor, in which all were principals, and all jointly and severally liable for everything that was done while they were acting in concert. Whether the indictments would be joint or several was unknown, and was a matter within the election of the district attorney, and could make no difference in the deliberations of the grand jury.

The investigation was as to one entire transaction, a simple proceeding, and the oath was, to give evidence as to any matter about which the witness should be interrogated, in relation to that transaction, respecting Moses Summers and all others who might have been engaged in it.

It is said that perjury could not be predicated on this oath. This is not so. It would sustain a count that false evidence was given against the party who complains. The witnesses were bound to speak the truth in regard to each and all of the persons concerning whom they should be interrogated.

The oath administered was the only one which could have met the exigency of the case. It cannot be that the grand jury are to suspend their proceedings, and that a witness is to stop in his testimony, every time a new name is introduced, in order that the witness may be sworn as to that particular individual.

2. As to the use of affidavits before the grand jury. Each affidavit became common law evidence the moment the witness said that the statement to which his name was signed was true. The affidavit was not read to the grand jury as an affidavit. But it was read to the witness, and, when he said it was true, the evidence was the same, in legal effect, as if given orally. It was only a brief way of examining the witness.

3. The last point is not open for inquiry. The question whether there was sufficient evidence before the grand jury on which to find the bill, is a field into which the court will not enter. It is a startling proposition, that a court is to be allowed in every case to inquire whether, on the whole, the grand jury were warranted in finding a bill.

The question here is not whether the bill was found without any evidence, but whether it was found on sufficient evidence. The indictment, presented on oath, and a matter of record, is conclusive evidence that it was found on sufficient testimony. It is only before the traverse jury that the evidence can be gone into again. When the grand jury admits improper evidence and abuses its trust, the court sometimes interferes. But the door is not open to inquire whether there was sufficient evidence on which to find the bill.

In Low's Case, 4 Greenl. 439, where the bill was found by less than twelve of the grand jury, it had no jurisdiction, and consequently the indictment was no indictment.

But, the allegation that the evidence was not sufficient is made only on information and belief. Can the court inquire into the matter on the mere suggestion of the party? What, in such case, becomes of the presumption that every public officer discharges his duty? We are under no obligation to speak in answer to such an allegation. The law does not presume that we have the means of speaking.

But the indictment contains two sets of counts—one set founded on the allegation that Jerry was a fugitive—the other on the allegation that he was an alleged fugitive, and that proceedings were in progress to determine the fact. There is no pretence that the evidence was not sufficient to support the latter class. Rosc. Cr. Ev. 233; Whart. Cr. Law, 133; Respublica v. Cleaver, 4 Yeates, 69; State v. Baldwin, 1 Dev. & B. 198; State v. Mathis, 3 Pike, 84.

Mr. Sedgwick, in reply.

There is a distinction between the oath here and a general oath. In an indictment for perjury, the oath must be stated exactly as it was administered; and, under the oath here, if an attempt were made to prove that the witness swore falsely in a proceeding against the defendant, the variance would be fatal.

There was here no joint indictment, and the oath was taken in a case in which no indictment was found, and no oath was taken in the case against the defendant. The oath was not equivalent to a general oath.

As to the admission of incompetent evidence. The accused has no access to the grand jury room, to obtain proof. He cannot compel, nor will the court permit, the grand jurors to disclose what took place before

them. Nor can he compel the district attorney or his clerk to give their affidavits as to what transpired in the grand jury room. The only way, then, that a party can know of an irregularity is by information and belief, and all that is left to him is to make a suggestion to the court. If, then, incompetent testimony vitiates an indictment, and if the only mode of reaching the question is by a motion to quash, and if the affidavit of the party on information and belief is the only foundation that can be had for the motion, then, such an affidavit requires an answer from the district attorney, who can call on the grand jurors to give evidence in reply, and can give it himself.

No witness was produced before the grand jury as to the ownership or escape of the slave. The only evidence on those points was by affidavit. The case was not one of insufficient evidence, but of a want of evidence as to vital points.

NELSON, Circuit Justice. Several of the questions raised on this motion on behalf of the defendant to quash the indictment, having been already disposed of in the course of the argument, we shall only refer to those remaining and which are deemed worthy of notice.

The first is in respect to the oath administered to the witnesses who were sent before the grand jury. They were sworn in open court, on a criminal charge against several persons for a participation in the rescue of a person from the hands of a public officer who held him in custody, and in the following manner: The clerk of the court was furnished with a general description of the persons accused,—"The United States v. Moses Summers and Others,"—and then administered to the witnesses, in due form, an oath, as follows: "You, and each of you, do severally solemnly swear, that the evidence you shall give to the grand inquest, touching charges against Moses Summers and others, concerning which you shall be interrogated, shall be the truth, the whole truth and nothing but the truth. So help you God." The argument is, that this oath was void, as it respected all persons accused before the grand jury, or, at least, as it respected all except the one particularly named; and that the evidence, therefore, given before that body, and upon which the indictment was founded, was not delivered under the sanction of an oath.

It was admitted on the argument, and we suppose there can be no doubt as to the correctness of the position, that a general oath to give evidence touching criminal charges to be laid before the grand jury, without reference to any particular person, would be unobjectionable. This seems to be the practice adopted in some of the state courts. But it is supposed that the description attempted to be given of the persons accused, in the instance before us, and to which the oath refers, vitiates it.

It is true, if this description had embraced one or more persons by name, whose cases were about to be laid before the grand jury, and in respect to which the oath was administered, and nothing more, the objection would have been well founded, so far as concerned evidence given in support of any accusation against others. It must then have been confined to complaints against the persons specified. But, in the case before us, the oath was not restricted to any specified number of persons mentioned, or to the single person named. The witnesses were sworn to give evidence touching charges against him and any other persons concerning whom they should be interrogated by the grand jury. And, if a general oath to give evidence touching charges against any and all persons concerning whom they might be thus interrogated, would be unexceptionable, of which we think there can be no doubt, it would seem difficult to maintain the objection made to the oath in this instance. It is no more general and unrestricted, as it respects the persons against whom complaints may be made before the grand inquest, in the one case than in the other, but applies to every complaint presented for examination.

There are no authorities to be found in the English books upon this question; as the mode of proceeding before the grand jury in England, in finding bills of indictment, differs from the practice usually adopted in this country. There, the indictment is drawn by the proper officers before the case is presented for examination, and the witnesses are sworn in the particular case. Here, the initiation of the proceedings is by swearing the witnesses and sending them before the grand jury, and the bill is drawn after they have agreed upon it. There is no cause pending in court, or even before the grand jury, in the legal sense of the term, at the time the witnesses are sworn, and, in consequence, no title to the proceedings can properly be given, or be necessary to the validity of the oath. If the person to be accused before the grand jury is named, it is simply for the purpose of giving application to the oath, or to the evidence under it; and, as we have seen, this application has been regarded as sufficiently direct and explicit when the oath is administered generally, and as relating to all persons concerning whom charges are to be made before that body.

Indeed, if the description of the case given to the clerk could be properly regarded as a title to the proceedings, in a technical sense, there might be some difficulty in maintaining the validity of the oath to these witnesses, as no such proceeding was then pending, in contemplation of law. An affidavit taken in a suit in which the title is given, is invalid if no such suit is pending. But, we do not regard the memorandum given to the clerk, as already referred to, in this case or in any other, even where the accused are all specially named when the oath is administered,

as a title, within the technical meaning of that term, but, as used simply for the purpose of giving application to the oath and to the evidence to be given thereafter under it. And, as the oath may be general as it respects all persons who may be accused, it would seem to follow, necessarily, that the form in which it was administered in this case is not liable to any well-founded objection.

Another ground taken in support of the motion to quash the indictment is, that there was no evidence laid before the grand jury tending to prove that Jerry was a person held to service in the state of Missouri, or that he was a fugitive from such service, at the time of his arrest and detention by the officer, or when the rescue took place, and that for this cause the indictment is founded on insufficient evidence, and, as it respects this fact, in the absence of evidence.

The indictment contains two classes of counts, one embracing an averment of these facts, and the other omitting this averment, and resting the counts upon a statement of facts showing that the magistrate had jurisdiction of the case, the issuing of the warrant, the arrest, &c.

The affidavit upon which this ground for sustaining the motion is founded, charges the absence of this evidence before the grand jury upon information and belief only—a charge, as is obvious, that may be readily made by the accused in any case where an indictment has been found, and which, if maintainable on such an allegation, might devolve upon the public prosecutor and the courts, in all cases, the necessity of going into the evidence before the grand jury, for the purpose of re-examining and revising the adjudication of that body; and this, without any authentic record of the evidence produced before them, or any means of arriving at that evidence. They are not bound to keep a record of the evidence taken before them, and are prohibited from disclosing their proceedings, and so, also, are all other persons who have access to or are permitted to participate in those proceedings. They are allowed by statute in some of the states to testify whether the evidence of a witness examined before them is consistent with or different from the evidence given by him before the court, and also upon a complaint for perjury, or upon a trial for that offence, to disclose the testimony given by any such witness; and, perhaps, evidence in these cases might be given by them at common law and without the aid of the statute. It is even doubtful whether they will be allowed to disclose the fact that a bill of indictment was found by a less number than twelve of their body, the authorities being contradictory. Rex v. Marsh, 6 Adol. & E. 236; Low's Case, 4 Greenl. 439; Rosc. Cr. Ev. 192; People v. Hulbut, 4 Denio, 133; Reg. v. Cooke, 8 Car. & P. 582; People v. Jewett, 3 Wend. 314; Whart. Cr. Law, 129. The rule is founded upon public policy, to guard against abuses that might arise from a disclosure of their proceedings to the accused, and to protect witnesses who may have given evidence before them, from being exposed to the ill-will and resentment of parties indicted. The permission to disclose in the case of a complaint for perjury, or for the purpose of contradicting a witness, seems to remove every well-grounded objection to the rule.

No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint; and the grounds and reasons which we have briefly alluded to, account sufficiently for the absence of any such precedent.

The unfitness and inconvenience of an inquiry into the evidence before the grand jury, in this ex parte and informal manner, afford, also, strong grounds of objection to any such practice. The re-examination and revision of the evidence before them, attempted to be established by ex parte statements, and upon the allegation of information and belief by interested parties, would necessarily lead to abuses in the administration of criminal justice, besides involving it in endless and profitless litigation. It pre-supposes improper, if not dishonest conduct, in the members constituting the body, and seeks to establish the fact in this loose and imperfect mode of arriving at the truth, and under circumstances in which the jurors themselves are precluded from vindicating their proceedings. For, it was well remarked by the learned judge who delivered the opinion of the court in the case of People v. Hulbut, 4 Denio, 133, upon this subject, that "the evidence which the defendant proposed to give could amount to nothing less than an impeachment of the grand jurors. They had found a bill charging the defendant with five different offences, and the substance of the offer was to show that only one offence had been proved before them." "It cannot be proper," he further observed, "to allow the jurors to be thus assailed. To permit the question to be tried over again in another place, whether the indicting jurors had sufficient evidence or any evidence to warrant their finding, would be plainly contrary to the policy of the law, which, in everything that may affect the jurors themselves, has placed the seal of secrecy upon their proceedings." These remarks were made in a case where the evidence to impeach the proceedings was offered on the trial, a mode much less exceptionable in arriving at the truth, than upon ex parte affidavits.

In the administration of criminal justice, confidence must be reposed somewhere; and it must be admitted that there are few bodies concerned in it that may be more safely trusted than the grand inquest of the county. They are selected for their intelligence, probity and character, from the whole body of the

county. In the county of Erie, whence this jury were drawn, the list out of which it was selected is limited to the number of three hundred, in a population of some one hundred thousand; a fact that more strongly illustrates the high character and qualifications of the grand inquest of the county for the discharge of the important duties devolved upon them, than any remarks we could make.

But, assuming that we may be mistaken in these views, there is another, which it is proper to notice, equally decisive of this motion. We have already stated that this indictment contains two classes of counts, and that one of them rests upon a statement of facts showing that the magistrate had jurisdiction of the case to issue the warrant, the issuing of the same, the arrest, &c. If this class of counts is well founded, and of which we entertain no doubt, then the indictment must be sustained, even conceding the absence of the evidence as alleged by the affidavits upon which the motion is founded.

By section 6 of the act of September 18, 1850 (9 Stat. 463), it is provided, that when a person held to service, &c., shall escape, &c., the person to whom such service is due, &c., may pursue and reclaim such fugitive, either by procuring a warrant from some one of the courts, judges or commissioners, for the apprehension of such fugitive, &c., or by seizing and arresting such fugitive where the same can be done without process, and by taking or causing him to be taken forthwith before such court, judge or commissioner, whose duty it shall be to hear and determine the case of such claimant, &c. If the facts, as presented before the commissioner, brought the case within his jurisdiction, and authorized the issuing of the warrant for the arrest, then the ministerial officer had full authority to make the arrest, and was bound to make it; and any person who knowingly rescued or attempted to rescue the fugitive from the custody of such officer, or aided, abetted or assisted in such rescue, was guilty of the offence charged in the indictment. The person thus arrested under the warrant is in the custody of the law, and any one engaged in the attempt to take him forcibly out of such custody, subjects himself to its penalties. When the warrant is issued by the authority of the law, it is made the duty of the marshal and deputy marshal, under heavy penalties, (section 5,) to obey and execute it; and it would be absurd to hold, that such officer could not be protected in the execution of the process, when the proof before the magistrate was sufficient, under the statute, to confer jurisdiction to issue it. In this, as in every other case of legal proceedings of an analogous description, it is sufficient to justify the arrest of the person, and his detention in custody until he is discharged by due course of law, that the warrant was issued by competent authority. The officer must be protected in its due execution, if the law of the land is to prevail; and any person concerned in the endeavor to obstruct it, or to take the person arrested forcibly out of his hands, becomes a public offender, and liable to the punishment the law annexes to the offence.

The question, whether the person is a fugitive from service or not, or whether such service is due to the claimant or not, is a question the authority to determine which, at the final hearing, is conferred by law upon the magistrate issuing the warrant—not upon the marshal, the ministerial officer, whose duty it is made to execute it. If these facts are sufficiently established before the magistrate to authorize the process, the marshal is authorized to arrest and detain the person until the hearing has taken place according to the provisions of the statute, and until the truth or falsity of the facts is established by the evidence. The question is one exclusively for the magistrate to determine, and, until that determination, the person arrested is in the custody of the law.

These principles are too common and familiar to require illustration or authority; and, in our judgment, upon any sound construction of the provisions of the act of congress on this subject, must govern the case. We have examined these provisions with some care, and the above are the deliberate conclusions at which we have arrived.

There is a remaining question in the case, which it is proper to notice—namely, the charge impeaching the conduct of Mr. Gates, the deputy marshal, whose duty it was made to draw the grand jury from the box of jurors for the county of Erie, and also to summon them for the term of the district court held at Buffalo, when this indictment was found. This charge is founded upon the affidavit, on information and belief, of one of the parties indicted. We have the affidavit of the deputy marshal, of the clerk of the county, and of a third person, who were present at the drawing and witnessed it, and they show that the charge is utterly unfounded, and most unjust as it respects this officer. The drawing took place in the usual way, and in strict conformity to the law. There is not the slightest ground for the imputation against the fairness and good faith of the deputy in the discharge of his duty, either in the drawing or the summoning of the jury, and it never should have been made.

For the reasons above given, the motion to quash the indictment must be denied.

Case No. 16,135.

UNITED STATES v. REED et al.

[13 Int. Rev. Rec. 148.]

Circuit Court, W. D. Tennessee. 1871.

INTERNAL REVENUE LAW—DISTILLERY TAX.

[Under Act July 20, 1868, the "deficiency" tax for which a distiller is liable is based on the quantity of spirits actually produced by him, unless this is less than 80 per cent. of the

capacity of his distillery, in which case the tax is to be estimated on such 80 per cent.]

[This was an action by the United States against James W. Reed and others, on a distiller's bond.]

WITHEY, District Judge (charging jury). The principal and sureties of the bond sued on are charged by the United States with liability for what is termed deficiency tax, barrel tax, and per diem tax, together with the penalty of five per cent. on the taxes alleged to be due and unpaid, and with interest of one per cent. per month on the taxes from the time they severally became due. There is no dispute, gentlemen of the jury, but that defendants are liable for the per diem tax, which the proofs satisfy you has not been paid, together with the five per cent. penalty thereon, and interest at one per cent. per month. But the defendants say Reed, the distiller, paid taxes on all the whiskey manufactured, and therefore no recovery can be had for the deficiency tax assessed for the months of December, 1868, March and April, 1869. On the other hand, the government claims that, as the distiller paid taxes only on what his returns show he actually manufactured during those months, and which was not equal to 80 per cent. of the distilling capacity of his distillery, the additional tax assessed on such deficiency, viz., on the number of gallons which the distiller's returns for those months was less than 80 per centum of the producing capacity of his distillery, as estimated under the provisions of law, is owing on this bond. The attention of the court is challenged by defendant's counsel to a decision made by the circuit court of the United States, in the Northern district of Illinois, fully sustaining the view urged by the defence, in the case of U. S. v. Singer [Case No. 16,292]. The district attorney challenges the attention of the court to the provisions of the internal tax law, of July 20, 1868 [15 Stat. 125], claiming that the decision cited is not supported by the statute. Sitting in a circuit other than that in which the case of U. S. v. Singer was decided, I am not at liberty to adopt the opinion in that case, if on examination I am satisfied that court has for any reason fallen into an error; and I am compelled to say, after carefully studying the sections of the law controlling this question, that in my judgment the distiller was liable to be assessed up to 80 per cent. of the capacity of his distillery, whether he manufactured that quantity or not.

Ordinarily, I would not, before a jury, enter into the reasons which control my judgment on the construction of a statute, but it is desirable in this instance. The rule that the different provisions of a statute should be made to harmonize if possible, is never to be lost sight of if we would reach correct views of a statute, the various provisions of which are apparently conflicting. The first section of the statute in question declares that "every proprietor of a still, distillery, or distilling apparatus shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom," etc. Section 5 requires every person engaged in distilling, or intending to so engage, to give notice in writing to the assessor of his district, stating the place, etc., of his distillery, the kind of stills, the cubic contents thereof, and all information to enable his capacity for distilling to be readily ascertained. Other sections require further specific information to be given to the assessor, designed to put that officer in possession of every fact necessary to enable him to make the exactions which the law commands from the distiller. The 10th section requires, in addition, that the assessor and another party, appointed by the commissioner of internal revenue, shall make a survey of the distillery, and "estimate and determine its true producing capacity." There is a provision that every distiller shall provide a warehouse, to be situated on and to constitute a part of his distillery premises, to be used only for the storage of distilled spirits of his own manufacture. The 19th section requires entries to be made, from day to day, in books to be kept for the purpose, showing truly, among other things, "the quantity of grain or other material used for the production of spirits," and other facts designed to aid in investigation into the quantity distilled. He is also, by this section, to render the assistant assessor, on the 1st, 11th, and 21st days of each month, an account taken from the books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced and placed in warehouse. This is made on oath. There is a provision in section 22, whereby a distiller, on notice to the assistant assessor, may suspend work and have his distillery closed and locked by the officer. During the time it is so closed no tax accrues.

In view of all these provisions, the question is, What is the proper construction of section 20, which provides "that on return of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and, to determine the quantity of spirits thus to be accounted for, the whole quantity of the materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer, brewed or fermented from grain, shall represent not less than one bushel of grain. . . . In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller . . . shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of forty gallons, and the collector shall proceed to collect the

same as in case of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than 80 per cent. of the producing capacity of the distillery, as estimated under the provisions of this act." Thus we find provisions which, viewed separately, would give different rules for taxing the distiller, but there is no conflict. The 1st section makes the distiller liable "on the distilled spirits produced." By the 19th section he is to render a sworn account of the "number of wine gallons and of proof gallons of spirits produced," etc.; and by section 20 the assessor is to determine whether the distiller has accounted in his returns for the preceding month "for all the spirits produced by him." All of which clearly indicates that the quantity actually produced is all that can be taxed. On the other hand, it will be noticed that section 5 requires the distiller to report such facts as the kind of still, the cubic contents thereof, and information for determining the capacity of distilling. Other sections have the same object. The 10th section requires a survey to be made and on it an estimate and determination of the "true capacity" of the distillery. Then the work may be suspended on notice, when the officer locks the still, etc., and no tax accrues while the works are thus closed; and finally, the last clause of section 20, that in no case shall the quantity returned by the distiller, in connection with the quantity assessed as deficit, be less than 80 per cent. of the capacity of the distillery as estimated. Here there is a clear requirement that the distiller shall pay on nothing less than 80 per cent. of the producing capacity of his distillery.

Now it is clear that these provisions can easily be reconciled. Thus, the tax shall be on the quantity actually produced whenever it equals or exceeds 80 per cent. of the producing capacity of the works; whenever, on the contrary, the amount does not equal that quantity, then the tax shall be on a quantity within 20 per cent. of the producing capacity; that is, on 80 per cent. The distiller is fully advised, by section 20, that if he enters into the distilling business he will be required to pay a tax on 80 per cent. of the producing capacity of his works. This is evidently designed to protect the government against fraud in the reports. It is no secret to any one that the devices and practices resorted to by whiskey manufacturers and others dealing in the article, to evade the tax imposed, have taxed the ingenuity of congress and of the revenue department to institute means which shall, in some degree, if not wholly, check such frauds. If the distiller is not able, for want of materials, to produce eighty per cent. of the capacity of his distillery, he may avoid any tax by giving the required notice and having his works put under lock and key. It is not presumed, under this law, that a manufacturer of spirits will keep his distillery in operation, month after month, when he is producing less than eighty per cent. of its capacity, as by doing so he must pay a larger tax than the business will afford.

The court does not see that when the actual amount produced is less than eighty per cent., the distiller must make a false return under section 19, for in such case he is to return the true amount produced, on oath, and to this he should add the deficiency, to make the eighty per cent. not in order to show actual product, but to form the basis of the tax for which he is liable to be assessed. We see no good reason for holding that the tax is to be on less than eighty per cent. of the producing capacity, simply because the provisions of the act are 'multifarious and complicated," nor because "the complex and expensive arrangements and safeguards to prevent fraud, thrown around the manufacturer of distilled spirits, could be dispensed with." The object of the legislation by congress was, undoubtedly, "to ascertain the product and thus compel payment of a tax on the whole of the article manufactured." But in view of the great inducements to fraud in rendering the accounts required to be made of actual product, and in view of frauds which had been practised, congress designed by this law to insure taxes on at least eighty per cent. of the capacity of the distillery—thus rendering the margin for frauds within the limits of twenty per cent. of capacity. Thus, it seems to me, we determine what the law is. With its justice or injustice the court has nothing to do, when once congress has said what the obligation of the distiller is. In brief, gentlemen, such are the reasons for holding that defendant Reed was bound to pay a tax on eighty per cent. of the producing capacity of his distillery; and if you find that he did not, then you will find what deficiency existed, and give a verdict for the government for the tax of fifty cents a gallon on such deficiency in each month, together with the per diem tax, the barrel tax, the penalty of five per cent., and the interest, at one per cent. a month, from the time when due.

I remark in conclusion, that my learned Brother Judge EMMONS, the circuit judge, informs me that he has already ruled in another district of his circuit substantially the point made in this case, holding in harmony with the conclusion I have reached. Thus forfeited, I cannot feel that the ruling in this case is other than is demanded by the statute.

The jury, without retiring, returned a verdict for the government for $3,049.94.

Case No. 16,136.

UNITED STATES v. REED.

[1 Lowell, 232.] [1]

District Court, D. Massachusetts. March, 1868.

VIOLATION OF INTERNAL REVENUE LAWS—DISTILLERIES—NOTICE TO COLLECTOR—INDICTMENT.

1. The doctrine of charging an offence in the words of the statute, considered.

2. Section 25 of the act of 1866 (14 Stat. 154), requiring the maker of a still to be used for the purpose of distilling, to notify the collector where such still is to be used or sent, and by whom it is to be used, and of its capacity, &c., means that the maker of every still intended for distilling spirits within the United States must notify the collector of internal revenue of the district in which it is intended to be so used, of these particulars, and an indictment should supply the omissions of the statute, and allege the offence according to its true meaning.

3. A charge that the defendant made a still, "to be used for the purpose of distilling," and that the same was removed with the defendant's knowledge and consent "to a district within the said United States, to your jurors unknown, without notifying the collector of the district in which said still was intended to be used" of the requisite particulars, is defective for not alleging affirmatively that the still was intended to be used within the United States, and for distilling spirits, and that the defendant failed to give the notice, and that the district in which it was to be used was unknown to the jury.

[This was an indictment against William G. Reed upon the charge of violating the internal revenue law. Heard on a motion in arrest of judgment.]

H. D. Hyde, Asst. U. S. Dist. Atty.

R. Morris, for defendant.

LOWELL, District Judge. The defendant has been convicted under section 25 of chapter 184 of the statutes of 1866 (14 Stat. 154) for a failure to notify a collector of internal revenue concerning a still which he had made, and now moves in arrest of judgment for alleged defects in the indictment.

The law enacts, that any person who shall manufacture any still, to be used for the purpose of distilling, shall, before the same is removed from the place of manufacture, notify the collector where such still is to be used or sent, and by whom it is to be used, and of its capacity, &c., and if he fail to give such notice, he shall be fined. It is apparent that this statute leaves much to be supplied, and is not an easy one on which to frame an indictment. It means that when a still is made for the purpose of distilling *spirits within the United States*, the maker is to notify the collector *of internal revenue of the district in which it is intended to be so used* where it is to be used or sent, and when, and by whom, &c. I have underlined the words which the statute omits, and an indictment ought to supply them, or something which, to a common intent, will fairly express the same meaning. The general rule that the words of a statute are to be followed in an indictment is not absolutely and always true. On the one hand it is often sufficient, when the statute expresses a simple and clear meaning in one way that the indictment should give the same meaning clearly in another way. And on the other hand, when the statute is itself elliptical so that its meaning must be gathered from the context or from other parts of the same or other statutes, the indictment, which has not the advantage of such aids in its interpretation, must of itself allege a crime according to the true intent of the statute. Both these exceptions or explanations amount only to this, that the statute crime may and must be laid with reasonable certainty according to the true meaning of the law.

In this case the charge in the indictment is, that the defendant made the still at his shop in Chelsea, "said still to be used for the purpose of distilling," and that after it was made, the said still was removed with the knowledge and consent of the defendant, "to a district within the said United States, which said district is to your jurors aforesaid unknown, without notifying the collector of internal revenue of the district in which said still was intended to be used" of the requisite particulars.

This indictment fails to charge affirmatively, that the still was intended to be used within the United States, or for distilling spirits, or that it was the defendant that failed to give the notice. The statement that the collector of the district in which the still was intended to be used was not notified, is not an affirmation that there was any such district. Every fact here charged would be true of a still for making petroleum, and removed from Chelsea to Boston for shipment to Canada, and of a failure by the person who removed it to notify the collector, and of a still intended to be used in a district well known to the grand jurors; for their ignorance is of the district to which it was removed which is not averred to be the same in which it was intended to be used.

I do not find Here the certainty of allegation which the criminal law, wisely or not, requires in charging an offence. Judgment arrested.

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]

Case No. 16,137.

UNITED STATES v. REESE.

[5 Dill. 405; [1] 8 Cent. Law J. 453.]

Circuit Court, W. D. Arkansas. May Term, 1879.

INDIAN LANDS—"LANDS OF THE UNITED STATES"—CUTTING TIMBER THEREON—GRANT OF LANDS BY TREATY—PENAL STATUTES.

1. The Cherokee tribe of Indians hold their lands by a title different from the Indian title

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

—by occupancy. They derived it by grant from the United States. It is a base, qualified, or determinable fee, without the right of reversion, but only a possibility of reversion, in the United States.

[Cited in U. S. v. Rogers, 23 Fed. 664; Re Wolf, 27 Fed. 615; Cherokee Nation v. Southern Kansas R. Co., 33 Fed. 905.]

2. The lands of the Cherokee tribe of Indians cannot, therefore, be held to be "lands of the United States," in the sense of the language used in section 5388 of the Revised Statutes of the United States.

3. Penal statutes are to be construed strictly. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused.

[Cited in U. S. v. Garretson, 42 Fed. 25.]

4. The treaty-making power of the United States can make a sale or grant of land to an Indian tribe without an act of congress.

5. Congress has no constitutional right to interfere with rights under treaties, except in cases purely political.

The defendant is charged, by an information preferred by the district attorney, and filed on the 5th of April, A. D. 1879, with violating section 5388 of the statutes of the United States, "by unlawfully cutting timber on lands situated and lying in the Cherokee Nation, in the Indian country, in the Western district of Arkansas, which said lands, in pursuance of law, may be reserved and purchased by the United States for military or other purposes." To the information the defendant, by his counsel, filed a demurrer, setting up (1) that the matters and things stated in the information do not constitute an offence, and (2) that this court has no jurisdiction of the offence charged in said information.

W. H. Clayton, U. S. Dist. Atty.
Duval & Cravens, for defendant.

PARKER, District Judge. The first ground of the demurrer is the only one I propose to notice; because, if this act charged against the defendant is one which is declared an offence by the section referred to in the statement of the case, I have no doubt the court has jurisdiction. Of course, if it is no offence, then it has no jurisdiction to try and punish, because there is nothing to which jurisdiction can attach. It is conceded in this case that the timber charged to have been cut by defendant was cut on lands formerly ceded by the United States to the Cherokee tribe of Indians. There are certain things which make up this offence. These are the elements which enter into it, and go to constitute it. They consist of the positive acts of the party charged, as well as the existence of other facts, all of which must exist before it can be held that the defendant is subject to the penalty prescribed by the law. In this case there must be a cutting of the timber by the defendant. It must be unlawfully done—that is, done wrongfully, without authority of the United States or her agents. These are the positive acts of the defendant. In addition thereto, the cutting must be done on lands of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes.

The pertinent question in this case is, Was this done upon "lands of the United States?" It is conceded that it was done upon lands which have been heretofore granted by the United States to the Cherokee Indians. Does the United States still have such a title to these lands as that they can be called lands of the United States in the sense of the law upon which this prosecution is based? If she has such a title thereto, this act of the defendant is a penal offence, and he is amenable to the punishment prescribed by the section above referred to. If she does not have such a title, this prosecution must fail, as being an act, although a gross outrage and a grievous wrong, not prohibited by law. To determine the question whether these are lands of the United States, requires a consideration of the title by which they are held by the Cherokee Nation. To any one who has given any attention to this subject, it presents a question not free from doubt or intrinsic difficulty. The Cherokee Nation of Indians derived their title to their lands from the United States by grant. This grant is by virtue of different treaties made between them and the United States. By the 2d article of the treaty of May 6, 1828 (Rev. Ind. Treat. 54), "the United States agrees to possess and guarantee to the Cherokees, forever, seven millions of acres of land, and this guarantee is hereby solemnly pledged." This land is a part of the country now occupied by them. On the 28th of May, 1830, congress passed a law, the 1st section of which provided that "it shall and may be lawful for the president of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove, and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from every other." Section 3 of said act provides "that in the making of any such exchange or exchanges, it shall and may be lawful for the president solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors the country so exchanged with them, and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: provided, always,

that such lands shall revert to the United States if the Indians become extinct or abandon the same." [4 Stat. 411.]

By section 1 of the treaty of the 14th of February, 1833 [7 Stat. 414], concluded between the Cherokees and the United States (Rev. Ind. Treat. 63), "the United States agrees to possess the Cherokees, and to guarantee to them forever, and that guarantee is hereby pledged, of seven millions of acres of land, to be bounded" as set out in said article. By the 3d article of the treaty of the 29th of July, 1835 [7 Stat. 478], it is provided "that the lands ceded by the treaty of the 14th of February, 1833, including the outlet and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the president of the United States, according to the provisions of the act of May 28, 1830" [Id. 311]. In pursuance of the terms of this treaty, the president of the United States, on the 31st day of December, 1838, executed to the Cherokee Nation a patent for the seven millions of acres of land, for the outlet west, as well as the eight hundred thousand acres of land granted to them by the treaty of the 29th of July, 1835. The granting clause of this patent is as follows: "Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee Nation the two tracts of lands so surveyed and hereinbefore described, containing in the whole thirteen million three hundred and seventy-four thousand one hundred and thirty-five and fourteen one-hundreths acres; to have and to hold the same, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee Nation forever; * * * subject, also, to all the rights reserved to the United States in and by the articles heretofore recited, to the extent and in the manner in which the said rights are so reserved, and subject, also, to the condition provided by the act of congress of the 28th of May, 1830, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokees become extinct or abandon the same."

Now, the question arises, what kind of a title do these several treaties, and this law of 1830, give the Cherokees to their lands? If it were not for the treaty of 1835, the treaty of 1833 is broad enough in its terms to convey a fee-simple title. This treaty is subsequent in date to the act of 1830, which contained the clause that the lands should revert to the United States if the Indians "become extinct or abandon the same." There is no limitation to the title conveyed by the United States under the treaty of 1833. If such treaty is inconsistent with the law of 1830, it repealed so much of it as was inconsistent. Besides, the act did not make any grant; it only provided that it might be done.

The treaty-making power was not limited by its terms, as the authority to make a treaty with the Indian tribes was one which the treaty-making power derived from a source higher than an act of congress, to-wit, the constitution. And by this power the president and senate of the United States could make a treaty with any Indian tribe, extending to all objects which, in the intercourse of nations, had usually been regarded as the proper subject of negotiation and treaty, if not inconsistent with the nature of our government, and the relation between the states and the United States. This treaty-making power could make a sale or grant of land without an act of congress. It could lawfully provide that a patent should issue to convey lands which belong to the United States without the consent of congress, and in such case the grantee would have a good title. Holden v. Joy, 17 Wall. [84 U. S.] 247; U. S. v. Brooks, 10 How. [51 U. S.] 442; Meigs v. McClung, 9 Cranch [13 U. S.] 11.

Congress has no constitutional right to interfere with rights under treaties, except in cases purely political. Holden v. Joy, 17 Wall. [84 U. S.] 247; Wilson v. Wall, 6 Wall. [73 U. S.] 89; Insurance Co. v. Carter, 1 Pet. [26 U. S.] 542; Doe v. Wilson, 23 How. [64 U. S.] 461; Mitchell v. U. S., 9 Pet. [34 U. S.] 749; The Kansas Indians, 5 Wall. [72 U. S.] 737; 2 Story, Const. § 1508; Foster v. Neilson, 2 Pet. [27 U. S.] 254; Crews v. Burcham, 1 Black [66 U. S.] 356; Worcester v. Georgia, 6 Pet. [31 U. S.] 562; Blair v. Pathkiller's Lessee, 2 Yerg. 407; Harris v. Barnett, 4 Blackf. 369. If title passed by the treaty of 1833, there were no restrictions upon it.

But it may be asked how could this title be held to be a title in fee when the word "heirs" was not used in the grant. At the common law, by a rule which in this country is purely technical, the word "heirs" is necessary. But this rule did not apply to grants to a corporation aggregate. The fee passed without the words "heirs or successors," because in judgment of law a corporation never dies, and is immortal by means of perpetual succession. 4 Kent, Comm. 7. This tribe of Indians may be regarded under the law as a corporation aggregate. It has been claimed by some that this title obtained under e treaty of 1833 could not be a fee-simple title because it was taken under the general law prohibiting the alienation of Indian lands, and that this was such a restriction upon the title as to take away its fee-simple character. But this act was not in existence until the 30th day of June, 1834. But it is said the treaty of 1833 did not operate to convey the lands described therein. This point is not entirely free from doubt. But it does seem to me that the words used in the 1st section of the treaty are sufficient to op-

erate as a cession of the land mentioned in the treaty: "The United States agrees to possess the Cherokees, and to guarantee to them forever, and that guarantee is hereby pledged, of seven millions of acres of land." The United States agrees to possess what? Why, the land described. And to guarantee what, and for how long? Why, not the possession, but the land, and forever. It does seem to me that this was a cession of the land described. This opinion is confirmed by the language of the 2d article of the treaty of 1835. Rev. Ind. Treat. 68. It is: "The United States also agrees that the lands above, ceded by the treaty of February 14th, 1833." This language is a recognition of the cession of the lands. If they had already been ceded to the Cherokees forever by the treaty of 1833, then the agreement by the United States, by the 3d article of the treaty of 1835, to give them a patent for these lands, according to the provisions of the act of congress of May 28, 1830, was a mere nudum pactum. It was an attempt to place a restriction upon a title which had already passed, and which, according to the 1st section of the treaty of 1833, was to be evidenced by patent.

I am unable to see what consideration passed to the Indians to induce them to take a title of less grade, under the 3d article of the treaty of 1835, when they, by the terms of the 1st article of the treaty of 1833, had one of a higher grade. Now, unless the treaty was afterwards modified by some other treaty or law, and my construction of it is the correct one, it cannot be held that these lands of the Cherokees are "lands of the United States," in the sense of the language of section 5388 of the General Statutes. Although the construction may be at fault, still it throws some light on what must have been intended by the treaty of 1835.

But suppose the condition contained in the patent is valid—let us see what effect that has upon the title. The condition is that the lands revert to the United States if the said Cherokees become extinct or abandon the same. Now, the first of these conditions is one which would be silently engrafted on the grant independent of any express words. When there is a grant, and the grantee and his heirs become extinct, the land escheats to the state, whether the grantee be an individual or a body of individuals. In an ordinary patent, absolute from the government, the implied right of escheat to the sovereign lies behind the patent. In this case it is expressed. Therefore, that expressed condition does not take away the character of a fee-simple title. But the other one, against abandonment, does. This leaves the title less than a fee. But what character does it have? Blackstone (book 2, c. 7, p. 109) says: "A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs, tenants of the manor of Dale. In this instance, whenever the heirs of A. cease to be tenants of the manor the grant is entirely defeated. * * * This estate is a fee, because by possibility it may endure forever in a man and his heirs. Yet, as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is, therefore, a qualified or base fee." Chancellor Kent (volume 4, p. 10, of his Commentaries) says: "A qualified, base, or determinable fee is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent. It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, and not merely a freehold." If the condition attached to the fee is one which is certain to happen, then there is a reversion. If such condition is one which may never happen, there is not a reversion, but only a possibility of reversion. 4 Kent, Comm. 9; 1 Washb. Real Prop. p. 90, pl. 86–88. Mr. Washburn (in vol. 1, pl. 88, p. 90) says: "If the estate be to A. and his heirs till B. comes back from Rome, the right to have it when he comes back is not a reversion, but a mere possibility. He may not come back, and if he were to die before he came back, the estate would become absolute in the grantee."

Here is a grant made to the Cherokees, having conditions which may never happen, and, in view of the facts that the Cherokee Indians are not likely to become extinct, and that they are now occupying the lands, with no intention of abandoning the same, there is only a remote possibility of either event happening. In such case there is not an absolute right of reversion in the United States, but only a possibility of reversion. There is a broad distinction between the rights of the grantee in case of a reversion and a mere possibility of reversion. When there is only a possibility of reversion, all the estate is in the feoffee, notwithstanding the qualification. 4 Kent, Comm. 11; 2 Bouv. Inst. § 1699, p. 220; 1 Washb. Real Prop. pl. 89, p. 90. This Indian title being a base, qualified, or determinable fee, with only the possibility of a reversion, and not the right of reversion, in the United States. all the estate is in the Cherokee Nation of Indians. I cannot, therefore, see how these lands, which have been depredated upon, can be held to be "lands of the United States," in the sense of the language used in section 5388.

It must be remembered that this is a penal statute, and it must, therefore, be construed strictly. In the office of the interpretation of statutes, courts, particularly in statutes that create crimes, must closely regard and ever cling to the language which the legislature has selected to express its purpose. And when the words are not technical, or words

of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular, and general signification. Statutes enjoin obedience to their requirements, and, unless the contrary appears, it is to be taken that the legislature did not use the words in which its commands are expressed in any unusual sense. Therefore, the law is settled that in construing statutes the language used is never to be lost sight of, and the presumption is that the language used is used in no extraordinary sense, but in its common, every-day meaning. The legitimate function of courts is to interpret the legislative will, not to supplement it or to supply it. The judiciary must limit themselves to explaining the law; they cannot make it. It belongs only to the legislative department to create crimes and enjoin punishments. Accordingly, courts, in the construction of statutable offences, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, as otherwise they may hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. U. S. v. Clayton [Case No. 14,814]. Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. U. S. v. Whittier [Id. 16,688]; U. S. v. Morris, 14 Pet. [39 U. S.] 694; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76; U. S. v. Sheldon, 2 Wheat [15 U. S.] 119; U. S. v. Clayton, supra. Therefore, in the face of these principles of the law so well sustained by authorities, if it does not clearly appear to the judicial mind that these lands granted to the Cherokee Indians are "lands of the United States," in the sense intended by its makers to be attached to the statute, then the act of the defendant is not one covered by the terms of the law, and he is not subject to its penalty. It is to be regretted that it cannot be held to be an offence, as the complaints of depredations upon the timber of the Indian lands are constantly being made to officers of this court. There is a class of men on the borders of the Indian country who revel in the idea that they have an inherent, natural right to steal from the Indians. This right is not to be questioned. They think it a tyrannical use of authority if they are interfered with.

There should be a law enacted, the penalty of which would teach persons that Indians have rights which should be respected as well as the rights of citizens. This is with the law-making power, and not with this court. That it is the right of congress to pass a law protecting the timber on the lands of these people, is clear; the duty of congress to do so, in the face of the pledges of the government of the United States, made by her treaties and her laws, to protect these Indians from unlawful intrusions from without, and from violations of their rights by any and all persons, is manifest.

If the law-making power will give us a law, we will lay its mailed hand upon its violators in such a way that the timber in that Indian territory will be protected from the rapacity of those who are now stealing it. It remains with us to execute the law, not to make it. And it is with regret that we must hold in this case that the offence, for the reasons already given, is not within the terms of section 5388. The demurrer is, therefore, sustained. Judgment accordingly.

Case No. 16,138.

UNITED STATES v. REESE.

[4 Sawy. 629.] [1]

Circuit Court, D. California. Oct. 9, 1866.[2]

FRAUD AGAINST UNITED STATES — FORGERY OF MEXICAN LAND GRANT PAPERS — PERJURY — JURISDICTION OF FEDERAL COURTS—BAIL.

1. The first section of the act of March 3, 1823, for the punishment of frauds committed on the government of the United States (3 Stat. 771), applies only to instruments altered or forged for the purpose of obtaining moneys from the United States, their officer or agents.

[Cited in U. S. v. Moore, 60 Fed. 739.]

[Distinguished in U. S. v. Spaulding, 3 Dak. 85, 13 N. W. 362.]

2. There was no act of congress, previous to that of May 18, 1858 (11 Stat. 290), covering cases of the altering or forging of documents or title-papers, or the uttering or publishing them as true, for the purpose of establishing against the United States a claim to land in California.

3. It seems that an indictment found for an act which does not constitute an offense under the laws of the United States, is still "a suit, controversy, matter or cause depending," in which perjury may be committed.

4. Although there are no offenses against the United States, except such as are declared by special enactment, and the criminal jurisdiction of the circuit court is in this respect limited, yet it has jurisdiction to inquire into and pass upon all acts charged by competent authority to be public offenses, and presented to it by such authority for its consideration.

[Cited in U. S. v. Eldredge (Utah) 14 Pac. 45.]

5. If, whilst objections to an indictment are under consideration, the accused is admitted to bail, the recognizance will be of binding obligation though the indictment should eventually be adjudged void.

[Cited in U. S. v. Evans, 2 Fed. 150.]

[Cited in U. S. v. Eldredge (Utah) 13 Pac. 679.]

6. A recognizance of bail embracing the amounts required upon two separate indictments, is not on that account objectionable.

This was an action upon a recognizance of bail, and was tried upon stipulation of the parties by the court without the intervention of a jury, at the June term of 1866. The court found for the United States. The facts are sufficiently stated in its opinion.

---

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

[2] [Reversed in 9 Wall. (76 U. S.) 13.]

Delos Lake, U. S. Atty. for the United States.

E. Casserly, for defendant.

FIELD, Circuit Justice. In December, 1856, Jose Y. Limantour was indicted by the grand jury of the circuit court of the United States for uttering and presenting as true to the board of land commissioners, created under the act of March 3, 1851 [9 Stat. 631], to ascertain and settle private land claims in the state of California, a false writing, purporting to be a grant of certain described lands from the Mexican government, with intent to defraud the United States, knowing the same to be false. To this indictment Limantour appeared and pleaded not guilty. He was then admitted to bail on motion of his counsel, the amount being fixed at $30,000.

Soon after the issue was thus joined, a motion was made on the part of the United States to set the case for trial early in January, 1857. This motion was resisted, and at the same time application was made on the part of Limantour for a continuance of the cause, and in support of the application his affidavit was read, in which he asserted the genuineness of the grant alleged by the United States to have been forged; and that it was made at the time and by the officers as averred by him. For alleged perjury in making this affidavit, the grand jury soon afterward found a second indictment against him. To this indictment he also appeared and pleaded not guilty, and upon the motion of his counsel was admitted to bail, its amount being fixed at $5000.

By order of the court the recognizance of bail was taken in one instrument, the obligation of the sureties being the amount required in both cases. The defendant Michael Reese and one Manuel Castro became the sureties of Limantour, binding themselves jointly and severally in the sum designated. It is upon this recognizance that the present action is brought. It recites the finding and presentment of the two indictments, the commitment of the defendant thereon, and the order of the court for his discharge on furnishing the required bail, and is conditioned that the defendant shall personally appear at the next term of the court, and at any subsequent term thereafter, "to answer all such matters and things as shall be objected against him," and to abide the order of the court, and not depart therefrom without leave first obtained. This recognizance is dated the fifth of February, 1857.

At a subsequent term of the circuit court in August of that year, the defendant appeared for trial in both cases, with witnesses in attendance from the city of Mexico. The district attorney thereupon moved for a postponement of the trials. At this time two cases of Limantour for land claimed under alleged Mexican grants were pending in the district court of the United States, on appeal from decrees of the land commissioners, by whom the claims had been confirmed. One of the cases was for a claim under the alleged forged grant. The witnesses in attendance were persons who had been brought from Mexico to testify in the land cases. It was therefore stipulated between the counsel of the parties: on the one side, that the postponement desired by the government should be assented to; and on the other side, that neither of the criminal actions should be brought to trial until after final decrees had been rendered in the two land cases by the district court; and if both or either of the decrees were in favor of the claimant, the criminal actions should be dismissed by the United States; but if the decrees were adverse to the claimant, reasonable time should be given him to prepare for the trial of the criminal actions, and to procure the attendance of such of his witnesses as resided without the state of California. The stipulation was entered on the minutes of the court, and the postponement desired was granted in accordance with its terms.

In December, 1858, the district court, by its decrees, rejected the claims of Limantour in the land cases [see Case No. 15,601]; and soon afterward the district attorney moved that the criminal actions be set for trial. After repeated adjournments, the motion was finally argued and decided in March, 1859, and the trials directed for the twenty-fifth of April following. On the latter day the two cases were called, but Limantour did not answer to the call in either of them, and the recognizance of his bail was ordered to be forfeited.

As a defense to the action, the defendant relies upon several grounds, the principal of which are: First, that the acts charged in the two indictments did not, at the time of their alleged commission, constitute any offense under the laws of the United States; and as a consequence, that the indictments and all proceedings thereunder, including the requiring of bail for the appearance of the defendant, were void; second, that if the indictment and proceedings thereunder were not void, the stipulation of August, 1857, for a postponement of the trial, released the sureties from liability on their recognizance; and, third, that the recognizance was void in embracing the amount required as bail upon both indictments.

The acts charged in the first indictment, the uttering and publishing as true the alleged forged grant, were undoubtedly deemed to fall within the class of offenses defined by the first section of the act of congress of March 3, 1823, "for the punishment of frauds committed on the government of the United States," and not under the act of March 3, 1825, as supposed by the counsel of the defendant. That section provides that "if any person or persons shall falsely make, alter, forge or counterfeit; or cause or procure to be falsely made, altered, forged or counterfeited; or willingly aid or assist in the false

making, altering, forging or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents any sum or sums of money; or shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered or counterfeited deed, power of attorney, order, certificate, receipt, or other writing, as aforesaid, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of or in relation to any count or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, every such person shall be deemed and adjudged guilty of felony; and being thereof duly convicted, shall be sentenced to be imprisoned and kept at hard labor for a period not less than one year, nor more than ten years, or shall be imprisoned not exceeding five years and fined not exceeding $1000." 3 Stat. 771.

The indictment uses the language of the second paragraph of this section, and was supposed to cover a case embraced by its terms. But we are of opinion that the section applies only to instruments altered or forged for the purpose of obtaining moneys from the United States or their officers or agents. The first paragraph covers the altering or forging of such instruments; the second paragraph the uttering or publishing them as true; and the third their transmission or presentation to any office or officer of the government. Neither of them applies to an instrument forged for the purpose of obtaining a cession of land from the United States, or the confirmation of a claim to land alleged to have been granted by the Mexican government. There was no act of congress which reached a case of this nature until the eighteenth of May, 1858, when an act was passed covering all cases of the altering or forging of documents or title papers, or uttering or publishing them as true for the purpose of establishing against the United States any claim to lands in California. 11 Stat. 290. That act was passed, it is believed, in consequence of the defects in existing legislation, suggested by this case of Limantour.

As to the second indictment, there is much greater doubt whether the act alleged was not in fact at the time an offense under the laws of the United States. The objection is, that perjury cannot be affirmed of any testimony under oath upon an indictment for an act not constituting an offense, a position to which we are not prepared to yield our assent. The act of 1790 speaks of this offense as one which may be committed "in any suit, controversy, matter, or cause depending in any of the courts of the United States." We do not perceive how it can justly be said that the first indictment, with issue joined upon a plea of not guilty, did not constitute "a suit, controversy, matter, or cause depending."

But admitting that neither of the indictments allege acts constituting a public offense at the time of their commission, and that on a demurrer it would have been so held, the conclusion asserted by counsel does not follow that all the subsequent proceedings of the court thereon, including the requiring of bail for the appearance of the defendant, were void.

The circuit court of the United States has cognizance of all crimes and offenses cognizable under the authority of the United States. Judiciary Act of 1789, § 11 [1 Stat. 78]. Its cognizance is exclusive in capital cases and concurrent with that of the district court in all other cases; and although there are no offenses against the United States—except such as are declared by specific enactment, and the criminal jurisdiction of the circuit court is in that respect limited, yet the court having jurisdiction to inquire into all public offenses thus declared by law, must, as a necessary consequence, have jurisdiction to inquire into and pass upon all acts charged by competent authority to be public offenses, and presented to it by such authority for its consideration. The authority provided by law for making such charges and presenting them to the court is the grand jury of the district. Its special duty is to inquire into all public offenses against the United States committed or triable within the district, and to make true presentment of them to the court. The law does not assume the infallibility of this body, but provides for its possible errors arising from imperfect knowledge of the statutes, or a misapprehension of their provisions, or ignorance of the established forms of procedure. It therefore subjects such action, whatever it may be, legal or illegal, valid or void, to the supervision and correction of the court. When its action is presented, the jurisdiction of the court attaches to consider it, and to determine its validity. But the time and manner in which its validity shall be considered must depend upon the business pending and the established practice of the court. To the proper and efficient administration of justice there must be some order and system in all judicial proceedings. The party complained of has a right to be heard, and of securing the aid of counsel, if desired; time, therefore, to prepare his objections and procure his counsel must be afforded. If he claim that the action of the grand jury is illegal or void, he may ask to have the indictment quashed, or he may interpose a demurrer, or he may plead not guilty to the indictment and reserve his objections until the trial. But whether he pursue one course or the other, some time will be consumed, amounting in the great major-

ity of cases to several days. If whilst these proceedings are going on, and the objections taken are under advisement, the defendant asks a discharge on bail, it is competent for the court to allow it, and the recognizance of bail given in such case will be a binding obligation, even though the indictment should eventually be adjudged void. The authority of the court to pass upon the validity of the action of the grand jury, and over the defendant whilst this validity is under consideration, is not an usurped authority, but an authority essential to the exercise of the general jurisdiction with which the court is clothed over all offenses cognizable under the laws of the United States.

The error of the argument of the learned counsel of the defendant consists in not distinguishing between the action of a court invested with this general criminal jurisdiction, and the action of a court having no criminal jurisdiction whatever. In the one case authority to inquire whether an act alleged to be an offense be in truth such offense, is an essential accompaniment of the jurisdiction over the act when once it is adjudged to be an offense. In the other case the attempt to inquire into the matter at all would be an act of pure usurpation. The argument of the counsel would be good if applied to criminal proceedings commenced in a probate court of the state, that court having no criminal jurisdiction whatever. If it were good when applied to criminal proceedings in the circuit court, such proceedings would be a constant source of apprehension to the officers of the court, and would often prove more injurious to them than to the defendant himself. And this singular result would follow: if the court should refuse to look into the indictment and to pass upon its validity, the judges would be justly censurable for neglect of duty; but if the court detained the defendant in custody whilst considering its validity, the judges would be liable to an action for false imprisonment if their ultimate decision should be that the indictment was void.

It follows that the court had authority to require bail of Limantour; and the recognizance in question is not void by reason of the insufficiency of the acts charged in the indictments. The condition annexed to the instrument is usual in such cases; and is not fulfilled unless the defendant personally appear as provided; unless he answer all matters then objected against him; unless he abide the order of the court; and unless he remain before the court until permitted to depart. A compliance with one or more of these provisions will not suffice; he must comply with all of them. It often happens that the indictment under which an arrest is ordered is set aside, or a nolle prosequi is entered, or a verdict of acquittal after trial is had, and yet in the progress of the case such evidence is developed as shows that an offense has been committed by the defendant which requires other and different proceedings. The condition of the recognizance is intended to meet all possible disclosures of crime, and to secure the appearance of the defendant to answer "all matters and things which may be objected against him;" and therefore he is not allowed to depart without leave of the court, although the particular ground of his original arrest may be removed. Hawk. P. C. bk. 2, c. 15, § 84; State v. Stout, 11 N. J. Law, 124; Champlain v. People, 2 N. Y. 82. In this case the defendant, even if he had succeeded in obtaining a discharge from arrest upon the indictments, might perhaps have been detained to answer a charge for perjury or subordination of perjury in the land cases before the board of commissioners or the district court.

The stipulation of August, 1857, as observed by counsel, is most unusual in all its features, and yet under the circumstances may be justified. The grant alleged to be forged, and in swearing to the genuineness of which the forgery was charged, had been adjudged valid by the board of land commissioners, and the appeal from its decree was at the time pending undetermined. The postponement of the trial until this appeal was disposed of was a very proper exercise of the power of the court, provided the accused waived his right to a speedy trial and assented to the postponement. In this act we do not perceive any ground upon which the bail can claim exemption from liability on their recognizance. They were not bound to continue as sureties any longer from this circumstance than without it. They could at any time afterward have surrendered the defendant and been exonerated. In the theory of the law he was in their custody, as jailors of his own choosing, subject to be surrendered at any moment. If they failed to exercise their power over him they must bear the responsibility attached to the position they voluntarily assumed.

The objection that the decrees of the district court were not final at the time of the alleged forfeiture of the recognizance, because they were for five years subsequently subject to appeal to the supreme court, and to reversal by that tribunal, is untenable. The stipulation evidently had reference to the immediate action of the district court upon the appeals pending, and not to its possible ultimate action after the cases had been passed upon by the supreme court; nor did it contemplate a delay of five years from the entry of the decrees before the trials should be had in case no appeal to that tribunal was taken.

The objection to the recognizance that it embraced the amount required as bail upon both indictments is equally untenable. The indictments constituted the occasion for the arrest of the defendant, but the recognizance was not that he should appear in court and answer them, but that he should appear and answer "all matters and things" which might be objected against him. The fact that there were two indictments undoubtedly governed

the court in fixing the amount of the bail; they constituted the moving cause, so to speak, of the action of the court; but they did not control the form of the recognizance, or determine the extent of the liability of the sureties. They are referred to in the instrument by way of recital to the conditions annexed, but in no respect qualify or restrain them.

We have given to the objections of the learned counsel of the defendant the most careful consideration, but are unable to perceive in them anything which will defeat a recovery by the plaintiffs. Judgment will, therefore, pass for the United States for the amount of the recognizance: namely $35,000, and costs.

NOTE. September 24, 1866. This case was taken to the supreme court of the United States, and was there reversed on a single point, viz.: that the stipulation of August, 1857, for a postponement of the trials until the appeals on the land cases were disposed of, released the sureties from liability on their recognizance. Mr. Justice Field wrote the opinion of that court, reversing his own decision on the point referred to. See 9 Wall. [76 U. S.] 13.

Case No. 16,139.

UNITED STATES v. REEVES et al.

[3 Woods, 199.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1878.

QUALIFICATIONS OF JURORS—GRAND JURORS—PREVIOUS SERVICE.

1. Where a juror was summoned to the November term, 1876, and was impaneled and sworn on December 11, 1876, and afterwards was summoned as a juror to the November term, 1878, and was impaneled and sworn on December 14, 1878: *Held*, that he was not liable to challenge under section 812 of the Revised Statutes, although his service as a juror under the first summons extended to April 27, 1877.

2. Defendants who have not had any earlier chance to object to the composition of the grand jury by which they have been indicted, may do so by plea in abatement.

3. The fact that a grand juror had, on a previous summons, attended the court as a juror within two years, does not constitute such a disqualification under section 812 of the Revised Statutes as will render bad any indictment found by the grand jury of which he is a member.

[Cited in U. S. v. Clark, 46 Fed. 640.]

[Cited in State v. Elson, 45 Ohio St. 657, 16 N. E. 686. Cited in brief in State v. Ward, 60 Vt. 147, 14 Atl. 190.]

[4. Cited in U. S. v. Richardson, 28 Fed. 67, to the point that in misdemeanors, as well as felonies, two or more pleas in abatement, not repugnant to each other, may be pleaded together.]

[Indictment against L. Vincent Reeves and others. Heard on demurrer to pleas in abatement.]

A. H. Leonard, U. S. Atty.

W. F. Mellen, D C. Labatt, and Julius Aroni, for defendants.

WOODS, Circuit Judge. The pleas in abatement are based on section 812 of the Revised Statutes, which declares: "No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of said challenge."

One plea alleges, in substance, that P. E. Bechtel was summoned as a juror at the November term, 1876, of this court, and was impaneled and sworn as a grand juror on December 11, 1876, and continued to serve as such grand juror until April 27, 1877; and that the same P. E. Bechtel was summoned as a juror at the November term, 1878, of this court, and was impaneled and sworn as a grand juror on December 14, 1878, and continued to serve as said grand juror until March 1, 1879, and until the indictment in this case was found and returned, and was of the panel by which said indictment was found and returned.

The other plea alleges that J. B. Glandin was summoned to serve as a juror in this court for the November term, 1877, and was sworn and impaneled as a petit juror in November, 1877, and served as such until January 22, 1878, and that said Glandin was summoned as a juror for the November term, 1878, of this court, and on December 14, 1878, was impaneled and sworn as a grand juror in this court, and continued to serve as such up to March 1, 1879, and was of the panel by which said indictment was found.

To these pleas the United States attorney has filed a demurrer on the ground that the same were bad in law.

As to the first plea, it is obvious to remark that the facts stated do not bring it within the terms of the section on which it is predicated. It does not appear from this plea that Bechtel was summoned "more than once in two years," nor does it appear that the juror has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of said challenge. It does not appear from the plea precisely when the juror named was summoned, but it is stated that, in the first instance, he was summoned to the November term, 1876, and in the second to the November term, 1878. The period of two full years had elapsed between the beginnings of these two terms.

According to the plea under consideration, the juror was impaneled and sworn on the grand jury on December 11, 1876, and was not again impaneled and sworn until December 14, 1878, a period of more than two years. Even supposing he had been chal-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

lenged on the day he was sworn, the challenge would have been ineffectual, for the juror had not been summoned and attended as a juror within two years, for at least a part of the term at which he last attended was held more than two years previously.

I do not think that the fair construction of this section is that twenty-four months must elapse between the close of the term at which a juror is summoned and serves and the beginning of the next term at which he is competent to serve. In this district this construction would render a juror incompetent for nearly two years and six months, for the November term of the court invariably lasts until the third Monday of April following. But the law in effect is, that he may be summoned as often as once in two years. It cannot be that the law allows a juror to be summoned as often as once in two years and at the same time forbids him to serve oftener than once in two years and six months. The juror named in this plea has not been summoned oftener than that.

This has, so far as I know, been invariably the construction put in this circuit upon the section under consideration. This plea is, therefore, bad, because the case of the juror named therein does not fall within the terms of section 812.

So far as the lapse of time is concerned, the second plea is not open to this objection. The grand juror named in this plea served on the grand jury by which the bill was found and also served on the grand jury impaneled in November, 1877.

As the defendants have not before now had an opportunity to object to the composition of the grand jury by which they were indicted, they may take advantage of any disqualification of any of the grand jurors by plea in abatement: U. S. v. Hammond [Case No. 15,294], and cases there cited.

The question is, therefore, squarely presented whether the facts set out in this plea render the indictment bad and liable to be quashed.

That depends on whether section 812 imposes a disqualification to serve as grand jurors upon persons who fall within its terms.

It seems doubtful whether section 812 applies at all to grand jurors, especially the second clause of the section, which declares: "It shall be sufficient cause of challenge to any juror called to be sworn in any cause, that he has been summoned and attended said court as a juror, at any term of said court held within two years prior to the time of said challenge." Grand jurors are not called to be sworn in any cause. They are sworn to investigate offenses against the criminal law generally, and causes which they institute where there has been no previous arrest are not in existence until their duty in reference thereto is fully completed and ended. The clause just quoted would not, therefore, seem to apply to them. It appears rather to be aimed at jurors taken de talibus circumstantibus—persons not regularly summoned as jurors, but called in as talesmen from the by-standers.

But, conceding that the entire section applies to grand as well as petit jurors, the question is, does the section impose such a disqualification on a grand juror as would render an indictment found by a jury of which he was a member bad?

It is easy to perceive that it was the object of congress, by the enactment of section 812, to secure the selection of jurors who were from the body of the district, and they should not be professionally or habitually called into the courts of the United States.

To effectuate this object they made two provisions, the first of which is a direction to those who select the array that they shall not summon any person who has been summoned within two years; and, second, that if, through ignorance of the facts any person should be twice summoned within two years, and should have attended within that period he might, when called to be sworn in any cause, be challenged. Congress has not seen fit to impose any consequence of invalidity upon verdicts, either by direct language or by necessary implication, when jurors were not challenged for this cause, who might have been.

The language of this section is guarded with great precision, and is in marked contrast with that of section 820. There is a distinction to be observed between a positive disqualification and a cause of challenge. Thus section 820 declares certain acts done by a person summoned as a juror to be a cause of disqualification and challenge. The use of the word "disqualification" has some purpose, and implies that there may be causes of challenge which are not positive disqualifications.

In U. S. v. Hammond [supra] I have held that section 820, by its very terms, rendered a juror disqualified, and thereby necessarily invalidated the finding of the jury in cases where there could be no waiver. But the language of the section now under consideration leaves the juror competent, not disqualified, though liable to challenge when called to be sworn, as manifestly as section 820 affects him with absolute disqualification.

In Munroe v. Brigham, 19 Pick. 368, Chief Justice Shaw makes this distinction, and held in effect that the fact that a juror was over the age of sixty-five years, which, by the law of Massachusetts, was not only a ground of exemption from jury duty, but also a ground of challenge by either party to the suit, did not absolutely disqualify the juror from sitting in the case, or furnish ground for setting aside the verdict returned by the jury of which he was a member.

I think the distinction rests on solid grounds. Pleas in abatement being dilatory are not favored. O'Connell v. Reg., 11 Clark & F. 155; Com. v. Thompson, 4 Leigh, 667; State v. Newer, 7 Blackf. 307.

In the case of People v. Jewett, 3 Wend. 321, the defendant and one Burrage Smith

were indicted for having, with others, conspired without legal authority or justifiable cause to carry off and transport one William Morgan to a place unknown.

Objection was taken to the indictment that one Benjamin Wood, one of the grand jurors, had, before the finding of the bill of indictment, in repeated conversations declared that the defendant was concerned in the abduction of Morgan, aided in carrying him off, was guilty thereof, and ought to be punished therefor; and it was alleged that the defendant had not been apprised of any criminal proceeding against him, not having been arrested or required to enter into recognizance.

In reply to this objection, Savage, C. J., said: "The books are silent on the subject of such exception after indictment found, and in the absence of authority I am inclined to say, in consideration of the inconvenience and delay which would ensue in the administration of criminal justice were a challenge to a grand juror permitted to be made after he was sworn and impaneled, that the objection comes too late."

In the same case Marcy, J., said: "As the defendant was not recognized to appear at the sessions when the indictment was found, he did not know that any charge would be laid before the grand jury against him, and consequently he had no opportunity to object to the jurors before they were sworn and had presented their indictment. * * * Though I feel the force of the argument, that the defendant should be allowed the benefit of an exception to a partial grand juror, I cannot turn my view from the consideration of the great delays and embarrassments which would attend the administration of criminal justice if it was to be obtained in the way now proposed. No authority for adopting this course was shown on the argument, and I have not since been able to find any."

And in Munroe v. Brigham, supra, Chief Justice Shaw remarks: "Upon general grounds, unless presumptively required by statute, it would be inconsistent with the purposes of justice to allow such an exception to a juror. * * * Where no other incapacity exists, and no injustice is done, nothing but a positive rule of law would seem to require that a verdict should, on that account be set aside."

This authority is cited merely to show how reluctant the courts are to interfere with the indictments of a grand jury by reason of the unfitness of one or more of the grand jurors. Nevertheless, courts will interfere where there has been a positive disqualification imposed by statute. But as, in my judgment, the fact that the juror has served within two years as a juror in the court is not made by section 812 a positive disqualification, but only a ground of challenge, I do not think that it can be urged as a reason for quashing the indictment.

Demurrer to pleas in abatement sustained.

Case No. 16,140.

UNITED STATES v. REID.

[Hoff. Land Cas. 74.] [1]

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

MEXICAN LAND GRANTS.

The validity of this claim is beyond question.

[Claim by Juan Reid for the Rancho Corte de Madera del Presidio, embracing one league of land in Marin county. Confirmed by the board of land commissioners, and appeal taken by the United States.]

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

McDougal & Sharp, for appellees.

HOFFMAN, District Judge. The land claimed in this case is shown to have been granted to Juan Reid by Governor Figueroa on the 2d of October, 1834. The original title is produced, and the signatures duly proved. The expediente—a traced copy of which is filed in the case—contains the petition on which the grant and a record of the proceedings of the territorial deputation on the 2d of October, 1835, approving the concession previously made by the governor. It is also shown by documentary proof that judicial possession of the granted land was given on the 28th of November, 1835. It is also shown that previous to obtaining the grant, and subsequently until his death, the grantee resided with his family on the land, and that since his decease his family have continued to occupy the land.

The case seems to present one of the few instances where every requirement of the law has been fully complied with. No reason is perceived by the court or suggested on the part of the appellants for refusing to confirm the claim. A decree must therefore be entered affirming the decision of the board of commissioners.

Case No. 16,141.

UNITED STATES v. REID et al.

[Hoff. Land Cas. 129.] [1]

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

MEXICAN LAND GRANTS.

The validity of this claim not controverted.

[Claim by Samuel G. Reid and others for the Rancho del Puerto, embracing three leagues of land in San Joaquin county. Confirmed by the board of land commissioners, and appeal taken by the United States.]

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

A. C. Whitcomb, for appellees.

HOFFMAN, District Judge. The claim in this case was affirmed by the late board of commissioners. No additional testimony has

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

been taken in this court, and the case has been submitted without argument or objection on the part of the United States.

The grant under which the claim is made was issued by Governor Micheltorena on the 20th of January, 1844. The signatures to the original document, produced by the interested parties, are fully proved, and the expediente is found in the archives and duly certified by the surveyor general. That the grant was made does not seem to admit of any question, and though from an error in drawing the diseño the positions of the San Joaquin river on one side and the serranias on the other are incorrectly delineated, and should be reversed, yet the calls in the grant, the natural objects mentioned in the diseño, the specification of the lindero or boundary of Higuera's rancho as one of the boundaries of the tract now claimed, together with the deposition of Hernandez contained in the transcript, are abundantly sufficient to explain and correct the error.

With regard to the occupation and settlement of the land, it is shown that the conditions were in that respect complied with within the time limited. The fact that owing to the depositions of the Indians the grantees were driven from their property after the murder of Linsay, cannot of course prejudice their claim. The mesne conveyances are proved and appear to be regular, and there seems to be no reason for reversing the decree of the board. A decree of confirmation must therefore be entered.

Case No. 16,142.

UNITED STATES v. REID.

[See Case No. 14,817.]

Case No. 16,143.

UNITED STATES v. REID.

[The case reported under above title in Howison Cr. Tr. 89, is the same as Case No. 14,817.]

Case No. 16,144.

UNITED STATES v. The REINDEER.

[2 Cliff. 57.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1861.[2]

CONFLICT OF JURISDICTION—VESSEL ATTACHED BY STATE PROCESS — FORFEITURE FOR PRIOR ACT OF OWNER — SLAVE-TRADE — ACT OF MARCH 22, 1794.

1. A vessel was seized under the act of March 22, 1794 [1 Stat. 347], as being fitted and prepared for the slave-trade. At the time of the service of the monition by the United States marshal she was in the possession of a state sheriff, by virtue of an attachment issued from a state court. *Held*, that this court still had jurisdiction, because forfeiture of a vessel arises from the wrongful act of the owner, or some person in charge of the vessel, and wherever the forfeiture is made absolute by an act of congress. the forfeiture attaches at the time the wrongful act is committed, and consequently the owner is divested of his title eo instanter, and the same becomes vested in the United States.

2. The possession of a sheriff, under civil process, whether from state or federal court. will not defeat the operation of the revenue laws of the United States, or impair a forfeiture for engaging in the slave-trade, or for fitting a vessel for the same.

3. Under the first section of the act of March 22, 1794, a vessel is liable to be prosecuted and condemned for engaging in the slave-trade, in any of the circuit or district courts where the vessel may be found and seized. Therefore where a vessel had been fitted and prepared for a traffic of this kind in New York, it was *held* that she was properly condemned by the district court of Rhode Island, having been seized there.

[Appeal from the district court of the United States for the district of Rhode Island.]

This was a libel of information filed by the district attorney, in behalf of the United States, and claiming forfeiture of the vessel. It was founded on the first section of the act of March 22, 1794, the first section of the act of May, 1800 [2 Stat. 70], and the second section of the act of April 20, 1818 [3 Stat. 450]. The libel was filed in the court below, August 7, 1861, and the case came before this court on appeal from a decree condemning the vessel as forfeited to the United States. [Cases unreported.] It was alleged that the bark Reindeer, of the burden of two hundred and forty-eight tons, was, on the 26th of January, 1861, by a citizen or citizens of the United States, either as master, factor, or owner, fitted, equipped, and prepared, within the port of New York, for the purpose of carrying on the trade or traffic in slaves to some foreign country, contrary to the first-named act of congress. Other counts were contained in the libel which were drawn upon the other acts above named. According to the libel, the bark arrived at the port of New York on July 11, 1861, and it was alleged that she was seized by the collector of the port on the 1st of August following. Claim was filed by Gregorio Tejedor on August 19th, averring that he was the true and bona fide owner of the cargo, and the charterer of the vessel, and praying that he might be admitted to defend. He subsequently filed an answer, denying every statement of the libel. Certain other parties also appeared and made claim to the vessel, and were admitted to defend. They were David M. Coggeshall, sheriff of the county of Newport, and Henry P. Booth and James E. Ward, claiming the vessel as attaching creditors. Answer was also filed by them, denying all the material allegations of the libel, and also pleading to the jurisdiction of the court. In the ninth article of their answer they alleged that David M. Coggeshall, on July 1, 1861, and up to the time of the hearing, was sheriff of the coun-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 2 Wall. (69 U. S.) 383.]

ty of Newport, and that on the 20th of that month, and again on the 26th, he seized and attached the bark, her cargo, apparel, and furniture, by virtue of several attachments duly issued out of the supreme court of the state; that he thereby became possessed of the bark, her cargo, &c., and that by reason thereof this court had no jurisdiction of the vessel or her cargo. They also alleged that the several acts in the libel charged to have been done were stated to have been so done in the port of New York, and not within the district of Rhode Island, wherefore they averred that the court had no jurisdiction of the charges. During the hearing, claim was also filed by the vice-consul of Spain, stating the bark, her cargo, &c., to be the property of Gregorio Tejedor, before named. Appeal from the decree of the district court to this court was taken by the sheriff of the county of Newport and the attaching creditors. Tejedor was allowed an appeal, upon condition of his filing a bond to prosecute the appeal, but he never complied with the condition, and did not perfect his appeal.

The following was a cargo list of the vessel:

Account of cargo and stores examined by me, as landed in Newport, from bark Reindeer of New York, by order of A. Sanford, United States marshal for Rhode Island, August 12, 1861.

1 cask, containing hand-saws, back-saws, and packages knives and forks, and bit-stock.
1 cask, containing sauce-pans, cooking-pans, with their covers.
2 casks, containing paints in pans. (Not on manifest.)
1 cask, containing table cutlery, iron spoons, hatchets, hammers, &c.
2 casks, containing sauce-pans, cooking-pans, and covers.
3 casks, containing glass tumblers.
2 packages, containing thirty mess or camp kettles.
16 pipes, containing bread.
187 new oars
1 cask, containing pickled haddock, fish. (Not on manifest.)
3 bags coarse salt. (Not on manifest.)
3 packages, 1 barrel tesago, or jerked beef.

Examined in the store, August 13.

1 case of thin overcoats.
2 cases Spanish cigars in boxes.
40 boxes candles.
64 boxes brandy, preserved fruit.
38 boxes claret wines.
15 boxes O T gin.
7 boxes B brandy.
7 boxes gin.
100 kegs cut nails, of different sizes.
2 barrels lime, 1 barrel cement. (Not on manifest.)
117 whole pipes of agua ardente rum.
65 half-pipes of agua ardente rum.
1 case containing medicines in small packages.
2 cases, containing medicinal herbs and lint in packages.
4 large jars chloride lime.
1 demijohn disinfecting fluid.
1 box small sponges.
(Not on manifest.)

All the ship's stores for the voyage in the custom-house.

Examined in the custom-house, August 14.

1 cask butts and hinges.
3 casks iron chains from ¼ to ⅜ inches.
1 cask table cutlery, &c.
1 cask steel or rat-traps.
1 cask butts, hinges, padlocks, spoons, &c.
4 cases mechuts or war knives.
6 to 8 thousand pounds tesago, or jerked beef.
65 pipes full, partly full, and empty ones, which all appear to have been used as fresh-water pipes. (Not on manifest.)
9 casks with two shooks, iron-hooped, and are used as ship's fresh-water casks.

The ship has a regular medicine-chest on board.

5 rolls and some loose flag matting. (Not on manifest.)

Among the charts examined on board the ship, there is one of the West Indies, and a new chart of the west coast of Africa, from Sierra Leone to the Cape of Good Hope; with an old logbook of a voyage to Bathurst, in Africa, in 1856 and 1857. Examined on board ship.

A. Payne and Gilbert Deane, for appellants.

The United States court in admiralty has no jurisdiction in this case. The thing sought to be effected by the proceeding having been, at the time of the commencement of these proceedings, in the custody of an officer of the state court, that custody and jurisdiction is exclusive, and there can be no concurrent jurisdiction. Taylor v. Carryl, 20 How. [61 U. S.] 593, and cases cited; Pars. Merc. Law, 523. The supreme court of the United States has often decided the converse of this proposition in cases where the court acquired the first jurisdiction over the person or property, namely, that no state court can impede or oust the jurisdiction thus obtained, and that the same rule obtains where the jurisdiction of a state court has first attached. The fact that the marshal took manual possession does not affect the question, the state court never having renounced its jurisdiction and control. The United States government having granted to this vessel a clearance from the port of New York, and she having sailed under it and delivered her cargo in Havana, they are estopped from setting up or saying that the vessel was at that time fitted out as a slaver in the port of New York. 1 Greenl. Ev. § 207; Kennedy v. Strong, 14 Johns. 131. But if they were not estopped, the evidence is clear and uncontradicted that at that time she was fitted out for and sailed on a legitimate voyage. No forfeiture of vessel or cargo will be presumed; like other penal laws these will be strictly construed. Clark v. Strickland [Case No. 2,864]; U. S. v. The Emily and Caroline, 9 Wheat. [22 U. S.] 381. The fitting out of this vessel, her apparel, tackle, or furniture, are neither of them within the language or the intention of the statute of 1794, and that statute does not confiscate the cargo. This case does not come within the prohibition of the statute of 1818, because the Reindeer did not sail from any port within the United States at the time she had on board this cargo which is claimed to be suspicious, and which furnishes the only evidence against her. It is under this section of the statute only that the cargo is affected

by the intended or actual employment of the vessel. There is no evidence that a single article of cargo on the Reindeer, when she was seized, was put on her in New York. But the claimants have proved that every article of cargo was laden on her in Havana.

The only remaining question is that arising upon the statute of 1800, which declares: "It shall be unlawful for any citizen of the United States, or for any person residing within the United States, to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another." The Reindeer has not been "employed in transporting slaves from one foreign country to another." The decisions of the court in The Alexander [Case No. 165] and U. S. v. The Catherine [Id. 14,755] fully sustain the position of the counsel for the claimants. The supreme court in U. S. v. Morris, 14 Pet. [39 U. S.] 473, define the term "employed," as used in the statute, as, "not only the act of doing it, but also to be engaged to do it, to be under contract or orders to do it." Applying this authoritative and common-sense exposition of the statute to this case, is there any pretence that the Reindeer was "employed" in the transportation of slaves? This vessel was not so "employed," "engaged to do it," "under contract to do it," unless the charter-party of Captain C. was valid; if he ran off with or stole the vessel, or violated his duty as captain, in signing that paper, then the vessel was not so "employed" while on her voyage to Africa or any other place, because there was no valid contract of employment. There is no evidence whatever that the owner of this vessel (Pearce) had any knowledge of the "employment" which it is claimed is to work a forfeiture; and the reasoning of the court in the case of U. S. v. The Catharine [supra], as well as common justice, shows that the property of no citizen can be forfeited without a voluntary crime on his part. The testimony of these pretended or professed experts should be entirely disregarded by the court. None of them have any knowledge on the subject on which they have testified. All of them speak from hearsay, and not from knowledge. Each of them contradicts the other, and they only say this cargo is one which might be proper for a legitimate or an illicit voyage. In such case the vessel is to be discharged. U. S. v. The Catharine. In no event can the cargo which is the property of a Spanish citizen be condemned. No law of congress authorizes it. International law forbids it.

Wingate Hayes, U. S. Dist. Atty.

The sheriff of Newport, and the said Henry P. Booth, and James E. Ward & Co. claim the vessel and cargo upon the ground that they had, before the marshal served the monition, attached the vessel and cargo as the property of Pierre L. Pearce. The claimants deny the jurisdiction of this court in this case, upon two grounds. 1. Because the vessel and cargo being, as they say, at the time of the service of the monition in the custody of an officer of a state court, that custody and jurisdiction is exclusive, and there can be no concurrent jurisdiction. 2. Because the offence having been committed, if at all, in the district of New York, the vessel was amenable to that jurisdiction only. Considering the questions of jurisdiction in their order, the libellants say:

This court has jurisdiction, notwithstanding the alleged attachment. The forfeiture of the vessel attaches at the time of the commission of the act inducing forfeiture, thereby eo instanti divesting the owner of all title, and vesting the same in the government. Hence the sheriff could not attach Pearce's interest, for he had none to attach. The alleged attachment was a nullity. That a forfeiture made absolute by statute dates back by relation to the time of the commission of the offence, and not to the date of the judgment, see U. S. v. Grundy, 3 Cranch [7 U. S.] 338; U. S. v. Bags of Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Mars (affirms last case) Id. 417; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246; Certain Logs of Mahogany [Case No. 2,559]; The Florenzo [Id. 4,886]; Caldwell v. U. S., 8 How. [49 U. S.] 366; Fontaine v. Phœnix Ins. Co., 11 Johns. 293; Roberts v. Wetherhead, 12 Mod. 92; Wilkins v. Despard, 5 Term R. 112; Conk. Tr. (Ed. 1842) 331. Possession by the sheriff under a civil process from a state court will not prevent the operation of the laws of the United States in cases of forfeiture, or oust the admiralty jurisdiction of the United States courts. The Florenzo [supra]; Taylor v. Carryl, 20 How. [61 U. S.] 609; Certain Logs of Mahogany [supra]. In the last-named case, Judge Story said: "No doubt can exist that a ship may be seized under admiralty process, for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending." If the doctrine contended for by the claimants be law, then the penal laws of the United States relating to revenue navigation, the slave trade, &c., will, by means of collusive attachments, be rendered null and void. Not a case has been or can be found sustaining the proposition of the claimants in cases of forfeiture. The case of Taylor v. Carryl [supra], and all the cases therein cited, refer solely to maritime liens such as seamen's wages, claims for collision, &c., where the state and federal courts generally have concurrent jurisdiction. The leading case of Taylor v. Carryl, 20 How. [61 U. S.] does not refer nor is intended to apply to cases of forfeiture. Judge Taney's opinion in that case (page 609). The sheriff in fact exercised no control of the vessel after the service of the monition. The marshal removed cargo, and, as he swears, had exclusive jurisdiction. The libel is properly filed in this district. The district court of the district where the seizure is made has

exclusive jurisdiction. The Little Ann [Case No. 8,397]; U. S. v. The Betsy, 4 Cranch [8 U. S.] 452; Keene v. U. S., 5 Cranch [9 U. S.] 310; The Bolina [Case No. 1,608]; The Abby [Id. 14]. "The vessel is liable to be seized, prosecuted and condemned, in any of the circuit courts, or district court for the district where the said ship or vessel may be found or seized." Act March 22, 1794, § 1, being one of the acts under which the libel is filed. Judge Betts, in the case of The Kate [unreported], says: "The doctrine is clearly settled, that in prosecutions for penalties or forfeitures, evidence less than what would amount to probable cause, and which would only be a reasonable ground of suspicion against the party proceeded against, is competent and proper proof upon which such forfeiture may be adjudged, if not satisfactorily contradicted, or explained by countervailing proofs;" and cites Murray v. The Charming Betsey, 2 Cranch [6 U. S.] 122; Maley v. Shattuck, 3 Cranch [7 U. S.] 488; The Josefa Segunda, 5 Wheat. [18 U. S.] 338. See, also, The Catherine [Case No. 14,755]; The Josefa Segunda, 10 Wheat. [23 U. S.] 312; The Struggle, 9 Cranch [13 U. S.] 71.

The Reindeer was found with a fit-out, preparation, and cargo, that indicated beyond all question that she was destined on a voyage for slaves. Though it is not necessary that the vessel should be completely fitted out, any preparation for the slave trade being sufficient (The Emily and Caroline, 9 Wheat. [22 U. S.] 381; The Plattsburgh, 10 Wheat. [23 U. S.] 133); yet in the case of the Reindeer, scarcely anything was wanting to indicate her complete fitment as a slaver. See case of The Plattsburgh, Id. 133. That the Reindeer was not on a legitimate voyage, but was bound for the coast of Africa for slaves, is evident from the ship's papers, especially the sea letter and manifest, and from the protest of the captain. The manifest declares the vessel to be bound for Falmouth for orders. The captain in his protest swears she was bound for Falmouth. The Spanish sea letter, enclosed in a sealed package, declares the destination to be San Antonio. Honest traders do not have conflicting papers. The cargo is neither adapted to the Falmouth nor San Antonio markets. At the present hearing, this fact is admitted; though the record shows that witnesses were cross-examined at length to prove that the cargo was suitable for either market. No evidence, however, has been offered by claimants to show the true destination of the vessel. The character and destination of the Reindeer is shown by her cargo. The character of the cargo always affords strong evidence. A cargo of cotton is presumed for some place of cotton manufactures; of molasses, not for Cuba, or of coals for Newcastle. The cargo occupies not over one third of the vessel, consisting chiefly of articles usually found on board slave vessels, and of some articles never found on board other vessels, but indispensable in slavers; nearly all the suspicious articles are disguised on the manifest, or not manifested at all. Not a tittle of explanatory evidence is offered, although the claimants could show the true destination of the cargo without difficulty. A bark of two hundred and forty-eight tons, bound to the coast of Africa, with a captain, crew, and two supercargoes, irons, chains, padlocks, sweeps, lime, biscuit, jerked beef, mess-kettles, sauce-pans, flag mattings, sponges, medicines (adapted in quantity and kind for a slave voyage), chloride of lime and disinfecting fluid,—all to obtain sixty-five wine pipes of palm oil! The vessel was fitted, equipped, otherwise prepared, and caused to sail, by Pearce, or Cunningham, her master, either as owner or master, for themselves or for some other person. The vessel was fitted, equipped, otherwise prepared, and caused to sail from New York, for the purpose of carrying on traffic in slaves. Unless clear and satisfactory explanation be furnished by the claimants to the contrary, it will be presumed that the vessel was fitted, equipped, prepared, and caused to sail, and intended for the purpose of carrying on the business in which she was found to be engaged. See rule of evidence in slave cases. Judge Betts's opinion in The Kate. The burden lies on the claimants to show this by clear and unequivocal testimony. The Catherine [Case No. 14,755]; The Josefa Segunda, 5 Wheat. [18 U. S.] 338. The claimants have not even attempted to explain anything in relation to the cargo, its destination, the objects of the voyage, or the presence of Garcia and Pinto on board. They set up two antagonistic excuses: 1st. That the vessel was chartered to Tejedor. 2d. That she was sold by Pearce to Tejedor, and that Pearce knew nothing of her use; that in fact the bark was on a new voyage. The Reindeer, having been admitted to be owned by an American citizen, and proved to have been found employed in the slave-trade, must be condemned under the act of congress of May 10, 1800, § 1. A vessel bound for Africa, for slaves, is "employed" in the slave-trade, within the meaning of the act. The Catherine [supra]; The Alexander [Case No. 165]. A captain has a right to charter a vessel in a foreign port. Abb. Shipp., passim. If a vessel be so "employed," she will be forfeited, though the owners be innocent. U. S. v. The Malek Adhel, 2 How. [43 U. S.] 210. The act of 1800 was made to meet cases like this, where there were pretended transfers and other evasions. Where the proceeding is in rem, the vessel may be held guilty, whoever be the owner. Courts will not strain the law or facts to find loopholes for vessels, virtually admitted or proved to be slavers, to escape through. It is as much a violation of the law to fit out, prepare, and cause a vessel to sail for the purpose of selling or chartering her to be used as a slaver, as to use her one's self for that purpose; especially, where the risk of retention of the legal title, so as to get the protection of our flag, is run and paid for.

CLIFFORD, Circuit Justice. Two questions of jurisdiction are presented by the pleadings, which will first be considered.

It is insisted by the claimants that this court has not jurisdiction, because the vessel and cargo, at the time of the service of the monition by the marshal, were in the custody of the sheriff of the county of Newport, under a process of attachment issued from the state court. But the proposition cannot be sustained, for several reasons, which will be briefly stated. Forfeiture of a vessel arises from the wrongful act or acts of the owner, or some person or persons in charge of the vessel; and whenever the forfeiture is made absolute by an act of congress, the forfeiture attaches at the time the wrongful act is committed, and consequently the owner is divested of all title eo instanti, and the same becomes vested in the United States. Where the United States have an election to proceed against the vessel, as forfeited, or against the person who committed the wrongful act, no such consequences follow, until the election is made. Accordingly, it was held in Certain Bags of Coffee, 8 Cranch [12 U. S.] 398, that the forfeiture of goods for a violation of the non-intercourse act takes place upon the commission of the offence, and avoids the subsequent sale to an innocent purchaser. But where an election was given to proceed against the vessel, or against the person who took a false oath to procure a registry of the vessel, the court held that the forfeiture did not take place until that election was made. U. S. v. Grundy, 3 Cranch [7 U. S.] 338; The Mars, 8 Cranch [12 U. S.] 417; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246; Certain Logs of Mahogany [Case No. 2,559]; The Florenzo [Id. 4,886]; Caldwell v. U. S., 8 How. [49 U. S.] 366; Fontaine v. Phœnix Ins. Co., 11 Johns. 293. Evidently the case under consideration falls under the first branch of the rule; but the objection to the jurisdiction may be overruled upon another ground. Possession by the sheriff under a civil process, whether from a state or federal court, will not, in my opinion, defeat the operation of the revenue laws of the United States, or the laws imposing forfeiture for engaging in the slave-trade, or fitting, equipping, or preparing vessels for that purpose. The respondents rely upon the case of Taylor v. Carryl, 20 How. [61 U. S.] 609; but in the opinion of this court, the opinion in that case was never intended to be extended to cases of this description.

In the second place, it is insisted by the claimants that the alleged forfeiture is cognizable in the district court of the United States for the district of New York, and not in the district court for this district. Provision is made by the first section of the act of the 22d of March, 1794, that the vessel shall be liable to be seized, prosecuted, and condemned, in any of the circuit courts or district courts where the said ship or vessel may be found and seized. "Where found and seized," are the words of the act; and while it is not admitted that the circuit courts have any original jurisdiction in such cases, not a doubt is entertained that the libel was properly filed in the court below, and that the case is now properly here on appeal. 1 Stat. 349; The Little Ann [Case No. 8,397]; The Betsey, 4 Cranch [8 U. S.] 452; Keene v. U. S., 5 Cranch [9 U. S.] 310; The Bolina [Case No. 1,608]; The Abby [Id. 14].

Having disposed of the questions of jurisdiction, it becomes necessary to consider very briefly the merits of the controversy. Numerous positions are assumed by the respondents to show that the evidence is not sufficient to justify a decree of condemnation; but in the opinion of this court, it is full and complete, and substantially without conflict or contradiction. Her fitment, preparation, and cargo furnish very decisive evidence that her destination was such as is charged in the libel. That she was not on a legitimate voyage is strongly indicated by her papers. While her manifest declares the vessel to be bound to Falmouth for orders, the protest of the master states that she was bound for Falmouth, and the sea letter, which was enclosed in a sealed package, declares her destination to be for San Antonio; and the evidence shows that her cargo was adapted to neither place. No satisfactory evidence is offered to show where she was bound, but the clear inference from the facts and circumstances is that she was bound on a voyage for slaves. Nothing else can be inferred from her cargo, and such is the opinion of all the experts in the case. A specification of the articles composing the cargo is unnecesary, as they comprise nearly everything which is usually to be found in vessels fitted out for the slave-trade. Certain articles were not included in the manifest, and all or nearly all such were of the class to be found in vessels engaged in that trade. Suspicion also arose in the same direction, from the presence of certain passengers on board, and their conduct, and especially from the conduct of the master and owner.

All explanation is declined, and the claimants rely mainly upon insufficiency of the evidence adduced for the government. Under the circumstances, it is not thought necessary to present the details of the evidence, which would be merely to repeat what is very well stated in the brief of the libellant. Suffice it to say, that, after full consideration, I am of the opinion that the district court could not have decided otherwise upon the evidence. Extended argument upon questions of fact is of no service to either party, and except in cases of real doubt, it will not be attempted. Regarding the case as a clear one, I shall, without hesitation, affirm the decree of the district court with costs.

[The case was taken to the supreme court on an appeal, where the decree of this court was affirmed. 2 Wall. (69 U. S.) 383.]

Case No. 16,145.

UNITED STATES v. The REINDEER.[1]

[14 Law Reporter, 235.]

Circuit Court, D. Rhode Island. June, 1848.

COD AND MACKEREL FISHERIES — BREACH OF LICENSES—FORFEITURE—CERTIFICATE OF PROBABLE CAUSE OF SEIZURE.

1. By the act of congress of February 18, 1793 [1 Stat. 305], "if any vessel is employed in any other trade than that for which she is licensed, such vessel shall be forfeited." By the act of July 29, 1813, special licenses were granted to vessels engaged in the cod fishery, and bounties were given on the vessels complying with certain conditions. By the act of May 24, 1828 [4 Stat. 312], special licenses were granted to vessels engaged in mackerel fishing. Under these statutes, and in fact, how far cod fishing and mackerel fishing should be considered different trades or employments, —quære.

[Cited in U. S. v. Paryntha Davis, Case No. 16,003; The Grace Darling, Id. 5,651.]

2. But whether cod fishing and mackerel fishing are, under these statutes and in fact, different trades or not, vessels under a license to catch cod will not be forfeited by catching mackerel, so long as the catching of mackerel is incidental merely, and not the main object of pursuit.

3. To work a forfeiture under these statutes, the old employment must have been abandoned, and a new trade must be permanently and exclusively pursued.

4. The seizure of a vessel, which under a cod fishing license, had incidentally caught mackerel, is a municipal seizure, expressly provided for by acts of congress as justifiable, if a certificate of probable cause is given.

5. A certificate of probable cause will be given, if the officer making the seizure acts in good faith, and has reasonable grounds to suppose that the law has been violated.

[Appeal from the district court of the United States for the district of Rhode Island.]

This was a libel, instituted in the district court on the 23d of June, 1847, in behalf of the United States and Edward Wilbur, collector of Newport, and others interested. It alleged, that the schooner Reindeer, on waters navigable for boats of twenty tons, within this district, was seized on the 21st of June, 1847, for a violation of the laws of the United States, inasmuch as that she was licensed by the collector of Newburyport for the cod fisheries, and, while so licensed, engaged in the mackerel fisheries, and thereby became forfeited. The answer was put in by William Stover, as agent for the owners, and averred: First, that the Reindeer had not been duly licensed for the cod fisheries, because, though enrolled for those fisheries, she had not asked for and obtained the previous examination and certificate which were necessary in the cod fisheries. Secondly, that if duly licensed for the cod fisheries, it was for one year, and that before the term expired she had a right to take mackerel, if time enough remained afterwards, as here, to fish for cod, the full period required by law. And thirdly, that a usage had long existed at that port to take out a cod license early in the season, and if mackerel were found in greater abundanee than cod, to catch them; but not to count the time spent in taking them, in order to obtain the cod bounty; and that this usage applied to all cases where catching cod was meant to be the permanent employment, and mackerel only incidental. That such was the intent and employment of the Reindeer in this instance, and the mackerel taken, being 130 barrels, were caught only under such circumstances and intent; that time enough remained to fish for and catch cod, if they were found, so as to complete the usual period for doing it in order to obtain the bounty; and if mackerel should have been caught till too late for that object, the cod license would have been surrendered, and no bounty claimed, and a mackerel license taken out. The evidence in this case on both sides was very voluminous, and in some respects conflicting. The substance of it will appear in the opinion of the court.

Dist. Atty. Burgess and Mr. Pearce, for the United States.

Choate & Hallett, for respondents.

WOODBURY, Circuit Justice. In this case, the evidence on the part of the United States showed, that the usual license for the codfishery issued to the Reindeer on the 5th of May, 1847, for one year; and that there was on file in the custom-house at Newburyport the usual certificate required of her inspection and fitness for the codfishery, bearing the same date. This certificate was made a prerequisite for the bounty by a circular from the first comptroller, dated February 22, 1842. It was further shown by the libellants, that the Reindeer had lines, hooks, gaffs, a machine to grind bait, and all the tackle suitable for the mackerel fisheries, with a large number of barrels and salt. Several witnesses on the part of the United States testified, also, that the South Shore fishery, where the Reindeer was employed, between the Capes of the Delaware and Cape Cod, was a mackerel rather than codfishery in the spring. That some other vessels in company with the Reindeer had mackerel licenses, and were equipped in like manner; and that since the act of congress

[1] For the better appreciation of this case it should be stated, that fourteen fishing vessels, of which the Reindeer was one, that had taken refuge from a storm in the harbor of Newport, were seized at the same time, and informations filed against them separately, in the district court. Answers were put in. When the cases came on for trial, the government not being ready, the libels were dismissed. An appeal was taken to the circuit court, and allowed on the terms that the government should select one case as a representative case, the decision in which should settle all the cases. The government selected the case of the Reindeer, and the result is above given. The vessels were owned all along shore, and the great number of parties and the large amount in issue, as also the fact that the privileges of a class were at stake, gave the case great interest and importance.

of February, 1828, authorizing a separate mackerel license, it was not customary to fish for mackerel under a cod license. And it was contended, that the business of catching mackerel had so increased then and since, as to constitute a separate employment and trade.

On the part of the respondents, several witnesses testified that long before the act of 1828 it was customary, under a license for catching cod, to take mackerel if the latter offered in great numbers so as to make it more profitable, and to relinquish the bounty for cod in that event, if not fishing for the latter exclusively as long as four months in the year. It was farther shown, that in 1820 the secretary of the treasury issued a circular, requiring an oath, before receiving the bounty for cod, that four months at least had been spent in fishing for cod, without counting the time devoted to catching mackerel; and that most of the collectors who gave licenses to fishermen, had been in the habit of considering it legal still to take mackerel, when they appeared in abundance, though having a cod license, if catching the latter was only an incident to the former, or was not the chief employment contemplated when the vessel sailed; and that no forfeiture was claimed, if the time so spent in taking mackerel was not counted in order to obtain the bounty; that it was the usage since 1828 to issue a mackerel license in the first instance only, when the party had no intention to fish for cod during any portion of the time. It was further proved by the respondents, that different kinds of fish were often caught on the same ground; that one or the other would at times unexpectedly predominate; that if the opportunity to take the kind most plentiful was not at once improved, it was likely to be wholly lost by returning to port for a different license; and hence that a cod license was better for the success of the fisheries as a business, no less than for individuals, if other fish were allowed to be taken under it as an incident, or subordinate, when they offered in greatest abundance, and would not injure the government if no bounty was claimed on account of the time spent in taking other fish, whether mackerel, hake, or halibut. It appeared, moreover, that taking a mackerel license, under the law of 1828, as modified by that of 1836, though allowing the fishermen to catch any kind of fish most abundant, would deprive him of the bounty which was intended by the government, and was useful to encourage this nursery for seamen, if he happened to find cod most abundant, and devoted the proper time to catching them.

Some of the testimony showed it was customary, at certain ports, to deduct the time spent in catching other fish under a cod license, and some to deduct the whole trip. It was also proved that the Reindeer was equipped with tackle, &c., to take cod; though in the South Shore fishery so many spare lines and hooks are not needed, as on the Grand Banks, because so near the coast and places to receive supplies; that she was likewise prepared to take other fish, such as mackerel, if they offered in greater abundance, and that the general outfit in the South Shore fishery was much the same for cod and mackerel, except in the lines and hooks; that, in the cod fishery, fresh mackerel were caught always when practicable, for bait and for provisions on board, and that bait mills were often used; that the Reindeer had fished for cod daily, while at sea, since she reached the fishing ground, but had caught only a few quintals, and that mackerel had been the principal catchings, having been so abundant for three or four days of the time, while out, as to enable her to catch the large quantity she had on board; and that she had no intention to apply for the bounty, unless she fished for cod exclusively, before her license expired, the required length of time. It did not appear that any other instructions or circulars had been issued by the treasury department, bearing on this matter, than those before referred to; or that this seizure had been made by its direction, or after consulting it.

The present proceeding was founded on the 32d section of the act of congress of Feb. 18th, 1793 (1 Stat. 305). Among other things, that act provides, as to "any licensed ship or vessel," that: "If any such ship or vessel shall be employed in any other trade than that for which she is licensed, or shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited." By this act, likewise, there is required an oath, "that the license shall not be used" for any other employment than that for which it is specially granted, and the license itself provides that the vessel shall not be employed "in any trade or business, whereby the revenue of the United States may be defrauded." The 4th section of the act also requires a bond to be given, to pay a penalty, if the "vessel has been employed in any trade, whereby the revenue of the United States has been defrauded during the time the license granted to said ship or vessel remained in force." Id. 307. Whatever may be the reason for the provision to forfeit the whole vessel, if engaging in any "other trade," it partakes more of the severe spirit of the last century, than of the present age, to impose so heavy a penalty for so slight an offence. The 5th section had already provided that any license should be in force, only while the vessel was owned by citizens, and not "in any other business or employment, than that for which she is specially licensed." But it did not forfeit the vessel in such cases, affixing such a severe penalty, only when the license was forged, or used for a ship not originally in-

tended. The 32d section, however, extended the forfeiture to all those cases, however light, but whether by inadvertence or design, is conjectural, and, to my mind, somewhat doubtful. To ascertain the real object of this harsh enactment, considering it as designed, is very important, in order to decide correctly whether it has been violated in the present instance. It can hardly be supposed, that so severe a penalty could be designed to punish a departure from a mere custom-house regulation, for the purpose of having accurate statistics or returns of the quantities of tonnage engaged in different branches of business. On the contrary, congress probably was looking more to the coasting than fishing licenses, both being embraced in the same law, and was regarding more the danger likely to be caused to the revenue, by the former engaging in the foreign trade and smuggling, rather than by the latter drawing bounties from the treasury, when in a different employment or trade from that of catching codfish. Hence it was made very penal to engage in what was different, so as to endanger the treasury by smuggling. So far as looking to the fisheries, it was designed, doubtless, merely to prevent getting bounties, without the training and exposure connected with the codfishery, as a great nursery for seamen. It looked, likewise, to security against bounties being obtained, when fishermen did not bring into the country the additional food and wealth, drawn from the depths of the ocean, in that fishery, and which it was a national object on that account, also to foster; or when they did not labor in competition with rival nations, encouraged by bounties in that fishery, and who would otherwise become triumphant over ourselves, and exclude us entirely from that great mine of riches and nautical skill.

The whole spirit of the penal part of the law and of the policy which led to it, so far as regards the fisheries, seems then to be to visit so severe a punishment only on those, who seek to obtain the public funds and public favor, while engaged in pursuits not made the object of those funds and favor. But if no forfeiture is incurred by such a culpable departure from the object of the statute, other consequences less penal may properly flow from a non-compliance with the laws, and were doubtless intended to be visited. Being engaged otherwise than the license specifies, whether it happen by fraud or misconception of the laws, or even by accident and mistake should probably deprive them of the bounty, though having a license valid on its face, because they would not do what is by law a condition precedent to the bounty. So, if engaged in one branch of business alone, but with an invalid license, it would prevent them from having the rights and privileges of an American ship, as contradistinguished from a foreign one. That is, she would be obliged to pay duties on tonnage and light money, like a foreign vessel, which once were very heavy, and she must do this, because suitable American papers from the custom-house are alone allowed to exonerate vessels from such duties. That is virtually the effect of the 4th section before quoted, the license merely becoming null in such cases. See U. S. v. Rogers [Case No. 16,189]. And perhaps the chief object in requiring all American vessels to take such papers, was to furnish due evidence of such exemption, rather than preserve accurate data of the amount of tonnage employed in different branches of business, and from the different ports and states. But the failure to obtain the exemption from duties, would seem to be the usual and a sufficient punishment for neglect to take out valid papers. Something more ought to be done, and of a more dangerous character, before exacting a forfeiture of a vessel. In the case of a coasting vessel changing her employment to the foreign trade, which it is the chief object of the 32d section to prevent, the circumstances are very different. There the change is easily defined and understood, and the danger to the revenue by smuggling foreign goods on board is much enhanced, and hence a forfeiture in such a case may often not have been too severe. But in case of a vessel, licensed for the cod fishery; not changing her employment to either the coasting or foreign trade, so as to increase the facilities for smuggling; not making any change from the general business of fishing, compared with other employments in navigation, so as clearly to come within the penal provision at all; not asking nor receiving any bounty so as to injure the treasury while taking mackerel, rather than cod; not committing nor even alleging in the libel that she meditated any fraud, much less offering clear proof of either; and being induced to take papers and fish as she did, by advice of the revenue officers, and by long usage at the port whence sailing; all this surely makes out any thing but a plain case for inflicting such a severe penalty. If by strict law a penalty can be deemed thus incurred, it must be only where the facts show the vessel engaged in a different employment, and that the different employment was followed manifestly as a different trade, and under circumstances conflicting with the spirit as well as the letter of the act of congress. That this last is the proper rule in the construction of such penal statutes may be seen in the following cases. The Enterprize [Case No. 4,499]; 3 Cow. 89; [Wilkinson v. Leland] 2 Pet. [27 U. S.] 662; [Minor v. Merchants' Bank of Alexandria] 1 Pet. [26 U. S.] 64; [Elliott v. Swartwout] 10 Pet. [35 U. S.] 151; U. S. v. Kimball [Case No. 15,531]; Taber v. U. S. [Id. 13,722]; U. S. v. Wonson [Id. 16,750]. But while adopting this rule, I do not of course hold, that ignorance of the law is an excuse for the owners in violating it, though that ignorance existed in both them and the officers of government. "Ignorantia juris non excusat."

But some might doubt here, whether it was not ignorance in part of the fact, which led to this course; of the fact, that catching mackerel for a few days without abandoning the codfishery, was a different trade or employment; and ignorantia facti excusat (2 Coke, 3b; Plow 343; Broom, Leg. Max. 122); or at least they might doubt whether it was not a mixed point of law and fact of which they were ignorant, and as to which they might therefore be excusable, penally.

Again, as to the defence here connected with the long usage. An usage or custom which violates an express law, created by statute or perhaps any other way, may not protect one who breaks the law. See Taylor v. Carpenter [Case No. 13,785]; Noble v. Durell, 3 Durn. & E. [3 Term R.] 271; U. S. v. Buchanan, 8 How. [49 U. S.] 83. Certainly not, either instance, in civil cases, and from civil and not penal consequences, unless both parties, by an agreement or an usage, known and acted on publicly, and which virtually dispenses with the law so far as regards their own private rights, gives efficacy to the agreement or usage, without a strict conformity to a statute. Cookendorfer v. Preston, 4 How. [45 U. S.] 326; [Bank of Washington v. Triplett] 1 Pet. [26 U. S.] 25; 2 Burrows, 1221; [U. S. v. Tappan] 11 Wheat. [24 U. S.] 420. A party may, by assenting to a custom or usage, waive his rights under a statute; and in this way, too, may make a thing legal, which otherwise might not be "Consuetudo pro lege servatur." See cases, 2 Bac. Abr. "Customs," C. A public officer, however, possesses no power to dispense with the penal provisions of a public law, whether from usage or a mistake in its construction; and an offender cannot claim an exemption on that ground, when prosecuted criminaliter. Usage can be proved, also, to explain whether a voyage has been properly pursued or not under an insurance. Noble v. Kennoway, 2 Doug. 510; 1 Burrows, 341; 1 Camp. 503, 508, note. What course in certain places it may be customary to sail; in what manner a trade may be carried on at anchor, and probably what fish may be captured without amounting to a deviation, can all be proved aliunde the policy, and will protect the insured while acting within the usage. So usage to construe a law in a particular, is some evidence that the construction is right, or should remain. U. S. v. McDaniel, 7 Pet. [32 U. S.] 14.

But there is another aspect of this objection, which possesses more force by its rebuttal of the criminal intent, necessary to constitute guilt in most cases. It is often very doubtful, whether an act can be deemed penal, where all the customary and natural presumptions of guilt, sufficient when standing alone to convict, are repelled, and every criminal intent is expressly disproved. See The Harriet [Case No. 6,100]. If long silence on the part of the public organs to complain, does not, as in private affairs, often give consent ([Bank of Augusta v. Earle], 13 Pet. [38 U. S.] 591; [Holmes v. Jennison] 14 Pet. [39 U. S.] 577), it is certain by a general rule, that there must be a malus animus in the accused to constitute an offence (U. S. v. Libby [Case No. 15,597]). An evil intent, to be sure, is to be inferred often from certain acts, and among them one is wilfully doing what the law forbids. 4 Durn. & E. [4 Term R.] 457; 2 Adol. & E. 612; Strange, 1146; 5 Burrows, 2667. Yet it deserves consideration, if shown that the circumstances, under which the act was done, rebut all intention to violate the law, whether punishment is proper; and it is very questionable, whether they do not constitute a perfect defence to the prosecution criminaliter. See The Emden, 1 C. Rob. Adm. 16. See also, cases of contraband on board, not known to the master or owner (1 C. Rob. Adm. 67, 104; 3 C. Rob. Adm. 143, 178), and U. S. v. Libby [supra], where persons came on board, not known to be slaves. In all these, the penal intent being wanting, the prosecution failed. So where, by advice of counsel, one swore to the truth of his schedule, though certain property was withheld under a supposed right, the case was considered to lack the criminal intent, necessary to constitute perjury. U. S. v. Conner [Case No. 14,847]. If the circumstances contradict the gist of the charge, this should be a bar to the prosecution, and not a mere ground of appeal to the uncertain mercy of the pardoning power. All are familiar likewise with the rule in cases of imputed fraud, that it is to be proved and not presumed, and the necessity which exists, of a fraudulent intent, generally, even to avoid proceedings, in civil matters on account of fraud. And no general maxim is sounder or more frequently applied to crimes—not civil liabilities—than "actus non facit reum, nisi mens sit rea." 3 Inst. 107. See cases, passim.

But I do not despair of the libel on these grounds alone, as they might be deemed in some respects novel, and are not necessary. Yet they appeal strongly to the court in favor of a liberal construction to protect a confiding class of people, who, in this case, did the acts complained of under the sanction, if not advice of the officers of government themselves, that had the execution of this branch of the laws in their charge, and who did these acts in conformity to a custom construing these laws in that manner in those places, very uniformly from the period of their enactment. Nor do I dwell on the hardship to honest, plain men being visited by penalties for breaking laws when adhered to, as read or interpreted erroneously to them by the public officers. That, however, furnishes a strong reason, by means of contemporaneous and long construction, to show that such a construction was the true one. Stuart's Case, 1 Cranch [5 U. S.] 299. The fact, too, of its open ex-

istence for such a length of time, rebuts any intent of citizens, by conforming to it, to do what is wrong by such conformity, and is another powerful argument in favor of adhering to this construction. Thus, Lord Ellenborough, observes: "It has been sometimes said, communis error facit jus; but I say, communis opinio is evidence of what the law is, not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice." Isherwood v. Oldknow, 3 Maule & S. 396; Garland v. Carlisle, 2 Cromp. & M. 95; Co. Litt. 186a. It becomes a very grave question, where law-makers and law-executors have long slept over conduct, as if not a departure from the law, whether the construction should suddenly be changed, and really innocent persons be insnared and prosecuted by a new construction. [Adams v. Jones] 12 Pet. [37 U. S.] 210. "Cotemporanea expositio est optima et fortissima in lege." 7 East, 199; 4 East, 327.

Finally, a construction so long and publicly prevailing, and this by the sanction of the local officers, and without any dissent by the treasury department, through instruction, correspondence or circulars, operates strongly in its support. 3 Atk. 576; 10 Ves. 338. "Quod non valet ab initio, tractu temporis valet." 1 Dod. 394, 395. And it is fortified even by the silence of congress itself, not legislating more specifically to prevent it, when knowing, as it must, the views which its own officers and the community had taken of the proper construction of the existing laws. Nor does this conclusion violate what seems a true rule to reach the proper construction, and enforce the real design of the law; because, under all the circumstances, what would appear to be the most appropriate course to settle, under the 32d section, the design or meaning of the words, "different trade, or employment"? Surely to adopt a construction, not departing from what has been long sanctioned, unless a contrary one is inflexibly required by law; surely the broadest and most liberal views, to sustain what accords with usage, and what prevents a forfeiture where no penal intent has existed. The design chiefly intended by this penalty, having, as already shown, been to prevent fraud on the revenue, the Reindeer, unless attempting that in some way, has not violated that main design. She had never asked for the bounty before or since her seizure, and no evidence exists that she ever meant to, even if continuing permanently to fish for mackerel, or if not fishing exclusively for cod, at least four months of her license, that being all the time required by law.

The cases which have so often been complained of, in and out of congress, in connection with the fisheries, are all of a different character. Those, where the bounty has been obtained by adding the time spent in catching mackerel to that spent in catching cod, and thus obtaining a bounty as well as drawback on the pickled mackerel, which the law did not in terms or spirit allow, led to the original circular of 1820, requiring an oath on that point, and led to actions for recovering the bounty back from 1829 to 1832. 3 Sen. Doc. No. 120, A. D. 1833, Report of Treasury Department. Others, which supposed unsuitable vessels for fishing on the Grand Bank, were fitted out, and the bounty obtained by not much either of exposure or fishing, led to the circular of 1841, requiring an inspection as to the condition and fitness of the vessel when licensed.

The precedents of these descriptions, then, apply to a state of facts radically different, and none of them stand in the way of exonerating these respondents from this penalty. But there are other strong reasons to show, that a forfeiture has not been incurred here. Two leading objections exist to a forfeiture in this case, besides the minor ones specifically examined already, and besides, that the spirit and design, as well as words of the law, contemplate no forfeiture when there has been no fraud on the revenue attempted, or no probability of fraud. They are, that by the letter of the law, the vessel must resort to a different employment from that named in the license, and follow it as "a trade," that is, as a business with permanency and constancy, or she cannot be condemned; and neither of these clearly happened here. Looking to general considerations and general principles, I should doubt much whether the catching of mackerel rather than cod is a different general employment, as it is still fishing, as much as the catching of cod was fishing. The case of a different general employment, in The Active, 7 Cranch [11 U. S.] 100, was that of transporting merchandise for hire, and this to parts unknown, and in violation of other laws. That was not only a distinct general employment, but required a different outfit, and fewer men training; as few for a vessel of 300 tons as for a fisherman of 80 tons; and hence not within the spirit of the bounty, to form a nursery for seamen; while in the present case, catching mackerel was not only the same general trade of fishing, but required a like outfit and like number of men. The bounty, to be sure, could not be claimed for the time spent in catching mackerel, because the act of congress gave it only for catching cod, and allowed a drawback for the salt used in pickling the mackerel, when they are exported, instead of a bounty. But still this does not impair the position, that for other purposes, and in other views, the employments, as employments, are similar, as being in the fisheries, and those of a like character as to outfits, skill, and habits. The words "trade," and "employment," should have a fair construction, looking to the complicated and mixed character of the business, and not a con-

struction metaphysical or insnaring. 5 Mass. 380; 15 Mass. 205; 4 Mass. 534; 12 Mass. 253; 7 Mass. 310, 523; 3 Mass. 215; 11 Pick. 487.

In most cases, "trade" is used in the acts of congress as contradistinguished from the "fisheries," rather than being a term applicable separately to every kind of fishing. Thus they speak of vessels engaged "in the coasting trade, or fisheries." 1 Stat. 7, 94, 360, 288. In most cases, also, of penalties, a word must mean in its commercial sense what would be a violation of the law, and not merely in a technical or etymological sense. See cases as to "sugar," "teas," &c. Taber v. U. S. [Case No. 13,722]; U. S. v. Breed [Id. 14,638]; [Scott v. Lloyd] 9 Wheat. [22 U. S.] 438; [U. S. v. One Hundred and Twelve Casks of Sugar] 8 Pet. [33 U. S.] 277; [Elliott v. Swartwout] 10 Pet. [35 U. S.] 150. And before a penalty should be deemed incurred, a transaction must come within both the word and the spirit of the law, as shown in the cases before cited. Such a construction would require us here, independent of the usage, to consider the employment or trade in fishing, not a different trade when it related to the same general business. So perhaps, though employed in a branch or ramification of fishing different in name, but not different in character, exposure, risks, and training. More especially would this be the proper construction, if it had been, as here, contemporaneous, long in force, and acquiesced in both by the public officers and congress. Still more proper would it be, if no fraud had been attempted under it, and no danger existed by it, not being without ample guards against any injury by it to the revenue or the treasury. And finally, what other construction could be expected to be put on the law, by the plain fishermen for whose government it was made, than that a different trade or employment from theirs was one not of fishing; and who, ever since this class followed their honest labors on the Lake of Galilee, have been accustomed to consider fishing, without reference to the kind of fish, as one general trade or employment; contradistinguished, for instance, from agriculture or manufactures, or the navy or merchant service. Such a class of citizens would seldom trouble their minds with metaphysical distinctions, and never think of cutting up the fisheries, like the polypus, into as many different trades as there were countless species of fish to be caught, from the sprat or alewife and smelt, to the halibut and whale. In short, it is all practically regarded as the trade or employment of fishing, rather than the coasting or foreign trade; and it seems conclusive on the preference of such a construction, if, beside all this, the different branch of business pursued was only incidental and temporary, or only subordinate, and not intended to be exclusive of the other, unless longer pursued and ultimately substituted for the other, and without then claiming any peculiar privileges or benefits belonging to the first branch. It is believed that of this last character was the catching of mackerel by the Reindeer in the present case while sailing under a codfish license. This is a question of fact as well as law on the facts. Now, in point of fact here, the cod and mackerel fisheries on the South Shore were so much alike as to require similar equipments and supplies, except in lines and hooks, and here she started with hooks and lines for cod as well as mackerel. Here she was certified to be suitable in strength and tackle for cod, and took the proper papers for catching them. Here, by positive evidence, she actually caught several quintals of cod, and fished almost daily for more. She had devoted but a few days to mackerel catching, though during those days they were found in great abundance, and most of her catchings had therefore been of them. She had come to no determination, however, not to fish more for cod, or not to devote exclusively four months to it before her license expired. There was yet ample time for doing this during her license, and during the fishing season. She had applied for no cod bounty whatever, and had evinced no intention to apply for it, unless fishing exclusively for cod full four months during her license. The case of The Harriet [Case No. 6,099] was just the reverse of this on the facts. The Reindeer also could not include the time, if she wished to do it, while catching mackerel beyond what she needed for bait and food, unless committing perjury through her owners or officers. The treasury had not thus, or in any other way, been defrauded, nor was it likely to be. To be sure, a door was open to it, as is always the case in all voyages, but perjury is not to be anticipated or presumed in any of them; and the guards, beside oaths, are strong, by information by revenue cutters, who speak these vessels, and write to the various ports where they belong if they are catching mackerel; and and examination of their cargo and crew, if suspected, can likewise be made. Often too in the end the fruits of their employment are the strongest witnesses by which to know what it has been. Nor is the government injured if pickled mackerel are on board beyond the quantity needed for provisions and bait, because time will be deducted equal to that probably spent in catching them, on account of the drawback likely to be obtained on them if exported, and the manifest impropriety of getting both that and a bounty for cod during the same period. So that full time must and can be left for the cod bounty, and full time for catching the mackerel, on which a drawback may be obtained. In this way, also, the government lose nothing, as it means to pay the cod bounty when four months have been spent in toils and dangers, and also allow the drawback on pickled mackerel, when caught in

other periods not included in the time counted for the cod bounty.

There is also a great gain to individuals and the public in this construction, as well as no tax to the treasury beyond what the law meant to impose. More fish are caught by the same number of persons, in the same voyage and same space of time. If cod offer, they can be taken; if mackerel, they can be taken; and this is not properly forbidden or ridiculously tabooed till the vessel can go back to port and obtain a different license, and the fish in the mean time have escaped to other seas. It is national as well as private economy to take at once whatever fish offer which are valuable and abundant; and the revenue cannot suffer thereby, if the times devoted to such are kept separate, and the case is not falsified by perjury so as to avoid detection of the real truth. But nothing of this last description had happened or been attempted here, and hence no fraud actually practised, which should work a forfeiture of the vessel. It is supposed, however, by the libellants, that notwithstanding these general reasons for not considering the catching of mackerel, as in the present case, a different trade from the catching of cod, as intended by the act of congress of 1793, it is meant to be regarded as different by the act of 1828. Without any judicial decisions on this point, I should have been inclined to hold, that though different for some purposes under the act of 1828, it is not by that act or any other declared to be different so as to incur a forfeiture, if pursued when under a cod license, and if no attempt is made to compute the time towards the four months required to obtain the cod bounty. But if the adjudged cases hold otherwise, and if, because mackerel are not the same specific fish caught, and not placed under the same specific license as cod since the act of congress of 1828, nor rewarded nor encouraged by congress in precisely the same form, these differences amount to enough to constitute in law a different trade or employment; then the next and last general defence to be relied on here is, that the catching of mackerel in the present instance had not been pursued long enough and exclusively enough to violate the act of 1793, and incur a forfeiture of the vessel. In other words, that here, the catching of mackerel, as a trade, had not in fact been followed as a separate employment or trade, distinct from that of catching cod, and the latter abandoned. If it had, though no bounty had yet been demanded for the time so spent, and none may have been meant to be, it is argued that the act of congress has been violated, and the forfeiture incurred. It is supposed by the libellants, that both of these principles were settled against the respondents in the case of The Nymph [Cases Nos. 10,388 and 10,389]; and have been again confirmed in the case of The Harriet [Case No. 6,099]. See, also, The Active, 7 Cranch [11 U. S.] 100; The Eliza [Case No. 4,346].

I do not feel disposed here to go into and impugn the law on this subject, so far as actually settled there, though the construction adopted was very vigorous for a penal prosecution. In my apprehension those cases do seem to decide the first objection against the respondents. They hold that now the mackerel fishery, when exclusively pursued as an employment, constitutes a distinct employment from catching cod; and that though this was not the rule formerly, it is so since the act of 1828, granting a mackerel license, reinforced by the act of 1836, permitting all kinds of fish to be taken under a mackerel license 4 Stat. 312; 5 Stat. 16. The reasons of this construction do not all strike me with force as already explained; and besides that, a mackerel license is only "authorized," but not required by the act of 1828. But supposing those reasons to be sound for the purpose of the inquiry in the present case, the other question, how far on the facts the catching of mackerel must be followed, in order to constitute a separate employment or trade in it, or in other words, to make one be considered engaged in it as a trade, was not decided there, except on the particular facts of those cases. The facts there differ materially from those here. The facts in the case of The Nymph, which is the leading case, are in some important respects so unlike those here, as to require and fully justify very different conclusions, as to the mackerel catching having become a different trade on board the vessel. There, the time spent since the vessel sailed, had been so long devoted to mackerel, as not to leave enough to become entitled to a cod bounty, though the rest of the term should be devoted wholly to codfishing. The fact was entirely the reverse here. There, likewise, more than half the whole period of the license had been devoted to a different species of fish than the license covered. But here not one eleventh of the whole period of the license had been so devoted; and but a few days, very successful ones to be sure, of only the thirty-two or three since she had reached her fishing ground. There, in fine, the catching of cod seems to have been long and entirely abandoned, while here the catching of cod had been continued or attempted almost daily, up to the seizure, though not with great success. But ample time was still left for it to be successful, if fish offered; and yet to be pursued exclusively quite four months before the license expired. It is not a fault in the vessel if cod do not bite; provided the crew try to catch them, they fulfill their duty. In point of fact, there as well as here, the employment or trade, originally licensed or contemplated, viz., the catching of cod, had not here been abandoned, and another employment or trade assumed instead of it. In The Harriet [supra], Justice Story says, as to the fact of pursuing another kind of fishery as an employment, such as the hake fishery, so as to incur a penalty,—"Before I should be prepared to adopt such a conclusion, I should require the

most determinate and satisfactory evidence, that the hake fishery was intentionally and exclusively carried on during the season, as a principal employment of the Harriet, in contradistinction to the cod fisheries." So the case of The Nymph no less than The Harriet, concedes, that a vessel under a cod license may pursue other business, which is incidental, or which does not amount to an entire change of her original business, being as a species of interlude, or an "aside," or parenthesis in it. She may catch mackerel, for instance, for bait, or for food on board ship, any thing which is incidental, merely. But beyond that, if, in doing what is incidental, she happens to strike such large schools, as to pull in more than are so needed at once, it cannot be that she must halt midway in their biting, and refrain to pull in one extra mackerel, or forfeit the whole vessel. That is a kind of self-restraint not to be expected of a fisherman. On the contrary, the true meaning of the case of The Nymph, especially as explained in The Harriet, corresponds with what is a rational view of the act of congress itself, that to constitute a different trade or employment. other fish-catching must not be carried on for so long a time, and to such an extent as to become a new permanent business, and the old one appear to be abandoned. Such clearly had not become the case here, where this seizure took place, whatever it might possibly have become before the voyage would have ended, if undisturbed. It may happen frequently that much can be done in one trade or employment, which is not strictly incidental or closely attached to that, yet so entirely subordinate to it as not to be considered a new trade or employment. It is occasional, and not constant or permanent. As in most professions or trades pursued by individuals, other business, like agriculture with lawyers or physicians, or some mechanic art with farming is at times attended to, not as a distinct or separate trade or calling, but as a minor or subordinate business, mixed with the other when leisure may permit, or taste or relaxation require it. The other avocations also may be profitable, but still they are not the profession or business of the individual, unless the principal pursuit is abandoned or changed for them. That is the test. Thus in The Harriet, large quantities of hake were fished for and caught. But that was not enough. It must become an exclusive employment. Justice Story said:—"If under color of a codfishery license, the mackerel fishery was in fact carried on as an exclusive employment, the practice was an abuse of the license," &c. The Nymph [supra]. But it was only these. This is a rational view, looking to the whole subject-matter.

From the very nature of ocean fisheries, where so many different kinds of fish abound, and live in the same seas and latitudes, and even on the same feeding grounds, the fisherman is often compelled, in some degree, to take different kinds of fish, whether he seeks them or not. The same hook, bait and line will answer for several different kinds, and till they come to the surface, or are drawn into his boat, the fisherman cannot determine which he has caught. To be sure, where different hooks and lines are necessary, then the chance is greater with him; but the technical departure from the strict license of the law, as to cod alone, is committed in either case. But in either, can the law be so harsh, unless he makes a real and permanent change in his trade or employment, as to punish him with a penalty for catching any thing except cod? or require him to throw into the ocean again every thing which is drawn to the surface, except cod? As if he derived his right to catch any kind of fish in the ocean from government, instead of God and nature, and was a criminal, if not confining himself to such fish alone, as congress specially permits in any one license. However valuable the halibut, or hake, or mackerel, or however fine a whale offers on the coast, he is not voluntarily, if impelled by the ruling passion, to hook, or harpoon, or catch him in any way in his power, and add so much to the common wealth of the country. No, what the law forbids, is fraud, is evasion of the revenue, is an entire change of business, permanently, without duly following it up, with a change of papers or license, as soon as is convenient and practicable.

But the law, in a case like this, never meant to restrain capturing what was wild, and taking "the good the gods provide," when no prior rights of others are violated. Nor can one or two indulgences of this kind, or parts of one or two weeks thus employed, while in the pursuit of codfishing also, though with less success, be regarded as making it a new and exclusive and permanent employment, and the former one as abandoned. To forfeit the whole vessel, there must be a clear departure from the law, a clear change of business, as a business, and not acts of a temporary and subordinate and innocent character in interludes, and under a strong temptation, and without injury to any one. But the evidence here does not show an entire abandonment of one employment, and an exclusive occupation in another. There is still another difficulty in connection with this. I entertain doubts whether this seizure was not in every view premature, and it certainly was before sufficient proof existed of any intent, either to defraud the revene, or change the employment for the voyage as a voyage. It seems to me, that in a penal law, where a forfeiture is demanded for a change of employment, without a new license, the government and its officers before seizure, must wait till it becomes clear that no new license to cover the change of employment, if at sea, is meant to be taken out, as well as that the employment has been permanently changed, so as to require a new one. In such cases, the change of fishing happens on the ocean, where the old papers of the ship cannot be surrendered, and new ones taken

out. It is an exigency which must be improved at the moment to take other fish, when offering in large numbers, or not take them at all. The argument ab inconvenienti, by a different course could hardly be stronger in any case. The bounties of Providence are to be slighted, and its gifts refused, or the other fish must be taken, and nobody injured thereby. Why not let them be taken in such a tempting crisis; in such an opportunity to add to national and individual wealth; in such a privilege of hunting and fishing on the great highway of the world, as is not per se wrong, and belongs to all mankind, by nature and the law of nations? Why is such an act to be punished as a crime, and the useful fisherman, when indulging in it, to be insnared by penalties, before he can come home with his honest earnings, and change his license, if he has been induced to change entirely the employment contemplated when he sailed? The object of the license seems to some extent to have been misconceived. We have no royal fish here like the whale on the coasts of England, belonging to royalty, and to be taken only under licenses from government, or used only by the government. The real object of the license here is, not to confer a right to catch any animal that swims in the ocean, that right being derived from a higher source than government. 4 Durn. & E. [4 Term. R.] 437; 2 Branch, 472; Gro. de J. B. c. 2, § 2, note 3. And it is protected by the law of nations, on the ocean; and even on its shores it belongs here rather to the regulating sovereign power of the States, than of the general government. See U. S. v. New Bedford Bridge [Case No. 15,867], and citations there. But the license, or the action of government in respect to it here, is merely to confer an incipient claim, if afterwards duly perfected, to receive a bounty or drawback, and to be exempted from certain duties imposed on vessels not duly registered, enrolled, or licensed as American vessels. There is a case (U. S. v. Rogers [Id. 16,189]) where a vessel, engaging in a new trade, on going to a new place, different from that licensed or stipulated, was held even to cease to be American, so that a revolt on board would not be punished by American courts. Generally as to duties on tonnage, they must also be paid as if foreign vessels, unless having proper American papers, and any question as to the bounty cannot be decided, till the voyage is ended, or till it has gone so long as to show clearly what must be its principal employment, and hence whether the claim to it should be enforced. It is not merely that a locus penitentiæ exists till his voyage has ended, which was the case of the Nymph, and no change in papers was there made or proposed; but it is that till the voyage is ended or chiefly ended, no decisive evidence is usually furnished, whether the business or trade has been permanently changed or not; and whether the vessel has still time enough left to fish for cod alone, so as to be entitled to the bounty, or means during the season to change the license, so as to correspond with any new employment permanently pursued.

By various considerations, the character of the employment in fishing during most of the voyage, is to fix it for the trip or season, and not its character for a few weeks, or even months, perhaps short of a majority of the whole. Hence, in the case of The Harriet [Id. 6,099], the court looked to the new or changed employment, "during the season." And though the words of the act of congress are, shall not, &c., "during the period for which licensed," do thus and so, yet it would be too narrow, if construed so as to require them to do this for the whole period, in order to commit an offence, instead of some time within the period. This done, some time must, however, be continued, sufficient to give a character to the act. The new employment must be long enough, or so clearly different, as to show a permanent change in the vessel's business. See The Harriet [supra]. A rule like this, requiring clearly a new permanent employment or trade, is clear as laws should be, and not vague, nor uncertain, like "some," or "considerable" other employment. It is also the common sense aspect of the subject, the only practical one which has any fixed principle as a guide. Like questions of domicile, this looks to intents, as well as acts, to decide whether a change has occurred; see Burnham v. Rangely [Case No. 2,176]; and intents not ambiguous, and acts not equivocal, but both clearly developed in favor of a permanent change of trade. In the case of The Active, 7 Cranch [11 U. S.] 100, the fishing was utterly abandoned, and a cargo of produce or merchandise taken in, doubtless, for the foreign trade, and a sailing commenced in the night for ports unknown, and in violation of the embargo law, and at a place where new papers could be at once obtained, if desiring and entitled to them. This showed clearly, not only a new trade or employment resorted to in that case, but permanently, and without any view of taking out a new license to cover the new trade and the new illegal voyage. See, also, U. S. v. The Mars [Case No. 15,723]; The Eliza [supra].

In the present case, no new trade was permanently and exclusively pursued; no determination had yet been formed or evinced to abandon entirely the old employment, and, consequently, no occasion had yet arisen to decide whether to take out new papers, or to attempt it, or not. The seizure, therefore, was premature. It was before the facts showed clearly that a forfeiture was proper, and that a violation of the 32d section of the act of 1793 had been manifestly committed. It is the end which usually crowns the work, and which usually must unite to designate the nature and character of the voyage. Taber v. U. S. [Id. 13,722]. By these conclusions we are happy not to come in collision with any sound principle, or any precedents.

It ought, perhaps, to be added here, that the

inspection on file at the custom-house, showing that the Reindeer was well manned and equipped for the codfishery, prevents her from being acquitted on the first ground set up in the defence, that she never had been duly inspected as well as licensed. It may not prove that the owners requested it, but that the inspection was duly made, is clear. Something ought perhaps to be said as to some general features of the case, which have been urged earnestly in the argument, and some of which relate to the existence of probable cause or not for filing these libels. On the one hand, the idea of instituting qui tam actions, or extorting forfeitures of vessels from fishermen, merely because they caught some other fish than cod, while sailing under a cod license, without intending or attempting to count the time to obtain a bounty while so employed, and without intending to abandon the codfishing while finding cod to catch, during the rest of the voyage without changing their regular employment, or if changing it, without meaning not to change their license as soon as they returned, probably never entered into the heads of congress, and certainly not of the treasury department. The last does not appear ever to have given any such instructions, nor to have been consulted on the present occasion, nor made any attempt to take a penal advantage of any innocent error.

But the seizure appears to have been made by subordinate officers; and in their behalf, it is some excuse, that they had been concerned in another district in the seizure of the Nymph, and had some reason for supposing that the conduct of these vessels was not legal on account of its similitude, in part at least, to what was censured there. No wanton wrong was, therefore, probably intended by these seizures, though they were very disastrous ones, and hardly necessary in anywise till the voyage and season were ended, considering how much of it remained, and that the vessels all belonged to ports near by. Certainly it is a great misfortune, that some fourteen of these vessels, without any consultation or advice from the proper department, so easily communicated with, should, early in their voyage,—quietly at anchor in the harbor of Newport, their grand rendezvous in bad weather,—be all, with 130 men, on board, seized like outlaws and foreigners, and a whole year's industry in many cases frustrated if not destroyed, though known to belong to a neighboring state, where they could be prosecuted after their voyage was ended, if doing wrong, as was the Nymph, the case relied on for a precedent. While, under all these circumstances, it is difficult to suppress sympathy in behalf of so hardy, and honest, and gallant a race of men, as the American fishermen, and while courts in all cases, and as to all classes, should feel anxious to protect innocent intentions and honest industry, and particular services, from severe penalties, intended only for illegal attempts on the treasury, or for wilful and wanton departure from the laws, the community may be assured that any self-willed or fraudulent evasions of the acts of congress can never be entertained by this tribunal.

Believing in this case, however, that no breach of the laws was really meditated or committed, I am happy to be able, on legal principles, to relieve the owners from the entire loss of their vessels, which, in addition to their other disappointments and onerous expenses in the vindication of their rights, would be so fatal to them. As in this case, also, I shall always be most happy to find, that acts of the citizen, which the officers of the government have long considered as lawful, and have long allowed to be done with impunity, and which, so done openly for many years, have never been by new proceedings more clearly forbidden by congress, can be shielded from prosecution and forfeiture, by a fair construction of the laws, and without any new or peculiar danger to the revenue.

It is a further consolatory reflection in this case, that if congress wishes to have the law different from this construction, it is very easy to effect it, though it should be unfortunately by throwing new restrictions and difficulties in the path of the honest fisherman, and new obstacles in the rearing up, in this fine nursery, more of our young men to fight the battles of the republic on the ocean; and by imposing new burthens on them in competition with this more privileged class in other countries, and new penalties and forfeitures, though not trying improperly to draw bounties or drawbacks, but only to exercise freely on the waves the sacred natural right from Providence, of taking every fish, which may offer, for their own advantage, as well as for the increase of our national wealth and greatness.

The libel must be dismissed.

This case was argued at Providence, November, 1847, and the opinion delivered there in June, 1848, at an adjourned term. At Newport at the regular session, during the same month, a decree was made that the libel be dismissed, without any taxable costs against or in favor of either side. But in the district court the claimants had paid certain fees of the clerk, marshal, &c., which in all the fourteen cases depending amounted to the sum of $588. This they moved to have refunded, and opposed any certificate of probable cause for the seizure to the officers who made it, and who had applied for such a certificate.

WOODBURY, Circuit Justice. The court considered it proper, that the claimants of the vessel, discharged on the merits, should not be compelled to pay any kind of costs. Unless by a positive requirement of statute, an innocent party ought never to be mulcted in costs any more than in damages. It was

hard enough when acquitted to be deprived of costs, and would be much more so if forced to pay costs. The decree will therefore be, as to all the fees of officers from the commencement of this case, that they be paid as the act of congress of Feb. 28, 1799 [1 Stat. 624], directs: which is in substance, that the officer informing must pay them when the vessel is not forfeited, unless the court certifies that a reasonable ground existed for the seizure. If they certify that, then the fees must be paid by the United States. This provision was made to protect the officer, when acting in a public capacity, if he appears to have acted reasonably, and on probable grounds of belief that the laws had been violated. This course is not burthensome to the government, while it is just to their agents if faithful. The only remaining inquiry here is, were they faithful? and are they entitled to such a certificate? That those officers erred in this case, has already been decided by us. But that is not enough to deprive them of such a certificate, or officers never could have one. Because it is only in cases of error that they need a certificate. What then is the true test as to the propriety of granting one? It is, that though the seizure was wrong, there was ground for suspicion of a breach of the law. Locke v. U. S., 7 Cranch [11 U. S.] 339. Here, a large quantity of mackerel on board, and only a small quantity of cod, furnished some such ground. Another test is, whether, though the property seized is discharged, real doubts exist as to the true construction of the law. U. S. v. Riddle, 5 Cranch [9 U. S.] 311. Here such doubts existed, according to the opinion of the court heretofore delivered, and the forfeiture was overruled only after a careful scrutiny and serious difficulty in construing the law supposed to be violated.

Still another test is, whether the officer informing appears to have honestly entertained an opinion, that the forfeiture had been incurred. Otis v. Watkins, 9 Cranch [13 U. S.] 339. Here, though the seizure was a most unfortunate one for the owners, for reasons before assigned, yet nothing of malice or oppression is disclosed under all the circumstances. No rivals in the mackerel fishing or mackerel selling appear to have interfered and instigated the seizure, but the captain of the cutter, who informed, seems to have acted from his former experience, in the case of The Nymph. He appears, however, to have overlooked the fact, that the voyage there had advanced much further, and the change of employment to have become certain and fixed; and he does not seem to have been aware of the subsequent doctrines laid down in the case of The Harriet, that a forfeiture is not incurred, unless another kind of fishing is pursued, so long and so exclusively as to show the old kind abandoned, and a new one substituted, not merely subordinate or temporary. We do not see, however, but that he acted in good faith, and had reasonable grounds to doubt whether the law had not been violated. It is suggested, finally, that this is a municipal case, and that no power exists to give a certificate in such a case. Dunl. Adm. Prac. 309. But if that impression was correct, the certificate could do no harm. It is, however, a case connected with the revenue, with shipping papers to affect the national character of the vessel, and the tonnage duties imposed on her, and sometimes the duties on the fish brought in, whether American or foreign. A prize case, or a seizure jure belli, needs no certificate for protection, if probable cause in truth existed. The Palmyra, 12 Wheat. [25 U. S.] 1; The Marianna Flora, 11 Wheat. [24 U. S.] 1. Probable cause, however, is no justification of seizure in a municipal case, as contradistinguished from a prize case, unless some statutory provision makes it so. The Appollon, 9 Wheat. [22 U. S.] 373; The Palmyra, 12 Wheat. [25 U. S.] 1. But the present case is one of those municipal seizures, expressly provided for in several acts of congress, as justifiable, if certificate of probable cause is given. See Acts of March 2, 1799, § 89 [1 Stat. 695]; 28th Feb., 1799 [1 Stat. 622]; 24th Feb., 1807 [2 Stat. 422]. And if the certificate be refused in such cases, the party seizing is liable in damages. The Appollon, 9 Wheat. [22 U. S.] 373; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246. Let a certificate of probable cause be prepared.

Case No. 16,146.

UNITED STATES v. REITER.

UNITED STATES v. LOUIS.

[4 Am. Law Reg. (N. S.) 534.]

Provisional Court,[1] State of Louisiana. July, 1865.

WAR—BELLIGERENT OCCUPATION—AUTHORITY OF PRESIDENT.

1. At the time of the establishment of the provisional court for Louisiana, a considerable part of the territory of that state was held by the forces of the United States, in armed belligerent occupation.

2. In a country so held, the authority of the occupying force is paramount, and necessarily operates the exclusion of all other independent authority in it.

3. Government from some source is a necessity, and while the power to give and administer government is exclusively with a party occupying a country, there can be no doubt that the right and the duty are his to furnish a government and supply that want.

4. The establishment of the provisional court for Louisiana, by the president, as commander-in-chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations.

[1] [This court was established by an executive order of the president of the United States, October 20, 1862, a copy of which is given in the opinion of the court. See, also, The Grapeshot, 9 Wall. (76 U. S.) 129. The records of the provisional court were transferred to the district court by Act July 28, 1866 (14 Stat. 344, c. 310)].

5. So long as the authority of the United States shall continue, the right and the duty of it as the party dominant there to afford to the country a government will continue.

6. Said court has, from the time of its foundation to the present time, rightfully exercised its functions in territory in which the government of the United States has been by force of its arms sovereign, and will continue rightfully to exercise them there, so long as its commission shall remain unrevoked and the power of the United States shall continue to support it in the exercise of them.

The accused were tried before Judge Peabody and a jury, and were severally convicted; [Augustus] Reiter of murder, and [John] Louis of arson. After the convictions a motion was made in each case in arrest of judgment.

Mr. Whittaker, for Reiter.

Durant & Horne, for Louis.

Geo. D. Lamont, Pros. Atty., for the United States.

PEABODY, Provisional Judge. These two cases may without inconvenience or danger of confusion be considered together, although they have in fact no connection with each other. The same objection to the proceeding of the court to pronounce sentence upon the accused and in arrest of judgment, is made by both the defendants, and although the objection is urged on different grounds in the two cases, still the objection is proper to be considered on all the grounds in each case. It is urged that this court is not authorized to try these defendants, and that its proceedings have not the sanction of law in the premises. If for any reason this be the case, no further steps should be taken. If for any reason the authority is wanting in one case it is equally so in the other, and the court should refrain from going further in either case. The accused have been indicted separately and tried separately on charges wholly different and having no connection the one with the other, and the consideration of their cases together rather than separately, now, is a matter of convenience solely. One of the accused, Reiter, has been indicted for murder, in causing the death of his wife by violence. The other has been indicted for arson, in burning a building used as a mansion or dwelling-house. Each has been tried before a jury of this parish and been duly convicted of the offence charged in the indictment, and each is now before the court on a motion in arrest of judgment, and in each case the arrest is urged on the ground that the court is not authorized in law and has not jurisdiction to try the case. The counsel for Reiter claim that the court, in its constitution and creation, had not originally the warrant of law to try the accused. The counsel for Louis concede that the court had authority originally to entertain and try such a case, but insist that for causes occurring since, its authority has ceased; that certain steps taken in Louisiana toward the re-establishment of a civil state government have superseded the powers once possessed by the court, and that it is now without jurisdiction or power. The offences of which the defendants stand convicted, by the laws of Louisiana are punishable with death, and nothing would be more agreeable to the court than to proceed with the utmost caution in considering these objections to its jurisdiction. The accused have been indicted, tried, and convicted under and pursuant to the law of the state of Louisiana.

The first question to be considered is whether the court has ever had, from the nature of its origin and constitution, authority to try cases like these; and if this question shall be decided in the affirmative it will remain to examine.

The second question, namely, whether the power to try or the jurisdiction over such a case, once possessed by this court, has been withdrawn or lost,—whether the court in fact has been in any way deprived of it by subsequent events.

It must be conceded that the court, in its origin and structure, is quite out of the usual course and novel. It has not its origin or foundation in any constitutional or legislative enactment—is not the creature of any regularly-organized constitutional or legislative body. Ordinarily the judicial tribunals of the land are the creations of the legislative departments either of the state or federal government, and for the regularity of their creation and the character and extent of their powers depend on the action of the legislative branch of the one or the other of these powers. In such cases, the first thing to be done in ascertaining the legality or powers of a court, is to consult the constitution and legislation of the government from which it claims to hold commission, and in the letter of these is found the act of its creation and the extent and limit of its powers. Not so with this provisional court, which depends for its existence on the law of nations, and on that part of the law of nations relating to war—the law by which parties and neutrals are guided in their treatment of each other in a state of war; and that portion of it which relates to and determines the rights and duties of a belligerent, a conqueror in the territory of an enemy and holding it in armed occupation. On that law must depend the decision of the question presented by this motion, of the validity in law and the powers of this court. On that law alone must this court rely for the power and jurisdiction it has exercised for a considerable time, in a large number of cases involving amounts usually very large. It was in that law that the president of the United States, pressed by the urgent wants of the community here, found his warrant for the establishment of this court in the midst of the country of an enemy held by him jure belli in armed belligerent occupation.

The authority of this court is derived from the president of the United States, the chief executive of the nation and commander-in-chief of its forces military and naval. It is conferred by an order, of which the following is a copy:

"Executive Order, Establishing a Provisional Court in Louisiana.

"Executive Mansion, Washington,
"October 20, 1862.

"The insurrection which has for some time prevailed in several of the states of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that state, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the state in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a provisional court, which shall be a court of record for the state of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be provisional judge to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana, his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the president, not exceeding beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the state of Louisiana. These officers shall be paid, out of the contingent fund of the war department, compensation as follows: * * * Such compensations to be certified by the secretary of war. A copy of this order, certified by the secretary of war, and delivered to such judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed. Abraham Lincoln.

"By the President:

"William H. Seward, Secretary of State."

"War Department, Washington,
"23d October, 1862.

"I hereby certify that the foregoing is a true copy, duly examined and compared with the original of the executive order of the president of the United States, constituting a provisional court for the state of Louisiana.

"Witness my hand and the seal of the war department.

"Edwin M. Stanton, Secretary of War.

"Attest: John Potts, Chief Clerk."

This order, by its terms, no doubt embraces cases like these under consideration, as indeed it does, perhaps, all others which can occur in life, or become the subject of judicial investigation. The language of the order "to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty," is clear and unquestionable, and embraces this class of cases, with all others of every description. The president then sought to give power to this court to try and determine cases of this kind, and having made an order to that effect, has given it that power, if he himself had authority to confer it. The only question remaining to be answered on this point, is whether the president had authority to confer such powers and jurisdiction.

The authority of the president of the United States to create this court, and invest it with powers which should embrace these cases, depends, to some extent at least, on the constitution of the United States, which creates the office exercised by him, and determines its functions. That constitution (article 2, § 1, par. 1) declares as follows: "The executive power shall be vested in a president of the United States of America." It also provides (article 2, § 2, par. 1): "The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States." As president, chief executive, and commander-in-chief of the army and navy, he would not ordinarily have power to establish tribunals for the determination of questions civil and criminal, arising in civil life. Was there anything in the condition of affairs existing at the time the order was made which could give him the power to establish them, and if so, what was there in the condition of affairs then existing to give him power in this respect not ordinarily possessed by him as one of the attributes of his office? Between the government of the United States and a people inhabiting a portion of country lying on the Atlantic Ocean and the Gulf of Mexico, and extending north beyond the northern boundary of the territory in question, and embracing within its borders that section of territory theretofore known, and still most conveniently designated, as the state of Louisiana, a war had for some time been waged. This fact is notorious, and moreover it is conclusively settled by the president, the ultimate arbiter of the fact, by his proclamation to that effect. As to its existence, therefore, as well as the existence of some other facts to which I shall have occasion to refer, equally well known,

no time will be consumed in attempting to prove them, but they will be assumed. It is a matter of public knowledge and notoriety that this war had been pending, and that the country over which the jurisdiction of this court is in question, and heretofore known, and in the order establishing this court described as the state of Louisiana, had been for many months held and occupied by those people and their forces, military and naval. That it had been for a long time previous to, and also since the commencement of this war, inhabited, cultivated, and owned by the same people who had entered into and carried on war with the government of the United States, and that it was still so inhabited by a people whose relations with the government of the United States had for some time been and were still those of enmity. That it had, in the course of the war, been by force of the arms of the United States wrested from the enemy, and was at the time the order establishing this court was made, held by the forces of the United States in armed belligerent occupation. That the armed belligerent forces of this enemy of the United States had been, by force of the arms of the United States, expelled from this country, and that they were at the time held out of it by the armed forces of the United States, and that war was still waged between those belligerents. The civil institutions of the country thus held, including the tribunals for the administration of justice, had been formed and established by the enemy of the conquering power, and were by it administered at the time of the conquest. These institutions having been formed, established, and administered by the government existing previous to and at the time of the conquest confessedly hostile to the government of the United States, were the only institutions found there at the time the military authority of the United States was by force of its arms established there.

By the conquest of the country, in this case as in others, the previously-existing government and the power by which it was administered were subverted and swept away, and those of the conquering power were substituted in their places. This is the necessary consequence of a conquest of a country —a transfer of the control, government, and sovereignty of it from one party to another. The old power is conquered and extinguished, and the new one of the conqueror is instituted in its place. The old institutions, if not abandoned and extinguished, are at least suspended in their action. They may be transferred to and adopted by the new governing power and may be used and operated by it, just as an old machine, detached from the power that has usually moved it, and abandoned for use as a whole, may furnish isolated pieces of machinery which can profitably be introduced into a new machine having different qualities, moved by a new and wholly another power, and used to accomplish on the whole, perhaps, purposes quite different. However there may be retained in use by the new governing power some of the features or institutions of the government which has been supplanted, it is nevertheless wholly another government, and derives its life and all its vital qualities from a new source—the new sovereignty installed by the conquest. A conquest necessarily operates the extinguishment of the power of the party conquered in the country which is the subject of conquest, and the establishment there of the power of the conqueror. Without this there is no conquest of a country, and there can be none. When the power previously dominant in a country has been extinguished by that of another party, and rendered incapable of governing it further, and a new one has been established in its stead, it is both the right and the duty of the party thus coming into power to see to it that a government wholesome and salutary shall be established and administered, and, as in such a case there is only one power, that of the new party succeeding, capable of giving and administering the government, it follows that it is the duty as well as the right of that power to do it. No country can exist without a government of some kind. The rights of the inhabitants must be protected—crime must be restrained and punished—the virtuous must be protected against the vicious—the weak against the strong—order must be preserved and security to person and estate assured. The party dominant for the time being has the power to do it, and no one else has the power, and it follows from the necessity of the case that he must exercise it. So the government of the United States, having conquered and expelled from the territory of country, theretofore known as the state of Louisiana, the power by which the government of it had been theretofore administered, and having established there its own power, was bound by the laws of war, as well as the dictates of humanity, to give to the territory thus bereft a government in the place and stead of the one deposed or overthrown, such an one as should reasonably secure the safety and welfare of the people thus reduced to subjection; in some manner, not inconsistent, to be sure, with the proper interests of the governing power, and the maintenance of it in its supremacy there. The power established there was the military power of the United States, and the president of the United States, as we have seen, the commander-in-chief of the forces, military and naval, of the United States, was at the head of that power, and had the right and duty to exercise and direct it. It was incumbent on him, representing for this purpose the sovereignty of the United States, to see that the duty devolving on his government should be properly performed. He acted in obedience to this duty, and in accordance with this right, when he attempted to establish there a judi-

cial tribunal capable of deciding controversies and administering justice.

But how does this question stand on the authority of adjudged cases? In the case of Cross v. Harrison, in the supreme court of the United States, in 1853, reported in 16 How. [57 U. S.] 164, the court held that a civil government formed in California, under the direction of the president of the United States, as commander-in-chief of the army and navy, shortly after the conquest of the country, and while it was held in military occupation by the forces under him, was an act warranted by the laws of nations, and that the formation of such a civil government was the rightful exercise of a belligerent right over a conquered country. It appeared that the port of San Francisco had been conquered by the arms of the United States in 1846, and that shortly afterwards, the United States holding military possession of all Upper California, the president authorized the commander of the forces of the United States there, to exercise the belligerent rights of a conqueror, and form a civil government for the conquered territory, with powers to impose duties on imports and tonnage, for the support of the government and of the army which held the country as a conquest in possession. This was done, and duties were levied and collected for a time. Afterwards, a treaty of peace was made with Mexico, by which Upper California was ceded to the United States. After this treaty, and after the cession to the United States of the territory, the military governor continued to collect import and tonnage duties as he had done before, but at the rate authorized by acts of congress in other parts of the United States; and for that purpose appointed the defendant in this suit collector there. He, as such collector, without any legislation of congress on the subject, collected those duties to a large amount from the plaintiffs, who sought in that suit to recover them back again. The question presented was, whether the United States, after the cession of this territory to it, and in the absence of any legislation by congress on the subject, had a right by its military governor to collect those duties. The governor, it appeared, collected them of his own motion, and without any instructions on the subject from his government at home. No question of the right of the government to levy duties as it pleased, while the country was held by right of conquest in strictly military occupation, appears to have been made; but the continuance of that right after the treaty of peace, and after the cession of the country to the United States, seems to have been chiefly in question. The court sustained the right in the broadest manner, putting their decision on the ground that the formation of the civil government when it was done, was the lawful exercise of a belligerent right over conquered territory. That that government being in existence when the territory was ceded to the United States, its powers did not cease by reason of the cession of the country to the United States, or of the restoration of peace, and that it was rightfully continued after peace was made with Mexico, until congress should legislate otherwise. The decision covered the whole ground that the duties were lawfuly collected by the civil military governor of California, an instrument of the provisional government of the United States in that country whilst the military occupation was continued; and that it was so afterwards from the ratification of the treaty of peace until the revenue system of the United States was put in practice, under acts of congress passed for that purpose; in effect deciding that the provisional government of the United States there was rightful and legal, and that it continued in force a legal rightful government through the time the country was held in military occupation, and after that occupation ceased, and that it was, in fact, in force until some other system was provided according to law to supersede it.

For the doctrine that a conqueror in a conquered country may establish a government and courts for the administration of justice, the case of Leitensdorfer v. Webb (decided by the supreme court of the United States, in 1857) 20 How. [61 U. S.] 176, is an authority directly in point. In that case the conduct of the government of the United States by General Kearney, the officer in command of its forces there, was brought in question. It appeared that after the conquest of that country by the arms of the United States, General Kearney, in command of the forces there, established a government and provisional courts for the administration of justice. Those courts, in the case referred to, were adjudged to be legal, and their decisions obligatory as warranted by law. The power to establish the government and the courts was directly in question, and was directly passed upon by the court, and was sustained on the ground of the right of conquest. In that case, moreover, it appeared that the country conquered was subsequently, by treaty, ceded to the United States, and it was claimed that by the act of cession the right of the United States to govern the country and enforce the laws made by the provisional government while it was held in military occupation, was terminated.

It was not seriously questioned that the United States might, while it held the country in military occupation, establish and administer a system of government—make laws by which to govern the inhabitants and regulate their rights and intercourse among themselves, and set up courts by which the laws so made should be administered. That right was deemed to be too evident to be seriously questioned. It was, however, in issue, and was necessarily passed upon by the court. The doctrine chiefly contended for,

was that by the cession of the country to the United States, the right to govern it by that provisional system adopted when it was held a conquest of arms, was terminated, and that the United States had, after the cession, only the right to govern it like other territory of the United States, by laws emanating from congress—the constitutional law-making power of its own government—enacted in reference to it as territory of the United States. This position was not sustained by the court, but was overruled and adjudged not warranted in law. The court says: "Of the validity of these ordinances of that provisional government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt, that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended, that whatever might have been the rights of the occupying conqueror, as such, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest, every institution which had been overthrown or suspended would be revived and re-established." "The fallacy of this pretension," the court proceed to say, "is exposed by the fact, that the conquered territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute, permanent dominion and sovereignty." The court then proceed to decide when the institutions of the provisional government would terminate. They say: "We conclude, therefore, that the ordinances and institutions of the provisional government could be revoked or modified by the United States alone, either by direct legislation on the part of congress, or that of the territorial government, in the exercise of powers delegated to it by congress." The question there presented was the validity of an ordinance of the territorial government, authorizing attachments of property of debtors, enacted by the provisional government, while the country was held in military occupation, and before the cession of it, but sought to be enforced by the provisional territorial court after the cession of the country to the United States, and after the military occupation had ceased. The court upheld the law in its origin, and also in its continuance in force, and the administration of it by the provisional territorial court after the cession of the country, and after the military occupation had ceased.

In the case of Jecker v. Montgomery, 14 How. [55 U. S.] 498, decided in 1854, the same supreme court of the United States incidentally recognise the legality and powers of those provisional courts, and while deciding that, for reasons peculiar to cases of prize, and not at all applicable to any others, they could not legally act in cases of that class, the court admit their powers and jurisdiction in other cases: making three decisions of the court of last resort of the government of the United States quite in point. Either of these should be sufficient authority for such a principle, if indeed a principle so plainly proper and necessary, can be thought to need authority of precedent at all. But at the risk of being tedious and doing work of supererogation, which charges I am persuaded might well be maintained against me, I will add to these authorities already commented on, still another one, which has a bearing quite material on this case at more than one point. I mean the case of U. S. v. Rice, 4 Wheat. [17 U. S.] 246. That case, as well as those already cited, decides that by the conquest and military occupation by one nation of a portion of the territory of another, the portion so acquired passes from the operation of the laws and government of the nation to which it had previously belonged, and comes under the laws and government of the nation making the conquest. It also decides that while such territory is held by the conqueror, it is the right of the party so holding it to govern it, and for that purpose to make laws by which to govern it. That while a portion of territory is so held, the laws of the conqueror holding are in force there, and the laws of the party from whom it has been taken are in abeyance not only de factor but also de jure; that while it is so held, the conqueror has de jure as well as de facto all the rights of dominion and sovereignty over it, and may exercise them at his pleasure, and that the former sovereign, overcome or expelled, has no right there, and his laws have no effect there; that acts done there with the authority of the conqueror are legal and proper, but those done in violation of his laws, even though done in obedience to the laws of the sovereign expelled, are not legal, but contrary to law. In short, that, by conquest, the sovereignty and right to rule of the conqueror are introduced and established, and the sovereignty and right of rule in the party expelled are extinguished; and that the duty of allegiance in the people remaining there is transferred in like manner from the vanquished to the victorious party; in fact, that by such an act the change of the sovereignty and allegiance are complete, and new rights and duties in both parties are created accordingly. I think that all these conclusions certainly follow from what is decided, if, indeed, they are not all actually decided there. That case, like each of the others cited, was decided by the supreme court of the United States—the court of highest human authority on that subject—and as the decision was against the United States, and in favor of the authority of Great Britain, its enemy in

the war, and was made shortly after the occurrence of the war out of which it grew; and while no department of this government was inclined to magnify the rights of Great Britain or disparage those of its own government, there can be no suspicion of bias in the mind of the court in favor of the conclusion at which it arrived, and no doubt that the law seemed to the court to warrant and demand such a decision. That case grew out of the war of 1812, between the United States and Great Britain. It appeared that in September, 1814, the British forces had taken the port of Castine, in the state of Maine, and held it in military occupation; and that while it was so held, foreign goods, by the laws of the United States subject to duty, had been introduced into that port without paying duties to the United States. At the close of the war the place was by treaty restored to the United States, and after that was done the government of the United States sought to recover from the persons so introducing goods there while in possession of the British, the duties to which by the laws of the United States, they would have been liable. The claim of the United States was that its laws were properly in force there, although the place was at the time held by the British forces in hostility to the United States, and the laws, therefore, could not at the time be enforced there; and that a court of the United States (the power of that government there having since been restored) was bound so to decide. But this illusion of the prosecuting officer there was dispelled by the court in the most summary manner. Mr. Justice Story, that great luminary of the American bench, being the organ of the court in delivering its opinion, said: "The single question is whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. * * * We are all of opinion that the claim for duties cannot be sustained. * * * The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance of the British government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case no other laws could be obligatory upon them. * * * Castine was therefore, during this period, as far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States." The court then proceed to say, that the case is the same as if the port of Castine had been foreign territory, ceded by treaty to the United States, and the goods had been imported there previous to its cession. In this case they "say there would be no pretence to say that American duties could be demanded; and upon principles of public or municipal law, the cases are not distinguishable." They add at the conclusion of the opinion: "The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority." Does this case leave room for a doubt whether a country held as this was in armed belligerent occupation, is to be governed by him who holds it, and by him alone? Does it not so decide in terms as plain as can be stated? It is asserted by the supreme court of the United States with entire unanimity, the great and venerated Marshall presiding, and the erudite and accomplished Story delivering the opinion of the court, that such is the law, and it is so adjudged in this case. Nay, more: it is even adjudged that no other laws could be obligatory; that such a country, so held, is for the purpose of the application of the law of its former government to be deemed foreign territory, and that goods imported there (and by parity of reasoning other acts done there) are in no correct sense done within the territory of its former sovereign, the United States.

No part of the remarks of the court in this case is more fully warranted or proper than the last, to the effect that the case is too clear to require aid from authority. The right, therefore, of a conqueror in a conquered country to ordain a system of government for it, and among other institutions to erect courts of justice, and maintain them in the discharge of their proper functions, is as well established and free from doubt when considered on authority, as it is in principle; and about as well in each as any proposition which could find among men an advocate to question it, could in the nature of things be expected to be.

But it may be said that this reasoning, if correct as to territory foreign to the conqueror, and as to which his rights and duties are simply and solely those of a conqueror by force of arms, is not applicable to the case in question, for this Louisiana is a part of the territory of the United States, over which the powers and duties of the president and the other departments of the government were already fixed, and are dependent on the constitution and laws of the United States, and limited to the powers and duties conferred by them; and that those laws do not give the president the power to establish a court like this, and therefore that he has not that power. It is quite certain that ordinarily he would have no such power; and hence, instead of looking for it to the constitution and laws of the United States alone, I have looked elsewhere and to other facts than his merely occupying the place of president at

the time. I have invoked also the fact that he was by virtue of that office, as commander of the forces of the United States, holding in armed belligerent occupation the country in which the court was established, and in which its powers and authority are now brought in question. Is this country, for the purpose of determining the powers and duties of the commander-in-chief of the army and navy of the United States, to be deemed domestic, or is it to be deemed foreign territory? What are the relations of the forces of the United States, and of their commander, to these districts of country as they enter them, expelling the forces of the enemy? Is he the chief executive of the country of which these districts are a part, and is he nothing more; and are his powers and duties those of chief executive only? Has he in this country subjected to his arms, and while in armed belligerent occupation of it, with the forces under his command, has he by law the same powers and duties as he would have in Massachusetts or New York in time of profound peace, and has he no others? Has war given him no powers in law in addition to those possessed by him in time of peace? Having in war broken down the hostile power of it, and driven its forces out of it by the military force under his command, has he no new powers there by reason of that fact? When his subordinate officer, Admiral Farragut, landed there from the deck of the Hartford, did he carry with him no right to power not commonly enjoyed by the president in other territory of the United States? Did his rights as conqueror cease the moment his power in that character was established? Having entered Louisiana as commander-in-chief, at the head of his forces victorious, was he at once remitted to the position, powers, and duties of a peace president in times of peace, and limited to them? Had he none of the powers or duties of a conqueror in a country subjected to his arms? What was this country to do for a government when the old hostile one had been reduced and expelled? Was it to get along without one as best it could? Was it to do this until some new one could spring up to supply the want? Were all the rights of persons and property, natural and acquired, the right to life, security, liberty, and property, to be at once suspended, and was the rule of physical force to override them all? The right of a conqueror to govern a country held by him by right of conquest, is well established on authority. The cases which establish this right, however, relate to the conquest of a country foreign to the conqueror, and as to which he has no rights and is under no restraints, except those which come from the fact of conquest alone, and not to one which is of right a part of his own proper domain. In this case, the territory over which the government of the United States had acquired, as we have supposed, some rights in the nature of rights of conquest, belonged of right to it as a part of its own domain, and it remains to be considered whether that fact makes any difference in respect to the right by the laws of war to govern a country conquered.

It may be said that the act of the United States in this case, had not the usual effect of a conquest of foreign territory; that instead of acquiring anew the rights of a conqueror, the United States by this conquest (as I for the sake of convenience have called it) has but removed the obstacles to the enjoyment of its pre-existing rights, and has not acquired any new ones of a conqueror. As we have seen, the foundation of the right of a conqueror to govern conquered territory, and for that purpose to establish provisionally civil institutions in it, is necessity, and that chiefly the necessity of the conquered country and its inhabitants. A government of some kind they must have, for no community can exist without it. The power of the conqueror has overridden and subjected all other power, and this necessity can be supplied from no other source than him, for he holds for the time being all power. Whilst this continues to be the case, what is there in the case in question of Louisiana which should make it different from a foreign country? The inhabitants of that country owed allegiance to, and were entitled to the protection of the government of the United States, it is said familiarly, and this is quite true in the sense in which the remark is usually made. But did the United States ever at any time, or under any circumstances, owe the people of this territory a protection and government which would supply all, or any considerable part of their wants in this respect? If the government of the United States should afford to this country all the protection and aid—should perform for it all the governmental offices, which it by virtue of the constitution and laws of the land was ever bound, or had a right to do, how far would this go towards supplying the wants of the country in that respect? Is it not quite certain, on looking into the law on the subject of the relations, rights, and duties of the federal government to the tract of country in question, or any other tract embraced within the state, that with the federal government in full function, and all its duties fully performed, a very small portion of the governmental necessities of the country would be supplied?

It is a fact familiar to us all, that under our system of government, almost all the governmental aid needed by our people is due to them from the local depositories of power, the state governments—for most purposes within their own territory sovereign. These governments, under our system, are the repositories of nearly all of the powers of government in ordinary times in familiar use among us, and whether they be applied by the state itself, by its own officers directly, or be allotted out in parcels to smaller gov-

ernmental districts, such as counties or parishes, cities, towns, or villages, to be applied by the officers of those localities respectively, still the state and not the federal government is the reservoir from which they are drawn, whether it be for distribution or exercise; and the state, and not the federal power and officers, administer and execute them. The man of commerce, the seaman, a traveller on the highway of nations, the soldier, whether at home or abroad, the direct instrument of the government, and at once its representative and defender, and the traveller in a foreign land, experience and realize the power and the protecting hand of the federal government, its value and beneficence; but in the ordinary walks of life, at home, among plain people, very few—probably not one in a hundred—have occasion in a lifetime to invoke or experience any office or effect, enabling or restraining, protective or punitory, of that government, whose duty relates in ordinary times and circumstances almost exclusively to the foreign relations of the country, happily almost always so secure and free from threatening aspect or cause of anxiety as to attract little or no consideration.

From which government comes the system of police by which order in society is maintained from one end of the land to the other? From which the judicial power—the one in question here and now—by which, in ordinary cases, crime is punished and repressed, controversies decided, and the rights of persons and property established and maintained? and what is certainly quite in point, from which source comes the power by which these very unfortunate criminals now before me would ordinarily on a basis of peace be tried, and justice be meted out to them? What law of the United States, as laid down in the constitution and statutes thereof, did Reiter violate, when (forsaken of his God) he took the life of his wife, the partner of his bosom, on that hopeful, holy morning of the anniversary of the birth of our Saviour, in the year of that event one thousand eight hundred and sixty-two? What law of the United States did Louis—poor benighted Louis—whose eyes have scarcely been blessed with the sight of himself free to seek his own security or happiness—violate, when he applied the fatal torch to the fated house, the residence of a human being? It is quite certain that the government of the United States, remitted to its ordinary constitutional functions within one of the states as in times of peace, could not supply a government at all adequate to the necessities of society, and especially could not have taken cognisance of, or punished at all, either of the offences in question by any tribunal it ever had or had the right to establish.

The necessity for a provisional government here, for nearly all the purposes for which a government is necessary, and especially of a provisional tribunal for dispensing justice generally, and in cases like these now under consideration, was the same as, and none other than it would have been if this tract of country in question had been a part of the domain of a government wholly foreign to that of the United States, and over the territory of which it had no other rights than those growing out of war and conquest. Indeed, it may well be doubted whether, in reference to governmental rights and duties in matters of this kind, there is any difference between the citizens of the several states and those of foreign territory. Certain it is from what has been said, that this territory is not, by the nature of our system of government, under the dominion of the federal government as to most matters of local administration, but is exclusively under the state and local government, and the federal government was never bound and never assumed or pretended to furnish government to any section of the states as to their internal or local matters generally, and has not, and never had the duty, right, or power to do so. But this district of territory had been in insurrection against the government of the United States, had openly withdrawn from all connection with that government under the forms of law and civil legislation, had allied itself with others hostile and at war with it, and had, by force of arms, for a considerable time maintained this attitude external and hostile, resisting successfully the efforts of the government to subject it to law and duty. However the act of secession was ineffectual in law, this district had in fact and practically withdrawn from all relations with the government of the United States, and had arrayed itself in armed hostility to it. Its duties remained unchanged no doubt, but its rights to the filial relation—its rights to receive from the federal government the consideration and care of a parent rather than the imperious commands of a military master, may have been much changed by the events which had transpired, and I think that they had been. Having taken for itself the attitude of a foreign state, and that too of one hostile and at war with the United States, and formed and adapted all its civil institutions, and in every respect bent itself to that condition, and claimed and asserted it, and practically maintained it by force of arms for a time, and having been at this time overcome and subjected to the arms of the government of the United States, it may very well be that while it has acquired no new rights by virtue of its pretensions, it has resigned and forfeited old ones, and is no longer entitled to demand the benefits of a relation it has renounced and repudiated, however it may have failed in establishing at that time its freedom from the duties attendant upon it.

The counsel for the prisoners Reiter and Louis, however, take different grounds on this motion. The former insists that the

whole structure of the court in its origin was without warrant in law. That inasmuch as the constitution and laws of the United States give no authority to the president to establish such a court, he has none, and that his act in attempting to establish it is ineffectual, from want of constitutional and legal power in him; while the learned counsel for the accused Louis concede that the president, as commander of the forces of the United States, had authority by the laws of war to establish it, and that it had originally all the powers by him attempted to be conferred, but insist that these powers have ceased, by reason, as I understand the argument, of the organization of a civil government here which supersedes the military. I pass to consider the question presented by this argument. If a conqueror in a conquered country have a right to set up a government in it, when does that right cease? Or, rather, if he have such a right, and exercises it, when does the power of the government so set up cease? I answer, first, it will terminate necessarily whenever the power which formed it shall terminate, or become unable to support it. And, secondly, whenever that power shall for any cause voluntarily bring it to an end. That the power of the federal government here has not been terminated, I need no argument to prove. It certainly has not been expelled, and it quite as certainly has not been withdrawn. It remains, we all feel and realize, the great, beneficent, paramount, and only power here; able ever to support and supporting itself, and furnishing and supporting every government office and function here. But on this point, as well as the one to which I have cited the cases above referred to, some of those cases speak as authorities. In two of those cases, at least, in which the power of the provisional government and the provisional courts was sustained by the supreme court of the United States, it was so upheld in territory belonging, aside from military occupation and of right to the domain of the United States, and over which that government had powers of government, full and complete, for all purposes, as any sovereign or state has ordinarily within its own territory; rights not limited to its external matters alone, or chiefly, as are those of the United States in territory lying within one of the states, but embracing powers for all the details of local administration, legislative, executive, and judicial. And even there, where the United States had by the constitution, powers of government ample for all purposes, the power to continue in force a provisional government long after military occupation had ceased, and when the rights of the United States there depended not at all on military power or belligerency, but wholly on compact between the former sovereign and itself—even there, in territory confessedly belonging to the United States, and in time of peace, and in the absence of military power or military necessity, the provisional government and the provisional courts were upheld to the fullest extent, and were adjudged to continue legally and practically in force as instruments of the federal government until it should, by its constitutional action, through its legislature, otherwise provide. In the earlier of those cases (Cross v. Harrison, 16 How. [57 U. S.] 164) the court say: "Our conclusion from what has been said is, that the civil government of California, organized as it was, from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the constitution or laws of the United States, and that until congress legislated for it, the duties upon foreign goods, &c., were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, &c., from Governor Mason."

These cases, in deciding that a provisional government may be maintained by the military power of the United States in territory belonging to it, not held in military occupation, or jure belli, go far to prove that the fact that this country belonged, for some purposes, to the United States, aside from those coming from conquest and military occupation, did not take it from the application of the general principle that the conqueror in conquered territory, has the right to govern it and to establish government as he may deem expedient; but that such territory, on the contrary, is on the same footing in that respect as territory strictly and for all purposes foreign.

There is no pretence that the federal government has in any manner directly brought, or sought to bring, the labors of this court to a close. Having established it, and bade it proceed in the performance of its mission, it will continue (the power which established it continuing) until that power shall revoke its commission, or otherwise decree its discontinuance. But it is said that a civil government has been established here, and that therefore the proper functions of the provisional one, and among others, the functions of the provisional court, have ceased. It is quite true that some measures apparently tending to the establishment of a civil government have been taken. Members of congress were elected in 1862, and were admitted to seats in the national legislature. Several other officers—a governor, attorney-general, and others, have also been elected more recently under the direction of the military authorities. A convention for the revision of the constitution of the state has been elected and convened. These things look like measures for the organization of a state government, and measures of this kind pursued may in course of time lead to such a consummation, at the pleasure of the federal

government. That all these things have been done under and by virtue of the fostering care of the federal government, as exercised by the military arm of it, no one at all acquainted with the facts will doubt.

Waiving for the present, however, as unnecessary to be considered here, the question whether these movements have their foundation in and derive their vital principle from the state or from federal sources; and, whether in use, as some of them are, they are in fact instruments in the hands of the defunct state, or of the living federal power, it is quite certain and sufficient for present purposes, that the federal government has not voluntarily abdicated and resigned to them, all or generally, the functions of government, certainly not those of the provisional court. Such a general surrender alone could have divested the power of this court, for there is no pretence that the federal government has singled out certain powers, and among them the powers heretofore exercised by this court, and so parted with them as to be unable to recall or exercise them. The whole argument, on the contrary, proceeds on the idea that civil government as a whole, has been established here, and all the power to exercise it resigned into the hands of state authorities. In short that the state is again in possession of all the governmental powers which of right, under our system, belong to the state, in contradistinction to the federal government, and that the United States retain only what are designed under our system of government, ordinarily to be exercised by the federal government in all the states in times of peace, and that both parties are, in fact, remitted to their own positions in the constitutional government formerly occupied by them, and the same as are now occupied by the loyal states. At the time this motion was made (and everything must relate to that time) there was not a court in the part of Louisiana within the federal lines having any reasonable pretence of authority from any other source than the federal government. The United States district and circuit court, then in operation here, were and are the constitutional courts of that government. All else were creations of the military power of the federal government.

The learned argument of Mr. Lamont, the prosecuting attorney of this court, on that point, was entirely correct. All the governmental functions in exercise here at that time, not only courts of justice, but all others, and all the judges, officers, and instruments by which they were performed and operated, were those of the federal government, and were appointed, commissioned, animated, sustained, and moved by that power alone. The provisional court for the state of Louisiana—the court of the federal government—retains all the powers it ever had and will continue to exercise rightfully a jurisdiction commensurate with its charter, so long as the president or the government he represents, shall will it, and shall uphold it for that purpose; and whatever other institutions may have been brought, or allowed to come into existence in the mean time, this court will not cease, or go out of existence, or be shorn of any of its powers or proportions by reason of the fact that some modicum of them or of other powers of civil government, have been allotted by the common parent—the federal government—to other institutions or instrumentalities.

Something was said on the argument about the laws which these courts should administer. The laws of the conquered country, like everything else connected with its government, are entirely under the control and subject to the will of the conqueror. He makes and adopts them in use at his pleasure. Those found in use at the time of the conquest may be continued in use by him or laid aside at his pleasure. If continued in use, however, they become his, and derive their force and efficacy from him and his adoption of them. In the cases cited above, a new code was made and introduced by General Kearney, representing the government of the conqueror, called the "Kearney Code." In the absence of any provision on the subject, in such a case courts of justice are not bound to adhere to any particular system. This court is commissioned to administer justice, and no code of laws is prescribed for it. It may adopt such rules as may seem wise and expedient, whether corresponding to the system in use here at the time of the conquest, or differing from it. It has always administered justice according to the Code of Louisiana, and so have all other courts here, not because it was bound by that Code, as law of the state, but because it seemed expedient and wise to continue along under the system found in use here, rather than introduce a new one. That system had had the sanction of the previous state government, and was no doubt suited to the occupations, habits, and wants of the people. The transactions which would become subjects of investigation had been entered into under and in reference to it as the system by which they would be construed and enforced. Moreover, it was already in use, and had better be continued in use and a change avoided, unless for some decided cause a change was deemed necessary. Having adopted that as the rule in the courts here it became law to them as well as to society here, and they were bound to adhere to it and administer justice according to it so long as it continued to be the rule. The courts here have always done that, and it is not probable that the laws of Louisiana have ever been more closely adhered to in the administration of justice here than they have been during the time of the government of the country by the federal authorities, since the occupation of it by their forces.

In the cases cited above from California (Cross v. Harrison, 16 How. [57 U. S.] 164; Leitensdorfer v. Webb, 20 How. [61 U. S.] 176; and Jecker v. Montgomery, 14 How. [55 U. S.] 498) the previously-existing systems of law were ignored and a new and original system introduced, which course received the

sanction of the supreme court of the United States in those cases; and in the case cited from Maine (U. S. v. Rice, 4 Wheat. [17 U. S.] 254) the British government made a new and different law and administered it while the territory was held by it, and that course received the sanction of the same court of highest authority, in the case referred to.

I have not cited authority for everything I have said in this opinion—perhaps not for every doctrine I have declared. I have, however, referred to the court of highest authority in such cases of any tribunal known among men, and to the decisions of that court, quite in point, for every principle and doctrine claimed in this opinion, which is not so plain and evident as to make reference to cases for authority unnecessary and inexpedient, and for the omission to cite them to such points, I have the very high authority of the supreme court of the United States, in the case of U. S. v. Rice, 4 Wheat. [17 U. S.] 254, above referred to, that in cases like that "too clear to require aid from authority," it is not well to encumber an opinion with them.

In addition to the cases already commented on, I will refer to several more having important bearing on this question, not as establishing any new principle or sustaining any old one not better sustained by more modern and unquestionable authority already referred to, though equally conclusive of the principle with them; but as furnishing, perchance, to some mind, some new view, reason, or illustration of a principle better established on authority by cases already introduced. Grotius De Jure B. ac. P. l. 2, c. —, § 5 et seq.; Id. l. 3, c. 6, § 4; Id. c. 9, §§ 9, 14; Puff. Laws Nat. (by Barbeyrac) l. 7, c. 7, § 5; Id. l. 8, c. 11, § 8; Bynkershoek, Q. J., Pub. I. 1, cc. 6, 16; Duponceau's Transl., 46, 124; Voet ad Pandect, l. 39, tit. 4, note 7, De Vectigalibus; Id. l. 19, tit. 2, note 28; Id. l. 49, tit. 15, note 1; U. S. v. Hayward [Case No. 15,336]; The Fama, 5 C. Rob. Adm. 106; The Foltina, 1 Dod. 450; 30 Hogsheads of Sugar, 9 Cranch [13 U. S.] 191; Reeves, Shipp. 98 et seq.; U. S. v. Vowell, 5 Cranch [9 U. S.] 368; U. S. v. Arnold [Case No. 14,469], 9 Cranch [13 U. S.] 106; Empson v. Bathrust, Winch, 20, 50; Winch, Ent. 334, cited Poph. 176, Hut. 52; Com. Dig. "Officer," H.

My conclusions, therefore, are: That at the time of the establishment of the provisional court for Louisiana, a considerable part of the territory of that state was held by the forces of the United States, in armed belligerent occupation. That in a country so held, the authority of the occupying force is paramount, and necessarily operates the exclusion of all other independent authority in it. That government from some source is a necessity, and while the power to give and administer government is exclusively with a party occupying a country, there can be no doubt that the right and the duty are his to furnish a government and supply that want. That the actual military occupation of that territory by the United States has continued from that time to the present, and still continues, and the right and duty of government, therefore, continue with the United States. That the establishment of the provisional court for Louisiana, by the president, as commander-in-chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations. That so long as the authority of the United States shall continue, the right and the duty of it, as the party dominant there to afford to the country government will continue. That said court has, from the time of its foundation to the present time, rightfully exercised its functions in territory in which the government of the United States has been by force of its arms sovereign, and will continue rightfully to exercise them there, so long as its commission shall remain unrevoked, and the power of the United States shall continue to support it in the exercise of them.

NOTE. The counsel of libellants in the case of The Grapeshot [Case No. 5,703], referred to in the article on the authority of the provisional court (4 Am. Law Reg. [U. S.] 388), desire us to state that that case was transferred by written agreement of parties, and they believe that no case has occurred of a compulsory transfer of causes from the United States courts to the provisional court.

Case No. 16,147.

UNITED STATES v. RENDELL.

[1 Curt. 369.] [1]

Circuit Court, D. Massachusetts. May Term, 1853.

CUSTOMS DUTIES—COLLECTION LAWS—REPORTING ARRIVAL TO COLLECTOR.

Under the 30th section of the collection act of 1799 (4 Stat. 649), if the master make report of arrival, he is not liable to the penalty, though he do not repair to the office of the principal officer of customs for that purpose.

This was a writ of error to the district court of the United States for the district of Massachusetts, bringing up the record of an information filed by the district-attorney against [Benjamin] Rendell, as master of the American brig Nithroy, for not making report, within twenty-four hours, of the arrival of the brig at the harbor of Holmes's Hole, in the district of Massachusetts, from a foreign voyage, pursuant to the act of March 2, 1799. At the trial of the information in the district court, there was a verdict of not guilty [case unreported], and the following bill of exceptions was taken by the district-attorney.

"At the trial of this cause before the jury, the United States, by George Lunt, their attorney, claimed that the defendant was liable to forfeit and pay the sum of one thousand dollars, penalty, for neglecting and omitting to comply with the provisions of the thirtieth section of the statute of the United

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

States, approved March 2, 1799, entitled 'An act to regulate the collection of duties on imports and tonnage;' which section provides, 'that, within twenty-four hours after the arrival of any ship or vessel from any foreign port or place, at any port of the United States established by law, at which an officer of the customs resides, or within any harbor, inlet, or creek thereof, if the hours of business at the office of the chief officer of customs at such port will permit, or as soon thereafter as the said hours will permit, the master, or other person having the charge or command of such ship or vessel, shall repair to the said office, and shall make report to the chief officer of the arrival of the said ship or vessel.' The defendant was master of a certain vessel called the brig 'Nithroy,' which arrived from a foreign voyage into the harbor of Holmes's Hole, in the collection district of Edgartown, at or about 9 o'clock, p. m., on the 14th day of February, in the year 1851. From this harbor she departed towards her port of final destination in the evening of the 17th day of the same month. At this harbor of Holmes's Hole, there resided one Henry P. Worth, who was, and had been for a long time, the deputy of the collector of Edgartown, and an inspector of the customs, by him appointed. He was the only officer of the customs there resident, and had no clerk, and acted himself also as boarding-officer, under the provisions of the 25th section of the same act. He had an office in one of the chambers of his dwelling-house, but no person was there to act for him when absent. Over the principal door of his house was the sign, 'Custom-House'; and there was evidence offered by the government, tending to prove that upon the outside of the door of the office within, was posted a written notice of business hours, viz.: 'Office-hours from 9 a. m. to 12 m., and from 2 p. m. to 4 p. m.;' and that he had such hours. There was evidence on the other side, tending to prove that he had no such hours. Evidence was given to show that, at this harbor of Holmes's Hole, many vessels, perhaps three thousand sail in the course of each year, were boarded by Mr. Worth; that five hundred of them at least would be under a foreign register; that he was absent from his office a great, and perhaps the principal, part of the time, in discharge of his duties as boarding-officer; but that he was always there when he had reason to expect that any business was to be done. During the period while the Nithroy lay at Holmes's Hole, so far as known to the officer, neither the defendant, nor any other person having charge or command of the vessel, made the report required by the act, at the office before described. The defendant, to maintain the issue on his part, gave evidence that Mr. Worth went on board the Nithroy, upon her arrival; was there informed by the master of the place whence she came, and of the time of her arrival, and that he also received a copy of the manifest, and made a certificate on the original; and it appeared, that for more than thirty years last past, not more than one in thirty had ever made, or been required to make, any other report of arrival. Evidence, also, was given, tending to prove that it was the custom and practice of Mr. Worth to board all vessels immediately upon their arrival at that port under a foreign register, and to receive the report of their arrival on board, and sometimes he informed masters that he required no other report, unless they remained there over forty-eight hours. Upon the exhibition of this evidence, the United States contended that the penalty provided by the statute was incurred by the defendant. But the judge instructed the jury, that, if the officer of the customs actually transacts the business of receiving the report of arrival at any place within his district, such place must be considered as adopted by him, and that he has discontinued or changed for the time any other office which he may heretofore have had; so that he either has no office to which the master can then repair and make the report, or that his office for that purpose is at the place where he actually transacts the business, by personally receiving the report; and especially must this be so, when that is the place where the officer has been in the practice of transacting that business for at least thirty years;" and that the report which was actually made, accomplished all the purposes of the law, and a further report merely of the arrival would have been utterly useless. Whereupon the United States, by their attorney as aforesaid, excepted to these instructions of the judge, and asked that their exceptions might be allowed; and they are allowed accordingly. P. Sprague, Judge.

"A true copy of record. Attest: S. E. Sprague, Clerk.

"A true copy of the bill of exceptions. Attest: H. W. Fuller, Clerk of the Circuit Court U. S. Mass. Dis."

Mr. Lunt, U. S. Dist. Atty.

CURTIS, Circuit Justice. It is not denied that in this case a report of the arrival of the vessel was made by the master, to the only officer of customs resident at the place of arrival, or that this report was made within the prescribed time, and contained all the required particulars. The objection is, that it was not made at the right place; that the act imperatively requires the report to be made, at the office of the principal officer of the customs; and that the penalty is to be inflicted upon the master, if it be made elsewhere. The act undoubtedly directs the master to repair to the office of the chief officer of the customs, as well as to make report; but it does not necessarily follow, that it inflicts a penalty upon the omission to repair thither. The penal clause applicable to this case, is as follows: "And if the master, or the person having the command of

such vessel, shall neglect or omit to make the said report, or shall not fully comply with the true intent and meaning of this section, as the case may be, he shall, for each and every offence, forfeit and pay the sum of one thousand dollars." 1 Stat. 649–651. It is to be considered, then, whether it was the intention of congress to impose a penalty only upon the omission to make the required report, or also upon the omission to repair to the office of the principal officer of customs to make it. And in the first place, it is to be observed, that in terms, it is only the omission to make the said report, or fully to comply with the true intent and meaning of the section, which renders the master liable to the penalty. And if, in point of fact, he do not omit to make the report, the only question would seem to be, whether he has not fully complied with the true intent and meaning of the section, by making the required report at a place within the port, where the officer actually received it. It is somewhat remarkable, that among all the acts required to be done by masters of vessels, in the way of reports and otherwise, there is no other case, under this statute, in which express mention is made of doing an act, at the office of the principal officer of the customs. Thus, in the 19th section, vessels bound to ports of delivery, are required to come to, at the port of entry of the district, "and there make report and entry in writing," &c. And so in very many other cases, the act is required to be done at the port, but not at any particular office. Nor do I find that the statute requires the principal officers to keep one stated and fixed place as and for an office. The 21st section directs them to attend in person at the ports to which they are respectively assigned, but does not make it necessary for them to transact their business at any one place therein. Undoubtedly, this section under consideration implies an expectation on the part of congress, that the officer will have an office, as it does that he will have stated hours for business. but it makes no requisition to that effect, and leaves both these particulars to be regulated by the executive. And whether the officer shall have one fixed place, or several different places, for the transaction of his business, is manifestly a matter entirely beyond the control of masters of vessels. arriving from foreign ports, who must make the reports to the officer, where he chooses to be found and to receive them. Moreover, if the required report is in fact made in person to the proper officer, and is received by him, the substantial purpose of the law is answered. It might tend to produce somewhat more regularity and exactness, to have these reports made and received at a stated office; but to secure these, cannot be considered as forming a substantial part of the purpose of a law, which does not even require such an office to be kept, but leaves them to be secured by proper regulations of the treasury department, the head of which has ample powers for that purpose.

I am strongly inclined to think, that what is said in this section concerning repairing to the office, was designed for the relief of masters, by affording them, in some cases, an excuse for not making a report, and to limit more distinctly their obligation to do so, rather than to impose upon them the necessity, in all cases, of repairing thither. It exempts the master from the necessity of looking elsewhere for the officer. But however this may be, I am of opinion, that if the master does make the required report, in due season, to the proper officer, who receives it, he is not liable to the penalty for omitting to repair to the office, because for this last omission, the act does not in terms impose a penalty, and because the master has, on his part, fully complied with the true intent and meaning of the act, by doing all that is needful to answer its purpose; the clause respecting his repairing to the office, being directory merely, and not intended to compel him to go thither, if the business can be, and in fact is, completely done elsewhere, within the port.

For these reasons I am of opinion, that there was no error in the judgment; for though the court below, apparently for the purpose of submitting a question of fact to the jury, took a somewhat different view of the act, the substantial result arrived at was, that a report, seasonably made to the officer, at the port, and received by him, was a compliance with the act. The judgment is, therefore, affirmed.

Case No. 16,148.

UNITED STATES v. REPUBLICAN BANNER OFFICERS.

[11 Pittsb. Leg. J. 153.]

Circuit Court, D. Tennessee.[1] 1863.

REBELLION—CONFISCATION ACTS—CONSTITUTIONALITY AND CONSTRUCTION.

Construction of the confiscation act of 1861 [12 Stat. 319]. It is constitutional, and applies to real estate.

Before CATRON, Circuit Justice, and TRIGG, District Judge.

TRIGG, District Judge. This cause is submitted to the court upon a motion to quash the information filed by the United States attorney, upon the ground that the real estate mentioned therein was not subject to seizure by virtue of the act of August 6, 1861, under which the proceeding in this cause has been instituted.

The question then to be decided by this court is: Does the act of August 6, 1861, embrace real estate within its provisions, and make that, as well as personal property, for the causes mentioned in said act, a subject of seizure, confiscation, and condemnation? It

[1] [District not given.]

is not denied that the words of the act, "any property of whatsoever kind or description," are very comprehensive, and in their terms would embrace real, as well as personal, property. But it is insisted that congress did not intend to include all kinds of property by the broad and comprehensive language employed, and that this is manifest from the words used in the act in denouncing the penalty against the property used or employed, or intended to be used or employed, as therein stated. The act declares that "all such property is hereby declared to be lawful subject of prize and capture wherever found"; and it is argued that the words "prize and capture" are purely technical in their meaning, and apply alone to personal property, real estate not being a subject of prize and capture, and that these words, therefore, must be understood to have been used in their technical sense. And the words "prize and capture," being thus technical in their meaning, must control the previous words, and limit and confine their operation to that description of property to which "prize and capture" are applicable.

The words of the statute are ordinarily to be understood in their common, popular sense, regard being had to the connection in which they are used, and the subject to which they relate. But it is equally a rule of construction, as contended for by the counsel of the claimants, that technical words must be understood in their technical sense, as applicable to the subject of the statute in which they are used. They must be technical to the subject of the particular statute, and not to any other subject.

The more common application, however, of this rule is to words and phrases which have obtained a peculiar legal signification. In law phrase many words have an exact technical sense, unlike or more limited or extended than their popular ones; and in this sense they are ordinarily to be construed in statutes. 1 Bish. 368–370.

Now let us test the application of these rules to the statute we are considering, and see how far those technical words, "prize and capture," on which the argument of the counsel of the claimants is based, should be permitted to govern its construction. The question presented to the court is not without difficulty, but it is clear, from what has been before stated, that, in giving a construction to this statute, it will not do to be limited by the mere technical sense of the words "prize and capture," for in that case it is apparent that a large and distinct class of property would be excluded from its operation. And it is manifest, from the reading of the act, that property, other than such as might be captured on the sea, was intended to fall within its provisions. For the act, independent of the sweeping provision, "any property of whatsoever kind or description," expressly declares that "all such property is hereby declared to be lawful subject of prize and capture wherever found." To give a just construction, therefore, to the statute, we must ascertain what the congress intended, and to do this, after looking at the words of the act itself, we may look to the surrounding facts and circumstances which would probably have influenced congress in its passage. And in order that technical words used in the act may not be deprived of their just weight in fixing its construction, we must regard the subject of it, and see whether those technical words are technical to its subject, for if they are, they must be understood in their technical sense. If the words used are not technical to the subject of the act, they are improperly or inaccurately used, and it is a rule of construction that if words or expressions are used inaccurately, they will be construed in the sense intended, where that sense appears upon the whole face of the act. Now, what is the subject of the act we are considering? It is the confiscation of property used for insurrectionary purposes; and it is difficult to perceive that the technical words relied upon to govern the construction of the act are or can be technical to that subject. For by said act a new class of forfeitures, if we may so term them, is created, growing out of the present unhappy condition of our country, and which were never before known to our laws. These technical words, then, cannot control us in our construction, and we must look to the whole body of the act, ascertain the intention of congress in passing it, and construe the technical words "prize and capture" in the sense intended by them, and not in the strict legal sense in which they are usually understood.

The act declares that if "any person or persons, his, her, or their agent, attorney, or employee, shall purchase or acquire, sell or give any property of whatsoever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting or promoting such insurrection or resistance to the laws, or any person or persons engaged therein; or if any person or persons being the owner or owners of any such property, shall knowingly use or employ the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found, and it shall be the duty of the president of the United States to cause the same to be seized, confiscated and condemned." The language of this act is broad and comprehensive, and looking to the surrounding facts and circumstances at the time, there being then a formidable rebellion in progress, the intention of congress, in enacting this law, must have been to deter persons from so using and employing their property as to aid and promote the insurrection, and thereby to diminish and weaken the power of the Rebellion—and perhaps it was also intended, by taking from him his property so unlawfully employed, to inflict

upon the party a penalty for his misconduct in thus aiding and promoting a resistance to the laws. What, then, is included, it may be asked, under that broad language of the statute, "any property of whatever kind or description," which is lawful subject of prize and capture, and liable to be seized, confiscated and condemned? We answer that it is manifestly any property of whatever kind which is capable of being used or employed in aiding, abetting, or promoting the insurrection.

The only question, then, is whether real estate can be so used or employed, for if it can, there is no more reason why it should not be seized or confiscated than any other description of property. Certainly the mischiefs to result from such use of it would be as great as those from the use of property of any other kind. Suppose that a person, with the avowed purpose of aiding the insurrection, should purchase a piece of ground suitable for his object, and proceed to erect upon it the necessary buildings and machinery for the manufacture of guns and other small arms, and he does proceed, in accordance with his previous intent, to the manufacture of such weapons of war to supply the rebel army—can it be contended that such property, real estate if you choose, is not used, and as effectually used, in aiding, abetting, or promoting the insurrection as any movable property whatever? And, if so, why should it not be as much a subject of confiscation as any other? All property used in its ordinary and legitimate mode is exempt from the operation of the act, but the moment it is purchased or acquired, sold or given, with intent to use or employ it in aiding the insurrection, or if the owner knowingly and intentionally uses or employs his property for such a purpose, it immediately becomes the subject of seizure and condemnation under the act, whether it be real or personal property. The words "prize and capture," in the act, were intended to have the same meaning which is given to the word "seizure" in the act of July 17, 1862 [12 Stat. 589], and to apply as well to real as personal property.

The second section does not effect or in any manner conflict with this construction of the act. That section only provides for the condemnation of the property seized, and directs in what courts it should be made. It declares "that such prize and capture shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted." The plain interpretation of this provision is, that no doubt it was so intended, that the district court, and where the value of the property seized shall amount to the sum of five hundred dollars, the circuit court, concurrent with the district court, shall have cognizance of such seizure when the same shall be made on land, or on waters not navigable from the sea by vessels of ten or more tons burden. But if the seizure be made upon the high seas, or on waters navigable from the sea by vessels of ten or more tons burden, then the proceedings must be instituted in admiralty, and, of course, in the district court, which, by the act of 1789 [1 Stat. 73], has exclusive cognizance of admiralty cases.

The question raised by claimant's counsel in the closing argument, as to the constitutionality of the act, was not made upon the original motion as the same was entered, and was not argued on behalf of the United States. No authority, however, was produced, and it seems to me that the arguments relied on to sustain its constitutionality would be as applicable to any other law of congress imposing the penalty of forfeiture as to the act we are considering.

Upon the whole, I am of opinion that the information filed in this case ought not to be quashed.

Case No. 16,149.

UNITED STATES v. REYMERT.

[1 Int. Rev. Rec. 63.]

Circuit Court S. D. New York. 1865.

DEPOSITARIES OF PUBLIC MONEYS — SHORTAGE OF ACCOUNTS—EVIDENCE.

[Where a receiver of public moneys was charged with a shortage of some $6,000 in his accounts, but claimed that the money had been stolen from him, *held*, that it was decisive against him that he had never in any manner presented to any accounting officer of the treasury a claim for a credit in that sum, and had not at the trial shown himself to be in possession of any vouchers not before in his power to procure.]

This action, brought to recover the amount remaining due on the official accounts of the defendant [James D. Reymert], late receiver of public moneys and designated depositary at Hudson, Wis., came on for trial on the 10th instant. The plaintiffs introduced and proved the original bond of the defendant, and a treasury transcript showing a balance of $6,000 due to the United States treasury; and also called Mr. P. F. Wilson, special agent of the treasury department, who testified that in the early part of the summer of 1861, he went out to defendant's office and examined the books, which showed that there was due to the treasury from defendant about $9,400; that defendant subsequently paid to the United States marshal at Chicago about $1,500, and to the witness at St. Croix Falls, Wis., about $1,850, leaving just $6,000 due the treasury as above; that defendant had no money in the safe, and told Mr. Wilson that this amount had been stolen from him; but nevertheless promised to pay it, and gave to Mr. Wilson certain conveyances (which were not produced) which Mr. W. said he understood at the time were given as collateral to defendant's official bond, and as a further security for the $6,000.

On the part of the defendant evidence was introduced to show the insecurity of the safe furnished to defendant and the precautions he took for greater safety; that the safe contained the exact balance shown by the books of the office on the 28th of February or March 1, 1861; that on the 4th of March following, large amounts were received from two other receivers, and a large payment made to Mr. Mix, Indian agent; that on the evening of that day, on making up his accounts, and examining the money on hand, $6,000 was found to be missing; and that the money was kept in bags. Defendant also introduced evidence to show that he had actually incurred expenses for clerk hire and guarding the money, which expenses had been disallowed by the accounting officers of the treasury.

E. Delafield Smith, U. S. Dist. Atty., P. F. Wilson, and F. B. Clarkson, for United States.

George W. Stevens, for defendant.

SHIPMAN, District Judge, said he must direct the jury to bring in a verdict for the plaintiffs; that without entering into the question whether defendant was entitled to a credit on his accounts for money lost by theft or robbery, it was decisive of this case that he had never in any manner presented to any accounting officer of the treasury a claim for credit for the $6,000; nor had he on the trial shown himself to be in possession of vouchers not before in his power to procure. Acts March 3, 1797, § 4 (1 Stat. 512). The judge further said that as to the claims made and disallowed for credit on account of expenses incurred, the defendant had not in any manner shown himself authorized to incur such expenses, and it did not appear, therefore, that they had been improperly disallowed (Acts Aug. 6, 1846, § 13; 9 Stat. 59), and the transcript of the books of the treasury department, introduced by plaintiffs, showing that the defendant is indebted in the sum of $6,000, it is incumbent on him to prove conclusively that he is not.

The jury accordingly rendered a verdict for the United States for $6,000 and interest from August 5, 1861.

Case No. 16,150.

UNITED STATES v. RHAWN.

[33 Leg. Int. 258;[1] 11 Phila. 521; 22 Int. Rev. Rec. 235; 1 Thomp. Nat. Bank Cas. 358; 2 Wkly. Notes Cas. 604; 8 Chi. Leg. News, 372; 23 Pittsb. Leg. J. 199.]

District Court, E. D. Pennsylvania. Nov. Term, 1875.

INTERNAL REVENUE—AUTHORITY OF INSPECTORS—EXAMINATION OF NATIONAL BANKS.

1. The law under which the national banks are incorporated does not exempt them from examination by the internal revenue officers mentioned in section 3177 of the Revised Statutes.

2. A clerk of a supervisor of internal revenue is, however, not such an officer.

At law.

John K. Valentine, U. S. Atty.

Charles S. Pancoast, for defendant.

CADWALADER, District Judge (charging jury). Section 3177 of Revised Statutes of the United States enacts, that "any collector, deputy collector, or inspector, may enter in the day time, any building or place where any articles or objects subject to tax are . . . kept within his district, so far as it may be necessary for the purpose of examining said article or articles, and that any owner or person having the agency or superintendence of such building or place, who refuses to suffer such officer to examine such article or articles, shall for every such refusal, forfeit five hundred dollars." Section 3163 enacts, that every supervisor, under the direction of the commissioner, shall see that all laws and regulations relating to the collection of internal taxes, are faithfully executed and complied with, etc. The present suit is to recover $500, a penalty alleged to have been incurred by the defendant, who is president of a national bank, by refusing to suffer a person who was acting under the direction of Mr. Tutton, the supervisor of internal revenue, to examine such checks of customers of the bank as were kept in it, in order to discover whether any, and which of them were unstamped, contrary to the provisions of the internal revenue law upon the subject.

It is alleged that there was an application to the defendant, to suffer such an examination to be made, and that the defendant refused to suffer this to be done. The defendant contends that the revenue officer had no right to make the examination requested. The ground of this contention is, that the law under which the national banks are incorporated provides for the occasional examination of their affairs, and for reports of their condition to the controller of the currency, and enacts that they shall not be subject to any visitorial powers other than are authorized by the act, or are vested in the courts of justice. These banks are fiscal agents of the government of the United States, and it would be most extraordinary that congress should have exempted their customers from a necessary and proper scrutiny under the revenue laws in a matter which has no legitimate connection whatever with the affairs of the banks. As to the position thus taken by the defence, I am of the opinion that it is wholly unreasonable and unfounded in law. If you believe the testimony of Mr. Tutton, he told the defendant that there was no desire or intention to examine into the affairs of the bank, or the accounts of its customers, and stated that the sole purpose was to ascertain whether checks in its keeping were unstamp-

[1] [Reprinted from 33 Leg. Int. 258, by permission.]

ed. If unstamped, they were subject to tax under the revenue law. The visitorial powers over a corporation are the subject of a distinct head under the law of corporations. The examination of such checks under the revenue law is not the exercise of a visitorial power under the act of congress relative to the banks. This part of the defence, therefore, fails in law. It appears, however, that the person who asked to make the examination in this case was a clerk to the supervisor. Such a person is not an officer within the meaning of the law. The words of section 3177 are, "any collector, deputy collector or inspector;" and a clerk to the supervisor is not included in this description. If the supervisor was himself authorized to make such an examination, he could not delegate this power to his clerk. Your verdict should, therefore, for this reason, be for the defendant.

Case No. 16,151.

UNITED STATES v. RHODES.

[Abb. U. S. 28; 1 Am. Law T. Rep. U. S. Cts. 22; 7 Am. Law Reg. (N. S.) 233.] [1]

Circuit Court, D. Kentucky. 1866.

INDICTMENT—CIVIL RIGHTS BILL—ITS CONSTITUTIONALITY.

1. An indictment need not aver the existence or the provisions of a public statute upon which the prosecution is founded.

[Cited in U. S v. Goodwin, 20 Fed. 239.]

2. An indictment for burglary in entering the house of T. in Kentucky, averred that T. was of African descent, and a citizen; that she was, by the laws of Kentucky, denied the right to testify against the defendants, they being white. There was a public statute of Kentucky, enabling white persons under similar circumstances to testify. *Held*, that the indictment was sufficient, and that the circuit court might take jurisdiction under section 3 of the act of April 9, 1866, (14 Stat. 27) known as the "civil rights" bill, notwithstanding there was no averment of the statute of Kentucky. The circuit court should take judicial notice of such statute, and the indictment should be construed in the same manner as if the statute were averred.

3. A prosecution for burglary is "a cause affecting" the owner of the building entered, within the meaning of section 3 of the civil rights bill, giving the courts of the Union jurisdiction of all causes affecting persons who cannot enforce in the courts of the state any of the rights secured to them by the first section. If the owner of the building entered, is, on account of color, incompetent, by the law of the state where the offense is alleged to have been committed, to testify in support of the indictment as a white person might, the circuit court has jurisdiction.

4. The criminal jurisdiction conferred upon the circuit and district courts by section 3 of the civil rights bill, is not confined to offenses committed by colored persons. It extends to prosecutions against white persons for offenses affecting persons who cannot enforce in the state courts the rights secured to them by section 1.

5. The civil rights bill is not a penal statute. It is a remedial one, and is to be liberally construed.

6. The history of the adoption of the first thirteen amendments to the constitution, and the objects and proper construction of them, explained.

7. Free persons of color, born within the allegiance of the United States, are citizens; and have always been entitled to be so regarded.

[Cited in McKay v. Campbell, Case No. 8,840.]

8. The dicta to the contrary, in Scott v. Sanford. 19 How. [60 U. S.] 393, disapproved.

9. The emancipation of a native born slave, by the thirteenth amendment, removed the disability of slavery, and made him a citizen of the United States; subject, however, to any lawful restrictions imposed upon his right to vote, or other powers or privileges.

[Cited in Le Grand v. U. S., 12 Fed. 581; U. S. v. Harris, 106 U. S. 640, 1 Sup. Ct. 610.]

10. The act of April 9, 1866 (14 Stat. 27) known as the "civil rights" bill, is constitutional in all its provisions. It is an appropriate method of exercising the power conferred on congress by the thirteenth amendment.

[11. Cited in Re Bogart, Case No. 1,596, to the point that since the organization of the supreme court, but three acts of congress have been pronounced by that body void for unconstitutionality.]

Motion in arrest of judgment.

SWAYNE, Circuit Justice. This is a prosecution under the act of congress of the 9th of April, 1866 [14 Stat. 27], entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication." The defendants having been found guilty by a jury, the case is now before us upon a motion in arrest of judgment.

Three grounds are relied upon in support of the motion. It is insisted: I. That the indictment is fatally defective. II. That the case which it makes, or was intended to make, is not within the act of congress upon which it is founded. III. That the act itself is unconstitutional and void.

I. As to the indictment, if either count be sufficient, it will support the judgment of the court upon the verdict. Our attention will be confined to the second count. That count alleges that the defendants, being white persons, "on the 1st of May, 1866, at the county of Nelson, in the state and district of Kentucky, at the hour of eleven of the clock in the night of the same day, feloniously and burglariously did break and enter the dwelling house there situate of Nancy Talbot, a citizen of the United States of the African race, having been born in the United States, and not subject to any foreign power, who was then and there, and is now, denied the right to testify against the said defendants, in the courts of the state of Kentucky, and of the said county of Nelson, with intent the goods and chattels, moneys and property of

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 1 Am. Law Reg. (N. S.) 233, contains only a partial report.]

the said Nancy Talbot, in the said dwelling house then and there being, feloniously and burglariously to steal, take, and carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the United States."

The objection urged against this count is, that it does not aver that "white citizens" enjoy the right which it is alleged is denied to Nancy Talbot. This fact is vital in the case. Without it our jurisdiction cannot be maintained. It is averred that she is a citizen of the United States, of the African race, and that she is denied the right to testify against the defendants, they being white persons. Section 669 of the Code of Civil Practice of Kentucky gives this right to white persons under the same circumstances. This is a public statute, and we are bound to take judicial cognizance of it. It is never necessary to set forth matters of law in a criminal pleading. The indictment is, in legal effect, as if it averred the existence and provisions of the statute. The enjoyment of the right in question by white citizens is a conclusion of law from the facts stated. Averment and proof could not bring it into the case more effectually for any purpose than it is there already. 1 Chit. Cr. Law, 188; 2 Bos. & P. 127; 2 Leach, 942; 1 Bish. Cr. Proc. §§ 52, 53. This right is one of those secured to Nancy Talbot by the first section of this act. The objection to this count cannot be sustained.

II. Is the offense charged, within the statute? The first section enacts: — "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery," . . . . "shall have the same right in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The second section provides:—"That any person, who under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any state or territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in the condition of slavery," . . . . "or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor," &c.

The third section declares:—"That the district courts of the United States within their respective districts, shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state where they may be, any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, shall be commenced in any state court against such person, for any cause whatsoever," . . . . . "such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the act relating to habeas corpus, and regulating judicial proceedings in certain cases, approved March 3, 1863, and all acts amendatory thereof."

It will be observed that jurisdiction is given to this court "of all causes, civil and criminal," affecting persons who are denied or cannot enforce in the local state courts "any of the rights secured by the first section of this act." The denial of any one is as effectual as the denial of any other or of all. But it is said the cause set forth in the indictment is not one affecting Nancy Talbot, in the sense of the law, and that therefore this court has no jurisdiction. U. S. v. Ortega, 11 Wheat. [24 U. S.] 467, is relied upon as authority for this proposition. That case is as follows: The constitution provides (article 3, § 2) that—"In all cases affecting ambassadors, other public ministers and consuls and those in which a state shall be a party, the supreme court shall have original jurisdiction."

Ortega was indicted in the circuit court for "infracting the law of nations by offering violence to the person" of Salmon, the charge d'affaires of Spain in the United States. The judges of the circuit court were opposed in opinion upon two questions, which were thereupon certified to the supreme court. They were: (1) Whether the case was one affecting a public minister within the meaning of the constitution; (2) and whether in such cases the jurisdiction of the supreme court is exclusive.

The supreme court decided only the first question. It was held that the case did not affect the charge d'affaires. This rendered it unnecessary to decide the other question. and it is still unsettled. It will be observed that the language of the statute is different. It is "causes, civil and criminal," and not "cases."

Burrill, in his Law Dictionary, thus defines "cause": "The origin or foundation of a thing, as of a suit or action; a ground of action. 1 Const. 470." The phrase "causes, civil and criminal," must be understood in the sense of causes of civil action and causes of criminal prosecution. These do unquestionably affect the plaintiff in the one case,

and the party against whose person or property the crime is committed in the other.

The soundness and authority of the judgment in the case of Ortega are not questioned; but it is by no means true, as a universal proposition, that none are affected in the legal sense of the term, by a case, but those who are parties to the record. The solution of the question must always depend upon the circumstances.

In Osborn v. Bank of the United States, 9 Wheat. [22 U. S.] 584, the court said: "If a suit be brought against a foreign minister, the supreme court has original jurisdiction, and this is shown in the record; but suppose a suit be brought which affects the interests of a foreign minister, or by which his servant, or his secretary, becomes a party to the suit, but the actual defendant pleads to the jurisdiction and asserts his privilege. If the suit affects a foreign minister it must be dismissed; not because he is a party to it, but because it affects him."

It may be asked, what is—if this is not—the proper construction of the statute? It has been answered that none are affected in criminal cases but the sovereign prosecuting and the defendants; and that hence colored persons only can be prosecuted under its provisions. When the act was passed there was no state where ample provision did not exist for the trial and punishment of persons of color for all offenses; and no locality where there was any difficulty in enforcing the law against them. There was no complaint upon the subject. The aid of congress was not invoked in that direction. It is not denied that the first and second sections were designed solely for their benefit. The third section, giving the jurisdiction to which this question relates, provides expressly that if sued or prosecuted in a state court under the circumstances mentioned, they may at once have the cause certified into a proper federal court.

The fourth section requires district-attorneys, marshals and their deputies, commissioners, agents of the freedmen's bureau, and other officers specially empowered by the president, to institute proceedings at the expense of the United States, against all persons violating the provisions of the act; and "with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude," it is made the duty of circuit courts of the United States to increase the number of their commissioners.

The fifth section imposes a heavy fine on marshals who shall refuse to receive or neglect to execute any process issued under the act; and it authorizes commissioners to appoint persons to serve such process issued by them.

The sixth section renders liable to fine and imprisonment any person who shall obstruct an officer or other person in the execution of such process; or who shall aid a person arrested to escape; or conceal a person for whose arrest a warrant has been issued.

Section eight authorizes the president to direct the judge, marshal, and district-attorney to attend at such place and for such time as he may designate, "for the purpose of the more speedy arrest and trial of persons charged with violations of this act."

The ninth section authorizes the president to employ such part of the land and naval forces of the United States, and of the militia, as shall be necessary to "prevent the violation and enforce the due execution of this act."

It is incredible that all this machinery, including the agency of the freedmen's bureau, would have been provided, if the intention were to limit the criminal jurisdiction conferred by the third section to colored persons, and exclude all white persons from its operation.

The title of the act is in harmony with this view of the subject. The construction contended for would obviously defeat the main object which congress had in view in passing the act, and produce results the opposite of those intended.

The difficulty was that where a white man was sued by a colored man, or was prosecuted for a crime against a colored man, colored witnesses were excluded. This in many cases involved a denial of justice. Crimes of the deepest dye were committed by white men with impunity. Courts and juries were frequently hostile to the colored man, and administered justice, both civil and criminal, in a corresponding spirit. Congress met these evils by giving to the colored man everywhere the same right to testify "as is enjoyed by white citizens," abolishing the distinction between white and colored witnesses, and by giving to the courts of the United States jurisdiction of all causes, civil and criminal, which concern him, wherever the right to testify as if he were white is denied to him or cannot be enforced in the local tribunals of the state.

The context and the rules of interpretation to be applied permit of no other construction. Such was clearly the intention of congress, and that intention constitutes the law.

This, with the provision which authorizes colored defendants in the state courts to have their causes certified into the federal courts, and the other provisions referred to, renders the protection which congress has given as effectual as it can well be made by legislation. It is one system, all the parts looking to the same end.

Where crime is committed with impunity by any class of persons, society, so far as they are concerned, is reduced to that condition of barbarism which compels those unprotected by other sanctions to rely upon

physical force for the vindication of their natural rights. There is no other remedy, and no other security.

It is said there can be no such thing as a right to testify, and that if congress conferred it by this act, a cloud of colored witnesses may appear in every case and claim to exercise it. There is no force in this argument. The statute is to be construed reasonably. Like the right to sue and to contract, it is to be exercised only on proper occasions and within proper limits. Every right given is to be the same "as is enjoyed by white citizens."

It is urged that this is a penal statute, and to be construed strictly. We regard it as remedial in its character, and to be construed liberally, to carry out the wise and beneficent purposes of congress in enacting it. Bac. Abr. tit. "Statute," 1.

But if the act were a penal statute, the canons of interpretation to be applied would not affect the conclusion at which we have arrived. U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 96; Com. v. Loring, 8 Pick. 374; U. S. v. Morris, 14 Pet. [39 U. S.] 475; U. S. v. Winn [Case No. 16,740]; 1 Bish. Cr. Law, 236. This objection to the indictment cannot avail the defendants.

III. Is the act warranted by the constitution? The first eleven amendments of the constitution were intended to limit the powers of the government which it created, and to protect the people of the states. Though earnestly sustained by the friends of the constitution, they originated in the hostile feelings with which it was regarded by a large portion of the people, and were shaped by the jealous policy which those feelings inspired. The enemies of the constitution saw many perils of evil in the center, but none elsewhere. They feared tyranny in the head, not anarchy in the members, and they took their measures accordingly. The friends of the constitution desired to obviate all just grounds of apprehension, and to give repose to the public mind. It was important to unite, as far as possible, the entire people in support of the new system which had been adopted. They felt the necessity of doing all in their power to remove every obstacle in the way of its success. The most momentous consequences for good or evil to the country were to follow the results of the experiment. Hence the spirit of concession which animated the convention, and hence the adoption of these amendments after the work of the convention was done and had been approved by the people. The twelfth amendment grew out of the contest between Jefferson and Burr for the presidency. The thirteenth amendment is the last one made. It trenches directly upon the power of the states and of the people of the states. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the states where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever the power to restore it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

The act of congress confers citizenship. Who are citizens, and what are their rights? The constitution uses the words "citizen" and "natural born citizens;" but neither that instrument nor any act of congress has attempted to define their meaning. British jurisprudence, whence so much of our own is drawn, throws little light upon the subject. In Johnson's Dictionary, "citizen" is thus defined: "(1) A freeman of a city; not a foreigner; not a slave; (2) a townsman, a man of trade; not a gentleman; (3) an inhabitant; a dweller in any place."

The definitions given by other English lexicographers are substantially the same. In Jacob's Law Dictionary (Ed. 1783), the only definition given is as follows: "Citizens (cives) of London are either freemen or such as reside and keep a family in the city, etc.; and some are citizens and freemen, and some are not, who have not so great privileges as others. The citizens of London may prescribe against a statute, because their liberties are reinforced by statute." 1 Rolle, 105.

Blackstone and Tomlin contain nothing upon the subject. "The word 'civis,' taken in the strictest sense, extends only to him that is entitled to the privileges of a city of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen." Scot v. Schwartz, Comyn, 677. "A citizen is a freeman who has kept a family in a city." Roy v. Hanger, 1 Rolle, 138, 149. "The term 'citizen,' as understood in our law, is precisely analogous to the term subject, in the common law; and the change of phrases has entirely resulted from the change of government. The sovereignty has been changed from one man to the collective body of the people, and he who before was a subject of

the king is now a citizen of the state." State v. Manuel, 4 Dev. & B. 26.

In Shanks v. Dupont, 3 Pet. [28 U. S.] 247, the supreme court of the United States said: "During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The Americans insisted upon the allegiance of all born within the states, respectively; and Great Britain asserted an equally exclusive claim. The treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from their allegiance to the British crown, and those who then adhered to the British crown, were deemed and held subjects of that crown. The treaty of peace was a treaty operating between the states on each side, and the inhabitants thereof; in the language of the seventh article, it was a 'firm and perpetual peace between his Britannic majesty and the said states, and between the subjects of one and the citizens of the other.' Who then were subjects or citizens was to be decided by the state of facts. If they were originally subjects of Great Britain and then adhered to her and were claimed by her as subjects, the treaty deemed them such; if they were originally British subjects, but then adhering to the states, the treaty deemed them citizens."

All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons. 2 Kent, Comm. 1; Calvin's Case, 7 Coke, 1; 1 Bl. Comm. 366; Lynch v. Clarke, 1 Sand. Ch. 583.

The common law has made no distinction on account of race or color. None is now made in England, nor in any other Christian country of Europe. The fourth of the Articles of Confederation declared that the "free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the United States," &c. On the 25th of June, 1778, when these articles were under consideration by the congress, South Carolina moved to amend this fourth article by inserting after the word "free" and before the word "inhabitants," the word "white." Two states voted for the amendment and eight against it. The vote of one was divided. Scott v. Sanford, 19 How. [60 U. S.] 575. When the constitution was adopted, free men of color were clothed with the franchise of voting in at least five states, and were a part of the people whose sanction breathed into it the breath of life. Scott v. Sanford, Id. 573; State v. Manuel, 2 Dev. & B. 24, 25.

" 'Citizens' under our constitution and laws means free inhabitants born within the United States or naturalized under the laws of congress." 1 Kent, Comm. 292, note. We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.

It is further said in the note in 1 Kent, Comm., before referred to: "If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several states may deem it expedient to prescribe to persons of color."

In the case of State v. Manuel, supra, it was remarked: "It has been said that by the constitution of the United States, the power of naturalization has been conferred exclusively upon congress, and therefore it cannot be competent for any state by its municipal regulations to make a citizen. But what is naturalization? It is the removal of the disabilities of alienage. Emancipation is the removal of the incapacity of slavery. The latter depends wholly upon the internal regulations of the state. The former belongs to the government of the United States. It would be dangerous to confound them." Id. p. 25.

This was a decision of the supreme court of North Carolina, made in the year 1836. The opinion was delivered by Judge Gaston. He was one of the most able and learned judges this country has produced. The same court, in 1848, Chief Justice Ruffin delivering the opinion, referred to the case of State v. Manuel, and said: "That case underwent a very laborious investigation by both the bench and the bar. The case was brought here by appeal, and was felt to be one of very great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence upon all questions of similar nature." State v. Newsom, 5 Ired. 253.

We cannot deny the assent of our judgment to the soundness of the proposition that the emancipation of a native born slave by removing the disability of slavery made him a citizen. If these views be correct, the provision in the act of congress conferring citizenship was unnecessary, and is inoperative. Granting this to be so, it was well, if congress had the power, to insert it, in order to prevent doubts and differences of opinion which might otherwise have existed upon the subject. We are aware that a majority of the

court, in the case of Scott v. Sanford, arrived at conclusions different from those we have expressed. But in our judgment these points were not before them. They decided that the whole case, including the agreed facts, was open to their examination, and that Scott was a slave. This central and controlling fact excluded all other questions, and what was said upon them by those of the majority, with whatever learning and ability the argument was conducted, is no more binding upon this court as authority than the views of the minority upon the same subjects. Carroll v. Carroll, 16 How. [57 U. S.] 287.

The fact that one is a subject or citizen determines nothing as to his rights as such. They vary in different localities and according to circumstances. Citizenship has no necessary connection with the franchise of voting, eligibility to office, or indeed with any other rights, civil or political. Women, minors, and persons non compos are citizens, and not the less so on account of their disabilities. In England, not to advert to the various local regulations, the new reform bill gives the right of voting for members of parliament to about eight hundred thousand persons from whom it was before withheld. There, the subject is wholly within the control of parliament. Here, until the thirteenth amendment was adopted, the power belonged entirely to the states, and they exercised it without question from any quarter, as absolutely as if they were not members of the Union.

The first ten amendments to the constitution, which are in the nature of a bill of rights, apply only to the national government. They were not intended to restrict the power of the states. Barrows v. Mayor, etc., 7 Pet. [32 U. S.] 247; Withers v. Buckley, 20 How. [61 U. S.] 84; Murphy v. People, 2 Cow. 818.

Our attention has been called to several treaties by which Indians were made citizens; to those by which Louisiana, Florida, and California were acquired, and to the act passed in relation to Texas. All this was done under the war and treaty making powers of the constitution, and those which authorize the national government to regulate the territory and other property of the United States, and to admit new states into the Union. American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 511; Cross v. Harrison, 16 How. [57 U. S.] 164; 2 Story, Const. 158.

These powers are not involved in the question before us, and it is not necessary particularly to consider them. A few remarks, however, in this connection will not be out of place. A treaty is declared by the constitution to be the "law of the land." What is unwarranted or forbidden by the constitution can no more be done in one way than in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the state governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The states possess all which they have not surrendered; the government of the Union only such as the constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void.

"The power to make colored persons citizens has been actually exercised in repeated and important instances. See the treaty with the Choctaws of September 27, 1830, art. 14; with the Cherokees of May 20, 1836, art. 12; and the treaty of Guadeloupe Hidalgo, of February 2, 1848, art. 8." Scott v. Sanford, 19 How. [60 U. S.] 486, opinion of Curtis, J.

See, also, the treaty with France of April 30, 1803, by which Louisiana was acquired (article 3); and the treaty with Spain of the 23rd of February, 1819, by which Florida was acquired (article 3). The article referred to in the treaty with France and in the treaty with Spain is in the same language. In both the phrase "inhabitants" is used. No discrimination is made against those, in whole or in part, of the African race. So in the treaty of Guadeloupe Hidalgo (articles 8 and 9), no reference is made to color.

Our attention has been called to three provisions of the constitution, besides the thirteenth amendment, each of which will be briefly adverted to.

1. Congress has power "to establish an uniform rule of naturalization." Article 1, § 8. After considerable fluctuations of judicial opinion, it was finally settled by the supreme court that this power is vested exclusively in congress. Collet v. Collet, 2 Dall. [2 U. S.] 294; U. S. v. Velati, Id. 370; Golden v. Prince [Case No. 5,509]; Chirac v. Chirac, 2 Wheat. [15 U. S.] 259; Houston v. Moore, Id. 49; Federalist, No. 32.

An alien naturalized is "to all intents and purposes a natural born subject." Co. Litt. 129. "Naturalization takes effect from birth; denization from the date of the patent." Vin. Abr. tit. "Alien," D. Until the passage of a late act of parliament, naturalization in England was effected by a special statute in each case. The statutes were usually alike. The form appears in Godfrey v. Dickson, Cro. Jac. 539, c. 7. Under the late act a resident alien may accomplish the object by a petition to the secretary of state for the home department.

The power is applicable only to those of foreign birth. Alienage is an indispensable element in the process. To make one of domestic birth a citizen is not naturalization, and cannot be brought within the exercise of that power. There is a universal agreement of opinion upon this subject. Scott v. Sanford, 19 How. [60 U. S.] 578; 2 Story, Const. 44.

In the exercise of this power congress has confined the law to white persons. No one

doubts their authority to extend it to all aliens, without regard to race or color. But they were not bound to do so. As in other cases, it was for them to determine the extent and the manner in which the power given should be exercised. They could not exceed it, but they were not bound to exhaust it. It was well remarked by one of the dissenting judges, in Scott v. Sanford, 19 How. [60 U. S.] 586, in regard to the African race:

"The constitution has not excluded them, and since that has conferred on congress the power to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the constitution of the United States."

It may be added that before the adoption of the constitution, the states possessed the power of making both those of foreign and domestic birth citizens, according to their discretion. This power, as to the former, they surrendered. They did not as to the latter, and they still possess it.

"The powers not delegated to the United States by this constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." Const. Amend. What the several states under the original constitution only could have done, the nation has done by the thirteenth amendment. An occasion for the exercise of this power by the states may not, perhaps cannot, hereafter arise.

2. "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Const. art. 14, § 2. This provision of the constitution applies only to citizens going from one state to another. "It is obvious that if the citizens of each state were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens." "The intention of this clause was to confer on them, as one may say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the same circumstances." 2 Story, Const. § 187.

Chancellor Kent says: "If citizens remove from one state to another, they are entitled to the privileges that persons of the same description are entitled to in the states to which the removal is made, and to none other." 2 Kent, Comm. 36. This provision does not bear particularly upon the question before us, and need not be further considered.

3. "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence." Article 4, § 4.

Mr. Justice Story, adopting the language of the Federalist, says: "That but for this power a successful faction might erect a tyranny on the ruins of order and law, while no succor could be constitutionally afforded by the Union to the friends and supporters of the government." . . . "But a right implies a remedy, and where else could the remedy be deposited than where it is deposited by the constitution?" 2 Story, Const. 559, 560. This topic is foreign to the subject before us. We shall not pursue it further.

Congress, in passing the act under consideration, did not proceed upon this ground. It is not the theory or purpose of that act to apply the appropriate remedy for such a state of things. The constitutionality of the act cannot be sustained under this section.

This brings us to the examination of the thirteenth amendment. It is as follows:

"Article 13, § 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

Before the adoption of this amendment, the constitution, at the close of the enumeration of the powers of congress, authorized that body "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof."

In McCullough v. Maryland, 4 Wheat. [17 U. S.] 421–423, Chief Justice Marshall used the phrase "appropriate" as the equivalent and exponent of "necessary and proper" in the preceding paragraph. He said: "Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." . . . . "To use one" (a bank) "must be within the discretion of congress, if it be an appropriate mode of executing the powers of government." . . . . "But were its necessity less apparent" (the Bank of the United States), "none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been justly observed, is to be discussed in another place."

Pursuing the subject, he added: "When the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Judge Story says: "In the practical application of government, then, the public functionaries must be left at liberty to exercise the powers with which the people, by the

constitution and laws, have entrusted them. They must have a wide discretion as to the choice of means; and the only limitation upon the discretion would seem to be that the means are appropriate to the end; and this must admit of considerable latitude, for the relation between the action and the end, as has been justly remarked, is not always so direct and palpable as to strike the eye of every observer. If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect." 1 Story, Const. § 432.

These passages show the spirit in which the amendment is to be interpreted, and develop fully the principles to be applied. Before proceeding further, it would be well to pause and direct our attention to what has been deemed appropriate in the execution of some of the other powers confided to congress in like general terms.

(1) "The power to lay and collect taxes, duties, and imposts." This includes authority to build custom houses; to employ revenue cutters; to appoint the necessary collectors and other officers; to take bonds for the performance of their duties; to establish the needful bureaus; to prescribe when, how, and in what the taxes and duties shall be paid; to rent or build warehouses for temporary storing purposes; to define all crimes relating to the subject in its various ramifications, with their punishment; and to provide for their prosecution.

(2) "To regulate commerce with foreign nations, among the several states, and with the Indian tribes." This carries with it the power to build and maintain lighthouses, piers, and breakwaters; to employ revenue cutters; to cause surveys to be made of coasts, rivers, and harbors; to appoint all necessary officers, at home and abroad; to prescribe their duties, fix their terms of office and compensation; and to define and punish all crimes relating to commerce within the sphere of the constitution. U. S. v. Coombs, 12 Pet. [37 U. S.] 72; U. S. v. Holliday, 3 Wall. [70 U. S.] 407.

(3) "To establish post-offices and post-roads." This gives authority to appoint a postmaster-general, and local postmasters throughout the country; to define their duties and compensation; to cause the mails to be carried by contract, or by the servants of the department, to all parts of the states and territories of the Union, and to foreign countries, and to punish crimes relating to the service, including obstructions to those engaged in transporting the mail while in the performance of their duty. The mail penal code comprises more than fifty offenses. All of them rest for their necessary constitutional sanction upon this power, thus briefly expressed.

(4) "To raise and support armies." This includes the power to enlist such number of men for such periods and at such rates of compensation as may be deemed proper; to provide all the necessary officers, equipments, and supplies, and to establish a military academy, where are taught military and such other sciences and branches of knowledge as may be deemed expedient, in order to prepare young men for the military service.

(5) "To provide and maintain a navy." This authorizes the government to buy or build any number of steam or other ships of war, to man, arm, and otherwise prepare them for war, and to dispatch them to any accessible part of the globe. Under this power the naval academy has been established. U. S. v. Beavan, 3 Wheat. [16 U. S.] 390.

These are but a small part of the powers which are incidental and appropriate to the main powers expressly granted. It is Utopian to believe that without such constructive powers, the powers expressed can be so executed as to meet the intentions of the framers of the constitution, and to accomplish the objects for which governments are instituted. The constitution provides expressly for the exercise of such powers to the full extent that may be "necessary and proper." No other limitation is imposed. Without this provision, the same result would have followed. The means of execution are inherently and inseparably a part of the power to be executed.

The constitution declares that "the senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath to support this constitution." No other oath is required, "yet he would be charged with insanity who would contend that the legislature might not superadd to the oath directed by the constitution such other oath of office as its wisdom might suggest." McCulloch v. Maryland, 4 Wheat. [17 U. S.] 416.

The Bank of the United States, with all its faculties, was sustained because it was "convenient" and "appropriate" for the government in the management of its fiscal affairs. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 316. Perhaps no measures of the national government have involved more doubt of their constitutionality than the acquisition of Louisiana and the embargo. Both were carried through congress by those who had been most strenuous for a strict construction of the constitution. Mr. Jefferson thought the former ultra vires, and advised an amendment of the constitution, but expressed a willingness to acquiesce if his friends should entertain a different opinion. 2 Story, Const. 160.

The Second Bank of the United States was a measure of the same class of thinkers. The acquisition of Florida involved the same question of constitutional power as the ac-

quisition of Louisiana. It was universally acquiesced in; and the constitutional question was not raised.

It is an axiom in our jurisprudence, that an act of congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favor of the validity of the law. "The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." Fletcher v. Peck, 6 Cranch [10 U. S.] 128. "The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated." Cooper v. Telfair, 4 Dall. [4 U. S.] 18. "A remedial power in the constitution is to be construed liberally." Chisholm v. Georgia, 2 Dall. [2 U. S.] 476.

"Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." Prigg v. Com., 16 Pet. [41 U. S.] 60.

Since the organization of the supreme court, but three acts of congress have been pronounced by that body void for unconstitutionality. Marbury v. Madison, 1 Cranch [5 U. S.] 137; Scott v. Sanford, 19 How. [60 U. S.] 393; Ex parte Garland, 4 Wall. [71 U. S.] 334.

The present effect of the amendment was to abolish slavery wherever it existed within the jurisdiction of the United States. In the future it throws its protection over every one, of every race, color, and condition within that jurisdiction, and guards them against the recurrence of the evil. The constitution, thus amended, consecrates the entire territory of the republic to freedom, as well as to free institutions. The amendment will continue to perform its function throughout the expanding domain of the nation, without limit of time or space. Present possessions and future acquisitions will be alike within the sphere of its operation.

Without any other provision than the first section of the amendment, congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked. Its office, then, is to repress and annul the excess; beyond that it is powerless.

We will now proceed to consider the state of things which existed before and at the time the amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing and anticipated evils.

When the late Civil War broke out, slavery of the African race subsisted in fifteen states of the Union. The legal code relating to persons in that condition was everywhere harsh and severe. An eminent writer said: "They cannot take property by descent or purchase; and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will or otherwise to the prejudice of creditors." 2 Kent, Comm. 281, 282.

In a note, it is added: "In Georgia, by an act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporal punishment; and it is unlawful for white persons to assemble with free negroes or slaves to teach them to read or write. The prohibitory act of the legislature of Alabama, passed at the session of 1831–2, relative to the instruction to be given to the slaves or free colored population, or exhortation, or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slaveholding states, but in Louisiana the law on the subject is armed with ten-fold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public discourse from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the state any paper, book, or pamphlet having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave states. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from Kent's

Commentaries. Further research would darken the picture. The states had always claimed and exercised the exclusive right to fix the status of all persons living within their jurisdiction.

On January 1, 1863, President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the Rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still subsisted in thirteen states. Its simple abolition, leaving these laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "appropriate" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race or color, and can not, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.

It was passed by the congress succeeding the one which proposed the amendment. Many of the members of both houses were the same. This fact is not without weight and significance. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 401.

The amendment reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects as to every one within its scope, than the consequences of a manumission by a private individual.

We entertain no doubt of the constitutionality of the act in all its provisions. It gives only certain civil rights. Whether it was competent for congress to confer political rights also, involves a different inquiry. We have not found it necessary to consider the subject.

We are not unmindful of the opinion of the court of appeals of Kentucky, in the case of Brown v. Com. [4 Metc. (Ky.) 221]. With all our respect for the eminent tribunal from which it proceeded, we have found ourselves unable to concur in its conclusions. The constitutionality of the act is sustained by the supreme court of Indiana, and the chief justice of the court of appeals of Maryland, in able and well-considered opinions. Smith v. Moody, 26 Ind. 299; In re A. H. Somers.

We are happy to know that if we have erred the supreme court of the United States can revise our judgment and correct our error. The motion is overruled, and judgment will be entered upon the verdict.

Motion overruled.

Case No. 16,152.

UNITED STATES v. RHODES.

[1 Cranch, C. C. 447.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

COMPETENCY OF WITNESSES—LARCENY BY SLAVE.

The owner of goods stolen by a slave is not a competent witness for the prosecution, because he is entitled to one half of the fine which the court must impose under the act of congress.

Indictment [against Milly Rhodes, a slave] for stealing a piece of Russia linen, the property of Mr. Vowell.

Mr. Jones contends that Vowell is a competent witness, because as a slave can have no property, there ought not to be a fine, and if no fine, no interest.

But THE COURT said, the act of congress under which she is indicted makes the fine a necessary part of the punishment, and Mr. Vowell will be entitled to one half of the fine.

DUCKETT, Circuit Judge, absent.

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

Case No. 16,153.

UNITED STATES v. RICE.

[1 Hughes, 560.] [1]

Circuit Court, W. D. North Carolina. May, 1875.

HOMICIDE—KILLING BY UNITED STATES MARSHAL—RESISTING ARREST.

If a person charged with an offence against the law, after making public threats against the life of an officer ordered to arrest him, when that officer proceeds to make that arrest, so acts with rifle in hand, as to make that officer believe that he intends to execute his previous threat, the officer is justified in the instant of danger to himself in taking the life of the person to be arrested.

On the 15th of last September, Andrew Woody, of Spring Creek, Madison county, was killed by Noah H. Rice, a United States deputy marshal, who was endeavoring to serve a capias on him for violation of the internal revenue laws. From facts developed before the court it appears that Woody had expressed a determination to resist any process which might issue against him, and had threatened to kill the defendant Rice if he attempted to arrest him. When this officer came upon Woody the latter was armed with a rifle. His demeanor was hostile, and when commanded to surrender he so acted as to impress the officer with the belief that his intention was to shoot him, and in self-defence he fired upon Woody with fatal effect. Rice came to Asheville and surrendered himself to the authorities, was examined by Commissioner Watts on application for bail, and committed to jail. His case was finally removed to the United States court, on Tuesday, May 11, 1875. He was placed upon trial for his life. The jury having requested full instructions from the bench, they were given as follows by

DICK, District Judge (charging jury). As this is a case of considerable importance to the defendant, and also to the due administration of justice, I have deemed it proper to commit to writing my instructions to the jury upon the questions of law involved. In this court in a trial for crime before one judge, defendants have no right to appeal, and the only remedy which they can have for misdirections to the jury on the part of the judge, is a motion for a new trial to be heard before the other judges of the court who were not present at the trial; then, upon a certificate of a division of opinion between the judges upon questions of law, the case may be carried to the supreme court for review. In all capital felonies tried by me sitting alone, I will allow defendants who may be convicted the benefit of these remedies; and I will always reduce to writing my instructions to the jury so that if I commit an error it may be corrected by the other judges who are authorized to preside in this court. All persons whose lives are put in jeopardy by a trial in court ought to have the benefit of all remedies afforded by law to guard against error and injustice. The humane and remedial provisions of the law ought to be fully afforded by courts of justice in favor of human life. The defendant in this case is charged with murder by an indictment found in the state court, and removed under the provisions of an act of congress to this court. This court has no original jurisdiction of the offence charged, but the case must be tried in the same manner as cases originating in this court; that is, the forms and modes of proceeding and the rules of evidence must be regulated by the course and practice of this court in criminal trials. The law which defines the offence is the criminal law which prevails in this state. This indictment is not founded upon a state statute, but is for an offence at common law. The laws of this state declare that the common law, with certain specified modifications, shall be in full force in this state. If the indictment was founded upon a state statute, we would be bound to regard the construction and exposition placed upon such statute by the supreme court of the state as a rule of decision. As it is founded upon the common law, we will look to the decisions of the state supreme court as highly important guides, but not as absolute authorities. We are at liberty to derive information as to the principles of the common law from the decisions of all the courts of England and this country which profess to administer criminal justice according to that wise, just, and time-honored system of law.

It is conceded that the alleged homicide was committed by the defendant, and he places his defence upon the ground that he was a regularly constituted officer of the United States, and had in his hands at the time of the homicide the process of law which authorized and commanded him to arrest the deceased for a crime against the United States; that the deceased resisted the execution of such process with a deadly weapon in his hands, and had manifested a purpose to use such deadly weapon in resistance; and that the homicide was necessarily committed in the attempt to make an arrest. This defence necessarily leads us to inquire what protection the common law affords to ministerial officers, and how far they are authorized to go in the performance of their public duties. Social order and political government are dependent upon the observance of law by the citizen. The mandates of the law are executed by officers provided for such purposes, and such officers are invested by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed. This rule is absolutely necessary for the advancement of justice, and is founded in wisdom and equity

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

and in the principles of social and political order. The law must be supreme within the sphere of its operation, or its influence would be nugatory, and there would be no certain rule to regulate human conduct in society and government, and all the rights and liberties of citizens would soon be lost in a chaos of anarchy. Mr. Justice Foster says: "Ministers of justice while in the execution of their offices are under the peculiar protection of the law." Fost. Crown Law, 308. If an officer is killed while performing his duty, the law deems such killing murder of malice prepense. This protection is not confined to the precise time when the officer is performing his official duty, but extends over him while going to, remaining at, and returning from the place of action. Any opposition, obstruction, or resistance intended to prevent an officer from doing his official duty, is an indictable offence at common law, and the punishment is regulated by the nature of the offence.

An officer is authorized to summons as many persons as may be necessary to assist him in the performance of his legal duties, and such persons are bound to obey such summons, and they are under the same protection afforded to officers, as they are for the time officers of the law. The law imposes upon private persons the duty of suppressing affrays, preventing felonies from being committed in their presence, and arresting such offenders and bringing them to justice; and such private persons, while performing their duties, are under the protection of the law. We may confidently lay down the broad general principle, that when any person is performing a public duty required of him by law, he is under the protection of the law. An officer of the law who has legal process in his hands is bound to execute it according to the mandate of the writ. If he is resisted in the performance of this duty, he must overcome such resistance by the use of such force as may be necessary for him to execute his duty. If necessary, the law authorizes him to resort to extreme measures, and if the resisting party is killed in the struggle the homicide is justifiable. Garrett's Case, 1 Winst. 144. If unnecessary and excessive force is used, after resistance has entirely ceased and the defendant in the writ has manifested his willingness to submit to the mandates of the law and be arrested, then if the said defendant is killed the officer will be guilty of manslaughter; and if the blood had time to cool, the killing would be murder. 2 Whart. Cr. Law, 1030, 1031, and authorities referred to in note. If, however, the defendant in the writ only ceases his resistance upon the officer desisting from his attempt to arrest, and still keeps himself in a condition to renew the resistance with a deadly weapon, if the officer should renew the effort to arrest, and the officer cannot make the arrest without great personal danger, he would be justified in killing the defendant. The submission of the defendant in such a case is not complete, and as long as he refuses to be arrested he is in a state of resistance; and if he is armed with a deadly weapon, and has manifested an intent to use it, and still keeps the weapon in his possession convenient for an emergency, and the officer has reasonable grounds for believing that the weapon will be used if an arrest is attempted, the officer is not required to risk his life in a rencounter, or desist from an effort to perform his duty. When a person puts himself in an armed and deadly resistance to the process of the law, he becomes virtually an outlaw, and officers are not required to show him the courtesy of a chivalrous antagonist and give him an open field and fair fight. It is only when a criminal submits to the law that it throws round him the mantle of protection and administers justice with mercy. It is the duty of every offender charged with crime in due process of law to quietly yield himself up to public justice. State v. Bryant, 65 N. C. 327; State v. Garrett, 1 Winst. 144.

A known officer, in attempting to make an arrest by virtue of a warrant, is not bound to exhibit his warrant and read it to a defendant before he secures him, if he resists; if no resistance is offered, the officer ought always, upon demand made, show his warrant to the party arrested or notify him of the substance of the warrant, so that he may have no excuse for placing himself in opposition to the process of the law. This is only a rule of precaution. A defendant is bound to submit to a known officer; to yield himself immediately and peaceably into the custody of the officer before the law gives him the right of having the warrant read and explained; when in resistance, the law shows him no favor. A defendant, knowing the arresting party to be an officer, is bound to submit to the arrest, reserving the right of action against the officer in case the latter be in the wrong. When a person acts in a public capacity as an officer, it will be presumed that he was rightfully appointed. 1 Whart. Cr. Law, §§ 1289, 2925; Cooley's Case, 6 Gray, 350. One who is not a known officer ought to show his warrant and read it, if required; but it would seem that this duty is not so imperative as that a neglect of it would make him a trespasser ab initio, when there is proof that the party subject to be arrested had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards. Garrett's Case, supra.

The law, in its humanity and justice, will not allow unnecessary force to be used in the execution of its process. If a defendant, without any deadly weapon or manifestation of excessive violence, makes resistance, an officer is not justified in wilfully shooting him down; but if a defendant has a deadly weapon, and has manifested a purpose to use it if an arrest is attempted, the officer is not

bound to wait for him to have an opportunity of carrying his purpose into effect. If the warrant is for a misdemeanor and a defendant attempts to avoid an arrest by flight, the officer has no right to shoot him down to prevent escape, nor even after an arrest has been made and defendant escapes from custody. Forster's Case, Lewin, Crown Cas. 187. The rule is different in cases of felony. Bryant's Case, supra. If an officer has process in his hands issuing from a court of competent jurisdiction over the subject-matter, authorizing and commanding him to arrest a defendant, he is entitled to the protection which the laws afford officers acting under process, although the process in his hands is informal and irregular. If the process is illegal and void on its face, or is against the wrong person, or its execution is attempted out of the district in which it can alone be executed, then the officer would not be under the protection of the law; but it would seem that if he kills a resisting party under such circumstances, he would only be guilty of manslaughter, unless he had actual knowledge of his want of authority, or acted from express malice.

I have stated to you many points of law which do not directly arise in the case before us; but it is important that they should be known and well understood in the country, where, in recent years, so much violence has been committed—violence in the name of law and violence in defiance of law. The principles of law involved in this case having been explained to you by the court, it is now your duty to ascertain the facts from the testimony and apply them to the law as laid down by the court.

In performing this important and solemn duty there are three points worthy of your special inquiry: (1) Whether the prisoner on trial was a known officer of the law and had in his hands, at the time of the homicide, legal process authorizing and commanding him to arrest the deceased. (2) Whether deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted. (3) Whether the resistance, if made, had entirely ceased, and the deceased had yielded himself quietly and willingly into the custody of the officer, and no longer had any purpose of resistance.

Upon the first point I will state, as a conclusion of law, that it is the duty of a court to recognize its regular officers and process. I therefore instruct you that the defendant was a regularly constituted officer of this court and the process under which he professed to act was due process of law. The only questions left for you to determine on this point are: Did the prisoner have such process in his hands at the time of the homicide? Was he endeavoring to execute such process? Was he a known officer of the law? And did the deceased have good reason to believe that there was an indictment against him which made him amenable to legal process?

The second and third points presented involve questions of fact which you must ascertain and determine from the testimony in the case. To aid you in the performance of this duty, I will now, in obedience to the requirements of the law, proceed to recapitulate the testimony, and will carefully endeavor not to express an opinion on the subject. I solemnly warn you not to allow your verdict upon questions of fact to be influenced by any impressions that you may form as to the conclusions of my mind. You must form your opinions upon questions of fact from the testimony, and allow no prejudice or outside influence to control your action.

* * * * * * * *

From this recapitulation and your own recollection you will perceive that the testimony is very conflicting. It is your duty carefully to consider the whole testimony and reconcile, as far as you can, any apparent conflicts; and when this cannot be done, you must believe that which you think, under all the circumstances, is entitled to the most credit. If, upon any question, you have a reasonable doubt as to the truth of the matter, you must render this doubt in favor of the defendant. This is the humane rule of the law in all criminal trials, but it is specially important and imperative in trials for capital felonies.

There are some circumstances connected with this case which I feel it to be my duty to call to your special attention, in order that they may not have an improper influence upon your action. The revenue laws have been the subject of much exciting discussion. Some persons advocate their rigorous enforcement, while others denounce such laws as unjust, inexpedient, and oppressive. All persons engaged in the execution of these laws have their warm friends and bitter opponents. No such influences should enter into and control your deliberations. A citizen on trial for crime is entitled to be confronted in court by his accusers and have them solemnly sworn to tell the truth. He is also entitled to be tried by a jury of his peers, who are free from all prejudices, and who in their action will have an eye single to justice and truth. These rights are as old as the common law; they constitute fundamental principles of English and American freedom, and have been secured in the federal and all state constitutions. They extend to all trials for crime, but they ought to be especially regarded as sacred and inviolable where human life is put in jeopardy. You, gentlemen of the jury, acting under the solemn obligations of your oath, and as fair-minded and impartial men, should discard all opinions and prejudices which you may have formed for or against the defendant, and try him as all

citizens charged with crime ought to be tried—according to the law and the testimony.

Gentlemen of the jury, if you come to the conclusion, after weighing all the testimony, that the deceased made resistance to the execution of legal process with a gun in his hands, and had manifested and continued to entertain a purpose to use such gun if an arrest was attempted, then you will find the defendant not guilty. (2) If you find that resistance was made but had entirely ceased and the deceased had yielded himself quietly and completely into the custody of the officer, and no longer had any purpose of resistance, then the prisoner is guilty of manslaughter; and if sufficient time had elapsed for the prisoner to get over the excitement caused by the resistance, then he is guilty of murder. If you have any reasonable doubts upon these questions, then the defendant is entitled to the benefit of these doubts.

The jury, after a retirement of two hours, found a verdict of "Not guilty."

Case No. 16,154.

UNITED STATES v. RICHARD.

[2 Cranch, C. C. 439.] [1]

Circuit Court, District of Columbia. Nov. Term, 1823.

CRIMINAL LAW—EVIDENCE—CONFESSIONS—LARCENY.

Although a confession, made under a promise of favor, is not, in itself, evidence against the prisoner, yet the fact of the prisoner's going to the place where the property was secreted, and identifying it, is evidence against him.

Indictment for stealing planks, the property of Mr. James McGuire, a lumber merchant. The prisoner [the negro Richard], upon a promise that he should not be prosecuted, was induced to confess his guilt, and to go and return the stolen articles, and to select those which belonged to Mr. McGuire.

Taylor & Fendall, for the prisoner, contended, and Mr. Swann, for the United States, admitted, that he must identify the property, independently of the confession.

THE COURT said that the fact that the prisoner selected Mr. McGuire's lumber was evidence against him.

Verdict, "Guilty."

Case No. 16,155.

UNITED STATES v. RICHARDSON.

[5 Cranch, C. C. 348.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

ASSAULT—WHAT CONSTITUTES.

If a man raise a club over the head of a woman within striking distance, and threaten to strike her if she open her mouth, this is an assault in law. He has no right to impose such a condition.

Indictment for an assault upon one Susan Shelton. The evidence was that the defendant [Allison Richardson] came into the house where Mrs. Shelton was sitting at a window. He was armed with a musket and a club; and raising the club over her head in an attitude for striking, and within striking distance, said to her that if she said a word (or if she opened her mouth) he would strike her; and this without any provocation on her part.

Bradley & Hoban, for defendant, contended that this was not, in law, an assault; that there can be no assault without a present intent to strike; and his saying, "if she opened her mouth," showed that he had not such a present intent, and they cited the old case, "If it were not the assizes, I would stab you."

But THE COURT (THRUSTON, Circuit Judge, absent) said that he had no right to restrain her from speaking; and his language showed an intent to strike upon her violation of a condition which he had no right to impose. Suppose a stranger comes to my house armed, and raises his club over my head, within striking distance, and threatens to beat me unless I will go out of and abandon my house, surely that would be an assault. So if a highwayman puts a pistol to my breast, and threatens to shoot me unless I give him my money, this would be evidence of an assault, and would be charged as such in the indictment.

Verdict, "Guilty." Fined ten dollars.

Case No. 16,156.

UNITED STATES v. RICHARDSON.
UNITED STATES v. SWANSON.
UNITED STATES v. SOTO.

[Hoff. Dec. 69.]

District Court, N. D. California. May 20, 1862.

MEXICAN LAND GRANT—EVIDENCE—CONCLUSIVENESS OF LOCATION.

[Where it appears that the claimants have in the most emphatic and solemn manner made their election of the three leagues granted to them, and have surveyed the same; that important interests have grown up and large expenditures been made on the faith of that election, by the purchase and improvement at great expense of land within the survey, and by settlement and improvement under the laws of the United States of lands without it; and that no objections to the location of the grant thus elected are suggested by the United States or the owners of the adjoining ranchos,—the land should be surveyed in accordance with the claimants' original survey and election.]

The rejection of the surveys of the Martinez ranchos: No. 205. Rancho El Pinole. Rancho Las Juntas. No. 87. Rancho Cañada del Hambre. No. 308.

HOFFMAN, District Judge. Objections to the surveys of these three ranchos have been filed on the part of the owners of E Pinole

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

and of Las Juntas. It is contended that the Rancho Cañada del Hambre has been so located as to embrace a considerable area which is clearly within the exterior limits of the Pinole and Las Juntas Ranchos without regard to the rights of election of the claimant of those two ranchos.

In behalf of the claimants of the Cañada del Hambre Rancho, it is contended—

(1) That the Del Hambre Rancho, as surveyed, does not include any lands comprised within the exterior limits of the other two ranchos, and,

(2) That the Mexican government, by granting the Cañada del Hambre to the extent of 3 leagues, ascertained and declared that there was a sobrante or overplus between the two ranchos Pinole and Las Juntas, and those two ranchos cannot now be located so as to exclude the tract between them, which has thus been granted to another. To this it is replied that the claim for the Cañada del Hambre is fraudulent, and it is contended that the claimants have a right to show that fact, notwithstanding that the validity of the grant has been affirmed by the United States tribunals; the claimants of the adjoining ranchos not having been parties to that proceeding, nor even permitted to intervene in it for the protection of their rights.

The decree in the Del Hambre case confirms to the claimants "so much of the land known at the date of the grant as the 'Cañada del Hambre,' as shall remain overplus from the ranchos of Pinole and Mr. Welsh, not to exceed three leagues after the latter shall have been duly located and surveyed by the proper officer." By the terms of this decree it is evident that those three ranchos must first be located and surveyed. In determining, then, the true location of the three leagues of the Las Juntas Rancho, it will be necessary, first, to ascertain what were the exterior limits of the tract granted; and, second, how far the right of election to the particular location of that quantity of land is modified or controlled by the alleged grant to Soto of the Cañada del Hambre. The expediente in the case of Las Juntas shows that on the 9th of June, 1834, Welsh petitioned for the place called "Las Juntas," on which he says he had resided two years, as shown by the document annexed; that he had cattle, a house, fields, etc. The "document annexed" was a previous petition to the alcalde for two leagues in the place called "Las Juntas," and an order of the alcalde, dated October 20, 1832, conceding it as a loan, subject to the approval of the government. On the margin of the petition to the governor is an order of reference to the ayuntamiento of San José and the padre of the mission for information. No report appears to have been made by either. On the 9th of February, 1844, Welsh presented a petition, in which, after referring to his unsuccessful efforts to obtain the place called "Monte del Diablo," he states that in 1832 he obtained a loan from the alcalde of the place called "Las Juntas," which, as shown by the map, lies to the west of the tract of Juana Sanchez and of the Monte del Diablo. He therefore solicits the place which he has occupied for ten years, and, referring to the map, says it is bounded towards the north by the Arroyo del Hambre, east by the Arroyo de las Nueces, south and west by lands of Pacheco and Moraga; that it is all pasture land, has but one permanent spring, and that its greatest extent from north to south may be three leagues, and from east to west, one-half to three-fourths of a league. On the same day, Pico, alcalde of San José, certifies that the western part of Las Juntas has been occupied for 13 or 14 years by Welsh, and that it has never belonged to any other individual. That its limits are: to the northward, the Arroyo del Hambre; to the eastward, the Arroyo de las Nueces, which also divides it on the south from the place of Lorenzo Pacheco; and on the west it is bounded by Senor Moraga. On the 19th February, Jimeno, the secretary, to whom the petition was referred, reports that from October, 1832, until 1838, Welsh had occupied the land with a house and property. That he left it on account of sickness, which was also the reason why the proceedings commenced on the 9th June, 1834, to obtain the title, were stopped. He, therefore, recommends the grant, as it can injure no one, the place being surrounded by known arroyos. And he deems it unnecessary to refer to the colindantes, as the alcalde of San José has given his certificate. On the 20th February the governor makes his decree of concession, in which he describes the land as "bounded by the Arroyo de las Nueces and by that of El Hambre, without prejudice to the boundaries of Lorenzo Pacheco, Juana Sanchez, Moraga or Martinez," and orders the title to issue for two square leagues. The grant issued on the same day. It describes the land as on the decree of concession, refers to the map in the expediente, and orders the land to be measured, reserving the surplus. The decree of confirmation is for two leagues, and describes the land as bounded east by the Nueces and lands of Juana Sanchez; south, by the Nueces and lands of Lorenzo Pacheco; west, by said arroyo and lands of Moraga; and north, by the Arroyo del Hambre and lands of Ignacia Martinez.

It might seem that there could be no difficulty in ascertaining a tract of which all the boundaries are well known arroyos. On referring to the diseño, we find that the Arroyo de las Nueces is represented as rising in the sierra on the west. After following in a southerly direction for a considerable distance it makes an abrupt bend, and, joined by two tributary streams, it runs in a direction nearly north into the Straits of Carquinez. Those straits are not by name laid down upon the map, but the creek is represented as falling into what are inscribed

"Esteros." The topographical map exhibited in the cause shows the creek, at or near the point where the diseño represents it as falling into or becoming an estero, enters a salt marsh, through which it pursues a somewhat sinuous course to the straits. The "Arroyo del Hambre" is also laid down upon the map, but it is represented as flowing from west to east, nearly at right angles to the course of the other streams, and as falling into the esteros at a short distance from the mouth of the Nueces. The tract delineated thus assumes nearly the shape of an inverted triangle—the Nueces curving around its lower extremity as has been described, and forming the two legs of the triangle, while the Del Hambre, running from west to east, forms its base. It is found, however, that the draughtsman of the diseño, though he has correctly laid down the courses of the streams on the east and west, has wholly mistaken that of the Del Hambre. The latter stream rises in the hills on the west not far from the source of the Nueces, or Reliez creek, as it is called, and flowing in an opposite direction, and in a course nearly due north, falls into the straits at a considerable distance to the west of the mouth of the Nueces. The Del Hambre, therefore, cannot serve as a northern boundary. If admitted as a boundary at all, it will form a portion of the western boundary, the northern boundary being the Straits of Carquinez.

Under these circumstances, it is contended on behalf of the claimants of the Rancho Cañada del Hambre that the northern boundary of Las Juntas, as called for in the papers, not being found to exist in nature, must be disregarded, and the quantity called for must be surveyed within the other lines; that if the straits had been intended as a northern boundary, they would have been mentioned in the papers, or in some manner referred to; that as the northern boundary called for in the papers cannot be found, the court must fix an imaginary line, enclosing the proper quantity between it and the other natural boundaries; that the tract is described as surrounded by arroyos, whereas it has arroyos only on three sides of it, and the fourth side must of necessity be bounded by an imaginary line, so as to include the required quantity.

It will be perceived that all these propositions rest upon the hypothesis that the intention of the grantor was to fix a northern boundary for the tract, and that he designated the Del Hambre solely because he supposed it to flow in the direction represented on the diseño, and across the land so as to form a northern boundary. If such was the predominant idea in the governor's mind, it might, with much reason, be urged that, as the brook cannot serve as a northern boundary, the call for it must be rejected, and the northern line be determined by quantity, or by drawing a line corresponding in position and direction to the supposed course of the Del Hambre. But, on the other hand, it may well be supposed that the intention of the grantor was to adopt certain well known and natural objects as the limits of the tract; and though, in the rude sketch submitted to him, the position and course of one of the brooks may have been erroneously laid down, yet his intention was to extend to that brook wherever it might, in fact be found. The Arroyo del Hambre is described by all the witnesses as publicly and notoriously known by that name since 1808. It derived its name from the circumstance that a body of Spanish soldiers, encamped near it, underwent in that year, much suffering from hunger. The same name was applied to the Bolsas, towards its upper waters, and to the cañada, or narrow valley of level land through which it flows as it approaches the straits. This Cañada del Hambre is represented on the diseños of the ranchos on the east and on the west, where its position and course are indicated with considerable accuracy. The grants for both of these ranchos are of older date than that for Las Juntas—one having been issued in 1834, and the other (Pinole) in 1842. It may therefore be supposed that the governor was not unacquainted with the true course and position of the Del Hambre. That the brooks were "known" appears from Jimeno's report, in which it is stated that the place is "surrounded by known arroyos,"—an observation which is cited by the counsel for the Soto claim as indicating that Jimeno must have supposed the Del Hambre to flow across the tract from west to east, so as to join its northern boundary, but which appears to me equally accurate and natural, if Jimeno had been acquainted with the true course of the stream, and knew that the land solicited was bounded on three sides by known arroyos, and on the fourth by the straits. It is not pretended that the lands of Martinez extended further east than the Cañada or Arroyo del Hambre; and yet throughout the whole proceedings in the case of Las Juntas, from the petition of the alcalde in 1832, down to the grant, the rancho of Martinez is mentioned as one of its boundaries. The alcalde, who in 1832 conceded to Welsh two leagues, by way of loan, states the lands loaned by him lay between the two brooks, the Nueces and the Del Hambre; and the proofs show that so early as ——, Welsh built a corral, and employed Vaqueros, who resided on the Del Hambre, at a short distance from its mouth. All the witnesses concur in the statement that the Del Hambre was universally recognized as the boundary between the two ranchos, and that Welsh, though his house was built further south, and at the lower part of the tract, always claimed to that stream. The attempt made to identify the Arroyo del Hambre of the diseño with Dry creek is wholly abortive. For, independently of the overwhelming mass of testimony, which establishes beyond doubt what creek was known, from a very early period, by the

name Del Hambre, the diseño itself represents Dry creek in its true position, and by the name "Arroyo Seco," which, translated, it still retains. It is also to be noted that neither the concession nor the grant call for the Del Hambre as a northern boundary. Those documents merely describe the land as bounded by the Arroyo de las Nueces and by that of Del Hambre. It is only by referring to the petition, the informes, and the diseño that we discover that that arroyo was supposed to be a boundary on the north. It has, for these reasons, seemed to me wholly inadmissible to construe the grant as intended to designate the Del Hambre as a northern boundary; and, if it cannot form such a boundary, to reject a call altogether. On the contrary, it should be construed in accordance with the universal understanding of the colindantes and neighbors from a period antecedent to the date of the grant, as calling for the Del Hambre creek and the lands of Martinez as boundaries, notwithstanding that the course and position of the creek may have been erroneously represented on the diseño.

The next inquiry is whether the right of the claimants of Las Juntas to select the three leagues granted within the exterior limits of the tract has been modified, and ought now to be controlled by the alleged grant to Teodora Soto. It may be admitted that if the Mexican government have within the exterior limits of the grant to Welsh, ascertained and cut off a sobrante or excess beyond the quantity granted, and have granted this sobrante by metes and bounds, or by other adequate description, the sobrante grantee would have the right now to insist that Las Juntas should be so measured as not to include the tract subsequently granted to himself. But the inquiry whether such a grant was, in fact, made, was had in a suit between the claimants under the Soto grant and the United States. The claimants of Las Juntas were not permitted to intervene for the protection of their rights, and have not been heard. The 15th section of the act of 1851 declares that the final decrees in this class of cases shall be conclusive only as between the United States and the claimants, but shall not affect the interests of third persons.

It is evident that the claimants of Las Juntas are "third persons," and that their interests would be seriously affected if the confirmes of the Soto grant are permitted to deprive them of the right of locating their grant so as to embrace the most valuable land within its exterior limits. I proceed, therefore, to inquire, notwithstanding the decree of confirmation, whether, as between the claimants of the Las Juntas and those of the Cañada del Hambre, the latter have, by virtue of a valid grant of the sobrante, the right to control the election of the former as to the location of the tract. The expediente in the Soto case discloses that on the 4th of May, 1841, Teodora Soto presented a petition, in which she stated that about four years before, her deceased husband, Barcenas, had obtained a provisional grant for the Cañada del Hambre, and had placed numerous cattle upon it; that soon after a fire compelled him to remove from the place, and that shortly afterwards he died. She therefore asked a grant of the land, even though it be provisionally, and until she can present a sketch of it. On the 4th May, 1842, José Castro, the ex-prefect, certifies that in 1839 he granted the land to Barcenas provisionally, and that the expediente ought to be amongst the papers of the prefecture. On the 6th of May, Estrada, the then prefect, certifies that the expediente is not found in his office. On the 8th May, the governor orders that a provisional grant issue. The petitioner presents a map, etc., subject to the usual reports.

There is no reason to doubt the genuineness of these documents. They are found in the archives, and bear every mark of authenticity. There was also produced by the claimants a translation of an alleged grant, dated December 14th, 1841, to Teodora Soto, of the Cañada del Hambre, "not to exceed three leagues of that which shall be left over after the ranchos of Welsh and Martinez shall have been measured." This document, it was alleged, was delivered by the claimant to M. G. Vallejo, who caused it to be translated. Vallejo swears to the genuineness of the original, and he and Frisbie to its loss. The translator swears to the accuracy of the translation. Proofs were also adduced to show occupation of the land by Soto from a period anterior to the date of the grant. The decision of this court was rendered at a time when the completeness and value of the archives, both as negative and positive proofs, were imperfectly understood; nor had the court then become aware how unreliable, in most instances, is the parol proof offered in support of grants of which the archives contain no trace. As the genuineness of the expediente was not questioned, it was not considered by the court most probable that a grant was in fact issued in accordance with the governor's order, and that he might have deemed the rights of the colindantes, Welsh and Martinez, sufficiently protected by directing the three leagues to be taken only out of the sobrante which should result after the adjoining ranchos were measured. Under this view, it was supposed that the translator had mistaken the date of the grant, and that it in fact issued in 1842, after the date of the governor's order of May 8th, of that year. The grant intended to be confirmed was therefore a supposed grant, dated subsequently to May, 1842; but by some oversight the decree refers to and confirms the alleged grant of 1841.

That no grant could have issued at that date is evident:

1. No petition or document whatsoever, relating to such a grant, is found in the archives.

2. None was believed to exist; else, why consult Estrada as to a previous provisional concession by a prefect?

3. Teodora Soto's own petition of May, 1842, asking for a concession of the Cañada del Hambre, even "tho' it be provisional," negatives the idea that she already had an unconditional grant for the same lands; as does also her reference to a supposed provisional concession to her husband, some four years before, and her entire silence as to an absolute grant to herself, made less than five months before the date of her petition.

4. The governor, if he made the grant of 1841, must be supposed to have granted the sobrante of two ranchos, for neither of which a title in full property had as yet issued; and this without any evidence that the limits of those ranchos contained a sobrante of three leagues, or any other quantity.

5. The subsequent grants of Pinole and Las Juntas omit all mention of the alleged previous grant of the Cañada del Hambre, although the Pinole grant calls for the cañada as one of its boundaries, and the Las Juntas is bounded by the Arroyo Del Hambre. In the latter grant the governor is at pains to declare that it is without prejudice to the boundaries of Pacheco, Juana Sanchez, Moraga or Martinez, but he does not mention Teodora Soto, who is alleged to have obtained her grant two years previously.

For these and other reasons that might be adduced, I think it proved beyond a doubt that no grant could have issued at the date mentioned by Vallejo. It may be said, however, that a grant may have issued in 1842, and that the translator has made a clerical error in copying it. But this hypothesis appears inadmissible. In the document presented not only is the date (December 14th, 1841) attached, but a translation is given of the habilitation at the top of the page, by which it appears that the paper was habilitated for the years 1840 and 1841. It would seem, therefore, that there could have been no mistake in the translation. That no such title could have issued before June 2d, 1842, the date of the Pinole grant, may be inferred from the fact that that grant makes no mention whatever of the Cañada del Hambre rancho, though the cañada itself is referred to as a boundary. On the 8th of June a grant is made for the Rancho Boca de la Cañada del Rinole, bounded by the ranchos of Welsh, Martinez, and Velencio; but without reference to any rancho of Soto, though it appears that she was the daughter-in-law of the grantee, and then residing on the Rancho Boca de la Cañada del Rinole. And finally, when, in 1844, Las Juntas was granted to Welsh, without prejudice to the ranchos of his neighbors, some of whom are expressly mentioned, all reference to any previous grant to Soto is omitted.

It has already been shown that the grant of 1841, relied on by the claimants, and the only one as to which proofs were offered, could not have been issued. It has been shown that the paper which was translated must have been dated in 1841, for it is impossible to suppose that the translator would not only have mistaken the date, but the purport of the printed habilitation at the head of the paper, which shows it was made for the bienno 1840 and 1841. The grant, therefore, which was translated, must have been a forgery. Gen. Vallejo and Frisbie are the only witnesses who testified to having seen it. The direct proof of its genuineness consists of the statements of Gen. Vallejo alone It follows that if any grant did issue subsequently to the date of the governor's order of May 8th, 1842, it has not been produced, nor has any evidence been taken to prove its existence. The hypothesis, therefore, of a grant in 1842, is an assumption wholly unsupported by proofs. The proceedings of the government with regard to the three other ranchos which have been referred to, and especially with regard to Las Juntas, render it highly improbable that up to 1844, the date of the latter grant, Teodoro Soto could have been known as a colindante of either. But there is found in the records of the former government evidence which I cannot but regard as decisive of the fact that no grant could have been issued to Teodora Soto. On the day on which the title for Pinole issued, a communication was addressed to the justices of the peace of Contra Costa, by Estrada, the prefect, in which he informs him that on that day he had received a dispatch from the secretary of state, notifying him that a title had been issued to Martinez for El Pinole, with all the lands pertaining to it, and ordering that the justices of the peace for San José, Contra Costa and San Francisco be informed of the order, that they may make it known to those in the neighborhood, and particularly to Teodora Soto, who is to be informed that the pretension she has made to occupy the Cañada del Hambre is not admissible, because it pertains to Pinole. The genuineness of this document seems indisputable. It is traced to the possession of Estudillo, at that time alcalde of the district in which the land lay, and the borrador or office copy of the dispatch from the secretary to Estrada is found in the archives. It proves what was the final result of Teodora Soto's application of May, 1842, and definitely establishes that her petition was rejected.

It is unnecessary to do more than refer in general terms to the mass of testimony which disproves the statement of Vallejo that Teodora Soto occupied the cañada from the year 1829. In 1845 and 1846 she was living at the rancho of Boca del Pinole, the home of her mother-in-law, where she put up the walls of an adobe. This she would hardly have done if she owned three leagues in the immediate neighborhood. Several witnesses, who have long resided in the cañada

or its vicinity, testify that they have never heard of any claim of Teodora for lands in the Cañada del Hambre. Another witness deposes to a declaration of Teodora that she had no land. And numerous witnesses testify that she went to the cañada for the first time in 1847. If to this be added the fact that in her deed to James she describes the grant as for one league, in her petition to the board as for two leagues, while in her deed to Vallejo no description whatsoever is given, together with the fact that Vallejo, when testifying before the board, was directly interested in the claim, it cannot, I think, be doubted that Teodora Soto never obtained a grant from the Mexican government. The claimants of Las Juntas, being thus found to have the right to elect the quantity granted within the exterior limits, without regard to the alleged grant to Teodora Soto, it remains to be considered whether that right has been properly exercised. The rancho was, in 1850, surveyed under the direction of the claimants, and the exact quantity of three leagues was located so as to extend from the Las Juntas to the straits, and embracing all the land between Arroyos del Hambre and Nueces, from the mouth of each of those streams up to a point on the Del Hambre, some two miles from the town of Martinez, from which point a line was measured in a southeast direction to Arroyo de las Nueces, so as to include the house of Welsh, and to leave the sobrante or excess not included on the southwesterly side, bordering on the Reliez creek, and contiguous to the lands of Moraga. This survey was recognized and adopted in the decree of the probate court of Contra Costa county, by which the lands of William Welsh were divided amongst his heirs. Nearly all the lands thus included have been sold by the claimants of Las Juntas; the first sales having been made so far back as 1849 of lots in the town of Martinez, situated at the mouth of the Arroyo del Hambre. The aggregate amount received by the claimants on these sales exceeds the sum of $66,000. On the lands so sold, especially those near the town of Martinez, the purchasers have made improvements to the value of more than $100,000. The land excluded from this survey, and admitted by the claimants to be public land, has been in great part taken up as public land by settlers, who have made improvements thereon to the value of $25,000. These lands are included in the official surveys. It is also shown that since the survey of 1850, the claimants have uniformly declared that they claimed no land outside of that survey.

It thus appears that the claimants have, in the most emphatic and solemn manner, made their election of the three leagues granted to them; that important interests have grown up and large expenditures on the faith of that election, not only by the purchase and improvement, at great expense, of lands within the survey, but by the settlement and improvement under the laws of the United States, of lands without it. No objections to the location of the grant thus elected by the claimants of Las Juntas are suggested on the part of the United States, or of the owners of the adjoining ranchos, except, of course, the claimants under the confirmation to Teodora Soto. As the latter, for the reasons already given, cannot be heard, there seems no reason why the important interests which have vested under the location adopted by the claimants at so early a date, should now be disturbed. I think, therefore, that the official survey of Las Juntas should be rejected, and the land surveyed in accordance with the claimants' survey of 1850.

The objections to the official survey of El Pinole remain to be considered. It appears from the expediente that in August, 1834, Martinez presented a petition to the commissioners on colonization, setting forth that in 1823 he had obtained a grant for the place called "Pinole y Cañada del Hambre," and that he had lost or mislaid it. The commissioners recommended that the papers be returned to him, that he may make his application in due form. The same proposition was presented to the departmental assembly. In the report of the committee on colonization and vacant lands, it is noticed that Martinez had represented to them that he was in possession of the place called Pinole and Cañada del Hambre, along the Straits of Carquinez; that he had lost or mislaid the title issued to him by Arguello, in 1832. They therefore propose "that the papers be returned to him, that he may present the same in due form." This report was approved by the assembly. On the 10th November, 1837, Martinez presented his petition to the governor, setting forth that in 1823 El Pinole was granted to him, but that the paper had long since been lost or mislaid; that he was therefore obliged to present a second petition for the place already solicited, being three leagues, but that now, from the increase of his cattle, it was necessary that there should be granted to him one sitio more, so that he may have an extension of four leagues; that although this may appear considerable, yet the greater part is not fit for pasturage, being composed of rocky hills and swamps. "The better portion is on the side of the 'Siscar,' and the Cañada del Hambre," wherefore he asks that his petition be granted as charged by the supreme government in the annexed document. The document annexed is an order from the president of Mexico, directing the governor to grant to Martinez the lands solicited. On the 25th December, 1837, the governor refers Martinez' petition to the ayuntamiento of San Francisco, reminding them that the petition is for four leagues. On the 10th September, 1838, the ayuntamiento reported favorably to the petition for a grant of four leagues. On the 1st June, 1842, the gov-

ernor makes his decree of concession in which he declares Martinez owner of the place called "El Pinole," having for limits the mouth of the Cañada del Pinole, thence eastwardly with the same to the Corral de Galinde, from this point to the Cañada del Hambre, and along it (por ella) to the Straits of Carquinez, and terminating at the mouth De la Cañada del Pinole on the Bay of San Francisco. The final title issued on the same day. It describes the land in the same terms as the decree of concession. The third condition declares its extent to be four square leagues, a little more or less, as explained on the diseño, and it directs the magistrate who shall give the possession to cause it to be measured, reserving the surplus to the nation for its convenient uses. On the same day the communication heretofore referred to was addressed to the justice of the peace of Contra Costa and San Francisco, directing that Teodora Soto be informed that the pretensions to the Cañada del Hambre were inadmissible, as the land belonged to Martinez. The decree of confirmation describes the boundaries precisely as they are given in the grant. No quantity is specified, but the usual reference, for greater certainty, is made to the map and expediente, and to the deposition of W. A. Richardson. It is contended that the grant is by metes and bounds, and that all the land within the exterior limits should be surveyed to the claimants. But this claim seems to me wholly inadmissible. It had never been considered by this court, that when the grant mentioned a certain quantity of land, adding the words "poco mas ó menos,"—"a little more or less,"— any greater excess over and above the quantity specifically mentioned could pass than a mere fractional part of a league, which was the common unit of measurement. Such seemed the reasonable, though, of course, somewhat arbitrary, interpretation of the phrase alluded to, and such an operation was attributed to it in those cases only where all the exterior boundaries were well defined, and where the proceedings showed that the governor intended to grant all the land within the limits specified, and where it appeared that the quantity within those limits exceeded the number of leagues mentioned only by such an excess as might reasonably be deemed to have been contemplated and provided for by the introduction of the words "poco mas ó menos." But this view was held by the supreme court to be erroneous, and the words "poco mas ó menos" were entirely disregarded, as "having no place in a system of surveys like the American." The quantity embraced within the exterior limits of El Pinole is about seven leagues,—nearly twice the quantity mentioned in the grant. It is plain, then, that neither the previous ruling of this court nor the decisions of the supreme court would authorize the confirmation of this claim for a greater quantity than four leagues.

It is said that the case of U. S. v. Rosa Pacheco [22 How. (63 U. S.) 225], is an authority for the confirmation of the whole tract; but the cases are essentially different. In that case, not only were all the boundaries distinctly mentioned, but the governor was informed by the petition and by the reports of the informing officers (by whom testimony was taken as to the extent of the land) that the tract solicited was two leagues in length by about two leagues, or little more or less, in width. With this information he proceeds to grant "the tract solicited," specifying all its boundaries; and the grant in that form was approved by the departmental assembly. In making out the title, however, the draughtsman, it would seem, by a clerical error, mentioned in the condition that the land was of the extent of two leagues. The supreme court held that all these circumstances showed an intention to grant a tract of the dimensions reported to the governor, and confirmed the tract to four leagues. But in this case all the proceedings show that quantity, and not boundaries, was the prominent idea in the governor's mind and in that of the grantee. The petition, as we have seen, states that the former grant, which had been lost, was for three sitios, but that he now asks for an additional sitio; that its extent asked for may seem large, but that the greater part is unfit for pasturage, etc. In his order of reference to the ayuntamiento, the governor is careful to remind them that the quantity solicited is four leagues. In the report of the ayuntamiento, the quantity of four leagues is again referred to; and, finally, in the grant, the extent of land granted is again specified as four leagues, "a little more or less," and it is ordered to be measured, the surplus to remain to the nation for its convenient uses. It will be perceived that this case is almost the converse of that of Rosa Pacheco, for here the intention to ask for and to grant a definite quantity of land is apparent throughout the whole proceedings. To permit, under such circumstances, a tract of land, of nearly double the extent solicited, to be taken from the public domain, seems to me wholly inadmissible. The decree of the board does not restrict the confirmation to any specified quantity; but, in their opinion, the deposition of Richardson is referred to as showing that there are not more than four leagues in the grant. The omission, therefore, to restrict the confirmation to the quantity mentioned in the grant is evidently due to the reliance placed on the erroneous statement of Richardson, the claimant's own witness, as to the extent of land included within the exterior limits.

I think it clear that the claimants are only entitled to four leagues of land, to be located within the exterior limits of the grant at their election. For the reasons already assigned with regard to Las Juntas, the election of the claimants of El Pinole cannot now be controlled by the representatives of

Teodora Soto. The exterior boundaries, within which the election is to be made remain to be considered. The only serious question appears to be with regard to the eastern boundary. The boundaries mentioned in the grant are: the mouth of Cañada del Pinole, thence eastwardly with the same to the Corral de Galinde, and from this point to the Cañada del Hambre, and along or through it ("por ella") to the straits, and terminating at the mouth of "El Pinole." It is urged that by the terms of the grant, and from the language of the petition, it is plain that the land was bounded by, but did not include, the Cañada del Hambre. In the last act of the expediente given in the printed brief filed by the counsel for Teodoro Soto the petition is translated so as to read that: "The extent of land solicited appears large; but the greater part is not fit for pasturage, being composed of stony hills and marshy lands. The last sitio solicited lies in the direction of the Siscar and Cañada del Hambre, which is the place the cattle most resort to, as is known to all the neighbors." But this translation is evidently inaccurate. Martinez makes no mention of the last sitio. He says the quantity of land may appear too great; but the greater portion is unfit for pasturage. The best part is on the side of the Siscar and Cañada del Hambre, etc. The petitioner had already mentioned that his last grant from Arguello had been for three leagues, "which were the Cañada del Pinole and that called 'Del Hambre,' on the Straits of Carquinez, and looking toward the Bay of Sonoma, as far as the mouth of the Cañada Pinole," as shown by the accompanying map. This same land he again solicits, with the addition of another sitio. On the map, the Cañada del Hambre is distinctly represented, and its name inscribed upon it. That the sitios first granted included that cañada is expressly stated in the petition, and it is also stated that owing to the loss of his document he is obliged to present a new petition for the same place. The excuse assigned for asking for the large quantity of four leagues is that the greater portion is unavailable, the best part being on the side of the Siscar and the Del Hambre. It is plain that he could not have intended to exclude from his application lands embraced in his previous grant, and which he specifies as the best part of the tract solicited in his second application. The grant has been translated as bounding the lands by the Cañada del Pinole, thence eastwardly with the same to the Corral de Galinde, thence to the Cañada del Hambre, thence to the straits, and thence to the mouth of the Cañada del Pinole. But, in fact, the grant does not call for the cañada as a boundary on such terms as would exclude it. The language is, "from that point (i. e. the Corral de Galinde) to the Cañada del Hambre, and through it or along it to the straits,"—precisely the same expression as is used with reference to Cañada del Pinole, which is on all hands admitted to be included in the grant.

Looking at the terms of the grant alone, I can see no reason why both cañadas must not be excluded if either be, for both are mentioned as boundaries, and the line is said to run with respect to each, "por ella" or por "la misma." But even if the intention of the petitioner or that if the governor were doubtful, the document issued on the same day, in which it is ordered that Teodora Soto be informed that her application for the Cañada del Hambre is inadmissible, as that that cañada belongs to Pinole, would seem to be decisive. If, in addition, we consider that on the diseño of Las Juntas the Arroyo del Hambre is distinctly delineated as the boundary between the two ranchos, the lands to the west of it being inscribed "Terreno de Martinez," together with the fact testified to by all the witnesses that the Arroyo del Hambre was universally recognized as forming the common boundary line of El Pinole and Las Juntas, no doubt can, I think, be entertained, that portion of the Cañada del Hambre lying to the west of the arroyo was included within the exterior limits of the Pinole.

It is said that if any of the cañada be included all must be, and the adoption of the arroyo as a boundary is purely arbitrary. The cañada in question is a long and narrow valley, not exceeding, in average width, a few hundred yards. Throughout the greater part of its course the Arroyo del Hambre, after entering the cañada, flows along the base of the eastern hills, leaving by far the larger portion of the valley on the west of it. The adoption, therefore, of a well known object like an arroyo as the boundary would be most natural, as it left almost all the cañada to Martinez, and satisfied the call of his grant, which required him to run through it "por ella" to the straits. In the subsequent grant for Las Juntas, the arroyo is expressly designated as the boundary of the latter, and the line so fixed has been recognized and adopted from that day to this. It appears to me, therefore, that the claimants of Pinole have the right to locate four leagues of land at their election, within the exterior limits, as ascertained in this opinion, viz., the Cañada del Pinole, thence along or through it to the Corral de Galinde thence to the Arroyo del Hambre, thence to the straits, and thence along the bay to the mouth of the Cañada del Pinole. When their election shall have been made, the enquiry will still be open whether they have exercised their right conformably to the rules and principles by which the right of election, in such cases, is governed.

Case No. 16,157.

UNITED STATES v. RICHARDSON.

[See Case No. 16,156.]

Case No. 16,158.

UNITED STATES v. RICKETTS.

[1 Cranch, C. C. 164.] [1]

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

ASSAULT—ACCOMPLICE.

If a man be present, and encourage an assault and battery, he is a principal.

Assault and battery upon Robert Abercrombie, a constable [by Benjamin Ricketts].

Mr. Mason, for the United States, moved the court to instruct the jury, that if the defendant was present and aiding, abetting, or encouraging the assault and battery, he was a principal.

Mr. Jones, for defendant, contended that it was necessary he should have been present, and aiding, and abetting, and encouraging.

THE COURT (nem. con.) gave the instruction. 1 Hawk. P. C. 58; 2 Hawk. P. C. 438; 2 McNally, Ev. 524.

Case No. 16,159.

UNITED STATES v. RICKETTS.

[2 Cranch, C. C. 553.] [1]

Circuit Court, District of Columbia. April Term, 1825.

ADMINISTRATORS—DEVASTAVIT—SURETY ON COLLECTOR'S BOND—JUDGMENT.

1. If the administrator of the surety in a collector's bond pay away the assets of his intestate in payment of the intestate's debts, before notice of the claim of the United States, such payment is not a devastavit.

2. The United States, in an action upon a collector's bond, cannot obtain judgment against the surety for more than the penalty of the bond.

Debt upon the official bond of C. Simms, late collector for the port of Alexandria, in the penalty of $10,000, and in which bond the defendant's intestate, J. T. Ricketts, was a surety. The defendant had paid away the assets of the estate of his intestate, J. T. Ricketts, in the payment of his debts, before notice of the claim of the United States for the balance due by the collector to them, amounting to $17,000.

Mr. Hewitt, for defendant, contended that the payment of the debts of the intestate, by his administrator, the defendant, was not a devastavit, and cited the case of U. S. v. Fisher, 2 Cranch [6 U. S.] 390, where Chief Justice Marshall, in a note, gives his own opinion that such a payment, without notice, is not a devastavit.

The question being submitted, this court was unanimously of the same opinion, and also that in this action the judgment could not exceed the penalty of the bond.

Mr. Swann, U. S. Dist. Atty.

Hewitt, Mason & Taylor, for defendant.

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

Case No. 16,160.

UNITED STATES v. RICO et al.

[Hoff. Dec. 48.]

District Court, N. D. California. Jan. 25. 1862.

MEXICAN LAND GRANT—CONFIRMATION OF CLAIM—CONCLUSIVENESS.

[In a proceeding to correct a survey under the act of 1860, the district court has no jurisdiction to review and reverse the final decree, whereby the genuineness and validity of the claim was established.]

[Claim of Francisco Rico and J. A. Castro to the Rancho del Rio Estanislao, comprising eleven leagues of land in Stanislaus county. On objections to the survey.]

HOFFMAN, District Judge. The claim in this case was confirmed by the board, and that decision was affirmed in this court, though not without much doubt as to the genuineness of the title papers. Case No. 16,161. An appeal was taken to the supreme court, which was subsequently ordered to be dismissed by the attorney general. The usual stipulation was thereupon made by the district attorney, and an order entered vacating the order granting an appeal, and allowing the claimants to proceed under the decree of this court as under final decree. A survey of the land confirmed has accordingly been made, and it was returned into court on the application of the United States, pursuant to the provisions of the act of 1860. On the return of the survey objections to it were filed, and the parties permitted to take proofs.

The only objection presented on the part of the United States is, that the grant is false and fraudulent, and the signature of the governor and seals upon the papers forgeries. Proofs in support of this allegation have been taken, and the question is now presented, whether these proofs are admissible, and whether the court has jurisdiction, at this stage of the cause, to reopen it for further proofs, and to review and reverse the decree heretofore rendered.

It may be observed that the proofs offered are of a nature to leave no doubt as to the fraudulent character of the claim, and if the court has jurisdiction to receive them, and decree accordingly, the claim must certainly be rejected. It must also be mentioned that the present parties in interest are innocent, bona fide purchasers, who paid a large consideration in money after the dismissal of the appeal and the filing of the consent of the district attorney that the claimants might proceed under the decree of this court, as under final decree.

The point is thus presented in the strongest form in which it could arise. On the one side, an unquestionably fraudulent claim confirmed by a decree of this court, which has become final by express stipulation and consent; and on the other side, the rights of innocent third parties, who have acquired their interests and parted with their money relying on the supposed final adjudication of the court. Prior to the

decision of the supreme court in the case of U. S. v. Fossatt [21 How. (62 U. S.) 445], it had been supposed, both by the bench and the bar, that the jurisdiction of this court was limited to deciding on the validity of claims, together with such questions, as to extent and boundary, as might be incidentally presented; but that the location and survey were to be determined by the surveyor general, under the instructions of the proper executive department of the government. In the case referred to, it was decided by the supreme court that this court has the power to direct a survey to be made, and to review and correct the surveys of the surveyor general, made in pursuance of its decree; and the court declares that "the jurisdiction of the district court over the cause does not terminate until the issuance of a patent conformably to its decree." U. S. v. Fossatt, 21 How. [62 U. S.] 450.

It is contended that the supreme court have, by this declaration, in effect affirmed the jurisdiction of the district court over the whole cause until the patent is issued, and that it has power at any time prior thereto to re-open it for proofs on a proper showing, and to review and reverse the decree it may have previously entered. But such I do not consider to be the true construction of the language of the supreme court.

1. The doctrine enunciated by the supreme court, though it embraced in general terms all cases, must have more especially referred to the case before them. If, then, the construction of their language contended for be wholly inadmissible with respect to the case under consideration, it follows that it would be equally inadmissible with reference to other cases. The claim of Fossatt had already been finally passed upon by the supreme court. By its decree, delivered at a previous term, it had been adjudged to be valid to the extent of one league, to be taken at the election of the grantee or his assigns, within the southern, eastern, and western boundaries mentioned in the grant, and this court was directed to declare those boundaries. The boundaries within which the league was to be taken were accordingly declared by this court, but no survey was made and approved, nor was the precise location of the league fixed by its decree. On appeal, the supreme court held that the decree of this court declaring the three external boundaries of the tract within which the league was to be taken was not a final decree, but that the league be surveyed and located by the surveyor general, under the direction of the court. In answer to the objection that this court had no means of ascertaining the specific boundaries of the confirmed claim, and no power to enforce the execution of its decree, the supreme court observed, in effect, that the court had power to enforce the execution of its decree by the surveyor general, and added that its jurisdiction over the cause did not terminate until the issuance of a patent conformably to its decree.

It will be perceived that the principle thus laid down referred exclusively to the jurisdiction of the court to enforce a decree admitted to be final; and it merely affirmed its right to take such further proceedings to secure the due execution of its decree as might be necessary. But it could not have been intended to declare that in that case this court would have had the authority to reopen the cause and to take further proofs as to the validity of the grant, or the extent of the granted land, and to reverse the solemn adjudication of the supreme court by which those questions had been finally determined. If then, the language of the supreme court cannot be interpreted, as is claimed, with reference to the case before it, neither can it be so interpreted with reference to other cases.

It is urged that the fact that this court has jurisdiction, after decree and survey, to correct the latter, proves that the whole cause remains sub judice until patent issued, that the decree is therefore not a final decree, but that it may be vacated or modified, on a proper showing such as would authorize the granting of a re-hearing, or have to file a bill of review, and that the purchasers from the confirmee are bound by the rules applicable to all purchasers pendente lite. It has already been shown that the supreme court could not, in the passage referred to, have intended to declare that its own adjudication could be reversed by this court, and that therefore the power over the cause, which was held not to terminate until the issuance of the patent, must be taken to mean not the power over the whole cause, including every question of validity and authenticity already determined by that court or the supreme court, but power to enforce the execution of the decree, and to control and modify the action of the surveyor general under it.

That the decree of this court, affirming the validity and extent of the claim, is a final decree, is evident from the fact that every appeal which has yet been taken to the supreme court, and passed upon without objection, has been from such a decree. It is therefore too late to say that those decrees were not final at least in the sense of being appealable. Again, the surveyor is, by law, authorized to survey claims which have been "finally confirmed." Unless, then, the decree confirming the claim be a final decree or confirmation, no survey can regularly be made, and yet until a location be made, and the lines run, the court is without the means of making any other decree than the general decree of confirmation. It is plain, therefore, that this decree is regarded by the law as the final decree of confirmation under which the survey is to be made, and this is evidently the view of the supreme court, as explained in the case of Hendricks' v. Castro, 23 How. [64 U. S.] 442. In that case it is stated that "though in the Case of Fossatt it was held that if questions of

a judicial nature arose in the settlement of the location and boundaries of grants the district court was empowered to settle those questions upon a proper case, submitted to it before the issue of a patent, yet that it was not expected that the surveyor would make returns to the district court in every instance, nor was it implied that the validity of a survey depended on the recognition of that court or its incorporation into a decree of the court."

From these observations it is clear that the interposition of this court may be invoked in a proper case to arrest a location by the surveyor general in its final decree, yet its interposition is not in every case necessary; that the survey is valid if not objected to, and the decree of the court remains not only its final decree, in a technical sense, but its last act in connection with the clause. Again, the proceeding by which this survey has been brought into court has been taken under the provisions of the act of 1860, by which the power of this court to correct surveys as declared by the supreme court to exist, was regulated and defined. By the provision of this act only those surveys made by the surveyor, under the provisions of the thirteenth section of the act of 1851, can be ordered to be returned, and these surveys must be, as has been already remarked, of lands finally confirmed. The fourth section provides that on the return of the survey evidence may be taken as to any matters necessary to show the true and proper location of the claim; and the court is authorized to approve the survey, or to correct and modify it, and the surveyor to cause a new survey to be made in obedience to the direction of the court. It is clear that this act in no manner authorizes or contemplates the introduction of evidence as to any matters except those necessary to show the true location of the claim which has been confirmed, and the power of the court is limited to making a decision upon the correctness of the survey, and giving the proper instruction to the surveyor. All testimony, therefore, relating to the validity and authenticity of the claim, is, in a proceeding under the act of 1860, clearly inadmissible. If, then, the meaning of the supreme court in the passage cited from its opinion in U. S. v. Fossatt were doubtful, the subsequent definition and regulation by statute of the power of the court as to surveys made after final decree must be taken as a restriction of its jurisdiction to the matters specified in the statute, and as a legislative definition of the extent and nature, and mode of exercise, of its power after final decree. But the meaning of the supreme court, as explained by Hendricks and Castro, cannot, I think, be mistaken, and it merely affirms the jurisdiction of this court to enforce the execution of the final decree of confirmation, for the exercise of which the subsequent statute prescribes more precise regulations. The proceedings under the act of 1860 are, therefore, closely analogous to a bill in equity, filed to enforce the execution of a decree. In such case it is clear that the original decree, though obtained by fraud, cannot be set aside, except by original bill, nor can the fraud be set up on the answer to the bill to enforce it. 16 Cal. 550, 551; Caldwell v. Giles, 1 Riley, Eq. 120 [2 Hill, Eq. 548]; 1 Bland, 120; 4 J. J. Marsh. 497; 1 Sandf. Ch. 103; Daniell, Ch. Prac. 1788; 2 Hill, Eq. 548.

It is conceded that this court has no jurisdiction to entertain a bill of review under the special powers conferred by the statute in this class of cases. But even if it had, and if this was an application for leave to file such a bill, it is not clear that it ought to be granted.

This claim was presented to the board in March, 1853. It was presented to a tribunal instituted for the sole object of ascertaining the validity of claims of the class to which it belonged. The genuineness of the title papers was, of course, the first question to be inquired into. After an investigation extending over a period of more than two years and a half, the board decided that the papers were genuine. The case was appealed to this court, and an opportunity afforded to the United States for further investigations and additional proofs. On the tenth day of November, 1856, more than three and a half years after the appeal, the claim was confirmed in this court, with evident reluctance, and doubt as to the authority of the title papers. It would not be easy to convey a clearer intimation that the case required further investigation than was contained in the opinion of this court. An appeal to the supreme court was taken. It remained pending, for on the 1st April, 1857, the district attorney, under instructions from the attorney general, withdrew the appeal, and formally consented, in writing, that the decree of this court should stand as the final decree of confirmation. It was after the abandonment of the appeal, and the filing of this consent, that the present owners effected their purchase. They are not denied to have been innocent purchasers for a large consideration in value.

The evidence of fraud and forgery which it is now sought to introduce is derived from the archives of the former government. These archives have, since the commencement of the suit, been in the possession of the United States. They would at any time, if carefully examined, have afforded incontrovertible proofs of the true character of this claim. The fact that the seal known as the "Limantour seal" is forged, was proved in court in November, 1857. It was probably discovered sometime previously. It was therefore known to the United States less than six months after the dismissal of the appeal,—nearly five years have elapsed since the decree became final by consent,—

and nearly four years since the spuriousness of the seals was detected.

Under all these circumstances, it may well be doubted whether a court, possessing full equity powers, would suffer a bill of review to be filed. The United States, as a suitor in court, is bound by the rules and principles which determine the rights of individuals. For more than three years and a half, during which this case was pending before the board and the district court, the United States have omitted to present testimony as to the principal points in issue, which a diligent search could have obtained. No new document has been discovered, nor any new evidence suddenly brought to light. A comparison has merely been made between the seals on papers, and those on others admitted to be genuine. Of both the United States was, from the beginning, the appointed custodian. Though apprised by the opinion of this court that the case was open to the gravest suspicions, the United States have, through their appointed agents, formally acknowledged the validity of the claim, and consented that the decree confirming it should be treated as final. Under these circumstances, I think it more than doubtful whether a bill of review could be permitted and a decree obtained, the effect of which would be to divest the title of those who have parted with their money on the faith of the formal acknowledgment of the government that the claim was valid, and the decree of confirmation not only final but just. 12 Johns. 521; 3 Ves. 448; 5 Johns. Ch. 550; Daniell, Ch. Prac. 1726; [Thomas v. Harvie] 10 Wheat. [23 U. S.] 146; Massie v. Graham [Case No. 9,263]; 1 Barb. Ch. 273.

But whatever be the true view to be taken of this question, it is enough to say that in a proceeding to correct a survey, under the act of 1860, this court has no jurisdiction to review and reverse the final decree whereby the genuineness and validity of the claim have been established; and this whether the final decree is that of the board or this court, which has become final by the dismissal of the appeal, or is the decree of the supreme court.

No other objection being made, the survey is approved.

Case No. 16,161.

UNITED STATES v. RICO et al.

[Hoff. Land Cas. 161.] [1]

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

MEXICAN LAND GRANT—CONFIRMATION.

This claim, though subject to suspicion as to the bona fides of the grant, must be confirmed on the testimony presented.

[Claim of Francisco Rico and J. A. Castro to the Rancho del Rio Estanislao, comprising eleven leagues of land in Stanislaus county; confirmed by the board of land commissioners, and appeal taken by the United States.]

William Blanding, U. S. Atty.
Jeremiah Clarke, for appellees.

HOFFMAN, District Judge. The claim in this case was confirmed by the board of commissioners. We have examined the testimony contained in the transcript, and, though there is room for doubt as to the genuineness of the grant, we have found nothing to justify us in reversing the decision on the ground that it is a forgery. It is true that a fatality not usual seems to have attended this grant, for not only do the signatures of Jimeno and Micheltorena present a somewhat suspicious appearance, but the expediente, which might have confirmed or dispelled doubts as to the authenticity of the grant, has been lost while in the custody of an officer to whom such documents were not ordinarily entrusted. But whatever doubts may be suggested by these and other circumstances, we are met by the positive testimony of witnesses who saw the grant executed, as they swear, and one of whom actually drew it up. The board who heard the witnesses testify, and who had other means of judging of their credibility than this court possesses, confirmed the claim; and the case has been submitted to this court without argument or observation of any kind on the part of the United States. No additional testimony has been taken since the decision of the commissioners, and we are left to confirm or reverse the decision of the board, with only such light as to the merits of the case as is afforded by a perusal of the transcript. To pronounce this grant a forgery, we should entertain something more than a suspicion as to its genuineness; and as the board, who saw the witnesses and examined the original grant, confirmed the claim, we do not feel authorized to reverse its decision. A decree of confirmation must therefore be entered.

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

Case No. 16,162.

UNITED STATES v. RIDDLE.

[4 Wash. C. C. 644.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1827.

SEAMEN—AUTHORITY OF MASTER—ASSAULT—EVIDENCE—LEAVING MATE IN FOREIGN PORT.

1. Indictment against the master of a ship for an assault with intent to kill, and for maliciously forcing the mate on shore at a foreign port, and leaving him there. To support the first count, an intention to kill is essential; it is not sufficient if it was merely to punish or to torture.

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

2. The second offence may be committed although no physical force was used; as if the mate left the ship under a well founded fear of his life had he remained on board.

The defendant was tried by the same jury upon two indictments. One was for an assault committed at sea by defendant, master of the ship, on his mate, with intent to kill. The other for maliciously, and without justifiable cause, forcing the mate of his ship on shore at Batavia, a foreign port; and leaving him there.

WASHINGTON, Circuit Justice (charging jury). That, upon the first indictment, the jury must be satisfied, not only that the assault was committed after the 3d of March, 1825, when the act of congress was passed; but that the intention with which the assault was made was to take the life of the person assaulted. If the jury should believe that it was made with intent merely to give pain, or to torture the person assaulted, however cruelly, the defendant cannot be found guilty; unless they are also satisfied that the intention was to kill, that being the offence stated in the indictment.

Upon the second indictment, the offence may be committed, although no actual, physical force was used in putting the mate on shore; as if he left the ship under a well grounded fear of danger to his life from the defendant if he continued on board to perform the return voyage. Mere general ill treatment by the defendant, committed on the mate, on the outward voyage, would not amount to that kind of moral force which would bring the case within the tenth section of the act of congress of March 3, 1825, c. 65 [4 Stat. 115].

The jury acquitted the defendant, on both indictments.

Case No. 16,163.

UNITED STATES v. RIGSBY.

[2 Cranch, C. C. 364.] [1]

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

LARCENY—INDICTMENT.

In larceny, "one silver coin of the value of fifty cents," is a sufficient description of the property stolen.

[Cited in Com. v. Gallagher, 82 Mass. (16 Gray) 240; Porter v. State, 26 Fla. 56, 7 South. 145.]

The defendant [Eliza Rigsby] was convinced of larceny.

Mr. Hewitt, for defendant, moved in arrest of judgment, that "one silver coin of the value of fifty cents of the goods and chattels of one John Kinchelow," is too vague and uncertain a description of the property stolen. It does not state the value in the current money of the United States, or of any other country.

THE COURT (THRUSTON, Circuit Judge, absent), after looking into precedents, overruled the motion.

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

Case No. 16,164.

UNITED STATES v. RILEY.

[5 Blatchf. 204.] [1]

Circuit Court, S. D. New York. Feb. 13, 1864.

CRIMINAL LAW—FORMER JEOPARDY—PROVINCE OF JURY — ARGUMENTS OF COUNSEL — CONSTITUTIONAL LAW—INTERNAL REVENUE LAWS.

1. Where a jury was empanelled and sworn, to try an indictment, before the defendant had been arraigned or had pleaded to the indictment, and that jury was dismissed, and, after the defendant had pleaded, a new jury was empanelled and sworn, by whom the indictment was tried, and the defendant was convicted: *Held*, that the defendant was not twice put in jeopardy by the proceeding.

[Cited in Disney v. Com., 5 S. W. 361.]

2. In the courts of the United States, the jury are not the judges of the law, in a criminal case.

[Cited in State v. Burpee, 65 Vt. 28, 25 Atl. 972.]

3. The case of U. S. v. Morris [Case No. 15,815], cited and approved.

4. On the trial of an indictment, it is proper for the court to require the question of the constitutionality of the act on which the indictment is founded, to be argued to the court, instead of to the jury.

[Cited in Sparf v. U. S., 156 U. S. 79, 15 Sup. Ct. 284.]

5. On the trial of an indictment for carrying on the business of a retail dealer in liquors, on a day named, without having taken out a license therefor, as required by the internal revenue law, evidence is competent, of the sale of a glass of liquor on the next subsequent day, from a store long occupied by the defendant, and in a bar room therein fitted up as a retail liquor shop.

6. An internal revenue law, which lays an uniform tax, and provides for its collection, in territory where forcible resistance to its collection shall take place, as soon as such resistance shall be put down, is not open to the objection that the tax laid is not uniform throughout the United States.

7. Congress has power to pass a law imposing a license duty on those who are engaged in a business which is a subject of police regulation by the states.

The defendant [James Riley] was indicted for a misdemeanor, in carrying on the business of a retail dealer in liquors, without having taken out a license therefor, as required by the act of July 1, 1862 (12 Stat. 432), commonly known as the "Internal Revenue Act," and by the amendments to that act made by the act of March 3, 1863 (Id. 713). The defendant was convicted, and now moved for a new trial.

E. Delafield Smith, U. S. Dist. Atty.

John McKeon, for defendant.

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

SHIPMAN, District Judge. I will notice the grounds urged on the motion for a new trial in this case, in the order in which they have been presented to the court.

The first is, that, after a jury had been empanelled and sworn, they were dismissed from the box and a new jury was empanelled and sworn, which tried the cause. It is insisted that the defendant was twice put in jeopardy, by this proceeding. The facts are these: The jury was empanelled and sworn, by inadvertence, before the prisoner had been arraigned, or had in any manner answered to the indictment. The prisoner was, in contemplation of law, coram non judice. The proceeding in empanelling the jury at that time was a mere nullity. The defendant could not have been required to proceed to trial. It was, therefore, not merely in the discretion, but it was the duty, of the court, to disregard the irregular proceeding, and, after the prisoner had been arraigned and had pleaded to the indictment, to direct the jury to be empanelled in the regular order. No injury was done to the defendant. The jury which tried him were drawn from the whole panel, including all those who had been irregularly sworn. The defendant had not been put in any jeopardy. No step had been taken in the proceedings, that affected him, or that could, in any manner, have resulted in touching his rights. No case has been cited which would warrant the claim set up by the defendant, that he has been put twice in jeopardy. Courts have some discretion in protecting the administration of justice, and they have gone much farther, in the exercise of that discretion, than the court went in this case. U. S. v. Morris [Case No. 15,815]. The motion on this ground cannot be sustained.

The second ground upon which a new trial is asked is, that the court refused to instruct the jury, that they, and not the court, were judges of the law, in criminal cases. This is no new question in the courts of the United States. Whatever may have been the views of some of the judges of those courts, in the early days of the republic, it is well understood, that the settled practice of those tribunals has, for many years, been in accordance with that followed on this trial. Nor does this view of the law rest, as the counsel for the defendant seems to suppose, on the single decision of Mr. Justice Story, in the case of U. S. v. Battiste [Id. 14,545], cited and criticized on the argument. The same question was considered at length, after full argument, by that eminent jurist, Mr. Justice Curtis, in the case of U. S. v. Morris [supra]. In a luminous and able opinion, he considers the state of the English law at the time of the adoption of the federal constitution, and conclusively shows, that, when that constitution was founded, it was the settled rule of the common law, that, in criminal cases, the court decided the law, and the jury the facts. He also shows, that the legislation of congress has proceeded on the idea that such was the law, for, the 6th section of the act of April 29, 1802 (2 Stat. 159), provides, that, in case of a division of opinion between the judges of the circuit court, on any question arising in a criminal case, such question may be certified to the supreme court, "and shall, by said court, be finally decided," and that "the decision of the supreme court, and their order in the premises, shall be remitted to the circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order." Mr. Justice Curtis well puts the question: "Now, can it be, after a question arising in a criminal trial has been certified to the supreme court, and there, in the language of this act, finally decided, and their order remitted here, and entered of record, that, when the trial comes on, the jury may rightfully revise and reverse this final decision?" I think but one answer can be given to this question, and, if it were an open one, I should have little hesitation in overruling the claim of the defendant in this case. But I regard it as already authoritatively settled, and I cannot conclude this brief reference to the law, in more impressive and fitly chosen words, than those with which the learned judge closes the opinion which I have already cited: "A strong appeal has been made to the court by one of the defendant's counsel, upon the ground that the exercise of this power by juries, is important to the preservation of the rights and liberties of the citizen. If I thought so, I should pause long before I denied its existence. But a good deal of reflection has convinced me, that the argument drawn from this quarter is really the other way. As long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them, when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times or the opinions of men. To enforce popular laws is easy. But, when an unpopular cause is a just cause, when a law, unpopular in some locality, is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne. I have entered thus at large into this important question, in the course of a jury trial, with unaffected reluctance. Having been directly and strongly appealed to,

and finding that no judge of any court of the United States had, in any published opinion, examined it upon such grounds that I could feel I had a right to repose on his decision without more, I knew not how to avoid the duty which was thus thrown upon me. My firm conviction is, that, under the constitution of the United States, juries, in criminal trials, have not the right to decide any questions of law; and, if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court."

The third error alleged is, that the court required the counsel to argue the question of the constitutionality of the law under which the defendant was indicted, to the court instead of the jury. It is difficult to see what error there could be in this. The main question, as to the branch of the court to which belonged the power of deciding the law of the case, had been determined, and it would seem that ordinary regularity and decorum would require that the argument on that question should be addressed to that branch of the court which was to decide it, instead of to the one which had no rightful power over it. The court certainly understood the counsel, when the question was raised on the trial, to acquiesce entirely in this view of the matter. But, in any aspect of the question, the court is of opinion, that the direction given, to argue the question of the constitutionality of the law to the court, was no more an error, than it would have been to direct the counsel to go to the jury on the facts. While the jury are the exclusive judges of the fact, the court is the exclusive judge of the law, and the orderly and decorous conduct of a trial would seem obviously to indicate, that the arguments of counsel upon each of these features of the case, should be severally addressed specially to that branch of the tribunal to which their decision appertains.

The fourth ground on which this motion rests is, that the court allowed a witness to give evidence of a specific sale of liquor by the defendant, at his place of business, after the day alleged in the indictment. The indictment was for carrying on the trade or business, &c. It was, in the nature of the case, a continuous transaction, and, although a day had to be alleged, the exact time is never material, in such a case, on the proof. The evidence of this witness went to the jury, with caution from the court, that the fact of the sale made on the day testified to by him, was not conclusive proof of the fact alleged in the indictment, but only tended to prove it. The day alleged was the 6th of June, and the witness stated, as I find from my minutes, that the transaction alluded to by him took place on or about the 7th. The fact went to the jury with the remark of the court, addressed to them, that the fact testified to was only to be regarded by them, so far as it tended to prove the business carried on by the defendant at the place in question, on or before the 6th of June. The fact that the defendant sold the witness a glass of liquor on the 7th, from a store long occupied by him, and in a bar room in that store, fitted up with all the paraphernalia of a regular retail liquor shop, certainly tended to prove that the same business was carried on there the day before.

The fifth and last ground on which a new trial is asked, is the allegation that the act requiring the license to be taken is repugnant to that clause of the constitution of the United States which provides, that "all duties, imports, and excises shall be uniform throughout the United States." The court is referred to the 37th section of the act, which recognizes the well known fact, that the execution of the law might be resisted, and even temporarily prevented, within the limits of some states or other territory of the United States, and provides for the collection of the tax as soon as the de facto authority of the government should be re-established therein. But this recognition of this possible and probable state of things by congress, furnishes no valid objection to the law itself. The law is uniform, and thereby conforms to the constitution. Its validity does not depend on the celerity or uniformity with which it can be executed in some disturbed districts of the country. Tax laws, both state and national, are required to be uniform. This is an elementary principle of legislation, resting upon the solid foundation of justice. But it is a novel doctrine that a law, uniform in its provisions, can be annulled by the refusal of a portion of those on whom it is designed to operate, to comply with its provisions. If this notion were to prevail, civil commotion, or foreign invasion, within a small district of the country, would paralyze the government, and repeal the fundamental law upon which its existence depends. The very resistance of this defendant thus far to the law, shows that its execution has not been uniform; but it would not be soberly argued that this fact has the remotest effect upon the validity of the act itself. The recognition of the fact by congress, in the act itself, that its execution might be forcibly delayed in some parts of the country, by combinations of individuals, until they should be put down by arms, can no more affect its binding force, than could the recognition of the fact that its execution might be delayed by this defendant, or any number situated like him, until its enforcement upon him or them should be effected through the power and according to the forms of a judicial tribunal.

Some suggestions were made, on the argument, as to the power of congress to pass a law imposing a license duty on those who are engaged in a business which is a sub-

ject of police regulation by the states. These questions have been disposed of by Mr. Justice Nelson, and, therefore, require no discussion in this place.

I have given the questions raised in this case as full an examination as the brief time since the argument yesterday would allow, and am entirely satisfied that the motion should be overruled on all the grounds.

Case No. 16,165.

UNITED STATES v. RINDSKOPF et al.

[6 Biss. 259; 1 N. Y. Wkly. Dig. 223; 21 Int. Rev. Rec. 326; 8 Chi. Leg. News, 9.] [1]

District Court, W. D. Wisconsin. Dec., 1874.

INTERNAL REVENUE LAWS — CONSPIRACY — OVERT ACTS—VENUE OF TRIAL.

1. Conspiracy, under the revenue act of March 2, 1867 [14 Stat. 471], is a combination between two or more persons to effect the purpose declared by the act to be illegal. The agreement may be expressed or implied, and the gist of the offense is the illegal conspiracy, the particular manner in which it was done, or to be done, not being material.

[Cited in U. S. v. Dennee, Case No. 14,948.]

2. It is not essential that any but the leading conspirator know the exact part which another was to perform.

3. If two are shown to have conspired, the acquittal of others jointly indicted does not prevent the conviction of such two.

4. The fact that the overt acts charged and proven were severally criminal, is no answer to an indictment for conspiracy, and an overt act, in itself criminal, may be proven, to show the existence of the conspiracy charged.

[Cited in U. S. v. Bayer, Case No. 14,547.]

5. Many cases cited and commented upon.

6. The defendants may be tried in any district where the overt acts were committed.

The defendants [Samuel Rindskopf and others] were indicted for conspiracy under section 30, Act March 2, 1867. It was alleged in the indictment that Alexander L. Rogers was the owner of a distillery at Middleton, and for the purpose and with intent to defraud the United States out of the tax upon the spirits manufactured thereat, conspired with Samuel Rindskopf, liquor dealer, of Milwaukee, Albert Mueller, his distiller, and James W. Bull, store-keeper at said distillery, to aid and assist him in carrying out such purpose; and that they did, in pursuance thereof, manufacture, dispose of, and defraud the government out of the tax upon large quantities of spirits manufactured thereat, and setting forth the various and illegal means and devices used for that purpose.

Before the trial commenced a nolle prosequi was entered as against the defendant Alexander L. Rogers. On the trial against the other defendants, he was called as a witness, and testified that he went into the business for the purpose and with the intent to manufacture illicit spirits; that after he had commenced, he went to Milwaukee and saw Rindskopf, and there told him, in substance, that he was engaged in manufacturing illicit spirits, and that he could get them from the still or government warehouse to his rectifying house without paying taxes, but he did not know how to get them from there upon the market, and asked Rindskopf to assist him, and that Rindskopf then told him he would go in with him and take the wines, and pay him Chicago prices, less twenty-two cents, which he was to retain as his share of the speculation or risk; that Rindskopf told him how to proceed to get them to his house, to wit, that he (Rogers) should put them in new barrels at the rectifying establishment, and get the gauger here to gauge them as whisky, and put on whisky stamps and ship them to his firm as such; and that they would receive them at the depot, and pay for them at the prices named. And he further stated that, under that agreement, he sent to them highwines under such false labels, from time to time, and that they were received and paid for upon the terms of that agreement; stating the mode and amount of two of the payments. Rogers stated that after that he continued to manufacture illicit spirits, and that Mueller was the distiller and did the work, or superintended it, and that Bull, the store-keeper, had full knowledge of it, and received from him $100 per month for neglecting his official duty, and permitting him to use what material he wished, and to take the spirits from the warehouse without payment of the tax. He further stated that, after some trouble with the revenue officers in February, he was ordered to send them two-stamp goods, and, if not detected, he would not enter them on the books.

Henry Lacher, another witness, testified that he had charge of the rectifying house under Rogers first, and afterwards under Rogers & Bunker, and that spirits were often received at the rectifier and dumped, upon which the government tax had not been paid, and described the means adopted to accomplish that purpose, particularly, and that such spirits or highwines were afterwards placed in other barrels and marked whiskies, kimmel or bitters, and stamped by the gauger either as whisky at 66 or 68 proof, or as bitters, no proof, and that they were shipped by rail to Rindskopf Bros., Milwaukee; that they were entered on their book at the rectifier according to the gauger's mark, and Rindskopf Bros. were charged with them at the market rates for such goods. This, he said, continued up to about the 11th of February, when he changed and shipped them as highwines with two stamps, but that they were, with a few exceptions, got out of the warehouse and placed in stamped barrels and no tax paid thereon. He further said that he received statements of sale and account and that they were paid for as highwines at the rate stated by Mr. Rogers, to wit: Chicago prices and

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 223, contains only a partial report.]

twenty-two cents off; that those statements and letters accompanying were returned to Mr. Rindskopf at his request after seizure. Other testimony was given sustaining and corroborating these general facts.

J. C. Kenney, for the United States.

H. S. Orton, Geo. B. Smith, P. L. Spooner, Gregory & Pinney, G. W. Goodwin, and H. M. Lewis, for defendants.

HOPKINS, District Judge (charging jury). The defendants were indicted under section 30 of the act of March 2, 1867 (United States revenue laws), for a conspiracy. This section reads as follows: "If two or more persons conspire, either to commit any offense against the laws of the United States or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not exceeding two years." 14 Stat. 484. The act declares what illegal purposes constitute a conspiracy. But in construing it, it becomes necessary to ascertain what is meant in this act by conspiracy. It may be defined as an agreement or combination between two or more persons to effect the purpose declared by the act to be illegal,—to do one of the things prohibited in the act. The indictment here in substance charges the conspiracy to be to defraud the United States out of the tax upon certain spirits to be distilled at the distillery of Alexander L. Rogers, in Middleton.

In the first count the charge of an agreement to manufacture illicit spirits at that place is expressly alleged. In other parts it is also alleged that the agreement was to do so by breaking seals and stamps placed upon certain tubs, and to use them unlawfully for the purpose of manufacturing illicit spirits. I have ruled during the trial that the gist of the offense was the illegal conspiracy to manufacture, and that the particular manner in which it was done, or to be done, was not the material question in the case; that the question to be determined under this count was whether there was a conspiracy between the parties to manufacture and remove spirits so manufactured without the payment of the lawful tax, to defraud the United States. Now the question is, did the parties, or any two of them, enter into a scheme to illegally manufacture spirits, with intent to defraud the government out of the tax by law imposed thereon. If they did, it constituted a conspiracy within the meaning of the act above mentioned, and on that question it is immaterial whether a seal or stamp was broken or not.

In order to charge the parties as conspirators, I do not think it necessary to prove an express agreement between all the parties to do the illegal act. It would be enough if you should find that all of them had the same illegal purpose in view and each acted a certain part to accomplish or tending to accomplish it. But you must be satisfied that each had the same common design and acted to carry such design into effect. In other words, if you should find that Rogers' purpose was to unlawfully manufacture spirits and remove the same from his distillery, and place them upon the market without paying the tax thereon, and that as a part of such corrupt purpose, he induced the storekeeper, Bull, to abstain from doing his official duties, so that he could obtain the material contrary to law, to use for such purpose, and employed Mueller, his distiller, to secretly manufacture the same into spirits, and, to assist him in his unlawful purpose aforesaid, employed Lacher to receive and conceal such spirits in the rectifying establishment of said Rogers, and by an agreement with the defendant Rindskopf, and at his suggestion, Lacher and the government gauger were employed to place said spirits into other barrels and gauge them as whisky and other articles of less proof, and then ship them under such false and fraudulent stamps to the defendant, or to the house of which the defendant was a partner, and that said defendant personally knew of their receipt under such false labels and stamps, and concealed or aided in concealing such facts, to defraud the government, and for the purpose of enabling the said Rogers to defraud the government, out of the legal tax thereon and share the proceeds with him,—you might be at liberty to infer from these facts that the parties acting for the common purpose were all guilty of conspiracy. It would not, in such a case, be necessary to show that the parties had any previous acquaintance, or, with the exception of Rogers, knew of the exact part the other was to perform. In such a case, each might be considered a co-conspirator with Rogers, and being so, would be responsible for his acts in carrying out the illegal purposes. And if you should find such acts to have been done in the carrying out of such illegal purpose, and that the illegal purpose was common to all, you would be authorized to find that the conspiracy was established as to all. If they knew the intention of Rogers, in procuring them to do such acts, to be to defraud the government, and that their acts respectively aided and assisted him to carry into effect such illegal purpose, and that they did the several acts to them assigned, on purpose to enable Rogers to successfully carry out his illegal designs, it would be a conspiracy as to all of such parties, if their overt acts are satisfactorily proven.

In determining the question of conspiracy, Rogers may be reckoned as one, so that if either of the others conspired with him to do

the acts alleged in the indictment, although you might find that the other defendants did not conspire with them, you might find that one guilty under this indictment, provided the overt act to effect it is satisfactorily proven.

The defendants were all found guilty by the jury.

On Motion for New Trial and in Arrest of Judgment.

HOPKINS, District Judge. The defendants having been convicted by the jury of the conspiracy charged against them, now move the court for a new trial and in arrest of judgment, and have, in the argument in support of the motion, mainly relied upon the following points: (1) That the court erred in its charge as to what constituted a conspiracy; (2) that as the overt acts set out and proven were severally criminal, and the parties committing them were liable to a specific punishment, after such acts had been performed the parties could not be held liable for a conspiracy to do them; and (3) that the verdict is against evidence.

The first two are those mainly relied upon. As to the first, after listening to the able and ingenious argument of the learned counsel, and after a careful and critical re-examination of my charge on the question, I am thoroughly satisfied that I correctly instructed the jury on that point. The instruction and charge on that question is supported and warranted by the following authorities: Rex v. Cope, 1 Strange, 144; People v. Mather, 4 Wend. 260 et seq; Rex v. Parsons, 1 W. Bl. 392; Gardner v. Preston, 2 Day, 205; U. S. v. Cole [Case No. 14,832]; Com. v. Warren, 6 Mass. 74; Reg. v. Murphy, 8 Car. & P. 297; 3 Greenl. Ev. § 93; 2 Bish. Cr. Law, § 187.

The law upon the second point I find too well settled and uniform against the defendants to be at this time questioned. The fact that each of the overt acts constitutes an offense is no answer to this indictment for conspiracy. Upon a charge of conspiracy, an overt act, which is itself criminal, may be proven, to show the existence of the conspiracy charged. Conspiracies, from their very nature, are usually entered into in secret, and are consequently difficult to be established by direct evidence. It has been, therefore, universally held that they may be inferred from circumstances. The common design is the essence of the charge, and may be shown by circumstances and the acts performed by the different alleged conspirators; and the fact that the several acts constitute separate criminal offenses, does not exonerate the parties from the crime of conspiracy, or bar a prosecution therefor. This is sustained by an almost unbroken chain of authorities, both in this country and England.

In Reg. v. Boulton, 12 Cox, Cr. Cas. 87, in court of queen's bench, before Chief Justice Cockburn, in 1871, although the course of receiving proof of the commission of the substantial crime is not regarded as satisfactory, yet it is decided that such a course is legal, and in that case, it being a charge of conspiracy to commit a felonious crime, proof of the commission of the crime itself was allowed. The chief justice cited and relied upon the authority of the late Lord Cranworth in Reg. v. Rowlands, 5 Cox, Cr. Cas. 497, note. In that case the parties had been indicted, not for the offense they had committed, but for a conspiracy to commit it, and the judge, after stating that it would have been more satisfactory if the parties had been indicted for what they had done and not for conspiracy to do it, stated "that the course pursued was no doubt legal, and, being legal," he said, "I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be much more satisfactory to my mind if parties had been indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is proof of the conspiracy. It never is satisfactory, although undoubtedly it is legal." I have quoted this language as expressive of my first view of the question when raised during the trial, and I can say now as I said then, that the better way, in my judgment, would have been to have indicted all parties here for the particular offense committed by each, but under the law it seems I have not the right to say they must be so prosecuted. The course pursued in this matter by the government attorney, in the language of those cases, is "undoubtedly legal," and I can, therefore, only consider the case as it is presented on this indictment.

These cases, if followed, dispose of the second question so strenuously pressed by defendants' counsel. The case of Com. v. Kingsbury, 5 Mass. 106, laying down a contrary doctrine, does not seem to have been followed in that state, for the same judge (Parsons), in Com. v. Warren, 6 Mass. 74, refused to arrest a judgment on a charge of conspiracy, where the overt act was a felony, and was completed and the avails of the crime divided; and in Com. v. Davis, 9 Mass. 415, it is held that acts in execution of the conspiracy may be shown, in aggravation. In the case in U. S. v. Boyden [Case No. 14,632], being an indictment under the same act and section as this, this question was raised and examined upon principle and authority, and Judge Lowell, before whom it was tried, arrived at the conclusion that though the act concerning which the conspiracy was formed was completed, and there was a specific penalty for doing that act, still the government could elect under which to proceed. This doctrine is also supported by People v. Mather, 4 Wend. 259; Collins v. Com., 3 Serg. & R. 220. The dictum in the opinion of Senator Spencer, in Lambert v. People, 7 Cow. 103, I do not think entitled to much weight, as the case

there did not turn on any such question. Indeed, it is impossible to tell what principle was settled in that case in the court of errors. [The senators seemed to have embarked on an uncertain sea of generalities, and to have spent their energies in magniloquent declamation, better suited to the forum than the bench. The plain, simple sentences in the opinion of Chief Justice Savage in same case, on page 166 of same volume, are far more satisfactory, reasonable, and convincing. The law on this question is too well established to be now overturned.] [2]

On the other point, that the verdict is not supported by the evidence, I need only say that if the jury believed the testimony of Rogers and Lacher, the charge was most clearly made out. Assuming their testimony to be true, the fact of an unlawful conspiracy to defraud the government out of the tax upon spirits to be manufactured at Rogers' distillery, as charged, is established beyond all controversy. The section of the act declaring the conspiracy expressly provides that the parties may be tried in any district where the conspiracy is committed, or an overt act is done in furtherance of the illegal purpose. The overt acts were performed in this district, and the case is properly triable here.

[During the trial several questions were raised of a technical character, as to the particular means by which illicit manufacture was effected. I then overruled them as not tenable, and as too critical, and since that time my attention has been called to section 8 of the amended practice act of 1872 (17 Stat. 198); and, if I had any doubts upon the questions before, that section has removed them. The objections have not, however, been renewed in this motion, and I presume the counsel are satisfied that they are made unavailing by the section of the act above referred to, even if they were good before its passage.] [2]

The motion for a new trial and in arrest of judgment is overruled.

Case No. 16,166.

UNITED STATES v. RINDSKOPF et al.

[8 Biss. 507; 8 Reporter, 426; 11 Chi. Leg. News, 376.] [1]

Circuit Court, E. D. Wisconsin. April 23, 1879.

ASSESSMENT AGAINST DISTILLER—BURDEN OF PROOF.

1. The validity of an assessment against a distiller may be inquired into by defendants answering a bill by the United States to subject to the payment of such assessment, lands transferred to them.

2. When the defendants have rebutted the presumption of law as to the validity of the assessment the burden of proof is shifted upon the government to establish its validity.

G. W. Hazleton, for the United States.

Murphey & Goodwin, for defendants.

Before DRUMMOND, Circuit Judge, and DYER, District Judge.

DRUMMOND, Circuit Judge. This is a bill founded on an assessment which was made against [Lewis] Rindskopf by the United States for taxes which were due by him as a distiller, and for not making a true return of the spirits manufactured from December 1, 1874, to July 1, 1875. It is a claim for an indebtedness due from him for a violation of the internal revenue laws, and because, as the bill alleges, he had incumbered his property fraudulently, and there was real estate belonging to him which could be taken for the debt due upon the assessment, if the incumbrances upon it were removed.

The bill is filed under a special statute of the United States which authorizes a bill to be filed for the purpose of enforcing any lien which may exist against the property of a distiller, or rectifier, and which declares that the parties in interest shall be made defendants to the bill, and that the case shall be heard by the court, and decided conformably to the equities. Rev. St. § 3207.

The question for the court to determine is, whether this bill under the facts, is maintainable; and we think that it is not. I will state very briefly why we have reached that conclusion.

We concede that the assessment made is prima facie a valid assessment, and must be regarded as binding when made by the officers, as required under the law of the United States; but while this is so, we hold that it is not conclusive against all parties, and that it is competent for those who may not be directly affected by the assessment (as in this case where it is sought to make the assessment binding against property in which other parties claim to have an interest), to contest its validity. We admit that it is necessary for them to show that the assessment is invalid, and the inquiry is, whether on the facts of the case they have done so. We think that they have. The evidence shows the capacity of the distillery. It also shows the amount of returns that were actually made by Rindskopf to the proper officers, and that upon the returns thus made the taxes were paid. The capacity of the distillery is ascertained under the laws of the United States, and they require that there should be a tax assessed against the party running the distillery to an amount equal to 80 per cent. of its capacity.

It appears that, taking the capacity of the distillery during the six months under consideration, it was 188,630 $^{61}/_{100}$ gallons. Upon this capacity returns were made to the amount of 83½ per cent., on which the tax was paid.

---

[2] [From 21 Int. Rev. Rec. 326.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 426, contains only a partial report.]

It is claimed there were a little over 62,000 gallons produced which were not returned. Including what was returned with what is assessed, it is much greater than the capacity of the distillery during the time covered by the assessment. It is said that it was possible for the distillery to produce this amount; that the capacity as fixed by the statute does not show the actual compass of the distillery; that more spirits can be produced than the capacity, taking the data prescribed by the statute, would return; but we think this is the position of this part of the case: that while the assessment is prima facie evidence of its validity, the defendants have presumptively shown by evidence that the assessment is invalid; and taking the facts altogether tending to indicate the returns as made, in connection with the capacity, if they do not show true returns, it was incumbent on the plaintiff to prove that they were not true returns. In other words, the defendants having rebutted the presumption that the law makes in relation to the validity of the tax, the burden of proof is shifted from the defendants to the plaintiff, and they must show that this assessment is a valid assessment. Now, how is that proposed to be done? In no other way than by some admissions made, it is claimed, by Rindskopf, in which he said he was running "crooked whiskey" at the rate of one hundred barrels a week. We think that is a very improbable statement, considering the capacity of the distillery, and what he actually returned, and that we cannot, upon that ground, hold that the proof has been made out which it is incumbent on the plaintiff to establish, that the assessment was a valid assessment, as against the evidence produced on the part of the defendants, especially when we consider the evidence from the employés of Rindskopf, all of whom state that they had no knowledge of "crooked whiskey" being run at that time. And this is stated by the storekeepers, as well as the employés of Rindskopf. Rindskopf himself contradicts all these admissions which he is said to have made; and while there may be suspicion, we cannot decree against the interests of persons on mere suspicion, without competent evidence to prove the fact which it is alleged actually existed.

Now, taking all these things together, we think the testimony of the United States has not satisfactorily met the proof which has been offered by the defendants that this was an invalid assessment.

We have looked into the question of the validity of the mortgage made to Wirtheimer, and the sale, but the view we have taken of the case renders it unnecessary to give an opinion on the validity of the mortgage and of the sale.

We hold, as the case stands, that it is wanting in an indispensable requisite, namely, satisfactory evidence to show that the assessment was a valid assessment. Therefore, we shall dismiss the bill.

Case No. 16,167.

UNITED STATES v. RINGGOLD.

[5 Cranch, C. C. 378.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

GAMING—INDICTMENT.

1. An indictment for keeping "a faro-bank" is bad, unless it aver the faro-bank to be a common gaming-table.

[Distinguished in Marcus v. United States, Case No. 9,062a. Cited in Stettinius v. United States, Id. 13,387.]

2. An indictment for keeping "a certain public gaming-table called 'faro-bank,'" is bad.

3. An indictment for keeping "a gaming-table," is bad.

[Cited in People v. Spousler, 1 Dak. 289, 46 N. W. 460.]

There were three indictments against the defendant [Benjamin Ringgold].

The first (No. 140) had only one count, which charged that the defendant "did keep a faro-bank," against the form of the statute, &c.

The second (No. 141) had two counts. The first charged that the defendant "did keep a certain public gaming-table called faro-bank." The second count charged that the defendant "did keep a faro-bank."

The third indictment (No. 142) also had two counts. The first charged that the defendant "did keep a gaming-table." The second charged that the defendant "did keep a faro-bank." All these counts concluded, against the form of the statute.

By the first section of the penitentiary act for the district of Columbia of 2d March, 1831 [4 Stat. 448], it is enacted, among other things, "that every person who shall be convicted" "of keeping a faro-bank, or other common gaming-table," "shall be sentenced to suffer punishment, by imprisonment and labor, for the time and times hereinafter prescribed, in the penitentiary act for the District of Columbia." And by the twelfth section, it is, among other things, enacted, "that every person duly convicted" "of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor, for a period not less than one year, nor more than five years."

Mr. Dandridge, for defendant, moved to quash these indictments, because neither of them averred that the defendant kept a common gaming-table; and he contended that it was not sufficient to charge the defendant with keeping a faro-bank, without averring that a faro-bank was a common gaming-table. Every faro-bank is not a common gaming-table; and, unless it be, it is not indictable.

THE COURT (THRUSTON, Circuit Judge, absent), took time to consider.

See the following cases, in this court, name-

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

ly: U. S. v. Smith [Case No. 16,328], at November term, 1835; U. S. v. Cooly [Id. 14,859], at March term, 1836, for keeping "a certain gaming-table called a 'faro-bank'"; U. S. v. McCormick [Id. 15,661], at the same term, for keeping "a certain public gaming-table called a 'faro-bank'"; and U. S. v. Smith [Id. 16,330], at the same term, who was indicted for taking insufficient bail on an indictment against one Miller, for keeping "a certain gaming-table called a 'faro-bank'"; and Craven's Case, Russ. & R. 14.

In Cooly's Case, the court (nem. con.) upon the authority of Craven's Case, quashed the indictment, "being of opinion that the indictment must charge the offence to be the keeping either of a common gaming-table, or the keeping of a faro-bank; not merely a gaming-table called a 'faro-bank.'" In that case Thruston, J., suggested that the best way of charging the offence would be to charge it as the keeping of a faro-bank, the same being a common gaming-table. In McCormick's Case, the court (Morsell, J., absent,) on the authority of Cooly's Case, quashed the indictment. In Smith's Case, the court (Morsell, J., absent,) held, that the indictment against Miller, which was for keeping "a certain gaming-table called a 'faro-bank,'" did not describe an indictable offence. On the last day of the term, the court being full, but Mr. Key, the district attorney, absent on account of the illness of one of his family, and after the court had given notice that it was about to close the session, Mr. Dandridge and Mr. Bradley argued the case again. They said that Mr. Key admitted that a faro-bank might be innocently kept, and that it is not punishable unless it be a common gaming-table; and, upon that admission, THRUSTON, Circuit Judge, argued that the term "faro-bank" was too uncertain in itself to support an indictment.

CRANCH, Chief Judge, said: I think the first count of the indictment No. 141, which charges that the defendant kept "a certain public gaming-table called 'faro-bank,'" is bad, upon the authority of Cooly's and McCormick's Cases. And that the first count of the indictment No. 142, which charges that he kept "a gaming-table," is also bad, because it is not charged to be a common gaming-table. I think the counts, charging that he kept a faro-bank, are good, because the words "a faro-bank or other common gaming-table," necessarily imply that a faro-bank is a common gaming-table; so that it would be tautology to say a "common faro-bank." Nor do I think it necessary to aver that a faro-bank is a common gaming-table, because the keeping of a faro-bank is, per se, made an offence. If it should be averred to be a common faro-bank, the defendant might, perhaps, deny that it was common; and prove that guards were placed at the door to prevent the approach of the officers of justice, and all others who might inform against them; which class might include a large proportion of the community. To prevent such cavilling, the word "common" might have been, by the legislature, designedly omitted before the term "faro-bank," from abundant caution. I am of opinion that the counts which charge the keeping of a faro-bank, are good under the statute; and that the other counts are bad, and should be quashed.

MORSELL, Circuit Judge, not being prepared to give an opinion, the court took time to advise until the next term.

At March term, 1838 THE COURT (CRANCH, Chief Judge, absent,) quashed these indictments, because, as it is understood, neither count charged the defendant with keeping a common faro-bank, nor a common gaming-table.

THRUSTON, Circuit Judge, was prevented by severe indisposition from attending at this term, except a few days.

UNITED STATES v. The RISING DAWN.
See Case No. 11,857.

Case No. 16,168.

UNITED STATES v. RITCHIE.

[4 Chi. Leg. News, 139; 15 Int. Rev. Rec. 43; 16 Am. Law Rev. 575.] [1]

District Court, D. Maryland. Jan. 13, 1872.

SALARY OF STATE'S ATTORNEY—LIABILITY TO INCOME TAX.

[1. One's compensation as state's attorney is not liable to the income tax.]

[2. The compensation of a state officer cannot be applied to the satisfaction of the $1,000 exemption from the income tax.]

In 1869 Mr. [John] Ritchie was state's attorney for Frederick county, and in assessing the internal revenue tax upon his income for that year, the assessor included as taxable the money received as compensation for his services as state's attorney. Mr. Ritchie took the ground that his compensation received as an officer of the state was exempt from the income tax, and declined to pay the portion of the tax assessed upon that part of his income. The $1,000 exemption, under the law then in force, was deducted from the aggregate amount returned. The government claimed that the salary in question was not exempt from the income tax; and, secondly, that if it were, then the United States could apply $1,000 of it to the exemption clause.

Mr. Stirling, U. S. Dist. Atty.
Albert Ritchie, for defendant.

GILES, District Judge, decided that under the case relied on by the defendant (The Collector v. Day, 11 Wall. [78 U. S.] 113) his

[1] [16 Am. Law Rev. 575, contains only a partial report.]

compensation as state's attorney was not liable to the income tax, that the office of state's attorney was established by the constitution of the state, and was one of the means and instrumentalities for carrying on the state government, with respect to which the powers of the state are independent of the general government, and that the United States has no more right to tax these agencies than the state government has to tax the means and agencies of carrying on the federal government.

Judge GILES also held that the United States could not apply the compensation of a state officer to the satisfaction of the exemption alone, because that would, indirectly, make his income from such source liable to the taxation from which it is exempt; that to exhaust the exemption clause by taking the amount out of his official income, would be to make it, in effect, subject to the revenue law, and to deny to a state's officer the advantage of the state's exemption, and that therefore the official income of defendant was not to be taken into consideration in the assessment of the tax. For these reasons Judge GILES held that defendant was entitled to judgment.

Case No. 16,169.

UNITED STATES v. RITTER et ux.

[3 Cranch, C. C. 61.] [1]

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

ADMINISTRATION BONDS—NECESSARIES FURNISHED.

In an action upon the administration-bond, to recover a distributive share of the estate, the administrator may retain for necessaries furnished to the distributee.

Debt on the administration-bond; breach, in not paying Ann Moxley's distributive share of the estate of John Lyon, deceased. The defendants [Peter Ritter and wife] claimed to retain for her board and education.

Mr. Swann, for plaintiffs, contended that if the defendants had been guardians they would not have been allowed more than the income of the estate unless previously authorized so to do by the orphans' court. As administrators, they had no right to make advances on account of the distributive share. The guardian was the proper person to provide for the support and education of the distributee. See the Maryland testamentary law of 1798 (chapter 101, § 12).

Mr. Key, contra, said it was not a set-off; it was payment in advance of the distributive share; and the administrator may in his discretion make such advances, either to the guardian, or to the distributee, and may retain therefor. Dale v. Sollet, 4 Burrows, 2133.

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

THE COURT said, that as this was a suit against the defendants, as administrators, and not as guardians, the law of Maryland, limiting the expenses of guardians to the income of the estate, did not apply; and that the defendants might retain for necessaries furnished to the distributee, according to her estate, condition, and circumstances.

Verdict for the defendants.

Case No. 16,170.

UNITED STATES v. ROBBINS.

[11 Int. Rev. Rec. 157.]

District Court, S. D. Ohio. May, 1870.

ATTORNEYS — COURTESY IN ARGUMENT — ATTACKS ON WITNESSES—VIOLATION OF INTERNAL REVENUE LAWS.

[1. It is disrespectful alike to jury and court for counsel to assume that utterly untrue imputations, wholesale abuse of witnesses unconnected with any criticism of their testimony, and attacks upon absent persons unknown to the trial, can by any possibility aid the cause of the defendant.]

[2. The court comments upon the difficulties attending trials for violation of the internal revenue laws, and the demoralizing effects flowing from the evasions of law by reputable business firms and their employés.]

[This was an indictment against John J. Robbins, for violation of the internal revenue laws for the purpose of evading payment of taxes.]

The court first recapitulated the testimony that had been given in reference to the charge of selling tobacco without proper stamps to Sprague, Warner & Co., of Chicago; to Randall, of Grand Rapids; and to Beidelbeck & Miller, of Davenport. As to the sales to Robert Sprague, James F. Rothschilds, and the White Brothers, the court considered the testimony so direct and simple that they would take no pains to recapitulate it.

First, as to the charge of selling to Sprague, Warner & Co. The testimony for the government showed that this firm ordered five cases of tobacco, containing five caddies, each branded "Admiration," from the defendant, and that in the usual course of trade, and in response to their order, they received the tobacco of that description. Subsequently, they received a letter from the defendant, which has been placed in evidence, asking pay for the tobacco. What the jury had to decide was whether it was reasonable to believe from the dray tickets, the bill of sale made out by defendant's clerk, the way-bills, the receiving books, and the testimony of Sprague, Warner & Co., that the defendant did send these goods in compliance with that order. If they thought the defendant did sell these goods, and that the proper stamps were not affixed, it would be their duty to find the defendant guilty on the third count.

Next, as to the tobacco, two cases of plug-tobacco pieces, sold to Randall at Grand Rapids. The testimony seemed to show that up-

on application from Sprague, Warner & Co., the defendant, by his agent, Charles J. Robbins, caused the bill of sale to be made out in the fictitious name of E. B. Ward, dated it at Danville instead of Cincinnati, and sent it accompanying the tobacco to Sprague, Warner & Co., of Chicago; that defendant subsequently wrote a letter claimed by the government to refer to these goods. in reference to the price to be paid for them; that they were subsequently sold to Randall, and found with counterfeit stamps attached in his possession by the government. If the jury found that the goods were traced from the defendant to Sprague, Warner & Co., from them to Randall, and then to the authorities in Cincinnati, and that they were sold by the defendant without the proper stamps affixed, they would find him guilty under the first count.

In relation to the Davenport transaction and the shipment of two cases of tobacco with counterfeit stamps to Beidelbeck & Miller, the court said: "One caddy of this lot had a very different treatment. Its history is most extraordinary, and important in this case. On the 8th of August, by order of the commissioner of internal revenue at Washington, this caddy was sent by the United States Express Company to General Young, supervisor of internal revenue, at Cincinnati. It arrived here on August 10. In the meantime, the defendant had learned of the seizure, and had instructed his agent, Saunders, to go to Davenport and secure if possible the destruction of the counterfeit stamps. After Saunders had started and before he reached the depot, the defendant learned that his factory had also been seized here, and he therefore detained Saunders a few days for consultation. The defendant shortly afterward learned from Collector Weitzel, in some mode, that the caddy had been ordered from Davenport to Cincinnati. And I wish that Collector Weitzel, and all other collectors who have business to do for the government of the United States, would understand that it is not their duty to make communications of any kind; no matter how severely they may be criticised, no matter how much they may lose the reputation of being clever fellows, they should not communicate in any way with persons charged with crime against the government. If they have not stability enough to be silent when approached by interested parties, they should resign their positions, and give place to others more competent to take care of the interests of the government. The details of this case show the effect of such communication." The court completed the history of the successful attempt to change the stamp on this caddy and the unsuccessful efforts of Robbins's agent to obtain possession of the balance of the caddies at Davenport, and instructed the jury, in case they found the defendant had sold the tobacco to Beidelbeck & Miller, to return a verdict of guilty on the fifth count.

In reference to the sale to White Brothers, the defendant having admitted the fact that the goods, with second-hand stamps attached, were sold as charged, it would be the duty of the jury to return a verdict of guilty on the sixth count.

Wm. Bateman, U. S. Dist. Atty., and B. Storer, Jr., Asst. U. S. Dist. Atty., assisted by counsellors, for the United States.

Hollister & Butterworth, for defendant.

EMMONS, Circuit Judge, concluded his charge to the jury as follows: In ordinary cases I should have submitted this cause to you without other comments. But after some consultation, I conclude to say a word or two about some of the incidents of this trial. The character of the discussions degenerated in a few instances into gross accusations and the imputation of bad motives on the part of the officers of the government, such as I suppose, as a general rule, ought not to be tolerated in any case. The uniform courtesy during the trial of the learned counsel for the defendant, made me reluctant to interrupt what, although in my own estimation distasteful and sometimes very extravagant, I thought without a violation of duty I might suffer to proceed. What was said, too, was so interwoven with an apparent good nature and pleasantry, that, as each excess occurred, they came and went before I felt it a duty to interfere. But I desire most emphatically to announce that it must not be cited as a precedent for what in future trials, as a judge, I shall deem it right to suffer. It degrades a public trial. Neither jury, counsel, nor court feel that self-respect, nor can they maintain that condition of mind, necessary for the performance of their duties, if, by the compulsions of the law or the tolerations of the bench, they are forced to listen, in circumstances which assume it is a legitimate part of a public trial, to an angry contest where the decorum and the proprieties of our homes, or an ordinary business intercourse, are utterly wanting. It is disrespectful alike to jury and court for counsel on either side to assume that utterly unproved imputations, that wholesale abuse of witnesses sworn, unconnected with any criticism of their testimony, and attacks upon absent persons who are unknown to the trial, can by any possibility aid a defendant, be he guilty or innocent. It supposes the court so constituted in both its branches as to be incapable of distinguishing between what alone it is sworn to consider on the one hand, and the passionate denunciations of counsel on the other. Although sufficiently intimated already, I take pains to repeat that, although I deem the argument of the learned counsel for the defendant a clear violation of the rule I intend to enforce, still it is not so far from precedent in this and other courts as to authorize any severity of rebuke; on the contrary, the general courtesy of the counsel during the trial so won upon the court, that it had much to do with what it suffered during the argument. There is, however, one por-

tion of it I wish particularly to notice. Counsel in his zeal expressed the belief that in the universal activity of the government assistants to oppress his client, they had actually poisoned the mind of the court, and quite clearly intimated that it was too prejudiced to sit in the trial of the cause. This, I suppose, I ought not to have permitted, and hope I may never again have cause to consider what, in such a contingency, a judge, mindful of the usefulness and power of the court, ought to do. I have concluded, however, instead of rebuking it directly here, to answer it in a mode I am certain will be more effective with the counsel and his client, and as influential as any other to teach new practitioners how in error they are when, in their zeal, they mistake an inflexible administration of the law for partiality and prejudice. To what I say, gentlemen, I ask your attention, as it has a practical application to your duties. You have before you as witnesses, men who are accomplices of the guilty participators in the offence for which the defendant is tried. This goes substantially to their credibility, and, so far as your verdict must rest upon their testimony, is worthy your consideration. Thinking it not impossible that, among the various prosecutions for offences under this law, I might be called upon to enforce its penalties; perceiving that each offence, no matter how many, even twenty in the same indictment, compelled me to inflict a prescribed punishment for each, I felt oppressed by the consequences which might, in certain instances, result. I, therefore, conferred with other able and experienced judges for some mode of mitigating the punishment. I called special attention to the peculiar condition of opinion in regard to offences against the government; that, for some unappreciable reason, although they were in fact among the most injurious and widely corrupting crimes, the fact was still beyond dispute that otherwise reputable men, those who would not steal their neighbor's goods or forge their names, would defraud the government by false invoices, smuggling, and false stamps. I brought forward the extraordinary facts of this case as they are claimed to exist by the government, the procuration of the counterfeit stamps, the employment of so many young men who had been taught to violate the law, and so take the first steps in crime, and found that while I could not look upon the defendant as an abandoned criminal, the public would demand in such a case what I might, in view of these circumstances, think should not be inflicted. I wished it even possible to omit the imposition of a punishment like that due to the hardened criminal who, abandoning all ordinary business, lives a continuous life of lawlessness and crime. It was thought we discovered a mode which in some degree would authorize the court, without a violation of duty, to temper the administration of this same statute to the exigencies of particular cases. I assure this counsel that it was because I entertained feelings wholly at war with, nay, on the other extreme, of those he so erroneously imputed, that I so anxiously sought an interpretation of the law which would authorize a kindly and mild judgment, should an exigency occur in which I should be called on to pronounce it. And although I may have ever so full convictions in this case, either way, resulting from a careful following of the proof, from the fact that I cannot leave behind my intelligence when I ascend the bench, and the necessity of accepting here as elsewhere conclusions which are necessary and inevitable, it is simply unenlightened to impute this necessary consequence to prejudice or hostility, any more than the same conditions should be imputed because, in view of the same facts, you, gentlemen, in the end pronounce the defendant guilty. So far forth as the judge can concede, without transparent affectation, he should do so, but while the jury are informed fully that the facts are for them, I have but little fear of doing injustice by a frank, unprejudiced rehearsal of them as they are proved, whether they defeat or sustain the prosecution or the defence. This I shall always deem it my duty to do. Whether a mild administration of this law can arrest the wrong is uncertain. I may, by and by, quite change my opinions in this regard. That it must in some way be arrested, is most certain. Its injurious consequences will not only damage every department of business in which they are perpetrated, and cruelly disappoint the just expeciations of the upright and fair dealer, but by their effects in familiarizing with crime, work conseqences the most fatal in society. Every father who has a son must feel the danger of such influential and high-positioned tempters to crime. We may save, by good example and high teaching, our boys from the low haunts of vice and crime, but we are compelled to trust them to the leading and more important walks of business life. If they who control these stoop to the cowardly crimes of forgery and counterfeiting, and a degraded and discreditable public insists upon their decency and partial respectability, there is no safety anywhere for inexperience. The first lessons of dishonor and crime will be learned in the first teachings of the storehouse and the counting-room. Look over the vast ramifications of our revenue. See how it pervades all departments of trade, and reflect how innumerable are the occasions and how demoralizing must be the effects if leading, wealthy, influential citizens teach the whole body of their employees that perjury and fraud is justifiable, so long as its object is to avoid a public tax. And when I doubtfully suggest that this anomalous condition of public opinion may in the outset somewhat temper the severity of judgment, I must not be understood as insinuating that I do not most thoroughly believe that the commission of these crimes by prosperous men of wealth and position, with all the corrupting incidents which so generally attend them, are

infinitely more injurious and pervading in their consequences than the comparatively trivial evil of a secret midnight burglary, committed by a few degraded, obscure, and uninfluential thieves. And as in this case I have, so in all others I probably shall, yield to an anxiety that there shall be no escape, if, in fact, a defendant has committed a crime which, in its example and influence for evil, is exceeded by no offence of which this or any other tribunal has cognizance.

The jury found defendant guilty on the first, third, fourth, fifth, and sixth counts.

[See Case No. 16,171.]

Case No. 16,171.

UNITED STATES v. ROBBINS.

[15 Int. Rev. Rec. 155; 6 Am. Law Rev. 765.] [1]

Circuit Court, S. D. Ohio. May 15, 1872.

CRIMINAL LAW—JURISDICTION OF FEDERAL COURTS—FINE AND IMPRISONMENT.

[1. The word "fine," as defined by Coke, Littleton, Blackstone, and Chitty, includes imprisonment, unless the money is paid.]

[2. By the practice at common law, if defendant were absent at the time of conviction, and the offence were finable only, the proper judgment was "quod capiatur"; but if he were present, and did not pay the fine, the judgment was that he stand committed to jail until the fine be paid.]

[3. In cases of statutory crimes punishable by fine or by fine and imprisonment, the federal courts have an inherent power, derived from the common law, to sentence the person convicted to confinement in jail until the fine is paid.]

[Cited in Fischer v. Hayes, 6 Fed. 73.]

[This was an application by John T. Robbins for a writ of habeas corpus.]

In June, 1870, the defendant was convicted of sundry violations of the internal revenue law, viz., the 71st section of the act of July 20, 1868 [15 Stat. 156]; and sentenced to a year's imprisonment, and to pay a fine of $2,000 and costs, and stand committed until the fine and costs were paid. [Case No. 16,170.] After the expiration of the year's imprisonment, the defendant being still detained in the Hamilton county jail as the fine and costs were not paid, the writ of habeas corpus is sued out of the circuit court on the ground that that part of the sentence which ordered the prisoner to stand committed until the fine and costs were paid, was void in law, and consequently that the detention was illegal.

W. M. Bateman, U. S. Atty., and Henry Hooper, Asst. U. S. Atty.

Durbin Ward and Butterworth & Vogeler, for petitioner.

Before EMMONS, Circuit Judge, and SWING, District Judge.

EMMONS, Circuit Judge, gave an oral opinion, promising the bar at a future time to render a written and detailed decision. The following is a summary of the point decided: That the word "fine," as defined by Coke, Littleton, Blackstone, and Chitty, includes imprisonment unless the money be paid; for, as stated by the former, "to a fine imprisonment regularly appertaineth." That the practice at common law is as stated by Chitty; if the defendant be absent at the time of conviction, and the offense is finable only the proper judgment is "quod capiatur"; but if the defendant be present and does not pay the fine, that he stand committed to jail until the fine be paid. Ex parte Watkins, 7 Pet. [32 U. S.] 574, distinctly recognises and affirms this doctrine. Kane v. People, 8 Wend. 206; Reg. v. Dunn, 12 Adol. & E. 1241, 12 Wend. 344.

The counsel for defendant urge that although the common law authorized the imposition of imprisonment until the fine was paid, this does not, at least in the states, apply to statutory offences; and that so far as Ohio is concerned, the supreme court of the state, in 11 Ohio Reports, has decided that the common law mode of procedure does not exist here. We find no such distinction as that urged by the learned counsel for the petitioner, which would confine the power of commitment to common law offences. On the contrary, nine-tenths of all the instances of its exercise are those of convictions under statutes. There is a long and unquestioned exercise of this right, both in England and this country. The cases in the Ohio Reports cited above, so far from denying the common law power concede it expressly, and only say, that in Ohio when the offence is statutory, they hold that the sentence should be confined to the letter of the law, and that the common law power is impliedly taken away or revoked. Of course it is readily granted that there is no common law jurisdiction of crimes in this court; which is a very different question than looking to the common law for the mode of proceeding in criminal cases. The power to commit a person convicted of a statutory offence—where the statute imposes a fine—to jail until the fine be paid, is, we think, an inherent power in the court derived from the common law.

The petition is accordingly refused.

[1] [6 Am. Law Rev. 765, contains only a partial report.]

Case No. 16,172.

UNITED STATES v. ROBERTS.

[See In re Crittenden, Case No. 3,393.]

Case No. 16,173.

UNITED STATES v. ROBERTS et al.

[2 N. Y. Leg. Obs. 99.]

Circuit Court, S. D. New York. May, 1843.

ADMIRALTY JURISDICTION—CRIMES COMMITTED IN FOREIGN HARBORS—PIRACY—REVOLT—AUTHORITY OF MATE.

1. Where prisoners were indicted for an endeavor to make a revolt on board of the Ameri-

can packet ship Burgundy, lying at the port of Havre in France, in an enclosed dock into which the tide was let at the will of the owner: *Held*, that the circuit court of the United States had jurisdiction of the offence. *Held*, also, that the admiralty jurisdiction, under the act of congress passed March 3d, 1835, was co-extensive with the English admiralty courts in cases when robbery or offences were committed in creeks, harbors and ports in foreign countries, which robbery was done by American citizens, and amounted to piracy.

2. Under the act of 1825 [4 Stat. 115], passed by the American congress, the United States courts had jurisdiction over their own citizens in foreign countries for offences committed on tide waters.

3. The mates of a vessel in the absence of the master had the command of such ship or vessel, and they could direct the whole of the crew to go below from the deck of the vessel to their berths in the night time.

4. Where one of the crew came on deck apparently to see what the cause of a disturbance was that was then going on, when ordered peremptorily to go below and neglected to do so, he was guilty of disobedience of orders and might be punished under the act of congress for disobedience of orders and an endeavor to make a revolt.

Endeavor to make a revolt and mutiny.

A. Nash, for prisoners.

The District Attorney, for the United States.

BETTS, District Judge (sitting as circuit judge). The prisoners in this case were indicted under the act of congress passed March 3, 1835, § 2 [4 Stat. 775], for an endeavor to make a revolt and mutiny on board of the American packet ship Burgundy, on the high seas, where the tide ebbs and flows within the admiralty and maritime jurisdiction of the United States. The vessel was a packet ship sailing from New York to the port of Havre in France. Captain John Rockett was master. The prisoners on their arraignment pleaded not guilty and moved for separate trials, whereupon John Roberts and William Bilson were put upon their trials under one panel of the jury, and Samuel Nicholson was tried under a separate panel, but at the same term of the court. The cause against Roberts and Bilson came on for trial, and the mate of the vessel was first introduced as a witness. He testified that the vessel arrived at the port of Havre, and appeared at the quay, where the harbor master took charge of the vessel under the municipal authorities of Havre, and the vessel was then taken to her station inside of the flood gates. It appeared that the docks at Havre had been artificially constructed by the municipal authorities of the town. That the earth had been first excavated to the proper depth, and then walls had been put up on each side of the excavations, and flood gates erected so that on a flood tide the dock became full, while on an ebb tide, the flood gates prevented the water running out, and the vessels in this manner rode in the water without touching the bottom. The Burgundy lay at a station within the dock, and inside of the flood gates, and discharged her cargo on to the quay, where were stationed several persons night and day, known in France as gens d'armes, who were employed by the French government for police services. Having discharged her cargo, she took in another cargo for the homeward voyage, and having taken in the cargo the vessel was ready to pass out of the dock through the flood gates the next morning at the flood tide. In the afternoon, a box of gold coin, containing between 5 and 6000 dollars, was brought on board as a part of the cargo for the homeward voyage, and was stowed under the lock and key of the first mate, in a stateroom adjacent to where he slept, which appeared to be a cabin under deck. This cabin communicated with the deck of the vessel by a gangway, and a house stood over the gangway which was locked at nights. It did not appear that the crew generally knew that the specie had been brought on board; indeed there was no proof on the trial that any one of the crew belonging to the vessel was cognizant of the fact that specie had been brought on board of the vessel. The mate also testified that that night the captain of the Burgundy slept on shore, and that in the night, after he had retired to his cabin, with the specie locked up in an adjacent stateroom, he heard a noise at the door of the house at the head of the companion way. That some person was trying to burst in. He sprang out of his berth, ran up to the door, and the man outside was kicking in the panels. He unlocked the door, went out, and met at the door the two prisoners and another person who had formerly belonged to the ship, but had left the vessel at Havre. The night was pretty dark. He spoke to the prisoners and ordered them into the forecastle. They did not obey his orders, and upon this state of things he sang out for the 2d and 3d mates. It appeared by this time that most of the crew had rallied on deck. He ordered them all below. They appeared to be noisy and somewhat riotous. He then clenched the men and began with his fists to clear the deck. Being a stout man, one after another was knocked down, and a general melee took place. Finally, he himself, assisted by the 2d mate, succeeded in capturing three or more of the crew, placing them on the quarter deck and tying them. The mate and his comrade then told the crew that no man should come aft upon peril of life, and ordered the crew to go to the berths at the forecastle. They neglected and refused to do so, and he and the 2d mate then took hold of some scantling strips which they found and cleared the decks. The person who was kicking at the door ran on to the quay and escaped into the town, and never was again seen by the witness. This evidence of the mate was confirmed by the 2d mate, and indeed some of the crew who were examined,

confirmed the account of breaking in the door, or attempting to do so, but stated that when they heard the noise they came on deck for the purpose of ascertaining what the difficulty was. It did not appear that all of the men were dressed who came on deck, though the prisoners were dressed if the mate testified correctly, when the attempt to break open the door was frustrated by his coming on deck amongst the assailants. Nothing distinct appeared that the two prisoners Roberts and Bilson had attempted or participated in any attempt to break open the door leading to the stateroom, where the specie was stowed. The cause was summed up to the jury, who rendered a verdict of guilty against the two prisoners Roberts and Bilson; and then the other prisoner, Samuel Nicholson, was put on trial under the indictment by another panel of jurors. The testimony in this cause was the same as in the preceding case, except Nicholson proved that he came on deck when he heard the noise at the house door. He was in his night clothes when he came on deck, without coat, vest, pantaloons or hat, and he proved that he went aft to interfere with the mates only to see what was doing, and to protect the men the mates were beating and tying on the quarter deck. The mate testified that the prisoner came aft contrary to his orders, and after he had repeatedly ordered the crew into their berths in the forecastle. The mate appeared to have acted throughout with a heroic courage, and proved himself to be physically competent, when assisted by the 2d mate, to control the whole of the crew of the vessel. The various points growing out of this trial were reserved by the prisoners' counsel with liberty to make a case and move in arrest of judgment. The counsel summed up respectively to the jury, and they retired and brought in a verdict of guilty against Nicholson, the prisoner.

The counsel for the prisoners made a case, and moved in arrest of judgment, and the

1st point was, that this court had no jurisdiction of the offence charged against the prisoners; that it was a case not within the admiralty jurisdiction of the United States, and cited U. S. v. Wiltzburgher, 5 Wheat. [18 U. S.] 76; U. S. v. McGill [Case No. 15,676], and urged that the jurisdiction of the circuit court of the United States depends exclusively on the constitution and laws of the United States and is territorial, and that this court had no jurisdiction over the present case, the offence having been committed within the enclosed dock at Havre, in the kingdom of France, while the vessel was fastened on shore to the quay. The learned counsel also cited Livingston v. Jefferson [Id. 8,411], in regard to the question of local jurisdiction, and again cited U. S. v. Hamilton [Id. 15,290], where the prisoner was indicted for a larceny committed on board of an American ship, in an enclosed dock at the port of Havre in France, into which dock the water was admitted at the will of the owners only. The court held in this case that the prisoner could not be convicted. He also stated that in the case of De Lovio v. Boit [Id. 3,776], the court had not claimed jurisdiction so extensive as that claimed in the present case, and stated that the rule appeared to be that offences against the sovereignty must be committed within its territorial jurisdiction, and likened the case to one where two persons go from England into France and fight there, and one kills the other, it is not murder in England by the common law (3 Just. p. 48); but in the present case, the court ought not to assume jurdisdiction, as all parties had voluntarily gone beyond the jurisdiction of the United States.

2d point. The counsel for the prisoner urged that Nicholson had been wrongfully convicted; that he was not an aider or abettor, or accessary in regard to any offence that the other prisoners had committed, nor had he been guilty of any offence under the laws of the United States; that the question of jurisdiction arose in his case equally with that of the other two prisoners, and likened the case to one where several persons were in company together, and engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commit an offence, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention. Rosc. Cr. Ev. p. 167. So where soldiers were employed to arrest a man, and unlawfully broke into a house where they supposed he was concealed, but it turned out otherwise, and then some of the soldiers went to stealing. It was held that the theft was a chance opportunity of stealing after the door was broken open, whereupon some of the soldiers committed a larceny, and others though present did not, and they were held not guilty as aiders and abettors. Id.

To the first point the district attorney joined issue on the question of jurisdiction, and contended that this was a case clearly within the jurisdiction of the United States courts in admiralty, and urged that the offence had clearly been brought within the act of congress of 1825 (section 5).

To the second point, he urged that the prisoner Nicholson had disobeyed the lawful orders of the mate, who was the commanding officer on board, and for such disobedience he ought to be punished, and having been found guilty by the verdict of the jury, he should be sentenced under the indictment.

BETTS, District Judge, at a subsequent day, delivered the opinion of the court, and stated that under the crimes act of 1790 [1 Stat. 112] maritime offences, triable and punishable by the courts of the United States, were mostly limited to those committed on the high seas, and out of the jurisdiction of any particular state; that the act of 1825 en-

larged the jurisdiction of the courts in this respect, so that offences committed on board vessels belonging to citizens of the United States while lying in any port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of such vessels, should be cognizable and punishable by the proper circuit court of the United States, in the same way and manner, and under the same circumstances, as if committed on board of such vessels on the high seas, and without the jurisdiction of such sovereign or state, provided that if the offender shall be tried for the offence, and acquitted or convicted thereof in any competent court of a foreign state, he shall not be subject to another trial in a court of the United States. The prisoners were indicted under the act of congress passed March 3, 1835 (section 2), which declares that if the offence charged against them in this case, and upon which they have been convicted, shall be committed on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, that the prisoner shall be punished by a fine not exceeding $1,500, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence; that the admiralty jurisdiction of the United States, properly so speaking, extended to all places where the tide ebbs and flows. It has been determined in some of the ancient admiralty criminal decisions, that if persons, who were British subjects, and belonged to British vessels, committed acts of piracy in any bays, harbors, creeks and ports while out of the realm of England, they might be indicted in the English admiralty court, and punished for such offences. This law, laid down by the ancient English authorities, does not appear to have been overruled. A modern case, in effect, adopts and confirms it. "If the robbery be committed in creeks, harbors, ports, &c., in foreign countries, the court of admiralty indisputably has jurisdiction of it, and such offense is consequently piracy." Rex v. Gillott (Feb. 28, 1812; MS. case). The same acceptation of the meaning of "admiralty and maritime jurisdiction" would naturally apply to the terms when used in the constitution or laws of the United States. Without the aid of English authority, there would seem to be no reasonable ground to doubt the rightful power and competency of the government of the United States to punish its own citizens for offences committed on board American vessels on tidewaters in any part of the world. Congress, in the act of 1825, intended to exercise that power in respect to the classes of offences there specified. The vessel, in the present case, lay in an enclosed dock in the port of Havre, where she rode at full tide. The tide ebbed and flowed there. This fact is found by the verdict. It was a part of the sea. It does not appear that the prisoners have been tried, convicted or acquitted of this offence in the French tribunals. They belonged to the American vessel, composed a part of its crew, and had been found guilty of the offence charged against them; and they are accordingly subject to punishment under the act of congress. To the second point, Nicholson might not have originally entered into the offence with the other prisoners, or been guilty of disobedience of orders; and it was left to the jury to determine whether he in any manner afterwards countenanced or participated in the riot on board and disobeyed the orders of the mates, given for the maintenance of order and subordination. The jury have found him guilty, and the court is not called upon by this case, if it has the power to review the verdict upon the facts.

The question reserved for the decision of the court is whether the act of congress applies to this offence, and if it does, whether congress had power to pass such act. Upon both these points the opinion of the court was that judgment must be rendered on the verdict against the prisoners. The indictment charges no robbery or attempt to commit one, and is limited to the riotous conduct and disobedience of orders of the prisoners, and their endeavor to make a revolt.

The court affirmed the verdict, and sentenced the prisoners each to pay a fine of $50. and be imprisoned one year.

Case No. 16,174.

UNITED STATES v. ROBERTSON.

[5 Cranch, C. C. 38.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

LARCENY—FALSE PRETENCES.

It is not larceny in A to receive goods under a false pretence that the owner had sent him for them, although A appropriated them to his own use.

The defendant [John Robertson] went to B, who had sold a parcel of cigars to C, and pretended that C had sent for a box of them; upon which B delivered a box to the defendant, who sold it, and gave a false account of the manner in which he had obtained it.

THE COURT (nem. con.) was of opinion that it was not larceny. See Chit. Cr. Law, 907; 2 Russ. Crimes, 118; and Rosc. Cr. Ev. 493.

Case No. 16,175.

UNITED STATES v. ROBINS.

[Whart. St. Tr. 392; 7 Am. Law J. 18; Bee, 266.]

District Court, D. South Carolina. 1799.

EXTRADITION OF FUGITIVES — CONSTITUTIONALITY OF BRITISH TREATY—MURDER ON WAR VESSEL ON HIGH SEAS—JURISDICTION OF COURT.

[1. The 27th article of the treaty of 1794 (8 Stat. 116), between the United States and

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

Great Britain, which provides for the reciprocal extradition of fugitives charged with the crimes of murder and forgery, is not in contravention of the constitution of the United States, as violating the right of trial by jury; and it applies to citizens of the United States who have committed those crimes within the jurisdiction of Great Britain, and have afterwards come hither, as well as to foreigners.]

[Cited in Re Sheagle, Case No. 12,734; Re Metzger, Id. 9,511.]

[2. A murder committed on board a British vessel of war on the high seas is committed within the jurisdiction of Great Britain, within the meaning of the treaty; and, if the murderer is found in this country, we are bound to deliver him up.]

[3. In the absence of any provision in the laws or the treaty in respect to which department of the government shall execute the provisions relating to extradition, recurrence must be had to the general powers vested in the judiciary by law, and by the constitution, which, in the 3d article, declares by express words that the judicial power shall extend to treaties.]

The question before the court was grounded on a habeas corpus, to bring up Jonathan Robbins, who was commited to jail in February, 1799, on suspicion of having been concerned in a mutiny on board the British frigate Hermione, in 1791; which ended in the murder of the principal officers, and carrying the frigate into a Spanish port; and on a motion by counsel, on behalf of the consul of his Britannic majesty, that the prisoner should be delivered up (to be sent to Jamaica for trial), in virtue of the 27th article of the treaty between the United States and Great Britain, which article runs thus: "Art. 27. It is further agreed that his majesty and the United States, on mutual requisitions, by them respectively or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other: provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive." The commitment of the prisoner, and the consequent demand made of him by the consul of his Britannic majesty here, were grounded on the two following affidavits:

"South Carolina District: William Portlock, a native of Portsmouth, in the state of Virginia, upwards of eighteen years old, appeared before me, and being duly sworn and examined, saith that he went out before the mast in the schooner Tanner's Delight, which was commanded by Captain White, who arrived here about three weeks ago; that a person who answered to the name of Nathan Robbins, came also in the said vessel before the mast, with him; that he, the said Robbins, is a tall man, middle size, had long black hair, dark complexion, with a scar on one of his lips; that on or about last Christmas night he was present, and heard the said Robbins talking, in the harbour of the city of St. Domingo, to some French privateersmen who were on board the Tanner's Delight, when and where he informed them, in his hearing, that he, the said Robbins, was boatswain's mate of his Britannic majesty's frigate Hermione, when she was carried into the port of Cavillia, and added that they had no occasion to take any notice of that. And after the above time, sometimes when he was drunk, he, the said Robbins, would mention the name of the Hermione, and say, bad luck to her, and clench his fist.

his
"William X Portlock.
mark

"Sworn before me this 20th February, 1799, Thomas Hall, J. P. Q. U."

"United States of America, South Carolina District, ss.: Personally appeared before me Lieutenant John Forbes, who, being duly sworn on the Holy Evangelists of Almighty God, deposeth, that a person confined in the jail of this district, who calls himself Nathan Robbins, but whose real name this deponent believes to be Thomas Nash, was a seaman on board the Hermione British frigate, in which this deponent was a midshipman from the 8th of February, 1797, until the 30th of August following, during which time the said Nash was personally known to this deponent; that this deponent was removed from the said frigate to the sloop-of-war Diligence, on the said 30th day of August, 1797; this deponent further deposeth, that on the 19th of September following, he was sent on board the said frigate, at which time he saw and left the said Nash in the same station on board that vessel, as he was at the time of this deponent's being a midshipman therein. That on the 22d day of the said month, the crew mutinied on board the said frigate, killed the principal officers, piratically possessed themselves of her, carried her into Laguyra, and there disposed of her to certain subjects of his Catholic majesty. That the said Thomas Nash was one of the principals in the commission of the said acts of murder and piracy, whose conduct in that transaction has become known to this deponent by depositions made and testimony given in courts martial where some of the said crew have been tried. John Forbes.

"Sworn before me this 18th April, 1799, Thomas Bee, District Judge, South Carolina."

The judge had received a letter some days before, from the secretary of state of the United States, mentioning, that application had been made by the British minister, Mr. Liston, to the president, for the delivery of the prisoner under the 27th article of the treaty, and containing these words—The president "advises and requests" you to de-

liver him up. This letter though not read in court, was shown to the counsel on both sides, and is hereunto appended.

The following certificate and affidavit were produced in behalf of the prisoner:

"United States of America, State of New York, ss.: By this public instrument, be it known to whom the same doth or may concern, that I, John Keese, a public notary, in and for the state of New York, by letters patent under the great seal of the state, duly commissioned and sworn; and in and by the said letters patent invested 'with full power and authority to attest deeds, wills, testaments, codicils, agreements, and other instruments in writing, and to administer any oath or oaths, to any person or persons,' do hereby certify that Jonathan Robbins, mariner, who hath subscribed these presents, personally appeared before me, and being by me duly sworn, according to law, deposed that he is a citizen of the United States of America, and a native of the state of Connecticut, five feet six inches high, and aged about twenty-three years. And I do further certify that the said Jonathan Robbins, being a citizen of the United States of America, and liable to be called in the service of his country, is to be respected accordingly, at all times by sea and land. Whereof an attestation being required, I have granted this under my notarial firm and seal.

"Done at the city of New York, in the said state of New York, the twentieth day of May, in the year one thousand seven hundred and ninety-five.

"Quod Attestor, John Keese,

"Notary public, and one of the justices for the city of New York.

"Jonathan Robbins, mariner, a prisoner now in custody of the marshal of the district court of the United States for South Carolina, being duly sworn, saith he is a native of the state of Connecticut, and born in Danbury in that state; that he has never changed his allegiance to his native country; and that about two years ago he was pressed from on board the brig Betsey of New York, commanded by Captain White, and bound for St. Nichola Mole, by the crew of the British frigate Hermione, commanded by Captain Wilkinson, and was detained there, contrary to his will, in the service of the British nation, until the said vessel was captured by those of her crew, who took her into a Spanish port by force: and that he gave no assistance in such capture.

"Jonathan Robbins.

"Sworn this 25th July, 1799, before me, Thomas Hall, federal clerk, and J. R. Q. U."

The signature made by the prisoner to this affidavit in court, appeared to be in the same hand-writing as the signature to the one made in 1795, from which circumstance it is presumable, that Jonathan Robbins is the prisoner's real name. The body of the affidavit made in New York, in 1795, was printed; the names, dates, signatures, &c., were filled up in writing; it had the notarial seal of John Keese, Esq. affixed; and had the appearance of being a genuine paper, deemed at that day by seamen to be a protection. It appears, however, by the result, that these affidavits, and the question, whether the prisoner was an American, and an impressed seaman, or not, were, in the opinion of the court, altogether immaterial; as the court would have felt itself bound to deliver up any respectable citizen of the United States, if claimed under the circumstances of the prisoner.

Mr. Ker, against the motion, expressed his regret that the short time he had given to the consideration of the prisoner's case, did not enable him to pay it that attention which its importance required: that whether it were considered as simply relating to the prisoner, or in a more extensive view as embracing great constitutional principles, in its relation to the citizens of America, in either case it must appear as a question of the highest magnitude, and requiring the most serious discussion. Shall a citizen of America be tried by his country, or be delivered up to a foreign tribunal? He hoped he should be able to show the court, that the prisoner's case was not within the 27th article of the British treaty; and if it were, that it was unconstitutional. The prisoner's certificate and affidavit, he contended, were proof of his having been impressed into the service of his Britannic majesty. By the late president's proclamation of neutrality, the citizens of the United States were prohibited from entering into the service of any of the belligerent powers: that the court could not presume, without the colour of evidence, that the prisoner had violated the laws of his country, unsupported as such a presumption would be by any legal charge of that nature against him. Hence it follows, that the prisoner must have been taken forcibly into the service of his Britannic majesty, in the face of his protection, and in contempt of our neutrality. Let those who make the requisition, that he be delivered up, show by the ship's articles, or by any other legal testimony, that he entered voluntarily into their service, and submitted himself to their discipline. If they cannot, the presumption is strong in favour of the prisoner. Taking the point then as ceded, that he was impressed, he was warranted by the most sacred rights of nature, and the laws of nations, to have recourse to violence in the recovery of that liberty, of which he had been unjustly and unlawfully deprived. These were facts proper to be submitted to a jury of this country; they would well know how to appreciate a defence of this nature, if it were necessary to make it. The court know, that in England a man would be excusable for murder in resisting a press-gang; but here, the prisoner being an American, his rights ought to have been peculiarly respected by a foreign nation, and resistance on his

part was not merely the exercise of the rights of an individual, but it was a duty he owed to his country. The principle contended for was supported by the best authorities. It is laid down in Vatt. Law Nat. bk. 3, c. 8, § 139: "An enemy attacking me unjustly, gives me an undoubted right of repelling his violence, and he who opposes me in arms, when I demand only my right, becomes himself the aggressor, by his unjust resistance: he is the first author of the violence, and obliges me to make use of force for securing myself against the wrongs intended me, either in my person or possessions. For if the effects of this force proceed so far as to take away his life, he owes the misfortune to himself; for if by sparing him I should submit to the injury, the good would soon become the prey of the wicked."

The constitution of the United States of America has expressly secured to every citizen thereof the trial by jury, and if the treaty went to deprive him of it, it would be invalid; it is inferior and subordinate to the constitution, and when it unhappily stands in hostility against it, or where there is a collision, it must, of necessity, yield. Treaties, however sacred, with whatever good faith they ought to be preserved, however high their authority, are not to receive a construction hostile to the sound principles of the constitution, and derogatory to the rights of the citizen. It is a general maxim in the construction of treaties, that every interpretation which leads to an absurdity ought to be rejected. Vattel (book 2, c. 17, § 282) says, "that we should not give to any peace a sense from which follows anything absurd, but interpret it in such a manner as to avoid absurdity." Can it be supposed that it was the intention of the contracting parties to deprive the citizens of America of the trial by jury, on which are bottomed the best principles of American freedom? Certainly not; it is an unfair and inadmissible inference. Hence it follows, that a citizen ought not to be delivered up to a foreign tribunal for any offence, which is within the jurisdiction and cognizance of his country. The atrocity of the crime with which the prisoner is charged, has nothing to do with the principle contended for; the requisition could be made with equal propriety, were it of a trivial nature. Piracy and murder is an high offence against all nations, and all nations have an interest in bringing offenders to justice, and all are equally competent to try them. A requisition is made under the 27th article of the treaty, to deliver up a citizen of the United States, on a vague allegation contained in two affidavits, which afford a mere suspicion of the prisoner having been on board the Hermione frigate at the time of the mutiny. If a citizen can be delivered up on ground so slight, in the present general political conflict among mankind, when the violence of party spirit knows no bounds; when vindictive passions are substituted in lieu of reason, justice and humanity; no man, however prominent and respectable among his fellow-citizens, can be secure against the operation of this law. The prisoner is an obscure character, and, although in the bosom of his native country, from the nature of his profession, being constantly removing from one place to another, is as destitute of friends as if he were on the opposite side of the globe.

Mr. Ker next adverted to the words of the 27th article of the treaty, under which the requisition is made. He contended, that the words "murder or forgery committed within the jurisdiction of either," manifestly implied the exclusive jurisdiction of the one or the other power, and not the jurisdiction of the high seas, where the United States have a concurrent one in common with all nations; that the laws of nations provide against offences committed on the high seas, and therefore a particular stipulation was unnecessary; that the apparent object of the article was to bring offenders to justice, and therefore provided against the crimes of murder and forgery being committed within the exclusive jurisdiction of either; but that the law did not apply in the present case, as the United States possessed competent power to try the offender, and bring him to justice; that if the offence had been committed within the kingdom of Great Britain, under the municipal laws of that country, the article affords a remedy, as our laws could not reach the offence; and further, that a construction should not be given to the treaty which abridged the jurisdiction of the United States, and that we ought not to presume that the government of the United States had abandoned any of its judicial rights to any nation, and that neither the letter nor spirit of the article warranted the conclusion.

Col. Moultrie, also for the prisoner, arose. After premising the importance of this case, and stating it as one in which the dearest interests of the Union were involved, he advanced the following grounds for consideration:

(1) On the constitutional ground: That the constitution of the United States contained the constituent principles of our social union as a nation: that it is the compact by which our government was formed, and under which alone it exists; and that from this compact, all civil power and authority, and every constituted branch of our society, as a nation, was derived, and is exercised: that mankind, in quitting a state of nature for that of society, gave up part of their natural rights, which they all possessed in common, to promote the good of the whole, and to secure the remainder which were not surrendered; that the natural rights so given up, were either totally relinquished, or were modified only under restrictions, and became political rights; and those not given up, formed a sacred residuum in the hands

of the people, and which are unalienable by any act of legislation: that this was no visionary theory of ancient writers, but is the true and modern ground of all social union: and it is fully recognized in our free constitution; for by article 12th, of the amendments to our constitution, it is declared, "that all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." And the 11th section declares, "the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

(2) On treaties: Treaties and laws made by legislatures, he said, were only acts of the constituted agents and subordinate ministers of the constitution: that they were of derivative authority only, and derived from the primitive authority of the constitution, and therefore must be subordinate to, and could not counteract or control it: and that the treaty making power was derived only from the constitution, is evident from the 2d section of the 3d article, which creates and gives it. He next pointed out the absurdity of the treaty-making power being allowed to counteract or control the constitution; as by that means, by a treaty, our constitution, the very foundation of our government and guardian of our liberty, might be overset and destroyed, and every sacred right of the people secured thereby laid prostrate; and this too at any time, and by combination with a foreign power: that no institution or sacred compact of the people for the preservation of their happiness could be formed, but what thus, by the creatures of the constitution and of the people's power, might be overset; that thus, though the government and nation might be called independent, the people might be slaves, and be in fact without any protection to their liberties. Third. That what the nature or denomination of the offences specified in the treaty were, was totally immaterial; for if the treaty-maker could insert one offence, he may insert as many more as he pleases: but the principle was, whether he had a right, for any offence, to oblige a citizen to be given up as a victim to any foreign power; a citizen, whose very liberty consisted in its being guarded by the sacred trial by jury. Fourth. That the 6th article of the constitution itself, shows that no law or treaty can be the law of the land, that is contrary to the constitution; inasmuch as it says, expressly, that laws only "made in pursuance thereof," and "all treaties made under the authority of the United States," are the law of the land. The question then was put by Mr. M., what was the "authority of the United States?" whence was it derived, and the United States itself created, but only by and from the constitution itself? That the constitution, and laws and treaties of the United States, being the supreme code of the law of the land, was evidently intended by the 6th article (as expressed) to be only as supreme to the local constitutions and laws of each state: but such laws and treaties stand on an equal footing; and both must be made in pursuance of, and under the authority of the constitution. That two supremes are of equal authority, and both must be equal: that two equal opposite forces, or powers, acting in opposition, destroy each other; and if not equal, one or the other must be superior, (either the constitution or treaty;) and that all laws and treaties can only be legal when made in pursuance of, in subordination to, and under the authority of the constitution; but that this treaty was opposite and repugnant to the constitution. Fifth. That in the 7th and 8th articles of the amendments to the constitution, the citizens are secured in all cases the trial by jury, except for naval and military offences by sea and land, in time of actual war, "flagrante bello," (during the rage of war;) and that no treaty could contravene these articles of the constitution: that the trial by jury is a sacred and unalienable right; as all the powers given by the constitution for the privation of the cardinal natural rights of life and liberty, are only a conditional cession of those rights to the care of society, under the advantage of a trial by jury of fellow-citizens, as the mutual safeguard and security of such rights so deposited; and that the exception of courts of militia, and in the navy, during the rage of war, is an exception by the constitution itself, on the necessity of the case, for the people's safety; and that such exception proves its full extent and operation. Sixth. That even if the treaty was legal, the present offence which the prisoner is in custody for, is not within the meaning and construction of the treaty: for the 27th article of the treaty relates to murder and forgery, committed within the jurisdiction of either Great Britain or the United States: that is, within the peculiar exclusive jurisdiction of either, where the offence is committed, and to which the jurisdiction of the one or the other, to which the party flies for refuge, or as an asylum, could not extend; that it relates, therefore, only to the respective territories of the contracting powers: but that the offence now before the court was done supra altum mare, (upon the high seas,) where all nations have equal jurisdiction, and no defect of justice could arise from a want of jurisdiction here to extend to the offence: that it was against the law of nations, which style a pirate hostis humani generis, (the enemy of mankind,) and over whom all nations claim a criminal jurisdiction equally, and over whom the United States have a concurrent jurisdiction. Vattel says, on the construction of treaties, that nothing shall be so construed as to make the treaty an absurdity; and it never can be supposed the learned civilians and casuists, who framed this treaty, would have been so

absurd as to make our nation of the United States give up her dignity, independence and concurrent maritime jurisdiction, which she holds equally in the great society of nations, with the rest of the world, or that they were ignorant of her holding such jurisdiction; or that Great Britain and the United States, by their own compact, could hold such jurisdiction exclusively; that the ocean is nature's great common, where all nations hold a common interest and authority, as tenants in common. Seventh. That the prisoner is a native citizen of America, and was arbitrarily pressed, contrary to his will, into the British service; and an attestation of his birth in Connecticut, under the seal of the city of New York, and the prisoner's own affidavit of his birth, and of his being pressed, were produced. On this it was remarked by Mr. M. that the notarial attestation appeared on its own face to be genuine, and of an age equal with its date; that by reference to New York its authenticity can be fixed, and by reference to the custom house there, the clearance and list of the crew of the vessel, and name of the prisoner, might be found, as stated in his affidavit; that all this would show his defence is not a false one; and that the signature, Jonathan Robbins, now made in open court to his affidavit, and the one made to the paper signed several years since, before the magistrate in New York, are the exact and indubitable signatures of one and the same hand. Also, that no man was to be presumed guilty of any transgression of the laws of his country, until he was legally charged and convicted thereof; that the laws and proclamations made to preserve our neutrality, and a late one to prevent our citizens going into foreign service, were very severe; that the insolent and daring conduct of Britain, in pressing our seamen and citizens, was an attack on the sovereignty of our nation, and notorious; and the presumption from these laws, and such conduct, was, that the prisoner was pressed contrary to his will, and the onus probandi (burden of proof) to the contrary, lay therefore with the prosecution; that if he was so pressed, it was meritorious, by the laws of God and man, to regain his liberty even by the death of his oppressors, and to avenge the insulted dignity of a free people; that hence the right of killing in war is founded (Vat. Law Nat. lib. 3, c. 8, § 139), and, that the prisoner, instead of being punished, "deserved well of his country." "Quid enim, potior libertate? Quid pejor quam servitute?" And here, Mr. M. added that he knew this motto was imprinted on the hearts of his countrymen; that their liberties, birthrights, and their country's honour and dignity were most sacred to them; that they would only part with them but with their lives; that ignominy and slavery were to them death; and, that they would ever hold an American unworthy the name of such, who would not sacrifice any one who, under the impious authority of any nation, would dare attempt to enslave him and rob him of his national privileges. Eighth. Mr. M. commented on the laws passed by Great Britain in the beginning of her war with us, for carrying American subjects over to England to be tried, and as one of the oppressive evils we fought against, and drew a striking analogy. Further, he observed, that the office of president was an executive and ministerial office, and had no right to control this court, as appeared by the secretary's letter in this case, advising the prisoner to be given up; that constitution and laws only, formed the true sovereignty of the nation, and the judicial was the proper guardian of it; and that the executive in fact, is but subordinate to the judicial, as he is bound to enforce its decrees. Ninth. That sending a citizen from the bosom of his country and friends, and for immolation, like a lamb to the altar, to gratify the ambition or policy of any foreign power or king, was a capital punishment—what could be greater? And, Mr. M. then asked, by what law of this land such a punishment, or any other, could be inflicted here, in time of peace, without a jury or a trial? a punishment by which a citizen was to be tried, instead of by a jury, by a court martial.

(3) Of the jurisdiction: A great number and variety of other striking and forcible remarks were made; but amongst the last, he further submitted, that by the law of the federal judiciary, the district court, before whom this was brought, had no jurisdiction for crimes on the high seas, when the punishment exceeded thirty stripes, six months' imprisonment, or one hundred dollars fine; that in this case, this court, like an inferior court or magistrate, was only competent to commit and retain in custody for trial, by the circuit court, and had no jurisdiction as to the merits; that the circuit court only had the jurisdiction, and that this court undertaking after commitment, to liberate or give up the prisoner, was to intrude on and usurp the jus dicere of the superior court; at least to determine and decide on it, and, if it had any jurisdiction, to abolish it and oust it of it; that in doing so, it would be precipitate and illegal. A further remark was also made by Mr. Moultrie, on the affidavits brought against the prisoner, showing that even in a common case, they were not sufficient to exclude a prisoner from bail; and much less sufficient were they, where a man was to be punished by exile, by so capital a punishment, in the first instance without any trial; that they were vague, uncertain, and ascertained no specific charge against the prisoner; and, in short, amounted to nothing more than mere suspicion, and even that but weakly supported; and that, under such circumstances, no man's life or liberty can be safe under this construction of the treaty. That as to removing a person from one state to another, to be tried where he commits an

offence, all this is but like moving from one county to another; for the culprit is still within the jurisdiction and protection of his country: but far different it is to remove him to a distant nation, out of the protection of his country, there to meet a summary trial by a court martial, and in the end, perhaps, be hung from motives of policy, more than from the principles of justice.

Mr. Ward, counsel for the British claim, was alone on that side. The counsel for the prisoner, he said, had addressed the passions of the auditory, which was quite unnecessary in this place, where the citizens were always remarkable for humanity and tenderness to the accused. It was not necessary, at this time of day, to discuss the question of constitutionality—that had been long since settled, in the ratification of the treaty by the proper authorities. It should be remembered, he said, that the cessions contained in the 27th article, now objected to, were mutual to the two nations; if the treaty cedes a portion of the rights of American citizens to the British government, the same treaty cedes an equal portion of the rights of British subjects to the American government. In answer to the argument, that a citizen could not legally suffer under an article of a treaty which contained the rights secured to him by the constitution, Mr. Ward contended, that a treaty made by the powers pointed out for the purpose in the constitution, is co-ordinate with the constitution itself, and even paramount to it; and that the court could not make it a question, whether the treaty between the United States and Great Britain, counteracted the constitution or not; the only question for the court to settle was, is the demand made for delivering up the prisoner conformable to the treaty? He had not a doubt but it was. To prove that the crime charged against the prisoner was committed within the jurisdiction of the British government, he stated, that every action done in a vessel on the high seas comes under the jurisdiction of the nation to which the vessel belongs. In support of this, he instanced the case of a child that should be born in a British vessel on a foreign coast; this child, he said, would be considered as a British subject.

Mr. Ward made a number of other pertinent observations, and quoted several passages of the law of nations, in support of his arguments. He again insisted that treaties are co-ordinate with, and paramount to the laws and constitution, and that the court had only to consider, whether the prisoner is, or is not, comprehended in the meaning of the 27th article of the treaty. In answer to the arguments of the prisoner's counsel, that he should not only not be given up, but be released from prison on his own bail, Mr. Ward remarked, that it would be inconsistent for the court to release a man without trial, after having sanctioned the charge on which he was confined, by suffering him to remain in prison a long time under their authority; and that if the prisoner was really the American he pretended to be, he would have been able, before this time, to have made it appear more clearly.

BEE, District Judge. The question on which I am now to give a decision, is grounded on a habeas corpus to bring the prisoner before me; and on motion by counsel on behalf of the consul of his Britannic majesty, the officer authorized by treaty to make the requisition, that the prisoner, charged with murder committed within the jurisdiction of Great Britain, shall be delivered up to justice, in virtue of the 27th article of the treaty of amity and commerce between the United States and Great Britain, signed the 19th of November, 1794.

Objections have been made by counsel on behalf of the prisoner to this motion, on a variety of grounds; and this case has been very fully argued on both sides. Two papers have been produced on behalf of the prisoner: one. a certificate from a notary public at New York, dated 20th of May, 1795, that Jonathan Robbins, a mariner, had that day deposed on oath before him, that he, the said Jonathan Robbins, was a citizen of the United States, and a native of Connecticut; the other is an affidavit of the prisoner, made in open court, that he is a native of Connecticut: and that about two years ago he was pressed from the brig Betsy of New York, on board the British frigate Hermione, and was detained there against his will, until the vessel was captured by the crew, and carried into a Spanish port, and that he gave no assistance. The motion before me has been opposed on a variety of grounds. It is contended, that it is a question of magnitude whether a citizen of the United States shall be tried by a jury of his own country, or in a foreign one: that the 27th article of the treaty, on which this motion is founded, is contrary to the constitution of the United States, and is therefore void; that the treaty can only relate to foreigners: that the fact in this case being committed on the high seas, the courts of the United States have competent jurisdiction: that a grand jury ought to make inquest, before a party shall be sent away for trial. It was also contended that this would strike at the root of the liberties of the people: that the constitution secured the right of trial by jury to the citizens; and that treaties and laws altering that, were of subordinate authority; and of course void: that the treaty making power may be abused; and it could never give authority to seize a person and send him away for trial. It was also contended, that this is not an offence within the contemplation of the treaty: the word "jurisdiction," means "territorial jurisdiction"; and that the act must be confined to offences committed within the territory of either; that the sending a person in confine-

ment to be tried in a foreign country, is a punishment not to be inflicted on a citizen: that the treaty is a head without a body, legs or arms: that the affidavits do not come up to the point, and are not sufficient to prevent the party being entitled to bail.

These were the points on which the objections to this motion were argued. In the course of the arguments, warm and pathetic appeals to the passions were made on some of the old grounds of opposition to the treaty, which I endeavoured to check, because, as this treaty has been ratified agreeably to the express provisions of the constitution, and is therein declared to be the supreme law of the land, and I am religiously and solemnly bound by the oath I have taken to administer justice according to the constitution and laws, it is not in my power, nor is it my inclination, ever to deviate therefrom. If we attend to the constitution, and the amendments which are now part of it, we shall find, that all the provisions there made respecting criminal prosecutions, and trials for crimes by a jury, are expressly limited to crimes committed within a state or district of the United States. Indeed, reason and common sense point out that it should be so: for, what control can the laws of one nation have over offences committed in the territories of another? It must be remembered, also, that in the 27th article of the amendments, where it is provided that no person shall be held to answer for a capital offence, unless on a presentment by a grand jury, an exception is made to cases arising in the land or sea service, or even in the militia when in actual service, in time of war or public danger. This shows unequivocally, that trials by jury may be dispensed with, even for crimes committed within the United States; and those observations are at once an answer to all the arguments founded on the right to trials by jury, they being expressly limited to crimes committed within the United States, and even then with some exceptions.

The objections made to the treaty's being contrary to the constitution, have been so often and so fully argued and refuted, that I was in hopes no time would have been occupied on that subject, more especially as that treaty has been recognized by the legislature of the United States and is now in full operation. It is remarkable, that in the midst of all the warmth against the treaty, at its first publication, the 27th article was one of the few that was never excepted to; and I believe this is the first instance in which it had been held up as dangerous to liberty. The crime of murder is justly reprobated in all countries; and in commercial ones the crime of forgery is so dangerous to trade and commerce, that provision has been made in various treaties for delivering up fugitives from justice for these offences; and many instances may be produced of criminals sent back to be tried where the fact was perpetrated. What says the 27th article of the treaty now under consideration? In the first place it is founded on reciprocity: in the next, it is general to all persons, who, being charged with murder or forgery, whether citizens, subjects, or foreigners. It is for the furtherance of justice, because the culprits would otherwise escape punishment; no prosecution would lie against them in a foreign country; and if it did, it would be difficult to procure evidence to convict or acquit. This clause is founded on the same principle with that part of the constitution which declares, that the trial for a crime shall be held in the state where it shall be committed; and the act of congress to prevent fugitives from justice escaping punishment, declares, that they shall be delivered up when demanded, to be tried where they committed the offence, either on a bill found, or an affidavit charging them with the offence. The principle, then, being the same, and the one being expressly founded on the constitution and laws of the United States, no solid objection can lie against this clause of the treaty. Nor does it make any difference, whether the offence is committed by a citizen, or another person. This will obviate the objection made by the counsel on that head. And I cannot but take this occasion to observe, that the two papers produced by the prisoner, are only affidavits of his own, or a certificate founded on an affidavit, which are not evidence; and if they were, prove little or nothing. It is somewhat remarkable, that a man of the name of Jonathan Robbins, with the paper produced in his possession, should continue on board a British frigate for a length of time, under another name, and acting as a warrant officer, which impressed men are not likely to be entrusted with, and that he should afterwards take the name of Nathan Robbins, and lay in jail here five or six months, without the circumstance being made known until now.

All the arguments against delivering up the prisoner seem to imply that he was to be punished without a trial; the contrary of which is the fact: we know that no man can be punished by the laws of Great Britain without a trial. If he is innocent, he will be acquitted; if otherwise, he must suffer. This would be the case here, under similar circumstances.

The objection most relied on against this motion, is to the word jurisdiction, in the 27th article of the treaty, and that the crime being committed on the high seas, the courts of the United States have a concurrent jurisdiction. There is no doubt that the circuit courts of the United States have a concurrent jurisdiction. and this arises under the general law of nations; and if the 27th clause of the treaty in question had not expressly declared the right to demand, and the obligation to deliver over, the prisoner

must have been tried here. With respect to the meaning of the word "jurisdiction," I think the case quoted from Vatt. Law Nat. bk. 1, c. 19, § 216, is conclusive, and this is corroborated by Ruth. Inst. bk. 2, c. 9, as to the jurisdiction over the men on board the vessels; and the clause itself seems to have contemplated this, because the word "jurisdiction" is used distinctly from countries in the next line; and this shows, that territorial jurisdiction, as contended for, cannot apply to the present case.

When application was first made, I thought this a matter for the executive interference, because the act of congress respecting fugitives from justice, from one state to another, refers it altogether to the executive of the states; but as the law and the treaty are silent upon the subject, recurrence must be had to the general powers vested in the judiciary by law and the constitution, the 3d article of which declares the judicial power shall extend to treaties, by express words. The judiciary have in two instances in this state, where no provisions were expressly stipulated, granted injunctions to suspend the sale of prizes under existing treaties. If it were otherwise, there would be a failure of justice.

I have carefully reviewed the arguments advanced by the counsel for the prisoner. I have looked into the constitution, the treaty, the laws, and the cases quoted: and upon a full investigation of them all, I am of opinion, that from the affidavits filed with the clerk of the court, there is sufficient evidence of criminality to justify the apprehension and commitment of the prisoner for trial, for murder committed on board a ship of war belonging to his Britannic majesty, on the high seas: that requisition having been made by the British consul, the officer authorized to make the same, in virtue of the 27th article of the treaty of amity and commerce between the United States and Great Britain, I am bound by the express words of that clause of the treaty, to deliver him up to justice. And I do therefore order and command the marshal, in whose custody the prisoner now is, to deliver the body of the said Nathan Robbins, alias Thomas Nash, to the British consul, or such person or persons as he shall appoint to receive him.

The judgment being pronounced, the court was immediately adjourned; the irons were replaced on the prisoner, and he was delivered over by the constables, to a detachment of federal troops, who had before been placed under arms opposite the court house, and had continued there during the sitting of the court. The troops immediately delivered up the prisoner to Lieut. Jump, of his Britannic majesty's sloop Sprightly, then lying in this harbour, and which sailed with the prisoner on Saturday morning for Jamaica.

NOTE. Judge Bee's decision, together with the action of the president that led to it, added a fresh stimulus to the then already too feverish state of public sentiment. The Examiner, the organ of the Virginia Republicans, began by a series of attacks, said to emanate from Mr. Madison, but which unfortunately are not preserved. This was answered in the Virginia Federalist by Mr. Marshall, as follows:

"I observe in a late paper of the Examiner, several strictures on the case of Robbins, who was delivered to the British consul at Charleston, under the 27th article of the treaty of amity and commerce between Great Britain and America, censuring the measure in general, but reprobating the conduct of the president in a particular manner. These strictures, calculated to exasperate the public mind, would probably lose their effect upon a fair explanation of the nature of the business, and therefore I have thought it worth while, for the sake of removing unjust impressions, and satisfying the minds of those who really wish for information relative to the necessary mode of proceeding in cases of that kind, to endeavour to make a just representation of the matter, as far as I am able to understand the case from the mutilated publications which we have seen of it. As to the opinion of the learned judge upon the case, I shall not enter into any arguments in support of it, because they would be useless and unnecessary, as the reasoning contained in his own excellent speech upon the subject is perfectly correct, and must be convincing to every unprejudiced mind. I shall therefore confine myself to that part of the case which respects the president's letter only; which I am induced to do, not because I think it needs any justification with candid men, who know the nature of such proceedings, but because I wish to prevent the effects which are intended to be produced from it upon the minds of those who do not possess the kind of information necessary to enable them to judge impartially on the subject. The case, from the publication which I have seen, I suppose to be this. The British government, having discovered that Robbins was in Charleston, applied to the judge for a warrant to secure him until application could be made to government for him. The warrant was granted, and an application, with the evidences of the charge, were laid before the president, who, being satisfied that it was a case within the treaty, directed the judge, as he was arrested under his warrant, to deliver him up, and the single question is, whether this proceeding in the present case was regular. By the treaty of amity made when the two nations neither did nor could contemplate this, or the case of any other individual, it is mutually stipulated that fugitives from justice who have been guilty of murder or forgery in one of the nations, and have taken shelter in the territories of the other, shall be delivered up to the injured government. Those stipulations are reciprocal, and America, whenever a case shall happen, will have the same right to demand a fugitive of Great Britain that the latter had to demand Robbins of the United States. Nor can either nation refuse, for the words are positive. They are: 'It is further agreed, that his majesty and the United States, on mutual requisitions by their respective ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged of murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or persons charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive

the fugitive.' These words contain an absolute engagement to deliver such characters up, and neither nation can refuse or neglect it without a violation of the treaty. It is, therefore, a certain fact, that Great Britain, by the express words of the treaty, had a right to demand Robbins in the present case, who was accused of murder, one of the enumerated offences for which fugitives were to be delivered up. There must, therefore, have been some mode of carrying the provision of the treaty in this respect into execution, or else the articles would be nugatory; and it would be absurd to suppose the parties meant to stipulate for a thing which could not be performed. The question then is, what mode should be pursued when a requisition of this kind is made, and what proceedings should take place in order to comply with it. The treaty has not pointed out any mode, and therefore we must recur to principles and the nature of things in order to discover it. As nations do not communicate with each other but through the channel of their government, the natural, the obvious, and the proper mode, is an application on the part of the government (requiring the fugitive) to the executive of the nation to which he has fled, to secure and cause him to be delivered up. (1) Because the government being the only channel of communication between the nations, the British government, in cases of this kind, has nothing to do with the detail and internal regulations of ours, nor we with theirs. For as the governments have respectively undertaken to do the thing which is required, the injured nation is not concerned any further with the business than merely to exhibit the proofs and call on the other for the performance of the treaty; and the nation called on must attend to the details and internal regulations themselves. (2) Because the government to which the fugitive has fled ought to be informed why an inhabitant is forced away from its territories; and therefore a removal of any person therefrom, without an application to the chief magistrate, would not only be dangerous to the personal safety of individuals, but would be an indignity and an affront which ought not to be offered. (3) Because, without such an application, the injured nation could not complain of an infraction of the treaty on the part of the other government in not delivering up the fugitive. For it would be an irresistible argument to such a complaint, that no application was ever made to the government itself. Nor would it strengthen the complaint, that an application was made to some inferior authority; because an application to subordinate officers who do not represent the general national concerns, would not only be improper on account of the inconvenient practices it might introduce (for by that means a man might be carried off without government having an opportunity of protecting him), but, in case the requisition were not complied with, could not be a just ground of reproach to the government itself, which was never informed of the application. (4) Because, it is manifest from what has been said, as well as from the very nature of things, that government must have a right to decide whether a fugitive should be delivered up or not. For it is a mere question of state, and all questions relative to the affairs of the nation emphatically belong to the government to decide upon. Therefore, in case of a requisition for a fugitive by the United States from Great Britain, the application would be to the executive, and not to the judiciary, or any other inferior department of the government. It follows, therefore, that an application to the government itself is essential; and accordingly, in the case under consideration, such an application was actually made. But surely the business was not to rest there. Some further steps were necessary, or else the application would have been to no purpose.

"The government, as we have already seen, was bound by engagement to cause delivery to be made; and therefore the president was under the necessity of taking some order in the business which might produce the object of the application. For, having been informed that the man was under confinement, upon the charge on which the application was made, until the determination of government upon the subject could be known, he was bound to give some directions in the business, so that the prisoner might either be liberated or delivered up, and those directions could only be given in writing. If the president had said to the British ambassador: 'You must apply to the judge under whose warrant he was arrested, and he will deliver the prisoner to you,' the obvious answer would have been, 'Sir, I cannot do so without your warrant. If I apply to your judge, I shall certainly be told again as I was told before, that he cannot interfere in a business of state without the knowledge of government; and it will be in vain for me to tell him that I have your instructions upon the subject, unless I am able to produce some evidence of them.' It follows, therefore, that the president was bound to give some written instructions upon the subject; because no other would, or ought to have been credited by the judge.

"The only question then is, whether the letter of the secretary of state contained the proper instructions or not? If I am right in my position that the application, in all such cases, should be made to the executive, and that the executive has a right to decide whether the requisition should be complied with or not; it follows necessarily, that when information was given to the judge that application had been made, it ought to have been accompanied with some expression of the will of government upon the subject. For it would have been ridiculous in the president to have ordered a letter to be written to the judge, informing him that such an application had been made, without informing him also what government had resolved to do in the business; because that would have left the judge exactly where he was; and he would have been at liberty to have considered it as a mere private letter from one gentleman to another, and not as an official document, on which he was bound to act. So that, if under that impression he had resolved to have taken no steps in the business, he not only would have stood excused himself, but the British government would have had just cause to complain that our conduct was illusory, and that the stipulations of that treaty were evaded. But, if it be admitted that any declaration of the president was necessary upon the subject, more eligible terms than those used by the secretary of state, even according to the garbled publication which we have of them, could not have been chosen. For they are the usual phrases all over the United States, from the governor down to the county court magistrate. There is not a mandate of any kind in use amongst us, which does not contain the word 'require'; and it will surely be admitted that the word 'advise' is at least as harmless as the words 'command' and 'at your peril,' which are to be found in the warrant of every superior to his inferior officer throughout the United States. Let me now, then, ask any candid man, if the inference drawn by the Examiner from this letter, namely, that the president had endeavoured to influence the opinion of a judge, in a matter depending before him, be a correct one? On the contrary, it is manifest from what has been said, that the matter never was, nor could be regularly before the judge, until he had received this letter, which was the ground and foundation on which he was to proceed. Until then he had no authority to act definitely upon the question; and so the judge evidently appears to have considered it himself. For

it was handed to the counsel on both sides, plainly as the authority on which he proceeded. Otherwise, he would not have shown it at all, or else he would have done it in a very different manner. It was, therefore, a mere official paper, and not a letter which was intended to be intruded upon the judge, in order to influence his determination in a matter depending before him. It was itself the very process, if I may use the expression, which brought the case before the judge.

"Perhaps it will be said that the judge himself has denied the authority of the executive; and there is a passage in his speech which looks that way. But this is a part of the opinion of the judge which seems liable to be questioned; and I strongly suspect it is not truly stated in the public prints, or else it comes to this, that the judge was of opinion that everything relative to treaties was to be transacted by the judges and not by the executive; a position which he certainly did not mean to maintain, and, therefore, the passage alluded to ought to be understood with some qualification.

"Perhaps the following solution may reconcile his opinion with the doctrine I have been contending for: The judge probably meant to say, that he once thought it a question which exclusively belonged to the executive, and therefore, that he, as a judge, could not in any manner be required to aid in the execution of the treaty. But finding, by recurrence to the constitution, that the judicial power extended to treaties, he was then satisfied that the judges might be called on, where circumstances rendered it proper, to take the necessary steps, in order to have the treaty carried into effect, as by issuing a warrant to secure the fugitive, until the determination of government could be known, and after that was promulgated, giving the necessary orders for carrying the determination into effect. With this qualification, the opinion of the judge was correct, and I therefore incline to think that he ought to be so understood in the passage under consideration. Upon the whole, the president appears to have done no more than his duty. For suppose it had been said that the British government had applied to the president for a fugitive from justice under the treaty, and that the latter, instead of ordering him to be delivered up, had refused or neglected to do it, without assigning any reason for it. How could the president have justified his conduct in that case? And might it not then have been said with propriety, that he had neglected his duty and omitted to execute one of the supreme laws of the land, which he was bound to observe and have carried into effect? In short, if some men would use but half the industry in examining into the real motives of the president's conduct upon any occasion, that they do in finding out reasons to reproach him, they would soon be convinced that, in no instance of his administration, has he either encroached upon the duty of others, or omitted to perform his own." 1 Hall. Jour. Jur. 28.

The opposition view was fully set forth in the following letter, written, as afterwards appeared, by Mr. Charles Pinckney, then a senator from South Carolina, which first was published in the newspapers, and subsequently was circulated, with one or two others, in a pamphlet, signed—"A South Carolina Planter":

"To the Citizens of the United States: As congress must by law provide, at their next session, for any similar cases which may occur under the British treaty, and as it is of general importance to the citizens of the United States, the following examination of the case of Jonathan Robbins, lately decided in the district court of South Carolina, is with deference submitted to their consideration: Fellow Citizens—As I believe you have not been much troubled with my remarks on any subject, I hope you will more readily excuse the favour I now ask, in requesting your attention to the present. I am induced to make them, because the question is of very great public consequence, and involves the dearest and most valuable rights of every man in the United States. It reaches all situations, as well the elevated and opulent as the most indigent. It affects the knowledge and independence of our judicials in the most important manner; and as I know it has excited the sensibility of the people, and must be so far made the subject of inquiry in congress as to enable them to provide for similar cases; I have supposed some examination of it may be necessary, in that spirit of deference and delicacy in which all such inquiries should be conducted. I shall not go into a definition of the principles of a free government, and the blessings its citizens ought to expect; because few of our own, even amongst the most illiterate, are ignorant of the nature of a representative government, the right of suffrage, and the inestimable privilege of the trial by jury, in all cases in which their characters, lives or property are concerned. To a people so informed, it is scarcely necessary to remark, that to men of feeling the value of character, of honorable fame, is dearer than life or property, or even the most tender connections; that to all men, whether of the nicest honour or otherwise, the love of life is dearer than that of property, and that they would readily sacrifice the one to preserve the other. Hence it follows, that those privileges which guard the character and lives of our citizens are viewed with a more jealous eye, and will be asserted with more firmness and promptitude, than even those which protect their properties, vigilant as they are with respect to these. A number of our citizens, therefore, believing that the inestimable privileges secured to them by the constitution and laws of the United States, have been affected in the case of Jonathan Robbins, that it is one which may if established as a precedent, reach some valuable inhabitants of this country, and to the intent that these privileges should be more carefully guarded by a positive law in future, the following remarks are submitted, with a view to bring this business more fully before the public than it has hitherto been. The following is the statement of the case, with the accompanying affidavits: It appears, however, by the result, that these affidavits, and the question whether the prisoner was an American, and an impressed seaman or not, were, in the opinion of the court, altogether immaterial: the court would have felt itself bound to deliver up any respectable citizen of the United States, if claimed under the circumstances of the prisoner. It appears by the preceding statement, that the judge, under the circumstances of this case, would feel himself obliged to deliver up any respectable citizen of the 'United States.' I do not mention this because he used the words 'respectable citizen'; but I do it to show, that this is a question which seriously concerns every part of the community, and that no citizen whose business may oblige him to go to other countries, is hereafter safe from such demands. It will not depend upon him to say he is not a mariner, or to show proofs or certificates to the contrary. It will depend upon the force with which he is attacked, and the temper or violence of the officer who directs it. Instances, it is said, have lately occurred where not only the seamen but the passengers have been impressed, who, although declaring they were not seamen, were still impressed as such, and obliged to perform their duties. No production of papers, no entreaties availed them: they were compelled to submit. Had these men been enterprising, or an opportunity offered, and they had possessed themselves of their oppressors, and brought them into port; or had they, in the attempt to regain their freedom, been obliged to destroy them, while the world would have applauded the act, the judge must,

from the decision, have delivered them to a similar demand; neither influence, fortune, or friends could have saved them. However superior in these, in political privileges they were only equal to the unknown and friendless Robbins. A consistent and inflexible magistrate must view them with the same impartial eye: he must give to them the same construction of the law or constitution; he could not vary them without the immediate loss of character. An enlightened people, therefore, will as attentively, nay, they ought more carefully to guard them in the person of a poor and unprotected than a rich or considerable man. The latter will always find powerful friends to support and protect his privileges; while the rights of the former may in silence and with impunity be unattended to merely because he is unknown, and has not an advocate to assert them. This would probably have been the case in the present instance, had not some gentlemen voluntarily offered themselves to examine and discuss its consequences. The public are obliged to them; it is an excellent example, I hope it will be followed upon every occasion, and that it will make us infinitely more vigilant of our rights than ever. We must never forget that in this country the poor and the rich, the humble and the influential, are entitled to equal privileges; that we ought to consider a violation of the rights of the most indigent and unprotected man, as an injury to the whole; while we have a pen to guide, or a voice to lift, they should constantly be exerted against the exercise of tyranny or oppression, by whatever nation committed or to whomsover the violence may be done.

"I now proceed to examine the case and the nature of the evidence, on which Mr. Bee determined to deliver Jonathan Robbins to the demand of the British minister. I believe it is the first instance which has occurred, of a demand under the British treaty in the United States; certainly, in this state. The law respecting the delivery of fugitives from justice was silent on the delivery of fugitives to foreign powers, therefore the judge conceived himself not only authorized but bound to interfere. By his own statement it appears to have been entirely a new case, in which I should suppose he had considerable discretion, and was not bound by any particular legislative act to deliver on a mere affidavit or any 'trivial surmise or hearsay evidence.' It was his duty to have maturely considered what were the legal import and meaning of the words, 'charged with murder and forgery,' and how far, according to the laws of this country, there was such evidence of criminality as would justify the sending any man, claiming to be a citizen, and not disproved as such, from his country, to be tried by a foreign tribunal, and most probably by a court martial. The judge's auditors must have been surprised when they heard him say 'that no man can be punished by the laws of Great Britain without a trial; if he is innocent, he will be acquitted; if guilty, he must be punished.' This observation was by no means applicable to the present case: the true question before the court was, whether Jonathan Robbins, producing a notarial certificate of being a citizen of the United States, and asserting that he was impressed by violence into the British service, was, from the nature of the affidavits before him, to be torn from his country and connexions, and deprived of all the rights of citizenship, and sent to be tried by a foreign tribunal, acting without a jury, in the most summary manner, and by martial law. I do not pretend to equal legal knowledge with the judge: but I have sometimes attended to points of this kind; and as far as I am able to form, am clearly of opinion that the prisoner, not having been disproved to be a citizen of the United States, there was not such evidence before the court as justified the judge in giving so important an order, as to surrender him to the demand of the British consul. This I will endeavour to prove from the examination of the affidavits, and the nature of the testimony required by our laws, as sufficient even to justify the putting a citizen upon his trial in this country, without adding to it the inexpressible disgrace and danger of sending him to be tried by a foreign tribunal. The first affidavit is William Portlock, on which I suppose the judge could not have rested at all: he appears from his age, and the statement in the affidavit, to have been a sailor lad as little known in this country as Robbins himself, and to have been so illiterate as not to have been able to write his name. This lad says, he heard a person who answered to the name of Nathan Robbins, declare he was boatswain's mate on board the Hermoine, when she was carried into the port of 'Gavilla;' and that sometimes when he was drunk, he would mention the Hermoine, clench his fist, and say 'Bad luck to her.' From this statement it results that this Portlock was an illiterate sailor lad, so ignorant as not to know the name of the port the frigate was carried into. It does not appear that he was shown the prisoner, or that he could swear that Jonathan Robbins was the person he knew on board the Tanner's Delight; he avowedly knew nothing of himself. He does not say the person he spoke of confessed to him that he was concerned in the murder or piracy charged on him. From the youth, ignorance and situation of Portlock; from the vague and uncertain account he gave, I must still be of the opinion that the judge could not have rested at all on his testimony; he knew, that even if Portlock had sworn positively to the identity of Robbins, and the latter had when sober made any confession of guilt to him, that it was the duty of a judge not to have attended to it. Any confession of a criminal must be made in a particular manner, before magistrates, or in open court, to operate to conviction. An elegant writer, treating on this subject, says, 'The confession of a criminal, when taken even before a magistrate, can rarely be turned against him, without obviating the end for which he must be supposed to have made it. Besides, we have known instances of murders avowed, which were never committed; of things stolen, which had never quitted the possession of the owner.'

"The evidence of words alleged to have been spoken by the person accused, and connected with the criminality of the charge, ought also to be received with great distrust. Such words are either spoken in the zeal of unsuspicious confidence, and cannot be repeated without a breach of private faith, which detracts much from the credibility of the witness; or, in the unguarded hours of boasting dissipation, in which case they are not unlikely to be false in themselves, and very likely to be falsely repeated. In every situation, therefore, in which Portlock can be received as a witness, or the testimony he gave examined, it must at once be seen, that it was not such as a grand jury could have found a bill on, or such as will be considered sufficient to justify the delivery the judge has ordered. It must, therefore, have been altogether on the single testimony of Lieutenant Forbes he ordered it, and this remains to be examined. The whole of Lieutenant Forbes' examination says, that a man confined in the jail of this district, who calls himself Robbins, but whose real name he believes to be Thomas Nash, was a seaman for a certain time on board the Hermione; that after he left the Hermione, she was seized by the crew and carried into an enemy's port; and that he has heard from the depositions of others in courts martial, that the man whom he believes to be named Thomas Nash, was a principal in the commission of the said acts of piracy and murder, &c. From this account, Mr. Forbes has confessed that he knows nothing of himself—that he was not sure what the

prisoner's name was, but that he believes it to be Thomas Nash, and what is extremely important, he does not attempt to say he is an Irishman, and not an American, or that he was not impressed into the British service. But that from the depositions of others, and what he has heard, he considers him as one of the principals in the said act. He does not explain what is the nature of the testimony he has heard on the subject, as it respects Nash—by whom given—whether by respectable or unprincipled witnesses, by such as were intimidated and forced into a confession of anything, or by ignorant and illiterate men (without a jury to interpose their lenient and impartial decisions) before a court of strict military officers, the severity and despatch of whose decrees they are every moment fearing to experience themselves. His testimony, therefore, being altogether hearsay, ought, in strictness of law, to have operated less forcibly upon the mind of the judge than even Portlock's, for however more respectable as an officer and a gentleman Mr. Forbes is, yet, when he tells you himself he was not on board the frigate when the murder and piracy were committed, and that he knows nothing but by hearsay, either from the relations or depositions of others, he at once comes within that description of testimony, which the laws of England, and the decisions of the best judges, and our laws borrowed from them, forbid either a judge or a jury to receive in any case affecting the life or limb of a subject of the one, or a citizen of the other.

"This being the state of the evidence before the judge, two important questions arise: (1) Whether the judge was strictly authorized, and if there was a doubt, whether he ought to have decided alone upon this question; and, (2) whether in deciding he had any, and what discretion, as to the nature of the evidence to be required, and whether his decision was such as the security of the personal privileges of our citizens, or the policy of the United States demanded.

"To the first question—It appears that, from laws of congress respecting the delivery of fugitives from justice from one state to another being silent, the judge was of opinion, on the application being first made to him, that it was a matter for executive interference; but that upon reconsideration, as the law and the treaty were silent, he was under the necessity of deciding. I think a further view of this subject must have, by this time, convinced him that he was mistaken, and that no possible construction that he can give to the 3d article of the constitution, can justify the opinion he formed of his having a right to decide on this case. The article respecting the judicial, after vesting in congress the right to establish superior and inferior tribunals, defines the important powers they shall exercise, but leaves the boundaries of each to be ascertained by congress. They have accordingly detailed the duties and fixed the limits of the supreme, circuit, and district courts in a manner so clear, that it is astonishing a doubt should have for a moment arisen as to the court really having jurisdiction to decide this question. The district courts have no right to decide on any crime, where the punishment is to exceed thirty stripes, one hundred dollars fine, and six months imprisonment: in any case exceeding these, and particularly for capital offences, however the judge, like any other magistrate, may, on proper testimony, commit for trial, here he has no right to decide: this authority is given to the circuit court. Had, therefore, Robbins been committed for trial in this state, could Mr. Bee have tried him? Certainly not. He must have remained to be tried by the circuit court. With what authority, therefore, could he decide upon a question which not only went to divest the prisoner of his right of citizenship, banish him from his country, and deprive him of the trial by jury, but also to dispossess the circuit court of a right to decide upon as new, delicate, and important a subject as ever came before them: one which I hoped would have been reserved for much more ample discussion and consideration, and in which I should have supposed the public would have been pleased to hear the opinions of all the most experienced counsel at the bar, and to have seen decided by the supreme court. It is no answer to say that the 27th article of the treaty speaks of commitment, because the latter clause qualifies it, and makes this commitment depend upon the evidence of criminality according to our laws; and there is surely an astonishing difference between a mere commitment for trial, and a delivery over to a foreign tribunal. Nor is it more just to say that the law of congress respecting fugitives from justice in the different states makes them deliverable on a bill found or by an affidavit, because they are only removed from one state to another, where the same laws, same right of jury and same forms exist; and what is equal to all, the invaluable right of habeas corpus, where a prisoner, improperly committed, can, after delivery and removal, demand to be brought before a judge, and have the reasons of his confinement examined. But where is the habeas corpus that can, in this situation, reach an unfortunate American? However slight or unfounded the accusation against him, or erroneous the opinion of a single judge who delivered him may be, when once delivered he is forever deprived of this invaluable privilege. The moment the order is given, he is hurried in chains on board an armed cutter, from whence, on his arrival in a distant and foreign port, he is immediately transferred to another vessel, on whose deck, after a summary military trial, he is doomed to meet his fate.

"I will pause here, and ask you, my countrymen, if there is no difference between this and an ordinary commitment by a magistrate for trial here? Your own good sense, and the security you must wish to the rights of your fellow-citizens and yourselves, will best dictate the answer you should give.

"There is another important reason why the judge ought not, upon this occasion, singly to have decided. I think if it had occurred to him he certainly would have postponed the decision until the meeting of the circuit court. It is this: That however all nations may have agreed upon the propriety of delivering up fugitives from justice, in the case of forgery, yet that in times of war, and particularly in revolutions, when different nations hold such opposite opinions upon what are piracy or murder, and what justifiable resistance to tyranny and oppression, when it is so extremely difficult, and requires all the acuteness, and all the knowledge and experience of the ablest judges to draw the line between them, most certainly in this country our judges ought not to have decided in cases that may hereafter be quoted as precedents, without the utmost caution and deliberation. They should have reflected, that in all trials where there was a claim of birthright or citizenship on the part of the accused, and where there was not the fullest and most positive proof of his criminality, that it was safest to try him here.[1] In this instance they ought certainly to have

[1] The following is taken from the advertisement of the British government of Antigua, April 14, 1798, describing Thomas Nash, with the other men that were on board the Hermione: "Thomas Nash, an Irishman, one of the forecastlemen, about five feet ten inches high, dark complexion, long black hair, remarkably hairy about the breast, arms, &c., had left the ship in Porto Cabello, had entered on board either an American or Spanish trading schooner." In this advertisement it is remarkable that Thomas Nash is not called a warrant offi-

done so. The testimony was slight and trivial; it was nearly all hearsay. It was indispensable, therefore, to justice, that the prisoner should have had an opportunity of sending to New York and Connecticut to prove, if he could, his birthright and citizenship, in the case of such delicate importance, and of such slight proof. Could the British government have censured the procedure? It was as easy for them to send their witnesses here, as to have sent an armed cutter to carry him away. Justice would have been done to all parties; and venerating, as their nation is said to do, the trial by jury, a generous and free people would have applauded the respect that was paid to it here.

"To the second question it has been already observed, that this was a new case, in which congress had not legislated, and the more, that if the judge thought proper to assume the power of deciding, he was bound by no particular act of restriction, but at liberty to declare the nature of the evidence on which, in his opinion, so important a decision should have been made. Supposing him, as the district judge, to have been at all authorized to decide, his discretionary power certainly would have extended to this; and the point then for consideration is, that having the power to determine on what evidence so important an order should be founded, what ought to have been his conduct, and what the nature of the proof he should have required? My own opinion, decidedly is, that, he should at least have required such proofs, as a grand jury would have thought sufficient to find a bill. Perhaps he ought to have gone further, and before he consented to his removal into a foreign country and military tribunal, he should have demanded complete proof of his guilt, such as would have induced a petit jury to convict him. But that he should at least have required the proof necessary to find a bill, no one, I think, will contend. The inquiry then is, what is the proof which the English laws and the laws of this country require to enable a grand jury to find a bill? Although I think there are many defects in the administration of justice, such, for instance, as the dependence of the judges on the crown, from which they receive their appointment, and to whom they may be looking up for further promotion and honour; that of being removable by an address from parliament which a minister can always command, and whose views and wishes, therefore, none else but an inflexible magistrate will dare oppose; and, particularly, in the sheriff's having the power to summon whom they please as jurors, and to pack them, if they think proper. Yet there is one part of their system which I have always admired, that is, the institution of a grand jury. Their laws have wisely and humanely considered, that next to the disgrace of being convicted of an infamous offence, is the dishonour of being charged with one; and therefore, before they would submit a subject to the danger and inconvenience of being publicly arraigned, an impartial jury are on their oaths to declare the just cause for accusation. We have copied their system and improved upon it. Our juries cannot be packed; they are drawn by lot, and, in my judgment, criminal trials in this state, are as perfect as they can be. The nature of the evidence which can alone be properly offered to a grand jury, although not entirely conclusive as to the actual guilt of the prisoner, must be such, as if offered to the petit jury, would be legal evidence. Even examinations taken agreeably to 2 & 3 Philip & Mary, c. 10 (of force in this state), can only be given in evidence before a jury, when the court is satisfied the witness is dead, unable to travel, or kept away by the means or procurements of the prisoner. No other examinations can be given, or ought to be received in evidence; and a presentment founded upon any other, would not be that due presentment, without which a citizen's life should not be put in danger.

"The above opinion is founded on the highest law authorities. A learned English judge, speaking on this subject, says: 'The evidence to be given ought to arise to a high degree of probability. Absolute positive proof is not to be insisted upon before a grand jury, and slight trivial suspicion and hearsay evidence, are not sufficient to ground such presentments upon; for although they are only in the nature of a charge, and do not carry a conviction, yet many inconveniences as well as expense and danger attend a charge of this sort, which no subject ought to undergo, but upon legal and sufficient evidence.' This is the law of England on the subject of legal evidence, sufficient to enable a grand jury to find a bill. Our law is taken from, and founded upon it; and the public can now judge, whether the testimony submitted in this case, was such as ought, in one of so much importance and danger to the prisoner, to have authorized his delivery.

"Some distinctions are attempted to be drawn respecting territory and jurisdiction, the counsel for the prisoner having contended, that the treaty entirely alluded to the peculiar exclusive jurisdiction of each. I have no doubt, in my own mind, that Mr. Jay meant no other than the exclusive territorial jurisdiction of each nation. He seems to have carefully omitted the word 'piracy,' aware of the difficulty I have before mentioned, of distinguishing between what may be called piracy, or what laudable resistance to violence and oppression. This omission, therefore, must at once convince us, that Mr. Jay could only have meant private acts of premeditated and deliberate murder, arising from motives unconnected with any attempts which individuals, coming to be the citizens of this country, might at any time make to free themselves from the tyranny of imprisonment. It is wonderful, however, to me, that Mr. Jay having seen the necessity of omitting piracy, did not also omit, at least during the existence of the war, murder also. For, in attempts to regain vessels or escape from impressment, it is certainly as difficult to distinguish what is murder, as what is piracy. Upon an occasion of such importance to the future safety of his fellow citizens, Mr. Jay certainly ought, and will, I suppose, explain, what was his meaning in that article of the treaty. The quotations from Vattel and Rutherford did not apply at all. They are merely meant to refer to the cases of children born at sea, to ascertain, as Vattel does very properly, the right as subjects or citizens of the nation to which the vessel they are born in belongs. To suppose that Vattel designed to extend the doctrine, so far as to mean that the ships of a nation are, with respect to the space of water they cover on the ocean, its territory as to jurisdiction, as completely as its lands or rivers are, is to prove him not only guilty of an inconsistency unbecoming so well-informed an author, but to make him flatly contradict doctrines expressed in other parts of his work. He then contradicts that neutral vessels do not make free goods; and it is on his authority the British rest, more than any other, their right to search neutrals.

"Among the reasons which should make our judges very cautious in deciding against the claim of citizenship, by persons assuming to be

---

cer; he is only advertised as a common seaman, and not charged as one concerned in the murder of the officers. But the most remarkable thing is this, that while Robbins' certificate says that he is a man five feet six inches high, the other (that is the Antigua advertisement) says he is five feet ten inches. Now, four inches is so conspicuous a difference in the height of a man, that surely it was of sufficient consequence in fixing the identity to have deserved attention.

citizens, there is one peculiar to this country, and which should be carefully attended to; it is, the difficulty of distinguishing between the natives of some of the Middle and Southern states, and the natives of Ireland, Germany, and, in some instances, Scotland. The emigrations from those countries to America were formerly very great. Whole counties have been entirely settled by them, with scarce the intermixture of any other The children hearing nothing but the language of their parents, will as naturally have the German, Irish, or Scotch accent, as if they were born in Europe. Instances of this sort must have occurred to any man, the least acquainted with these states. Indeed, it is well known that, in some places, many native Americans, born of German parents, have been met, who could not speak the English language. If, then, any of these men, born of German parents, have become seamen, will it not be impossible to distinguish between them and Europeans? And can there be a more fallacious mode of determining than from the voice or accent? I know of none more so than that of the countenance; and to neither should an acute or experienced judge ever attend.

"I now come to the policy of the measure in the United States. More than any other nation, except Great Britain, ought the privileges of our seamen to be vigilantly attended to—they are the instrument of our commerce, and to them their country must look up as the true means of becoming an important naval power—of having the ability to protect and guard their rights, and to insure to its citizens the blessings of peace: they are more exposed to the attacks and insolence of powerful and overbearing nations than any other class of our citizens, and are therefore more entitled to the care and attention of our public guardians. Possessing as the United States do, bulky products, every day increasing, and to export which great quantities of shipping and numbers of seamen are necessary, to what portion of their citizens can they look with more anxiety than to them? Numerous as they may become within these ten years, who knows to what extent the parental and fostering hand of government may increase them within the like succeeding period? But to effect this we must value and cherish them. We must recollect that they are not our men, but citizens—that they do not, the moment they become impressed by a superior foreign force, lose their rights or become lost to their country. Can it be supposed, because they are seamen, they have no families, no tender connexions, no comforts to endear their homes to them? Rough and boisterous as is the element they traverse, and laborious as are their lives, among none of our citizens are to be found more true independence and generosity, or more ardent attachment to their country. If, then, they have those passions, that impatience of insult, that invincible thirst for revenge, which indignities like impressment and tyranny never fail to provoke, are they to be punished for using opportunities to exercise them? Are they to submit to the manacle and the lash, without a murmur, because they fear their country, however possessing the means, may not have the inclination to protect them? If so, adieu to your commerce and your navy! Your seamen will fly to other governments more sensible of their value, and more disposed to assert and maintain their rights.

"I will here take notice of the letter which the judge was said to have received from the secretary of state, mentioning, that 'the president advises and requests the delivery of the prisoner,' because it has made some noise, and I do not view it in the same light with others. I believe that neither of them meant to influence the opinion of the judge—that they supposed it was a mere matter of course—that there was no doubt as to the identity or country of the prisoner; and they probably never heard of his claim of citizenship; that they were anxious, on the part of this government, faithfully to execute the treaty, and that the letter to the judge had another intent. This I really believe to be the case; but the noise it has made will show the extreme impropriety of the higher executive officers of our government ever touching, in the most distant manner, on any subjects that may come before the judicial. However innocent the intention, as I think it was in this instance, it is very apt to give rise to unfavourable opinions;—and none more dangerous to a community can be entertained, than that of a wish of the executive to influence the judicial. It weakens the confidence of the public in both; and lessens the respect it is their wish to show them. The present instance will probably operate to advantage; because it is to be supposed that after this our secretaries will be careful to avoid ever writing to a judge on any subject that may possibly come before him. In one thing I perfectly agree with Mr. Bee; and that is, in his avoiding to question the constitutionality of the treaty, although I think it constitutional. On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of congress, a doctrine which is not warranted by the constitution, and will not, I hope, long have many advocates in this country.

"I shall here conclude my remarks on this case. They are made in that spirit of deference and respect, which is intended to avoid giving offence, while it examines with candour the subject under discussion. My earnest wish is to draw the attention of congress to the amendment of the act, and to prove to them the necessity of providing in future against the delivery of any fugitives, unless a bill is found against them by a grand jury: to guard them against entering into any articles on this subject in other treaties, unless they assent to it; and particularly to warn them against ever forming any agreements respecting fugitives from justice, except with nations whose citizens possess the right of trial by jury, and are willing to reciprocate so indispensable a provision.

"A South Carolina Planter.

"Charleston, August 3d, 1799."

(The following are such of the documents appended to the above letter as are not contained in the president's message of Feb. 7, 1800, given post):

Letter from Mr. Moodie, British consul at Charleston, to Judge Bee:

"Charleston, Nov. 27, 1799.

"Sir: In consequence of the very great opposition made to the delivering up under the 7th article of the treaty of amity, &c. Thomas Nash, alias Nathan Robbins, one of the principal mutineers on board his Britannic majesty's late ship Hermione, and of the numerous publications on that subject, as well in this as others of the United States, I wrote to Admiral Sir Hyde Parker, requesting he would send me minutes of the court martial, meaning to communicate the contents to you; but being informed that a compliance with such request would have been contrary to the rules of the British navy, I beg leave to enclose you a copy of the admiral's answer, which I consider fully adequate to the purpose I intended. Whilst on this subject I cannot help remarking, that about the time my counsel moved for a habeas corpus, I happened to be in the court of common pleas, when Mr. Ker, a gentleman of the bar, addressed me, and mentioned his intention to oppose the delivery of the prisoner,

under an idea of his being a citizen of the United States of America: on this I expressed some surprise, that a person should at so late a day interest himself in behalf of the prisoner, particularly as his majesty's cutter Sprightly had been here a very short time before for the purpose of carrying him off, and that it was from your opinion of the transaction being an executive one, that he was not then delivered up: he answered that Mr. Sasportas* had spoken to Colonel Moultrie and himself. I have the honor to be, sir, your most obedient humble servant, Benjamin Moodie.

"The Hon. Thomas Bee, Esq."

Extract of a letter from Admiral Sir Hyde Parker, to Benjamin Moodie, Esq., his Britannic majesty's consul in Charleston; dated on board the Abergavenny, in Port Royal harbour, Jamaica, 13th September, 1799:

"Sir: I have received your letter of 21st of last month, with a copy of another (not yet received) of the 3d of same month; and in answer to both, am to acquaint you that Nash has been executed and hung in chains, agreeably to the sentence of a court martial, and that he confessed himself to be an Irishman: and it further appears by the Hermione's books† that he was born at Waterford; on the 21st of December, 1792,‡ entered a volunteer on board the Dover; received three pounds bounty money, and was removed to the Hermione 28th January, 1793, and with respect to transmitting minutes of his trial, that is not in my power, but rests with the lords of the admiralty only."

"I had the command of the boats of the squadron on the day of his execution, and attended with them to see his body hung in chains, agreeably to an order for that purpose, from Sir Hyde Parker, Kt., commander-in-chief, &c., &c., at Jamaica. Geo. Hans Blake,

"Late commander of his majesty's sloop L'Ameranthe."

"The foregoing was duly attested before me this 29th November, 1799.

"John Mitchell, Q. U."

Letter from Mr. Moultrie to Mr. Moodie:

"To Benjamin Moodie, Esq., His Britannic Majesty's Consul in Charleston—Sir: Having discharged my duty as a counsellor in the case of Jonathan Robbins, and having but little time to bestow on newspaper altercations, it was neither in my expectation nor my wish to be called forth further on this subject, and especially, as the author of a publication in a newspaper; but, sir, I find I am indebted to your politeness and moderation, or the zeal of your printer, (if he is your commentator,) for this occasion of my coming forth in this publication. In your letter of the 27th ultimo, to Judge Bee, respecting the case of Robbins, you conclude by saying you were informed by Mr. Ker, that Mr. Sasportas had spoken to Mr. Ker and myself as Robbins' counsel, and with an asterism annexed to the word Sasportas, referring to an annotation below, this brilliant note is in italics, as follows:—'Mr. Sasportas was the agent for the French Republic at the time their cruisers were permitted to sell their prizes in this port. The records of the District Court in Admiralty causes will prove this.' If I understand right, and can read right, and if I understand the sentiments and views of the advocates of your nation in this country, (and think I have contemplated them since the dawn of our Revolution,) this bright note and those capitals are intended as an insinuation to the world, that French influence was at the bottom of Robbins' defence, consequently was the mover of his counsellors. If I am mistaken, sir, in my sentiments you will pardon me, and I hope at the same time correct the error; but, sir, these sentiments are the natural impressions of your conduct, and I will hold them till properly effaced. The cry or insinuation, sir, of French influence may be an admirable engine of British policy in this country, and serve to promote many of their purposes, but as to myself or any injury it may work towards me in this case, you have lost your aim, sir. The mens conscia sibi recti defies your attack; your shaft has no sting, sir, its poison is ineffectual; and your own disappointment shall be your own punishment. When I was first called on in Robbins' case I considered it generally and gave my opinion that I thought such was the prevailing influence of opinions and sentiments of those in power, that every effort would be vain; he had not then been represented to me as an American citizen, and I considered the case on the point of jurisdiction only. I gave it but a short consideration, and soon determined, and thought no more of it. Matters rested thus for some days—till the day before Robbins was tried. I was then accidentally informed, in conversation with a friend, that Robbins was an American. I was struck and alarmed to think I had deserted him. I immediately went to Mr. Ker and desired him to prepare himself for the argument next morning. I went home and considered the case, and met Mr. Ker in court the next day. I had never yet seen Robbins, nor had I ever any intercourse with him till he was pointed out to me, and I went up and spoke to him in court, the day of his trial; nor had I till then ever seen one of his papers. On my coming into court, amongst the first things I did, I asked the clerk for the papers, and amongst them found Robbins' certificate of nativity and citizenship. I examined it and found it had every mark of authenticity; no erasure, no obliteration; that its colour and appearance were natural and correspondent with its date, and that the handwriting of the notary was genuine and can be proven here. But one thing further struck me: on inquiring of the clerk if this paper was found on Robbins when first taken, and being informed it was, I was of opinion it was genuine; and was clear if it was not, it was no fabrication in Charleston. Under these circumstances, sir, I undertook the cause of Robbins; a cause, sir, in which the rights of mankind and those of my country were deeply involved; a cause, sir, which I held myself bound in duty, as an American, to defend and support; which pointed at the constitution and vital principle of American independence. And, give me leave further to tell you, that in this cause, I neither undertook it from French influence or an idea of advancing their interest, nor from the promise or expectation of any fee or reward, and that I never have received any such. Every one, sir, who knows me, knows my politics; they have been uniform since 1775, and I hope will continue so to my latest hour. I honour and respect all nations: but I hate tyrants. I love my country and will defend its freedom. I am, sir, with due consideration, your humble servant, Alexander Moultrie."

Letter from Mr. Sasportas:

"Messrs. Freneau & Paine: The unexpected attack of Mr. Moodie, the British consul, in Timothy's paper of Monday last, I am induced to notice, not from any apprehension of its injurious effects on the public mind, respecting my

---

* Mr. Sasportas was the agent for the French republic, at the time their cruisers were permitted to sell their prizes in this port. The records of the district court in admiralty causes will prove this.

†Copies of the ship's books and accounts of the British navy, are made up every two months, and transmitted to the lords of the admiralty. The admiral procured transcripts of this ship's books, in order to describe the persons and names of the crew.

‡Jonathan Robbins' certificate was dated at New York, 20th May, 1795.

conduct in the case of Robbins, because the publication bears its own insignificance on the face of it; but, as he has thought proper to arraign the motives which induced me to employ counsel in his behalf, I shall briefly relate the circumstances which brought Robbins under my observation. Being drawn to serve as a grand juror for the district of Charleston, we were requested by the court to visit the jail, in order to make a report of the state of the same. In the exercise of this duty I saw Robbins, confined in irons; who communicated to me the cause of his commitment, and his defence to the charge, viz: that of his being an American citizen, impressed by the English. From his relation, and his certificate of citizenship then shown me, I was induced to employ counsel in his behalf, in order that his innocence or guilt might be established by an appeal to the laws of the country. The world must be at a loss to trace any connection between my conduct on this occasion and my having acted as commercial agent for the republic of France upwards of six years since. Hence, it follows that Mr. Moodie can have no other object in view than a desire to establish a prejudice against me in the eyes of my fellow-citizens. Mr. Moodie states that he expressed his surprise to Mr. Ker, that at so late a day he meant to oppose Robbins being delivered up. The fact is I had spoken to the counsel the very day I saw the prisoner in jail, but his avocations, I presume, did not permit him to attend to the case. The consequence was, that rather than the cause should be wholly neglected, I applied to other counsel, with whose exertions I have no reason to be dissatisfied. But I presume this is the first instance where a prosecutor has assumed to himself the right of dictating to the accused party, when, and how he shall seek redress. I am, gentlemen, your most obedient servant, Abraham Sasportas.

"N. B. No one knows better than Judge Bee that I was agent to the French republic, and no one knows better than myself that Mr. Moodie was agent for the British government; by the repeated vexatious impediments which were raised up by him in every case, without the colour of a legal defence. The numerous decrees of the supreme court of the United States, in favour of the captors, prove the fact."

Immediately upon the meeting of congress a call was made upon the president for papers, &c., connected with Robbins' surrender, to which the following answer was given:

"Message from the president of the United States, transmitting a report of the secretary of state, and sundry documents relative to the requisition for and delivery of Jonathan Robbins, in pursuance of a resolution of the house of representatives of the 4th instant.

"Gentlemen of the House of Representatives: In consequence of your request, to me conveyed in your resolution of the fourth of this month, I directed the secretary of state to lay before me copies of the papers intended. These copies, together with his report, I now transmit to the house of representatives for the consideration of the members. John Adams.

"United States, February 7, 1800."

"Report.

"Department of State, February 6, 1800.

"The secretary of state has prepared, as directed, and now respectfully submits to the president of the United States, copies of the papers which probably were contemplated by the house of representatives in their resolve of the 4th instant, although no requisition, as the resolve supposes, has ever been received, nor any communication made to the judge of the district court of South Carolina, concerning any man by name of Jonathan Robbins. But by the proceedings before that judge, as they have been published, it appears that a seaman named Thomas Nash, the subject of the British minister's requisition, did assume the name of Jonathan Robbins and make oath 'that he was a native of the state of Connecticut, and born in Danbury in that state.' The secretary, therefore, besides the copy of the requisition, and the copies of his letter to the judge of the district court of South Carolina, and of the judge's answer, has prepared, and herewith encloses, copies of the certificates of the select men of Danbury, and extracts of letters from Admiral Sir Hyde Parker, satisfactorily proving that the Thomas Nash calling himself Jonathan Robbins, who, on the requisition of the British minister, was delivered by the judge aforesaid, with the assent of the president of the United States, was not an American citizen, but a native Irishman, who, to his other crimes, added perjury, in the hope thereby to escape the punishment due to piracy and murder. The original certificates of the select men and town clerk of Danbury are in the secretary's possession, and he has compared the extract of Admiral Parker's letter to Mr. Liston with the original, and the extract of the admiral's letter to the British consul at Charleston with the passage as recited in the consul's original letter to Mr. Liston. All which is respectfully submitted. Timothy Pickering."

(No.1.)

Copy of a note from Robert Liston, Esq., envoy extraordinary and minister plenipotentiary of his Britannic majesty, to Timothy Pickering, secretary of state of the United States:

"R. Liston presents his respects to Col. Pickering, secretary of state. A seaman of the name of Thomas Nash having beeen committed to jail in Charleston, South Carolina, at the instance of his majesty's consul there, on suspicion of his having been an accomplice in the piracy and murder committed on board his majesty's ship Hermione, and information of the circumstance having been transmitted to Admiral Sir Hyde Parker, a cutter was dispatched to Charleston with an officer on board, to whom the man was well known, in order that his person might be identified, and that he should be carried to the West Indies for trial. But, on the application of the consul for the restoration of Nash, in conformity to the treaty of 1794, Judge Bee and the federal attorney were of opinion that he could not with propriety be delivered up without a previous requisition on my part made to the executive government of the United States. May I therefore request, sir, that you will be pleased to lay this matter before the president, and procure his orders that the said Thomas Nash be delivered up to justice.

"Philadelphia, May 23, 1799."

(No. 2.)

Letter from the secretary of state to Judge Bee:

"Department of State, Philadelphia, June 3, 1799.

"Sir—Mr. Liston, the minister of his Britannic majesty, has requested that Thomas Nash, who was a seaman on board the British frigate Hermione, and who, he is informed, is now a prisoner in the jail of Charleston, should be delivered up. I have stated the matter to the president of the United States. He considers an offence committed on board a public ship of war on the high seas to have been committed within the jurisdiction of the nation to whom the ship belongs. Nash is charged, it is understood, with piracy and murder, committed by him on board the above mentioned British frigate, on the high seas, and consequently 'within the jurisdiction of his Britannic majesty,' and therefore, by the 27th article of the treaty of amity with Great Britain, Nash ought to be delivered up, as requested by the British minister, provid-

ed such evidence of his criminalty be produced as, by the laws of the United States or of South Carolina, would justify his apprehension and commitment for trial, if the offence had been committed within the jurisdiction of the United States. The president has, in consequence thereof, authorized me to communicate to you 'his advice and request,' that Thomas Nash may be delivered up to the consul or other agent of Great Britain who shall appear to receive him. I have the honour to be, &c., &c.

"(Signed) Timothy Pickering.

"The Honourable Thomas Bee, Esq., Judge of the District Court of South Carolina."

(No. 3.)

Letter from Thomas Bee, Esq., to the secretary of state, dated:

"Charleston, South Carolina, 1st July, 1799.

"In compliance with the request of the president of the United States, as stated in your favour of the 3d ult., I gave notice to the British consul, that at the sitting of the district court on this day, I should order Thomas Nash, the prisoner charged with having committed murder and piracy on board the British frigate Hermione, on such strong evidence of his criminality as justified his apprehension and commitment for trial, to be brought before me on habeas corpus, in order to his being delivered over, agreeably to the 27th article of the treaty of amity with Great Britain. The consul attended in court, and requested that the prisoner should remain in jail until he had a convenient opportunity of sending him away. I have therefore directed that he remain in prison until the consul shall find it convenient to remove him. I have the honour to be, with great respect, your most obedient servant,

"Thomas Bee,

"District Judge of South Carolina.

"Honourable Timothy Pickering, Secretary of State."

(No. 4.)

"Danbury, Sept. 16th, 1799.

"We, the subscribers, select men of the town of Danbury in the state of Connecticut, certify that we have always been inhabitants of said town, and are from forty-five to fifty-seven years of age, and have never known an inhabitant of this town by the name of Jonathan or Nathan Robbins, and that there has not been, nor now is, any family known by the name of Robbins within any limits of said town.

"Certified per: Eli Mygot.

"Eben Benedict.

"Justus Barnum.

"Ben. Hichcop."

"Danbury, September 16th, 1799.

"The subscriber, late town-clerk for the town of Danbury, in the state of Connecticut, certifies that he kept the town records twenty-five years, viz.—from the year 1771 until the year 1796; that he is now 56 years of age, and that he never knew any person by the name of Robbins born or residing in the said town of Danbury, during that term of twenty-five years, before or since. Major Taylor."

(No. 5.)

Extract of a letter from Admiral Sir Hyde Parker to Robert Liston, Esq., envoy extraordinary and minister plenipotentiary of his Britannic majesty to the United States, dated:

"Port Royal Harbour (Jamaica), September 9th, 1799.

"I have had the honour of receiving duplicates of your excellency's letters numbered 10, 11 and 12, and in answer thereto, acquaint you that in consequence of Nash, one of the ringleaders in the mutiny, murders, &c., on board the Hermione, being delivered up by the United States to me, he has been tried at a court-martial, and sentenced to suffer death, and afterwards hung in chains, which sentence has been put in execution. He acknowledged himself to be an Irishman."

(No. 6.)

Extract of a letter from Benjamin Moodie, Esq., consul of his Britannic majesty at Charleston, (South Carolina,) to Robert Liston, Esq., envoy of his said majesty to the United States, dated:

"November 19th, 1797.

"In consequence of many obstacles I had to encounter in obtaining the delivery of Thomas Nash, late of his majesty's ship Hermione, and of the numerous publications to the northward, and in this place, I wrote to Admiral Sir Hyde Parker, requesting he would be good enough to send me minutes of the court-martial; to which he answered under date 13th September—I am to acquaint you that Nash has been executed agreeably to a court-martial, and that he confessed himself to be an Irishman: and it farther appears by the Hermione's books that he was born at Waterford; on the 21st December, 1792, entered a volunteer on board the Dover, received £3 bounty-money, and was removed to the Hermione, 28th of January, 1793. And with respect to transmitting the minutes of his trial, that is not in my power, but rests with the lords of the admiralty only."

The following letters subsequently were produced to the house:

Extract of a letter from the secretary of state of the United States, to the president of the United States, dated:

"May 15th, 1792.

"Mr. Liston informs me, that an information received by Admiral Sir Hyde Parker, of one of the mutineeers and murderers of the officers of the British frigate Hermione, being at Charleston, South Carolina, the admiral sent thither a vessel on purpose to receive and carry the culprit to the fleet to be tried; but that the district judge had not deemed it proper to deliver him up. This question has occurred before, respecting the crew of the Hermione, in consequence of some of them being apprehended in New Jersey, where they were tried and acquitted. One only was detained some time longer, on a suggestion or expectation of decisive evidence against him: but it appeared afterwards that this man was not involved in the offence, and at Mr. Liston's request he was discharged. The only and legal question was, whether an offence committed on board a public ship of war, on the high seas, was committed within the jurisdiction of the party demanding the offender, on a just construction of the 27th article of the treaty. Upon a further consideration of the subject. I am inclined to answer in the affirmative; I supppose the offence committed on board the Hermione to have been a most atrocious act of piracy accompanied with murder: that all nations having jurisdiction in this case, if the pirates be found within their dominions, any of them may try and punish them; but wanting the full evidence for that purpose, it would seem reasonable, and essential to the due administration of justice, that the culprits be delivered up to the government of the country to which they belong; all nations being interested in the punishment of such pests to society. On the point above-mentioned about the jurisdiction, it may be observed, that besides the general concurrent jurisdiction held by Great Britain on the high seas, her officers have, and exercise, a particular jurisdiction on board of their own ships. For these reasons, and as the 27th article of the treaty especially requires the delivering up of murderers, I respectfully submit my opinion, that the judge of the district of South Carolina should be directed to deliver up the offender in question, on the demand of the British government by its minister."

Extract of a letter from the president of the United States to the secretary of state, dated:

"Quincy, May 21st, 1799.

"Your favour of the 15th is received. I have no doubt that an offence committed on board a public ship of war, on the high seas, is committed within the jurisdiction of the nation to which the ship belongs. How far the president of the United States would be justifiable in directing the judge to deliver up the offender, is not clear. I have no objection to advise and request him to do it."

House of Representatives, Feb. 21, 1800.

Mr. Livingston, in consequence of a reference of the message of the president on the case of Jonathan Robbins to a committee of the whole house, and of another resolution proposed by Mr. Bayard thereupon which had also been so disposed of, the amount of which resolution was an approbation of the conduct of the executive in his proceeding on that subject, proposed the following resolutions: "Resolved, that it appears to the house that a person calling himself Jonathan Robbins, and claiming to be a citizen of the United States, impressed on board a British ship of war, was committed for trial in one of the courts of the United States for the alleged crime of piracy and murder, committed on the high seas, on board the British frigate Hermione. That a requisition being subsequent to such commitment, made by the British minister to the executive of the United States for the delivery of the said person (under the name of Thomas Nash) as a fugitive, under the 27th article of the treaty with Great Britain, the president of the United States did, by a letter written from the department of state to the judge who committed the said person for trial, officially declare his opinion to the said judge that he 'considered an offence committed on board a public ship of war to have been committed within the jurisdiction of the nation to whom the ship belongs,' and in consequence of such opinion and instruction, did advise and request the said judge to deliver up the person so claimed to the agent of Great Britain, who should appear to receive him, provided only, that the stipulated evidence of his criminality should be produced. That in compliance with such advice and request of the president of the United States, the said person so committed for trial, was, by the judge of the district of South Carolina, without any presentment or trial by jury, or any investigation of his claim to be a citizen of the United States, delivered up to an officer of his Britannic majesty, and afterwards tried and executed on a charge of mutiny and murder. Resolved, that inasmuch as the constitution of the United States declares that the judiciary power shall extend to all questions arising under the constitution, laws and treaties of the United States, and to all cases of admiralty and maritime jurisdiction, and also that the trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the state where such crimes shall have been committed, but when not committed within any state, then, at such place or places as congress may by law have directed; and inasmuch as it is directed by law, that the offence of murder committed on the high seas shall be deemed to be piracy and murder, and that 'all crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought.' Therefore, the several questions, whether the aforesaid crime of piracy or murder was committed within the exclusive jurisdiction of Great Britain; whether it comes within the purview of the said 27th article; and whether a person stating that he was an American citizen, and had committed the act of which he was accused in attempting to regain his liberty from illegal imprisonment, ought to be delivered up without investigation as to his citizenship, or inquiry into the facts alleged in his defence, are all matters exclusively of judicial inquiry, as arising from treaties, laws, constitutional provisions, and cases of admiralty and maritime jurisdiction. That the decision of those questions by the president of the United States, against the jurisdiction of the courts of the United States, in a case where those courts have already assumed and exercised jurisdiction; and his advice and request to the judge of the district court, that the said person thus charged should be delivered up, provided only, such evidence of his criminality should be produced as would justify his apprehension and commitment for trial, are a dangerous interference of the executive with judicial decisions; and that the compliance with such advice and request on the part of the judge of the district court of South Carolina, is a sacrifice of the constitutional independence of the judicial power, and exposes the administration thereof to suspicion and reproach."

The question of a reference to a committee of the whole was taken and carried: ayes, 55.

Tuesday, February 25th.

The house having resolved itself into a committee of the whole, on the message of the president respecting Jonathan Robbins, Mr. Edmond was called to the chair. A short debate took place, whether the committee should take up the business of the resolution first proposed by Mr. Bayard, or on those subsequently offered by Mr. Livingston. Mr. Bayard seemed inclined to withdraw his motion, but the committee seeming of opinion that both resolutions were within their jurisdiction, and that they might proceed on either, the question was taken whether the committee should proceed on the resolution of Mr. Livingston, and carried in the affirmative. Messrs. Bayard, Rutledge, Otis, &c., voting in favour of the question; and, Messrs. Livingston, Nicholas, &c., voting against it. Mr. Livingston entered upon an argument in support of the resolutions which he had some days before submitted to the house, and which now were taken up. Soon after he began the discussion he was proceeding to read a deposition of Jonathan Robbins, and certificates accompanying the same, to prove himself a citizen of the United States, in which the deponent swore, before the court of South Carolina, that he was born at Danbury, in the state of Connecticut, and that he was impressed from on board the American brig Betsey, by the crew of the British frigate about two years before, where he was detained, contrary to his will, until the mutiny occurred: when Mr. Bayard opposed the reference to a fact so incompetently authenticated as the report of a case upon newspaper testimony, especially when, if it had been the desire of the gentlemen to have introduced it as evidence, it was extremely easy to have procured the record of the court before he proceeded on his allegations. If such evidence as this was to be admitted, other, and perhaps more important, might next be introduced to oppose upon the committee. Besides, it certainly must be looked upon as ex parte evidence, which it was impossible to repel. Mr. B. submitted to the house, whether it could be in order to admit any such evidence to support the resolutions when all the documents which had been asked for, and which had come to the knowledge of the executive, had been admitted to the house. Mr. Gallatin, on the question of order, contended for the admission. This document, he said, was referred to as authentic, in his letter. That, by the proceedings before the judge (Bee), as they have been published, it appears that a seaman named Thomas Nash, did assume the name of Jonathan Robbins and make oath that he was a native of the state of Connecticut, &c. Certainly it cannot be improper to refer to the identical document there mentioned. If it was proper for the secretary of state to make the allusion, the house could

take it up under the same idea. He did not think it was introduced as evidence before the committee. Mr. Dana said he was very sorry the gentleman had been interrupted; he could not think of admitting it as evidence, but the gentleman might read it as part of his speech, which perhaps might otherwise have a chasm in it. Mr. Bayard was fully of opinion with the mover of these resolutions, that it was a very serious business; he believed that there was a very serious object in view. He believed the affidavit was introduced as evidence, also why should the gentleman have taken this in the rotation, after he had been stating the facts contained in the message.

It was further said that this deposition was referred to by the secretary. Surely then it was introduced as evidence upon that authority, but how had the gentleman been assured that this was the same deposition, an extract of which was taken by the secretary? Did it follow that because the secretary referred to a printed paper, that this was the authentic one? He presumed no gentleman would vouch for the veracity of this paper. The secretary had only extracts from the document of such parts as he deemed necessary for the information of the house, supposing this was the case meant. Mr. Nicholas was surprised that the gentleman should oppose the reading of what he supposed the secretary had authenticated copies of in his office; the secretary had certainly referred to an authenticated affidavit which was published, and it was presumable this was the one. The result of this declaration must be, if the gentleman thinks the house is imposed upon by a reference to a false paper, that the committee must rise, and the house ask for the authentic copies, which may aid their decision. But, Mr. Nicholas thought the information was sufficiently authentic; the house had asked the papers of the president, some papers were sent, and instead of sending this original paper, he had referred to the printed report. This had never been contradicted, and had every appearance of authenticity. He really hoped that the objection would not be insisted on, and the discussion arrested in this stage. Mr. Rutledge hoped the paper might be read, but not for the purpose for which it was introduced; he wished it as part of the gentleman's speech, but he did not think this was the proper time; he did not think the gentleman was come to that chasm in his speech which was supposed by the gentleman from Connecticut. The gentleman had produced facts and stated evidence, among which he was proceeding to introduce this paper. Mr. Rutledge said he was willing to procure all the information, and that other gentlemen should also be possessed of it, on which account, when the subject was first mentioned, he moved its reference to a select committee; in that case, all the facts and every necessary light would have been procured, but it was referred to a committee of the whole. Mr. Sedgwick (as speaker), thought as this was merely a question of order, and as the acts and deliberations of the committee of the whole were prescribed, it could only have been proper to have made it an act of the house. The committee of the whole, he said, were limited to the documents referred to it by the house, and if they found them insufficient, it was their duty to rise and go to the house for more. If it was the intention of the gentleman to read this as evidence, (which we must suppose was intended,) and it was not evidence, it might shed darkness, but it could not illuminate. He was surprised, that gentlemen, who were sitting there in their inquisitorial capacity, should bring forth charges of a serious nature against two officers, of high confidence, and, deservedly so in the public opinion, upon evidence which cannot be deemed authority, when, for merely asking, they could receive that which was authentic. Mr. S. said, he was not afraid of the reading of any papers whatever, on any subject, because he must possess a desire to come at the whole truth. "If there be a man," said he, "who possesses the public confidence unworthily, strip him of that confidence and his power too, but do it not, sir, on bare newspaper publication." Mr. S. said, that his reasons for opposing the reading were, not because that paper was deficient of that formality which courts of justice require; he should, therefore, waive formalities, except the evidence should appear evidently false. But the deposition itself he believed to be perfectly irrelevant to the object of inquiry. It was not, in his opinion, material whether this man claimed to be an American citizen or not, nor was it material whether the paper under question was in the office or not; he thought the only inquiry to be, whether the president had interfered with the judicial authority or not; and, whether the judge had been guilty of a breach of his duty, in obeying the orders given him by the executive of the United States. There were, to be sure, allusions made to a printed trial, but it was by the secretary of state, and not by the president; he had said no such thing, and therefore he was not culpable. The only thing which he believed the president considered was, what must appear a very clear and well ascertained fact, to wit: that a ship or vessel, of any power, was to be considered as the jurisdiction of that power to whom it belongs, and not whether the man was an American citizen or not. Mr. Livingston said, he did wish to read this paper as part of his speech, and he believed it a very material part, because it was a justification of a point which he wished to establish. He wished to show the committee, that Jonathan Robbins claimed to be an American citizen, and that he said he was impressed; this he swore in court, and that he did so he hoped would be admitted. He said he only introduced it with this view. Surely he could not be so far mistaken in his law knowledge as to be thought to have said, that the culprit could be evidence in his own behalf. If he did say he was a citizen, then the matter, upon examination, must appear more serious than gentlemen would be willing to think. "Did the speaker think it was his desire," Mr. Livingston asked, "to criminate the man who stood so deservedly high in the public estimation?" Surely the mere reading of this paper could not contribute to that crimination, since it was with the other papers, furnished to the house, as documents which were asked for by the house. The house received their papers (this among others, for to this the secretary referred the house) to assist them in forming their judgment. If "newspaper evidence" was given to the house, if unauthenticated affidavits, who then was to blame? The house asked for all papers relative to the subject, the president furnished this, and therefore, if any blame attached, it must be to him.

It was said, that this paper was in the office of the secretary of state; that this was not an act of the president, that this was a report of the secretary of state, and that he only was answerable for it. "Sir," said Mr. L., "when the president says, that he, in conformity to the request of the house, had ordered the secretary to bring him the papers, and that he submits them to the house for their consideration, does he not take the act off the secretary and appropriate it to himself? Certainly he does. The conduct of the gentlemen must appear a little strange when it is considered that a part of these papers, such as certain affidavits from Connecticut, that Robbins was not born there, and a letter from the British admiral in the West Indies, stating that he was an Irishman, and entered into the service,—I say it is unaccountable that gentlemen are willing to admit this part of the report, which was never required by the house, and refuse another part which was, and of which it was the duty of the house to be informed, if information could

be had. Information is had, but it must not be admitted! Sir, this is to be considered as an act of the president. It is to be considered that this affidavit is quoted and ought to be wholly read, since it is the part upon which we are to proceed to the investigation."

Mr. Bayard had no doubt but it was the gentleman's intention to impress the force of the facts contained in that paper, upon the minds of that committee; and, to suppose it would have no impression, would be absurd. It would afterwards be said that this man was admitted to be an impressed American citizen, and that he was praiseworthy in committing what would then be called the homicide. The decision of the committee would be much affected, he said, by the kind of evidence which was alleged. If this was admitted, it would be impossible to ascertain the extent of the principle. Other depositions may be produced; indeed, he had no doubt but the gentleman could get proof to any point which he might think it material to ascertain. In saying this, he did not mean to insinuate that any improper steps would be taken by that gentleman, but there were volunteers enough to be found who would step forward, in order to answer party purpose, and make oath of anything. But what the gentleman had now acknowledged, his reference to that paper was a work of supererogation; he now said, that he only wanted to prove that the man claimed to be an impressed American citizen. This is admitted in the letter of the secretary of state—"Sir," said Mr. B., "you are about to inculpate the conduct of the president, and of the district judge of South Carolina; and to do this, shall you do it on the affidavit of a man at the hazard of his life; and a man who could commit murder and piracy, for which he was then going to be executed? It was the last resource of the wretch himself." Mr. B. had no doubt, but the gentleman would have brought that paper as evidence, and though derived from the vilest possible source, he would certainly have turned it to serve his point. With this idea, and for the sake of consistency, (for the rules of the house would admit in any other part of the examination, what was now admitted,) and viewing the principle injurious, he had thought it his duty to put a stop to it in time. Mr. Livingston supposed he should increase the astonishment of gentlemen still more, when he declared, that he did not believe a word of the affidavit, but he believed Nash was an Irishman, and that he entered on board and committed all the crimes charged to him. It was clear that the affidavit could not be evidence. In admitting this, he believed he did not surrender one point of the resolutions; he should prove that all he wished to ascertain was that such a claim was made to the court. Mr. Gallatin did not consider the question to be, whether this should be considered as evidence, but whether the gentleman might be permitted to read the paper—whether as part of his speech or whatsoever. It was certainly no legal evidence, and therefore if a trial was holding, or if the ground was an impeachment, refusal would be proper; but upon what ground the gentleman was interrupted at this time was inconceivable, except it was to throw all possible impediments in the way of the investigation. The letter from the British admiral to the British consul was not legal evidence, but yet that was inserted in the report of the executive, that was sent no doubt to disprove some fact which was related. What was that fact? Why, that this man had laid claim to citizenship; and surely, while the gentleman was stating the facts contained in his resolutions, he had a right to elucidate that fact by reading a paper so intimately acquainted therewith. Mr. G. said, he did not know what use the gentleman made of this paper, but it is certainly proper to hear what he intended by the reference, before he ought to have been stopped. There certainly could be no doubt, Mr G. thought, that the secretary of state knew this affidavit to be authoritative, by the reference he made to it. If this paper could not be read for himself, he should wish to procure further information, before he should think it proper to proceed. Mr. Bayard asked, where could be the necessity of proving a fact which every member of the house was willing to admit? No man but would acknowledge that Nash claimed to be an American citizen; but perhaps the will of the gentleman was to have additional light on this subject, on which account he introduced the deposition. Mr. B. said, he was willing only to proceed upon what the house knew from the documents before them, and not take a step on precarious ground. It must be well known what the gentleman wanted to get this admission for: he no doubt wished to prove that upon his own mere suggestion, that he was an American citizen, and that he was impressed, he was entitled to a trial by jury in this country, and on that account, that the act of sending him away was unconstitutional. This would lead to an extensive field of argument. If there was any necessity for more evidence, or to call witnesses to the bar of the house, let proper measures be taken to procure it, but let it not come forward in any other way. Mr. Dana read the resolution first offered to the house for a call of papers relative to Jonathan Robbins.—This was answered, he said, by the secretary of state, that no requisition or proceedings had been had in that name, but he presumed allusion was made to the case of Thomas Nash, concerning whom proceedings were had in the district court of South Carolina in that way, and that only the secretary made reference to the printed report. In this blundering way, Mr. Dana said, the business was begun. (He was called to order.)—In addition to this, he said the proceedings of gentlemen were erroneous, but notwithstanding that, Mr. D. said he would gratify the wish of the gentleman as far as his vote would go, to read it, but only as part of his speech; no doubt he wished to support some point of his argument by it, and in that view he had a right to read it; but that it was evidence, he denied. General Lee said, he did not profess to understand the rules of the house perfectly, but he must indulge a presumption, that they could have but one grand object in view, to encourage and maintain full and fair discussion, on every subject, whatever it might be, that could come before the house. That being necessary, surely a rule must be bad, indeed, that would bar a gentleman from reading anything that might tend to elucidate the subject. He therefore, thought it the duty of the committee to allow the gentleman from New York to read this, and every other paper which might enable him to proceed on so serious a charge as the one exhibited in the resolutions. Were not gentlemen fully adequate to judge what may be wrong, when he should come to the application? If he asked the papers of the president of the United States, was he to be content with those only which should come through his ministers? That could not be the true ground of proceeding. Suppose the gentleman be stopped from reading what he thinks material, and the resolutions which he has introduced should afterwards be negatived; "I pray you to say, sir," said Mr. Lee, "what would be the consequence? Would not the people say that no other possible decision could be had by the house, because the committee of the whole laid their hand upon every effort the gentleman used to substantiate his charges? They certainly will, and no act can more increase the means of the opposition to the measures of the government." Upon this ground he hoped the gentleman would be permitted to proceed, and the whole truth be made to appear. If gentlemen should determine it out of order, he would move that the committee rise in order to get hold of all the authentic papers.

The chairman having stated his reasons, con-

cluded with an opinion that the member could not proceed to read the affidavit.

Mr. Gallatin appealed to the committee from the decision of the chair, when there appeared 39 in favour of the decision, and 48 against it.

Wednesday, Feb. 26th.

Mr. Davis moved, that the committee of the whole house be discharged from the further consideration of the resolutions proposed by Mr. Livingston and Mr. Bayard on the subject of Jonathan Robbins. The small progress, Mr. G. said, which was made yesterday in the discussion, fully convinced his mind that nothing at all would be done in it; besides, were he convinced that the discussion would be impartially conducted, he did not know of any possible good that could arise from the adoption of the resolutions. If there had been any error in the proceedings of the executive, he conceived that error would correct itself. If there was an improper interference, he was certain it could not have arisen from improper motives, and therefore he sincerely hoped he should not be called upon to give an opinion on the subject. Nor, on the other hand, was he at all prepared to compliment the executive, or any officer of the government, for having done what he thought to be right. If he had done right, it was his duty. He did not think it of any great importance, but most assuredly, if the argument was extended, it would be made a case of great importance. It was better, however, to let the case of Jonathan Robbins sleep in the committee of the whole, where it was. He was not prepared to criminate, nor was he prepared to applaud. Mr. D. did not think the evidence before the house was sufficient to form a decision upon, and he professed himself unable to make up a determinate opinion; but if he could form any, the deficiency of evidence furnished must raise his suspicion. Reference was yesterday made to a paper; it might be authentic or it might not: it was impossible to say to what papers gentlemen might be disposed to refer, and for gentlemen to sit there as judges having papers read the authenticity of which it was impossible to know, was to judge in the dark. He hoped that if the house were not prepared to discharge the committee of the whole, they at least were for a call for such authentic papers as could be procured, for from the present documents it was impossible to form a correct judgment upon this very disagreeable and irksome business. He had no doubt but many gentlemen had formed their judgments one way or the other, but he had not. Mr. Randolph said that no gentleman had a higher respect for the motives of the gentleman from Kentucky than himself; but however disagreeable it might be, he must differ from him in his present opinion. He really hoped the gentleman would reconsider the motion he had made, and not stop the gentleman from New York in this early stage of the business. If there were any defects in the papers, and their authenticity was questionable, it must not arise from the gentleman from New York, but from those whose duty it was to furnish all the facts relative to the business. He was obliged to read a printed paper, because those with whom the authoritative copies are, have not thought proper to furnish the house with them. He hoped, if a stop was put to the proceedings, it would not be to discharge the committee, but to call for authentic copies of all the papers within reach of the government. It must be acknowledged that the man whose case the house are considering, did put in his claims to citizenship, and the protection of his country on that account. If that acknowledgment is refused on account of the paper which has been produced being a newspaper, reference must be made to what is within reach of the house—more authentic papers. The gentleman had supposed that most of the members had made up their minds on the business without other papers; where he procured that information, Mr. R. could not tell; but certain it was that his mind was not made up; he professed to be still in a state of incertitude; he therefore was sorry the gentleman had not made his motion until it would be known by the house whether the gentleman from New York had any further evidence to adduce. Could he undertake to say that his mind would not be made up, and the subject appear to him in a very different point of view after a full and fair discussion? Mr. R. thought the very reason which the gentleman had given for his motion would operate as a strong argument against it; with him it certainly had that impression; he thought a discussion was more proper to remove incertitude from the mind, than that, because such a state existed, the committee should be discharged. The public mind, he believed, was very uneasy on the subject, and this inquiry should not be eluded; he therefore ought to have withheld his motion, that a discussion might be had from which the people could draw their deductions. If, after all the evidence that was to be produced, he could draw a conclusion similar to that expressed by the gentleman, Mr. R. said he would cordially join with him, that no expression ought to be made by the house without being well supported by facts. General Lee considered the motion would have the complete effect any gentleman could wish whose desire it was to reprobate the conduct of the administration of our government. How could the motion be necessary—how useful? "If they were to ask more evidence," said Mr. Lee, "I would vote for it to be produced; they have brought the subject before the house; let us see it in the purest colours which it can be placed in. We are ready to meet them here; we are willing that they have every evidence that can be obtained to elucidate their charge, but let not the executive be hung up to reproach without a trial; let not suspicion be encouraged, which must have all the effects of a substantial charge. I wish them to go on with the discussion, that all truth may be disclosed, and every fair light be given which the case will bear, for now the people of the United States have their eyes fixed upon our proceedings on this important question." Mr. Macon was in favour of the motion; if the committee of the whole was not to be discharged, he hoped at least the business would be postponed till the public business of the session was over; there were many public bills, he said, that must be passed. The house was called upon to judge with almost no testimony, and yet upon this uncertain ground, perhaps a whole week might be spent of the most precious time of the house, for if the house was to rise at the time proposed, the loss of this time would certainly be felt. As to the impression it would leave on the minds of the people, they had as many facts to judge from as the house, and they certainly would form an opinion whether the house did so or not. Gentlemen were very much mistaken, he said, if they undertook to lead the people; they would think, and they would show what their judgment was when a proper time came for that purpose. The time the people would take to show their approbation or disapprobation of the measures of the administration, was at elections, and then they would do it. Gen. Smith said if the object of the motion was to get better testimony, he thought it a very proper one; the house certainly ought to be possessed of the documents of the district court of South Carolina, on this case, in an authentic form, and not from newspaper information. He professed himself to be in the precise situation of the mover, and if called upon to vote without more evidence, should be at a loss to know how to vote. Mr. Dana was against the postponement or the rising of the committee. It was to be recollected that the business had assumed its present shape only in consequence of the zeal of the gentle-

man from New York and his coadjutors, to censure the executive. On the 7th of February it was committed to the whole house; contrary to the opinion of a number of gentlemen who wished the facts investigated by a select committee, thirteen days then elapsed before he had prepared his resolutions—resolutions not calculated to make an inquiry into the conduct of the executive, but expressive of the most pungent censure upon its conduct. These resolutions were produced upon the papers which, at the desire of those gentlemen, were submitted to the house. The only question then is, do the papers upon which those resolutions are based, warrant the censure contained in them, or not? It certainly would be a high reproach to the very idea of a public inquisition to admit more evidence upon those grounds. Still, however, let gentlemen go on in their heterogeneous proceeding; the house would have the wisdom justly to appreciate the various attempts made to clear themselves of a predicament in which their over-arduous attempts to censure had thrown them.

Gen. Shepherd thought the best way would be to let the resolutions take their course; they must be debated sooner or later, and the sooner it was got rid of, the better. He was sorry they had ever been introduced in the house, but as they were, he hoped no postponement would take place.

Mr. Livingston conceived it his duty to answer the observations of the gentleman from Connecticut (Mr. Dana), as to the resolutions being founded upon the facts then before the House. He did not think the facts were precisely sufficient to warrant every idea contained in the resolutions. When the original call for papers was passed by the house, he hoped that something more authentic than newspaper testimony would have been referred to by the executive, and upon that he was called to act, if at all.

"The gentleman had further said that my zeal," said Mr. L., "and that of my coadjutors, to censure the executive, has brought us into this situation. Who, sir, I would ask the gentlemen are my coadjutors? That gentleman himself was my coadjutor, and every gentleman in the house, because the resolution was adopted: the house directed the inquiry and every gentleman must therefore take the burthen in part with me. It was upon the suggestion of the notoriety of the facts that the inquiry was made, and now we are about to enter into the inquiry upon the facts with which we are furnished. We never can act but upon the evidence we have to guide that action; if the facts contained in the resolutions cannot be substantiated, if they shall fail to justify the conclusions we mean to draw from them, we certainly cannot be worthy of blame for not possessing more." "I consider the affidavit yesterday produced," said Mr. L., "as only supporting one branch of the conclusion that may be drawn from the whole. Whatever gentlemen may think as to the folly or hasty zeal of the resolutions, I can assure them that they are the results of many days' most serious reflection; they were not drawn in haste, and I am not afraid to say that they can be well substantiated—every fact contained in them. I am sufficiently prepared to proceed, and therefore hope this motion may be negatived, and a calm and deliberate investigation be had. If the deductions I shall make will not be satisfactory, then let it drop: I am, however, well satisfied of their force." Mr. Craik said that very early in this business he thought the house were entering into it very improperly, either having nothing at all to do with it, or else taking wrong measures; if they had, he thought then, and was yet of opinion, that if the object was to impeach the president, measures ought to have been taken accordingly. He never did look upon the house of representatives as having either the power to censure or to approbate the conduct of the executive, and therefore equally disapproved the resolutions of the gentlemen from New York and Delaware; and upon that ground he felt strongly inclined to vote with the gentleman from Kentucky for giving the whole business the go-by, and getting clear of it by any possible means.

The motion being to discharge the committee of the whole from both questions, was giving an opinion upon neither one nor the other, and therefore it could not be received as a censure agreeably to the apprehensions of the gentleman from Virginia, (Mr. Lee.) Mr. C. believed the people of the United States were too wise and too intelligent to form unjust conclusions upon the conduct of the house on this subject. They had the whole subject before them, they could judge, and they had a right to do it, but the house had not, except the avowed object of impeachment, which was not the case; the house had nothing to do with it, and therefore they ought not, in this unnecessary way, spend time upon it. Mr. Harper agreed with gentlemen that it would be folly for the house to spend time in useless discussion, which could lead to no decision, but viewing this resolution as he did, he must conclude it of more importance; he thought it the direct road to an impeachment of the president of the United States, and if so, surely it must be important. The resolution declared in express terms, that the executive had exercised unconstitutional powers, one of the most dangerous crimes he could commit; if he had so exercised his power, the inevitable consequence must be that the president of the United States must be impeached by this house. Then how could any gentleman say this was a trifling question, and one with which the house had nothing to do? Certainly no question can be more important. If, as it respected the motion of the gentleman from Delaware, no motion had been made to criminate the executive, he should not think it right to approbate his conduct; he should, in short, have been of an opinion that the house had nothing to do with it, but it having been, he should consider it very disrespectful not to express a sense of the propriety of the executive conduct. He was willing, nay desirous of meeting the charge with all its terrors, and never should shrink from a decision on it. He presumed gentlemen had a meaning in what they did; and if they had any meaning, it must be that the house ought to proceed against the executive. He did not think, however, from the total evidence which appeared, that there was one idea in the resolution but ought to be scouted with disdain from the house. He wished to have an opportunity of showing to the world that the house disdained to look with unconcern at a serious and unfounded charge upon the executive of the United States. He wished to give an opinion upon these charges, and treat them as they merited. Mr. Rutledge regretted that he could not join with his friend from Maryland (Mr. Craik) in thinking this consideration useless; he believed the attention of the people had been called to view this subject, and they were anxiously looking for a decision in some way. Neither did he think with his honourable friend that the house had nothing to do with it because no impeachment could grow out of it. It was impossible to say what the gentleman meditated in his motions, but one thing was certain: if the gentleman had wished to promote an impeachment, he could not have taken a more direct means for it, if the resolutions could be carried. He thought the friends of the administration would act a very unfriendly part towards the administration if they should agree to smother the business at this stage. The minds of the people had been raised to the highest pitch of expectation. They had been told, in certain public prints, that it loudly called for the interference of congress; they had also been told so by an honourable member of the other house that congress

must interfere. Attempts having been made to lead the public mind astray, and the house having proceeded so far on resolutions calculated to procure the object it would be extremely wrong not to remove that disquiet by a suitable proceeding. It would not be useless to rescue the executive from the very serious charges which had been thrown on him, and prove to the world that his actions had been consistent. Mr. Kitchell thought no good could arise from the investigation of this subject, because he did not know what was to be done in it, let the decision be what it might. The gentleman from South Carolina (Mr. Harper) wished to have an opportunity of showing that every part of the resolution was built on false ground; every gentleman in the house was not so fond of speaking or of hearing as was that gentleman, and he hoped merely on that account the house would not spend time on what (in his opinion) could not possibly lead to impeachment. What effect could a discussion have but to show the world that there were parties in the house, and to raise a rancorous disposition? He did not know what in the resolution could lead to an impeachment; nor did he know what the house, in their censorial capacity, had to do but to impeach—he believed it equally out of the power of the house to applaud. In short, he did not think they had anything to do with it. Mr. Nicholas hoped the discussion would proceed. Although there might not be sufficient ground on which to impeach the executive, he could not agree that, therefore, no inquiry ought to be made into his conduct; there might be an error in his conduct, and no impeachment be necessary to be raised out of it, and if so it would be extremely wrong to suffer it to go out to the world without a decision after the business had once been taken up by the house. Where there might be no bad intention, or wicked design, the actions might be of a dangerous tendency and proper to be inquired into, in order to express an opinion thereon. Mr. N. said he was well pleased that his opinion, that the motion ought to be negatived, accorded with that of the gentleman of South Carolina, because it would afford him an opportunity of showing what he said he could show. Mr. Bayard had no doubt of the competency of the house either to impeach, to censure, or to approbate the conduct of the executive, and of course both resolutions were within their power.

Several gentlemen had intimated that the authentic evidence, and the whole of the documents were not before the house, and that the executive department was to blame for the deficiency. It appeared that the gentleman himself had forgotten the import of his resolution; it called for such documents as might be in possession of the department of state. Now what could possibly be in possession of that department? The president of the United States had his duties to perform, and the judge of the district his duties; each had their separate documents, and as neither interfered with the other, therefore it could not be expected to be in the power of the president to furnish the papers belonging to the court of South Carolina, any farther than they came within the joint duties of both. Agreeably to treaty the British consul made a requisition for the person; a copy of this and the several letters and instructions were sent to the house, but it was not in the power of the executive to order the judge to furnish him with a record of the proceedings; he was not bound to furnish it if the president had called for it; but the president had not required it, and no doubt had furnished the house with every paper in his possession. The idea in the resolutions being to criminate the judge as well as the executive, Mr. B. thought he ought to have had an opportunity to furnish the papers of his department, and those could and ought to have been called for before his conduct ought to have been so deeply implicated. Mr. Otis said, when first the motion was made by the gentleman from Kentucky, he felt for a moment inclined to lean to it; the motives of that gentleman appeared to be so candid and liberal, that, for the moment, Mr. O. confessed, his feelings got the better of his reason. But a short reflection induced him to change an opinion thus hastily formed, and he felt satisfied that to vote with him would be to display, in the conduct of gentlemen who wished to support the administration of the country, worse than censure. He joined that gentleman in regret that it had gone so far, but certainly it was a subject of the most irritating nature possible—a charge the most serious—a breach of the law by the executive magistrate, who is bound to support it and see it carried into effect—it is certainly a charge of much importance, and however disagreeable it might feel to him, Mr. O. said, he must vote that every argument should be used that could possibly tend to substantiate the charge, that nothing of truth might be hidden.

An insinuation was thrown out that the president had suppressed part of the information which ought to be had on the business. Lest this should take hold of the minds of gentlemen, he would observe that the president, in his message, says: "I have directed the secretary of state to lay before me copies of the papers intended, which I now transmit to congress." If, therefore, there is any blame, it is not attached to the president, but to the department of state; but it does not appear that the secretary of state has any more papers in his possession than those the house are furnished with. This may be inferred from the readiness with which he furnished the papers he has given; he says he has no papers respecting any person of the name of Jonathan Robbins; "but, by the proceedings before that judge (Bee), it appears that a seaman named Thomas Nash, the subject of the British minister's requisition," &c. He having been, therefore, asked for papers relative to Jonathan Robbins, expressed his willingness by furnishing what he supposed was intended. Mr. Otis said he did not know to what points the evidence required by the gentlemen from New York could apply, except it was to that of his being an American citizen, and of his being impressed. An affidavit was produced to prove these facts, but it would be found from an examination of the documents, that nothing relating to those points was in the office of the department of state, for the date of the affidavit of Robbins is the 25th of July, but the order of the secretary of state bears date the 5th of July, so that no papers as to his claim can be in the possession of that department. Mr. Otis thought that the documents before the house contained everything that was important to the point. Admitting the position gentlemen had taken to be true, which he positively denied, but admitting that the president had given an opinion upon a judicial question, it was only as respected the delivery up of the man which was, in fact, an executive duty; but if the evidence should prove insufficient to support the charge exhibited against the executive or the judge, he was certain that the gentleman from New York would rejoice as much as himself, to find the charges unfounded and the character of those gentlemen beyond blame. Mr. Craik was sorry that gentlemen who advocated this motion should be charged with an opposition to the administration of the government; he believed his conduct had heretofore evinced a different line of conduct. He still denied that the mode taken by the resolution could lead to impeachment. It certainly did contain a very great censure, and one which the house had no authority to inflict. Gentlemen had supported their resolutions upon the ground of the necessity of the various departments being kept distinct, but the very object of the resolution was dereliction of that principle, since it exemplified an interference on the part of the house with a judge of the United

States and with the executive of the United States. When the house undertook to decide upon executive or judicial acts, and call their conduct into review before them not with a view to impeach but to inflict a severe censure, they certainly interfered with the separate powers of those departments, which in his opinion was setting a very dangerous precedent. He thought it ought not to be in the power of any member to lay such a resolution upon the table, or, if it was laid there, it ought not to be discussed, unless it was found to contain principles over which the house had power; it should not be in the power of any gentleman to call the attention of the house to what could not have any good effect, but might have a very dangerous one. The power of impeachment by the constitution was not a power to inflict any punishment; it was only a power to investigate facts to be tried by another tribunal; the house were not to judge, they were only to charge; but by this proceeding they had taken upon them to consider the propriety of punishing as well as charging, for most assuredly to censure, to injure a man's character, must operate as a punishment. Mr. Gallatin considered the motion to be grounded on two ideas, one that there was not sufficient foundation for the house to act upon, and therefore that it was necessary to discharge the committee, or postpone the subject for want of further evidence. It is clear, said Mr. G., that the evidence is not sufficient to impeach the district judge of South Carolina. If an impeachment of him was the object, it would be impossible to carry it forward without an authoritative copy of the record of the court; but if there was no intention to impeach, he did not think there was any material evidence wanted in order to decide upon the resolution, since it only meant an implication of censure upon the executive and the district judge, and not impeachment. The only business being to consider of the propriety or impropriety of censuring or approving the conduct of the president and the judge, all the material facts were before the house. If any censure was due to the president, it was on account of the opinion and advice he expressed by his letter to Judge Bee. This letter was before the house, and nothing more could be wanted to base the resolution upon; the fact was sufficient to form a decision upon. There could be but one thing wanting, and that was the original letter of the president to the secretary of state, instructing him what to write to Judge Bee, and this could not be requisite if gentlemen would not say the letter of the secretary perhaps did not contain the precise opinion of the president. If there should be such an objection, he should certainly wish the house to possess the document. However, he concluded that no such objection could be, since a message of the president contained a full acknowledgment of every sentiment contained in that letter. Mr. G. agreed there was at first sight some weight in the sentiment expressed by the gentleman from Maryland (Mr. Craik), that the house had only a power to impeach, not to censure; but certainly, when it was considered that an act might be committed without any ill motive, and yet the act be injurious, it cannot be the subject of impeachment, but it might be of censure. The same act committed with a criminal motive would be impeachable, which without it would be of a nature not to admit of it. Again—Mr. G. thought that the house might have no ground whereupon to censure; but they had exercised that power; they had, in a number of cases, approved of the conduct of the president, and if the act of approbation had been done, they surely had as much power to disapprove and censure. As to the irritation that was apprehended from a continuation of the discussion, that consideration would not induce him, Mr. G. said, to vote with the gentleman from Kentucky: if there was any irritation to be apprehended, it must come from those gentlemen who denominated themselves exclusive friends of the administration; from those who presumed to arraign all the measures of their opponents, and who declared, that they were disposed to support not only that measure, but every measure of the administration. A number of very improper epithets had been thrown out as it respected the resolution, and certainly the distinction must be considered very narrow between those resolutions and the supporters of them; but it was too frequent for those great supporters of the administration to use high tones, and if they chose to do so, let them. Mr. G. said he was not afraid of any inquiry accruing from the high ground they had assumed to themselves.

The question was then taken on the motion to discharge the committee of the whole from the further consideration, and negatived: nays, 76; yeas, 14; majority against the motion, 62. Those who voted in the minority were, Messrs. Baily, Condit, Craik, Davis, Dent. Dickson, Freeman, Goode, Grove, Kitchell, Linn, Macon, Pinckney, and S. Smith.

Thursday, Feb. 27th, 1800.

Mr. Davis said, as the house had yesterday thought proper to negative a proposition to discharge the committee of the whole from the farther consideration of the business, and, as one great motive for that motion was the incompetency of evidence before the house, and as he knew it was in the power of the house to procure that evidence by a proper application, he hoped gentlemen would now indulge him in the adoption of the following, which he moved, viz.: "Resolved — that the president of the United States be requested to direct the proper officer to lay before this house a copy of the proceedings of the court held in the district of South Carolina, in the case of Thomas Nash, calling himself Jonathan Robbins." Mr. Bayard said, if he was persuaded, or if the gentleman could convince him that there was any particular evidence in the hands of any officer that would tend to throw such light as to give the least explanation of the case, he certainly would be willing to accord with the resolution; but he believed every necessary fact was before the house, and this had been acknowledged by several gentlemen. If the object was to prove that Nash was an American citizen, and that he was impressed, that could not be necessary as it respected the resolutions of the gentleman from New York, for that gentleman himself had acknowledged that he believed no such thing, but that the whole claim was a falsehood. Would the gentleman then inform the house what point he wished to ascertain, or in what he expected additional proof? He wished information farther: Who was the "proper officer" to whom reference was expected to be made? There are but two officers at all in view, one is the secretary of state, the other is the district judge of South Carolina; the gentleman could not suppose that the judge would be able to transmit the records of that court previous to the adjournment of the house; and if it could be obtained, no evidence to the point could be expected from him. If on the other hand it was meant to call on the secretary of state, it was not to be expected, from the nature of the case, that any more documents were in his hands than those already furnished; he had given copies of the correspondence and requisition, which might be fairly inferred, from the nature of his office, was all of which he could be possessed. But if any gentleman doubted this fact, he could apply at the office of the secretary of state, from whom he could procure whatever was in his possession. If it was the intention of the house to close this very disagreeable business in the present session, they must negative the resolution, and let the discussion go forward. The gentleman who brought forward the resolution ought to have been provided with every document that was necessary to support

the charges, before he suffered them to appear. However, he did not think but the gentleman who proposed the resolutions thought his grounds were quite sufficient to support them. General Smith was in favour of the resolution. He considered himself as filling the character of judge of the case, and as such he was inclined to think, from the documents which were laid before the house, that there were other papers which were not yet brought forward relative to the judicial proceedings of South Carolina, that would have a considerable effect on his vote. He said there was a paper, which he had seen published, which ought, in his opinion, to be in possession of the house; he meant that wherein Robbins swore he was an American citizen, and as a proof of it produced before the court a notarial certificate of New York, the date of which went to corroborate the fact. He also swore he was impressed. If this certificate was before the house, gentlemen would be able to compare the date of it with the declaration made by Admiral Parker, and perhaps that comparison might produce conviction some way or other. These he thought very important, if it was desirous to prove the man an American citizen. This was certainly the duty of the judge to ascertain, but it did not appear whether he paid attention to it or not. Mr. S. declared he should be at a loss to go forward in the business without these papers, if he was to decide upon the whole truth. Mr. Nicholas said he always believed that the testimony was incomplete; but when he heard a gentleman get up and mention particular testimony which he considered so important that without it he should not know how to vote, whatever, Mr. N. said, might have been his former satisfaction as to the establishment of the points, he certainly must now be inclined to grant gentlemen every point of evidence that they should think necessary, if within reach of the house.

One particular piece of testimony had been mentioned, viz: that the man filed an affidavit that he was an American citizen, and he was impressed on a British man-of-war. Could any gentleman pretend to say that no inferences might be drawn from this source and the concomitant facts? The gentleman from New York, to be sure, had declared his satisfaction with the facts that had been produced to the house, but did the gentleman from Delaware know that this was the case with any other gentleman in the house? That gentleman's conclusions and impressions were not to be taken as the opinions of others, nor were others obliged to be satisfied because he was; and, therefore, to couple others in a measure to which they were not privy, and to ascribe opinions to them which they had not expressed, was at least unfair. Some gentlemen might feel satisfied with what came out since this unfortunate man's death, but that could be no rule for others. As to this part of the papers, Mr. Nicholas could by no means understand or conceive for what they were collected and sent to the house, except indeed it was to quiet the minds of some gentlemen who thought that the measures of the government were too precipitate, in their having judged the case without proof. That certificates should be collected respecting this man after his death, and when he could not possibly appear to contradict it, or to adduce contrary evidence, was an insult to the common understanding. Suppose this man had claimed to be an American citizen, and the government had known it, he would ask gentlemen how they would justify an act done when no such evidence was known to exist as was now presented from Connecticut. What does it amount to but that there is a chasm in this business which wants to be supplied? It might be supplied to the satisfaction of some gentlemen, Mr. Nicholas said, but it was by no means so to his. Suppose, as was observed before, the certificates had proved the man to be an American, what could gentlemen have then said? From the present state of information, every gentleman must acknowledge it a matter of doubt, and being so, it ought to have been searched into; this doubt might probably be removed by a reference; but the record of the court would prove another thing, and one which the gentleman who moved the resolutions expressed his intention to dwell much upon, that is, whether the judge had caused him to be arrested, and intended him for trial in the circuit court of the United States; and whether the judge had taken upon him to supersede, not his own jurisdiction, but that of the court over which he presided, in the delivery of this man to the British agent. For his part, Mr. Nicholas said, he had no doubt of the jurisdiction of the United States upon this man's trial, and that it was a departure from justice to deliver him up to a foreign tribunal.

Upon a review of these reasons, he must conclude that more evidence ought to be had, if more evidence could enable the house to make a better investigation, and more was attainable; for, although the gentleman from New York thought the business ripe for discussion, he could not say it was, and therefore thought it his duty to vote for the motion. Mr. Otis said he should not, for himself have the smallest hesitation, if that resolution pointed to a particular object, or to a particular officer, who might be under the direction of the president, to agree to it. If the gentleman would modify his motion, so that the president of the United States might be directed to instruct the secretary of state, to lay before the house those papers, he should not vote against it. But he thought it his duty to declare that the secretary of state had received no further authentic or other transcript than he had furnished to the house, of the judicial proceedings on this subject. Mr. O. said he had received this information from the secretary of state in answer to an inquiry of that officer, whether he had any such documents. But in the present form of the resolution, he could not agree to it. If the motion was adopted, the question would be who was the "proper officer?" Even if it was to be some officer under the direction of the president, the president had already furnished the house with every paper within his power. If the "proper officer" meant, was the judge of South Carolina, Mr. Otis would say that the executive could not with propriety furnish it, because it would be to all intents an interference with the judiciary department. He did not think that the president had any right to demand the documents of that court. He thought the house were fully competent to send to that district judge, ordering him to lay before them all the papers they should think necessary; but then the question should be, were the house ready to consent that the proceeding should be postponed until such an application should be made, or, in short, till the conclusion of the session? Besides, to ask for documents which would be made use of in a way injurious both to the executive and to the judge, was a measure which gentlemen who supported the resolutions of the gentleman of New York, could have no right to expect from gentlemen who could perceive nothing improper in their conduct. If then it be true, of which Mr. Otis thought there could be but little doubt, that the judicial proceedings of that court were never before the executive, whether the judge had done wrong or not, he, and he only, would have to answer, and not the president. The conduct of the president grew out of the proceedings of the court; where, then, could be the propriety or justice of having up the president in effigy, and there suspend him until the next session of congress, subject to the thousand alarms, surmises and reproaches of the people, which must carry with it the whole object of the censure! Every man might have had access to those papers; the judge never would have refused any man a copy of all the proceedings that might

tend to elucidate a subject which they may think was deficient without it. An honourable gentleman had lately written a pamphlet on the subject; he might have produced the proceedings of that court, if he had thought them of any service, and so might the gentleman from New York. Should, then, the proceedings on this business be suspended merely for the want of evidence, which it was in the power of every gentleman to have brought forward? Gentlemen had with very great deliberation brought forward this accusation before the house—if it was in the power of every gentleman to refer to new evidence at every stage of the business, after the accusation was grounded only on the documents before the house, the evident effect must be to procrastinate beyond all bounds, a business, which the honour of our government requires should be immediately decided. In justice, therefore, to the president, he conceived himself bound to vote against the resolution. Mr. Dana thought this a most extraordinary resolution, indeed. Was the president of the United States the clerk of that court, to keep the records of it? What had the president of the United States to do with that court? It was certainly a total departure from all the forms of judicial proceedings to suppose a thing of the kind. The gentlemen must certainly have mistaken the situation held by the president, or they never would have made so vast a departure from all the forms of judicial proceedings to suppose a thing of the kind. The gentlemen must certainly have mistaken the situation held by the president, or they would never have made such a vast departure from order and propriety of proceeding. The president is not the public accuser—he is not to be called upon for papers with which he has nothing to do. When he found gentlemen outraging everything that belonged to judicial propriety; when he found them stumbling into error after error, and departing totally from all jurisprudential propriety, Mr. Dana said he could not avoid rising to oppose it. So much for the form: he believed it totally wrong, and therefore could not be adopted. But in addition to this, the house would render themselves more ridiculous than they now appeared by the adoption of measures which must make a matter appear important, that in itself was unimportant. Several gentlemen proceeded with the same zeal as though an American citizen was concerned. This was not the case; it was notorious to every man that this Nash was a foreigner; of this the house were fully apprised by respectable testimony. This man contended that he was born at Danbury, but the certificates of the clerk who kept the registers for a number of years back, to whom the annual list of all the births was transmitted and by him registered; and also the certificates of a number of old residents in that town, had incontestably proved that this man was never an inhabitant of that town. He was an Irishman—let any man from Ireland, whatever, declare that he is an American of Connecticut, in vain would he be able to impose that opinion upon the mind of any man who observes his speech; it is entirely impossible to suppose that an intelligent court could be so imposed upon. The fact of country being incontestably proved, how can gentlemen be so earnest in the face of that fact, to charge the executive with any improper influence? Could the gentleman be ignorant how many men who were aliens had taken advantage of the certificates granted to Americans, and as Americans, had procured certificates from a magistrate in attestation of their false oaths? Any gentleman who believed that possible, might account for his having procured an American certificate. Mr. Livingston said he did hope that this motion would not have been brought forward, but as he meant to vote in favour of it, after having declared his satisfaction with the documents, as sufficient to support his resolutions, he should now give his reasons, and lest he should be accused of a desire to keep alive a calumny against the president of the United States, an effect which had been stated, he took opportunity to answer the insinuation by saying that he as much abhorred so mean a principle as any gentleman in the house. Mr. L. said he would again declare that the evidence was sufficient to satisfy his mind upon the points he meant to establish, but that should not preclude other gentlemen from thinking other papers necessary; papers which he must acknowledge would throw an additional light on the subject. Though he thought the message contained all the facts absolutely necessary to establish the points he proposed to dwell on, yet it certainly did not contain all that was asked for, and what they had no right to send, was given. The resolution, Mr. L. said, asked for all the papers relative to the delivery of Jonathan Robbins. We are told that they are not in the office of the secretary of state; the president must know whether they can be procured, and he has it in his power to procure them: they may be in the hands of the district judge of South Carolina. But the house are told the president cannot procure this record, gentlemen say he has no power over that department, and yet this very president has the power to instruct this very district judge to deliver up the person to the British government! How then can gentlemen presume to say the president has not power to call for the records of the court in a case in which himself has acted a principal part! Again. It was said that neither the president nor the judge had a right to deliver up papers that might lead to their crimination. This was the very reason why the house should require papers that would explain any doubtful parts of their conduct; for this very reason the house should demand, not only the documents, but the reasons for their conduct. The president or the judge can only be able to supply the house with those documents, and if they have been wrong, they ought to be required to furnish them. But, gentlemen, supposing the main reason for inquiring is to ascertain whether Nash was an American citizen, or not, how can it be said that the inquiry was extremely unimportant whether he was or was not? Upon that, Mr. L. said, he did not lay so much stress as some other gentlemen; he believed that it was perfectly immaterial, because he believed that the course of proceeding would be precisely the same, whether he was or was not, and because it appeared that the conduct of the executive, and of the judge, would have been the same in either event. The same might be said as to the impressment. And, therefore, though some trouble had been taken to prove that, in addition to the murder, he had been guilty of perjury, he being proved to the satisfaction of some gentlemen, to be an Irishman, was precisely the same in the case. However it had been, he should have been delivered up. Gentlemen had farther said, that he, Mr. Livingston, ought to have known all these facts before he had formed the resolutions. Mr. L. said he did not think so; as he had before declared, he was possessed of satisfactory facts, but he could not prevent himself giving loose to the desires which other gentlemen had expressed, and therefore should now accord with them in the vote. Mr. Marshall said, it was with no inconsiderable regret that he perceived so much of the time of the house, which ought to be devoted to more beneficial purposes, employed in preliminary discussion; he thought that it was impossible the house could agree to a postponement, which the motion under consideration must cause, when it was reflected how much time must be employed in procuring those papers; it could not take less than a month; for they could only be found, he presumed to say, in the court of the district of South Carolina; it was therefore scarcely to be expected that they could be obtained until just before the rising of the house, a period, if they arrived before the house rose, too unfit for

their consideration. He, therefore, considered the question precisely the same in principle, though different in form, to that which yesterday occupied the house. The question he believed essentially to be, would the house postpone the business till the next session? In this light he should treat it; and he could not see how gentlemen who voted against the motion yesterday, could advocate the present. Shall the house merely, because two or three members think such documents are necessary, agree to postpone the business? for if two or three members be indulged on this account, two or three may lay claim to the same right on another account, and thus day after day may be spent, and no determination ever be come to. It is a necessary case in every house, and upon every question; there always will be some few found who will express dissatisfaction at proceedings, and claim some privilege; but this can never operate as a general rule for a session. Gentlemen ought not to request this when the general expression of the case is, that there is enough evidence before the house to decide on the resolutions. And most particularly it ought not to be indulged in a case where so much manifest mischief would attend its inevitable consequences —delay. Let gentlemen recollect the nature of the case—the president of the United States is charged by this house, with having violated the constitution and laws of his country, by having committed an act of dangerous interference with a judicial decision of this country; he is charged so by a member of this house. Gentlemen were well aware how much the public safety and happiness depended on a well or misplaced confidence in the executive. "Was it reasonable or right," Mr. M. asked, "to receive this charge —to receive in part the evidence in support of it —to receive so much evidence as almost every gentleman declared himself satisfied with, and to leave the charge unexamined, hanging over the head of the president of the United States, until a distance of time, how long it was impossible to say, but certainly long enough to work a very bad effect?" To him it seemed of all things the most unreasonable and unjust; and the mischief resulting therefrom must be very great indeed. When the evidence now in possession of the house came to be examined, gentlemen would be unable to decide whether more would be necessary than there possibly could be at present; if more should then be wanted, the business might with propriety be postponed. If it was possible to obtain the documents shortly, he should have no hesitation to admit of the motion; but being impossible, he felt no hesitation in declaring he should put his negative on it.

The gentleman from New York, (Mr. Livingston,) Mr. Marshall said, in his opinion, had criminated the conduct of the secretary of state, in supposing that he had withheld some of the documents. The court record was mentioned, but was it to be supposed by the executive that he was to be called upon to furnish papers the property of another department of the government, supposing them material? To procure these papers, he knew was as much in the power of the house as in his power. The house could as well dispatch a messenger as the executive. How was the president then to consider those papers asked for of him? Was he to be a menial to the house in a business wherein himself was seriously charged? Certainly not. There could be no doubt but the executive thought he had fully complied with the request of the house, where he supplied them with those immediately in his power. Mr. Bayard said he could not distinguish between the present motion and one yesterday negatived, because it must act as a discharge upon the committee of the whole house. There could be no doubt but the secretary of state had furnished all the papers relative to the business in his possession; indeed he could assuredly say so. He said he held in his hand a letter from the secretary of state in answer to one from an honourable member of the house, inquiring whether there were any more documents in his office; he answered that he had no certified copy whatever, but those which he furnished the president with from whom they came to the house. Gentlemen must then perceive that the mere operation of this resolution was an absolute and inevitable postponement of the business till another session. Many gentlemen, who were yesterday ashamed to vote for a postponement, would now have a plausible cover for their vote, by calling for additional proof, to accomplish the object of the resolution of yesterday, and thus he feared it would have many advocates; but however specious the pretext, he hoped it would not be carried. Mr. B. then went into an examination of the facts contained in the resolutions of Mr. Livingston, from which he deduced the impossibility of procuring anything that could be material in the prosecution of their discussion, or that could assist the house in drawing their conclusions, except any new facts could be produced, and therefore he concluded that nothing but a postponement could be the issue. He farther contended, in an answer to Mr. Nicholas, that it was not competent for the executive to furnish papers the property of the district judge; as well might the house ask for the executive to bring the proceedings on again at their bar. In the impeachment of Blount, Mr. Bayard said, the house did not apply to the president, but appointed a committee to bring the case and all the papers to view relative to it; so it might have been in the present case. And by what authority, taking the subject in another view, could the house call upon that judge to furnish it with papers? The executive had no right to demand them of him, nor had the house. The power of the judiciary is co-ordinate with the power of the house; it is a distinct branch of the government. He would have precisely the same right to call authoritatively for a copy of the journals of the house, as the house would to call upon him for copies of his record; his proceedings are public, his records are open to view; so are our journals; we cannot call upon him for them, though we may obtain them by paying the clerk for a copy of them, as any individual might do.

The gentleman from Maryland (Mr. Smith) had considered the notarial certificate of New York, in attestation of Nash or Robbins's citizenship, to be important. If that gentleman thought this a material document, Mr. Bayard said he did not, but he thought the observation very material, as it might have an improper impression on the minds of some gentlemen. What could be more easy than for this Thomas Nash, this perjured pirate and murderer, to have got a certificate, either when he murdered some man from whom he might have procured it, or by purchase or favour? But there were facts before the house, that this man was an Irishman, that his name was Nash, and not Robbins; that it was never issued to him, and he was never entitled to it. What farther then can be wanted? Will not this satisfy gentlemen? The next thing will be, that if this objection be admitted, we shall be called upon to send to the West Indies to prove that his name was Nash. Mr. B. said, he was well satisfied that when this subject came to be analyzed, it would be made to appear perfectly clear, that the whole of the evidence necessary was before the house, and it only would be most annoying, and producing extremely injurious consequences, to grant the motion. Mr. Rutledge conceived this motion to be the same as to postpone the business. Further information was wanted, and that information could alone come from South Carolina. He wished the gentleman of Kentucky would read the resolution before he pressed his motion; he would find that the district judge was not charged; no, it was only a charge against the executive; there

was not a word of irregularity of proceeding in the court, but the executive was seriously charged. Mr. Davis explained.—He said, his objects were to have the record in order to see whether Robbins did produce a certificate that he was an American citizen; to see a copy of the warrant by which he was committed; and thirdly, to know what stratagem, or what proceedings were used to take him out of cognizance of the court, and he must have remained so, if the president had not interfered.—These things he wished to ascertain, but that would be impossible without the court record. Mr. Rutledge said, he conceived this to be the object; but he by no means thought the gentleman would be satisfied on these points, were he to be possessed of the record. The gentleman might inquire the reasons for the executive and judicial conduct being as it was, but perhaps he should not receive the information. Every gentleman in the house would unite their vote to procure all the testimony within their reach, so as to enable the house to prosecute this business; we know, said Mr. R., what monstrous clamour has been raised about this business; we know that great pains have been taken to make the people believe that their fellow-citizen has been torn from his country; that he has been impressed into a foreign service; that the treaty has been violated; that their fellow-citizen has been taken to a foreign country, and there been tried in a summary mode and executed; we have been told for many months past that this business would be inquired into; we wished not to avoid it; we will by all means in our power assist it; we have done it. Some time since papers were asked for; we agreed with gentlemen that they should be furnished; it was done, and they are now on your table. They have been there many days; so that gentlemen had sufficient time, long before this, to have known whether they were satisfied or not. The gentleman himself who brought forward the resolutions, affected to be satisfied, but in compliance with the wish of some of his friends, he now wishes to postpone it. We want to bring the matters to a decision, and far as we can accommodate gentlemen so as to avoid delay, we will do it. "But," said Mr. Rutledge, "what will be the effect of that motion? Sir, it will hold up to the view of the world the president of the United States as having been grossly delinquent in his duty. We say, if he has offended, punish him; if he has not, discharge him from censure; but by no means expose him to popular suspicion, without an examination. What more can be wanted than the house are in possession of? The secretary of state says he has no further documents; and he cannot be suspected of any design to smother the business, by the readiness with which the call of the house was complied with. He might have said, he would send to the district of South Carolina; but instead of that, so earnest was he to give every possible information, that he trusted to newspaper publications, and this, he tells you, is all he has. What more can be asked?" After the discussion, if the evidence should be found insufficient, and more light should be necessary on which to form a decision, Mr. R. then would agree to send anywhere for evidence; but until he was convinced of a want of such testimony, except the will of gentlemen could be complied with without delay, he should be compelled to vote against the motion.

Mr. Nicholson rose to correct what he considered a mistake in the gentleman last up (Mr. Rutledge) when he said that the executive only was implicated in the resolutions; he conceived that the district judge of South Carolina was implicated, and that the papers of that court were necessary to examine the conduct of that judge. He read the resolution, and contended his deduction was accurate. Mr. N. said he wanted to know whether the district judge of South Carolina had committed this man for trial; this would appear, or be disproved by the warrant. Mr. N. said he could not believe the position laid down by a gentleman (Mr. Dana) that it was utterly impossible that Jonathan Robbins should have been a citizen of the United States. It was worthy of notice that the notarial certificate which the unfortunate man produced in court was dated 1795—the opposite authority to wit, a copy of the books of the Hermione appears to state that Thomas Nash was transferred to that ship in 1792, he, therefore, wanted to know authoritatively, whether this certificate was produced to the court, for if it was produced, it certainly went to prove that the copy of the books of the Hermione was erroneous, because if this man was in New York in 1795, he could not have been on board a British frigate in 1792, and have continued there until the time of the mutiny. That the president of the United States was not to be considered the servant of that house, he was willing to admit, but he thought that the president might with propriety apply to the judge of the district for the documents of the court. And he did not believe that the president would object to make the application. However, the object, he presumed, was to procure the papers, no matter from whom: that being the object, he hoped that the mover of the resolution would withdraw it in order to accommodate it more to the feelings of some members in the house, by adopting something like the following: Resolved, that the speaker of the house of representatives be requested to procure from the clerk of the district court of South Carolina, copies under seal of the proceedings of that court, together with the evidence produced in the case relative to the requisition for Thomas Nash, alias Jonathan Robbins, who was delivered to his Britannic majesty's consul. Mr. Davis withdrew his resolution, and Mr. Nicholas moved the substitute, which was now before the house. Mr. Harper moved a postponement of the resolution for one week. The object of the resolution which was before the committee of the whole was twofold,—a charge on the president, and a charge on the district judge. As to so much as related to the president of the United States, it was manifest that the testimony called for by this resolution could have no effect whatever upon him, because he left the whole to the judge. The president went no farther than to declare that if it should appear, that the acts committed by this man came within the purview of the British treaty, the man ought to be delivered up conformably to that stipulation.

It must be manifest that the testimony to be expected from South Carolina could have no possible effect on the part relating to the president, and therefore the house could proceed with that part of the resolution; but whether the judge, in executing the duty belonging to him, acted with propriety or not, might be more clear from the documents of that court. When the judge entered into the consideration of this business, what questions were open to him? The principle was, whether the man was guilty of the piracy and murder charged to him or not; if this was proved, no further question could arise as to the propriety of delivering him up conformably to the requisition. The consequence of these papers being called for, had been stated to be much delay; it would operate so. "Was it not an established principle," Mr. Harper asked, "that a delay of justice amounted to a denial of justice? If you suffer this charge to hang over the head of your president for eight months for no purpose, you inflict a punishment extremely severe. A charge is here exhibited against the first magistrate of the Union which must be considered as the commencement of an impeachment, for if gentlemen have any propriety of conduct, this must operate as a foundation to impeachment. This is to keep alive the idea of guilt,

to hang up suspicion as a party weapon over the head of the executive until an opportunity shall offer to make use of it on a great approaching occasion"—this, he thought, was the main intention of the motion, and this consequence was inevitable. He believed the motion now before the house to be the same in principle as the one negatived yesterday; it was an effort to shrink from a charge, the object of which could better be answered by delay than examination. Mr. Nicholas thought with the gentleman last up, that if the only inquiry was as to the conduct of the president; or if the inquiry was only to respect the judge, the papers might be dispensed with, but it was otherwise; the conduct of both was called forth to view by the resolutions, but how far the conduct of either may be reprehensible, depended on the testimony which might be made to appear before the house. It was impossible to say what the president had done until the documents should be seen. If gentlemen refused the inquiry being made of the court of South Carolina, they, by that act, made the president answerable for every part of the facts, which he believed they would not pretend to do. He really believed it extremely important to know what steps had been taken in this very serious business, to know whether this man was in a course for trial, and whether the president had acted in this hasty and premature manner, in delivering him up, which was stated. Mr. N. then proceeded to prove that the warrant was important to be seen, because the intent for which the apprehension was made, it was explicitly incumbent on the judge to record, together with the court where he was to be tried, agreeably to the provisions of the judiciary act, and, therefore, this information could be obtained by recurring to that record. A gentleman had thought the information could not be obtained from persons, when probably that information may criminate. But were the house to decide upon information short of truth because the result may lead to criminate? That is, they are to be acquitted without materials whereupon to acquit. The objection of gentlemen on account of the time it would take to procure the testimony, which they suppose would be so late that the case could not be acted upon during the present session, he believed not accurate. Mr. Nicholas declared that it was far from his desire to postpone the business; he wished it to go forward without delay, but not unless all the facts were before the house which were necessary. The house were told by a gentleman (Mr. Marshall) that it would be extremely improper to indulge a few gentlemen in their objections. Was the gentleman confident that there would be a majority of his opinion? A few, it must be remembered, could make a decision, and if so, the result of the opinion of those few might guide the question. Much had been said about the introduction of the motion and the motives ascribed to the supporters of it, as though it was a planned object. Mr. Nicholas denied having the least knowledge of it till the motion was made, and, with respect to him, it could not be thought as an attempt to carry into effect the motion yesterday made for postponement, because he yesterday voted against that motion, and by no means would agree to postpone, but for an object which he now thought material: when the object was to obtain important information, and believing, as he did, that it would not put off the decision beyond the power of the present session, he should consider himself justified in voting for the motion. Mr. Gallatin could not help observing the disposition which gentlemen evinced of placing the opinions and sensations expressed by one gentleman to the account of others. To take a fair view of the resolutions, what did they amount to? Nothing more than the deductions which one man had drawn from the message sent to this house by the executive; these deductions, in the form of a resolution, he had submitted to the consideration of the committee of the whole. Now, except it could be proved that that gentleman had made all the deductions of and acted for every gentleman, there could be no ground for saying that every gentleman would be satisfied without the evidence which might be collected from the records of the district court of South Carolina. Was any gentleman in the house bound to be satisfied, with the gentleman from New York, that all the facts necessary to be known were furnished? Was every gentleman in the house bound to confine himself solely to the resolutions before the house? Certainly not. It could not be denied that the evidence now required was essential to a full investigation of the conduct of the judge who was the principal agent of the executive in this case. He did not consider the question to be, whether the resolutions of the gentleman from New York required that evidence or not to support them: but whether, to come to a knowledge of the truth, and the whole truth, relative to the circumstances, it was not necessary? Although Mr. Gallatin observed he could not at present perceive how far it was likely those documents might assist the decision of the house, yet he thought them proper to come before the house; it was very probable they would tend either to criminate more, or to extenuate and perhaps to justify.

With respect to the objections on the ground of postponement, Mr. Gallatin would observe, that the motion of the gentleman from South Carolina proved that this was not the proper time to proceed in the discussion: the motion implied that gentleman's acknowledgment of it, or he would rather have at once rejected the motion than moved its postponement for a week. He therefore presumed that gentleman thought additional testimony necessary. Mr. Harper had said that neither the testimony to be expected, nor the postponement could have any possible bearing on the part relating to the president, and therefore that ought to be decided; but as far as related to the judge, evidence might be necessary. Taking this to be the mind of the gentleman, Mr. Gallatin said, he did not know in what manner he could apply his argument to the motion. For himself, Mr. G. said, he was ready to vote on the resolutions without more documents; but as other gentlemen were not, he should not vote without them. He confessed he was the more earnest in this, because on the very threshold of the business a gentleman was stopped while reading a paper he thought useful to bring forward. Gentlemen had now got up and declared themselves compelled to call for evidence which might substantiate a fact contained in that paper, which, though known to be true, was not stamped with that legal credit that was necessary. Let gentlemen then come forward at once and give this fact its legal importance, or prove its non-existence.

Another fact stated was, that the president had undertaken to discharge the man, when the court had already assumed jurisdiction of the case. This it was possible to prove or disprove by the record of the court. That this record, agreeable to law, was to contain the name of the court before which the case was triable, and process upon which the man was arrested, he quoted the judiciary act. 1 Stat. 73. He was, however, well satisfied from the letter of the judge and the nature of the case, that this man was committed for trial before a court of the United States, and what corroborated the opinion was that no power was given by our laws to hold a man in prison on any other ground. On the whole, Mr. G. said, as one fact had been, and others might be, disputed, if produced, it would perhaps be the most expeditious, as it certainly would be the most satisfactory method to procure every fact authentically attested before the proceeding was had. General Lee hoped that the gentleman

from South Carolina would withdraw his motion. He would mention some reasons which would induce him to vote differently from gentlemen with whom he usually had the honour to vote. Considering this a question of very great importance not only to the American people, and to the reputation of the house, but also the highly respectable character presiding over our government, he trusted the house would, in its whole progress, be led by principles so fair and candid as not to leave the least room for a charge of derogation from its own dignity, or the great subject it was discussing. He would vote for the motion calling for the papers; but he would do it with an expectation that it would not postpone the discussion of the business, so far as related to the conduct of the president of the United States. It appeared that the conduct of the president, as charged, was fully before the house; there could be no difficulty, therefore, to proceed on it; but as far as it respected the judge, Mr. Lee trusted the record of the court would be sent, for he thought it but fair to gratify gentlemen who considered there was any material evidence wanting.

If the view of gentlemen was to postpone the whole of this business, until a return from South Carolina, he would ask the gentleman from New York, and his friends, whether they could wish any means to be adopted more completely to effect the object of the resolutions than by postponement? "Were I the high character," said Mr. Lee, "to whom this resolution refers, I would infinitely rather have the disapprobation of this house to the full extent which the censure goes, than to have the subject postponed and exposed to the conclusions and surmises of the world. I will not attribute to gentlemen that which the gentleman from South Carolina has expressed; I cannot think the member from New York wishes to suspend the decision of this house until that high character shall be before that tribunal which is to estimate his merits or demerits, for knowing that no baser motive can be cherished, I will not even suspect it of him; but whatever may be the motive which may induce a postponement, it cannot fail of having that effect." He therefore wished to proceed as it respected the president. Mr. Dana acknowledged his very high sense of the opinion of the gentleman last up; but he could not agree with him at present: he did not think it would consist with general justice to delay the case for the time contemplated by the resolution; he well knew that if the inquiry was not made, gentlemen would talk about liberality and about motives, but that he should not in the least regard, assured that his conduct would be guided by the strictest rules of legal propriety and justice. Mr. D. could not admit that much propriety marked the conduct of the gentleman from Maryland (Mr. Nicholson); that gentleman well knew that the executive ought not to be called upon, and that the speaker of the house was the true medium by which evidence could be obtained for that house, but as the argument was in favour of a complete investigation of the business, Mr. D. could not help calling to the recollections of gentlemen a motion (which was negatived) to put this previous examination in the hands of a select committee; for want of that very necessary measure, gentlemen now found themselves in a disagreeable situation, for, having accused these officers, they could not prosecute their accusation as they wished, and therefore they would fain make further inquiry. He objected, farther, to it because it was unnecessary; he did not believe the least good could spring from it. But it was extremely unreasonable, and highly unbecoming the dignified character of grand inquisitors general, because there was no proof to make the charge appear, that they should suspend the business while gentlemen sought for proof which they ought to have known when the resolutions were proposed, which they ought by no means to have brought upon slight grounds. Did the gentleman know that public officers professed reputation; and that the preservation of that reputation was essential to preserve public confidence in them? He would not stretch a man on the bed of torture, for time unknown, while he searched for proof of a supposed crime. "Sir," said Mr. D., "by this treatment you chain your public officers to a rock, for this spirit of patriotism, like a vulture, to prey on their hearts. This is conduct I abhor, and therefore cannot, for my part, indulge it. Sir, they have brought the charge; we are willing to meet it—we are willing to give full weight to their charge—we are not disposed to vindicate the executive, or any other public officer, if doing wrong—but it is because we respect honest men in public stations, that we are prepared to hear what the tongue of accusation can produce; we are unwilling to leave them exposed to calumny, as they must be unheard and unjustified except it be by clamour, which a suspicion must inevitably raise." Mr. Varnum would vote for the resolution proposed; he thought it was doubtful whether the president had acted with propriety or not, but he believed if there had been any incidental impropriety of conduct it never was done with an evil design, or with a view to interfere with any other department of the government; but certainly to deny this evidence, which several gentlemen stated to be necessary to assist them in making up their minds, would stamp a censure on the conduct of those officers as great as that contained in the resolution. He thought that the gentleman from New York had a right to bring the subject to the view of the house; if he saw any proceeding which to him appeared to be dangerous, it was his duty to commence an investigation; no man ought to flinch from what he thought right. The only way to give public satisfaction, in a matter that had given so much public attention, was to give all the evidence which could be procured, and let the matter be investigated to the bottom; and most assuredly the only way effectually to clear the characters implicated, if they were innocent, was to leave no doubt as to the desire of the house to scrutinize their conduct. But certainly the very great reluctance which gentlemen showed to procure all the evidence, and after all their denial of it, must leave a suspicion much bordering on guilt. Mr. Bayard rose, in answer to Mr. Gallatin and others, and observed that with respect to Nash calling himself an American citizen before that court, an object which it was desired to prove by this call for evidence, they were asked to admit the fact. Mr. B. asked, would those gentlemen admit that Nash was guilty of the dreadful murders committed on board the British frigate; would they admit that he falsely made the claim? However, he had no disposition to rest on that point. Another fact, however, which it was required to admit was as to the jurisdiction of the court of the United States upon the case. Mr. B. denied this, and repeated the former arguments in proof of his opinion. He insisted that the whole arrest and proceeding were had at the instance of the British consul and minister, in proof of which he quoted their letters. The record, he said, could not possibly dispense any light to this fact; the record would only give the warrant and some of the depositions first taken before the judge; but as to the court being designated where the cause was to be tried, he contended that it was not usual to insert it on the warrant, he never saw one so drawn. It was possible that Nash was committed with a view to be delivered up to the British, before the letter was received by the judge from the president, and it was very reasonable to suppose that the whole previous business was at the instigation of the British agent; but it was impossible to prove that jurisdiction had attached before the letter directing the delivery to be made was received. Mr.

Jones said, that finding himself, from the vote he was about to give, implicated in the charge made by the gentleman from Delaware (Mr. Bayard), that gentlemen who were yesterday ashamed to vote for the proposition to discharge the committee from further consideration of the subject in general and express terms, because it would imply a distrust of sufficient ground to support the principles of the resolutions, were disposed to effect the same object by a decision which would in fact go to evading the question during the present session, he felt himself impelled by a respect for his own conduct to explain the motives which would govern his vote on the present question. He considered the case which had been called into view by the proposition of the gentleman from New York (Mr. Livingston), as one that involved in it the dearest interests and deepest concerns of the people of the United States. The gentleman from Delaware (Mr. B.) and the gentleman from Connecticut (Mr. Dana) had indulged themselves in the most violent invectives and unnecessary abuse, against the unfortunate, the obscure, and insignificant character, now dead, who was the subject of this proposition; on this topic they had exercised all their powers of passionate declamation. If this was a grateful theme for the employment of their talents, he did not envy them the enjoyment of it. How that kind of argument could apply to the question he left to the house to determine. For his part he deemed it totally immaterial whether the man was as they had declared, an Irishman, or not; whether he was a Turk, a Hottentot, or a native born American; if he claimed to be an American citizen and produced a certificate in due form, under the signature of a proper officer, of his citizenship, and that claim was slighted by the judge, or declared immaterial, and the fact not inquired into of his being a citizen, then he considered the safety of the citizens of America to be equally put in jeopardy, as if the man had been born and raised in Charleston, in the circle of the judge's own acquaintance. "If," he asked, "a dagger aimed at my breast by an assassin in the dark, should, by mistake or impetuosity pierce the bosom of another, would not the discovery of such an attempt awaken alarm and demand a precaution for my future safety? Certainly it would. So in this case; if this man claimed to be a citizen and bore about him the legal voucher of that claim, and if he was told in the presence of American citizens, 'it is of no importance whether you are or are not a citizen, that is a point of no concern in the case,' notwithstanding it may afterwards be found he was no citizen, yet would it equally involve the safety of every true citizen who might fall into similar circumstances. We may congratulate ourselves that it has not fallen on a fellow-citizen, but we ought still to improve the lesson this case has presented." Mr. Jones hoped that it would be improved, and that at least legislative provisions would be made to prevent this decision from operating on a citizen, if such a case should occur in future; this man was a citizen to all intents and purposes, so far as respects the precedent, if he claimed that right and produced a voucher to testify it, and was entitled to all the privileges of a citizen, till his claim and certificate had been formally proved to be false. Mr. J. said, to ascertain with certainty whether this claim was put in, and how it was treated, it certainly was necessary to procure authentic copies of the record and proceedings in the case from the court, and every ray of evidence that could be obtained; nothing could be more essential in deciding on the conduct of the judge than to have an authentic account of the proceedings. Gentlemen seemed extremely anxious to have the question decided early, on account of the censure hanging over the executive by continuing the business on the table. "It is true," Mr. J. said, "the papers now called for were not necessary to determine on that part of the resolution which charges the executive with interfering with the judiciary; on this point no further evidence was wanted; that was an abstract question, and might be so decided; but there was a probability that the evidence to be obtained from the court in Charleston, might be material as to another charge or implication of the president. If it should by any means be proved, that the president was informed of, or knew the man had claimed to be a citizen, then he was surely as much to blame in not making the distinction, as the judge; it was possible this might appear from some of the proceedings or papers before the court." Gentlemen were sensibly affected for the president's feelings in this case, and if he is blameless, this tenderness was proper, but for his part he considered the case of the judge as equally and more delicate than that of the president. The situation of a judge determining on the life of his fellow creature, was, he thought, the most important and responsible duty mankind could impose on any one; of course to censure a judge for any decision that could affect life, was a severe infliction, and in doing it every possible proof and sight ought to be had. It was said that by the delay which this vote would cause, if carried, the president would be hung up in odious effigy to the people at large. Mr. Jones said he could not conceive how a disposition of the house to receive every light, and go into as ample an investigation as possible, would have that effect; he believed a contrary conduct would be more likely to render the conduct of the president suspicious and censurable. What effect would a dry vote of approbation have in this case after refusing to permit testimony to be brought forward which was thought material. It would seem as if the friends of the executive were afraid to let the matter be clearly sifted, and wished to avoid everything that could throw light on the subject. What value ought to be put on applause obtained in such a way? He believed the president would disdain the approbation of the house on such terms—to make his exculpation grateful to himself and satisfactory to the nation, nothing ought to be suppressed, everything should be produced that related to the subject. The gentleman from Connecticut, Mr. Dana, who is always so tenderly concerned for the character and dignity of this house, and so frequently complains of other gentlemen committing that dignity and respect by their conduct and opinions, has, on all occasions, when he has addressed the house, in his style and manner, manifested the most unlimited confidence in the talents and penetration of one member of the house; but what kind of respect he had discovered for every other gentleman in it, he appealed to the observations of gentlemen generally to determine. Some gentlemen had indulged themselves in attributing to the mover and friends of this proposition, unworthy motives; he had on many occasions observed that those gentlemen were partial to that kind of debate; he could not see the use or advantage of such conduct; he thought it very unbecoming any gentleman in this body. There was, however, one motive which these gentlemen had not attributed to him, or those with whom he usually acted in the house; they could not insinuate or pretend that their conduct was designed to throw themselves within the benign beams of executive patronage. Mr. Jones said he would not so far conform to a practice which he condemned as to designate what gentleman would bear an insinuation of that kind; it was not necessary to point them out. He could perceive no other object which could induce gentlemen to declaim so frequently and earnestly on those unpleasant topics.

The question was then taken, on the motion of Mr. Harper, to postpone the consideration of the motion of Mr. Nicholson for a call of the record of the court of South Carolina, for one week, and negatived: yeas, 63; nays, 32.

The question then recurred on the adoption of the resolutions of Mr. Nicholson, when Mr. Marshall again spoke in opposition to, and Messrs. Nicholas and Randolph in answer. The call for the question being very loud, it was taken as follows: Yeas—Messrs. Alston, Baily, Bishop, R. Brown, Cabell, Christie, Clay, Condit, Davis, Dawson, Dent, Eggleston, Ebendorf, Fowler, Gallatin, Goode, Gregg, Hanna, Jackson, Jones, Kitchell, Lee, Leib, Lyon, Livingston, Muhlenburg, New, Nicholas, Nicholson, Randolph, Smilie, J. Smith, S. Smith, Stanford, Stone, Sumpter, Taliafero, Thompson, A. Tregg, Van Cortland, Varnum, R. Williams—44. Nays—Messrs. Baer, Bartlet, Bayard, Bird, Brace, J. Brown, Champlin, Cooper, Craik, Dana, F. Davenport, Dennis, Dickson, Edmond, Evans, A. Foster, D. Foster, Freeman, Glen, C. Goodrich, E. Goodrich, Gordon, Gray, Gresworld, Grove, Harper, Huderson, Hill, Hugher, S. Lee, Lyman, Linn, Marshall, Nott, Otis, Page, Parker, Pinckney, Powell, Reed, Rutledge, Sewall, Sheaf, Shepherd, Thatcher, J. C. Thomas, R. Thomas, Wadsworth, Waln, L. Williams, Woods—51.

Monday, March 3d.

The house having resolved itself into committee, Mr. Edmond in the chair, on the resolution proposed by Mr. Livingston and M. Bayard—the resolution of Mr. Livingston being first in order. Mr. Edmond said he almost ceased to wonder at anything done on that floor. If the intentions of gentlemen were to lay the foundation of another inquiry, which should bring the past conduct of the president to view, perhaps this motion might then be proper; but calling for papers relative to another transaction and not included in the original resolutions, was unaccountable, except it was to lay the foundation of an impeachment of the president; and if ever that was the view, the house ought first to get rid of these troublesome resolutions. He knew it was very easy for gentlemen to get up and call for this and that testimony; and if they did not receive it to make a handle of the refusal by saying that the evidence was precluded; but, Mr. Edmond said, such excuses would not in the least affect his vote. Suppose the papers in question were obtained, he could perceive no possible application they would have to the present case; for if the president was wrong in what he did, concerning Johnson (or Brigstock), that would not prove him wrong or right in his conduct respecting Nash. The facts respecting Robbins (or Nash), were only now before the house in the resolutions, and no other case ought to be brought to confound it. Suppose this was admitted, if the gentleman should still find himself deficient in his testimony to support the resolutions, he might want the house to send for more testimony from some other parts. This kind of conduct must take up unnecessary time where a decision was very necessary to be come to. He hoped the motion would be negatived. Mr. Macon confessed he was astonished at the conduct he had seen exemplified in the house; it appeared to him that gentlemen were making every possible excuse to prevent that information coming before the house which the friends of the resolution said they wanted. If, Mr. M. said, he was desirous of injuring the reputation of the president, (and that he declared he was not,) he should think himself facilitating that desire by throwing every embarrassment in the way, and refusing every sort of information on the subject; this conduct would effectually tell the public that the truth dare not be seen; that the facts are too bad to be seen. He could not think it was any great mark of friendship to the president to give rise to such conjectures as the people must and would form by the door to investigation into his conduct being stopped. In his opinion, Mr. M. said, this seclusion of the facts went to prove that the opinion of the president, or his conduct in the New Jersey case, was right, and to reveal them would amount to an evidence that the latter was wrong with respect to Nash. If it was otherwise, the papers asked for would speak for themselves; it certainly would have a very suspicious appearance to refuse the papers which were declared by several gentlemen to be important to their forming a decision. Mr. M. wished to have got rid of this business altogether, but as it must be examined, he wished it to be done with all the evidence possible. If there were gentlemen who were enemies to the president, he declared he was not one; he desired to do him justice, which he thought could not be done by hiding any part of his conduct which was open to suspicion. If the president had changed his opinion, give him an opportunity to show that he had acted right. If the papers should prove to be of no use in the present investigation, he could see no harm that could accrue from them. Mr. Shepherd hoped the resolution never would be permitted to go on the journals of the house, because it must lead to inquiry. The object he believed only to be delay. He thought when the resolution was first admitted, in having anything to do with the business, the house committed a very great error, but because the house had committed one blunder, was that any reason they should go on blundering? He hoped the house would get rid of this business with all possible expedition. Mr. Livingston said, if he were really a personal enemy to the president, he should rejoice at such a motion as this being opposed; he thought it a very inconsistent part of the conduct of those gentlemen who called themselves exclusive friends of the president; those gentlemen who boasted of giving up their personal ease in the service of their country in contradistinction to those gentlemen of opposite political opinions, with whom they disdained to be seen in their patriotic labours. His bitterest enemies would not wish to place him in a more undignified situation. What inference can be drawn by the people of the United States, but that there is something rotten in the business, and that will bear too hard on the conduct of the president to be made appear; that he had done in the case of Nash without consideration very differently from what he did in the case of Brigstock, after mature consideration? "It had appeared, in the course of his business," Mr. L. said, "that some gentlemen in the house had been in the habit of corresponding with the department of state on the case of Robbins; might it not be inferred from their subsequent conduct that they had discovered something which they did not choose to have exposed? Whether this was a fair inference or not, it would certainly be made."

"The wretched argument with which this opposition was supported," Mr. L. said, "was almost extraordinary, and would be quite so, could it be supported on better grounds. The distinction of the cases when no perceptible distinction exists—the time that it would waste, when a few hours could procure all that was asked, and above all the miserable excuse of trouble to the clerks in the secretary's office, were too futile for gentlemen to suppose they could palm them upon the public. But miserable as they are, it is a convincing proof that no better are to be found, and these are their last resort." To suppose that no correspondence took place would be an absurdity, and equally so would it be, to harbour the opinion which gentlemen had desired to establish, that it could throw no light upon the present subject if it did appear. Gentlemen had actually presumed to say that these cases were not the same; but what gentlemen had pretended to draw a shade of distinction? It was impossible, and nothing was wanted to prove this fact but a slight examination of the two cases. "If they are the same," said Mr. L., "'tis impossible to suppose the conduct of the executive in respect to this one was right; and the proceedings of the court thereupon will not be laid down as

a rule for future proceedings. The opinion of the president in the Jersey case was no doubt given upon a due deliberation, and in a future case, so precisely the same, his conduct ought to have been the same, or not being so, the house ought to be informed why it differed. The result could be obtained; if it should prove favourable to the character of the president," Mr. L. declared, he should be as willing to admit it as those who called themselves his exclusive friends. Mr. Harper said, when the gentleman from New York undertook to direct others in their votes he should be careful to give reasons which must convince their minds; for his part, Mr. H. said, he never chose to accept of advice from his enemy, but if he could get instruction from his errors, and if by viewing his mistaken measures he could improve himself, he was always willing to do it; if he took advice from any man he must know that his motives are good in giving it; if in the present instance, he could believe the design of the gentleman was to preserve the president of the United States from obloquy; if he had not discovered the "pen dipped in gall," he should be more inclined to listen to his advice. He was not afraid that the people of the United States were so stupid as to mistake the true light in which they ought to view the subject. "Was it a common practice," Mr. H. asked, "to exhibit vast charges and then to go and look for testimony? Why, did not the gentleman and his counsel, whoever they might be, know that the testimony from South Carolina, and the testimony from New Jersey, or any other, would be necessary to support the charge? They had plenty of time since the business was first agitated. Had not this business been talked of for eight months past, and paste-board figures of Jonathan Robbins been exhibited at every election ground in the United States? The most ordinary rules of courts of justice in the United States forbade testimony to be admitted at such a period of the proceedings. If any public accuser in the United States was to conduct himself in that way, he would get severely rapped over the knuckles, if not thrown over the bar. The matter has proceeded too far for its admission." "But," said Mr. H., "what can be the use of this testimony? Gentlemen say that the executive has decided on one case in different ways, and that on the present occasion he must be wrong. One gentleman said, the claim of citizenship was important; but this is a wrong idea. The claim of citizenship which was built on falsehood, was not made until after the president had acted on the case, and consequently it must be out of the question. It is scarcely possible that any requisition was ever made by any British agent in the case in New Jersey. Can it be supposed that the president would be guilty of such a boyish trick, of such versatility of conduct in his dealings with a foreign nation, as in a few months to put a different construction upon one and the same action? No, the supposition is absolutely impossible, and gentlemen well knew it." The New Jersey case, Mr. H. said, was an entirely different one; the men were indicted by the circuit court: they were not claimed to be given up to the British; they were indicted for an offence cognizable in that court; bills were found against them; two of them were tried and acquitted, the other the president ordered a nolle prosequi to be enterd upon. Why were the men acquitted? Was it through a defect of testimony? "No, sir," said Mr. H., "but through a defect in the jurisdiction. The jury well knew, being judges of law as well as of facts, that the court had no jurisdiction, and therefore they made a return of not guilty. Inasmuch as there was no demand made from Great Britain, the men were discharged." Mr. H. said, he was opposed to this motion on account of the principle contained in it; it was very wrong to first exhibit a charge and then go to hunt for testimony. It was like hanging a man on a gibbet, and then seeking for his guilt. This principle had been presented to the house in various shapes, but in every one he thought very properly rejected, as he had no doubt this would be. If this were to be acceded to, the next thing would be to search for a piece of evidence in Georgia or in Maine, or anything that would procure the object—delay, and its influence on a certain occasion (election). Here was a criminal charge, dressed up and blazoned out with all the false colours which a stretched imagination could invent, but which was manifestly and totally unfounded, and contrary to facts; it therefore appeared to him necessary, Mr. H. said, to come to a decision speedily and strip the charge of its gloss, in order that its true deformity might appear, and all the world would see that the intention to accused was baffled by an exposure of the truth, and the character accused justified from guilt. Mr. S. Smith said, the gentleman last up had given the most powerful reason why these papers were necessary that could possibly be imagined. He said, in strong language, that no requisitions had ever been made in the New Jersey case to deliver up the men to the British. If this was a fact, most assuredly the case would not apply; but the only way to estimate that fact was to obtain a view of the papers, or know from authority that there were none. Mr. S. said he could not draw that conclusion; he believed that a requisition had been made; that it was precisely the same as the South Carolina case, and that the papers relating to it would be completely in point, to which the house ought to have access, and not to go to British statutes and law books when the country produced a precedent. The gentlemen last up had said that the jury, being judges of law and facts, determined that there was no jurisdiction. How that was he could not say. The verdict was not guilty, which most likely was a verdict upon facts. Suppose it should turn out by the documents that requisition was made for these men, and it should prove that two of them were liberated for want of sufficient proof. Suppose it should turn out that this very lieutenant Foreshaw was sworn to have been killed by Brigstock, and yet now Nash is charged with having killed Foreshaw. Suppose it would turn out that Brigstock was an American citizen, and being such, was liberated from further prosecution, because the president might have thought that an American citizen, impressed on board a British ship of war, was justifiable in getting his liberty. These things might appear. The same claim of citizenship was now made, and in his opinion a jury trial ought to have been had, in order to ascertain facts so material to a man's personal interest.

Mr. Harper explained, that he said the documents did not discover any requisition having been made in the Jersey case. And further, instead of positively saying the jury had acquitted for want of jurisdiction, he said it was presumed so. Mr. Smilie said there was another fact stated by the gentleman which was incorrect. He said the figure of J. R. was hung up at every election ground. This was not truth; for Mr. S. said he was at one election where it was not hung up. (Several other gentlemen also declared that they saw no such thing at their respective districts, but they heard of it in some few places.) One extraordinary feature, Mr. Smilie observed, was easily perceived throughout the whole of this attempt to investigate facts. It appeared that gentlemen were determined to exculpate the president at all events. He was not ready to do so; nor was he ready to accuse him; he only wished to do what was right and lawful; for which purpose he wished every document that could assist him. It was strange that, while there were papers which, it was said, would make the whole of the executive conduct appear free of blame, the friends of the executive should repress them. How could gentlemen say they

had not withheld important testimony, when all the world must perceive that facts were yet hidden that would throw a light on the case. Mr. H. Lee said he had hitherto voted with gentlemen who asked for papers. He did it because they themselves said they wanted such papers to guide their decision. He was unwilling that they should have any excuse. Supposing that other information might possibly be procured, and anxious to obtain it, he wrote to the secretary of state, but received for answer, there was none. Mr. L. said he did it in order, if there had been any papers, to have moved that they might be produced. He should have voted on the present question in the same way, but from what he had perceived he found that any attempts to gratify those gentlemen were in vain, and that to encourage it would be wasting day after day, without any hope of settling the main inquiry before the next session of congress. Besides, Mr. Lee said, the session was far spent, and not one public act was yet passed. And should so many days be spent on a matter of so little consequence, as considering the case of an individual who had transgressed the law and very properly suffered for his crimes? He hoped not. From this moment he was determined to stop, by his vote, every attempt to delay a final decision. Mr. Lee contended that the president had a right to change his proceeding according to his opinion, if he should be convinced of the propriety of it. It was a privilege every public character enjoyed, even if it should appear that they had changed his conduct. He would not vote for a postponement, which he must do were he to vote for the motion. Mr. Nicholas thought there was a very great possibility that a requisition was made in the New Jersey case: the gentleman from South Carolina (Mr. Harper) said there was none; but how did he know it? Did the gentleman believe that the British ministry were not as desirous to have these men delivered as they were of the other? To suppose that they acted understandingly: to suppose they were desirous of pursuing one steady object unremittingly, as they always had done, would warrant a strong presumption that they did demand those men. It was impossible but the papers in question must either add or diminish the construction put upon this case, and solve some important queries. Mr. Dana thought the conduct of the president was consistent, constitutional and proper, and that it was out of the power of any gentleman to prove the contrary. One great reason for his thinking this, was the manner this charge had been conducted from its first appearance, which was contrary to all legal knowledge and constitutional principles; he desired any gentleman to produce a precedent in any public body except it was in the proceedings of the revolutionary government of France. The manner of conducting the business being totally wrong, Mr. D. said he did not expect to receive the least conviction from anything that would be brought forward, or any arguments which would be used. Gentlemen had said it would awaken dreadful suspicions if the motion was negatived. And were the house to be deterred from their duty at the apparition of a demagogue? No, he trusted not, because he well knew that men of understanding would well approve their conduct, and if weak and silly men disapproved he was willing to bear it from them. If gentlemen would look to the record they would find that the cases were different; these men were charged under the statute of the United States, the other was not. The proceeding being different, the case could not illuminate. As well might gentlemen ask for the whole of the state trials in order to discover the law on impeachments. Mr. Gallatin contended that if investigation was the object of the house, they ought to grant the resolution; whether it was admitted or not, it would be impossible to destroy one fact—that the court did admit jurisdiction on that case, which was exactly similar to this, and that also the court of South Carolina did assume jurisdiction—whether the demand was made in the Jersey case or not, it was clear that it was made in the case of Nash, and that it was complied with, and the man by the advice of the president, was taken out of the hands of the judiciary. But to know how exactly the circumstances of the Jersey case corresponded to the latter, the papers were certainly desirable. This was a case in point much better than all which the English authorities could produce, and there being a different decision, it certainly ought to be known why that difference did occur. The gentleman from South Carolina had stated facts; he said that no jurisdiction was admitted by the jury, and therefore the men were acquitted; and that no requisitions were made. To be sure, he afterwards said it was all founded in supposition; now whether these were or were not facts, the papers could tell. By knowing all the circumstances of that case a decision could be formed with more accuracy as to the other case. Mr. Davis said he was desirous of avoiding this very disagreeable subject, but as a majority of the house thought differently, and they determining he should give a vote, however contrary to his will, he certainly wished to meet it with all the information in the power of the house. The gentleman from New York had brought forward certain resolutions which he had defended; the gentleman from South Carolina said they were blazoning with falsehood: now which of these two gentlemen, Mr. Davis asked, was he to believe? How could he form an opinion without the facts being produced? He wished not to be forced to form it upon bare conjectures; he wished to have the truth before him. Certainly if he was refused facts, he must suppose there was some great reason against the disclosure. He asked gentlemen to recollect in what a situation they placed the executive, exposed to such censure! Let everything appear that will do honour to the character of that gentleman, but to afford such crippled testimony never would acquit the president in the view of the American people, if that house should be satisfied that his conduct was honourable. The question was then taken by yeas and nays: Yeas, 46; nays, 46. The speaker decided in the negative.

Thursday, March 4th.

Mr. Gallatin presented to the house the following resolution: "Resolved, that the president of the United States be requested to cause to be laid before this house, copies of any requisition, or any application that may have been made by the British minister, or any agent of his Britannic majesty, for or concerning the delivery up of Wm. Brigstock, otherwise John Johnson, of John Evans, otherwise Michael Campbel, and of Johannes Williams, otherwise Johannes Williamson, or either of them who were tried at the circuit court of the United States, in the New Jersey district, on a charge of piracy, committed on board the British frigate Hermione; and also copies of any communication in the executive department, or any other of the departments relative thereto." Mr. Nicholas, yesterday, just before the rising of the house, mentioned the necessity of this inquiry, but the house adjourned before a motion was made to that effect. Some conversation occurred as to the disposal of this motion. Mr. Bayard hoped the resolution would follow the usual course, and lie on the table for a day. If the idea was to connect the case with that of Nash, or to bring more evidence to the present case, he thought it must fail of its object. It was impossible, he said, that the decision on that case could be the least guide to the house in the present, as it was a very distinct trial, and therefore, he hoped it would lie. Mr. Livingston hoped the resolution would not lie on the table till another day, and for

this plain reason—what were we to do in the meantime? He believed it perfectly connected with the business that now occupied the house, and therefore, if it was the desire of the house to proceed, they had better dispose of this resolution immediately. But the gentleman from Delaware had intimated that it could bring no new evidence respecting the case now before the house, because it was a case quite distinct from it. To be sure Mr. Livingston said it would operate for the benefit of the gentleman's argument, if he could make the house believe so. But, Mr. L. thought, they were clearly the same, except it was in men, in place of trial, and in judges who tried them. Both were for precisely the same act, and committed at the same time. It would be remarked in the warrant that it appeared, these men were committed under the treaty with Great Britain, and therefore it was more than probable that it was in consequence of application from some British agent, to the executive, that they were apprehended. How could the gentleman say it could give no new light? Was it possible that the conduct of the executive in the case of Brigstock, and others, in New Jersey, could afford no new light to the conduct of the same executive in the very same case on the trial of Thomas Nash? Mr. L. said, he knew nothing of what passed between the executive and others, but suppose, it should appear, if the house obtain possession of the communication, that application had been made before the trial by some British agent for the delivery up of all or either of these men, and the answer of the president had been that it was a judicial point, and therefore he did not choose to meddle with it? Certainly the gentleman would not say that this case had nothing to do with the present, in which such an extraordinary change of conduct had been evinced. If this result could arise, (which it was impossible to deny,) gentlemen ought to yield to the wishes of others. The plea could not now be that they would have to send to South Carolina for what was asked; because this information might be procured in a few hours, and certainly to obtain what was deemed so important, a small delay might well be borne. A gentleman had said it ought to have been brought forward at an earlier period. How was this possible? Mr. Livingston said, that he did not receive the record of the New Jersey case, till just before the house met yesterday; he then made use of it in the discussion, and it was not till just at the rising of the house, any gentleman could make use of it, and then a gentleman did propose something of the kind. It was a plain inference to be drawn that some communication did occur with a foreign agent, and some answer must have been given; the executive no doubt did act on the subject; he also acted in this case. It was, therefore, very proper for the house to be informed how he acted. Mr. Rutledge trusted that the difficulties gentlemen had to encounter in their present precipitate way of acting, would prevent them bringing forward any crimination of so great a character in future, without being better prepared to substantiate it. Mr. R. said that he had no objection to call for all the information that could conveniently be had previous to the debate commencing, but to do it afterwards was most extraordinary indeed! If these proceedings were to prevail, it would be impossible to say when a vote was taken. Gentlemen, now they are entered into the business, find that facts will not bear them out: they find they cannot substantiate what they would prove. One calls for this, another for that, and there would be no end to their calling. He wished for all possible elucidation of the subject, as long as it could be proper, but after going into the argument, it was extremely improper. But, Mr. R. asked, what had this case to do with the business of Nash? The gentleman supposed that it was considered by the executive as a case within the judicial cognizance, and therefore he refused to act in it; suppose it was so; and suppose the executive afterwards changed his opinion, what he might consider an erroneous opinion; certainly he had a right to do so. The object of this he believed to be, to delay and finally to postpone the decision, but he hoped the house would not now agree to delay the business. If the gentleman should hereafter think proper to promote an impeachment upon the proceedings in the case of Brigstock and others, and on that ground should ask for the papers relative thereto, he should have no objection to an acquiescence; but as this was entirely an independent case, he could see no necessity of yielding to the solicitations of gentlemen at present. Mr. Gallatin said, as to the late period of introducing the resolution, it must be clear that it was out of his power to propose it till the time he offered it to the house, because the facts which gave rise to it were not produced until yesterday; and as to the objects for it, the gentleman last up was quite mistaken. A gentleman had said that it was a last effort, in order to support charges against the president of the United States. As to what would be the effect of these papers if they should be sent, Mr. Gallatin could not tell. He did not know that such papers existed at all, but the inference the gentleman had drawn was upon a presumption that they would criminate the president. This Mr. G. did not know was the fact; he knew nothing about them; they might criminate, or they might have a very contrary effect. The gentleman was extremely mistaken if it was his idea that other gentlemen were determined at all events to discover a charge; he only wished an investigation of the truth, and let that truth as well as the law dictate the proper measures to be used. The affair having been brought before the house, he would say it was their duty to obtain all possible information, whether in favour of or against the president; with this view he made the motion. Contrary to the opinion expressed by the gentleman last up, he must consider this case extremely similar, and he believed the most minute scrutiny could not distinguish between them. There was this difference, however, so far as the house had knowledge of it at present; in one there was a requisition made, in the other there possibly was not, but whether so or not he wished to be satisfied, as well as the ground for which a requisition was made and refused. There had been no law passed since the New Jersey case occurred, to carry this 27th article of the treaty into effect, and therefore the proceedings in every case ought to have been precisely the same, but not having been so, Mr. G. said he wished to know on what rule or law the president had acted. Much had been said as to the claim of Thomas Nash to citizenship. How far the president acted in that case with regard to citizenship would be seen; but there was one remarkable fact as to the New Jersey case. One of the men named Brigstock, it appeared, was indicted by three different indictments; two of them were for piracy, and were much alike, the other was for murder; for the two first he was tried and acquitted, but for the last, a nolle prosequi was left; one remarkable difference was in the last indictment from the two others; in that he was represented as being a citizen of the United States. He thought it was very probable the nolle prosequi was ordered by the president, because the man was a citizen of the United States; the opinion of the president on that case, Mr Gallatin thought, would tend much to elucidate his conduct with respect to Nash's case.

Mr Marshall (whose speech, as given in a note to Bee's reports, 266, was written out by himself, which is said by Judge Story to be among the very ablest arguments on record, and is even admitted by the Aurora to have

temporarily silenced opposition, and which is consequently introduced here in full), said, that believing, as he did most seriously, that in a government constituted like that of the United States, much of the public happiness depended, not only on its being rightly administered, but on the measures of administration being rightly understood. on rescuing public opinion from those numerous prejudices with which so many causes might combine to surround it, he could not but have been highly gratified with the very eloquent, and what was still more valuable, the very able and very correct argument which had been delivered by the gentleman from Delaware (Mr. Bayard) against the resolutions now under consideration. He had not expected that the effect of this argument would have been universal; but he had cherished the hope, and in this he had not been disappointed, that it would be very extensive. He did not flatter himself with being able to shed much new light on the subject; but, as the argument in opposition to the resolutions had been assailed, with considerable ability, by gentlemen of great talents, he trusted the house would not think the time misapplied, which would be devoted to the re-establishment of the principles contained in that argument, and to the refutation of those advanced in opposition to it. In endeavouring to do this, he should notice the observations in support of the resolutions, not in the precise order in which they were made; but as they applied to the different points he deemed it necessary to maintain, in order to demonstrate, that the conduct of the executive of the United States could not justly be charged with the errors imputed to it by the resolutions. His first proposition, he said, was that the case of Thomas Nash, as stated to the president, was completely within the 27th article of the treaty of amity, commerce and navigation, entered into between the United States of America and Great Britain. He read the article, and then observed: "The casus fœderis of this article occurs, when a person, having committed murder or forgery within the jurisdiction of one of the contracting parties, and having sought an asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of his guilt as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed." The case stated is, that Thomas Nash, having committed a murder on board of a British frigate, navigating the high seas under a commission from his Britannic majesty, had sought an asylum within the United States, and on this case his delivery was demanded by the minister of the king of Great Britain. It is manifest that the case stated, if supported by proof, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation. That such a murder is within their jurisdiction, has been fully shown by the gentleman from Delaware. The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation are rightfully obligatory on its own citizens in every situation, where those laws are really extended to them. This principle is founded on the nature of civil union. It is supported everywhere by public opinion, and is recognized by writers on the law of nations. Rutherforth, in his second volume (page 180), says: "The jurisdiction which a civil society has over the persons of its members, affects them immediately, whether they are within its territories or not." This general principle is especially true, and is particularly recognized, with respect to the fleets of a nation on the high seas. To punish offences committed in its fleet, is the practice of every nation in the universe; and consequently the opinion of the world is, that a fleet at sea is within the jurisdiction of the nation to which it belongs. Rutherforth (volume 2, p. 491) says, there can be no doubt about the jurisdiction of a nation over the persons which compose its fleets, when they are out at sea, whether they are sailing upon it or are stationed in any particular part of it. The gentleman from Pennsylvania (Mr. Gallatin), though he has not directly controverted this doctrine, has sought to weaken it by observing, that the jurisdiction of a nation at sea could not be complete even in its own vessels; and in support of this position he urged the admitted practice of submitting to search for contraband—a practice not tolerated on land, within the territory of a neutral power. The rule is as stated; but is founded on a principle which does not affect the jurisdiction of a nation over its citizens or subjects in its ships. The principle is, that in the sea, itself, no nation has any jurisdiction. All may equally exercise their rights, and consequently the right of a belligerent power to prevent aid being given to his enemy, is not restrained by any superior right of a neutral in the place. But if this argument possessed any force, it would not apply to national ships of war, since the usage of nations does not permit them to be searched. According to the practice of the world, then, and the opinions of writers on the law of nations, the murder committed on board of a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation. Although such a murder is plainly within the letter of the article, it has been contended not to be within its just construction; because at sea all nations have a common jurisdiction, and the article correctly construed, will not embrace a case of concurrent jurisdiction. It is deemed unnecessary to controvert this construction, because the proposition, that the United States had no jurisdiction over the murder committed by Thomas Nash, is believed to be completely demonstrable. It is not true that all nations have jurisdiction over all offences committed at sea. On the contrary, no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself. This principle is laid down in 2 Ruth. Inst. 488, 491.

The American government has, on a very solemn occasion, avowed the same principle. The first minister of the French republic asserted and exercised powers of so extraordinary a nature, as unavoidably to produce a controversy with the United States. The situation in which the government then found itself was such as necessarily to occasion a very serious and mature consideration of the opinions it should adopt. Of consequence, the opinions then declared deserve great respect. In the case alluded to, Mr. Genet had asserted the right of fitting out privateers in the American ports, and of manning them with American citizens in order to cruise against nations with whom America was at peace. In reasoning against this extravagant claim, the then secretary of state, in his letter of the 17th of June, 1793, says: "For our citizens then to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the executive, and to those whom they consulted, as much against the laws of the land as to murder or rob, or combine to murder or rob its own citizens; and as much to require punishment, if done within their limits, where they have a territorial jurisdiction, or on the high seas, where they have a personal jurisdiction, that is to say, one which reaches their own citizens only; this being an appropriate part of each nation, on an element where all have a common jurisdiction." The well considered opinion, then, of the American government, on this subject, is that the jurisdiction of a nation at sea is "personal," reaching its "own citizens only;" and that this is the "appropriate part of each nation" on that element.

This is precisely the opinion maintained by the opposers of the resolutions. If the jurisdiction of America at sea be personal, reaching its own citizens only; if this be its appropriate part, then the jurisdiction of the nation cannot extend to a murder committed by a British sailor, on board a British frigate navigating the high seas under a commission from his Britannic majesty. As a further illustration of the principle contended for, suppose a contract made at sea, and a suit instituted for the recovery of money which might be due thereon. By the laws of what nation would the contract be governed? The principle is general that a personal contract follows the person, but is governed by the law of the place where it is formed. By what law then would such a contract be governed? If all nations had jurisdiction over the place, then the laws of all nations would equally influence the contract; but certainly no man will hesitate to admit that such a contract ought to be decided according to the laws of that nation to which the vessel or contracting parties might belong. Suppose a duel, attended with death, in the fleet of a foreign nation, or in any vessel which returned safe to port, could it be pretended that any government on earth, other than that to which the fleet or vessel belonged, had jurisdiction in the case; or that the offender could be tried by the laws or tribunals of any other nation whatever? Suppose a private theft by one mariner from another, and the vessel to perform its voyage and return in safety, would it be contended that all nations have equal cognizance of the crime, and are equally authorized to punish it? If there be this common jurisdiction at sea, why not punish desertion from one belligerent power to another, or correspondence with the enemy, or any other crime which may be perpetrated? A common jurisdiction over all offences at sea, in whatever vessel committed, would involve the power of punishing the offences which have been stated. Yet, all gentlemen will disclaim this power. It follows, then, that no such common jurisdiction exists. In truth the right of every nation to punish is limited, in its nature, to offences against the nation inflicting the punishment. This principle is believed to be universally true. It comprehends every possible violation of its laws on its own territory, and it extends to violations committed elsewhere by persons it has a right to bind. It extends also to general piracy. A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery, therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation, and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation, is only punishable by that nation. It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offences committed on the high seas. A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable. It had been observed by his colleague (Mr. Nicholas), for the purpose of showing that the distinction taken on this subject by the gentleman from Delaware (Mr. Bayard) was inaccurate, that any vessel robbed on the high seas could be the property only of a single nation, and being only an offence against that nation, could be, on the principle taken by the opposers of the resolutions, no offence against the law of nations; but in this his colleague had not accurately considered the principle. As a man who turns out to rob on the highway, and forces from a stranger his purse with a pistol at his bosom, is not the particular enemy of that stranger, but alike the enemy of every man who carries a purse, so those who without a commission rob on the high seas, manifest a temper hostile to all nations, and therefore become the enemies of all. The same inducements which occasion the robbery of one vessel, exist to occasion the robbery of others, and therefore the single offence is an offence against the whole community of nations, manifests a temper hostile to all, is the commencement of an attack on all, and is consequently, of right, punishable by all. His colleague had also contended that all the offences at sea, punishable by the British statutes from which the act of congress was in a great degree copied, were piracies at common law, or by the law of nations, and as murder is among these, consequently murder was an act of piracy by the law of nations, and therefore punishable by every nation. In support of this position he had cited 1 Hawk. P. C. 267, 271; 3 Inst. 112, and 1 Wood. El. Jur. 140.

The amount of these cases is, that no new offence is made piracy by the statutes; but that a different tribunal is created for their trial, which is guided by a different rule from that which governed previous to those statutes. Therefore, on an indictment for piracy, it is still necessary to prove an offence which was piracy before the statutes. He drew from these authorities a very different conclusion from that which had been drawn by his colleague. To show the correctness of his conclusion, it was necessary to observe, that the statute did not indeed change the nature of piracy, since it only transferred the trial of the crime to a different tribunal where different rules of decision prevailed; but having done this, other crimes committed on the high seas, which were not piracy, were made punishable by the same tribunal; but certainly this municipal regulation could not be considered as proving that those offences were, before, piracy by the law of nations. (Mr. Nicholas insisted that the law was not correctly stated, whereupon Mr. Marshall called for 3 Inst. and read the statute:) "All treasons, felonies, robberies, murders, and confederacies, committed in or upon the seas," &c., "shall be inquired, tried, heard, determined and judged in such shires," &c. "in like form and condition as if any such offence had been committed on the land," &c. "And such as shall be convicted," &c., "shall have and suffer such pains of death," &c., "as if they had been attainted of any treason, felony, robbery, or other the said offences done upon the land." This statute, it is certain, does not change the nature of piracy; but all treasons, felonies, robberies, murders and confederacies committed in or upon the sea, are not declared to have been, nor are they piracies. If a man be indicted as a pirate, the offence must be shown to have been piracy before the statute; but if he be indicted for treason, felony, robbery, murder, or confederacy, committed at sea, whether such offence was or was not a piracy, he shall be punished in like manner as if he had committed the same offence on land. The passage cited from 1 Woodeson, 140, is a full authority to this point. Having stated that offences committed at sea were formerly triable before the lord high admiral, according to the course of the Roman civil law, Woodeson says: "But, by the statutes 27 Hen. VIII., c. 4, and 28 Hen. VIII., c. 15, all treasons, felonies, piracies and other crimes committed on the sea, or where the admiral has jurisdiction, shall be tried in the realm as if done on land. But the statutes referred to affect only the manner of the trial so far as respects piracy. The nature of the offence is not changed. Whether a charge amount to piracy or not, must still depend on the law of nations, except

where in the case of British subjects, express acts of parliament have declared that the crimes therein specified shall be adjudged piracy, or shall be liable to the same mode of trial and degree of punishment." This passage proves not only that all offences at sea are not piracies by the law of nations, but also that all indictments for piracy must depend on the law of nations, "except where, in the case of British subjects, express acts of parliament" have changed the law. Why do not these "express acts of parliament" change the law as to others than "British subjects?" The words are general, "all treasons, felonies," &c. Why are they confined in construction to British subjects? The answer is a plain one: The jurisdiction of the nation is confined to its territory and to its subjects.

The gentleman from Pennsylvania (Mr. Gallatin) abandons, and very properly abandons, this untenable ground. He admits that no nation has a right to punish offences against another nation, and that the United States can only punish offences against their own laws and the law of nations. He admits, too, that if there had only been a mutiny (and consequently if there had only been a murder) on board the Hermione, that the American courts could have taken no cognizance of the crime. Yet mutiny is punishable as piracy by the law of both nations. That gentleman contends that the act committed by Nash was piracy, according to the law of nations. He supports his position by insisting that the offence may be constituted by the commission of a single act; that unauthorized robbery on the high seas is this act, and that the crew having seized the vessel, and being out of the protection of any nation, were pirates. It is true that the offence may be completed by a single act; but it depends on the nature of that act. If it be such as manifests generally hostility against the world—an intention to rob generally, then it is piracy; but if it be merely a mutiny and murder in a vessel, for the purpose of delivering it up to the enemy, it seems to be an offence against a single nation and not to be piracy. The sole object of the crew might be to go over to the enemy, or to free themselves from the tyranny experienced on board a ship of war, and not to rob generally. But, should it even be true that running away with a vessel to deliver her up to an enemy was an act of general piracy, punishable by all nations, yet the mutiny and murder were a distinct offence. Had the attempt to seize the vessel failed, after the commission of the murder, then, according to the argument of the gentleman from Pennsylvania, the American courts could have taken no cognizance of the crime. Whatever then might have been the law respecting the piracy, of the murder there was no jurisdiction. For the murder, not the piracy, Nash was delivered up. Murder and not piracy, is comprehended in the 27th article of the treaty between the two nations. Had he been tried then and acquitted on an indictment for the piracy, he must still have been delivered up for the murder, of which the court could have no jurisdiction. It is certain that an acquittal of the piracy would not have discharged the murder; and, therefore, in the so much relied on trials at Trenton, a separate indictment for murder was filed after an indictment for piracy. Since, then, if acquitted for piracy, he must have been delivered to the British government on the charge of murder, the president of the United States might, very properly, without prosecuting for the piracy, direct him to be delivered up on the murder.

All the gentlemen who have spoken in support of the resolutions, have contended that the case of Thomas Nash is within the purview of the act of congress, which relates to this subject, and is by that act made punishable in the American courts. That is, that the act of congress designed to punish crimes committed on board a British frigate. Nothing can be more completely demonstrable than the untruth of this proposition. It has already been shown that the legislative jurisdiction of a nation extends only to its own territory, and to its own citizens, wherever they may be. Any general expression in a legislative act must, necessarily, be restrained to objects within the jurisdiction of the legislature passing the act. Of consequence an act of congress can only be construed to apply to the territory of the United States, comprehending every person within it and to the citizens of the United States. But, independent of this undeniable truth, the act itself affords complete testimony of its intention and extent. See 1 Laws U. S. p. 10 [1 Stat. 112]. The title is: "An act for the punishment of certain crimes against the United States." Not against Britain, France or the world, but singly "against the United States." The first section relates to treason, and its objects are, "any person or persons owing allegiance to the United States." This description comprehends only the citizens of the United States, and such others as may be on its territory or in its service. The second section relates to misprision of treason; and declares, without limitation, that any person or persons, having knowledge of any treason, and not communicating the same, shall be guilty of that crime. Here then is an instance of that limited description of persons in one section, and of that general description in another, which has been relied on to support the construction contended for by the friends of the resolutions. But will it be pretended that a person can commit misprision of treason who cannot commit treason itself? That he would be punishable for concealing a treason who could not be punished for plotting it? Or, can it be supposed that the act designed to punish an Englishman or a Frenchman, who, residing in his own country, should have knowledge of treasons against the United States, and should not cross the Atlantic to reveal them? The same observations apply to the sixth section, which makes any "person or persons" guilty of misprision of felony, who, having knowledge of murder or other offences enumerated in that section, should conceal them. It is impossible to apply this to a foreigner, in a foreign land, or to any person not owing allegiance to the United States. The eighth section, which is supposed to comprehend the case, after declaring that if any "person or persons" shall commit murder on the high seas, he shall be punishable with death, proceeds to say, that if any captain or mariner shall piratically run away with a ship or vessel, or yield her up voluntarily to a pirate, or if any seaman shall lay violent hands on his commander, to prevent his fighting, or shall make a revolt in the ship, every such offender shall be adjudged a pirate and a felon. The persons who are the objects of this section of the act are all described in general terms, which might embrace the subjects of all nations. But is it to be supposed that if in an engagement between an English and a French ship of war, the crew of the one or the other should lay violent hands on the captain and force him to strike, that this would be an offence against the act of congress, punishable in the courts of the United States? On this extended construction of the general terms of the section, not only the crew of one of the foreign vessels forcing their captain to surrender to another would incur the penalties of the act, but if in the late action between the gallant Truxton and the French frigate, the crew of that frigate had compelled the captain to surrender, while he was unwilling to do so, they would have been indictable as felons in the courts of the United States. But surely the act of congress admits of no such extravagant construction. His colleague, Mr. Marshall said, had cited and particularly relied on the ninth section of the act; that section declares that if a citizen shall com-

mit any of the enumerated piracies, or any acts of hostility, on the high seas, against the United States, under colour of a commission from any foreign prince or state, he shall be adjudged a pirate, felon and robber, and shall suffer death. This section is only a positive extension of the act to a case which might otherwise have escaped punishment. It takes away the protection of a foreign commission from an American citizen, who, on the high seas, robs his countrymen. This is no exception from any preceding part of the law, because there is no part which relates to the conduct of vessels commissioned by a foreign power: it only proves that, in the opinion of the legislature, the penalties of the act could not, without this express provision, have been incurred by a citizen holding a foreign commission. It is then most certain that the act of congress does not comprehend the case of a murder committed on board a foreign ship of war.

The gentleman from New York has cited 2 Wood. El. Jur. 428, to show that the courts of England extend their jurisdiction to piracies committed by the subjects of foreign nations. This has not been doubted. The case from Woodeson is a case of robberies committed on the high seas by a vessel without authority. There are ordinary acts of piracy which, as has been already stated, being offences against all nations, are punishable by all. The case from 2 Woodeson, and the note cited from the same book by the gentleman from Delaware, are strong authorities against the doctrines contended for by the friends of the resolutions.

It has also been contended that the question of jurisdiction was decided at Trenton, by receiving indictments against persons there arraigned for the same offence, and by retaining them for trial after the return of the habeas corpus. Every person in the slightest degree acquainted with judicial proceedings knows that an indictment is no evidence of jurisdiction; and that in criminal cases, the question of jurisdiction will seldom be made but by arrest of judgment after conviction. The proceedings after the return of the habeas corpus only prove that the case was not such a case as to induce the judge immediately to decide against his jurisdiction. The question was not free from doubt, and therefore might very properly be postponed until its decision should become necessary.

It has been argued by the gentleman from New York, that the form of the indictment is, itself, evidence of a power in the court to try the case. Every word of that indictment, said the gentleman, gives the lie to a denial of the jurisdiction of the court. It would be assuming a very extraordinary principle indeed, to say that words inserted in an indictment for the express purpose of assuming the jurisdiction of a court, should be admitted to prove that jurisdiction. The question certainly depended on the nature of the fact, and not on the description of the fact. But as an indictment must necessarily contain formal words in order to be supported, and as forms often denote what a case must substantially be to authorize a court to take cognizance of it, some words in the indictments at Trenton ought to be noticed. The indictments charge the persons to have been within the peace, and murder to have been committed against the peace of the United States. These are necessary averments, and, to give the court jurisdiction, the fact ought to have accorded with them. But who will say that the crew of a British frigate on the high seas are within the peace of the United States, or a murder committed on board such a frigate against the peace of any other than the British government? It is then demonstrated that the murder with which Thomas Nash was charged, was not committed within the jurisdiction of the United States, and, consequently, that the case stated was completely within the letter, and the spirit of the twenty-seventh article of the treaty between the two nations. If the necessary evidence was produced, he ought to have been delivered up to justice. It was an act to which the American nation was bound by a most solemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no jurisdiction, would have been murder; to have acquitted and discharged him would have been a breach of faith, and a violation of national duty.

But, it has been contended, that although Thomas Nash ought to have been delivered up to the British minister, on the requisition made by him in the name of his government, yet the interference of the president was improper. This Mr. Marshall said led to his second proposition, which was: That the case was a case for executive and not judicial decision. He admitted implicitly the division of powers, stated by the gentleman from New York, and that it was the duty of each department to resist the encroachments of the others. This being established, the inquiry was, to what department was the power in question allotted? The gentleman from New York had relied on the second section of the third article of the constitution, which enumerates the cases to which the judicial power of the United States extends, as expressly including that now under consideration. Before he examined that section, it would not be improper to notice a very material misstatement of it made in the resolutions, offered by the gentleman from New York. By the constitution, the judicial power of the United States is extended to all cases in law and equity, arising under the constitution, laws and treaties of the United States; but the resolutions declare that judicial power to extend to all questions arising under the constitution, treaties and laws of the United States. The difference between the constitution and the resolutions was material and apparent. A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated could exist no longer, and the other departments would be swallowed up by the judiciary. But it was apparent that the resolutions had essentially misrepresented the constitution. He did not charge the gentleman from New York with intentional misrepresentation; he would not attribute to him such an artifice in any case, much less in a case where detection was so easy, and so certain. Yet this substantial departure from the constitution, in resolutions affecting substantially to unite it, was not less worthy of remark for being unintentional. It manifested the course of reasoning by which the gentleman had himself been misled, and his judgment betrayed into the opinions those resolutions expressed. By extending the judicial power to all cases in law and equity, the constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit. A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court. As under the fourth or sixth article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia and oth-

er nations, which secure to the subjects of those nations their property within the United States: or, as would be an article, which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the courts of the United States. But the judicial power cannot extend to political compacts: as the establishment of the boundary line between the American and British dominions: the case of the late guarantee in our treaty with France, or the case of the delivery of a murderer under the twenty-seventh article of our present treaty with Britain. The gentleman from New York has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? "Permit me," said Mr. Marshall, "but not triumphantly, to retort the question. By what authority can any court render such a judgment? What power does a court possess to seize any individual and determine that he shall be adjudged by a foreign tribunal? Surely our courts possess no such power, yet they must possess it, if this article of the treaty is to be executed by the courts." Gentlemen have cited and relied on that clause in the constitution, which enables congress to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; together with the act of congress, declaring the punishment of those offences; as transferring the whole subject to the courts. But that clause can never be construed to make to the government a grant of power, which the people making it do not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurisdiction to that government. The law, therefore, cannot act upon the case. But this clause of the constitution cannot be considered, and need not be considered, as affecting acts which are piracy under the law of nations. As the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the United States of course extends to it. On this principle the courts of admiralty under the Confederation took cognizance of piracy, although there was no express power in congress to define and punish the offence. But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States. There are cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation; the people of America possessed no other power over the subject, and could consequently transfer no other to their courts; and it has already been proved that a murder committed on board a foreign ship-of-war is not comprehended within this description.

The consular convention with France, has also been relied on, as proving the act of delivering up an individual to a foreign power to be in its nature judicial and not executive. The ninth article of that convention authorizes the consuls and vice consuls of either nation to cause to be arrested all deserters from their vessels, "for which purpose the said consuls and vice consuls shall address themselves to the courts, judges and officers competent." This article of the convention does not, like the 27th article of the treaty with Britain, stipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign minister to cause an act to be done, and prescribes the course he is to pursue. The contract itself is, that the act shall be performed by the agency of the foreign consul, through the medium of the courts; but this affords no evidence that a contract of a very different nature is to be performed in the same manner. It is said that the then president of the United States declared the incompetency of the courts, judges and officers to execute this contract without an act of the legislature. But the then president made no such declaration. He has said that some legislative provision is requisite to carry the stipulations of the convention into full effect. This, however, is by no means declaring the incompetency of a department to perform an act stipulated by treaty, until the legislative authority shall direct its performance.

It has been contended that the conduct of the executive on former occasions, similar to this in principle, has been such as to evince an opinion, even in that department, that the case in question is proper for the decision of the courts. The fact adduced to support this argument is the determination of the late president on the case of prizes made within the jurisdiction of the United States, or by privateers fitted out in their ports. The nation was bound to deliver up those prizes in like manner, as the nation is now bound to deliver up an individual demanded under the 27th article of the treaty with Britain. The duty was the same, and devolved on the same department. In quoting the decision of the executive on that case, the gentleman from New York has taken occasion to bestow a high encomium on the late president; and to consider his conduct as furnishing an example worthy the imitation of his successor. It must be cause of much delight to the real friends of that great man; to those who supported his administration while in office from a conviction of its wisdom and its virtue, to hear the unqualified praise which is now bestowed on it by those who had been supposed to possess different opinions. If the measure now under consideration shall be found, on examination, to be the same in principle with that which has been cited, by its opponents as a fit precedent for it, then may the friends of the gentleman now in office indulge the hope, that when he, like his predecessor, shall be no more, his conduct too may be quoted as an example for the government of his successors.

The evidence relied on to prove the opinion of the then executive on the case, consists of two letters from the secretary of state, the one of the 29th of June, 1793, to Mr. Genet, and the other of the 16th of August, 1793, to Mr. Morris. In the letter to Mr. Genet, the secretary says, that the claimant having filed his libel against the ship William, in the court of admiralty, there was no power which could take the vessel out of court until it had decided against its own jurisdiction; that having so decided, the complaint is lodged with the executive, and he asks for evidence to enable that department to consider and decide finally on the subject. It will be difficult to find in this letter an executive opinion, that the case was not a case for executive decision. The contrary is clearly avowed. It is true, that when an individual, claiming the property as his, had asserted that claim in court, the executive acknowledges in itself a want of power to dismiss or decide upon the claim thus pending in court. But this argues no opinion of a want of power in itself to decide upon the case, if, instead of being carried before a court as an individual claim, it is brought before the executive as a national demand. A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it. But a public prosecution carried on in the name of the United States can, without impropriety, be dismissed at the will of the government. The opinion, therefore, given in this letter, is unquestionably correct;

but it is certainly misunderstood, when it is considered as being an opinion that the question was not in its nature a question for executive decision. In the letter to Mr. Morris, the secretary asserts the principle, that vessels taken within our jurisdiction ought to be restored, but says, it is yet unsettled whether the act of restoration is to be performed by the executive or judicial department. The principle, then, according to this letter, is not submitted to the courts—whether a vessel captured within a given distance of the American coast, was or was not captured within the jurisdiction of the United States, was a question not to be determined by the courts, but by the executive. The doubt expressed is, not what tribunal shall settle the principle, but what tribunal shall settle the fact. In this respect, a doubt might exist in the case of prizes, which could not exist in the case of a man. Individuals on each side claimed the property, and therefore their rights could be brought into court, and there contested as a case in law or equity. The demand of a man made by a nation stands on different principles.

Having noticed the particular letters cited by the gentleman from New York, "permit me now," said Mr. Marshall, "to ask the attention of the house to the whole course of executive conduct on this interesting subject." It is first mentioned in a letter from the secretary of state to Mr. Genet, of the 25th of June, 1793. In that letter, the secretary states a consultation between himself and the secretaries of the treasury and war, (the president being absent,) in which (so well were they assured of the president's way of thinking in those cases), it was determined that the vessels should be detained in the custody of the consuls, in the ports, until the government of the United States shall be able to inquire into and decide on the fact. In his letter of the 12th of July, 1793, the secretary writes: The president has determined to refer the questions concerning prizes "to persons learned in the laws," and he requests that certain vessels enumerated in the letter should not depart "until his ultimate determination shall be made known." In his letter of the 7th of August, 1793, the secretary informs Mr. Genet that the president considers the United States as bound "to effectuate the restoration of, or to make compensation for, prizes which shall have been made of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of our ports." That it is consequently expected that Mr. Genet will cause restitution of such prizes to be made, and that the United States "will cause restitution" to be made "of all such prizes as shall be hereafter brought within their ports by any of the said privateers." In his letter of the 10th of November, 1793, the secretary informs Mr. Genet, that for the purpose of obtaining testimony to ascertain the fact of capture within the jurisdiction of the United States, the governors of the several states were requested, on receiving any such claim, immediately to notify thereof the attorneys of their several districts, whose duty it would be to give notice "to the principal agent of both parties, and also to the consuls of the nations interested; and to recommend to them to appoint by mutual consent arbiters to decide whether the capture was made within the jurisdiction of the United States, as stated in my letter of the 8th inst., according to whose award the governor may proceed to deliver the vessel to the one or the other party." "If either party refuse to name arbiters, then the attorney is to take depositions on notice, which he is to transmit for the information and decision of the president." "This prompt procedure is the more to be insisted on, as it will enable the president, by an immediate delivery of the vessel and cargo to the party having title, to prevent the injuries consequent on long delay." In his letter of the 22d of November, 1793, the secretary repeats, in substance, his letter of the 12th of July and 7th of August, and says that the determination to deliver up certain vessels, involved the brig Jane of Dublin, the brig Lovely Lass, and the brig Prince Wm. Henry. He concludes with saying: "I have it in charge to inquire of you, sir, whether these three brigs have been given up according to the determination of the president, and if they have not, to repeat the requisition that they may be given up to their former owners." Ultimately it was settled that the fact should be investigated in the courts, but the decision was regulated by the principles established by the executive department.

The decision then on the case of vessels captured within the American jurisdiction, by privateers fitted out of the American ports, which the gentleman from New York has cited with such merited approbation; which he has declared to stand on the same principles with those which ought to have governed in the case of Thomas Nash; and which deserves the more respect, because the government of the United States was then so circumstanced as to assure us, that no opinion was lightly taken up, and no resolution formed but on mature consideration. This decision, quoted as a precedent and pronounced to be right, is found, on fair and full examination, to be precisely and unequivocally the same with that which was made in the case under consideration. It is a full authority to show, that, in the opinion always held by the American government, a case like that of Thomas Nash is a case for executive and not judicial decision. This clause in the constitution which declares that "the trial of all crimes, except in cases of impeachment, shall be by jury," has also been relied on as operating on the case, and transferring the decision on a demand for the delivery of an individual from the executive to the judicial department. But certainly this clause in the constitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world. It is not designed to secure the rights of the people of Europe and Asia, or to direct and control proceedings against criminals throughout the universe. It can then be designed only to guide the proceedings of our own courts, and to prescribe the mode of punishing offences committed against the government of the United States, and to which the jurisdiction of the nation may rightfully extend.

It has already been shown that the courts of the United States were incapable of trying the crime for which Thomas Nash was delivered up to justice. The question to be determined was, not how his crime should be tried and punished, but whether he should be delivered up to a foreign tribunal which was alone capable of trying and punishing him. A provision for the trial of crimes in the courts of the United States is clearly not a provision for the performance of a national compact for the surrender to a foreign government of an offender against that government. The clause of the constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed in the land and naval forces of the United States. Had such a construction prevailed, it would most probably have prostrated the constitution itself, with the liberties and the independence of the nation before the first disciplined invader who should approach our shores. Necessity would have imperiously demanded the review, and amendment of so unwise a provision. If then this clause does not extend to offences committed in the fleets and armies of the United States, how can it be construed to extend to offences committed in the fleets and armies of Britain or of France, or of the Ottoman or Russian empires? The same argument applies to the observations on the seventh article of the amendments to the constitution. That article relates only to trials in the courts of the United States, and not to the performance of a contract for the delivery of a murderer not tria-

ble in those courts. In this part of the argument, the gentleman from New York has presented a dilemma—of a very wonderful structure indeed. He says, that the offence of Thomas Nash was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed; if it was not a crime, he ought not to have been delivered up to a foreign government, where his punishment was inevitable. It had escaped the observation of that gentleman, that if the murder committed by Thomas Nash was a crime, yet it was not a crime provided for by the constitution, or triable in the courts of the United States; and that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma then, the gentleman from New York is, himself, perfectly at liberty to retain either form. He has chosen to consider it as a crime, and says it has been made a crime by treaty, and is punished by sending the offender out of the country. The gentleman is incorrect in every part of his statement. Murder on board a British frigate is not a crime created by treaty. It would have been a crime of precisely the same magnitude, had the treaty never been formed. It is not punished by sending the offender out of the United States. The experience of this unfortunate criminal, who was hung and gibbeted, evinced to him that the punishment of his crime was of a much more serious nature than mere banishment from the United States. The gentleman from Pennsylvania, and the gentleman from Virginia, have both contended that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination.

The points of law which must have been decided, are stated by the gentleman from Pennsylvania to be, first, a question whether the offence was committed within the British jurisdiction; and secondly, whether the crime charged was comprehended within the treaty. It is true, sir, these points of law must have occurred, and must have been decided: but it by no means follows that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court. Whether a patent for land shall issue or not is always a question of law, but not a question which must necessarily be carried into court. The gentleman from Pennsylvania seems to have permitted himself to have been misled by the misrepresentation of the constitution made in the resolutions of the gentleman from New York; and, in consequence of being so misled, his observations have the appearance of endeavoring to fit the constitution to his arguments, instead of adapting his arguments to the constitution. When the gentleman has proved that these are questions of law, and that they must have been decided by the president, he has not advanced a single step towards proving that they were improper for executive decision. The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them, if in its power, were questions of law, but they were questions of political law, proper to be decided, and they were decided by the executive, and not by the courts. The casus fœderis of the guaranty was a question of law, but no man could have hazarded the opinion that such a question must be carried into court, and can only be there decided. So the casus fœderis, under the twenty-seventh article of the treaty with Britain, is a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts. If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the casus fœderis of the twenty-seventh article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts. When, therefore, the gentleman from Pennsylvania has established, that in delivering up Thomas Nash, points of law were decided by the president, he has established a position which in no degree whatever aids his argument. The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence the demand is not a case for judicial cognizance. The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him. He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it. The treaty, which is a law, enjoins the performance of a particular object. The person, who is to perform this object, is marked out by the constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses. The gentleman from Pennsylvania contends, that, although this should be properly an executive duty, yet it cannot be performed until congress shall direct the mode of performance. He says that, although the jurisdiction of the courts is extended by the constitution to all cases of admiralty and maritime jurisdiction, yet if the courts had been created without any express assignment of jurisdiction, they could not have taken cognizance of cases expressly allotted to them by the constitution. The executive, he says, can, no more than courts, supply a legislative omission. It is not admitted that, in the case stated, courts could not have taken jurisdiction. The contrary is believed to be the correct opinion. And although the executive cannot supply a total legislative omission, yet it is not admitted or believed that there is such a total omission in this case.

The treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of congress making the same declaration. If, then, there was an act of congress in the words of the treaty, declaring that a person who had committed murder within the jurisdiction of Britain, and sought an asylum within the territory of the United States, should be delivered up by the United States, on the demand of his Britannic majesty, and such evidence of his criminality, as would have justified his commitment for trial, had the offence been here committed; could the president, who is bound to execute the laws, have justified the refusal to deliver up the criminal, by saying, that the legislature had totally omitted to provide for the case? The executive is not only the constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided. The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements

with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration. If, at any time, policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union? This department, too, independent of judicial aid, which may, perhaps, in some instances, be called in, is furnished with a great law officer, whose duty it is to understand and to advise when the casus fœderis occurs. And if the president should cause to be arrested under the treaty an individual who was so circumstanced as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of his arrest before a judge by a writ of habeas corpus. It is then demonstrated, that, according to the practice and according to the principles of the American government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the executive department.

It remains to inquire whether, in exercising this power, and in performing the duty it enjoins, the president has committed an unauthorized and dangerous interference with judicial decisions. That Thomas Nash was committed originally at the instance of the British consul at Charleston, not for trial in the American courts, but for the purpose of being delivered up to justice in conformity with the treaty between the two nations, has been already so ably argued by the gentleman from Delaware, that nothing further can be added to that point. He would, therefore, Mr. Marshall said, consider the case as if Nash, instead of having been committed for the purposes of the treaty, had been committed for trial. Admitting even this to have been the fact, the conclusions which have been drawn from it were by no means warranted. Gentlemen had considered it as an offence against judicial authority, and a violation of judicial rights to withdraw from their sentence a criminal against whom a prosecution had been commenced. They had treated the subject as if it was the privilege of courts to condemn to death the guilty wretch arraigned at their bar, and that to intercept the judgment was to violate the privilege. Nothing can be more incorrect than this view of the case. It is not the privilege, it is the sad duty of courts to administer criminal judgment. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the president expresses constitutionally the will of the nation; and may rightfully, as was done in the case at Trenton, enter a nolle prosequi, or direct that the criminal be prosecuted no further. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power. Had the president directed the judge at Charleston to decide for or against his own jurisdiction, to condemn or acquit the prisoner, this would have been a dangerous interference with judicial decisions, and ought to have been resisted. But no such direction has been given, nor any such decision been required. If the president determined that Thomas Nash ought to have been delivered up to the British government for a murder committed on board a British frigate, provided evidence of the fact was adduced, it was a question which duty obliged him to determine, and which he determined rightly If, in consequence of this determination, he arrested the proceedings of a court on a national prosecution, he had a right to arrest and to stop them, and the exercise of this right was a necessary consequence of the determination of the principal question. In conforming to this decision, the court has left open the question of its jurisdiction. Should another prosecution of the same sort be commenced, which should not be suspended but continued by the executive, the case of Thomas Nash would not bind as a precedent against the jurisdiction of the court. If it should even prove that, in the opinion of the executive, a murder committed on board a foreign fleet was not within the jurisdiction of the court, it would prove nothing more; and though this opinion might rightfully induce the executive to exercise its power over the prosecution, yet if the prosecution was continued, it would have no influence with the court in deciding on its jurisdiction. Taking the fact, then, even to be as the gentleman in support of the resolutions would state it, the fact cannot avail them. It is to be remembered, too, that in the case stated to the president, the judge himself appears to have considered it as proper for executive decision, and to have wished that decision. The president and judge seem to have entertained, on this subject, the same opinion, and in consequence of the opinion of the judge, the application was made to the president.

It has then been demonstrated: (1) That the case of Thomas Nash, as stated to the president, was completely within the twenty-seventh article of the treaty between the United States of America and Great Britain; (2) that this question was proper for executive, and not for judicial decision; and (3) that in deciding it, the president is not chargeable with an interference with judicial decisions. After trespassing so long, Mr. Marshall said, on the patience of the house, in arguing what had appeared to him to be the material points growing out of the resolutions, he regretted the necessity of detaining them still longer for the purpose of noticing an observation which appeared not to be considered by the gentleman who made it as belonging to the argument. The subject introduced by this observation, however, was so calculated to interest the public feelings, that he must be excused for stating his opinion on it. The gentleman from Pennsylvania had said, that an impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer In this, Mr. Marshall said, he concurred entirely with that gentleman. He believed the opinion to be unquestionably correct, as were the reasons that gentleman had given in support of it. He had never heard any American avow a contrary sentiment, nor did he believe a contrary sentiment could find a place in the bosom of any American. He could not pretend, and did not pretend to know the opinion of the executive on the subject, because he had never heard the opinions of that department; but he felt the most perfect conviction, founded on the general conduct of the government, that it could never surrender an impressed American to the nation, which, in making the impressment, had committed a national injury. This belief was in no degree shaken by the conduct of the executive in this particular case. In his own mind, it was a sufficient defence of the president from an imputation of this kind, that the fact of Thomas Nash being an impressed American was obviously not contemplated by him in the decision he made on the principles of the case. Consequently, if a new circumstance occurred, which would essentially change the case decided by the president, the judge ought not to have acted under that decision, but the new circumstance ought to have been stated. Satisfactory

as this defence might appear, he should not resort to it because to some it might seem a subterfuge. He defended the conduct of the president on other and still stronger ground. The president had decided that a murder committed on board a British frigate on the high seas, was within the jurisdiction of that nation, and consequently within the twenty-seventh article of its treaty with the United States. He therefore directed Thomas Nash to be delivered to the British ministers, if satisfactory evidence of the murder should be adduced. The sufficiency of the evidence was submitted entirely to the judge. If Thomas Nash had committed a murder, the decision was that he should be surrendered to the British minister; but if he had not committed a murder, he was not to be surrendered. Had Thomas Nash been an impressed American, the homicide on board the Hermione would, most certainly, not have been a murder. The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the United States, in resisting such violence, would not have been murder, and the person giving the wound could not have been treated as a murderer. Thomas Nash was only to have been delivered up to justice on such evidence as, had the fact been committed within the United States, would have been sufficient to have induced his commitment and trial for murder. Of consequence, the decision of the president was so expressed as to exclude the case of an impressed American liberating himself by homicide. He concluded with observing, that he had already too long availed himself of the indulgence of the house to venture farther on that indulgence by recapitulating or reinforcing the arguments which had already been urged.

Saturday, March 8. The only business which occupied the house was the unfinished business of Friday, on the question to agree with the committee of the whole in their disagreement with the resolution proposed by Mr. Livingston on the case of Jonathan Robbins. Mr. Nicholas spoke in answer to Mr. Marshall; immediately after which the question of agreement with the reported disagreement was taken by yeas and nays, as follows: Yeas. Messrs. Bartlett, Bayard, Bird, J. Brown, Cooper, Craik, J. Davenport, Davis, Dennis, Dent, Dickson, Edmond, Evans, A. Foster, D. Foster, Freeman, Glen, Goode, C. Goodrich, Gordon, Gray, Griswold, Groves, Harper, Henderson, Hill, Imlay, Jones, Kittera, H. Lee, S. Lee, Lyman, Linn, Marshall, Nott, Otis, Page, Parker, Pinckney, Platt, Powell, Reed, Rutledge, Sewell, Sheafe, Sheppard, Spaight, Stone, Taliafero, Thatcher, J. C. Thomas, R. Thomas, Wadsworth, Waln, L. Williams, Varnum, Woods. 61. Nays. Messrs. Baily, Bishop, R. Brown, Cabel, Christee, Clay, Conduit, Eggleston, Elmendorf, Fowler, Gallatin, Gregg, Hanna, Heister, Holmes, Jackson, Kitchell, Leib, Lyon, Livingston, Macon, Muhlenburgh, New, Nicholas, Nicholson, Randolph, Smilie, J. Smith, S. Smith, Sumpter, Thomson, A. Trigg, J. Trigg, Van Courtland, R. Williams. 35. A motion was then made to adjourn. Mr. Macon hoped the house would sit and decide the resolution proposed by the gentleman from Delaware, so as to have done with the business, and not to enter on another week with it: however, fifty-four rising for the adjournment, it was carried.

Monday, March 10. Mr. Bayard moved that the committee of the whole house, to whom was referred the message of the president relative to Thomas Nash alias Jonathan Robbins, and a resolution submitted by himself to the house, approbating the conduct of the president, and referred to that committee, be discharged from the further consideration thereof. A long debate arose upon this motion, in which Messrs. Randolph, Davis, Jones, Nicholas, Livingston and Eggleston spoke against it; and Messrs. Bayard, Bird, Otis, Kittera, Varnum, Rutledge, Edmund, Shephard and H. Lee in favour of it; when the question was taken by yeas and nays, and carried in the affirmative in manner following, to wit: Affirmative. Messrs. Baer, Bayard, Bartlett, Bird, Brace, J. Brown, Champlin, Claiborne, Craik, J. Davenport, F. Davenport, Dennis, Dent, Dickson, Edmond, Evans, A. Foster, D. Foster, Freeman, Glenn, Goode, G. Goodrich, E. Goodrich, Gordon, Gray, Gregg, Griswold, Grove, Hanna, Harper, Henderson, Hill, Huger, Imlay, Kitchell, Kittera, H. Lee, S. Lee, Lyman, Linn, Nott, Otis, Parker, Pinckney, Platt, Powell, Reed, Rutledge, Sewell, Sheafe, Shepherd, S. Smith, Spaight, Thatcher, J. Thomas, Thompson, Varnum, Wadsworth, Waln, L. Williams, Woods. 62. Negative. Messrs. Alston, Bishop, R. Brown, Cabel, Christie, Clay, Conduit, Davis, Dawson, Eggleston, Elmendorf, Fowler, Gallatin, Heister, Jackson, Jones, Lich, Lyon, Livingston, Macon, Muhlenburgh, New, Nicholas, Nicholson, Randolph, Smilie, J. Smith, Standford, Stone, Sumpter, Taliafero, A. Trigg, J. Trigg, Van Courtland, R. Williams. 35.

Notwithstanding this disposal of the question, so far as its congressional aspect was concerned, Robbins' surrender continued a fertile subject for party declamation.

The views taken by the opposition after the adjournment, may be gathered from the following extract from the Aurora, of June 20, 1800.

Jonathan Robbins.

During the late session of congress we were promised some facts concerning this unfortunate citizen; and we hoped to have had them in time for the discussion upon Mr. Livingston's motion. We were disappointed then. We have been more successful since, and shall now lay before our readers the information we have obtained, literally, as we have obtained it, in a letter addressed by a gentleman residing at Danbury, to the editor of the Aurora. In the view of national independence; as it relates to our character as a nation; as it relates to the character and independence of our judiciary, it is a matter of utter insignificance, whether Jonathan Robbins was a native of the Irish bogs or of the rough declivities of Connecticut. Judge Bee himself declared as much from the bench; but he declared it in a sense different from what we conceive to be the law of the land, or the law of nations. Judge Bee, according to the report published, asserted that it made no difference whether Robbins was a British or an American citizen; the treaty comprehended both descriptions, and he was delivered up. We conceive that, having a law paramount to every treaty, that is the great charter of the federal constitution, to deliver him up, was (1) As a citizen, contrary to the constitution. (2) As charged with the crime of piracy on the high seas, over which the jurisdiction of all nations is common, it was a violation of law and justice. (3) That it was a violation of the constitution to deliver him up without the inquest of a jury.

The principal ground of defence set up to justify the interference of our executive, (and this appears to have been Pickering's act solely,) was that Robbins was an alien born; and the prejudices of the public were called forth to palliate and mitigate the disgrace of the act, under this black subterfuge of inhumanity. It is well worthy of consideration, however, with what nice sympathy in crimes and maxims of government, the angio-federalists and their British friends agree. It was a sufficient palliation of disgrace to say, Jonathan Robbins was a feigned name, and that in truth his name was Thomas Nash, a native of Waterford! It is remarkable that an Englishman was acquitted of murder at Waterford, in Ireland, under the British government, and upon this plea: The accused confessed that he had killed

this man, but alleged that it was not murder, because he was a mere Irishman. The Hottentots are less barbarous than such civilized savages. Public weakness having tolerated, in some measure at least by its sullen silence, the delivery of this unfortunate man into the talons of the British, it became a matter of some moment to discover the validity and authority which the certificates procured from Danbury, by the immediate application of Mr. Pickering, carried with them. The certificates of the selectmen stated that they could find no such name as Jonathan Robbins on the records of Danbury. The public will be surprised to find this fact literally true, and yet covering a most gross deception. The records of Danbury were burnt along with the town, by the British, during our Revolutionary war. Consequently, these selectmen could not find his name therein. Thus, we see too, that the barbarity of the British soldiery during our war with them has been accessary to the murder at the distance of twenty years. The selectmen likewise asserted that they did not remember any family of the name of Robbins in Danbury. The matter has passed before the public, and the selectmen have recovered their memories, and they have actually found a family of that name, nay more, a brother of Jonathan Robbins, living within a few miles from that town. Read the letter—whoever wishes to see the original may see it in the hands of the editor. Extract of a letter to the editor, dated Danbury, June 1, 1800: "The delivering up of Jonathan Robbins under the 27th article of the British treaty, (for the furtherance of justice,) cannot, with all its palliation, be palatable to our citizens. On the subject of the certificates from this town, I wish to make a few observations. The gentlemen who wrote those certificates are, I believe, men of common honesty; they are so reported here, but assure yourself they are party men. In the first place the records of this town were burnt with the town in the time of the last war. It is not difficult to suppose a man might forget the record of a person whom he could not have thought of in twenty years, when the records where his name must have been deposited, had been reduced to ashes for that length of time; still less is the difficulty in conceiving that he might be born there, but never recorded. There is no impossibility or improbability that he belonged to an obscure family, then scarcely known, and now long since forgotten Our selectmen have certified that they never knew a person by that name residing in this town for any length of time, but they now acknowledge a person, by the name of Robbins, once laboured somewhere in this neighbourhood, whose age would not altogether disagree with that of Jonathan Robbins, the pirate. But, the following is an important and an astonishing fact, a fact which nonplused many of our certifiers, and which was related to me by one of the number. On making inquiry after the receipt of the secretary's request, they found that a person of the name of Robbins was then residing in the boundaries of New York state, but near those of this town. This person they visited, and the information they obtained was, 'that he once had a brother by the name of Jonathan Robbins; that he had been absent some years, and he concluded dead, as he had not heard from him for a great length of time; that he believed, if his brother was alive, he was about thirty-three years old.' "

In what way the proceeding was made use of at the fall election, may be seen from the following handbill, which, enclosed in black lines, like the "coffin handbills" of later days, was posted throughout the country:

Reader,
If thou art a Christian and a freeman,
consider
By what unexampled causes,
It has become necessary to construct
This monument
Of national degradation
and
Individual injustice, which is erected
To commemorate a citizen of the United States,
Jonathan Robbins, Mariner,
A native of Danbury, in the pious and industrious
State of Connecticut,
who,
Under the Presidency of John Adams,
And by his advice
When Timothy Pickering was Secretary of State,
Was delivered up to the British Government,
By whom he was ignominiously put to death
Because
He was an American Citizen,
who,
After having been barbarously forced into the service of
His country's worst enemy,
And forced to fight
Against his conscience and his country,
On board the British frigate Hermione, commanded by
A monster of the name of Pigott,
Bravely asserted his right to freedom as a man,
And boldly extricated himself from the bondage of his
Tyrannical oppressors,
After devoting them to merited destruction.
If you are a Seaman,
Pause—
Cast your eyes into your soul,
and ask,
If you had been as Robbins was,
What would you have done?
What ought you not to do?
And look at Robbins
Hanging at a British yard-arm!
He was your comrade,
And as true a tar as ever strapped a block;
He was your fellow-citizen,
And as brave a heart as bled at Lexington or Trenton;
Like you,
He was a member of a Republic,
Proud of past glories,
and
Boastful of national honour, virtue and independence;
Like him, you one day may be
Trussed up to satiate British vengeance,
Your heinous crime
Daring to prefer danger or death
To a base bondage.
Alas, poor Robbins,
Alas, poor Liberty,
Alas, poor, humbled, and degenerate Country.

For an explanation of the present position of the law in reference to extradition under a treaty with a foreign state, it is only necessary to turn to the admirable opinion of Judge Betts, in the late Case of Metzger [Case No. 9,511]. It was there held that, as a treaty is the supreme law of the land, it is entitled, when coming before the courts, to the same effect as an act of congress, though no act has been passed to define the method of its operation; that under such treaty a fugitive is subject to apprehension and commitment for a crime committed against the laws of the country demanding him as a fugitive, whether such crime be an offence in the country to which he has fled or not; and that, whether the casus fœderis has arisen, or whether the compact will be executed, is a political question to be decided by the president, the courts having no power to direct or contravene his decisions in the first instance. Whether the judiciary has authority in habeas corpus, after the fugitive is under arrest, to prevent his extradition, if the president decides to make it, was not decided.

UNITED STATES v. ROBBINS. See Case No. 16,171.

Case No. 16,176.

UNITED STATES v. ROBINSON.

[4 Mason, 307.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

FEDERAL COURTS—JURISDICTION IN ADMIRALTY—OFFENCES ON HIGH SEAS.

An offence committed in a bay, which is entirely land-locked and enclosed by reefs, is not committed on the high seas, within the purview of the act of congress of March 26, 1804 [2 Stat. 290] c. 40.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 481; U. S. v. Wilson, Case No. 16,731; U. S. v. Plumer, Id. 16,056; Miller's Case, Id. 9,558; Ex parte Byers, 32 Fed. 406. Cited in dissenting opinion in U. S. v. Rodgers, 14 Sup. Ct. 116, 150 U. S. 268.]

[Cited in Hubbard v. Hubbard, 8 N. Y. 200.]

Indictment [of Ebenezer Robinson] for perjury committed in an examination before a justice of the peace on a complaint against Capt. Dennis, of the ship Margaret, for feloniously burning and destroying the ship, with intent to defraud the underwriters thereon. Plea, not guilty. At the trial it appeared, that the complaint before the justice was, that the offence was committed in a bay, called "Mango Bay," in the island of Bermuda. It further appeared, that this bay is entirely land-locked, and enclosed by a reef and island from the sea; that the ship, at the time of the occurrence, was lying in this bay, about a quarter of a mile from the shore, and that it was about three quarters of a mile from one point of land to the other, constituting the forelands of the bay.

R. W. Greene, U. S. Dist. Atty.
Bridgham & Tillinghast, for prisoner.

STORY, Circuit Justice, said: The court is of opinion, upon these facts, that the place where the offense is alleged to be committed, was not within the purview of the act of congress of March 26, 1804 (chapter 40). That act punishes offences committed on the high seas; and upon the evidence it does not appear, that, in any just sense, Mango Bay can be considered as the high seas. It is entirely land-locked and enclosed. If then the offence was not within the cognizance of the court of the United States, the magistrate had no jurisdiction to inquire into it; and, consequently, the perjury, if any, was committed in a cause coram non judice. Upon this ground the court recommend to the jury to find a verdict for the prisoner.

Verdict for the defendant.

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

Case No. 16,177.

UNITED STATES v. ROBINSON et al.

[1 Sawy. 219.] [1]

Circuit Court, D. California. July 8, 1870.[2]

SALE—USAGE PROVED—BREACH OF ENTIRE CONTRACT.

1. A usage in the grain trade in California to deliver barley in sacks may be shown, when nothing is said in the contract as to the mode of delivery.

[Cited in Balfour v. Wilkins, Case No. 807.]

2. Where a vendor of grain, bound by the contract to deliver from time to time upon requisitions made by the purchaser, refuses to deliver upon requisitions made in pursuance of the contract, and notifies the purchaser that he regards the contract as rescinded, and that he will deliver no more grain under it, the purchaser may treat the contract as wholly broken, and sue for, and recover, the damages upon the entire contract, without making further requisitions.

Action for breach of contract to deliver barley.

The defendants agreed to deliver upon the requisitions of the United States quartermaster, at certain military posts in the vicinity of San Francisco, at such times within the year, and in such quantities as required for the use of such posts, not exceeding in the aggregate one million pounds. The contract did not specify the mode of delivery, whether in sacks, in bulk, or otherwise. It was stipulated that the United States should pay a specified sum per pound in gold coin; and on failure to deliver in accordance with the requisitions made under the contract, that the quartermaster might purchase the required amount in open market, and charge the defendants the difference between the contract price and the price so paid. The requisitions were made and duly filled from time to time for a period of six months, the delivery being always made in sacks. Afterward another requisition of thirty thousand pounds of barley was made, to be delivered at the presidio on the tenth of January following. The defendants brought the barley to the wharf, some six hundred yards from the presidio, in sacks, emptied it into wagons, hauled it to the presidio and tendered it in bulk. The post quartermaster, having no facilities for storing in bulk, declined to receive it in that form, and insisted that under the general usage of the trade in California, he was entitled to have it delivered in sacks. Defendants declined to deliver in sacks, and hauled the barley away. They then addressed the quartermaster a note, stating that they regarded the contract as rescinded, and that they would deliver no more barley under it. The quartermaster notified the defendants, in writing, that he should hold them to the contract, and that if they did not furnish the barley, he would purchase in open market and

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

[2] [Affirmed in 13 Wall. (80 U. S.) 363.]

charge them with the increased cost. Defendants neither delivered, nor tendered any more barley; and the quartermaster, thereupon, from time to time purchased in open market, at a considerably higher price than that stipulated in the contract, barley having, before the requisition to be filled on the tenth of January, risen largely in price. On the trial the defendants objected to any proof of a usage to deliver in sacks, nothing having been said in the contract as to the mode of delivery. They also insisted, that no recovery could be had except for the requisitions actually made; that notwithstanding their notice that they would deliver no more barley, the quartermaster was bound to make requisitions from time to time, as the barley was wanted, and that plaintiff could only recover for the requisitions so actually made.

L. D. Latimer, U. S. Dist. Atty.
J. B. Felton, for defendants.

SAWYER, Circuit Judge. The first question in this case is, whether it is competent to show a usage in the grain trade in California to deliver grain in sacks, nothing being said in the contract as to whether it is to be delivered in bulk or in sacks. I am satisfied from the authorities, that the testimony is admissible. The cases cited in the note to Wigglesworth v. Dallison, 1 Smith, Lead. Cas. Eq. (5th Am. Ed.) 305, clearly establish this rule. In a case there cited, Baron Parke says: "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, on matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life in which known usages have been established and prevailed, and this has been done on the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages." So another learned judge cited, in the notes at page 308, Id., says: In all contracts "as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of those usages; they commonly reduce into writing the special particulars of their contract, but omit to specify those known usages which are included, however, as, of course, by mutual understanding. The contract is in truth partly expressed in writing, partly implied and unwritten." So at page 309, note a, Id., the learned editors of the American Notes well state the rule thus: "In like manner, where there has been an express contract about a matter concerning which there is an established custom, this custom is reasonably to be understood as forming a part of the contract, and may be referred to to show the intention of the parties in those particulars which are not expressed in the contract. And it is obvious that the reason of the rule which forbids the receipt of parol evidence of the intention of the parties for the purpose of adding to a written contract, has no application to the evidence of custom." In one case (Smith v. Wilson, 3 Barn. & Adol. 728) the court went so far as to permit the custom of a particular place to be shown—that 1,000 rabbits meant 1,200 rabbits. But it is not necessary to go to that extent here; for in that case, there would seem to be a custom shown contrary to the express terms of the contract. In this case there is nothing in the contract in terms inconsistent with the usage shown. The most that can be said is, that the testimony annexes an incident to the contract in a matter respecting which the contract itself is silent. It merely discloses the circumstances surrounding, and the well known incidents connected with, the subject matter, at the time of entering into the contract, and in view of which it is to be presumed the contract was made. See other authorities cited in note to Wigglesworth v. Dallison; also, Macy v. Whaling Ins. Co., 9 Metc. [Mass.] 363. I think the evidence of usage to deliver in sacks, when not otherwise expressly provided in the contract, admissible, and being admitted, the usage was clearly established, there being no contradictory evidence. The general usage being established, the defendants must be presumed to have been cognizant of it, and to have contracted with reference to it. But I think, also, that the evidence and acts of the parties justify the inference that the contractors well understood the usage. They at least, in fact, voluntarily conformed to it during the first half of the year over which the contract extended. I also think, that the refusal to deliver in sacks, and the subsequent notice to Major Hoyt, United States army quartermaster, that they would deliver no more barley under the contract, but should regard the contract as rescinded, a breach of the entire contract at that time, and that nothing more was required to be done on the part of the plaintiff after the continued failure to deliver the barley referred to, in January, to entitle the United States to recover, than was done in the matter by Major Hoyt. Hale v. Trout, 35 Cal. 230, and cases there cited. This case is sought to be distinguished from Hale v. Trout, because, in that case, the amount of lumber to be delivered was fixed, while here the defendants, Robinson & Co., might not be called upon to deliver the whole million pounds of barley; and it is claimed that it was necessary to make the requisitions from time to time in order to fix the amount. But this, I apprehend, does not affect the principle. The defendants had notified plaintiff that they "decline to furnish any more barley to the government under the contract," and they never did deliver the barley mentioned in the January requisitions. It would be a vain

thing after this to continue to make requisitions. They were to furnish all required for certain posts, not exceeding a specified amount. They had already declined to furnish any more under the contract, and had been notified that they would be held to the contract, and that the necessary amount of barley, etc., would be purchased in open market and the difference in cost charged to them. They did not afterward notify the agents of the government of any intention to recede from the determination not to furnish more barley. I think there was a total breach of the contract. See, also, Withers v. Reynolds, 2 Barn. & Adol. 882; Franklin v. Miller, 4 Adol. & E. 599.

The plaintiff, in my opinion, is entitled to judgment for $4,048.16 in gold coin.

This judgment was affirmed by the supreme court at the December term, 1871. 13 Wall. [80 U. S.] 363.

Case No. 16,178.

UNITED STATES v. ROBINSON et al.

[1 Wall., Jr., 161.] [1]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1846.

EVIDENCE—MARSHAL'S BOND—STATUTORY CERTIFICATE.

Where a statute, dispensing with common law proof of a writing, allows a certified copy to be evidence after certain acts previously performed in regard to the original, a copy certified so as not to shew that those acts have been previously performed is inadmissible.

This was an action of debt against sureties, brought on the official bond of B., late marshal of the Western district of Pennsylvania. The declaration was in the usual form with profert: the plea non est factum. The plaintiff offered in evidence, from the files of the treasury at Washington (where it had been sent in compliance with the rules of that department intended to secure the government against loss) a copy of the bond declared on, with a certificate from the clerk of this court, not under the seal of the court, that the same was "a true and faithful copy of the official bond," &c. but the certificate did not state nor shew that the bond had been filed and recorded in the clerk's office.[2] The competency of the copy being objected to on this account, the point was, whether or not it was admissible under an act of congress on the subject of marshal's bonds, which enacts that "they shall be filed and recorded in the office of the clerk of the district or circuit court," &c. and that "copies thereof certified by the clerk under the seal of the court, shall be competent evidence," &c. Act April 10, 1806 (2 Stat. 372) § 2.

GRIER, Circuit Justice. Where the common law proof of a writing has been changed by statute, and copies substituted in the place of originals, it is settled that the mode of authentication required by the statute should be strictly pursued: and all that the act requires should be made to appear on the face of the new evidence. The legislature may establish rules of evidence in derogation of the common law; but the judicial power is limited to rules laid down in the statute.

The copy here offered has not such authentication as the act requires. The clerk does not certify that it is a copy of any instrument "filed and recorded" in his office. As a matter of fact in the case, it is said that he could not have truly given such a certificate. And yet undoubtedly both filing and recording are pre-requisites to his capacity to give a copy at all. It makes no difference that the copy is the original one filed in the treasury office. If that department chooses to disregard settled rules of evidence, and to take as security against default copies which have no value as proof, it must do so. The court will not follow their precedent.

If the words of the statute, when compared with the form of this certificate, (sufficiently explained by admitted facts in case,) do not satisfy the mind, and a precedent be needed, precedent in point is at hand in a decision of the supreme court of Pennsylvania. Young v. Com., 4 Bin. 113. A statute of that state requires that official bonds of sheriffs should be "duly recorded by the recorder of deeds," and "when so taken and recorded, shall be by him endorsed as duly recorded, and forthwith transmitted to the secretary of the commonwealth, who shall file the same in his office;" and enacts that "copies thereof, under the hand and seal of office of the said secretary or recorder, shall be admitted as legal evidence," &c. [4 Smith's Laws, p. 47, § 2.] A copy was offered "duly certified by the secretary of the commonwealth to be a true copy of the original which was filed in his office;" and it was held inadmissible on the plea of non est factum; the plea in this case.

The paper is also defective in wanting the seal of the court.

The plaintiff was called.

[1] [Reported by John William Wallace, Esq.]

[2] In point of fact it had been lost and had never been either filed or recorded.

Case No. 16,179.

UNITED STATES v. The ROB ROY.

[1 Woods, 42; [1] 13 N. B. R. 235.]

Circuit Court, D. Louisiana. April Term, 1870.

FORFEITURES—REDELIVERY BOND—DISCHARGE IN BANKRUPTCY—FRAUD—DEBTS DUE UNITED STATES.

1. When a steamboat and her cargo of cotton were seized by the United States for con-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

demnation, and delivered to the claimant on his execution of a bond for the redelivery of the property, the amount of the judgment to be rendered in a suit on the bond would be the value of the property, estimated at the highest price that could be obtained for it, between the date of the bond and the date of the judgment.

2. The United States seized and filed a libel against a steamboat and cargo, as liable to forfeiture for violation of the rules of war. The claimant gave bond for the property, and made an unsuccessful defense against the libel, but set up as a defense to a judgment against him on the bond his discharge in bankruptcy. *Held*, that the debt evidenced by the bond was not created by fraud within the meaning of the thirty-third section of the bankrupt act [of 1867 (14 Stat. 533)], even though the claimant used the evidence of false witnesses, and swore falsely himself in making his defense.

3. When the claim evidenced by such bond was not reduced to judgment until after the adjudication of bankruptcy and the final dividend, *held*, that it was not provable against the bankrupt estate, and consequently was not barred by the bankruptcy.

4. A discharge in bankruptcy does not bar debts due the United States.

[Cited in Re Strassburger, Case No. 13,526.]

In this case a decree had been rendered in favor of the government upon the libel, and the court was called on to pronounce judgment against the claimant and his sureties upon the bond executed by them for the redelivery of the property seized, to the United States. Upon this branch of the case several questions were raised which were disposed of in the following opinion.

A. B. Long, U. S. Atty., and J. S. Whitaker, for the United States.

J. A. Campbell, for respondents.

BRADLEY, Circuit Justice. In this case a decree has been rendered on the merits in favor of the United States, and judgment has been entered against the sureties for the several sums in which, by way of penalty, they were bound for the safe return by the claimant of the cotton which was delivered to him. The true amount due, and the true amount to be paid by each surety, will have to be ascertained by testimony as to the value of the cotton at the time it was bonded and at any time since. Having been taken out of the possession of the government, the latter is entitled to such amount as could, at any time since the delivery, have been obtained for the same.

A question still remaining to be decided is, whether the claimant, A. S. Mansfield, is or is not discharged from liability on the bond, by reason of his having received a discharge in bankruptcy. He has pleaded such discharge, dated June 30, 1869, purporting to be a discharge from all debts due by him which existed June 1, 1868, on which day the petition for his adjudication as a bankrupt was filed. The solution of this question depends upon that of one of two others: First. Is the claim itself such an one as would be affected by a discharge in bankruptcy? Secondly. If it is, will a discharge in bankruptcy bind the United States?

1. Under the first head, it is claimed on the part of the government that this is a debt created by fraud and therefore not entitled to the benefit of a discharge under the bankrupt act. The government seized the steamer Rob Roy and her cargo as liable to forfeiture for acts done during the war. These acts were in violation of the rules of war, as adopted by the United States. The title of the government rested on such unlawful acts. The claimant, when the property was seized, came into court and undertook to defend the suit, and on giving a bond, which was then satisfactory, the property was delivered to him. Now, the appearance of the claimant in court, and his bonding the property, are the transactions on which the present claim is based. They cannot be regarded as fraudulent. Every person is entitled to come into the courts and prosecute and defend his suits in the ordinary way. The government proved the unlawful acts—the claimant failed to make good his defense. It is said that, in making his defense, the claimant used the evidence of false witnesses, and swore falsely himself. That, if true, was more than a fraud; it was a crime. But it is not a fraud by which this debt or obligation was created, and does not bring the case within that class of exceptions. In the next place, it is insisted that the claim was not provable in the proceedings in bankruptcy, and therefore was not subject to discharge. By the 34th section of the bankrupt act it is enacted, that a discharge duly granted shall, with certain exceptions referred to, release the bankrupt from all debts, claims, liabilities and demands, which were or might have been proved against his estate in bankruptcy. The 19th section declares what debts and claims shall be thus provable. A careful examination of the debts and claims here described will show that the claim in question was not one of them. To have been such, it must have been either—(1) a debt due and payable at the time of the adjudication of bankruptcy, or a debt then existing but not payable till a future day. It was neither of these. Or (2) a demand for goods wrongfully taken, converted or withheld. It was not this. Or (3) a liability as drawer, indorser, surety, bail, or guarantor on a bill, bond, note, specialty, or contract, or debt of another person. It was not this. Or (4) a contingent debt, or contingent liability, where the contingency happens before the order for final dividend, or where the present value of the debt or liability can be ascertained and liquidated. The contingency on which the liability in this case was depending was the final decision of the case, which could not be known, anticipated, or valued by any method of discount or any calculation of probabilities or chances whatever. That decision was not made till the present term of the court. It is

not shown when the final dividend of Mansfield's estate in bankruptcy was made; and consequently we can recognize its operation only upon claims which had become liquidated or fixed at the time of the adjudication of bankruptcy. The residue of the section is regulative of the claims already described; and it closes with the declaration, that no debts other than those thus specified shall be proved or allowed against the estate.

2. This decides the case, without making it necessary to examine the other question, whether the United States is affected by the discharge of its debtor in bankruptcy. On this point, the case of United States v. Davis [Case No. 14,929] is undoubtedly a precedent in favor of the validity and operation of a discharge, as against a debt due the government, being founded on a bankrupt act similar on this point to the present act. Were it not for that precedent, we should not hesitate to take a different view. There is nothing in the act itself which necessarily implies that a discharge under it was intended to operate upon claims of the government. The 33d section, which declares that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under the act, is not sufficient to raise an implication that debts due to government, other than those which arise by defalcation as a public officer, will be discharged. There are public officers of the several states, as well as public officers of the United States; and they are undoubtedly included in this phrase. Neither does the proviso at the end of the 28th section raise any such implication: "That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any state." This proviso has the effect of preventing the assignee from interfering with the process for collecting such taxes. He cannot take the property out of the hands of the tax collector, or other tax officer, and cause them to wait till he is ready to pay over the taxes. He cannot interfere with them in any way. Other claims of the government are to be paid by the assignee out of the proceeds of the property, before he attempts to make any dividend to the creditors. Taxes are to be collected by the tax officers themselves. We do not think that either of these provisions affects the question before us. The general rule is, that the government is not bound by any law which would affect its rights, unless specially mentioned therein. This rule is so imperative as not to be displaced, we think, by any such ambiguous expressions as those which are relied on.

The point, so far as we are aware, having never been decided by the supreme court, we do not feel bound by the decision in U. S. v. Davis, supra, but are of opinion that the federal government is not bound by a discharge under the bankrupt act. The plea of bankruptcy is overruled, and judgment will be entered against Mansfield for the entire amount found to be due.

Since this case was decided, the United States supreme court has held that a discharge in bankruptcy does not discharge debts due the United States. See U. S. v. Herron, 20 Wall. [87 U. S.] 251.

[See Case No. 9,049.]

Case No. 16,180.

UNITED STATES v. ROCHE.

[1 McCrary, 385.] [1]

Circuit Court, D. Colorado. Dec., 1879.

TRADE MARK—UNCONSTITUTIONAL STATUTES—COMMON LAW REMEDIES—INFRINGEMENT.

1. The decision of the supreme court of the United States holding the trade mark legislation of congress to be unconstitutional and void, does not affect the validity or impair the force of a decree enjoining the use by defendant of a certain label or trade mark, it appearing that the injunction suit wherein said decree was rendered was not a statutory but a common law proceeding.

2. The right of the proprietor of a trade mark to the exclusive use of the same, and to protect and enforce his exclusive right by proceedings in chancery, exists by virtue of the common law, and independently of the statute.

3. The defendant had no right to imitate the trade mark of the plaintiff in the injunction, by using in his label or trade mark any of the prominent or distinguishing words of said plaintiff's trade mark.

[Rule against John Roche to show cause why he should not be attached for contempt for violating an injunction against the infringement of a trade mark.]

McCRARY, Circuit Judge. By decree of this court entered at the June term, 1879, the defendant was, at the suit of the Philip Best Brewing Company and others, perpetually restrained from thereafter using a certain trade mark or label upon bottles of manufactured beer. [Case unreported.] By an order of this court at chambers, made on the twenty-ninth day of September last, it was, after proper showing, ordered that the defendant show cause why he should not be attached or otherwise proceeded against for contempt of the decree aforesaid. In answer to this rule, it is suggested that the supreme court of the United States having in the recent cases of U. S. v. Steffens, and Same v. Johnson, 100 U. S. 82, held the existing congressional legislation on the subject of trade marks to be unconstitutional and void, the decree of injunction above mentioned is a nullity and the defendant is not bound to obey it.

Upon looking into the record we find that the injunction suit was not a proceeding instituted under the statute, but a bill in chancery brought to protect and enforce the plaintiff's exclusive right of property in their

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

trade mark as that right exists at common law. In the opinion of the supreme court above referred to it is said: "The right to adopt and use a symbol or device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of the use of that symbol by all other persons, has been long recognized by the common law and chancery courts of England and of this country, and by the statutes of some of the states. It is a property right for which damages may be recovered in an action at law, and the violation of which will be enjoined by a court of equity with compensation for past infringement. This property, and the exclusive right to its use, were not created by the act of congress and do not now depend upon that act for their enforcement. The whole system of trade mark property and the civil remedies for its protection existed long anterior to the act of congress and remain in full force since its passage." It follows beyond all doubt that the validity of the decree heretofore rendered against the defendant is in no wise affected by the decision of the supreme court holding the trade mark legislation of congress to be unconstitutional.

It is, however, further insisted that the label or trade mark now being employed by defendant is not so nearly like that of the plaintiffs in the injunction as to deceive a person of ordinary caution. This point, even if sound, comes too late. By reference to the decree, which was entered by consent, it will be seen that the defendant was, among other things, enjoined from using any label whatsoever bearing thereon the words "Best Brewing Company." These words are placed conspicuously upon the label which the defendant by his own admission has been, since the injunction, and is now, placing upon bottles of beer manufactured and sold or offered for sale by him. He has therefore violated the plain terms of the injunction. If, however, the question was still an open one, we should hold, without hesitation, that the defendant is rightfully enjoined from using a label bearing the words "The Best Brewing Co." or "The Best Brewing Co.'s Export Beer." These are the prominent and distinguishing words upon the label or trade mark now in use by the defendant as they are likewise upon the trade mark or label of the plaintiff in the injunction. The defendant has no right to imitate the trade mark of the plaintiff in the injunction by copying therefrom any of these prominent or distinguishing words. The use by the defendant of a label bearing these words is, in our judgment, well calculated to deceive even the cautious and careful purchaser, by leading him to infer that it is the trade mark of plaintiff in the injunction.

The showing of cause by the defendant is held to be insufficient, and it is accordingly ordered that an attachment issue against him returnable the first day of the next term of this court, and that upon service of the same the defendant enter into bond in the sum of one thousand dollars, with surety to be approved by the clerk, conditioned that he will appear on the first day of the next term of this court and abide such further order as the court may then make, and that in the meantime he will obey the decree of injunction aforesaid.

UNITED STATES (RODDY v.). See Case No. 11,990.

Case No. 16,181.

UNITED STATES v. RODRIGUEZ.

RODRIGUEZ v. UNITED STATES.

[Hoff. Land Cas. 175.] [1]

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

MEXICAN LAND CLAIMS.

Objections by the board met by the additional testimony taken in this court.

Claim [by Ramon Rodriguez and others] for one league of land in Santa Cruz county [the Rancho Agua Puerca y las Trancas], rejected by the board, and appealed by the claimants.

D. S. Gregory, for appellants.
William Blanding, U. S. Atty.

HOFFMAN, District Judge. The claim in this case was rejected by the board on the grounds: (1) That there was no proof of occupation and cultivation. (2) No juridical measurement or possession. (3) No proof of the boundaries or of the quantity of land included in the claim. These objections have been met by additional testimony taken in this court. José de la Cruz Rodriguez deposes that he was born within a few miles of the rancho; that its boundaries are well known; that they are, on the north the Sierra, on the east the Cañada of Agua Puerco, on the south the ocean, and on the west the Cañada de las Trancas. He also swears that in March, 1844, which was about five months after the grant, it was occupied by Rodriguez and Alviso, the grantees; that they built houses and corrals, and lived upon it for two years after that time, and that it has remained in their possession ever since. Cornelio Perez testifies to the same effect. And Hiram L. Scott not only testifies to the general recognized boundaries of the tract called "Agua Puerca y las Trancas," but states that the land contained within them is about a league.

No question appears to have been made before the board as to the authenticity of the grant, and the case has been submitted to this court without argument on the part of the United States.

---

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

The boundaries of the tract as sworn to by the witnesses are the same as those mentioned in the grant; and the quantity of land contained within appears to correspond with sufficient exactness to that mentioned in the condition, viz: "one league, a little more or less, as explained by the sketch." I think, therefore, that the claim should be confirmed according to the boundaries mentioned in the grant and as shown on the map.

Case No. 16,181a.

UNITED STATES v. RODRIGUEZ.

[1 Cal. Law J. 358.]

District Court, N. D. California. 1862.

MEXICAN LAND GRANTS — LOCATION OF BOUNDARIES—OBJECTIONS TO SURVEY.

Official survey of rancho "Butano," one square league, in Santa Cruz county. Approved March 2, 1861.

The following is the history of this claim: "Manuel Rodriguez, claimant for 'Butano,' one square league, in Santa Cruz county. Informal grant, February 19, 1838, by Juan B. Alvarado, ratified November 13, 1844, by Manuel Micheltorena to Romana Sanchez; claim filed February 24, 1853; confirmed by the commission February 8, 1855, by the district court November 19, 1856 [Case No. 16,185]; and appeal dismissed June 12, 1857,—containing 3,025.65 acres."

HOFFMAN, District Judge. This case comes up on objections to the survey filed by the claimant. By the decree of this court there was confirmed to the claimant the land called "Butano," bordering on the rancho of the heirs of Simeon Castro, the serraina and the sea—of the extent of one square league.

The principal point in controversy is as to the location of the boundary of the rancho of the heirs of Simeon Castro. To ascertain that boundary resort must be had to the expediente. In Castro's petition the land is described as the tract called "'Punta del Año Nuevo,' from the boundaries of Hilario Buelna to those of Juan Gonzales, which will be four leagues, a little more or less, and from the sierra to the seashore, which will be one league, as shown on the accompanying sketch." On the diseño attached to the original petition of Romana Sanchez for the land confirmed to the claimant, the Butano creek is represented as the northern boundary of the land solicited, and as the southern boundary of the Gonzales tract—and the same creek is delineated on the Gonzales diseño, and mentioned in his grant, as forming his southern boundary. If, then, the description in the Castro grant be construed as referring to the southern boundary of Gonzales, as shown by the grant of the latter, no location whatever can be made of the league granted to the claimant; for his northern boundary is the Butano creek and his southern boundary the land of Castro. But the northern boundary of Castro is the same Butano creek. Hence the ranchos of Gonzales and Castro adjoin, and the claimant can take nothing.

But it is contended that the northern boundary of the Punta del Año Nuevo rancho, which, by the terms of Rodriguez' grant, constitutes the southern boundary of the land of the latter, is not the Arroyo del Butano, but another creek, called Arroyo de los Frijoles, or Bean Hollow. We have already seen that the Año Nuevo rancho is declared in the grant to be bounded by the rancho of Gonzales on the north, and that the southern boundary of this latter, as shown by his grant, is the Arroyo del Butano—as appears from the Gonzales diseño and grant, and even from the diseño in the case at bar. It is urged, however, that, when the governor, in the Año Nuevo grant, referred to the boundary of Gonzales as constituting the northern limit of the land he was then granting to Simeon Castro, he intended, not the Gonzales boundary, as mentioned in the grant of the latter, but that boundary as delineated on the diseño of the Punta del Año Nuevo rancho. On referring to this diseño, we find a tract delineated lying between the ocean and the sierra, and chiefly contained between two arroyos represented as running from the mountains to the sea. At a short distance to the north and south of these brooks, respectively, lines are drawn, of which the southern is marked "Lindero Hilario Buelna"—and the northern "Lindero de José Gonzales." If the brook near which this boundary of Gonzales is drawn had any name inscribed upon it, the position of this line, and consequently the northern limit of the Punta del Año Nuevo rancho, as indicated by the diseño, could be ascertained beyond controversy; but it is merely marked "Arroyo." But the delineation of the line of the coast affords very important indications as to the particular brook intended. The rancho of Punta del Año Nuevo was made up of two ranchos, one of which had been granted to Bernal, who surrendered his rights to Castro, by whom a final grant for both, under one name, was obtained. These two ranchos were the Punta del Año Nuevo, proper, and the rancho called "Rincon de la Ballena." On the diseño under consideration, these two points, from which the ranchos derived their names, are laid down, and, by comparing the diseño with the official map of the coast attached to the patent obtained by the successors in interest of Castro, they are readily identified. The Punta del Año Nuevo, "New Year's Point," (being its former name translation,) and the Punta de la Ballena as another point near which is a rock marked "Stone House Rock." As to the identity of Punta del Año Nuevo with New Year's Point there is no question, and it is equally clear that the Punta de la Ballena must be the point near Stone House Rock, for there is none other on the coast which could have been intended.

It is stated by one of the witnesses in the Sebastian Rodriguez Case, the record of which has been made evidence in this, that the Punta de la Ballena is about six miles north of the Punta del Año Nuevo, and this is precisely the distance as shown by the map between the New Year's Point and the Stone House Rock Point. If, then, this latter point be the Punta de la Ballena of the diseño the arroyo drawn on that diseño a short distance to the north of it cannot be the Arroyo del Butano—for the arroyo of the diseño is represented as falling into the ocean at a distance from the Punta de la Ballena if about one-third the whole length of the rancho, whereas the Arroyo del Butano falls into the sea at least as far north of the Punta de la Ballena as the Punta del Año Nuevo is south of it. In other words if the arroyo of the diseño be taken to be the Arroyo del Butano, the Punta de la Ballena will be about the middle of the tract, instead of being at about one-third of its whole length from north to south. But to the north of the Punta de la Ballena there is an arroyo called Arroyo de los Frijoles, which, in all respects, corresponds with the arroyo of the diseño. It is at the requisite distance north of the point, and if it be assumed to be the arroyo of the diseño, it makes the rancho about four leagues in length—corresponding, in that respect, with the description in the petition of the tract solicited.

It is also urged that the diseño attached to the original petition of Bernal, who obtained, as has been stated, a grant for the Rincon de la Ballena, and whose rights were surrendered to Pico and by him to Castro, by which latter a grant for that and the adjoining rancho was obtained, show what was intended to be the northern boundary of the original rancho of Rincon de la Ballena, and consequently what must have been intended to be the northern boundary of the consolidated rancho of Punta del Año Nuevo. In the diseño attached to the original petition of Bernal, and which in the record of the Sebastian Rodriguez Case, which was rejected by the board, the rincon or corner is represented as comprised within the Arroyo de la Laguna and the sea. This arroyo is evidently the same as the Arroyo de los Frijoles—which, as appears from the official map, terminates at its mouth in a laguna of some size. On the Bernal diseño it is represented as forming the northern boundary of the Rincon de la Ballena; and on the north of it the land is inscribed as that of the citizen José Antonio Galindo the same person who obtained for himself and his mother the grant in the case at bar. I think it clear, therefore, that the Rincon de la Ballena, petitioned for by Bernal, and delineated on his diseño, was intended to be bounded towards the north by the Arroyo de la Laguna, or De los Frijoles, which was regarded as forming the southern boundary of the Galindo rancho. That these were the limits of the Galindo tract, is also apparent from the diseño in the case; for by comparing the Bernal diseño with that in the Galindo expediente, it will be seen that the two tracts are represented as adjoining each other. The Galindo tract being bounded on the south by the Arroyo de la Laguna or de los Frijoles and the Bernal tract being bounded on the north by the same stream.

An additional argument in favor of the location contended for by the claimants is found in the fact that if the Gonzales boundary mentioned in the Castro grant be the boundary described in the Gonzales grant, to wit: the Butano creek—we must suppose the government to have counseled the absurdity, not to say injustice, of making a grant to Galindo under which he could take no land whatever; for his northern boundary, as shown by his diseño, is the Butano creek, and his southern boundary the rancho of Castro. But if the same creek is the northern boundary of Castro, there will be no land between the two ranchos of Gonzales and Castro to be appropriated to Galindo. That the government may sometimes have accidentally granted the same land to two persons is not impossible; but such an accident is highly improbable, and the clearest evidence ought to be required before we are justified in considering it to have occurred. But, in this case, where the pretensions of Castro were founded on a former grant to another person, whose rights he had acquired—when the grant and diseño of his predecessor in interest showed that the land asked for did not include the possession of Galindo held by him under a provisional concession made long previous to the first application for the Rincon de la Ballena, it is in the highest degree improbable that the government would have granted to Castro the land held by another under so ancient and equitable a title.

The question, then, is: Did the government, when it declared that the land was bounded by the rancho of Gonzales, intend the boundary expressed in the grant of Gonzales, or that delineated on Castro's own diseño? I think it very clear that the latter was intended. And for the following reasons: The land is stated in the grant to be four square leagues as shown in the respective diseño. By that diseño, as we have already seen, the boundary of Gonzales is placed a very short distance to the north of a creek, which is obviously not the Arroyo del Butano but the Arroyo de la Laguna, or de los Frijoles. The tract is described in the petition as four leagues in length and one in breadth as shown in the sketch. The officer to whom it was referred for information reports that the boundaries of the tract are the same as are expressed "in the petition and respective diseño—the demarcation of which does not comprise the land of any other person;" a report which could not have been made if the land had been supposed to embrace the lands already provisionally granted to Galindo, and occupied by him long before the petition of Castro, or even that of Bernal, to whose rights he succeeded. The governor, relying on this report, makes the grant and designates the rancho of Gonzales

as the northern boundary; but the tract he meant to grant must have been that delineated on the diseño and comprised within the boundaries there laid down, or the lines thereon marked, as the boundaries of Gonzales and Buelna—notwithstanding that they may not have been the actual boundaries of those persons when their own grants are consulted. Again: The land asked for and granted is four leagues in length by one in breadth. This tract the alcalde reported to be vacant, and this alone the governor intended to grant. But if the Butano creek be taken as a boundary the length of the tract will be five leagues, while the quantity can be restricted to the four leagues confirmed only by making the width of a considerable portion much less than the width expressed in the petition and indicated on the diseño. And, finally, it is in a high degree improbable that Castro intended to solicit, as it is almost impossible that the governor would have consented to grant, any extension towards the north beyond the boundary of the former rancho of Rincon de Ballena, the rights to which Castro represented, when, by so doing, a person would be deprived of land which he had long occupied and enjoyed under a provisional title, and his rights to which had been recognized and respected when the Rincon de Ballena had originally been given to Bernal.

I therefore think that the land of the present claimant has been correctly located as bounded by the Arroyo de los Frijoles on the south, and that the objections of the representatives of Castro to that survey must be overruled.

It is to be regretted that a patent has already been issued to the latter, founded on what I must consider an erroneous survey. But that survey was never submitted to this court, and the rights of the present claimant must now be maintained, notwithstanding that the United States have erroneously patented his land to another. When both shall have obtained patents, they will be in condition to finally settle the controversy before the ordinary tribunals.

The claimant also contends that there should be surveyed to him one league—notwithstanding, that to obtain that quantity, he may be compelled to go beyond the Butano creek. But we have seen that that creek is the southern boundary of Gonzales, who has the oldest grant, and it is clearly designated in the diseño of the claimant as the northern boundary of the latter. Whether he can in any event cross that creek to obtain the required quantity—or whether following the indications of the diseño, the boundary between the claimant and Gonzales, is to be taken to be a line drawn from the mouth of the creek, at right angles to the line of the coast and not following the creek, which enters the ocean at an acute angle, it would be clearly improper now to decide. For the Gonzales claim, though confirmed by the supreme court, has not been surveyed, and the boundary between his rancho and that of the claimant, ought not be fixed until the rights of both grantees can be considered.

An order in conformity with this opinion must be entered.

Case No. 16,182.

UNITED STATES v. RODRIGUEZ.

[1 Cal. Law J. 361.]

District Court, N. D. California. March 15, 1862.

MEXICAN LAND GRANTS — LOCATION OF BOUNDARIES—REJECTION OF SURVEY.

OPINION OF THE COURT. When the first official survey of the land confirmed in this case was before the court (Case No. 16,181), it was excepted to on the part of the representatives of Simeon Castro, the grantee of the adjoining rancho on the south, because the southern boundary of the survey was fixed at the Arroyo de Frijoles instead of the Arroyo Butano. It appeared that the rancho of Gonzales, lying immediately north of the rancho of the claimants, was clearly bounded on the south by the Butano. If, then, the same creek should be taken to be the northern boundary of the Castro rancho, the effect would be to leave no land whatever between the two ranchos to satisfy the grant to the claimants of the Rodriguez or Butano rancho. After fully examining the diseños and grants in three cases, it was decided by the court that the northern boundary of the Castro grant, and, consequently, the southern boundary of the Rodriguez, was the Arroyo de Frijoles. It was also considered that the Arroyo del Butano was the southern boundary of the Gonzales tract; and, as the claim of the latter had been confirmed to a tract one league in length by three-fourths of a league in breadth, he was, when the survey was submitted for approval, permitted to locate his land, running northward from the Butano creek, along the shore of the sea, and eastward so far as was necessary to complete the quantity granted. It resulted that, between his northern and southern boundaries and to the eastward of the line drawn for quantity, a strip of land was left, which, though within the exterior boundaries of the tract, was not included in the survey. It is this strip of land which the claimants in the present case propose to appropriate in satisfaction of their grant for one league. If this location be permitted, no part of the land delineated on the diseño will be included. For the map evidently embraces a tract bounded by the Butano creek on the north and the Frijoles on the south, while the strip of land referred to lies wholly to the north of the Butano creek, and behind the tract, about one league long and three-fourths of a league wide, surveyed to Gonzales.

It is contended that this location is in entire conformity with the language of the grant

and the decree. The land confirmed to the claimants being "one square league, bounded by the Rancho de Punta del Año Nuevo (Castro's rancho), the sierra, and the sea." But it will at once be perceived that under no construction of these calls, can the location contended for be permitted. For having ascertained, as was done in the previous decision, and at the instance of the claimants, the line of the Punta del Año Nuevo grant, it only remained to locate one league of land bounded on the south by that line; on the east by the sierra and on the west by the sea. The northern boundary would thus be left to be determined by quantity: provided (and the determination of this point was expressly reserved) the survey could be permitted to cross the Butano creek. It is evident that the southern line of the rancho being determined, the calls for the sierra and the sea become definite and restricted, and must be deemed to refer not to any portion of the sierra or the shores of the ocean, to be arbitrarily selected, but to such portions of them respectively, as would form an eastern and western boundary to a rancho, the southern boundary of which was a line of the Punta del Año Nuevo rancho.

In the brief originally submitted by the counsel for the claimants, in the case at bar, it was insisted that the boundaries of the tract were, on the south, the Arroyo de los Frijoles (claimed to be the line of the Año Nuevo rancho), on the east, the mountain side; on the west, the ocean; and on the north, an east and west line, drawn one league south of the rancho of San Gregorio; that space being necessary to allow the location of the Gonzales tract, one league long by three-fourths in breadth, between the San Gregorio and the rancho of the claimants.

By the claimant's own admission, therefore, the southern boundary of his land must be the Arroyo de los Frijoles, or the line of the Castro rancho; and the eastern and western boundaries must be those portions of the sierra and of the seashore, lying contiguous to his southern boundary.

It remains to be determined whether he can be permitted to cross the Butano creek for the quantity. If the diseño be accepted as a guide, it is apparent that the Butano creek was fixed as the northern boundary of the tract solicited. It is equally clear that the same creek was designated as the southern boundary of the Gonzales rancho, which was an older grant. It is said, however, that the grant was not made with reference to the diseño; and that the claimants ought not to be confined to the tract thereon delineated. The land was originally solicited by Romana Sanchez. In the petition it is described "as exhibited on the accompanying diseño, and as one league in length, and one-half a league in breadth." On the 29th September, 1837, this petition was referred to the administrator of the ex-mission of Santa Cruz for his report. On the 11th October, 1837, Juan Gonzales reports that the land is vacant, and that it may be granted. On the 19th February, 1838, the governor grants to the interested party one square league "in the said locality, provisionally," while the necessary "proceedings are going on." After receiving a further report from the prefect of the First district, the governor, on the 9th September, 1838, makes a more formal grant of the land. In this it is recited that, "whereas Romana Sanchez has solicited, etc., the land known by the name of 'Butano,' as is shown in the expediente, I have concluded to grant her the mentioned location, in extent one square league; said concession being understood to be provisional, and subject to the approbation or disapprobation of the excellent deputation."

On the 8th November, 1844, Jose Antonio Galindo, the son of Romana Sanchez, presented a petition to Governor Micheltorena, in which, after setting forth that, since 1838, they had become possessed of a location known by the name of "Butano," under a provisional document, issued by his excellency's predecessor, he solicits a ratification of the respective title, in order that he might obtain judicial possession, etc. This petition, having been referred to Jimeno, the latter reports, in view of the favorable reports appearing in the expediente, that there is no obstacle to granting the land, "having for boundaries precisely the rancho of the heirs of the deceased Simeon Castro." On the 13th November, 1844, the governor makes his decree of concession, declaring Doña Ramon Sanchez owner of the location called "Butano," bordering on the rancho of the heirs of Don Simeon Castro, the sierra, and the sea. On the 14th November of the same year, the formal title was issued. In this it is recited that, "whereas Doña Ramon Sanchez has solicited the ratification of the provisional title given to her from the year 1838 for the tract of land granted her, called 'Butano,' bordering on the rancho of the heirs of the deceased Simeon Castro, the serraina, and the sea, I have concluded to grant her the mentioned land," etc. The third condition declares the land granted to be one square league in extent.

It is plain from the proceedings and from the very language of the title that that instrument was intended merely as a ratification of the provisional concession of 1838; nor is there any reason to suppose any alteration of the boundaries of the tract provisionally conceded in 1838 was intended, except that it was to be limited on the south by the rancho of the heirs of the deceased Simeon Castro. To ascertain, therefore, what was the land, the title to which was ratified or made absolute by the grant of 1844, we must inquire what land was provisionally conceded in 1838. The provisional concession describes the land as "known by the name of 'Butano,' as is shown in the expediente." As the petition contained no description of the boundaries of the tract solicited, and the reports or informes make no mention of them, the only manner in which the expediente could have shown the tract

conceded was by the diseño which accompanied it and formed part of the expediente. We are thus referred, unavoidably, to the diseño to ascertain the limits of the tract known as "Butano," which the governor conceded, in 1838, and the title to which, without changing its name or alteration of boundaries, he granted, absolutely, in 1838. The diseño thus becomes a part of the grant in this as in other cases.

It appears, however, that the extent of the land solicited is stated in the petition to be one league in length by one-half league in width. But the provisional concession and the final grant declare the land granted to be one square league. It appears, therefore, that the governor granted to the petitioner a tract twice as wide as that solicited, and, in view of this augmentation, he may have adopted the sierra as the eastern boundary, thereby including land not embraced within the limits of the diseño. But I see no reason whatever to suppose that he intended, in any manner, to disturb the location of the northern boundary, which was plainly fixed on the diseño at the Butano creek, the same stream having been previously adopted as the southern boundary of the Gonzales rancho. It will be noticed that all the reports declare the land to be vacant. On the strength of these favorable reports, Jimeno recommends that the provisional title be issued. But these reports would not have been made—especially that of Juan Gonzales, who, it is presumed, was the grantee of the rancho on the north—had it been by any one supposed that the grant of Butano would include any part of the land already granted to Gonzales himself.

It has already been observed that by the terms of the grant the sierra forms the eastern boundary. The diseño shows that the Butano creek was intended as a boundary only on the north. But in ascending this stream from the ocean it is found that its course is, for a considerable distance, about southeast; that is, it flows in a northwest direction—but on approaching the sierra it bends to the south, running for nearly half its entire length near the base of the sierra, and nearly parallel with it and with the seashore. This portion of the stream is not represented on the diseño, neither does the sierra mentioned as the eastern boundary appear upon it. If, then, the grant be limited by the Butano, the sierra will not be reached, nor will the quantity be obtained.

It has, therefore, appeared to me on the whole, most just to adopt the Butano creek as the northern boundary only, so far as it is delineated on the diseño, and to permit the survey to be extended eastward for quantity to the sierra, notwithstanding that in so doing it will cross that portion of the Butano which runs near the base of, and parallel to the sierra. I think, therefore, that the official survey should be set aside; and that a new survey should be made, bounding the tract on the south by the Arroyo de los Frijoles, on the west by the sea, on the north by the Arroyo Butano, so far as the same is delineated on the diseño, and thence crossing that stream to the sierra, and on the east by the sierra, so as to include an area one square league in extent.

[See Case No. 16,185, and note.]

Case No. 16,183.

UNITED STATES v. RODRIGUEZ.

[1 Cal. Law J. 363.]

District Court, N. D. California. July 11, 1862.

MEXICAN LAND GRANT — LOCATION — DEFICIENCY IN QUANTITY.

[There is no principle or authority for decreeing to a grantee an equivalent for a deficiency within his exterior boundaries out of a sobrante (surplus or excess), accidentally found to exist within the exterior boundaries of a neighboring grant.]

BY THE COURT. In the opinions heretofore delivered in this case [see Case No. 16,185 and note] it was considered that the land granted to the claimant was bounded on the south by the Arroyo de los Frijoles, on the west by the sea, and on the east by the sierra. The northern boundary is not mentioned in the grant. But, as that instrument professes to be merely a ratification of a previous provisional concession, and as the provisional concession described the tract as the land of Butano, "as shown in the expediente," the map found in the expediente, and which constituted the only means of identifying the land provisionally granted, was referred to for the ascertainment of the northern boundaries. On this map the Arroyo del Butano is clearly laid down as the northern boundary of the tract, the lands to the north of it being inscribed as those of Gonzales. On the diseño of Gonzales, the Butano is, in like manner, laid down as the southern boundary, and both the decree of concession and the grant describe his land as bounded by the rancho of Buelna, the sierra, the coast, and the Arroyo del Butano.

There was much reason to contend that the grant to Gonzales, which was older than that to Rodriguez, was intended to embrace all the land within his external boundaries. The supreme court, however, seem to have thought that he should be restricted to three-fourths of a league, to be surveyed within his out-boundaries. But there can be no doubt that the external boundaries, within which his land was to be taken, were the rancho of Buelna, the sierra, the sea, and the Arroyo del Butano. On the diseño of Gonzales, the Butano is represented as flowing with a slight curve, from the sierra to the sea. On the diseño of Castro the arroyo supposed to be the Frijoles, is also delineated as flowing in a general westerly direction from the sierra to the sea. It appears, however, that the course of both of these creeks is, for some distance, not far

from parallel to the sierra, after which they deflect to the west, and fall into the ocean in such a manner as that their lower portions might be conveniently adopted as the northern and southern boundaries of the rancho. As the grant called for the sierra as the eastern boundary, and the quantity granted and confirmed was one square league, it appeared to me reasonable to adopt the Butano only so far as it could serve as a northern boundary to the rancho; and not, by following its course where it flows nearly parallel to the sierra, make it serve as the eastern boundary, also thus cutting off the grant from the sierra called for as boundary. The diseño of Rodriguez represents neither the sierra nor the upper part of the Butano. It delineates a small and readily identified tract, between the two streams and the ocean. But the petition which this diseño accompanied, was for a tract half a league in extent. The provisional grant was for a tract of one league, and the title which ratified was for one league bounded by the sea, the sierra, and the rancho of Castro, on the south. I therefore consider that in order to meet the call for the sierra, and to obtain, if possible, the quantity, the northern line should follow the Butano so far as it was delineated on the diseño, where it was evidently intended to represent the northern boundary of the half league, originally solicited, and thence in a direct line to the sierra, crossing the Butano at or near the point where its course in ascending it deflects to the south, and becomes parallel with the sierra.

It is now sought to obtain the quantity, not by running from this point easterly to the sierra, but by turning abruptly to the north at nearly right angles to the course of the Butano, and parallel to the sea, to include the sobrante of the Gonzales grant, left vacant by the restriction of the latter to a tract of only three-fourths of a league. The land so included is clearly within the exterior boundaries of Gonzales, and the survey would include a considerable portion of the Pescadero creek, represented on the Gonzales diseño as flowing diagonally through nearly the centre of the tract. It would embrace land always claimed by Gonzales, included within his boundaries delineated on his diseño, and to the whole of which there is much reason to suppose, as contended by his counsel, his title should have been confirmed. That no portion of it could have been intended to be given by a subsequent grant to Rodriguez is manifest. His diseño represents no part of it, but recognizes the land on the north of the Butano as belonging to Gonzales. His grant does not call for it, for it merely describes the land as bounded by the sierra, the sea, and the rancho of Castro. Gonzales reports that the land asked for by Rodriguez is vacant, which he assuredly would not have done if it had been supposed to include any part of the land previously granted to himself.

I am unable to perceive on what principle, or by what authority, I can, in effect, decree an equivalent to Rodriguez for any deficiency of quantity within his exterior boundaries out of a sobrante accidentally found to result within the exterior boundaries of his neighbor. With respect to the southern boundary, it is to be observed that the Arroyo Frijoles was, at the urgent suggestion of the counsel for and owner of the Rodriguez claim, adopted as to the southern boundary of the latter and the northern boundary of the Castro grant.

The lands of Castro unquestionably extended from the sierra to the sea, and from the lands of Hilario Buelna, on the south, to an arroyo on the north. The arroyo was delineated on the diseño as running from the sierra to the sea. After much consideration it appeared to me that the arroyo intended was the Frijoles, notwithstanding that the grant called for the lands of Gonzales as the northern boundary of Castro, and the Gonzales rancho was confessedly bounded by the Butano. Had the latter stream been adopted as the boundary of Castro, the effect would have been to exclude altogether the grant to Rodriguez, for the grants to Gonzales and Castro would have been coterminous.

The Arroyo de los Frijoles having been thus adopted as the northern boundary of Castro, it became of necessity the southern boundary of Rodriguez, as required by the grant, and suggested in the report of Jimeno, who recommends the grant with the express understanding that "it is to be without prejudice to the rights of the heirs of the deceased Simeon Castro." It is now said that the Arroyo Frijoles in its upper portion is indistinctly traceable, and that it could not serve as a boundary in its whole course from the sierra to the sea. If this be so, it affords an argument against the adoption of that stream as the northern boundary of Castro, and it may justify the inference that the court should have taken the Butano as the boundary, thus excluding the Rodriguez grant altogether. But it hardly lies in the mouth of the present owner of both ranchos to make the objection, as the Frijoles was adopted as the dividing line between the ranchos at his suggestion, and in conformity with the agreement strenuously urged by himself.

Assuming the decision of the court to be correct, and any other supposition would prevent any location whatever of the Rodriguez claim, it is clear that the boundary of Castro was a stream flowing from the sierra to the sea, and, as that stream is decided to be the Frijoles, the latter must be adopted throughout its whole extent. The survey should, therefore, be made by adopting, as the true northern line of Castro, the Arroyo de los Frijoles from the sierra to the sea. If it should be found that the sierra cannot be reached by ascending the Frijoles,

then the stream is to be ascended to the point where it approaches nearest to the sierra, and the southern boundary is to be completed by a drawing. The eastern boundary is the sierra; his western boundary the sea, and his northern line will be run by following up the Butano as far as it is delineated on the diseño, which is supposed to be not far distant from the point where its course, in ascending it, deflects towards the south, and thence, in a straight line, to the sierra. If, within these boundaries the quantity cannot be obtained, it will be the not very unusual case where the exterior boundaries contain less than the quantity supposed. If such should prove to be the fact, it is no doubt due to the extraordinary and unaccountable circumstance that the governor in this case appears to have granted twice the quantity of land solicited by the petitioner and delineated on his diseño, and in respect to which alone all the informes and reports were given. The survey herein directed will assume, substantially, the form of that certified by the surveyor-general to be in accordance with the opinion of this court heretofore rendered.

The surveyor-general, having made two plats since the opinion heretofore delivered, and the same having been informally submitted for approval, though not filed in the clerk's office, and the interested parties having been informally heard in chambers, the above is intended as a supplemental opinion for the guidance of the surveyor-general, to be taken as a part and explanatory of the opinion heretofore delivered. Anything contained in the order heretofore made, supposed to be in conflict with the views herein expressed, is to be taken as vacated and annulled.

[The final decree locating the claim was affirmed in 1 Wall. (68 U. S.) 582.]

Case No. 16,184.

UNITED STATES v. RODRIGUEZ et al.

[Hoff. Land Cas. 82.] [1]

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

MEXICAN LAND CLAIMS.

No objection to this claim made by the United States.

[Claim by Maria Concepcion Valencia de Rodriguez and others for the Rancho San Francisquito, containing three-fourths of a league of land in Santa Clara county; confirmed by the board of land commissioners, and appeal taken by the United States.]

S. W. Inge, U. S. Atty.
Stanley & King, for appellees.

HOFFMAN, District Judge. The grant in this case was made on the first day of May, 1839, by Governor Alvarado, to Antonio Buelna, the husband of the claimant. Buelna, after obtaining his grant, appears by the proofs to have occupied and cultivated his land and continued to live there with his family until his decease. The present claimant, his widow, seems to be his sole heir. The United States have taken an appeal in this case, but it is submitted to us as usual without argument, or the statement of any objection to the validity of the claim. The genuineness of the grant seems to be fully proved, and the board have confirmed the claim according to a judicial measurement, which on a resurvey has been found to include less than the quantity mentioned in the grant. We think the decree of the board should be affirmed.

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

Case No. 16,185.

UNITED STATES v. RODRIGUEZ.

[Hoff. Land Cas. 170.] [1]

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

MEXICAN LAND GRANTS — ARCHIVAL EVIDENCE — POSSESSION.

[Claim confirmed on evidence from the archives, supported by long continued possession, though the original title was lost.]

[Claim of Manuel Rodriguez to the Rancho Butano, being one league of land in Santa Cruz county, California.]

William Blanding, U. S. Atty.
Jeremiah Clarke, for appellee.

HOFFMAN, District Judge. The claim in this case was confirmed by the board, an appeal having been taken on the part of the United States, but the cause has been submitted to this court without argument, or the suggestion, on the part of the appellant, of any objection to the validity of the claim. The claimant, and those under whom he derives title, appear to have been in possession of the premises in question for nearly twenty years; and though the original title delivered to the interested party has been recently lost, we agree with the board in considering the secondary evidence of its contents as sufficient. In all these cases, the evidence from the archives is perhaps even more satisfactory than that afforded by the production of an alleged original title; for the facilities for the commission of a forgery of this single paper are far greater than are offered for the perpetration of the same crime, when numerous documents have to be forged and subsequently introduced among the archives. A list of the latter has long since been made, and no new expediente could now be placed amongst them without imminent risk of detection. In this case the record of the pro-

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

ceedings is full and minute, and the character of the documents and the number of the signatures afford intrinsic evidence of genuineness. If to this be added the fact of long continued possession, from a date anterior to the provisional grant, we are unavoidably led to the conclusion that the grant must have issued at the time and in the terms alleged by the claimant. We think a decree of confirmation should be entered.

[The case was subsequently heard upon objections to survey. See Cases Nos. 16,181–16,183. The final decree locating the claim was affirmed in 1 Wall. (68 U. S.) 582.]

UNITED STATES (RODRIGUEZ v.). See Case No. 16,181.

Case No. 16,186.

UNITED STATES v. ROELLE et al.

[24 Int. Rev. Rec. 332; 6 Reporter, 550; 11 Chi. Leg. News, 18.] [1]

Circuit Court, N. D. Illinois. Oct., 1878.

VIOLATION OF INTERNAL REVENUE LAWS—IMMUNITY TO PERSON CHARGED WITH CRIME ON CONDITION OF TESTIFYING FOR THE GOVERNMENT—EFFECT OF—PARDON.

1. The court holds that the immunity promise to the "first batch" on condition that they testify fully and truthfully in reference to a conspiracy among certain officials, to defraud the government, must be carried out; that it is full and complete immunity, both civil and criminal.

2. The pardon granted to certain persons of the "second batch," does not relieve them from prosecution for the recovery of taxes assessed against them for violation of the revenue laws. *Held*, it is not competent for any officer of the government to donate or remit taxes due from the citizen under the laws of congress, for the collection of revenue.

Mr. Justice Harlan has recently disposed of numerous cases, in which the United States is a party, arising under the internal revenue laws. They were spoken of in argument as "first batch" and "second batch" cases. The "second batch" cases were actions of debt on distillery and warehousing bonds; breach, nonpayment of taxes. The "first-batch" cases comprised two actions of debt for the recovery of taxes assessed, six informations for the condemnation of spirits and other property, for alleged violations of the internal revenue laws, and two actions of debt for the recovery of the double tax penalty prescribed by that law for violation of its provisions. In each of the cases for condemnation and to recover double tax penalty, it appears that the defendants filed an amended answer, as follows: "And the said claimants, by, etc., say 'actio non,' etc., because they say that heretofore, to wit: on the 27th of December, A. D. 1875, at Chicago, viz., at said Northern district of Illinois, the said plaintiff and the said claimants entered into an agreement by which it was, among other things, agreed that if the said claimants, Joseph Roelle and Anton Junker would testify on behalf of the plaintiff, frankly and truthfully, when required, in reference to a conspiracy among certain government officials in the internal revenue service, and other parties then known to exist, whereby the honest manufacture of distilled spirits and the collection of taxes thereon had been rendered practically impossible, and should plead guilty of one count in an indictment then pending against them in said district court, and should withdraw their pleas in certain condemnation cases then pending against their property in said district court, for the purpose only of insuring their good faith in so testifying on behalf of the plaintiff, the said plaintiff would recall any and all assessments under the internal revenue law then made against said claimants, and that no more assessments under said law should be made against said claimants and that no more proceedings against said claimants should be commenced on account of violation of the internal revenue laws then passed, and that no penalties or forfeitures should in any manner be enforced or recovered against them and their property, and that all suits for penalties or forfeitures then pending against them and their property should be dismissed, and that full and complete immunity, both civil and criminal, should be granted to said claimants. And these claimants aver that the said Joseph Roelle and Anton Junker, and each of them have fully and faithfully performed said contract on their part; and they further aver that this suit is for the condemnation and confiscation of their property, originally seized by the said plaintiff on the ground of said alleged violation of the internal revenue laws on the part of the said claimants, alleged to have been committed by them prior to entering into said agreement, and is one of the suits which the said plaintiff, under the terms of said agreement, fully kept and performed on the part of said claimants as aforesaid, agreed to dismiss and discontinue; and that the prosecution of this suit is contrary to and in violation of said agreement entered into, as aforesaid, between the said plaintiff and said claimants, and this these claimants are ready to verify; wherefore they pray judgment if the plaintiff ought to have his aforesaid action against them, etc."

Replications were filed by the United States, denying that any such agreement as that alleged had been made, and averring that the claimants had not fully and faithfully performed the said alleged agreement, in manner and form as in their plea alleged. At the April term, 1878, of the district court, it appears that, by leave of court, the replications filed in behalf of the government

[1] [6 Reporter, 550, contains only a partial report.]

were withdrawn and a general demurrer filed. At the June term, 1878, an order was entered in each of the six condemnation cases, in which it is stated that "the court doth find, both from the admissions made by said demurrer, and also from facts appearing upon the records and within the judicial knowledge of the court, that said claimants were used as witnesses by the government in criminal cases against their associates, upon the promise and understanding that this case should no further be prosecuted. It is, therefore, ordered by the court that said demurrer be overruled, and this case is dismissed, both by reason of the defence set up in said pleas, and also because of the finding of the court, from the facts appearing on the record and within the judicial knowledge of the court, that the cause ought to be no further prosecuted by the plaintiff." From that order appeals in the "first batch" cases for the condemnation of property were taken to the circuit court.

HARLAN, Circuit Justice, when announcing his decision, said: The demurrer admits the agreement set out in the amended answer. It must, therefore, be taken as true that the authorities of the United States stipulated with the defendants, respectively, that no further proceedings should be commenced against them on account of violations of the internal revenue laws then passed; that no penalties or forfeitures should in any manner be enforced or recovered against them and their property; that all suits for penalties and forfeitures then pending against them and their property should be dismissed; and that full and complete immunity, both civil and criminal, should be granted to them. The consideration for this stipulation was, it must be assumed, that the defendants should testify, frankly and truthfully, when required, in reference to a conspiracy among certain government officials in the internal revenue service, and other parties, whereby the collection of taxes had been rendered practically impossible, should plead guilty to one count in an indictment then pending against them in the district court, and should withdraw their pleas in certain condemnation cases then pending against their property. Upon the demurrer it must be also taken as true that the several defendants have fully and faithfully performed the alleged agreement.

Taking all these facts to be true, the question arises whether the order entered by the district court, that the condemnation causes be not further prosecuted, was authorized by law. The question thus presented is of the highest importance both to the government and to the citizen. It is by no means easy of solution. None of the authorities cited seemed to be directly in point, and the court has found much difficulty in reaching a conclusion entirely satisfactory to its own mind. Some light, however, is thrown upon the question by decisions in American courts. In Com. v. Brown, 103 Mass. 422, it appears that an indictment was returned charging Brown and Drake with assault and battery upon each other. Drake pleaded guilty, and Brown was tried and found guilty. Upon Brown's trial it appeared that the fight was by agreement, when Drake suddenly stabbed Brown with a knife. Brown immediately reported the facts to a police officer, on whose complaint Drake was brought before the municipal court for an assault on Brown with a knife. At the examination before the municipal court Brown appeared as a witness for the commonwealth, and Drake was held to bail for assault with a knife. Brown also appeared as a witness for the commonwealth, before the grand jury. Upon this evidence it was claimed that, as the commonwealth had accepted and used Brown as a witness, its faith was thereby pledged to protect him from harm by reason of his complicity in the offence set forth in the indictment. The attorney general of the state responded that in prosecuting the defendant there was no breach of public faith, since "there was no promise whatever, express or implied, by any person authorized or unauthorized, that he should be exempt from prosecution." Chief Justice Chapman disposed of the case in the following brief opinion: "It does not appear that any express pledge was made to the defendant nor that any implied pledge was made to him by any one having authority to make it." A similar ruling was made in Com. v. Denehy, 103 Mass. 424. In the subsequent case of Com. v. Woodside, 105 Mass. 594, it appears that the defendant was indicted for embezzlement of the property of his employer. He filed a plea in bar relying upon certain facts, connected with his use by the commonwealth as a witness, as entitling him to be no further prosecuted. The supreme court of Massachusetts disposed of the case in these words: "The facts set forth in the plea in bar do not constitute a pledge; nor do they in any way operate as a bar to sentence."

The reports of these cases from the supreme judicial court of Massachusetts, do not show what the decision would have been had the prosecution of the defendants directly involved a violation of the pledge of those representing the government, and a breach of the public faith. But since the pleas in those cases were overruled partly upon the ground that there had been no agreement or promise, express or implied, of immunity from prosecution, it is not an unreasonable inference that, had such agreement or promise been clearly established or admitted, the action of the court might have been such as to protect the defendant from the prosecution. Without discussing the matter fully, the court has concluded in view of the circumstances attending these cases, and in order that these questions may be passed upon by the supreme court of the

United States, before further action upon the part of the prosecuting officers, to affirm the judgments in the six condemnation cases (Nos. 15,689–15,694). The district attorney can at once take one or all of these cases to the supreme court of the United States where it is not doubted, they will be advanced, if the attorney-general so desires. In case 12,893, for the recovery of the double tax penalty, the same principles should govern as in the condemnation cases. The trial of that case can await the result of the condemnation cases in the supreme court of the United States. The remaining cases of the "first batch," (14,169 and 14,170), being two actions of debt for the recovery of taxes assessed, and all the cases of the "second batch," (Nos. 13,345, 13,346, 13,566, 13,561, 13,804, 13,805, 13,821, 14,167, and 14,173), being actions of debt on distillery and warehousing bonds for non-payment of taxes, rest altogether upon different grounds. In the "second batch" cases, the defendants present a petition averring an agreement between them and the United States officials, conducting the suits, under which they claim exemption from the payment of the taxes sued for. As to four of the defendants, A. C. Hesing, Geo. S. Burroughs, Henry B. Miller, and Simon Powell, a pardon was granted them the 21st of September, 1876, of certain offences for which they were prosecuted under the provisions of the Revised Statutes. It is claimed that the assessments of taxes against those defendants are based upon the violation of the internal revenue laws for which they were indicted. The prayer of the petition is that the court interpose and, to the end that the government may be compelled to keep its said alleged agreement, restrain the further prosecution of these suits for taxes assessed.

The prayer of the petitioners in these tax cases cannot be granted. It is not competent for any officer of the government to donate or remit taxes due from the citizen under the laws passed by congress for the collection of revenue. Disputed claims for taxes may be compromised in the mode prescribed by law. These cases do not belong to that class. The pardon of certain criminal offences granted to the four defendants, heretofore specially named, does not purport to relieve those parties from taxes assessed or due under the provisions of law. The power conferred upon the president to grant pardons or remit fines and forfeitures does not embrace the power to relieve from the payment of taxes. Nor did he assume to exercise such power. Congress alone can do that. It might perhaps confer such power upon some department or officer of the government, but it has not done so.

Let the demurrer of the government to the pleas in Nos. 14,169 and 14,170 be sustained, and the petition of defendants in cases Nos. 13,345, 13,346, 13,561, 13,566, 13,804, 13,805, 13,821, 14,167, and 14,173, is denied.

Case No. 16,187.

UNITED STATES v. ROGERS.

[Hempst. 450.] [1]

Circuit Court, D. Arkansas. 1845.

RELATIONS OF GOVERNMENT TO INDIAN TRIBES—CRIMINAL JURISDICTION OF FEDERAL COURTS—STATUTES AND TREATIES — ADOPTED WHITE MAN.

1. The United States have adopted the principle originally established by European nations, namely, that the aboriginal tribes of Indians in North America are not regarded as the owners of the territories which they respectively occupied. Their country was divided and parcelled out as if it had been vacant and unoccupied land.

2. If the propriety of exercising this power were now an open question, it would be one for the lawmaking and political department of the government, and not the judicial.

3. The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the states, congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian.

4. The 25th section of the act of the 30th June, 1834 [4 Stat. 729], extends the laws of the United States over the Indian country, with a proviso that they shall not include punisment for "crimes committed by one Indian against the person or property of another Indian."

5. This exception does not embrace the case of a white man, who, at mature age, is adopted into an Indian tribe. He is not an "Indian," within the meaning of the law.

6. The treaty with the Cherokees, concluded at New Echota, in 1835 [7 Stat. 478], allows the Indian council to make laws for their own people or such persons as have connected themselves with them. But it also provides, that such laws shall not be inconsistent with acts of congress. The act of 1834, therefore, controls and explains the treaty.

7. It results from these principles, that a plea set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the circuit court of the United States, is not valid.

At the April term, 1845, of the said circuit court, the grand jury indicted William S. Rogers for the murder of Jacob Nicholson. Both Rogers and Nicholson were alleged in the indictment to be "white men and not Indians." The offence was charged to have been committed within the jurisdiction of the court, that is to say, in that part of the Indian country west of the state of Arkansas, that is, bounded north by the north line of lands assigned by the Osage tribe of Indians, produced east to the state of Missouri, west by the Mexican possessions, south by Red river, and east by the west line of the now state of Arkansas and the state of Missouri, the same being territory annexed to the said district of Arkansas, for the purposes in the act of congress in that behalf made and provided.

[1] [Reported by Samuel H. Hempstead, Esq.]

The defendant filed the following plea: "And the defendant in his own proper person, comes into court, and, having heard the said indictment read, says, that the court ought not to take further cognizance of the said prosecution, because, he says, heretofore, namely, on the —— day of November, 1836, he then being a free white man and a citizen of the United States, and having been born in the said United States, voluntarily and of his free will removed to the portion of the country west of the state of Arkansas, assigned and belonging to the Cherokee tribe of Indians, and did incorporate himself with said tribe, and from that time forward became and continued to be one of them, and made the same his home, without any intention of returning to the said United States; and that afterwards, namely, on the —— day of November, 1836, he intermarried with a Cherokee Indian woman, according to their forms of marriage, and that he continued to live with the said Cherokee woman, as his wife, until September, 1843, when she died, and by her had several children, now living in the Cherokee Nation, which is his and their home. And the defendant further says, that from the time he removed, as aforesaid, he incorporated himself with the said tribe of Indians, as one of them, and was and is so treated, recognized, and adopted by said tribe and the proper authorities thereof, and exercised and exercises all the rights and privileges of a Cherokee Indian in said tribe, and was and is domiciled in the country aforesaid; that before and at the time of the commission of the supposed crime, if any such was committed, namely, in the Indian country aforesaid, he the defendant, by the acts aforesaid, became and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of congress in that behalf provided. And the said defendant further says, that the said Jacob Nicholson, long before the commission of said crime, if any such was committed, although a native born free white male citizen of the United States, had settled in the tract of country assigned to said Cherokee tribe of Indians, west of the state of Arkansas, without any intention of returning to said United States; that he intermarried with an Indian Cherokee woman, according to the Cherokee form of marriage; that he was treated, recognized, and adopted by the said tribe as one of them, and entitled to exercise and did exercise all the rights and privileges of a Cherokee Indian, and was permanently domiciled in said Indian country as his home up to the time of his supposed murder. And the defendant further says, that by the acts aforesaid, he, the said Jacob Nicholson, was a Cherokee Indian at the time of the commission of the said supposed crime, within the true intent and meaning of the act of congress in that behalf made and provided. Wherefore, the defendant says, that this court has no jurisdiction to cause the defendant to make a further or other answer to said bill of indictment, for said supposed crime alleged in the bill of indictment. And the defendant prays judgment, whether he shall be held bound to further answer said indictment."

To this plea the district attorney of the United States filed the following demurrer: "And the said United States, by Samuel H. Hempstead, district attorney, come and say, that the said first plea of the defendant to the jurisdiction of this honorable court is insufficient in law, and that by reason of any thing therein contained, this court ought not to refuse to entertain further jurisdiction of the crime in said bill of indictment alleged. And the following causes of demurrer are assigned to said plea: (1) That a native born citizen of the United States cannot expatriate himself so as to owe no allegiance to the United States without some law authorizing him to do so. (2) That no white man can rightfully become a citizen of the Cherokee tribe of Indians, either by marriage, residence, adoption, or any other means, unless the proper authority of the United States shall authorize such incorporation. (3) That the proviso of the act of congress relating to crimes committed by one Indian upon the property or person of another Indian, was never intended to embrace white persons, whether married and residing in the Indian nation or not." And, upon the argument of the said demurrer, by S. H. Hempstead, Dist. Atty., for the United States, and E. L. Johnson, for the prisoner, the following questions arose, and were propounded for the decision of the court; but the judges being divided in opinion upon the same, upon motion, ordered that they be entered of record, and certified to the next term of the supreme court of the United States for its opinion and decision thereupon:

(1) Was it competent for the accused, being a citizen of the United States, either under the fourth clause of section 8, art. 1, of the constitution of the United States, or under any act of congress passed in virtue of the constitution of the United States, upon the subject of naturalization, or in virtue of any admission, obligation, or duty, incumbent upon the government of the United States and implied by the said clause, section, and article of the constitution; or any of the said acts of congress in reference to citizens of the United States, or to foreign governments, their subjects or citizens, upon the authority of the will and act of the accused, and without any form, mode, or condition prescribed by the government of the United States, to divest himself of his allegiance to that government, and of his character of citizen of the United States?

(2) Could the accused, as a citizen of the United States, or a resident within the same, possess the right or the power resulting

from the nature and character of the civil and political institutions of the United States, or as appertaining to, and inherent in, him as a free moral and political agent, or derived to him from the law of nature or from the law of nations, founded either upon natural right or upon convention, voluntarily and entirely put off his allegiance to, and his character of citizen of, the United States, and transfer that allegiance and citizenship to any other government, state, or community?

(3) Could the tribe of Indians residing without the limits of any one of the states, but within the territory of the United States, as set forth in the pleadings in this prosecution, and designated as the Cherokee Tribe, and also as the Cherokee Nation, and by whom the accused alleges that he has been adopted, be held and recognized in reference to the government and under the laws of the United States as a separate and distinct government or nation possessing political rights and powers such as authorize them to receive and adopt, as members of their state, the subjects or citizens of other states or governments, with the assent of such subjects or citizens, and particularly the citizens of the United States, and thereby to sever their allegiance and citizenship from the states or governments to which they previously appertained, and to naturalize such subjects or citizens, and make them exclusively or effectually members, subjects, or citizens of the said Indian tribe, with regard to civil and political rights and obligations?

(4) Could the accused, by any act or assent of his own combined with the acts, authority, or assent of the above-mentioned tribe, residing within the territory aforesaid, so change and put off his character, rights, and obligations as a citizen of the United States, as to become, in his social, civil, and political relations and condition a Cherokee Indian?

(5) Does the 25th section of the act of congress of the 30th June, 1834, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers," and the proviso to that section limit the operation of the said act, and give effect to the said proviso, as to instances of crimes committed by natives of the Indian tribes of full blood, against native Indians of full blood only; or do the said section and proviso have reference also to Indians, natives, or others adopted by and permanently resident within the Indian tribes; or have they relation to the progeny of Indians by whites or by negroes, or of whites or negroes by Indians, born or permanently resident within the Indian tribes and limits, or to whites, or free negroes born and permanently resident within the Indian tribes and limits, or to whites and free negroes owned as slaves, and resident within the Indian tribes, whether procured by purchase or there born the property of Indians?

(6) Does the plea interposed by the accused in this prosecution, the facts whereof are admitted by the demurrer, constitute a valid objection to the jurisdiction of this court?

The 25th section of the act of 1834, referred to in the fifth point certified, enacts as follows: "That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country; provided, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The defendant moved the court for an order to discharge him from imprisonment, on the ground that the court were divided in opinion on his plea to the jurisdiction; but the court overruled the motion, and remanded him to the custody of the marshal.

[Decision of supreme court on the questions certified:]

TANEY, Circuit Justice. This case has been sent here by the circuit court of the United States for the district of Arkansas, under a certificate of division of opinion between the justices of that court. It appears by the record, that William S. Rogers, a white man, was indicted in the above-mentioned court for murder, charged to have been committed upon a certain Jacob Nicholson, also a white man, in the country now occupied and allotted by the laws of the United States to the Cherokee Indians. The accused put in a special plea to the indictment, in which he avers that, having been a citizen of the United States, he, long before the offence charged is supposed to have been committed, voluntarily removed to the Cherokee country and made it his home, without any intention of returning to the United States; that he incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country; that by these acts he became a citizen of the Cherokee Nation, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of congress in that behalf made and provided; that the said Jacob Nicholson had in like manner become a Cherokee Indian, and was such at the time of the commission of the said supposed crime, within the true intent and meaning of the act of congress in that behalf made and provided; and that, therefore, the court had no jurisdiction to cause the defendant to make a further or other answer to the said indictment. This is the substance of the plea, and to this plea

the attorney for the United States demurred, setting down the causes of demurrer, which appear in the foregoing statement of the case.

Several questions have been propounded by the circuit court, which do not arise on the plea of the accused, and some of them we think cannot be material in the decision of the case, and need not, therefore, be answered by this court. The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular state. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control. It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject, which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them, if possible, from the consequences of their own vices. But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the lawmaking and political department of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States, are subject to their authority, and where the country occupied by them is not within the limits of one of the United States, congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian. Consequently, the fact that Rogers had become a member of the tribe. Cherokees, is no objection to the jurisdiction of the court and no defence to the indictment, provided the case is embraced by the provisions of the act of congress of the 30th June, 1834, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers." By the 25th section of that act, the prisoner, if found guilty, is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso, which is, that the provisions of that section "shall not extend to crimes committed by one Indian against the person or property of another Indian." And we think it very clear, that a white man, who, at mature age, is adopted in an Indian tribe, does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may, by such adoption, become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who, by the usages and customs of the Indians, are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. And it would, perhaps, be found difficult to preserve peace among them if white men of every description might, at pleasure, settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.

It may have been supposed that the treaty of New Echota, made with the Cherokees in 1835, ought to have some influence upon the construction of this act of congress, and extend the exception to all the adopted members of the tribe. But there is nothing in the treaty in conflict with the construction we have given to the law. The fifth article of the treaty stipulates, it is true, that the United States will secure to the Cherokee Nation the right, by their national councils, to make and carry into effect such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them. But a proviso immediately follows, that such laws shall not be inconsistent with the constitution of the United States, and such acts of congress as had been or might be passed regulating trade and intercourse with the Indians. Now the act of congress under which the prisoner is indicted, had been passed but a few months before, and this proviso

in the treaty shows that the stipulation above mentioned was not intended or understood to alter in any manner its provisions, or affect its construction. Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man of the white race, and therefore not within the exception in the act of congress.

We are, therefore, of opinion, that the matters stated in the plea of the accused do not constitute a valid objection to the jurisdiction of the court, and that, if he is found guilty upon the indictment, he is liable to the punishment provided by the act of congress before referred to, and is not within the exception in relation to Indians.[2] And we shall direct this opinion to be certified to the circuit court as the answer to the several questions stated in the certificate of division. We abstain from giving a specific answer to each question, because, as we have already said, some of them do not appear to arise out of the case, and upon questions of that description, we deem it most advisable not to express an opinion. [4 How. (45 U. S.) 567.]

Case No. 16,188.

UNITED STATES v. ROGERS et al.

[10 Int. Rev. Rec. 206.]

District Court, E. D. New York. Dec., 1869.

INTERNAL REVENUE—WHISKEY TAX.

This suit was brought to recover the amount due on a distiller's bond. The evidence showed that [Henry] Rogers carried on the business of a distiller during the months of October and November, 1868. The assessor's returns showed that his unpaid taxes amounted to $22,517.26. This was not disputed on the part of the defense, and a verdict for that amount was directed to be rendered for the government.

Case No. 16,189.

UNITED STATES v. ROGERS et al.

[3 Sumn. 342.] [1]

Circuit Court, D Rhode Island. June Term, 1838.

WHALE FISHERIES—REGISTERED VESSEL—REVOLT OF SEAMEN.

1. By the act of 1793, c. 52 [1 Story's Laws, 285; 1 Stat. 305, c 8], no registered ship or vessel can, while she remains registered, engage in the whale fisheries; but she must surrender her register, and be enrolled and licensed for the fisheries.

2. The act of 1835, c. 40 [4 Stat. 775], provides that "if any one or more of the crew of an American ship or vessel, on the high seas, &c., shall endeavor to make a revolt," &c., he and they shall, on conviction, be punished as provided in the act. *Held*, that a ship, engaged in a whaling voyage, without having surrendered her register, or taking out an enrollment and license, pursuant to the act of 1793 (chapter 52), was not an American ship, within the purview of the act of 1835 (chapter 40), and that an indictment would not hold, under this act, against the crew, for an endeavor to make a revolt.

[Cited in U. S. v. Almeida, Case No. 14,433.]

[Cited in People v. Tyler, 7 Mich. 225.]

Indictment against the defendants [William Rogers and others] for an endeavor to commit a revolt, on the 10th of May, 1838, on board of the brig Troy, belonging to Bristol (Rhode Island), alleged to be a registered ship, owned by certain citizens of the United States, named in the indictment, and the defendants being seamen in and on board thereof, against the act of March 3, 1835, c. 40 [4 Stat. 775]. Plea, not guilty.

At the trial it was admitted by R. W. Greene, the district attorney, that the brig was, at the time when the supposed offence was committed (May, 1838), engaged in a whaling voyage, and her crew were, by the shipping articles, in the same year shipped for a whaling voyage. The ship's register was dated in 1833, and the voyage was undertaken without any surrender of the register, or taking out an enrollment and license pursuant to the act of 18th February, 1793, c. 52 [1 Story's Laws 285; 1 Stat. 305, c. 8], for enrolling and licensing vessels employed in the coasting trade and fisheries.

Upon this statement, which was agreed to be the truth of the case, the court suggested a doubt, whether the offence (if any) was, under the circumstances, within the purview of the statute; and the case was spoken to by—

Mr. Greene, U. S. Dist. Atty.

Randolph and Pearce, for defendants.

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

STORY, Circuit Justice. I am unable to persuade myself, that the present indictment is maintainable, under the circumstances. The act of 1835 (chapter 40) provides that "if any one or more of the crew of an American ship or vessel, on the high seas, &c., shall endeavor to make a revolt," he and they shall, on conviction, be punished as provided in the act. To bring the case within the statute, the voyage, for which the seamen are shipped, must be a lawful one, and they must, at the time, be of the "crew" of an American ship or vessel; and of course there must exist a lawful relation between them and the master. The statute of 1793, c. 52, § 1 [1 Story's Laws 285; 1 Stat. 305, c. 8], enacts, that such ships or vessels as are enrolled and licensed according to the provisions of that act, "and none others shall be deemed ships or vessels of the United States, entitled to the privileges of ships engaged in the coasting trade or fish-

[2] Rogers was never tried, having been afterwards drowned in the Arkansas river, in attempting to make his escape.

[1] [Reported by Charles Sumner, Esq.]

eries;" and the whale fisheries are expressly within the purview of the act, as is abundantly seen in the form of the license prescribed by the fourth section. Now, it seems plain to me, that no registered ship is entitled to carry on the whale fisheries, as an American ship, or is entitled to the privileges of an American ship, under the statute of 1793, c. 52 [8]. The third section declares, that it shall be lawful for the collectors of the several districts, to enroll and license any ship or vessel that may be registered, upon such registry being given up, or to register any ship or vessel, that may be enrolled, upon such enrolment and license being given up. And the sixth section treats every ship or vessel not so enrolled or licensed, and found engaged in the trade, as liable to pay the same fees and tonnage in every port of the United States, as ships or vessels not belonging to a citizen or citizens of the United States; and, under certain circumstances, the ship or vessel and its lading become liable to forfeiture. My opinion, therefore, is, that this ship cannot be deemed an American ship, within the sense of the third section of the statute of 1835 (c. 40), on which this indictment is founded; and the crew are not the crew of such an American ship or vessel as are contemplated by the act. On this ground the indictment would fail upon the facts. Indeed, my impression is, that, upon the manifest intent of the act of 1793, c. 52 [8], no registered ship or vessel can, while she remains registered, engage in the whale fisheries; but she must surrender her register, and be enrolled and licensed for the fisheries. And that if she should be found engaged in such fisheries without such enrolment and license, at least, if she has on board any article of foreign growth and manufacture, or distilled spirits, other than sea stores, she would be forfeited. The main purposes of the act would be utterly frustrated upon any other construction, and the main securities and privileges of the trade be defeated.

The district judge concurred in opinion that the facts did not support the indictment; and thereupon the district attorney entered a nolle prosequi.

Case No. 16,190.

UNITED STATES v. ROLAND.

[1 Cal. Law J. 298.]

District Court, N. D. California. 1863.[1]

MEXICAN LAND GRANT — GENUINENESS OF TITULO —EVIDENCE.

[1. Where no map was presented or informes obtained, and the titulo purports to have been issued on the same day that the borrador was drawn, the fact that the description of the land in the former is much more specific than that in the latter is strong evidence adverse to the genuineness of the titulo.]

[2. The fact that the governor's signature to the alleged titulo, testimonio, and order for extension, are in a style rarely, if ever, used by him, and different from his signature affixed to similar documents on the same date, tends to show that such papers are forgeries.]

[3. The fact that the journals of the departmental assembly show that that body was not in session at the date on which the testimonio states that the grant was approved by it is strong evidence that the grant is not genuine.]

[4. Proof that four days after the date of the alleged grant by the governor of eleven leagues he granted another nine leagues to the same persons tends to show that the former grant is not genuine.]

On appeal from the board of land commissioners.

Claim for eleven square leagues at the junction of the San Joaquin and Stanislaus rivers. Rejected, August 4, 1862.

HOFFMAN, District Judge. The claimant has produced, in support of his title, an expediente from the archives. This document contains a petition, marginal order that the title issue, decree of concession, and the borrador or draft of the title to be issued to the party interested. This expediente is found in the archives, and is noted on the indexes of Hartnell and Mr. Carey Jones. The claimant has also produced the title paper alleged to have been delivered to him—a testimonio or certificate of approval by the departmental assembly—and a petition for an extension of time to fulfill the conditions of the grant, with a marginal order of the governor granting the request. It is not pretended that the land was occupied, or any attempt made to perform the conditions of the grant, until September, 1847, when the claimant caused some cattle and horses to be placed upon it.

The claim was rejected by the board.

It is contended, on the part of the United States: (1) That the title paper produced by the party, the testimonio of approval by the departmental assembly, and the petition, and order for the extension of time, are not genuine; and (2) that the grant was abandoned,—the claimant having, four days after its date, asked for and obtained another grant for a different tract of land.

On examining the expediente we are struck by the circumstance that the petition of Roland, the marginal order that the title issue, the decree of concession, and the borrador of the grant are all dated on the same day, May 2d. The approval of the assembly is dated May 4th, and the order for an extension May 5th. No map was presented with the petition—no informes were required or obtained; and the whole proceeding, from its inception to its completion, was consummated within the short space of three days.

It has not been urged on the part of the United States that the mere fact that no informes were asked for, or investigations made, as to the qualifications of the petitioner, the situation of the land, etc., is fatal to the grant; although the decision of the supreme

[1] [Affirmed in 7 Wall. (74 U. S.) 743.]

court in the Case of Cambuston, 20 How. [61 U. S.] 63, might seem to justify the position that the preliminary steps, made requisite by the law of 1824 and the regulations of 1828, must necessarily be taken by the governor to enable him to make the grant. But, at all events, the absence of an important part of such proceedings, and the evident haste, if not recklessness, with which they appear to have been conducted, are fitted to suggest a doubt as to whether the governor was acting in the bona fide exercise of the powers confided to him by the colonization laws. The land was in a remote wilderness, uninhabited by reason of hostile Indians, so little known that the petitioner could only describe it as eleven leagues on the banks of the rivers Stanislaus and San Joaquin, and was unable to delineate it on a map. No inquiries are made as to his intention or ability to occupy so large a tract; and, within three days of the date of the grant, the governor allows him an indefinite extension of time for its occupation and cultivation. The grant purports to have been made by Pico (as was observed by the supreme court, with respect to the grant to Cambuston) "near the time when the government of the territory passed from his hands; and, indeed, during the heat and struggle of the controversy by which his power was finally overthrown." The grantee seems to have had no special claim upon the bounty of the government, and had already obtained, jointly with another, a grant for four leagues of land. All these circumstances render it difficult to believe that the governor, if he made the grant, was bona fide, exercising the powers confided to him, and fairly and faithfully endeavoring to carry out the policy of the Mexican laws of colonization.

But the objections of the United States to this grant are of a more specific nature:

1. In the borrador or draft found in the expediente, the land is described as "eleven leagues, situated on the banks of the rivers Stanislaus and San Joaquin." The title papers produced by the party direct, in the third condition, "that the measurement of the eleven leagues shall be on the banks of the Stanislaus, of the width of one league, commencing where the two rivers join." The fact that the borrador differs in phraseology from the titulo is not, of itself, conclusive; for slight discrepancies of this kind sometimes occur in cases of undoubted genuineness. But, in this case, the description in the borrador is evidently taken from the petition, and, as no map was presented, or informes obtained, and the grant issued on the same day, the governor had neither time nor means to obtain more accurate information. It is a little singular that the titulo, if drawn at the same time, should be so much more specific in its designation of the tract; and it serves to confirm the theory of the United States that the proceedings recorded in the expediente were stopped, that no titulo was issued, and that the paper produced was subsequently prepared when the necessity of a more particular description of the land was well understood. The signatures of Pio Pico to the titulo, the testimonio, and the order for an extension, are in a style rarely, if ever, used by him in public documents of that date. Three documents are produced from the archives of undoubted authenticity, dated respectively on the 1st, 2d, and 3d of May, on which Pico's signature appears, exhibiting its uniform and striking characteristics. The claimant himself produces an expediente and titulo of a grant to Arenas and him, dated May 6th. On these documents, as on those presented by the United States, the signature of Pico is in his usual style. In the case of Luco v. U. S. [Case No. 8,594] this court had occasion to investigate at length the evidence furnished by the archives as to the uniformity and peculiarities of Pico's signature. The fact that his signature to the documents in that case differed from those elsewhere found in the archives was considered a strong argument against its genuineness, and the same argument was used and the conclusion adopted by the supreme court. 23 How. [64 U. S.] 541.

2. The claimant has attempted to weaken its force in this case by the production of four documents, on which the signature of Pico is different from his usual style. But the genuineness of none of these documents is proved—one of them is certainly fraudulent, another probably so, and the two others are open to serious doubt. But, even if authentic, they may serve to impair, but do not overthrow the argument relied on by the United States. For, independently of the numerous signatures (more than six hundred) found in the archives, the proofs in this case show that on the very day when Pico is alleged to have signed the documents produced in this case, he was signing similar documents in his usual handwriting.

3. It is shown by the journals of the departmental assembly, that that body was not in session at the date when the testimonio states the grant to have been approved. The testimonio is dated May 4th. It appears by the journals that the earliest session in May was on the 8th. The preceding session was on April 29th, and the minutes of that session were read and approved, as was customary, at the succeeding session of May 8th.

The counsel for the claimant, sensible, no doubt, of the force of this record evidence thus furnished, has caused the journals of the assembly to be searched, to discover discrepancies or omissions which might serve to impair their value as complete and reliable records of the proceedings of that body. But three such have been found. The first is evidently a mere clerical mistake. A minute of the proceedings of May 8th is found erroneously entitled as of April 8th, on which day there was no session. This is shown by the fact that the acta or minute is left incomplete, and another one is found identical in terms, but correctly dated May 8th. It is also

shown by the contents of the minute itself, which commences by a note, that the proceedings of the previous session of April 29th were read and approved. An instance is also found where the proceedings of July 1st were approved at the session of July 3d, without noticing an intermediate extraordinary session on July 2d, which the journals show was held. But the explanation is evident. On recurring to the actas of the session of July 2d, we find that the minutes of the proceedings were read and approved on the same day before adjournment. The minutes of the preceding regular session of July 1st not having been read at this extraordinary session, they were read and approved at the next regular session of July 3d. The only other omission that has been discovered is that of the minutes of the session of April 24th, which the journal shows were read and approved at the session of April 29th. They have probably been lost; but, even in this case, the journal shows that a session was held on that day. In the case at bar the archives not only contained no trace of the supposed session of May 4th, but they show, affirmatively, that no session was, in fact, held on that day,—unless we suppose that the record has been lost and that the minutes of the session were read and approved before its adjournment; a coincidence certainly improbable in the highest degree.

4. But the strongest argument to show that the alleged grant was not issued to Roland is the fact that, on the 6th of May, only four days after its date, Pico granted to Arenas and John Roland nine leagues in the jurisdiction of San Jose Gaudalupe. He had already granted to Roland and Workman four leagues of land. If, then, on May 2d, he granted to him eleven leagues, and, on May 6th he granted to him and another nine leagues, we must suppose the governor to have committed a flagrant violation of the law under which he derived his powers. All of these last grants are claimed to be genuine, and have been presented for confirmation. That of May 6th bears every mark of authenticity. The only hypothesis, therefore, on which we can acquit the governor of a willful departure not only from the spirit but the letter of the colonization laws, is that suggested by the United States, viz.: that the proceedings in relation to the eleven league grant were suspended, the application abandoned, and a petition presented and a grant obtained for another tract of land. We have seen that this hypothesis is confirmed by all the other facts in the case; the discrepancy between the titulo and the borrador, the style of the signatures of Pico and the proof, almost certain, that no session of the assembly was held on the day when the grant is alleged to have been confirmed. Other circumstances, though not so important, significantly point in the same direction. On the very day (May 5th) on which (if the paper be genuine) Roland asked the governor for an extension of time, he presented to the governor a petition for a grant to himself and Arenas, and to one petition he subscribes his name John Roland, to the other John Rowland,—a difference in the mode of spelling his own name not likely to have occurred on two documents written on the same day. The governor, Pio Pico, has been examined at length; but he is unable to recollect any circumstance connected with the grant, or even that it was in fact made. His only reason for believing it to have been made is the fact that the documents bear his signature.

On the whole, my opinion is that the alleged titulo produced, the testimonio, and the order for an extension have been fabricated since their dates, and that the titulo, in all probability, never issued to him, but the proceeding was abandoned in order to obtain a grant in a different part of the country.

The decision of the board, rejecting the claim, must therefore be affirmed.

[Affirmed in 7 Wall. (74 U. S.) 743.]

Case No. 16,190a.

UNITED STATES v. ROLIGER.

[28 Int. Rev. Rec. 314.]

District Court, S. D. Illinois. Feb. 22, 1882.

VIOLATION OF INTERNAL REVENUE LAWS—RETAILING LIQUORS—CLUBS OR ASSOCIATIONS.

[In order to procure liquors and beer to drink, a number of persons formed a voluntary association, to which they paid an initiation fee. With the fund thus raised a stock of liquors was purchased, and the same were dealt out by an officer of the association to members only, upon paying for each drink a sum fixed therefor; the purpose being not to make a profit, but merely to realize a sum with which to keep up the stock. *Held*, that the association constituted a partnership for the sale of liquors at retail, without paying the special tax, and that each member thereof was guilty of violating the statute.]

[Cited in U. S. v. Giller, 54 Fed. 660.]

Indictment for carrying on business as retail liquor dealer without paying special tax.

In the summer of 1881 the defendant, Roliger, and about thirty others, in Assumption, Illinois, united themselves in a voluntary association for the purpose of providing themselves with liquor and beer to drink as they wanted it, the village of Assumption refusing to license the sale of liquor or beer. The plan of the association thus formed was that each person, on becoming a member, should pay one dollar, which went into the treasury, and so a fund was raised with which to purchase the first stock of liquor. They rented a room, hired a man to take charge of the room and liquors, and it was his duty to make the purchases in the name of the association, and dispense the liquors to members of the association only, each member paying for his liquor such price as a committee of the association fixed, and the price to be fixed so that no profit should be made, but so that the stock of liquors might be kept up, and room rent and wages be paid. The association paid no

special tax as retail liquor dealer, and, on being required to do so, the members, after taking counsel, refused to pay, taking the ground that the association was not selling liquor, as the liquor belonged to the members, and none but the members were allowed to partake of it. Thereupon the individual members of the association were indicted by the grand jury of the district court for the Southern district of Illinois, and this case against Fred. Roliger, one of their number, was selected as a test case, and tried before a jury at the January term, 1882, of said court, the trial resulting in the conviction of the defendant, whereupon all the others indicted pleaded guilty.

James H. Connolly, U. S. Atty., and E. T. Roe, Asst. U. S. Atty.

J. C. Robinson and F. W. Burnett, for defence.

THE COURT (TREAT, District Judge) instructed the jury that under the facts, as stated, each member of the association was liable for carrying on business as retail liquor dealer without paying the special tax, and the fact that the business was being carried on without any attempt to make a profit out of it made no difference, as the law requires those who sell or offer for sale malt or spirituous liquors, shall pay the special tax, without reference to whether the selling or offering for sale is done for the sake of profit or not; and the fact that none but members of the association were allowed to partake of the liquor made no difference. The association was a partnership, in which all the members seem to have been equal partners, and liquors, when purchased in bulk, belonged to the partnership; but when the individual partner went to the clerk of the concern, and obtained from him a drink of the partnership liquor, and paid the clerk for that drink at the price fixed, that was a purchase of so much liquor from the partnership, and it was a sale of so much liquor by the partnership to this individual partner, and for so carrying on business the partnership should have paid a special tax as retail liquor dealers, and having failed and refused to do so, each member of the partnership became liable to the criminal provision of the law.

Case No. 16,191.

UNITED STATES v. ROLLINSON.

[2 Cranch, C. C. 13.] [1]

Circuit Court, District of Columbia. Nov. Term, 1810.

CRIMINAL LAW—EVIDENCE—BAWDY-HOUSE.

On a prosecution for keeping a bawdy-house, the United States cannot give evidence of the general reputation of the house.

Indictment [against Polly Rollinson] for keeping a bawdy-house.

Mr. Jones, for the United States, asked the witness whether the house was generally reputed to be a house of ill-fame.

E. J. Lee objected.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the question was improper.

UNITED STATES (ROMERO v.). See Case No. 12,029.

Case No. 16,192.

UNITED STATES v. RONZONE.

[14 Blatchf. 69.] [1]

Circuit Court, S. D. New York. Dec. 9, 1876.

INDICTMENT AND INFORMATION—MOTION TO QUASH—NOLLE PROS.

A motion being made to quash an indictment for a misdemeanor, an information was filed setting forth the same charge as that in the indictment, accompanied with an affidavit as to the identity of the offence. A nolle prosequi was entered on the indictment, and the defendant moved to quash the information, on the ground that there had been no preliminary examination before a commissioner nor any order to show cause: *Held*, that the motion must be denied.

[This was an indictment against Philip Ronzone.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Louis F. Post and Abram J. Dittenhoefer, for defendant.

BENEDICT, District Judge. The defendant was indicted for a misdemeanor. Objection being taken to the averments of the indictment, and a motion to quash being made, the district attorney filed an information setting forth the same charge contained in the indictment, accompanied with an affidavit showing that the offence charged in the information had been made to appear to a grand jury, and that the grand jury, upon evidence, had found an indictment against the accused for the same offence charged in the information. Upon filing the information, a nolle prosequi was entered upon the indictment and thereupon a motion was made, in behalf of the accused, to quash the information, upon the ground that he had not been afforded a preliminary examination before a commissioner, nor an opportunity to show to the court, upon an order to show cause, the absence of evidence to justify placing him upon trial.

The case of U. S. v. Shepard [Case No. 16,273] was cited in support of the motion. That case is no authority for holding that an order to show cause and a hearing thereon is a necessary preliminary to a proceeding upon information, for, in that case the court says: "It would certainly be quite foreign to any known practice in the United States courts, to pursue the English practice of re-

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

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

quiring a rule for the accused to show cause before the court and there contest the question whether the evidence justified placing him on trial." Nor is that case authority for holding that an examination before a commissioner is, under all circumstances, a necessary preliminary to proceedings by information. In Shepard's Case there had been no preliminary inquiry, either before a commissioner or before a grand jury, and the information was not accompanied with any oath whatever. The question, whether the fact of an indictment having been found for an offence would not justify placing the accused on trial upon an information charging the same offence, was not before the court in Shepard's Case, and was not there decided. There have been many cases where the exhibition of an indictment found in one district has been deemed sufficient evidence to warrant an arrest in another; and there is one adjudged case where the precise question here raised was involved. I allude to U. S. v. Waller [Id. 16,634], where an indictment had been found which was quashed, whereupon the district attorney filed an information alleging the offence charged in the indictment, and the accused then moved that the information be quashed. The court refused to quash the information. The decision in Waller's Case is sufficient authority to support the present proceeding, and the motion to quash this information must be denied.

Case No. 16,193.

UNITED STATES v. ROSE.

[2 Cranch, C. C. 567.] [1]

Circuit Court, District of Columbia. May Term, 1825.

EXECUTORS—ACTION ON ADMINISTRATION BOND—DEFENSES—JURY—AUDITING ACCOUNTS.

1. An executor, indebted to his testator's estate, cannot, in an action upon administration bond, brought by creditors or legatees, discharge himself by showing payments to his coexecutors.

2. If, after the jury is sworn and impanelled, it appears to be a case in which it is necessary to examine and determine upon accounts between the parties, the court will order the jury to be discharged, and the accounts to be audited and stated by the auditor of the court, agreeably to the Maryland act of 1785 (chapter 80, § 12), and that he report to the court.

[Suit by the United States, for the use of Eliza Balch and others, against John Rose.]

Debt upon an administration bond, given by the defendant and the Rev. S. B. Balch, as coexecutors of T. B. Beall. The breach assigned was in not accounting for, and paying over to the persons entitled to the same, a debt of $4,120, due by the defendant to his testator. In order to show that the whole sum of $4,120 was not due by the defendant, he offered in evidence certificates of his coexecutor, S. B. Balch, that "the defendant is justly entitled to the following credits in his account with T. B. Beall, deceased," &c.

Mr. Jones, for plaintiffs, objected that those certificates are not competent evidence. One executor is not to account with his coexecutor, and cannot discharge himself from the claims of creditors and distributees, by showing that he has paid the money to his coexecutor.

THE COURT (MORSELL, Circuit Judge, not sitting) rejected the evidence.

Marbury & Swann, for defendant.

NOTE. After the jury was sworn, and the cause had been opened, THE COURT (nem. con.) made the following order: "In this case, the court being of opinion that this is an action in which it is necessary to examine and determine on accounts between the parties, it is ordered that the jury sworn in this cause be discharged, and that the accounts and dealings between the parties be audited and stated by Joseph Forrest, the auditor of this court, agreeably to the 12th section of the act of November, 1785 (chapter 80), and that he report to this court." The plaintiffs had leave to amend their replication, by stating the names of the legatees, &c., and the defendant to amend his rejoinder.

[See Case No. 16,194.]

Case No. 16,194.

UNITED STATES v. ROSE.

[3 Cranch, C. C. 174.] [1]

Circuit Court, District of Columbia. May Term, 1827.

EXECUTORS—ADMINISTRATION BOND.

An action cannot be maintained upon the administration bond of an executor, for not giving in a claim against himself, until the claim has been established by the orphans' court, according to the Maryland testamentary act of 1798 (chapter 101, § 20, cl. 8).

Debt on the administration bond of the defendant who was one of the executors of the will of Mr. Brook Beall. The breach assigned in the replication was, that the defendant was indebted to his testator upon bond, as well as upon open account, and that he had not given in or accounted for either of the said debts. To this replication there was a general demurrer, and joinder. By the Maryland testamentary act of 1798 (chapter 101, § 20, cl. 8), it is enacted: "That the bare naming of an executor in a will shall not operate to extinguish any just claim which the deceased had against him; but it shall be the duty of every such executor accepting the trust, to give in such claim in the list of debts: and on his failure to give in such claim, or any part thereof, any person, interested in the administration, may allege the same by petition to the orphans' court granting the administration; and the said court, with consent of the parties, may decide on the same; or it may be

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

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

referred by the parties, with the court's approbation; or, at the instance of either party, the court may direct an issue, or issues to be tried, and the same shall be tried in any court of law proper for the trial, and most convenient under all circumstances; and the court of law shall have power to direct the jury, and grant a new trial, as if the issue or issues were in a suit therein instituted; and a certificate from such court, or any judge thereof, of the verdict or finding of the jury, under the seal thereof, shall be admitted by the orphans' court to establish or destroy the claim, or any part thereof; and if the executor shall give in such claim, or the same, or any part, be established as aforesaid, he shall account for the sum due in the same manner as if it were so much money in his hands, and, on failure, his bond may be put in suit."

Mr. Marbury, for defendant, contended that no suit could be maintained upon the administration bond against the executor, for not giving in a claim against himself, until the claim should have been established by the orphans' court, in the manner provided by the testamentary act of 1798 (chapter 101, § 20, cl. 8), above recited. At common law the debt would be extinguished; the plaintiff's only remedy is given by the statute; and he must take that or none. Mr. Marbury cited the Maryland act of 1720 (chapter 24, § 2), and the case of Seegar v. Seney, 5 Har. & J. 488.

R. P. Dunlop and Mr. Jones, contra, contended that it was the duty of the executor to give in the claim, whether cited before the orphans' court, or not. That the condition of the bond was general, that the executor "shall well and truly perform the office of executor," "according to law, and shall in all respects discharge the duties of him required by law, as executor aforesaid, without any injury or damage to any person interested in the faithful performance of the said office." The neglect of any duty, is a breach of the condition of the bond, and will support an action. The proceeding provided by the statute is not necessary; the condition is broken, and for every breach an action lies at common law, without the aid of any statute. The proceeding under the statute is cumulative only, and does not impair the common-law remedy upon the bond. The act of Maryland of 1720 (chapter 24, § 2), restraining the right to sue upon the administration bond, until a return of non est inventus, or nulla bona, applies only to creditors of the estate, and shows that, but for that act, a direct and original suit might have been maintained, on the bond, by any person interested. This suit is not brought by a creditor of the estate, but by legatees. A creditor has a legal remedy against the executor, but a legatee has not. He cannot comply with the requisition of the statute by obtaining judgment at law, or even by issuing a capias ad respondendum. But the act of 1720 was repealed by the act of 1798 (chapter 101, § 10, cl. 3), which gives a right of action upon the bond to "any person conceiving himself interested in the administration of the estate;" "and judgment may be recovered, upon such action, for the damage actually sustained." This is an action for damages actually sustained by the legatees. "Actually" stands opposed to "judicially." "Actually sustained," not "judicially ascertained." The case of Seegar v. Seney, 5 Har. & J. 488, is not law; it is contrary to the practice of this court; and is not considered by the court of appeals of Maryland as of any authority upon the point stated by the reporter. The ground of the decision was that the action ought not to have been brought against Benton's administrator but against the administrator de bonis non. The debt due by the executor to his testator was legal assets by the act of 1798 (chapter 101, § 3, cls. 7, 14). Every debt due to the testator is assets.

Mr. Marbury, in reply. Debts due to the testator are not assets until recovered. They may be good or bad; separate or desperate, and the executor is not to be charged with them until they are recovered.

THE COURT (MORSELL, Circuit Judge, not sitting) was clearly of opinion that the executor is not liable upon his bond, for neglect of the duty stated in the replication, until that duty shall have been established in the mode pointed out in the Maryland testamentary act of 1798 (chapter 101, § 20, cl. 8).

Judgment for the defendant upon the demurrer.

Case No. 16,195.

UNITED STATES v. ROSE et al.

[Hoff. Land Cas. 197.] [1]

District Court, N. D. California. Dec. Term, 1856.[2]

MEXICAN LAND GRANT—SUTTER GENERAL TITLE—ABANDONMENT.

[1. One claiming under the "general title" of Micheltorena has merely to show that he is one of those in whose favor General Sutter reported, and need not show that he received a copy of the grant.]

[2. Where one who had purchased land, and had built a house thereon, obtained a grant from the government of adjoining land, his continued occupancy of the former tract extended to the latter, so as to rebut any presumption of abandonment of the grant.]

[3. The fact that claimant was recognized by General Sutter as one of those entitled to the benefits of the "general title" of Micheltorena, which was in terms restricted to "citizens," and that Sutter delivered a copy of the grant to him as such, is sufficient, when accompanied by the oath of the claimant to that effect, to show that he was within the class of "citizens."]

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

[2] [Reversed in 23 How. (64 U. S.) 262.]

[Claim by John Rose and others for the Rancho de Yuba, comprising six leagues of land in Yuba county; confirmed by the board, and appeal taken by the United States.]

William Blanding, U. S. Atty.

Thornton & Williams, for appellees.

HOFFMAN, District Judge. The claim in this case is founded on what is known as the "general title" of Micheltorena. It has already, after full consideration, been determined in this court that that grant was sufficient to convey a valid title to those in whose favor it issued. The only points now open to controversy in this case are therefore: (1) Whether the alleged grantee was one of those persons for whose benefit the grant was made. (2) Has the right (if any) acquired by him been forfeited by such unreasonable neglect to perform the conditions of occupation and cultivation as to authorize the presumption that he had abandoned his land.

First, was he one of the grantees under the original title. The grant of Micheltorena bears date December 22, 1844. It recites: "That the supreme government not being able, on account of other occupations, to extend one by one the respective titles to all the citizens who have petitioned for lands with favorable reports from Señor Don A. Sutter, by these letters grants unto them and their families the lands described in their petitions and diseños to all and each one who has obtained the favorable report of Señor Sutter, without any one being able to question their ownership; a copy of this given to them hereafter by Señor Sutter serving them as a formal title, with which they shall present themselves to this government for the purpose of delivering to them the title in due form and upon paper of the corresponding seal. And for the testimony thereof at all times, I give this present document, which shall be acknowledged and respected by all the civil and military authorities of the Mexican nation in this and all other departments. (Signed) Micheltorena." It having been decided that this grant passed a title to the persons therein referred to as fully and effectually as if they had individually been named in it or had received their separate titles, the only question that remains is, was the claimant one of those who had petitioned the government, and had obtained a favorable report from Señor Sutter? Of this, the most satisfactory evidence would undoubtedly be the production of a copy of the grant delivered to him by Sutter in obedience to the direction contained in it. But this, though perhaps the best, is not the only evidence which could establish the fact that the claimant was one of the intended grantees. If he could show that he had petitioned for the land, and that he had obtained the favorable report of General Sutter, it would clearly be enough to establish his right under the grant, even though Sutter may have neglected or refused to give him the evidence of his title which he was directed to furnish. The fact, however, that such a copy was not delivered to the party, would be a circumstance requiring explanation; for it has not, as yet, been suggested to this court that Sutter neglected or refused to comply with the directions of the general title in this respect, when applied to by any one entitled under it.

In the case at bar, it is alleged that a copy of the title was duly given to the grantee; that it, with other papers, was lost by him while fording the Sacramento river; that on being made acquainted with the loss, Captain Sutter furnished a second copy, which was sent by the grantee to Monterey for the purpose of obtaining the approval of the assembly, but that he has never been able to recover it, or to discover what had been done with it. General Sutter, who was sworn on the part of the claimants, testified that John Smith petitioned the governor for six square leagues of land, accompanying his petition by a map drawn, as he understood, by John Bidwell. The expediente with the usual decree for information was acted upon by the witness, and a favorable report made before the twenty-second of December, 1844. The witness also stated that he remembered having given to Smith a copy of the original title, as he was entitled to have it; that subsequently he was informed and fully satisfied that in the spring of 1845, Smith lost all his documentary evidence or expediente in this case. On his cross-examination he stated that after the petition came back from Monterey for his report he examined it in the presence of Bidwell, who wrote it, and of Smith, the grantee. Major Bidwell confirms the testimony of General Sutter, and states that he saw the latter deliver a copy of the general title to Smith; and that subsequently he prepared a petition to General Sutter, soliciting another copy of the general title, as the first had been lost with the accompanying documents; and that General Sutter knowing that fact, delivered a second copy as requested. The witness also states that the land claimed in this case was granted to Smith by the general title referred to; and he identifies a map as made by himself in 1844, on which the land now claimed is marked as the "Rancho de Yuba." General Sutter was re-examined in this court. His recollection when making his last deposition seems more uncertain and confused than when his testimony was first taken. He repeats, however, his former statement as to the facts we are considering, viz. that Smith applied for the land; that the petition was referred to him; that he reported favorably upon it; that he delivered a copy of the general title to Smith; and that on its being proved to him "by many persons" that the first copy was lost, he gave or sent to Smith a second copy. When asked how the loss was proved, he replied: "When a man like Bidwell told me anything, I believed it like the Gospel."

There can, I think, be no room for doubt under this testimony that Smith was one of those in whose favor the general title issued.

His own testimony has been taken to prove the loss of the copy delivered to him and of the other documents. It is objected that it has since appeared that he has or pretends to some interest in the land, notwithstanding his conveyance to the present claimants. A bill of complaint is exhibited in which he prays that that sale may be set aside on the ground of fraud. The objection was not taken, however, at the time he testified, and besides, his own evidence as to the loss of the documents would clearly be admissible, notwithstanding his interest. His account is corroborated by the testimony of Sutter and Bidwell—witnesses of whom it may be observed that they are of a class, unfortunately too small, upon whose veracity this court can place reliance. It is not to be forgotten that the production of the copy of the general title is only important as showing that the party producing it was one of those intended to be benefited by the original. The interest passed by virtue of the original; and it passed to those persons who are referred to in it, though they are not named.

The only inquiry, therefore is, was the claimant one of those persons? To establish this, no secondary evidence of the contents of the copy delivered to him is necessary. It is the fact that he was one of those in whose favor Sutter had reported which fixes his rights, and identifies him as one of the intended grantees. That he did petition for the land; that Sutter reported favorably on his petition; that a copy of the original grant was given to him at the time, as one of the grantees, is clearly proved. His rights are, therefore, established, whatever may have become of the copy delivered to him—that copy being in no sense the instrument which conveyed the title, but only a means of showing by its production what other testimony has sufficiently proved. But in order to ascertain what lands were granted, reference must be had to his petition; for it was the tract therein solicited which the governor granted, and secondary evidence of the contents of the petition must, of course, in the absence of the original, be resorted to.

That the petition and accompanying documents were lost is, I think, sufficiently shown, not only by Smith's own testimony, but by that of Sutter and Bidwell, and still more conclusively by the fact that a second copy of the grant was delivered to the grantee—a proceeding absurd and without a motive, unless the first had been lost. It is suggested that due diligence has not been shown to obtain this second copy. But the only document as to which secondary evidence is important is the petition, and of this it does not appear that any copy was made. The petition not being produced, the fact that the land now claimed was that solicited in it must be established by other testimony. Major Bidwell testifies that he is well acquainted with the land, and he states its boundaries, and that it was granted to Smith by Micheltorena. A map is also identified by him as made by himself in 1844, on which the land now claimed is delineated under the name of "Rancho de Yuba." General Sutter testifies that John Smith petitioned Governor Micheltorena for six leagues of land, accompanying his petition with a map or diseño, drawn, as witness understood, by Major Bidwell. Smith (the witness says) was in possession by his authority of this land—the boundaries of which correspond with the map referred to in the deposition of Bidwell. The witness on his cross-examination says that he examined the original diseño when the expediente was referred to him for his "informe;" that he was well acquainted with the ground, and that the boundaries as testified to by Major Bidwell, and delineated on the map referred to by him, correspond with those on the diseño which accompanied the petition. When subsequently examined, the witness declared his inability to specify the boundaries of the land petitioned for, or to give a particular description of the diseño which accompanied the petition. He even states that he cannot recollect the quantity of land applied for by Smith.

It is not very easy to reconcile the accurate recollection exhibited in the first deposition of General Sutter with the confusion and forgetfulness shown in his last. Perhaps the lapse of time may in some degree have impaired his memory, though it is strange that two years should have so completely obliterated the recollection of events which in 1855 he so freshly remembered. If we were compelled to rely upon General Sutter's testimony alone to ascertain the land which Smith petitioned for, and which was granted to him, we should, perhaps, be obliged to reject the claim. The testimony of Bidwell, however, is explicit, and identifies the land granted to Smith. Smith himself swears that he petitioned for and obtained the Rancho de Yuba; and that he claimed to own it is evident from the testimony introduced on the part of the United States; for in 1848, he sold out to Nye and Foster, from whom the claimants derive title, his interest in the land now in controversy. The fact that so soon after the acquisition of the country he claimed to own this land under the title derived from Micheltorena, shows that the claim now urged is no recent invention, and corroborates the testimony of Sutter and Bidwell that the tract now claimed was that originally petitioned for and granted to him. Upon the whole, I think it sufficiently proved, not only that Smith was one of the intended grantees under the general title, but that the land petitioned for by him, and by that instrument granted, was the Rancho de Yuba claimed in this suit.

The next inquiry is, was the vested interest so acquired forfeited during the existence of the former government by such unreasonable neglect to perform the conditions

as to justify the presumption that the grantee had abandoned his grant. The evidence shows that before obtaining his grant, Smith had purchased from General Sutter one league of land, and had built a house upon it. The land he solicited immediately adjoined this tract, and it would seem from the proofs, that the second house built by Smith was also within the limits of his purchase, and not within those of his grant. This is certainly the case if the boundaries of Sutter's grant be located according to the preliminary survey made of it. It may be admitted, therefore, that Smith never built a house within the limits of the six leagues granted; but that he resided in a house built on the land purchased by him which immediately adjoined it. His cattle, however, ranged over the large tract, and he appears to have claimed and been recognized as possessing both tracts, until 1848, when he sold out to Nye and Foster. It seems to me that this occupation was sufficient to satisfy the Mexican law. When a sobrante or surplus was granted to one who had previously obtained a grant of a portion of the land inclosed within natural boundaries, it was not expected that he should build a second house and reside on both tracts at once. So also where an augmentation or additional grant was made, the additional quantity was added to that first granted, and both formed one whole. If Smith then was residing and had built a house upon the one league purchased, and subsequently obtained from the government an additional six leagues immediately adjoining it, he must be considered from that time as occupying the whole seven leagues, or the whole tract, upon a portion of which he continued to reside. Certainly, such an occupation repels all idea that he had abandoned his grant. And it is only when the neglect to fulfill the conditions has been so unreasonable as to justify the presumption of abandonment, that we are authorized, under the principles laid down by the supreme court, to declare his claim forfeited.

It is further objected that the general title only grants to those citizens who have obtained the favorable report of General Sutter the lands solicited by them respectively; and that it is not shown that Smith was a citizen. It appears that Smith is a native of Canada or New Brunswick; that he came to this country in 1835. He swears himself that he was naturalized, but he does not produce his papers or give secondary evidence of their contents. They were lost with the other documents. It appears, however, that General Sutter delivered to him a copy of the title as one of those referred to in it. General Sutter was at that time military commandant of the frontier, and exercised civil jurisdiction in that portion of Upper California. He was directed to deliver a copy of the title to a certain class of persons described in it. It is to be presumed that as an officer of the government he did his duty, and acted within the limits of his authority. The fact, therefore, that Smith was recognized by him as one of those entitled to receive a copy of the grant, and that he delivered a copy to him as such, should, when corroborated by the oath of Smith himself, be received as sufficient to bring him within the class of persons in whose favor the grant issued.

The claim was confirmed by the board, and I see no reason to reverse their decision.

[The case was taken, on an appeal, to the supreme court, where the judgment of the district court was reversed, and the cause remanded, with directions to dismiss the petition. 23 How. (64 U. S.) 262.]

UNITED STATES v. ROSE. See Cases Nos. 10,285 and 10,286.

Case No. 16,196.

UNITED STATES v. ROSS.

[1 Gall. 624.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1813.

FEDERAL COURTS — ADMIRALTY JURISDICTION — PIRACY IN FOREIGN ROADSTEAD—MURDER —ACCOMPLICES—CONSPIRACY.

1. The circuit court has cognizance under the act of the 30th of April, 1790, c. 9, § 8 [1 Stat. 113], of piracy on board of an American ship, although committed in an open roadstead, adjacent to a foreign territory, and within a half mile of the shore.

[Cited in Ex parte Byers, 32 Fed. 407.]

2. The "high seas," in that act, mean any waters on the sea coast, which are without the boundaries of low water mark.

See U. S. v. Pirates, 5 Wheat. [18 U. S.] 184; U. S. v. Robinson [Case No. 16,176]. See, also, U. S. v. Grush [Id. 15,268]; Thomas v. Lane [Id. 13,902]; U. S. v. Davis [Id. 14,932]; The Harriet [Id. 6,099]; Curt. Tr. Seamen, p. 362, and authorities there cited.

[Distinguished in U. S. v. Morel, Case No. 15,807. Cited in U. S. v. New Bedford Bridge, Id. 15,867; U. S. v. Plumer, Id. 16,056. Cited in dissenting opinion in U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 116.]

3. To make a man a principal in murder, it is not necessary that he should inflict the mortal wound. It is sufficient, if he be present, aiding and abetting the act. Nor is it necessary, that there should be a particular malice against the deceased. It is sufficient, if there be deliberate malignity and depravity in the conduct of the party.

[Cited in People v. Chapman, 62 Mich. 286, 28 N. W. 898.]

4. If a number of persons conspire together to do an unlawful act, and death happen in the prosecution of the design, it is murder in all. If the unlawful act was a trespass, the murder to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happen collaterally, or beside the principal design.

[Cited in brief in Com. v. Nickerson, 87 Mass. (5 Allen) 525. Cited in Stephens v. State, 42 Ohio, 153.]

---

[1] [Reported by John Gallison, Esq.]

5. If several persons conspire to seize with force and violence a vessel, and run away with her, and if necessary to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present, aiding and abetting in executing the design.

[Cited in U. S. v. Douglas, Case No. 14,989; U. S. v. Boyd, 45 Fed. 863.]

[6. Cited in The Ambrose Light, 25 Fed. 424, to the point that if several persons conspire to seize with force and violence a vessel, and, in carrying out their designs, kill one of the persons on board, it is a clear case of piracy at common law.]

The prisoner [William Ross] was indicted for being present, aiding, and abetting, in the murder of a colored man, on board of the American schooner Pocahontas, on the high seas, near the Cape de Verd islands. At the trial it appeared, that on or about the 5th of June, 1812, the schooner lay at anchor in an open roadstead or bay, near the isle of St. Jago, one of the Cape de Verd islands, about a half mile from the shore, and about a mile from the town of Praga. There were several passengers on board (and among them the person, who was murdered) who were to have been landed at the island of Fogo; but the vessel had a cargo on board and was bound for Boston. About midnight, the prisoner, who acted as ringleader, and nine Portuguese convicts, came on board, armed with muskets, cutlasses, and long knives, took possession forcibly of the vessel, drove those of the crew, who were on deck, below, wounded two persons on deck, knocked down the mate, who was coming up the companion way, and stabbed the colored man, who was on the deck, in four places, of which wounds he died within a half hour. The ruffians then cut the cables, hoisted the sails, and stood out for sea, intending to proceed to South America. It did not appear precisely where the vessel was, when the death of the colored man took place; but she was adrift, and the sails hoisting with a breeze off shore; and according to the testimony, from two to six miles from the land. The seizing of the vessel was proved to have been by a preconcert, and with a determination to accomplish the enterprise, be the consequences ever so fatal. There was a great deal of evidence in the cause, as to the subsequent proceedings and the final rescue of the vessel by the captain and his crew, aided by the prisoner, whom the captain had brought over to his side by exciting jealousies between him and his companions. But it is inconsistent with the object of this report to state it at large; and therefore, so much only of the evidence, as raised the points of law, in which the court gave an opinion, is presented. There was no evidence, by whom the mortal wounds were given. But all the conspirators were on the deck at the time, engaged in assisting each other; and the prisoner acted as their chief, and was armed in the same manner as the others. The pretence alleged for this piratical enterprise, and insisted on at the trial, as a defence, was that the conspirators seized the vessel, in order to recover their personal liberty, and escape from the control and subjection of the Portuguese government.

It was insisted: (1) That the court had not jurisdiction over the offence, because it was committed in a roadstead or bay, within the jurisdiction of a foreign country, and not on the high seas; (2) that if the court had jurisdiction, the prisoner could not be convicted on the indictment, as it was not proved, that he was present at the time when the wounds were given, or ordered them to be given, though he was on the deck and engaged in the common enterprise; (3) that the seizure of the vessel was a mere marine trespass and not a felony, and therefore the killing in this case was not murder. In support of these positions, Whipple & Searle, for the prisoner, cited Act April 30, 1790, c. 9, § 8; 1 Hawk, c. 31, § 53; 4 Bl. Comm. 195, 200; Plow. 471, 473; 4 Bl. Comm. 231; 1 Hawk. P. C. c. 37, §§ 1, 4; Fost. Crown Law, 350.

Bowen & Robbins for the United States, cited, é contra, 4 Bl. Comm. 195; U. S. v. McGill [Case No. 13,989, note]; s. c., 4 Dall. [4 U. S.] 428 [Case No. 15,676].

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

STORY, Circuit Justice (after summing up the facts). The first question to be decided is, whether the court has jurisdiction over the offence, as proved in the evidence; or in other words, was the offence committed on the high seas, within the true intent and meaning of the act of the 30th of April, 1790, c. 9, § 8? From the language of the act I am of opinion, that the words, "high seas," mean any waters on the sea coast, which are without the boundaries of low water mark; although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government. Such is the meaning attached to the phrase by the common law; and supported by the authority of the admiralty, perhaps to a more enlarged extent. 3 Inst. 113; 1 Rolle, 250; 4 Inst. 134; 1 Inst. 260a; Hale de Port in Harg. 10; 5 Coke, 106; Exton, 80, etc.; Com. Dig. "Admiralty," E (7); 2 East, P. C. 803. The additional words of the act, "in any river, haven, basin or bay, out of the jurisdiction of any particular state," refer to such places without any of the United States, and not without foreign states, as will be very clear on examining the provision as to the place of trial, in the close of the same section.

In the present case, the crime was not completed, until the vessel was standing out at sea under sail. The mortal stabs were given, when the vessel was about a half mile from the shore; but the death did not happen, until the vessel had either drifted or sailed a considerable distance. I do not however deem the difference material. Had the death occurred instanter, I think it would have been a homicide on the high seas.

To constitute the crime of murder, it is not

necessary that the slayer should have a particular enmity or malevolence against the deceased; it is sufficient, if there be either a deliberate malice in the act, or circumstances of cruelty and malignity carrying in them the plain indications of a depraved, wicked, and malignant spirit. Fost. Crown Law, 257. Nor is it necessary, to constitute murder, that the party should himself inflict the mortal wounds. It 's sufficient if he is present, aiding and abetting the act. In common sense and reason, as well as law, the ruffian, who stands by and directs or encourages the bloody deed, is equally guilty with him, who applies the poniard.

In the present case, the prisoner and his associates, if the evidence be believed, had entered into a most atrocious conspiracy, in which they were but too successful. The murder (for there can be no doubt it was such in some one of the party) was committed in the course of the execution of that conspiracy. It was a natural, though not a necessary consequence, of the attempt to execute it. The conspirators appear to have armed themselves for the purpose of ensuring success at all hazards; and, indeed, so is the confession of the prisoner himself. It is said, that the original intention of the prisoner and his associates was, not to commit murder, but forcibly to seize the vessel; that such an act was not a felony, but a mere marine trespass, and therefore if death ensued, it would not be murder.

Whether the intention was felonious or not, may not be very material to settle. If by a felony be meant an act punishable with death in the United States, or for which the goods and lands of the party were forfeitable at common law, the conclusion is correct; for the running away with a vessel of the United States is a capital offence only in a captain or mariner of the vessel, and the common law forfeitures do not attach on such an offence. 2 East, P. C. 796. But if by a felony be meant an act punishable by the common law with death, there can be no doubt, that the intention in this case was felonious, for if the evidence be believed, it was a clear case of piracy at the common law. But even supposing the intention was not felonious, still the distinction of the prisoner's counsel cannot be supported.

If a number of persons conspire together to do any unlawful act, and death happen from any thing done in the prosecution of the design, it is murder in all, who take part in the same transaction. Fost. Crown Law, 344, 350, 351; 1 East, P. C. 259. If the design be to commit a trespass, the death must ensue in prosecution of the original design, to make it murder in all. 1 Hale, P. C. 443, 444; J. Kel. 112, &c.; Fost. Crown Law, 351. If to commit a felony, it is murder in all, although the death take place collaterally, or beside the principal design. 1 East, P. C. 255, 256, 258; Fost. Crown Law, 258. More especially will the death be murder, if it happen in the execution of an unlawful design, which, if not a felony, is of so desperate a character, that it must ordinarily be attended with great hazard to life; and, a fortiori, if death be one of the events within the obvious expectation of the conspirators. Fost. Crown Law, 261, 351–353.

If, therefore, the jury believe the evidence, that the prisoner with his associates did conspire to seize the schooner with force, and run away with her, against the will of the master and crew, and meant in the prosecution of such conspiracy, if necessary, to kill whoever should oppose them in executing their project; that the prisoner was the chieftain and actually present on board, aiding and assisting in accomplishing the project by all the means in his power; and one of the associates did, on that occasion, kill the unhappy passenger, in aid of the general design; I hold, that the homicide so perpetrated was murder, and that the prisoner and all his associates then present were principals in guilt. See Fost. Crown Law, 349, 350.

The jury found a verdict of not guilty.

Case No. 16,197.

UNITED STATES v. ROSSVALLY.

[3 Ben. 157.] [1]

District Court, E. D. New York. Feb., 1869.

COUNTERFEITING NATIONAL CURRENCY—CONSTRUCTION OF STATUTE.

1. Where the accused was convicted, under an indictment charging him with aiding and assisting in the making of a plate to be used in printing counterfeit national currency bank notes, and it appeared that the 11th section of the act, under which he was indicted, did not in terms speak of plates for printing national currency but that the 13th section of the act (13 Stat. 218) provided "that the words 'obligation or other security of the United States,' used in this act, shall be held to include * * * national currency;" but the phrase "obligation or other security of the United States" nowhere appeared in the act: *Held*, that the 13th section referred to the words used separately, and not as a phrase, and that the quotation marks must be disregarded.

2. Inasmuch as the 11th section of the act used the word "obligation," that word must be held to include national currency, and the accused was rightly convicted.

The accused, in this case [Moritz Rossvally], was convicted, under an indictment under the 11th section of the act of June 30, 1864 (13 Stat. 218), of aiding and assisting in the making of a counterfeit plate from which counterfeit national currency bank notes could be printed. The 13th section of the act provides: "That the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, national currency," &c. A motion was made in arrest of judgment, on the ground that the phrase "obligation or

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

other security of the United States" did not occur in the 11th section of the act, nor did that section otherwise make it an offence to counterfeit national bank notes.

BENEDICT, District Judge. This case comes before the court upon a motion in arrest of judgment. The prisoner has been convicted under an indictment charging him with aiding and assisting in the making, preparing and engraving of a certain plate, in the likeness and similitude of certain parts of the plate from which are printed certain parts of a United States national currency note particularly described, and also with having in his control, custody and possession, a certain metallic plate, made, prepared and engraved in the likeness and similitude of certain parts of the plates from which are and have been printed, and which were designed for the printing of, certain parts of the United States national currency notes, particularly described, with intent to use the same in counterfeiting such notes. He now moves in arrest of judgment, upon the ground that the act of June 30, 1864, under which the indictment is found, creates no such offence as is charged, inasmuch as the words of the 11th section of the act, which is the section relied upon by the government, only relate to the bonds provided for in the act, and do not include the national currency, and that the provision of the 13th section of the same act, which declares "that the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, national currency * * * which have been or shall be issued under any act of congress," has no effect upon the words of the 11th section, for the reason that the phrase "obligation or other security of the United States" nowhere occurs in that section. The point is untenable. It is true that the phrase "obligation or other security of the United States" does not occur in the 11th section of the act in question, but it is also true that the phrase is nowhere used in the act. If, then, the 13th section is to be considered as confined in its effect to the defining of the phrase "obligation or other security of the United States," which appears there to be quoted as a phrase, the whole 13th section is without effect, and meaningless. No proper rule of construction requires this result. The act declares that the words, not the phrase, "obligation or other security of the United States," used in this act, shall be held to include national currency, and although the words appear inclosed in quotation marks, as a phrase, the fact, that no such phrase is used, indicates clearly that the section refers to the words when used separately, and not as a phrase. This would be the reading of the section, if the quotation marks were omitted; and these marks, if not placed as they are by a proof error, cannot be considered as sufficient to make useless so significant a section, which, without them, has a clear meaning and important effect. They must, accordingly, be disregarded. Under this construction, then, of the 13th section, it is manifest that the 11th section creates the offence here charged, for it uses the word "obligation," which, by the 13th section, is declared to include national currency. This is the only point which has been taken on behalf of the prisoner, and that being held against him, the motion must be denied.

Case No. 16,198.

UNITED STATES v. ROUDENBUSH.

[Baldw. 514.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1832.

CRIMINAL LAW—EVIDENCE OF SIMILAR CRIMES—GOOD CHARACTER—INTOXICATION—COUNTERFEITING.

1. On the trial of an indictment for passing counterfeit notes, evidence may be given of the defendant passing similar counterfeit notes, in order to prove the knowledge that the note in question was counterfeit. So the passing of notes of a different bank at the same time, or of having them in his possession at the time. But if the indictment is for passing a counterfeit note of the Bank of the United States, evidence of passing a counterfeit note of another bank, at another time, is not admissible, or if given without objection a jury will not consider it.

[Cited in McCartney v. State, 3 Ind. 355.]

2. Good general character avails a defendant only in a doubtful case.

[Disapproved in Kistler v. State, 54 Ind. 405. Cited in State v. Northrup, 48 Iowa, 585.]

3. Intoxication is no defence, if the defendant was possessed of his reason, and was capable of knowing whether the note he passed was good or bad.

[Quoted in Wood v. State, 34 Ark. 344. Cited in Garner v. State, 28 Fla. 113, 9 South. 846; Roberts v. People, 19 Mich. 417; Loza v. State, 1 Tex. App. 488.]

This was an indictment for passing a counterfeit ten dollar note of the Bank of the United States, on the trial of which Mr. Gilpin, Dist. Atty., without objection, had given evidence of the defendant [Adam Roudenbush] having passed a counterfeit five dollar note of the Easton (Pennsylvania) Bank, to a different person and at a different time from what was laid in the indictment.

Mr. Hubbell and Mr. Jack, in their address, requested the court to charge the jury that the evidence was improper, and ought not to be considered by them. Evidence was given that the defendant had sustained a good character before the charge was made against him, and at the time of the alleged offence was in a frolick and intoxicated.

BALDWIN, Circuit Justice (charging jury). In cases of this description, the offence consists in the guilty knowledge of the party

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

who passes a counterfeit note, which can seldom be made out by direct proof; the prosecutor is therefore at liberty to prove the scienter by circumstances happening at other times, and in relation to other notes. He may show the whole conduct of the prisoner at the time of passing the note for which he is indicted, his having in possession or passing other counterfeits of the same or a different appearance, every thing he said or did at the time, as part of the res gestæ, indicative of his knowledge of the character of the notes he has about him, or is passing. 2 Bos. & P. (N. R.) 93; 1 Burrows, 645; 1 Camp. 324; 6 Barn. & C. 145; Russ. & R. 375; 1 Leach, 125; 5 Rand. (Va.) 701; 5 Day, 175. Evidence of passing notes of the same manufacture and appearance, at other times, and to other persons, is also admissible, if their general resemblance to the one laid in the indictment is such, that a person who knows the one to be a counterfeit could not reasonably believe the others were genuine. So of the circumstances of passing them, and his whole demeanour at the time (4 Bos. & P. 92; Russ. & R. 120, 531), so as to show that he believed them to be counterfeits and passed them as such (3 Mass. 82; 8 Mass. 110; 2 Cow. 522). But where the notes are so different in their appearance, that the knowledge of the one being a counterfeit, would not be a reasonable ground to believe that the other was so, the evidence is not admissible, unless there is some connection between the act of passing them both. In this case the transactions are wholly distinct, being at different times and places, and there is no legal ground of presumption that the prisoner knew the note in question to be forged, because he had passed the notes of another bank knowing them to have been so. To justify the admission of such evidence of a distinct passing, the notes must be of the same or a similar manufacture and appearance (Car. Cr. Law, 195), calculated to lead to the belief that they were of the same character. A man who passes one counterfeit at one time, and a similar one at another, may well be presumed to have known them both to be so; but not so when the notes are on different banks, or so unlike in appearance, that an honest man might think one good, though the other was known to be bad. The scienter must be brought home to the note laid in the indictment, the scienter as to any other note, however clearly proved, is only a matter of inference, and therefore it ought to appear from an inspection of both notes, that they are so similar that a person in the situation of the defendant could not well be deceived. The evidence was therefore inadmissible, if it had been objected to, and as it was not legally competent for you to hear, ought not to be taken into consideration in making up your opinion on the fact, whether the defendant knew the note laid in the indictment to be counterfeit.

This is the principal question in the cause, as the mere fact of passing a counterfeit note is no offence without a guilty knowledge that the note in the indictment was forged. The evidence of his passing other counterfeit notes is not admitted to prove a distinct offence, but merely corroborative of the crime charged, and as auxiliary proof, if the evidence as to the note in the indictment is doubtful. But while this is an exception from the ordinary rules of evidence in criminal cases, unfavourable to the accused, there is another which operates in his favour. He is allowed to give evidence of his general good character, and to avail himself of it to rebut the presumption of a corrupt and criminal intention in passing the paper. It is one of the great safeguards of innocence, and never fails to have a powerful influence with the jury; where there is any doubt, good character will outweigh ordinary presumptions and circumstances merely suspicious. But if the evidence is clear and convincing that the note was passed knowing it to be counterfeit, then, however bright his character may have been previous to the offence, a jury must look only to the facts and law of the case; on the same principle, evidence is permitted to be given of the character of his relatives and connections in society, and of the situation of his family; but these are circumstances which can avail him in a less degree only in cases of doubt; if the positive or circumstantial evidence of guilt leaves no doubt on their minds, a jury could not suffer such considerations to operate without violating a duty which should be ever held sacred in courts of justice, to judge alike, and by the same rules, the high and low, the rich and poor.

A defendant's standing in society gives him a right to demand from you the most favourable construction of the acts proved upon him, which the law permits to be drawn; but every dictate of public justice, the peace, interest and safety of the community, forbid him to expect, or the jury to grant him a dispensation, if his case comes within the law. If the provisions of the law have been violated, its penalties must be enforced, the arm of public justice must not be arrested in court, merely because its blow may, in reaching a guilty man, strike deep into his social and domestic relations. If there is a punishment which operates severely on the criminal, which is a solemn warning example to others, and produces an impressive influence on society, it is when the effects of crime are visited upon the dearest objects of affection; and if any thing can prevent their commission, if society can have any hold on those who are inclined to disturb its repose, it is in the certainty that the happiness of all around them depends on their conduct. When this hold is loosened, the time cannot be far distant when the feelings of families and friends of an accused, will be deemed more sacred than the laws of the

country, and his good character carrying with it an exemption from punishment, become an indemnity for crime.

One of the restraints society has upon men to prevent the commission of crimes, is the consideration they may have for their wives and children; but if these connections are to be a protection for the guilty, so far from being a restraint, they will be an inducement to crime, they will offend, trusting to their family for escape.

If a jury make up a verdict on considerations of character, family connections or wealth, and on this ground acquit where the evidence of guilt is clear, they not only establish a principle of the most atrocious kind, but hold out a most dangerous example to society. The danger and loss to the public from the passing of counterfeit paper, is greater or less according to the character of the person who passes it; you see this exemplified in the case before you, Shive and defendant. If both are equally guilty, who deserves the severest punishment? He who descends from his high character, abuses his means of usefulness, perverts them to the injury of his fellow citizens, and sets a base example to all below him; who sins against light and knowledge and prostitutes every thing to his criminal pursuits, or the poor, the friendless, the low born, low connected, and of low associations, who sees his respectable neighbour commit crime with impunity, and is seduced by his example of detected, but successful crime? The rule of law is in a few words this: Never convict rich or poor, high or low, the good or the bad, without such proof of guilt as satisfies your minds beyond all reasonable doubt. If the character of the accused is bad, and his habits vicious, if the moral principle is impaired or extinct, and the evidence leaves you in doubt as to the motive with which the act is done, you may, and in most instances will, presume, that the intention with which the particular act is done, is in accordance with the general tenor of his character and conduct. So if the character is good, you will apply the rule in his favour; but when the evidence is clear, either way, character is out of the question; you cannot convict without, or acquit in face of, the evidence.

There is another circumstance in this case which calls for some remarks from the court. It is alleged that the defendant was on a frolick, and intoxicated at the time of receiving the counterfeit notes at Shive's. Intoxication is no excuse for crime, when the offence consists merely in doing a criminal act, without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume that there was a want of criminal intention; that the reasoning faculty, the power of discrimination between right and wrong, was lost in the excitement of the occasion. But if the mind still acts, if its reasoning and discriminating faculty remains, a state of partial intoxication affords no ground of a favourable presumption in favour of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same acts when sober. The simple question is, did he know what he was about? The law depends on the answer to this question. The offence charged against Mr. Roudenbush is not for dishonestly receiving, but for dishonestly passing, counterfeit notes. If he received these notes believing them to be genuine, you must be satisfied that he passed them as true, knowing them to be false. But if he received them as counterfeits, then the act of passing them as true completes the offence without further evidence. If you shall believe that when he received these notes at Shive's, he was in such a state of intoxication, as not to know what he was giving or what he was receiving in exchange, then you may say that he did not receive them as known counterfeits; and before you can find him guilty you will require, besides proof of his passing them as true, proof of his knowledge that they were false. This would be going to the utmost extent which the law would warrant or reason justify, by putting him on the footing of a sober man who innocently should receive forged paper.

The defendant's counsel could not ask you to go further in any case of the highest degree of intoxication. You will decide whether, from the circumstances of this case, you will feel justified in going so far. Should you be of opinion that either from intoxication, ignorance, or the imposition practised on him by artful villany, he received the notes as good, or not knowing them to be bad, and thus make every possible allowance in favour of the accused; you canot extend that allowance to the passing of the notes, when intoxication has ceased, and imposition could no longer be practised upon his ignorance, if he then knew them to be forged.

Case No. 16,199.

UNITED STATES v. ROUNSAVEL.

[2 Cranch, C. C. 133.] [1]

Circuit Court, District of Columbia. April Term, 1817.

GAMING—INFORMATION.

An information will not lie upon a presentment of a grand jury for public gambling, contrary to the Virginia statute of December 8, 1792 (chapter 96, § 5, p. 175).

Rule to show cause why an information should not be filed upon the presentment of the grand jury for playing at vingt et un at a tavern, contrary to the act of assembly.

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

BY THE COURT. The statute has prescribed the mode of prosecution, and no other can be sustained. See U. S. v. Willis [Case No. 16,728], at November term, 1808, and U. S. v. Simms (in supreme court of the United States) 1 Cranch [5 U. S.] 252.

Rule discharged.

Case No. 16,200.

UNITED STATES v. ROUSMANIERE'S ADM'RS et al.

[2 Mason, 373.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1821.

BANKS AND BANKING—COLLECTION OF DUTY BONDS—PAYMENT BY FORGED INDORSEMENTS—EQUITIES OF BANK.

Where a bank, in which the bonds for customs were left for collection under the authority of the government, discounted for the principal obligor certain notes for the payment of these bonds, and the proceeds were carried to the credit of the United States by the bank, in discharge of the bonds, and it turned out that the indorsements on the notes were forgeries practised by the principal, it was *held*, that the bonds were discharged, and there was no remedy in equity to acquire a priority on the assets of the principal.

Bill in equity brought by the United States, as trustees of the Newport Bank, against the defendants as administrators of the estate of Lewis Rousmaniere. The bill in substance states, that the Newport Bank is a bank of deposit of the United States for the revenue collected in that district, and agent for the collection of such revenue. That two custom house bonds, executed by Rousmaniere and some of the defendants as his sureties, were deposited in the bank for collection, which bonds were for $1,576 $^{15}/_{100}$, and payable on the 29th and 30th of April, 1820; that on the 25th of the same month Rousmaniere proposed to the bank to receive in payment of these bonds two notes to be signed by himself, and indorsed by John P. Mann and Andrew Winslow, (two of the defendants) one note for $750, payable in 30 days, and one note for $750, payable in 60 days, he, Rousmaniere, paying the usual discount; that the bank directed their cashier to receive the same notes in payment of the bonds, and to pass the amount to the credit of the United States; and on the next day (the 26th of April) Rousmaniere delivered to the cashier two notes, purporting as above, in payment of the bonds, and he received them in payment, and delivered up the bonds to Rousmaniere, and passed the amount to the credit of the United States; that before the bonds became due, Rousmaniere, out of the money so credited to him by the bank, paid a debt due to the bank of $600, but this payment was not a part of the agreement relative to the payment of the custom house bonds, and Rousmaniere replaced the sum so paid, before he took away the bonds; that when the notes became due, payment was demanded of the administrators of Rousmaniere, he having died in the interim, and also of the indorsers; but payment was refused, and by Mann, because the indorsement of his name was a forgery; that the administrators have refused to deliver back the bonds to the bank, which are in their hands uncancelled, or to acknowledge the debt to be still due on the bonds; that his estate is insolvent; that in fact the signature of Mann was a forgery, made by Rousmaniere to deceive the bank, and that the notes delivered to the bank were delivered by Rousmaniere as true and genuine notes; and upon the faith thereof the bonds were delivered to him by the bank. The prayer of the bill then is, that the notes so received may be decreed not to be a payment of the bonds, and that the debt is still due on the bonds and ought to be paid out of the estate of Rousmaniere in the hands of the administrators, or, that the bonds be delivered up to the plaintiffs, and be paid by the obligors, and for other relief. The answer of the administrators denies, that the Newport Bank is agent of the United States in the manner stated in the bill; and avers, that the custom house bonds were punctually and bona fide paid by Rousmaniere, and being discharged were delivered up to him. It further avers, that the two notes above stated were not received in payment of the bonds, but were discounted for Rousmaniere by the bank, in the ordinary course of business; that the United States have no claim on the bonds, full payment having been made to the collector, and he having been credited with the amount in the settlement of his accounts with the United States; that the bank have no title to obtain a preference by using the name of the United States, and are entitled only to a dividend in common with other creditors. The answers of the co-obligors and sureties on the bonds allege a due payment of the bonds, and that they are discharged; and aver, that they are ignorant how the money was obtained; and also aver, that the bank had no right to accept the notes in payment of the bonds. The answer of Winslow does not admit his indorsement on the notes, averring, that he cannot say, whether he signed them or not, as the bank have refused to let him see them. The answer of Mann denies, that he ever indorsed the notes.

The general replication being filed, and evidence taken, the cause was set down for argument at this term.

Searle & Robbins, for plaintiffs.
Hazard & Randolph, for defendants.

STORY, Circuit Justice. This cause has been argued at considerable length, but it

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

does not appear to me to involve any real difficulty. Stripped of the disguise, which the bill attempts to throw over them, the naked facts appear to be these. Mr. Rousmaniere was indebted to the United States on two custom house bonds, which were lodged at the Newport Bank in the usual course of business for collection. Before they became due, and with the avowed intention of paying them out of the proceeds, Mr. Rousmaniere procured two indorsed notes to be discounted at the bank, and paid the discount. The remaining proceeds were applied with other monies of Rousmaniere to the payment of the bonds, which were delivered up to him, and the amount was credited by the bank, first to the collector of Newport, and by him to the United States; and in a final settlement of accounts has been duly credited to the collector at the treasury department. It turns out, that the notes so discounted were not what they purported to be, the indorsement of the signature of Mr. Mann being a forgery. The bank has brought this suit to have these bonds re-delivered to it, they now remaining in the hands of Rousmaniere's administrators uncancelled; and to procure a decree, that the bond debts have not been paid, and ought to be paid by the administrators. What authority the bank has in this case to make use of the name of the United States, I profess not to understand. The district attorney is no party to the bill, and I cannot perceive, that in any legal sense the United States are established to be trustees of the bank. The bonds never were assigned to the bank by the United States, nor is there any equitable ground, upon which the bank can claim any interest in them. If they have been regularly paid, they are extinguished, and their functions are gone; if not so paid, then they remain the exclusive property of the government; and the recovery, if at all, must be for their exclusive use.

The question, therefore, naturally arises, whether these bonds have been paid. And it is most manifest, that they have been duly paid, and credit accordingly given to the public treasury. But it is said, that these spurious notes were received in payment of the bonds by the bank, as agent of the United States, and payment in such notes is utterly void. But in point of fact, the notes were never so received, or paid. They were discounted at the bank in the usual course of business, and the discount was received by the bank; and the most that can be said is, that the proceeds were applied to the payment of the bonds. If the notes had been discounted at another bank, and the proceeds so applied, there would be no pretence to say, that the payment was not good and irrevocable. It cannot vary the case, that the bank here was entrusted with the collection of the bonds. When it applied its own money to the discount of Rousmaniere's note, the money became Rousmaniere's, and, as such, was paid over to the United States; and it matters not how Rousmaniere obtained it. Neither is it true, that the notes were ever received in payment of the bonds for the United States. The United States never had any interest in them, or title to them. They were the exclusive property of the bank, and the discount was for its own profit. It is impossible, therefore, to sustain the position, on which the whole argument of the plaintiff rests. Besides, the bank had no authority from the United States to receive such notes in payment. It cannot be inferred from the nature of such an agency in general; and in respect to the government, it is perfectly clear, that no right exists in any public officer to delegate such an authority; and if it did, it is as clear, that none was given. So that, if the bank had undertaken to receive the notes in payment, it would have been at its own peril, and it would be responsible for the money due on the bonds.

In every view, this bill has not a shadow of right to sustain it; and I think the defendants are entitled to recover costs, to be taxed against the bank, which is the real plaintiff in the case. Bill dismissed.

Case No. 16,201.

UNITED STATES v. ROYALL.

[3 Cranch, C. C. 618.] [1]

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

INDICTMENT—COMMON BARRATRY, ETC.

An indictment, charging the defendant with being a common slanderer, or common brawler, is not sufficient. It should charge the defendant as a common scold, or common barrator, in technical language; these being the only indictable offences of that class.

The indictment in this case contained three counts: (1) The first count charged that the defendant [Ann Royall] "being an evil-disposed person, a common slanderer and disturber of the peace and happiness of her quiet and honest neighbors, on the 1st of June, 1829, and on divers days and times, as well before as afterwards, was, and yet is, a common slanderer of the good people of her neighborhood, in which she, the said Ann, resides, that is, at the county aforesaid, and on divers other days and times, as well before as afterwards, at the county aforesaid, in the open and public streets, in the city of Washington, in the county aforesaid, in the presence and hearing of divers good citizens of the said county, did falsely and maliciously slander and abuse divers good citizens of the said county, to the common nuisance of the good citizens of the United States, residing within the county aforesaid, to the evil example, &c., and against the peace and government of the United States." To this count there was a

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

demurrer. (2) The second count charged her as a common scold. To this count she pleaded not guilty. (3) The third count commences like the first, and charges that, on the 1st of June, &c., she was, and yet is, a common brawler and sower of discord among her honest and quiet neighbors; and on the 1st of June, &c., at, &c., in the open and public streets of the city of Washington, in the county aforesaid, did annoy and disturb the good people of the United States residing in the county aforesaid, by her open and public brawling, and public slanders, to the common nuisance of the good citizens of the United States, residing within the county aforesaid, to the evil example, &c. To this count there was also a demurrer.

CRANCH, Chief Judge, delivered the opinion of the court, as follows (THRUSTON, Circuit Judge, dissenting): The first and third counts of this indictment seem to us to be clearly bad, because they want that technical description which is necessary to charge the defendant as a common scold or barratrix, which are the only indictable offences of this class. Thus, in the case of Margaret Cooper, 2 Strange, 1246, "she was indicted for being a common and turbulent brawler and sower of discord among her quiet and honest neighbors, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes amongst her majesty's liege people, contra pacem," &c. "It was moved in arrest of judgment that the charge was too general, and did not amount to being either a barrator or common scold, which are the only instances in which a general charge will be sufficient. It was likewise objected, that, if the words did amount to a description of a scold, yet it should be laid ad commune nocumentum of her neighbors; for every degree of scolding is not indictable. And the court was of opinion (absente C. J.) that the judgment ought to be arrested on both exceptions, for none of the words here used are the technical words; and it must be laid to be to the common nuisance." So, also, in the case of Rex v. Hardwicke, 1 Sid. 282, communis vicinorum suorum oppressor was adjudged bad, because the word "oppressor" was uncertain; and that in such indictments the word "barrectator" ought to be used, "which is a word of art," "and all the other judges agreed that the indictment is not good without the word 'barrectator;' and their great reason was that all the precedents are so, and that 'barrectator' is a word of art in such a case; but they said that the finding him to be a common oppressor of his neighbors had been good evidence to find him guilty of barratry, and therefore they bound him to his good behavior." So in the case of Rex v. Taylor, 2 Strange, 849, "an indictment was quashed for generality, being calumniatrix et communis et turbulenta pacis perturbatrix, ac lites, rixas et pugnas movit et incitavit, et quendam Josephum Atherton, verbis, contumeliis et opprobriis abusa fuit in domo ipsius J. A." So in Rolle, Abr. "Indictment," K.: "Defamator bonorum nominis et famæ, is not good without showing some particular matter. So defamator, vexator, et oppressor multorum hominum, common forestaller, common thief; so also common disturber of the peace of the lord the king, and that he unjustly excited and procured divers suits and discords, as well between his neighbors as between divers liege subjects of the lord the king," &c. So, also, in the case of Reg. v. Foxby, 6 Mod. 11, "judgment was arrested because it was that she was communis calumniatrix, which is not the Latin word for 'scold,' but 'rixatrix.'"

All these have been decided not to be indictable offences. Upon the authority of these cases, we think that the judgment upon the first and third counts of this indictment must be for the defendant.

[See Case No. 16,202.]

Case No. 16,202.

UNITED STATES v. ROYALL.

[3 Cranch, C. C. 620.] [1]

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

COMMON SCOLD — EVIDENCE — BAIL FOR APPEARANCE — NUISANCE.

1. Upon the trial on an indictment for being a common scold, particular instances of scolding may be given in evidence.

2. After conviction as a common scold, the court will order the defendant, if in court, to give security for her appearance in court, from day to day, to hear the judgment of the court, and in the mean time to be of good behavior.

3. The law against a common scold, as being a common nuisance, is not obsolete, although the punishment by ducking may be. It is still punishable, as a nuisance at common law, by fine and imprisonment.

4. Anger is not a necessary ingredient in scolding.

The first and third counts of this indictment [against Ann Royall] having been adjudged bad upon demurrer [Case No. 16,201], the cause now came on for trial upon the general issue on the second count.

Mr. Swann, for the United States, called a witness to testify to a particular instance of the defendant's scolding.

Mr. Coxe, for defendant, objected that particular instances could not be given in evidence, the offence consisting in her being a common nuisance.

THE COURT, however, (nem. con.) overruled the objection.

The jury found the defendant guilty, and her counsel moved in arrest of judgment, and for a new trial; whereupon, at the motion of the attorney for the United States, the defendant was required to enter into recognizance with one or more good sureties, to appear in court from day to day, to hear

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

the judgment of the court, and in the mean time to be of good behavior.

The cause was argued, on the motion in arrest and for a new trial, by Mr. Swann, for the United States, and Mr. Coxe, for the defendant.

Mr. Coxe contended that, by the common law, the only punishment of a common scold was ducking—a mode of punishment which is obsolete in England, and was never inflicted in Maryland, under whose common law this prosecution has been commenced. That it certainly is an unusual punishment, and is therefore forbidden by the bill of rights of Maryland. That as the punishment is taken away, the common law which inflicted it is also abrogated. To show that ducking was the only punishment of the offence, he cited Jac. Law Dict. tit. "Scold"; Rees' Cyclopædia and Webst. Dict. same title; 1 Hawk. P. C. 198, 200; 3 Inst. 219; Jac. Dict. tit. "Castigatory." Upon the motion for a new trial, he contended that anger and turbulence were necessary to constitute unlawful scolding, and that there was no evidence of either. The jury also had taken out with them the indictment containing the two bad counts which had been quashed by the court.

CRANCH, Chief Judge, delivered the opinion of the court (nem. con.) as follows: The defendant has been convicted upon the second count of this indictment, which is in the following words: "And the jurors aforesaid, upon their oath aforesaid, do further present that the said Ann Royall, being an evil disposed person as aforesaid, and a common scold and disturber of the peace of her honest and quiet neighbors, on the first day of June, in the year of our Lord one thousand eight hundred and twenty-nine, as aforesaid, at the county of Washington aforesaid, and on divers other days and times, as well before as after, was and yet is a common scold, and disturber of the peace and happiness of her quiet and honest neighbors residing in the county aforesaid; and that the said Ann Royall, on the first day of June, in the year aforesaid, and on divers other days and times, as well before as afterwards, in the open and public streets in the city of Washington, in the county aforesaid, did annoy and disturb the good people of the United States residing in the county aforesaid, by her open, public, and common scolding, to the common nuisance of the good citizens of the United States residing within the county aforesaid, to the evil example of all others in like cases offending, and against the peace and government of the United States."

The counsel for the defendant has moved the court to arrest the judgment, and to grant a new trial. In support of the motion to arrest the judgment, it is contended that the law for the punishment of common scolds is quite obsolete in England, and never was in force in this country; that it is a barbarous and unusual punishment, and therefore is prohibited by the bill of rights annexed to the constitution of Maryland, under whose supposed common law this indictment is framed; that the punishment of ducking was the appropriate and only punishment by the common law of England; and that, as that mode of punishment is obsolete there, and never was in use here, the law, which considered scolding as an indictable offence, is obsolete also. That the term "scold" is of uncertain signification; that the offence is not well defined in any adjudged case, or in any elementary writer. Jacob, in his Law Dictionary, says: "Scolds, in a legal sense, are troublesome and angry women, who, by their brawling and wrangling amongst their neighbors, break the public peace, increase discord, and become a public nuisance to the neighborhood. They are indictable in the sheriff's tourn, and punished by the cucking-stool." In order to show that such was the only punishment which could be inflicted upon a scold, the counsel for the defendant cited Jacob's Dict. (Tomlin's Ed.) tit. "Castigatory for Scolds," where it is said: "A woman indicted for being a common scold, if convicted, shall be sentenced to be placed in a certain engine of correction called the 'trebucket,' 'tumbrel,' 'tymborella,' 'castigatory' or 'cucking-stool,' which, in Saxon, signifies the 'scolding-stool,' though now it is frequently corrupted into 'ducking-stool,' because the residue of the judgment is, that when she is so placed therein, she shall be plunged into the water for her punishment." And in the case of Reg. v. Foxby, 6 Mod. 11, the reporter says: "Note, the punishment of a scold is ducking"; and Holt, when the exception was first made, said: "It were better ducking in a Trinity than in a Michaelmas term." And in the same case, in 6 Mod. 178, it is said: "She was convicted by the justices of the peace, at their quarter sessions at Maidstone, upon an indictment for being a common scold, and judgment that she should be ducked; whereupon she brought a writ of error, and hereupon the sheriff let her go at large, there being no fine or imprisonment in the judgment." And again, in the same case, 6 Mod. 213, upon affidavits that she was so ill that, without danger of her life, she could not come up to assign errors, in person, according to the course of the court, "they enlarged the time till next term, to see how she would behave herself in the mean time; for Holt, Chief Justice, said ducking would rather harden than cure her; and if she were once ducked she would scold all the days of her life;" a consequence which the court would hardly have inflicted upon the public, if they could have avoided it by substituting fine and imprisonment for ducking. From these authorities the counsel for the defendant concluded that ducking was the only punishment which could ever have been inflicted upon a scold, by the common law.

And to show that that punishment was obsolete in England, he cited the following passage from Jacob's Law Dictionary, tit. "Castigatory": "Though this punishment is now disused, a former editor of Jacob's Dictionary (Mr. Morgan) mentions that he remembers to have seen the remains of one" (a ducking stool) "on the estate of a relation of his, in Warwickshire, consisting of a long beam or rafter, moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed."

The only punishment which could be inflicted being obsolete, the counsel for the defendant contended that the offence was no longer indictable, and therefore the judgment ought to be arrested. But it will be perceived that this argument rests upon the proposition that ducking was the only punishment which could be inflicted for the offence of being a common scold; and that that proposition is supported only by uncertain inferences drawn from a few loose expressions in the books, and chiefly from the word "shall," and the word "residue," in the first passage above cited, from Tomlin's Jacob's Dictionary, tit. "Castigatory." That passage, and particularly those words "shall" and "residue," are copied from 4 Bl. Comm. 168, where Blackstone says: "Lastly, a common scold—'communis rixatrix'—(for our law Latin confines it to the feminine gender,) is a public nuisance to her neighborhood, for which offence she may be indicted (6 Mod. 213); and, if convicted, shall (1 Hawk. 198, 200) be sentenced to be placed in a certain engine of correction called the 'trebucket,' 'castigatory,' or 'cucking-stool,' which, in the Saxon language, is said to signify the 'scolding-stool'; because the residue of the judgment is that, when she is so placed therein, she shall be plunged in the water for her punishment. 3 Inst. 219." The authorities, thus cited by Blackstone, do not indicate any opinion that ducking is the only punishment, nor even that it is an indispensable part of the punishment. The argument drawn from the playful expression of Lord Chief Justice Holt, in 6 Mod. 213, does not warrant so grave a conclusion. They were intended, perhaps, only to excite suprise by their exaggeration; for surprise is sometimes an approximation to wit. Nor can such a conclusion be drawn from the language of Hawkins in the passages cited by Blackstone. 1 Hawk. P. C. 198, 200. The first of those passages is this: "Although it hath been said that an indictment of a common scold by the words 'communis rixatrix,' which seem to be precisely necessary in every indictment of this kind, is good, though it conclude 'ad commune nocumentum diversorum,' instead of 'omnium,' &c., perhaps for this reason; because a common scold cannot but be a common nuisance." The other passage is (1 Hawk. P. C. 200)—"As to the third point, namely, in what manner common nuisances may be punished, it is said that a common scold is punishable by being put in the ducking-stool; and there is no doubt but that, whoever is convicted of another nuisance may be fined and imprisoned." And the passage cited from 3 Inst. 219, seems rather to justify a contrary conclusion. Lord Coke is speaking of the different means of punishment; and, after describing the pillory and tumbrel, he says—" 'Trebucket,' or 'castigatory,' named in the statute of 51 Hen. III., signifieth a 'cucking-stool'; and 'trebucket' is properly a 'pitfall,' or 'downfall,' and, in law, signifieth a stool that falleth down into a pit of water, for the punishment of the party in it; and 'chuck,' or 'guck,' in the Saxon tongue signifieth to scold or brawl, (taken from 'cuckhaw' or 'guckhaw,' a bird, 'qui odiose jurgat et rixatur,') and 'ing,' in that language, (water); because she was, for her punishment soused in the water; and others fetch it from 'cuck-quean i pellex.' " This citation does not justify an inference that the ducking-stool was an instrument appropriated to the punishment of scolds only. It says, for the punishment of the party; and it refers to the statute of 51 Hen. III. stat. 6, entitled "Judicium Pillorie; A Statute of the Pillory and Tumbrel, and of the Assize of Bread and Ale," "A. D. 1266," by which it is enacted, that "if a baker or a brewer (braciatrix) be convict, because he hath not observed the assize of bread and ale," "patiatur judicium corporis silicet, pistor collistrigium, et braciatrix trebuchetum vel castigationem" (the old translation in the statute-book is—"then he shall suffer punishment of the body; that is, to wit, a baker to the pillory, and a brewer to the tumbrel, or some other correction.")

It is, therefore, clear, that the punishment of the tumbrel or trebucket, which were the same instrument, was not confined to scolds; and that this citation from Lord Coke does not justify an inference that ducking was the only punishment which could be inflicted upon them. If it should be said that such an inference may be drawn from the etymology of the word "cucking-stool," which he derives from a Saxon word signifying to scold, that inference is rebutted by the more probable etymology given by Burn (3 Burn's Justice, p. 225), who says—"The common people in the northern parts of England, amongst whom the greatest remains of the ancient Saxon are to be found, pronounce it 'ducking-stool,' which, perhaps, may have sprung from the Belgic or Teutonic 'ducken,' to dive under water; from whence, also, probably we denominate our duck, the 'water-fowl'· or, rather, it is more agreeable to the analogy and progression of languages to assert, that the substantive, 'duck,' is the original, and the verb made from thence; as much as to say, to 'duck' is to do as that fowl does." So that the name of the instrument may have been given to it because it is a plunging instrument, and not because it was used for the punishment of scolds

only. The words "tumbrel," "trebucket," "castigatory," "cucking-stool," and "ducking-stool," are used synonymously by the old writers, as well as in the old statutes; so that the observations of Lord Coke in the following passage, from the page cited by Blackstone (3 Inst. 219), is as applicable to the trebucket as to the tumbrel—"Now, for that the judgment to the pillory or tumbrel (as hath appeared before,) doth make the delinquent infamous, and that the rule of law is 'Judicium de majore pœna quam quod legibus statutum est non infamum facit, sed per breve de errore adnullari potest'; and again, 'Pæna gravior ultra legem posita æstimationem conservat'; that the justices of assize, oyer and terminer, jail delivery, and justices of the peace would be well advised, before they give judgment of any person to the pillory or tumbrel, unless they have good warrant for their judgment therein. Fine and imprisonment, for offences finable by the justices aforesaid, is a fair and sure way." It is said, however, that this last observation of Lord Coke is confined to offences finable by the justices; and that to argue, from that passage, that a common scold was finable, is to beg the question; as the sentence admits, by implication, that some offences, punishable by the pillory or tumbrel, might not be finable by the justices. In the next sentence, in the same page, however, Lord Coke enumerates many statutes which authorize punishment by the pillory and tumbrel; in some of which the courts are authorized to inflict that punishment in addition to fine and imprisonment, and in others to inflict that punishment alone; which will account for Lord Coke's advice being confined to offences finable by the justices, without admitting that there were any common-law misdemeanors which could not be punished by fine and imprisonment. Mr Chitty (1 Cr. Law, 710) lays down this general rule, that "every description of misdemeanor, or crime, for which an indictment will lie at common law, not subjecting the offender to a capital penalty, is within the discretion of the judges." Thus in the case of Rex v. Thomas, Cas. t. Hardw. 279, convicted of keeping a disorderly house, the wife was in prison, but the husband had run away from his bail; affidavits were made that the prisoner was in so weak a condition that a bodily punishment might kill her: "Per Curiam. The ordinary judgment in this case is pillory; but, for misdemeanor, the court is not tied down to any particular punishment; and being a married woman has nothing to pay a fine withal, the punishment must be imprisonment." The judgment was, that she be imprisoned a year, and then to find security for her good behavior for seven years.

It may be observed, also, in the Case of Foxby, before cited from 6 Mod. 178, that she was a married woman, as appears in page 213 of the same book; which may account for the judgment not being fine and imprisonment, as well as ducking. In Bac. Abr. tit. "Nuisance," D, it is said—"All common nuisances to the public are regularly punishable by fine and imprisonment, at the discretion of the judges; but in some cases corporal punishment may be inflicted, as in the case of a common scold, who is said to be properly punishable by being put into a ducking-stool Also the offence of keeping a disorderly house is punishable, not only with fine and imprisonment, but also with such infamous punishment as to the court, in its discretion, may seem proper."

We think that, by these authorities, it is clear that Sir William Blackstone, in using the word "shall" in the passage cited, is not to be understood as having used it in its peremptory and obligatory sense, and as intimating that the court was bound to inflict the punishment of ducking upon a common scold, under all possible circumstances; and that, in using the word "residue," it is not to be presumed that he intended to be understood as denying the power of the court to punish any common-law misdemeanor by fine and imprisonment. It is true, that the court, in its discretion, might sentence the offender to be ducked only; in which case, it would be part of the judgment that she should be placed in the stool; and the "residue," in that case, would be, that she should be plunged in the water. And in this sense only can Blackstone be understood, consistently with the general principles of law and the authorities cited. If a part of the common-law punishment of the offence has become obsolete, the only effect is, that the discretion of the court is so far limited. The offence is not obsolete, and cannot become obsolete so long as a common scold is a common nuisance. All the elementary writers upon criminal law admit, that being a common scold, to the common nuisance of the neighborhood, is an indictable offence at common law The court is therefore of opinion, that although punishment by ducking may have become obsolete, yet that the offence still remains a common nuisance, and, as such, is punishable by fine and imprisonment, like any other misdemeanor at common law; and that, therefore, the motion in arrest of judgment must be overruled.

The motion for a new trial rests upon two grounds: (1) That a woman cannot be guilty of scolding unless the words were spoken in anger, and with turbulence; and that the court permitted evidence to be given of insulting and provoking language, uttered by the defendant in an insulting and provoking manner, but not in an angry and turbulent manner; and that there were only two or three instances proved of the language being used by the defendant in anger. (2) That the jury was permitted to take out the indictment which contained the two counts which the court had adjudged to be insufficient, without any information to the jury

that those two counts were not to be considered by them.

1. As to the first ground of new trial, the court, at the trial, overruled the objection to the evidence, being of opinion that the insulting and provoking language might be given in evidence, although not spoken in an angry or turbulent manner; which opinion, they still think, is correct, and that its admission is not a sufficient reason for granting a new trial.

2. The second reason is, that the jury took out with them the indictment containing the two counts which the court had, upon demurrer, adjudged to be insufficient. Those counts were not matter of evidence; nor could they have been so understood by the jury; and they could not be separated from the good count, upon which the issue was joined. The indictment was, as usual, delivered to the jury when they retired, without objection by the defendant, or her counsel; and all the facts averred in those counts were matters which, if proved, were evidence upon the issue which the jury was sworn to try. If issue had been joined upon all the three counts, and a general verdict of guilty had been rendered, the judgment could not have been arrested on account of the two bad counts; and yet the jury might have given their verdict, in fact, upon evidence applicable only to one of the bad counts. It is true that it might be the ground of a motion for a new trial; but, upon that motion, the court, before they would grant a new trial, must be satisfied that the evidence was not sufficient to support the good count. So here, although the jury might have supposed they were trying an issue upon all the counts, and may have given their verdict, because they thought one of the bad counts was supported, if the court is satisfied that the evidence was sufficient to support the good count, the court ought not, in its discretion, to grant a new trial. The court is perfectly satisfied that the evidence in that respect was sufficient, and must, therefore, overrule the motion.

The defendant was sentenced to pay a fine of $10, and to give security for her good behavior for one year, and to stand committed until the fine and costs should be paid, and the security given.

Case No. 16,203.

UNITED STATES v. RUCKER.

[1 Am. Law Rev. 217.]

Circuit Court, W. D. Tennessee. 1866.

WAR—TERMS OF CAPITULATION—MILITARY PAROL —TREASON.

[The agreement of capitulation between Generals Sherman and Johnston, in 1865, was the exercise of a belligerent, not a sovereign, right. As to persons included in its terms, it was a military parole, which terminated with the war, and such persons were consequently liable to arrest for treason after the war.]

In this case, General Rucker, who had been arrested for treason, moved to be discharged from arrest, on the ground that he was embraced in the agreement of capitulation between Sherman and Johnston, by which it was stipulated that he should not be molested by the authorities of the United States.

THE COURT held, that the granting of these terms of surrender was "the exercise of a belligerent right, sanctioned by the laws of war; and not that of sovereignty, as distinguished from belligerent. The sovereignty of the government did not reside in the president as the military chief of the nation, and he could not delegate to his subordinate officers in the field any right of sovereignty which did not properly pertain to him in his military character, under the constitution and laws of the United States;" that the agreement was a military parole, intended to terminate with the war; that the court would certainly not have permitted the prisoner to have been arrested on its process, during the war; but that the war was now ended.

THE COURT accordingly refused to discharge the prisoner, but admitted him to bail.

Case No. 16,204.

UNITED STATES v. RUGGLES.

[5 Blatchf. 35.] [1]

Circuit Court, S. D. New York. Nov. 19, 1861.

LANDS UNDER NAVIGABLE WATERS — GRANTS BY STATE—INJUNCTION—RIGHTS OF UNITED STATES NAVY YARD.

1. Under the act of the legislature of New York, of April 10th, 1850 (Sess. Laws 1850, c. 283) authorizing the commissioners of the land office of the state to grant lands under the waters of navigable rivers or lakes, and providing that no such grant shall be made to any person other than the proprietor of the adjacent lands, the grant must be confined to a line starting at the intersection with the shore, and extending at a right angle with the thread of the stream, or at a right angle into the lake, without any regard to the course or direction of the line upon the land

2. A party who has obtained a grant in violation of the statute, as thus interpreted, will be restrained by injunction, at the suit of the proprietor of the land adjacent to the land under water so granted, from erecting docks on the land under water, so granted.

3. Where such adjacent land was owned by the government and used as a navy yard, an injunction was granted to restrain the erection of docks on other land under water properly granted to such party, until it should be shown that such erection would not seriously interfere with the rights of the government as proprietors of the navy yard, and it was referred to a master to inquire into the effect of such erection.

James I. Roosevelt, U. S. Dist. Atty.
Edwin W. Stoughton, for defendant.

NELSON, Circuit Justice. The bill in this case is filed to restrain the defendant [Henry Ruggles] from obstructing the free navigation

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

of the East river, and thereby seriously interfering with ingress and egress to and from the navy yard at Brooklyn. The government purchased the site of the yard on the East river, and obtained from the state a cession of the jurisdiction some sixty years ago, and have since expended upon it millions of dollars, said to amount to five millions, in erections and improvements in fitting it for the uses and purposes for which the purchase was made. The defendant is the owner of a lot of land lying adjacent to and west of the yard, fronting also upon the river, and has procured from the commissioners of the land office of the state of New York, a deed of the land in front, covered with water, extending into the river between six and seven hundred feet. The boundary line of the parties is not at a right angle with the thread of the river, but strikes the shore in an oblique direction. The general course of the river at this place is nearly east and west, and the course of the boundary line, extended into the river, is north forty-two degrees and thirty minutes east, the effect of which is to carry the line thus extended into the water across a part of the water frontage of the navy yard, which, it is claimed, will, when the docks are erected, as contemplated by the defendant, interfere with the free ingress and egress of vessels, and otherwise seriously impair the use of the yard, and will also have the effect to alter the channel of the river, and of the waters of the Wallabout Bay, by deposits of silt and sand, and render access to the yard difficult and hazardous. The grant to the defendant by the commissioners was made under an act of the legislature of the state, passed April 10th, 1850 (Sess. Laws 1850, c. 283), which authorizes them to grant lands under the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of the state, or proper for the beneficial enjoyment of the same by the adjacent owner, but provides that no such grant shall be made to any person other than the proprietor of the adjacent lands, and that any such grant that shall be made to any other person shall be void. In my judgment, the true construction of this statute is, that the grant of the water lots, authorized to be made to the adjacent proprietor of the land, must be confined to a line starting at the intersection with the shore, and extending at a right angle with the thread of the stream, or at a right angle into the lake, without any regard to the course or direction of the line upon the land. It is apparent that this is the only construction upon which the intent and purpose of the statute can be carried into effect. The case in hand illustrates the practical difficulty attending any other construction. The government, as well as the defendant, is an adjacent proprietor, within the meaning of the statute, and is entitled to the grant of water lots in front, or, at least, according to the express terms of the statute, no other party is entitled to such grant. And yet, the grant to the defendant, if allowed, has already appropriated a considerable portion of this very water frontage. I shall, therefore, restrain the defendant from erecting his dock upon any portion of the water lots granted, lying east of a line drawn from the intersection of his eastern line with the shore, in conformity with the interpretation given to the statute, as above explained. And, even with this modification, I shall not at present interfere with the provisional injunction, inasmuch as I am not sufficiently advised, from the proofs in the case, that, with the line drawn in conformity with the true meaning of the statute, as above given, and the docks to be erected confined to the remaining portion of the grant, the effect would not be to seriously interfere with the fair and full enjoyment of the rights and privileges belonging to the government, as proprietors of the navy yard. The large amount of money expended in its erections and improvements, as well as its great public importance and use, and the danger of imperilling them, lead to caution and hesitation upon a question involving all these considerations. A mistake might result in a public calamity. Before, therefore, I shall interfere with the provisional injunction heretofore granted, the case must go before a master pro hac vice, whom I shall appoint, to inquire into the effect of the docks to be erected, even with the modifications stated, upon the free ingress and egress of vessels to and from the navy yard.

Case No. 16,205.

UNITED STATES v. RUGGLES.

[5 Mason, 192.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1828.

SHIPPING — AUTHORITY OF MASTER — "FORCING MARINER ON SHORE" IN FOREIGN PORT.

1. Under the 10th section of the act of 1825, c. 276 [3 Story's Laws, 2001; c. 65, 4 Stat. 117], the forcing a mariner on shore must be done, not only without justifiable cause, but also maliciously, to justify a conviction. If done under a mistaken sense of duty, it is not a case for conviction.

[Cited in U. S. v. Coffin, Case No. 14,824.]

2. "Maliciously" in the statute means, with a wilful disregard of right and duty, or doing the act against a man's own conviction of duty.

[Cited in U. S v. Coffin, Case No. 14,824; U. S. v. Taylor, Id. 16,442.]

[Cited in Wills v. Noyes, 12 Pick. 328.]

3. A master of a ship has authority to confine his seamen in a common gaol, in a foreign port, for offences and misconduct, in extreme cases, and where the proper correction or punishment cannot be effectual on ship-board.

[Cited in Jordan v. Williams, Case No. 7,528.]

[Cited in Buddington v. Smith, 13 Conn. 336.]

Indictment [against Spencer Ruggles] for maliciously forcing a mariner on shore in a foreign port, contrary to the tenth section of

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

the act of 1825, c. 276 [3 Story's Laws, 2001; c. 65, 4 Stat. 117]. Plea, not-guilty.

The cause turned principally on matters of fact at the trial.

Mr. Greene, U. S. Dist. Atty.
Pratt & Searle, for defendant.

Upon the summing up to the jury, the following opinion was delivered as to the construction of the statute:

STORY, Circuit Justice. The words of the act of congress are, that "if any master, &c. shall, during his being abroad, maliciously and without any justifiable cause, force any officer or mariner of such ship, &c. on shore, &c. he shall, on conviction thereof, be punished by fine, &c." To constitute the offence, both facts must concur. It is not sufficient, that there is no justifiable cause for the act; it must also be maliciously done. If therefore the jury should come to the conclusion, that there has been no justifiable cause, still they must be satisfied further, that the act has been maliciously done by the defendant. By "maliciously," in the intendment of the statute is not merely meant a wicked, malignant, and revengeful act, such as in cases of murder constitutes malice, and which flows from a heart regardless of social duty, and fatally bent on mischief. But if the act be wantonly done, that is, with a wilful disregard of right or duty, it is, in the sense of the statute, malicious. It must be a wilful act, done contrary to a man's own convictions of duty. If, therefore, the defendant did the act from good motives, and under a mistaken sense of duty, and not from a spirit of hatred, or with an intention to oppress, then he ought to be acquitted, notwithstanding the want of justifiable cause. But if he did the act contrary to his own sense of duty, as a mere exercise of power, without any sense of its being right, then it was "maliciously" done in the sense of the statute. See Harman v. Tappenden, 1 East, 555, 563, and note, and 564, 565, as to the meaning of "maliciously." See, also, 2 Starkie, Ev. tit. "Libel and Malice," pp. 862, 891, etc.; Robertson v. McDougall, 4 Bing. 670, 680; Looker v. Halcomb, Id. 183, 190. as to the meaning of "willfully and maliciously," in St. 1 Geo. IV. c. 56.

There is another point, on which the court is called to express an opinion. In the present case, the master not only forced the seamen on shore, but he caused them to be confined and imprisoned in the common gaol at St. Pierre's, under circumstances of such great exposure and severity, as cannot be justified. It is said, that the law does not clothe the master with any authority to imprison the seamen for disobedience or misconduct in a common gaol in a foreign port; and that the imprisonment, if necessary or proper, must be on board of the ship. I am aware, that it has been doubted by very able judges, whether the law does authorize such an imprisonment on shore in a foreign port. My opinion, however, upon the most mature deliberation, is, that it does authorize it; but I am also of opinion, that the authority arises, and can be exercised only in cases of flagrant offences, where there is a positive necessity of removal of the party offending from the ship to some place of safety on shore. The authority is of a very delicate and summary nature, and is justified only by the same necessities, which clothe private persons in other cases with extraordinary powers. Cases may easily be conceived, where the authority may be indispensable for the safety of the ship, cargo, and crew. Suppose a mutiny in port, with an intent to murder the officers, or to embezzle the cargo; and the conspiracy be so extensive, that the mutineers cannot be suffered to remain on board, but at the imminent hazard of the lives of the officers, and the property on board. The master must have (as I think) a right, under such circumstances, to remove them from the ship; and to imprison them, as well for punishment as safety, if he does not choose (as he may) to dismiss them altogether from the employment. But in such a case, the imprisonment must be with the intent to take them again on board the ship for the voyage, or to bring them home: and not with the intent merely to punish them, and at the same time to dissolve their connexion with the ship. The master can punish only to promote good discipline, and compel obedience to lawful orders on board of the ship. He is not clothed with judicial authority to sentence seamen to punishment for their offences. The law has conceded that authority to the regular tribunals of the country, acting in the common forms of justice, and upon a trial of the facts by a jury. While, therefore, I admit, that a master may, in extreme cases, imprison a seaman in a common gaol in a foreign port, (for no such authority is pretended to exist in a domestic port,) I think the authority is confined to extreme cases; and cannot be justified, when a more moderate punishment on ship-board would be effectual and safe. The notion, so commonly entertained, that a master may, at his pleasure, for slight offences imprison his seamen in a foreign gaol, is utterly unfounded in law. It is well known, that there is in warm climates great danger to the healths and lives of seamen in these miserable and loathsome places; and a power to imprison them there is often a power of life or death. It is high time, that masters should understand, that they are criminally liable for such wanton abuses of authority. And if a seaman should lose his life by confinement and exposure in such a gaol through the instrumentality of the master, without justifiable cause, the master is responsible, as in other cases of homicide. One of the strongest reasons against the exercise of the authority is, that the seamen are thus put utterly out of the control and supervision of the master. It is his duty to watch over

them with parental attention, as long as they belong to the ship; and he has no right to delegate his authority or custody to gaolers and turnkeys in a foreign country.

Verdict, guilty.

Case No. 16,206.

UNITED STATES v. RUM RIVER & M. BOOM CO.

[See 3 Fed. 552.]

Case No. 16,207.

UNITED STATES v. RUMSEY.

[5 Int. Rev. Rec. 93.]

District Court, D. New Jersey. 1867.

VIOLATION OF INTERNAL REVENUE LAWS—FRAUDULENT RETURNS—INDICTMENTS—EVIDENCE—PREVIOUS TRANSACTIONS.

[1. Where indictments are found, under the act of June 30, 1864 (13 Stat. 223), both for making false returns (under section 15) and for perjury (under section 42), the district attorney cannot proceed upon both indictments, but must elect between them.]

[2. On the trial of an indictment against a manufacturer for making false and fraudulent returns for a given month, it is competent to show, for the purpose of proving the fraudulent intent, that in previous months defendant made false returns.]

This was an indictment for disclosing and delivering to an assistant assessor a false and fraudulent return of manufactures, under section 15 of the act of June 30, 1864. The trial was begun on the 21st of February last, at Trenton, and terminated in the conviction of the defendant on the 8th of March, having continued more than two weeks. The case has exhibited almost all forms of opposition to the execution of the internal revenue laws, and therefore a brief statement of the various proceedings connected with it will be of interest. The defendant was a manufacturer of clothing in Salem, New Jersey, and carried on, in connection with it, an extensive dry goods business. Up to May, 1866, he had returned to the assessor manufactures amounting only to about $300 per month. It was believed that his actual sales were more than ten times that amount, and in May last, a revenue inspector, Mr. Wm. H. Van Nortwick, was sent to investigate his affairs. He examined the books and clerks, and became satisfied that great frauds had been committed. After examining the books and making abstracts for one day, he found that about 60 pages had been cut out during the night, with the evident design to conceal the amount of sales. The collector at once seized the store and books, and reported the case to the district attorney. Before information was filed, Rumsey obtained from the state court of chancery an injunction restraining the collector from withholding possession of the store and books, and, under cover of this process, he took possession of the store by duplicate keys, and carried off the books from the collector's office by strategem. He also sued the collector and inspector in an action of trespass, in the state court, laying his damages at $20,000 The United States district attorney, regarding the seizure as complete, and possession of the property involuntarily abandoned by the collector, filed an information, issued process, and directed the marshal to take possession of the property. He also immediately removed the suit in chancery, and the action at law into the United States circuit court. The marshal took possession of all the stock and materials of the clothing manufacture, and on application of Rumsey, appraisers were appointed, and a bond was given for the appraised value of the property, Rumsey still retaining the books. Shortly after the issuing of the injunction, Rumsey obtained from the chancellor an order for the collector to show cause why an attachment should not be issued to punish him for a breach of the injunction, which the collector had refused to obey. Testimony was taken ex parte under this order, and the motion for attachment was made after the removal of the cause. The district attorney insisted that the chancellor had no power to take any further proceeding, and Rumsey's counsel urged that the attachment for a breach before removal was not a further proceeding in the cause, but only a punishment of the individual for contempt committed while the case was in the power of the court. The argument was delayed and the motion was not afterwards pressed. Meanwhile the assessor had summoned Rumsey to appear and produce his books, but acting under the decision of Judge Smalley, his counsel caused the books to be torn in two, and produced only the fragments relating to the last month's business, denying the right of the assessor to examine into any transactions for which returns had been already made. The district attorney then applied to Judge Field for an attachment under section 14, to compel the production of the books. The attachment was issued, and on its return, after some delay, the judge made an order that the books should be produced. They were, however, not actually examined by the assessor, he having in the meantime made an assessment of $6,000 for taxes withheld. In June, 1866, the case was brought before the grand jury, before whom Rumsey's clerks and employees were summoned, and eight indictments were found; three for false returns under section 15, four for perjury under section 42, and one for forcibly obstructing the collector under section 38, of the act of June 30, 1864. Motions were then made to quash these indictments, and the argument was postponed to September term. At that term four additional indictments were found, and motions to quash were also made as to these. After elaborate argument these motions were overruled, and the indictments set

down for trial at January term. It was held, however, by the judge, that the defendant must not be tried both for perjury and for false return, as to the same monthly return, and that the district attorney must elect as to which he would try. After various delays on the part of the defendant, the trial of the indictment for making a false and fraudulent return for September, 1864, was commenced on the 21st of February.

The case was tried for the government by A. Q. Keasbey, U. S. Dist. Atty., and E. Mercer Shreeve; and for the defendant by Messrs. Joseph P. Bradley, Abraham Browning, and A. H. Slape.

The defendant's counsel had been notified to produce the books, but they refused. Thereupon the abstracts made by the inspector from the day-book were admitted in evidence, showing sales on credit alone of more than three times the whole amount returned; and it was proved that much the greater portion of the sales were for cash. The clerks, cutters, and sewing women of the defendant were examined, and proved an amount manufactured, at least ten times the amount returned. The only important legal question that arose, was upon the admissibility of the returns made by the defendant for other months than September, on which the indictment was founded. They were offered, not to prove the fact of falsehood in the September return, but to show the fraudulent intent with which it was made. It was earnestly contended that it was not competent to go into proof of other crimes, and that to admit the other returns would be to put the defendant on his defence, for twenty different misdemeanors. But THE COURT held that they were clearly admissible to show the fraudulent character of the September return; that the several returns were parts of a connected series of transactions, forming the general business of the defendant, and therefore admissible on the settled rules of evidence laid down in the books and cases cited by counsel for the defendant; that such proof was competent in order to show that the return for September was not exceptional, but one of a series of frauds; and that so far from being foreign to the case, this proof was what both parties ought to want to produce, as being best calculated to elucidate the truth, and affording the defendant the best opportunity of vindicating himself if innocent of fraud.

When he came to his defence the defendant produced certain books which he insisted were all the books of his business. It was plain by inspection, and also by comparing them with the inspector's abstracts, that the books had been systematically altered by Rumsey, by adding after a charge of different garments sold, the words "cut and trimmed," in order to make it appear that these were not sales of manufactured articles; and in other instances the word "clothing" had been altered to "cloth," by erasing the last syllable. These alterations ran through all the books, and were made in hundreds of places, as shown by visible marks, or by comparing with the inspector's abstracts. A book which was reluctantly produced upon proof of its existence, near the close of the trial, revealed the entry of over 8,000 garments for about two years, and it was shown that another had existed, which he utterly refused to produce, covering the month in question, which at the same rate of production, would have shown over 13,000 garments for a period during which he had returned about 1,200. In fact, it was clearly shown that he had done a business of about $40,000 a year, while returning less than $4,000 for taxation. He was convicted, with a recommendation to the mercy of the court, it being understood that two of the jury refused to find the verdict without such recommendation, desiring to save him from imprisonment. After the verdict he pleaded non vult contendere, as to the other indictments for false return, and the district attorney entered nol pros on the indictments for perjury and obstructing collector.

THE COURT imposed a fine of $1,000 and costs on the indictment tried, and suspended sentence on the others, upon which he may be punished by imprisonment, or fines amounting to $17,000. It is probable that the severity of the sentences on these indictments will be governed by the action of the defendant as to the payment of his taxes withheld, and the amount of his bond for the property seized as subject to forfeiture.

Case No. 16,208.

UNITED STATES v. RUNDLETT.

[2 Curt. 41.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1854.

UNITED STATES COMMISSIONERS — CRIMINAL COMPLAINTS—AUTHORITY TO TAKE BAIL—RECOGNIZANCES—DEFAULT.

1. A commissioner, appointed to take affidavits, &c., under the acts of congress, has power to let to bail, one brought before him on a criminal complaint, pending the proceedings; in those states where justices of the peace have a similar power; and a recognizance to appear before him to have the proceedings completed is valid.

[Approved in U. S. v. Case, Case No. 14,742. Cited in U. S. v. Horton, Id. 15,393; U. S. v George, Id. 15,199; U. S. v. Evans, 2 Fed. 151; U. S. v. Martin, 17 Fed. 155; Ex parte Perkins, 29 Fed. 909; Rand v. U. S., 36 Fed. 672; Marvin v. U. S., 44 Fed. 410. Cited in U. S. v. Ewing, 140 U. S. 144, 11 Sup. Ct. 743; U. S. v. Keiver, 56 Fed. 425; Re Acker, 66 Fed. 294; Hallett v. U. S., 63 Fed. 822; Hudson v. Parker, 156 U. S. 282, 15 Sup. Ct. 452; U. S. v. Hudson, 65 Fed. 77; Re Dana, 68 Fed. 893.]

[Cited in Re Mantz, 19 D. C. 598; U. S. v. Eldredge (Utah) 13 Pac. 679.]

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

2. Such a commissioner has power to adjourn to another time and place, as incident to the power to hear and determine; but he cannot adjourn in the absence of the accused.

[Cited in Re Ewing, Case No. 4,587.]

3. In New Hampshire, one under a recognizance to appear before an examining commissioner at his office at ten o'clock, a. m., is not in default for not appearing precisely at ten o'clock, nor before the expiration of that hour,—nor is he bound to appear elsewhere than at the commissioner's office.

[Cited in Re Gilley, Case No. 5,438; Re Ewing, Id. 4,587.]

4. The condition of a recognizance to appear before a commissioner can be shown to be broken, only by calling the cognizor at the time and place, when and where he was bound to answer, and making an entry of his default to appear on the minutes of the commissioner which he returns to the court.

[Cited in Marvin v. U. S., 44 Fed. 411.]

[Cited in Brooks v. U. S. (N. M.) 27 Pac. 311; Philbrick v. Buxton, 43 N. H. 463; State v. Kinne, 39 N. H. 138.]

5. It is not sufficient to aver and prove aliunde, that the cognizor had in fact absconded, and did not intend to appear, and could not have appeared if he had been called.

Marston & Emery, in support of the demurrer.

Mr. George, U. S. Dist. Atty., contra.

CURTIS, Circuit Justice. This is an action of debt [against Harrison G. O. Rundlett] on a recognizance. The amended declaration, which is demurred to, shows that one Woodbury Gilman was complained of, before Horace Webster, one of the commissioners appointed by the circuit court of the United States for the district of New Hampshire, and therein was charged with the crime of presenting to the commissioner of pensions certain false and fraudulent papers for the purpose of obtaining an allowance of a claim for a pension, and the payment of a sum of money from the United States in satisfaction of such claim. That the said Gilman was arrested and brought before the commissioner at his office in Portsmouth, on the 30th day of August, 1853, and such proceedings were thereupon had that Gilman was ordered by the commissioner to recognize in the sum of $2,500, with three sureties, in the sum of $833 33-100 each, to be and appear before the commissioner at his office in Portsmouth on the first day of September then next, at ten of the clock in the forenoon, further to answer to the said complaint, and then and there wait and abide the order of the said commissioner; that the said Gilman and three sureties, of whom the defendant was one, did so recognize. That Gilman did not appear at the office of the commissioner on the first day of said September, at ten of the clock in the forenoon, according to the tenor of his recognizance; and the commissioner adjourned to the court house in Portsmouth, at the same hour, and then and there Gilman was three times solemnly called, and made default, and the sureties were also then and there three times solemnly called to bring in the body of their principal, but did not appear, or bring the principal, and so default was made in the condition of the recognizance, and the same was declared by the commissioner to be forfeited; all which will appear by the record, &c.

Several questions have been argued upon the demurrer. The first is, whether the commissioner had authority to take the recognizance of a defendant, with surety, to appear before himself. It is argued that the powers of a commissioner, in this particular, are the same as those of a justice of the peace; that at common law, a justice of the peace cannot order a prisoner to recognize to appear before himself; that though there is, by statute in New Hampshire, as in other states, authority conferred on justices of the peace to let to bail persons accused before them, while the complaint is pending, and no order has been made thereon, there is no act of congress which confers this power on commissioners. By the first section of the act of August 23, 1842 (5 Stat. 516), it is provided, that the commissioners shall exercise all the powers that any justice of the peace, or other magistrate of any of the United States may now exercise, in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the thirty-third section of the act of September 24, 1789 (5 Stat. 91). To that section we must look for the powers of the commissioners over this subject; and it provides that, for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States, &c.

My opinion is, that it was the intention of congress by these words, "agreeably to the usual mode of process against offenders in such state," to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to the proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them, in those states where justices of the peace, or other examining magistrates, acting under the laws of the state, have such power; as they have in New Hampshire, by the Revised Statutes (page 564, § 8). It is, perhaps, admissible, to consider the taking of a recognizance, to be strictly, and literally, within the meaning of the word "process." See Beers v. Houghton, 9 Pet. [34 U. S.] 329; U. S. v. Knight, 14 Pet. [39 U. S.] 301. But

if not so, I consider the words "mode of process," as used in this law, to be synonymous with mode of proceeding, and to include power to let to bail. This must be so, because the law expressly says, the prisoner is not only to be arrested and imprisoned, but bailed, agreeably to the usual mode of process in the state; and though this refers to his being bailed to appear and answer before the court, it shows that the words "mode of process" were not confined to the form of the warrant or mittimus, but were used in the larger sense above mentioned. See Duncan v. Darst, 1 How. [42 U. S.] 306, and cases there cited; and Gwin v. Breedlove, 2 How. [43 U. S.] 29. This objection must therefore be overruled.

The next objection is more formidable. It is that the condition of the recognizance required the principal to appear at the office of the commissioner at ten o'clock; that the legal effect of this was, that he had until eleven o'clock to appear; that he was not bound to appear at any other place; that the recognizance could not be forfeited, without calling him at the commissioner's office, and entering his default for non-appearance there; that the adjournment to the court house, at ten o'clock, did not impose on the accused a duty to follow the commissioner, and make his appearance there before eleven o'clock; and, consequently, when he failed to answer the call at the court house, he was not thereby in default, and so there was no forfeiture.

To maintain an action on a recognizance, the declaration must show a breach of its condition. And as the recognizance is required and taken by the commissioner pursuant to an authority conferred on him by law, and to satisfy certain legal requirements, the nature, extent, and limitations of the responsibility created thereby, are to be determined, not by a mere examination of the terms of the instrument, but also by reference to the rules of law which are applicable thereto. These rules apply themselves to the terms of the condition, and affect their meaning and operation. Beers v. Houghton, 9 Pet. [34 U. S.] 329; U. S. v. Knight, 14 Pet. [39 U. S.] 301. One of these rules of law requires the principal cognizor to be called, and his default entered; and the legal effect of the condition is such, that it is not broken by non-appearance, generally, to be proved by any evidence, but only by non-appearance in answer to a call, to be proved by an entry made on the minutes of the magistrate, and returned by him as part of the proceedings. This has been decided in New Hampshire, and elsewhere, upon reasons, which, to me, are satisfactory. State v. Chesley, 4 N. H. 366; Dillingham v. U. S. [Case No. 3,913]; State v. Grigsby, 3 Yerg. 280; White v. State, 5 Yerg. 183; Park v. State, 4 Ga. 329. It is clear also that the declaration must show a default to answer to a call, made at a time and place, when and where the cognizor was bound by law to answer. And the question here is, whether Gilman was bound by law to answer the call made at the court house. By the terms of the recognizance, he was to appear at the office of the commissioner, at the hour of ten o'clock in the forenoon, and then and there further answer to the complaint, and wait and abide the order of the said commissioner. Any lawful order which the commissioner was empowered to pass in the course of proceedings upon this complaint, is within the very terms of the condition. If he had appeared, and the hearing had not been finished on that day, and the commissioner had adjourned the hearing to the next day, the defendant would undoubtedly have been bound by the recognizance to appear on the next day. The commissioner also had power to make an order to adjourn to a more convenient place, for the purpose of hearing the complaint. This power is incident to the power to hear and determine. It includes adjournments both of time and place. Where, as in some of the states, the power is regulated by statute, of course those statute limits must be observed. Where it has not been thus regulated, it must be a reasonable exercise of the power, in reference to the circumstances of the case, for the purpose of more conveniently, or speedily, or safely, discharging the duty of examining the complaint. Morrell v. Near, 1 Cow. 112; Caswell v. Ward, 2 Doug. (Mich.) 374.

In this case no objection is made to the mode of exercising this power, save that the order to adjourn was made in the absence of the defendant, and before he was bound to be present. That the order to adjourn was made in his absence, is averred by the amended declaration. That it was made at ten o'clock in the forenoon is also averred. I do not think he was bound to be present before, or precisely at ten o'clock. I have always understood it to be part of the common law of the New England states, and I believe it is so held in other states, that in proceedings before magistrates, which are notified to begin at a fixed hour, neither party is in default, until the expiration of that hour and the commencement of the next. This is a convenient rule, prevents surprise, and exacts as much promptness as is safe and reasonable. It seems quite clear from the case of Downer v. Hollister, 14 N. H. 122, that it is part of the law of this state.

Under these circumstances I am of opinion the commissioner had not lawful authority to make the order to adjourn, that the order was not binding on the defendant, so as to oblige him to answer at the court house, and consequently that his failure to answer there was not a breach of the condition of the recognizance,—and this for the following reasons: The general rule is, that in criminal proceedings, no action affecting any right of the accused should take place in his absence. In this particular case it might be of no importance to the defendant whether the adjournment took place in his absence or

not. In many cases it might be of practical importance. I cannot consent to make a precedent, which might be used injuriously to the substantial rights of persons examined for offences by magistrates. When they have bound themselves to appear before a magistrate and answer to a complaint at a particular place, they must be allowed an opportunity to appear there, and offer such reasons as they may have, why they should not be compelled to answer elsewhere; and those reasons must be considered by the magistrate, before they are required to answer at another place. As has already been said, the power to adjourn is incident to the power to hear and determine. But if the defendant avoids, there is no hearing or determination. Until he appears, therefore, there is no power to hear and determine, and consequently, a power to adjourn, which is merely incidental to the power to hear, and which is to be exercised, if at all, only for the more convenient, safe, or speedy execution of the principal power, not only need not be exerted, but can hardly be said to exist. If the defendant had been in any default, for not being present at the time the order to adjourn was made, it might be urged, perhaps, that he was bound to take notice of the adjournment, and to follow the commissioner to the court house. Adjournments by courts of record thus bind persons who are under recognizance. But, as has already been declared, his appearance at any time before eleven o'clock, at the office of the commissioner, would satisfy the condition of the recognizance; and I can make no distinction between an order of the commissioner to adjourn at ten o'clock, before he appeared, and an order at nine o'clock, or any earlier hour. In neither case, was the defendant bound to be present, or in default for not being present; and I do not perceive upon what ground he could be required to take notice of and obey the order of adjournment, in one case, rather than in the other.

Several cases in the state of New York have been decided upon principles somewhat analogous to those above stated: Wiest v. Critsinger, 4 Johns. 117; Stewart v. Meigs, 12 Johns. 417; Morrell v. Near, 1 Cow. 112.

It was stated at the bar that Gilman, the defendant, actually absconded, and had no intention to appear, and did not, nor would, at any time or place, appear to answer the complaint; that this was well known to his sureties, and that it was of no practical importance to him or them whether the adjournment took place or not. This may be so; but the case must be decided upon fixed principles of law, applicable to all cases of such recognizances taken by magistrates, and whatever the intentions or acts of Gilman may have been, if there was no breach of the condition of the recognizance, no recovery can be had. Being of opinion that there was no breach, the judgment must be for the defendant.

Case No. 16,209.

UNITED STATES v. RUSSEL.

[4 Dall. 414, note.] [1]

Circuit Court, D Pennsylvania. Oct. Term, 1806.

MURDER ON HIGH SEAS—PEREMPTORY CHALLENGES.

[One indicted for murder on the high seas is entitled, by the express provision of the statutes, to only 20 peremptory challenges.]

In the case of United States against Russel, on an indictment for murder on the high seas, tried at October term, 1806, the prisoner's counsel, at first, claimed the right of peremptorily challenging thirty-five jurors; but, that being an offence set forth in the penal law, was expressly embraced by the provision limiting the peremptory challenges to twenty; and the claim was, accordingly, overruled.

UNITED STATES (RUSSELL v.). See Case No. 12,164.

Case No. 16,210.

UNITED STATES v. RUTHERFORD.

[2 Cranch, C. C. 528.] [2]

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

COMPETENCY OF WITNESSES—RIOT—JOINT INDICTMENT.

1. If three persons be jointly indicted for a riot, and one only be put upon his trial, the other two having forfeited their recognizances, connot be examined as witnesses for the defendant.

2. The offender who has committed an infamous offence, is restored to his competency as a witness, by a pardon.

The defendant [William Rutherford] and two others were indicted for a riot, and also for a simple assault and battery, in separate counts of the same indictment.

Mr. Jones, for defendant, offered to examine as witnesses, the two who had forfeited their recognizances.

THE COURT (nem. con.) refused.

Mr. Jones then offered to examine as a witness, for the defendant, one Golding, who had been convicted under the post-office law of 30 April, 1810 [2 Stat. 592], of embezzling letters and stealing bank-notes there from, but was pardoned by the president.

THE COURT (nem. con.) permitted him to be sworn.

Case No. 16,211.

UNITED STATES v. RYCRAFT.

[Milwaukee Daily News, Scr. Bk. 178.] [3]

District Court, D. Wisconsin.

FUGITIVE SLAVE LAW—AIDING IN ESCAPE.

[1. On a prosecution for aiding in the escape of one arrested under lawful process as being

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

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

[3] [Published from a scrap book in the clerk's office at Philadelphia. Date not given.]

a fugitive slave, it is not necessary to show that he actually was the slave of the person at whose instance the process was issued.]

[2. The fact that the members of a vigilance committee formed to prevent the execution of the fugitive slave law stated that their object was to prevent the "kidnapping" of the fugitive by the officers of justice and the alleged owner, furnished strong evidence of their responsibility for a subsequent riot and rescue of the fugitive from the jail in which he was confined, even though they individually counseled peaceable measures.]

This was an indictment against John Rycraft for aiding, assisting, and abetting in the escape of Joshua Glover, a fugitive slave.

MILLER, District Judge (charging jury). At the commencement of this trial, I remarked, that verbal application had been made, on behalf of a reporter for a daily paper, for leave to report the evidence in this case. After the case is concluded, I have no objections that a correct report be made. I have never consented in any case, that a report be published during the pendency of a trial. The jurors have access to the papers, and feeling an interest in the proceedings, may there read what may not be correct. Jurors should find a verdict upon the evidence as it passed to them from the witnesses, without having their minds disturbed by reading the reports of irresponsible and perhaps inaccurate reporters. In criminal cases, so far as my observation has extended, I am inclined to think, injustice has been done in several instances, by the daily publication of evidence, during the trial. And in case of non-agreement of the jury, a just second trial is rendered uncertain by such publications. For these reasons I respectfully request the editors, to postpone any publication of the evidence, until the cause is finally determined. I do not make a positive command, but a respectful request, which in every instance heretofore has been complied with. This request I believe has been complied with, and you are left to decide this case upon the evidence, as you understood it, from the witnesses.

I also, at an early hour of this trial, cautioned you against outdoor influences, feeling it my duty to protect the purity of the jury-box. In all cases likely to be attended with excitement, I have pursued this course, and gave the jurors to understand that an attempt to influence their decisions, out of court, is indictable, and that it is their duty to make the information. The law throws around a juror, sworn to try an issue according to evidence, a circle, into which no man can corruptly enter with impunity. One object of the provision, in the federal constitution, of a judiciary, was that a tribunal may exist in each state, wherein all persons may appear as suitors, unembarrassed by local prejudices, influences, or interests. This is a court of the nation, open to all persons of every state or country. Residents of our sister states of this Union appear here under the constitutional provision, as American citizens, on an equality with those of Wisconsin; and inhabitants of, or emigrants from foreign states, as suitors, have equal consideration with our own citizens. This being a national court, you are a national jury, equally removed, with the judge, from all local influences. A gentleman occupying the seat of a juror in this court, will feel it a duty, in promoting this object of the constitution, to discard from his mind all local prejudices, or feelings in regard to policy, circumstances, or individuals.

The subject of slavery in the several states of the Union, has been attended with difficulties, both before and since the adoption of the federal constitution. Through the cupidity and avarice of England, slavery was introduced into the American colonies; and it existed in them without regard to their locality, North or South, until the people in the North found by experience that it was unprofitable. At the adoption of the constitution, it existed in all the states; but laws had then been generally enacted in the Northern states for its gradual abolition At the adoption of the constitution of the United States, slavery had been so engrafted into the several states, that a constitutional provision for the surrender of fugitives from labor, became essential to the adoption of that instrument. The constitutional provision upon the subject is this: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." What I shall say to you upon this occasion has nothing new or original with me. I shall content myself by following decisions of the supreme court of the United States, and the opinion of the supreme judges, Story and Curtis, of Massachusetts, Baldwin of Pennsylvania, and Nelson of New York.

The mode of delivering up fugitives from justice and labor, is not prescribed in the constitution, nor by any law, until the act of congress, respecting fugitives from justice and persons escaping from the service of their masters, of February 12, 1793 [1 Stat. 302], four years after the adoption of the constitution. This act being found defective and inoperative, the amendment of Sept. 18, 1850 [9 Stat. 462], was passed. In respect to this amended act: In a charge of the circuit court of the United States, in the state of New York; to a grand jury, Mr. Justice Nelson, of the supreme court of the United States, remarks: "It will, I think, excite some surprise, after the determined opposition to the passage of the supplementary act, and even threatened, and in some instances, actual resistance to its execution in certain quarters, when it is seen that there is not a power conferred upon those appointed to administer it judicially, but what was conferred upon the judges and other state magistrates under the act of 1793 —a law approved by Washington and Adams, and enacted by the fathers and founders of

the republic—not one. It is simply, in this respect, a substitution of the commissioners for the state magistrates, who were disabled and prevented from discharging their duties by the state authorities. Full confidence was reposed in them by the general government, so long as they were permitted to act. When thus disabled, other officers were selected, of necessity, to supply their places. This is the only difference, as it regards the judicial authority conferred by the act. Neither is there any power conferred by it, on the claimant, his attorney, or agent, but what is found in the act of 1793—not one. All the additional powers are conferred upon the ministerial officers; the marshal and deputy marshal, who are required to execute the warrants and other process issued in pursuance of its provisions, and which warrants and process are the same as those provided for in the previous act, and none others. Every ground of opposition to this recent act, distinguishable from opposition to the former, is exclusively referable to the powers with which the marshal and his deputies are armed, with a view to its execution." The supreme courts of the several states in the North have sustained this law. And the supreme court of the United States in repeated decisions have sustained it, and we, both judge and jury, are bound by these decisions.

It is said, that this law is unjust, as it allows a master to arrest his fugitive slave, and to bring him before a judge or commissioner for examination. The right of a master to arrest his fugitive slave, is not a solitary one in the laws of this country. A master may pursue and apprehend his fugitive apprentice, whose service and labor he is entitled to demand by virtue of the deed of indenture. A father may compel his errant minor child to return to parental protection, and to submit to parental authority. A surety may pursue and carry back his absconding principal, and commit him to prison in discharge of his recognizance. All these things are done daily without producing excitement, and not one of these persons, except apprentices, can claim, by virtue of any statute provision, an open, fair and public examination upon disinterested testimony before their removal is effected, as in the case of fugitive slaves.—The fugitive from justice may be arrested upon a warrant founded upon an affidavit of the injured or interested party, and removed without a preliminary hearing; and it frequently results upon trial that the charge is unfounded. While the law under consideration is effective in carrying out the provisions of the constitution, it is equally so in protecting free colored persons from secret or criminal deportation.

The marshal is held to the United States for the use of all persons interested, with sureties, in a bond of a heavy penalty for the faithful discharge of his official duties. He is liable in this bond for all acts of his deputies. He is required to execute every process committed to his hands, either by himself or a deputy. This process was handed to Deputy Marshal Cotton, but was directed in the usual way to the marshal. If Glover owed service to Garland in the state of Missouri, and escaped from there, and was apprehended by Cotton upon this process, and was rescued by the crowd that surrounded the jail, the marshal and his sureties are liable to Garland for the full value of the fugitive, in the state of Missouri. The marshal had the alternative, either to receive the warrant, or pay Garland one thousand dollars penalty; and now since the fugitive has escaped, he has no way known to the law, to avoid paying his full value. Such is the law in all cases. The marshal is bound under a penalty to receive all process issued to him, and to endeavor to serve them. If he arrests a man upon a capias, and a rescue is effected, he must pay the plaintiff his damages. If he makes an arrest upon a ca. sa., he is liable to the plaintiff for the full debt, in case of a rescue. If he levies upon personal property under a fi. fa., he is liable to the plaintiff for the value thereof, or for the debt, if it should be taken from his custody even by superior force.

For these reasons. and also to maintain the majesty of the laws, it is the duty of all good, law-abiding citizens to aid this officer, upon all proper occasions, in the service of process. And if the court and jury should refuse him legal redress for the resistance of process, his duty to himself and his sureties will compel him to resort to forcible means; which (in Russell on Crimes, page 666,) may be used even to the taking of life: "Amongst the acts done, by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable. A rule founded in reason and public utility, for few men would quietly submit to an arrest, if in any case of resistance the party empowered to arrest were obliged to desist and leave the business undone." I was pleased to see that the legislature of this state, at its last session, passed a law for the punishment of resistance to state process, similar to the act of congress; and it is no doubt the anxious desire and prayer of every good citizen that these laws may be faithfully administered; and the dreadful alternative of force be avoided. The officers, by whose agency the government of the United States administers the domestic affairs of the country, have a just claim upon the government for protection from assaults or interruption, in the discharge of their several duties and the judi-

ciary, which is a component part of the government, is bound to render them that protection. Attacks upon officers of government, so as to render its laws and authority ineffective, is the first step towards insurrection, and their defence is the protection of the stability and integrity of the government. In all this matter, we have not arrayed ourselves against our fellow-citizens. Having done just what the law required of us, we have a right to expect that confidence and protection which are due to us as citizens. and that respect due a judicial tribunal. In this free country, liberty of action is allowed, while not in opposition to the force or authority of government, and not prejudicial to the peace or happiness of society, or the rights of individuals; but in the discharge of official duties, officers must pursue the course marked out by the law, without regard to personal consequences or considerations.

This court and jury have nothing to do with the opinions of men, disconnected with the case; nor have we anything to do with the opinions of the defendant. We are not here to be controlled by the opinions of men upon any subject. It is not our business to inquire into the opinions of this defendant, or of any man in this community, upon the subject of slavery, or any other subject; nor to compare our opinions with theirs; nor to gratify our own opinions; but to administer the laws of the land with fidelity. The defendant is not upon trial for his opinions, but for his acts. He may believe that a particular law should not be administered, and that the process issued in pursuance of it should be resisted; but if his opinions, ceasing to be speculative, have ended in acts; no morbid sympathy, no false respect for pretended "rights of conscience," or "superior law," can prevent this court and jury from judging him justly, without fear or favor. The constitution and laws of the United States are the supreme laws of the land; and no "higher law" in opposition thereto, can be recognized in a court of justice. If a man willfully violates the laws of his country by the commission of an offence known to those laws, he comes with a poor grace before a jury of honest men, sworn to render a true verdict according to evidence, with the plea of "higher law" or "rights of conscience." In this respect the case is not different from any other known to the catalogue of crimes.

The proposition. that the law, under which this indictment is framed, is distasteful in this community. and should not be enforced, cannot be tolerated in a court of justice. Courts do not make the laws; but to administer them in their purity, is their limited and responsible duty. All constitutional laws are the expression of the sovereign will of the people through their representatives. Every man is represented at the enactment of all laws of congress; and even if any laws there enacted are not according to our peculiar opinions or interests, we are bound, as good citizens to obey them, and as judge and jurors to administer them, while they remain upon the statute book. Upon no other principal can this government exist as a government of written constitutions and laws. If an appeal to courts and juries to disregard acts of congress, because they may be distasteful or unpopular, or because their representative was in the minority, or for any other reason, were allowed, every public act would be annulled in portions of the United States. The law-making power, vested in congress by the constitution, would soon became nugatory, through the imbecility or corruption of courts and juries. To ask the judge to withhold the prescribed sentence, or the jury to find a verdict in disregard of the evidence, because they or the community looked upon a law with disfavor, is asking a commission of moral perjury. Such a corrupt principle can not be advanced without a rebuke commensurate to its enormity.

This court administers laws, that I might not vote for as a representative; and decides causes, in pursuance of decisions of the supreme court of the United States, which individually I might not approve. The organization of our government, and of our judicial system requires this surrender of private opinion, on the part of the judge. Equally so is the duty imperative upon the juror. The jury are called to try the issue of fact submitted by the parties. This they are sworn to try according to evidence. Under the judicial system of the United States, they take the law from the court in all cases both civil and criminal, whether it comports with their individual opinions or not. U. S. v. Battiste [Case No. 14,545]: U. S. v. Morris [Id. 15,815]. The court pronounces the law upon its responsibility; and the jurors find the facts upon their responsibility; and both for judge and jury the law and evidence alone form the rule of action, to which men of sound heads and honest hearts will conscientiously adhere, while judicial tribunals are esteemed courts of justice. The act of congress uses the words, as nearly as may be to those in the constitution in the description of the person. It makes all persons indictable, who may aid, abet or assist the person apprehended, to escape from the claimant, or from the person assisting the claimant, either with or without process. This warrant was issued at the instance of Garland, the claimant, whereby he procured the assistance of the marshal, or a deputy. The marshal's deputy, Cotton, in this instance, was a person assisting Garland the claimant, with a process. The terms "fugitive," "person owing service or labor," are descriptive of the person apprehended, as the words "slave" or "apprentice," would be if used.

The first count charges that the defendant did aid, abet, and assist Joshua Glover, a person owing service and labor to Benami S. Gar-

land in the state of Missouri, from where he fled, to escape. The plea I think puts this whole charge in issue; and as there is no evidence in support of it, what I shall address to you will relate to the second and third counts of the indictment. These counts set forth the warrant, and the arrest by Cotton, the deputy marshal, of the person described in the warrant, and that the defendant did aid, abet and assist in the escape. According to the decision of the circuit court of the United States for the Southern district of New York, in the case of U. S. v. Reed [Id. 16,134], and the intimation of the circuit court for the Massachusetts district in U. S. v. Morris [supra], these two counts do not involve the question of the slavery of Glover. The only questions raised by these two counts, are these. Was the warrant issued and served as therein stated, and did the defendant aid, abet or assist in the escape? Glover escaped before the hearing required by the law. Whether he was a slave or not, and had fled from Missouri, had not been determined by the proper officer; nor is it to be upon this issue. If Garland should prosecute the marshal, or the rescuers, for the value of Glover, he would then be bound to prove satisfactorily, by disinterested testimony, in the way prescribed by our rules of practice, that Glover owed him service according to the laws of Missouri, and that he escaped from such state. This is a prosecution for the public offence of resisting a lawful process. "An escape is a violent or privy evasion out of some lawful restraint; as where a man is arrested or imprisoned and gets away before he was delivered by due course of law." The judge has lawful authority to issue this process; and the process is strictly according to law. It was lawfully served by the deputy marshal; Glover was thereby in the custody of the law, from which he escaped before he was delivered. He was in custody, the same as if he had been arrested upon a capias, or any other warrant. Garland might have arrested Glover under the law without process, and brought him before the judge for examination, but he procured this warrant, which the marshal was bound to receive and serve. Glover was lodged in jail by the deputy marshal, and was there placed by him under keepers. From the moment of his arrest by Cotton until he escaped, he was in the possession of Cotton as deputy marshal. He was lodged in jail for safe keeping. The marshal may, before a trial or hearing, lodge a man arrested in jail, or in his own house, or any place else, but he is legally held for the return of his prisoner with his process. It would be absurd to advance any other idea as to the officer's liability, than that he is bound to serve process placed in his hands, to make an arrest and to bring the prisoner arrested before the authority issuing the process. And it is equally absurd to hold that the marshal should not be protected in the execution of his process. The officer must be protected, if the law of the land is to prevail; and any person concerned in the endeavor to obstruct his process, or take the person arrested out of his custody or hands becomes a public offender, and liable to the punishment the law annexes to the offence. The escape in this case is just as complete as if it had been effected from the hands of the marshal; and those who aided in it are equally as guilty as if they had rescued Glover from the manual possession of the marshal.

The indictment charges that the defendant did aid, abet and assist Glover to escape from the custody of the deputy marshal. If the defendant did either aid, or assist, or abet in this escape, he is guilty. The words "to aid," "to assist," mean the same thing; that is, to help another in the commission of some act; to abet, is not only to render help, but to encourage or promote the commission of an act. The mere presence of the defendant when the act was committed, without participation on his part, does not make him accountable. Exciting, directing, consenting to, or encouraging the escape complained of, is abetting it; and if the defendant did either of these acts, he is guilty, whether he applied the axe or battering-ram or not. If the defendant took part in this matter, by inciting, or directing it, or consenting to it, or encouraging it, with others, it is not necessary to prove the particular act of each. Each one is liable for the acts of the others. The law fastens the consequence of any illegal act upon him, which he may have in any manner, as before mentioned, done, brought about, or caused.

It is proven by witnesses on the part of the prosecution, that the defendant was present at the jail, working and assisting to break the door of the jail-yard and the door of the jail. It is also proven by witnesses on his part, that they did not see him commit these overt acts. In such a case the affirmative testimony must prevail. Those who did not see defendant commit these acts, do not contradict those who did see him. Those witnesses who saw the defendant at the tree no doubt speak truly, and still may possibly not contradict those of the prosecution. In such a crowd, excited as that appears to have been, they may possibly be mistaken as to the exact moment of time. It is the duty of the jury to reconcile evidence of witnesses without imputing perjury or false swearing to any, if possible. If witnesses contradict each other, and they are equally credible, the jury should give the affirmative testimony the preference. If a witness was connected with the defendant, his testimony is not entitled to the same weight as that of a disinterested witness. The jury will judge of the evidence for themselves.

These are all the rules of evidence that I now deem necessary for your instruction in regard to the testimony of the witnesses generally. But there is one item of evidence which my duty requires me to notice. Herbert Reed was called by the defendant, and,

among other things, he testified that a committee of vigilance was organized on that morning, of which he and the defendant were members. He stated, in substance, some of the acts of that committee; and that one of its objects was, that the kidnappers should not take Glover out of town before a trial; that the kidnappers were Cotton, the owner, and any others who took part. He said that he heard said that Glover should not be taken away. He also said that the defendant suggested to call upon the judge, and assure him, if he would then order the prisoner up for hearing, that he would not be allowed to escape. That the defendant was for peaceable measures. He further stated that the committee did not offer to assist the marshal. Another witness—Stratton, I think—stated that he went to the back door of the jail, as he heard in the crowd that the kidnappers were taking Glover out there. Now, if this testimony is so as stated, it presents one of the worst features in the case. The crime of kidnapping, or feloniously carrying off a free person into slavery, is one of the most heinous in the law; and the epithet of kidnapper is one of the most odious that can be applied to an individual. If this committee organized, in whole or in part, to control the action or the time of the action of the judge, or for treating the officers of the law and of the court as kidnappers, they are responsible for this rebellion. This was the best means that could be adopted to influence the minds of the people, and to cause this riot and escape. The appellation of kidnappers applied to those men, under the circumstances, was to bring that jail down.

If I had ordered the marshal to bring up Glover for hearing, at that time, it certainly could not have been done. Under the cry of kidnapper the rescue would have been effected by that excited crowd, and the personal safety of the officer periled. An offer to the judge of protection would be of little avail, after a mob was got up by the cry of rescue, and inflamed by that of kidnapper. If, as from the defendant's evidence, he was associated with that committee which was engaged in impeding or obstructing the process, he must take the consequences. They are all indictable. This committee was probably the primary cause of that outrage, and if so, each member of it is responsible for the escape, whether he suggested peaceable means or not. The law is "that, if a man does an unlawful act, that is likely to cause an injury, and an injury is actually caused, it is immaterial by what intermediate hand it is inflicted; the first wrongdoer is as directly answerable as the immediate trespasser—as where a man threw a lighted squib into a crowd, it was thrown by one and another, till it struck a person, and put out his eye, the man who first threw the squib was made answerable." The organization and conduct of that committee were more dangerous than the squib, because more likely to be attended with fatal consequences, as no cry or epithet would be more exciting in the most orderly community, than that of rescue and kidnapper. The officers of the law are responsible to the law for their acts, and no committee, or set of men can organize to control their acts, or interfere with the service of process, without incurring the responsibilities of the law. This warrant was in the hands of the officer, and no man can throw obstacles in the way of the officer in making full service by apprehending and delivering the person therein named to the authority who issued it.

Verdict, "Guilty."

Case No. 16,212.

UNITED STATES v. SA-COO-DA-COT et al.

[1 Abb. U. S. 377;[1] 1 Dill. 271; 3 Am. Law T. Rep. U. S. Cts. 113.]

Circuit Court, D. Nebraska. May Term, 1870.

INDIANS — CRIMINAL JURISDICTION OF NATIONAL COURTS.

1. Indians, though belonging to a tribe which maintains the tribal organization, but occupying a reservation within the limits of a state, if there is no valid statute of congress or treaty to the contrary, are amenable to state laws for murder or other offenses against such laws committed by them off the reservation and within the limits of the state.

[Cited in State v. Doxtater, 47 Wis. 281, 2 N. W. 439.]

2. Query—whether the United States courts have jurisdiction, under such circumstances, of offenses committed by Indians upon the reservation?

3. The court in a capital case against Indians, though neither party asked it, and both demanded judgment, arrested judgment, on its own motion, for want of jurisdiction over the offense charged in the indictment; but, instead of at once ordering the discharge of the Indians, the court made a special order for turning them over to the state authorities.

4. The relations which Indians, residing within state limits, sustain to the state and the United States, and their respective laws, discussed, by Dillon, Circuit Judge.

[The defendants, four in number, and Indians, have been indicted in this court, charged with and convicted of the murder of one Edward McMurty, a white inhabitant of the state of Nebraska. They were tried before Mr. District Judge Dundy, sitting alone in this court, upon their plea of "Not guilty." Prior to the verdict, neither by demurrer, motion, plea, or otherwise, did the defendants make any objection to the jurisdiction of the court. After a verdict of guilty they made a motion for a new trial, and another in arrest of judgment. By the latter motion the question as to the jurisdiction of the court was for the first time presented. These motions were argued and submitted at the last regular term of the court, but before any decision thereof was made, the defendants asked, and the court

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

granted leave, to withdraw them. This was at the adjourned February term, 1870. Whereupon the district attorney, in behalf of the United States, moved for judgment upon the verdict. This motion is not resisted by the defendants, or the counsel who represents them.] [2]

Mr. Strickland, Dist. Atty., and Mr. Baldwin, for the motion.

Mr. Chase, for defendants.

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

DILLON, Circuit Judge. The present attitude of this case is not a little singular. The one party asks, and the other party, acting under the advice of skillful counsel, does not resist a judgment which is the highest human laws or a human tribunal can inflict. It is the court alone which hesitates and deliberates.

In explanation of the course which the counsel for the defendants have taken in withdrawing all questions as to the jurisdiction of the court, a reason has been given, which, for the honor of the people of the state, it is hoped can have no real foundation, viz.: that such is the strength of the tide of local feeling and prejudice against them and their Nation, that they prefer to take a sentence of death and trust to executive interposition, than to run the risk of illegal violence, if discharged from this court, or turned over to the authorities of the state. The court gladly avails itself of this occasion to express its conviction that fears of this character are groundless.

As the defendants have been duly indicted and convicted, it is the duty of the court to pass judgment against them, if it has jurisdiction of the crime charged in the indictment. Whether it has jurisdiction is the only question remaining to be decided. Notwithstanding the withdrawal of the motion in arrest, it is still the duty of the court, before pronouncing the sentence of death, to be satisfied that it has cognizance of the offense which it is proceeding to punish. No act that a court can be called on to perform is more grave and solemn than to render a capital judgment. To the performance of such a duty, a judge is only reconciled by the consideration that it is not he who does it, but the law, of which he is simply the minister. But if the law invests him in the particular case with no such power, he may well deliberate, and must refuse to exercise it. If the court has no jurisdiction, therefore, it is its duty, on its own motion, to stay judgment, although this question may not be made, or may be waived by counsel.

With these preliminary considerations, which seemed proper to be stated, we proceed to examine the question whether the courts of the United States have jurisdiction of the offense for which the defendants have been convicted.

The only allegations in the indictment made with a view to show the jurisdiction of the court are the following: "That the defendants are Indians belonging to the Pawnee tribe, which tribe are, and were, in charge of a United States Indian agent duly appointed by the United States, and were, and are, living upon an Indian reservation, known as the 'Pawnee Reservation,' within the state of Nebraska; that said defendants crossed the boundary line of said Indian reservation and entered into the county of Polk, in the state of Nebraska aforesaid, and then and there unlawfully," &c., did kill and murder by shooting, as particularly described in the indictment, one Edward McMurty, a white inhabitant of the said state. Thus, it appears from the express averments of the indictment, that the place where the offense was committed was within the body of the county of Polk, in the state of Nebraska, and not within the limits of the Indian reservation. The proof, in this respect, corresponds with the allegations. The offense is alleged, and was shown to have been committed on May 8, 1869, which was after Nebraska had been admitted into the Union, and her organization as a state was fully perfected and in operation. The question is, whether the offense thus committed is one of which the courts of the United States have cognizance, or whether it is alone cognizable by the courts of the state of Nebraska. Within the territorial limits of the state just named is a body of people known as the Pawnee tribe of Indians, to which the defendants belong. This region has for many years been their home; but their occupancy is now restricted to a "reservation" of limited extent. Here they reside in a body, maintaining their tribal organization, under the superintendency of agents appointed by the government of the United States. They are already in the midst of a white population, but do not enjoy any of the political, nor many of the civil rights of the latter. They do not vote, are not taxed, and under the decision of the supreme court of the United States their property is not taxable by the state authorities. The ordinary state laws relating to taxation, schools, marriage, divorce, administration of estates, and the like, are not extended to, observed by, or enforced among them. As respects all their internal concerns, they are governed and regulated by the laws and customs of the tribe.

The inquiry is neither uninteresting nor unimportant, as to which, whether the general government or the state, has legislative control over this people; and if both, whether the power is concurrent, and if not, where is the boundary line, marking where the control of the one ends, and where that of the other begins. This inquiry it is our duty to answer, so far as the record in this case requires it. It is necessary to examine into

[2] [From 1 Dill. 271.]

the acts of congress, relating to offenses committed by Indians, into the treaty stipulations of the United States with the Pawnees, and into the acts of congress respecting the powers and jurisdictions of the state of Nebraska. Nebraska was organized into a territory by the act of May 30, 1854 [10 Stat. 277], and by that act (sections 4, 37) the rights of Indians therein are preserved unimpaired, and the authority of the United States to make regulations respecting them, their property and other rights, by treaty, law, or otherwise, retained. The Pawnee tribe then, as now, resided within the limits of the territory thus created. On September 24, 1857, the Pawnees ceded by treaty of that date their lands in the territory of Nebraska to the United States, reserving, however, "out of this cession a tract of country thirty miles long from east to west, and fifteen miles wide from north to south." 11 Stat. 729. This is the reservation described in this indictment. The treaty provides that United States agents may reside on the reservation; that the government may build forts thereon; that the whites may open roads through it, but shall not reside thereon; that the Indians shall not alienate the lands, except to the United States; that all the offenders against the laws of the United States shall be delivered up, &c.; but it contains no stipulation as to the jurisdiction over it, or over the Indians residing thereon, when the territory shall be admitted as a state. On April 19, 1864 [13 Stat. 47], congress passed an act to enable the people of Nebraska to form a state constitution; in 1866 a state constitution was formed, and in 1867 [14 Stat. 391] congress passed an act for the admission of Nebraska, under its constitution, into the Union, "upon an equal footing with the original states, in all respects whatsoever."

There is no exception in the state constitution, or in either of these acts of congress, of the Pawnee reservation or the Pawnee Indians, from the territorial or civil jurisdiction of the state. So that we have before us the case of Indians maintaining the tribal organization, which is recognized in the treaty by the general government, but living upon a reservation which is now within the limits of the state, and respecting which, or the Indians occupying it, there are no special provisions granting or retaining jurisdiction in favor of the United States, or withdrawing the Indians from the jurisdiction of the state.

It will be observed that the present indictment is not for an offense committed by Indians against an inhabitant of the state upon the reservation, and hence we have no occasion to inquire whether for such offenses the courts of the United States or those of the state of Nebraska have jurisdiction; nor whether it would be competent for congress in such a case (the absence of any cession of jurisdiction by the state) to invest the national courts with cognizance thereof. See, on this point, U. S. v. Bailey [Case No. 14,495], and the case therein referred to against two Indians for the murder of Davis in the Cherokee country, within the limits of a state; U. S. v. Cisna [Id. 14,795]; U. S. v. Ward [Id. 16,639], opinion of Mr. Justice Miller; U. S. v. Stahl [Id. 16,373], opinion of Miller, J.; U. S. v. Rogers, 4 How. [45 U. S.] 567; U. S. v. Holliday, 3 Wall. [70 U. S.] 407. Compare Kansas Indians, 5 Wall. [72 U. S.] 737, and remarks of Davis, J., arguendo, page 755; New York Indians, Id. 761; Worcester v. Georgia, 6 Pet. [31 U. S.] 616; New York v. Dibble, 21 How. [62 U. S.] 366. As to state authority over Indians, see, also, Goodell v. Jackson, 20 Johns. 693, and constitutional provisions and act of April 12, 1822 (2 Rev. St. 881), there cited; Murray v. Wooden, 17 Wend. 531; Swan's St. Ohio 304; Rev. St. Mass. 148; Clay v. State, 4 Kan. 49; People v. Antonio, 27 Cal. 404; Hicks v. Ewhartonah, 21 Ark. 106; Id. 485; Peters' Case, 2 Johns. Cas. 344; [McCracken v. Todd, 1 Kan. 148].[3]

It will appear from these authorities and citations that New York, Ohio and other states have, at different times passed acts declaring that the civil and criminal jurisdiction of these states extended to Indians and to Indian reservations; and that such legislation has been considered valid when not in conflict with some treaty or constitutional act of congress. The locality or place where the homicide now in question is alleged to have been committed, is confessedly within the territorial limits of the state, and the deceased was an inhabitant of, or found within the state. It is settled that there are no common law offenses cognizable by the courts of the United States; that before these courts can take cognizance of an offense, it must be declared such by an act of congress; and that it is not competent for congress to enact a criminal code punishing offenses generally, but those only which relate to the general government, or which are committed by or upon citizens or inhabitants of the United States, upon the high seas, or within the national domain beyond the limits of any state, or in places over which congress has exclusive jurisdiction. The offense charged in the indictment is murder; and we now inquire whether there is any act of congress which confers, or undertakes to confer jurisdiction upon the national courts of a homicide committed under the circumstances of the one under consideration?

There are two statutes relating to murder, cognizable by the United States courts,—the statute of 1790 [1 Stat. 112] and that of 1825 [4 Stat. 115]. The former act provides that if any person shall "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States," commit the crime of willful murder, &c., he shall be punished, &c. The latter act declares

[3] [From 1 Dill. 271.]

"that if any person upon the high seas or any river, &c., within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state," shall commit willful murder, &c., he shall suffer death. It is scarcely necessary to remark that the case at bar falls within none of the provisions of either of these statutes. These do not undertake to punish murder generally, but only when committed on water out of the jurisdiction of any state, or upon land when committed at a place within the exclusive jurisdiction of the United States. If other provisions do not exist, it is evident that the court had no cognizance of the case made in the indictment.

We have been referred to the intercourse act of 1802 (2 Stat. 137, 143, §§ 14, 15), by which congress defined the "Indian country," and provided for the punishment by the United States courts of Indians who left the Indian country, and committed offenses in any state or territory. It must have escaped the attention of counsel, that this act, so far as it relates to Indian tribes west of the Mississippi, was repealed as long ago as June 30, 1834. 4 Stat. 729, § 29. As it will not be maintained that a prosecution can be supported under a repealed statute, we need give it no further attention.

The jurisdiction of the court is also sought to be sustained under the act of June 30, 1834, just cited. By section 1 of that statute it is enacted "that all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, shall be taken and deemed to be the Indian country." By a subsequent section, this Indian country is annexed, part to the judicial district of Arkansas, and the rest to the judicial district of Missouri. Section 25 is in these words: "So much of the laws of the United States as provide for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country: provided, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian." At the time this statute was enacted it applied to the locality where the offense in question was committed; but it ceased to be operative within the limits of Nebraska the moment when the latter was admitted into the Union as a state, upon an equal footing with the original states. This is the precise point decided by Mr. Justice Miller in United States v. Ward, supra, and it is quite unnecessary to enlarge upon it, or repeat the reasons by which the conclusion is supported. That was an indictment of a white man for the murder of a white man, committed on an Indian reservation, within the state of Kansas, and it was held that the national courts had no jurisdiction, and the opinion expressed that the state courts had.

In U. S. v. Bailey [Case No. 14,495] a case is referred to in the Tennessee district, where, in 1816, two Indians were indicted in the United States circuit court for the murder of a white man, on a reservation, in the Cherokee country, within the limits of the state, and it was decided that the United States court had no jurisdiction; and this decision in the Tennessee case, was the occasion of the passage of the act of 1817 (3 Stat. 383), which (after the decision of the Bailey Case) was repealed (4 Stat. 729, 734), whereby congress provided for the punishment in the national courts of offenses committed by Indians or others, upon Indian lands, within state limits. This decision referred to would preclude this court from taking jurisdiction in the case at bar, had the homicide been committed by the defendants within the limits of the reservation; but, as before remarked, the court has no occasion to give any opinion on this point. But if it could not take cognizance of offenses committed upon the reservation, it surely cannot of those committed beyond its limits. And it seems impossible to hold that this court has jurisdiction in this case without necessarily implying that the courts of the state have not; and if they have not, then we decide that the state of Nebraska has not the power to make her ordinary criminal statutes coextensive with the state limits, and enforce them against all persons living or found therein. Such a power we are not prepared to deny to the state, in the absence of some conflicting treaty stipulation or valid act of congress.

No statutes, other than those above noticed, have been referred to by counsel, as giving the court jurisdiction in the present case, and these we hold do not confer it. This conclusion is supported by many of the cases before cited, and is opposed to none of them. Of its correctness the court entertains no doubt. In view of the peculiar relations which the general government sustains to the Indian tribes, I think I ought to observe that I am not at present prepared to yield assent to the opinion which Mr. Justice McLean seems to have entertained in Bailey's Case, that congress had no power to pass the act of 1817 (3 Stat. 383); that is, congress could not, if it saw fit, make punishable in the national courts offenses committed by or against Indians upon reservations in state limits. And it might be worth the consideration of congress whether some such legislation would not be expedient.

But if it be conceded that under the power of peace and war, to make treaties, and to regulate commerce with Indian tribes (Worcester v. Georgia, 6 Pet. [31 U. S.] 515), congress could, in the absence of reserved right to do so, withdraw Indians living within the limits of a state entirely from state jurisdiction and the reach of its criminal laws and process for offenses against its citizens committed off a reservation, it would seem most improbable that such a power

would ever be exercised. We have seen that, in point of fact, congress has not undertaken to exercise it, and therefore this court, which can take cognizance only of offenses created by some act of congress, has no jurisdiction of the crime charged in the indictment.

The defendants must be discharged.

Under the circumstances of the case, the defendants having been convicted and entitled to be discharged only for want of jurisdiction, and following the course pursued in a similar case (U. S. v. Cisna [Case No. 14,795]), we deem it our duty to enter the following special order:

Ordered, that the district-attorney of the United States notify, without delay, the governor of this state, or the proper district-attorney, of this order: that the marshal retain the custody of the defendants, and safely keep them for the space of twenty days, within which time he will deliver them over to any authorized officer of the state, producing a writ for their arrest. If no such writ is presented within the time limited, he will discharge them from custody, or if they desire it, place them in the charge of the United States Indian agent or superintendent for the tribe to which they belong.

NOTE [from 1 Dill. 271]. Jurisdiction of federal courts over Indians within state limits: Cited, Karrahoo v. Adams [Case No. 7,614]; U. S. v. Bridleman, 7 Fed. 897; U. S. v. Martin, 14 Fed. 823; Ex parte Sloan [Case No. 12,944]; Danzell v. Webquish, 108 Mass. 134.

Case No. 16,213.

UNITED STATES v. SALENTINE.

[8 Biss. 404;[1] 11 Chi. Leg. News, 167.]

District Court, E. D. Wisconsin. Jan., 1879.

NEW TRIAL—MISCONDUCT OF JUROR.

1. A new trial will not be granted on the ground of misconduct of a juror, when it appears that the party asking for such new trial participated in and was a party to such misconduct.

[Cited in Harrington v. Worcester, L. & S. St. Ry. Co., 157 Mass. 583, 32 N. E. 957.]

2. The defendant was tried for manufacturing illicit spirits. During the progress of the trial one of the jurors, contrary to express instructions of the court, which were known to the defendant, visited the rectifying house of the latter, and was by him shown through it. Nothing was said concerning such misconduct on the part of the juror until after the close of the trial. The verdict being against the defendant, a motion was made for a new trial because of the misconduct of the juror: *Held*, that under the circumstances, the motion must be overruled.

3. Discussion of cases, where new trial has been granted for misconduct of jury.

The defendant [Christian Salentine] having been convicted of violation of certain provisions of the internal revenue law, a motion for new trial was made on the ground of misconduct of one of the jurors.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

G. W. Hazleton, U. S. Dist. Atty.

Murphey & Goodwin, for defendant.

DYER, District Judge. The question bearing upon the right of the defendant to a new trial arises upon the misconduct of one of the jurors while the trial of the cause was in progress. At the beginning of the trial the jury were cautioned against having any conversation with any person about the case, and against allowing any person to approach them for the purpose of having such conversation, and against permitting any conversation relating to the case to be had in their presence. The admonition was pointedly given and must have been well understood by the jury and by all parties present. At a subsequent stage of the case the defendant, through his counsel, made application for an order granting to the jury leave to visit and examine his rectifying house, where it was alleged illicit spirits had been manufactured. His application was denied, and the denial was accompanied with observations on the part of the court, which must have given the jury and all parties interested distinctly to understand that the case was to be heard and determined upon the evidence adduced in court, and that no other sources of knowledge or information were to be consulted. Nevertheless, before the conclusion of the trial, one of the jurors, without the knowledge or leave of the court, visited the rectifying house and made extensive examinations of the same in company with the defendant. The circumstance was first brought to the knowledge of the court after verdict, by affidavits of the facts made by the defendant and certain of his witnesses. Proceedings were at once taken for an investigation of the conduct of the juror, which resulted in the imposition of such punishment as the court at the time thought his misconduct warranted. This act of the offending juror has been earnestly urged as ground for a new trial.

Invoking, as counsel did in support of their view, the rule which limits the inquiry of a juror in the case he is called to hear to the evidence adduced at the trial, unless otherwise ordered by the court, and also those general principles regulating jury trials which are essential to a pure and impartial administration of justice, and impressing also upon the attention of the court the circumstance that there had been such transgression by the juror as merited, and made it the duty of the court to impose, suitable censure and punishment, my mind was at the time strongly impressed by the argument which counsel for defendant made upon this branch of the case. In testing its soundness as applicable to the case at bar, it seems essential that we look closely into the particular circumstances and facts connected with the admitted misconduct of the juror.

The material portions of the affidavit made by the defendant and presented to the court as the basis for proceedings against the juror, are as follows: "That on the 16th day of April, A. D. 1878, at or about the hour of one p. m. of said day, said Horace De Long, juryman as aforesaid, came to the rectifying house of M. J. Salentine, No. 227 Reed street, in said city, which is the rectifying house spoken of in the testimony introduced in the trial of said action, and which contains the tubs and still where the illicit distillation of spirits is alleged to have been carried on; that I saw the said De Long inside of the said rectifying house when I came to the place at said time; he then stated that he had come into the establishment to look over the same and see how things were, or words substantially and to that effect. He then asked me where the barrel of wine was lying that had been spoken of in the evidence during the trial, and I showed him the place; he asked me what the big tubs were for which stood in the rectifying house, meaning the receivers; he then said, in substance, that he wanted to go into the still and see where the mash was alleged to have been made; he then went into the still room; he looked at the dumping holes leading through the still room floor into the tubs, and said: 'That is the place where they said you made your mash,' and I said 'Yes;' he then looked at the still and the other tubs in the still room. * * * Said De Long then went into the stable connected with said premises, and asked me where the place was where the jug of liquor was hid; then the said juryman, saying that he wanted to see the place where the molasses was laid, went to the rear of the store on Virginia street, where it was proven that the molasses was stored; he looked into said store room and examined the side walls in front, and remarked that it was a poor hiding place. The said juryman then returned, as I remember, into the still, and from there the said juryman went up stairs and looked about upon the second and third floor of said establishment; he examined the iron basket of the still spoken of in testimony, and also the top of the column in the still; he and I then went back into the store."

The affidavit of the juror, made in the proceeding against him for contempt, varies in some particulars from that of the defendant, but it is in substance an admission of the alleged misconduct, and shows that the defendant participated with him in the examination of the premises, and pointed out to him various places and objects in the rectifying house referred to in the testimony. For the purposes of the pending question of a new trial, we may accept the affidavit of the defendant as giving a truthful statement of the occurrence.

The facts then being as stated by the defendant, the question is, do they entitle him to a new trial? That the rule touching the effect of misconduct of a juror upon a verdict is a strict one, cannot be denied. That it is also a salutary rule, and one to be faithfully observed as essential to the purity of jury trials, must without hesitation be admitted. The books are full of cases where the rule has been enforced. And, although there is some disagreement in the authorities on the point, I think the weight of authority is, that it is not necessary in order to justify the court in setting aside a verdict for irregular conduct of a juror, to show affirmatively that such conduct influenced the jury or affected the verdict. The misconduct of a juror, if it occurs without the knowledge or participation of the party litigant, taints the verdict; that is, provided it was of such a character that it might have had an undue influence. Says Judge Clifford in Johnson v. Root [Case No. 7,409]: "Irregularity on the part of the party charged or of the jury, must be satisfactorily proved in order to lay a foundation for the interposition of the court, but when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case it is sufficient that the irregularity appears to be of a character that it might have affected the impartiality of the proceedings." Such was the rule laid down in Com. v. Roby, 12 Pick. 520, and it appears to be correct. In that case the court says that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshments have been furnished by the party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves or have had communications not authorized, inasmuch as there cannot be any certainty that they have not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what has thus been improperly and might have been corruptly done. Text writers have stated the rule as follows: "That whenever it seems satisfactorily to appear that the jury were influenced by improper motives, or that they acted corruptly or under restraint, and it clearly appears that a fair trial has not been had, the verdict will be set aside and a new trial granted. Any improper interference with the jurors may afford sufficient grounds for granting such a motion, and it is not necessary that the attempt to influence the jurors should be made by one of the parties, nor even by his agents. It is sufficient, if it clearly appear that it was done in his behalf, and it is never necessary to show that the misconduct controlled or determined the verdict, provided it was of a character that it might have had an undue influence." In Knight v. Inhabitants of Freeport, 13 Mass. 218, the plaintiff's son-in-law said to one of the jurors that the cause was of great conse-

quence to him; that he should have to pay the costs if the cause should go against the plaintiff, and that the defense of the action was a spiteful thing on the part of the defendants. On motion of defendants a new trial was granted, the court remarking that "too much care and precaution cannot be used to preserve the purity of jury trials. The attempt to influence the juror in this case was grossly improper, and ought to be discountenanced. It is not necessary to show that the mind of the juror thus tampered with was influenced by the attempt. Perhaps it is not in his power to say whether he was influenced or not. If he was, there is sufficient cause to set aside the verdict, and if he was not, and the party who has gained the verdict has a good cause, he will still be entitled to a verdict upon another trial. We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes, and every one ought to know that for any, even the least intermeddling with jurors, the verdict will always be set aside."

As illustrative of the extent to which the courts go in setting aside verdicts for improper attempts to influence jurors, the following cases are in point: Hamilton v. Pease, 38 Conn. 115; Perkins v. Knight, 2 N. H. 474; Bennett v. Howard, 3 Day, 223. See, also, Sargent v. Roberts, 1 Pick. 337; Dana v. Roberts, 1 Root, 134; Farrer v. Ohio, 2 Ohio St. 54; Riley v. State, 9 Humph. 646; Foster v. Brooks, 6 Ga. 287; State v. Andrews, 29 Conn. 100, and many other cases which might be cited.

In this connection it may be observed that in McIlvaine v. Wilkins, 12 N. H. 474, the court, in discussing this subject, say, that "scattered throughout the reports there are far more cases than there should be of applications for new trials, founded upon evidence tending to show sometimes attempts by a party to prejudice a jury in his favor, and sometimes conduct in jurymen indicative of a forgetfulness of the important responsibilities resting upon them." And Mr. Hilliard says in his work on New Trials (Hil. New Trials, c. 10, § 11) that the weight of authority would seem now to be that conversation with jurymen, more especially, unless held when they are together, is not ground for a new trial; citing Davis v. Taylor, 2 Chit. 268; Parke's Case, 2 Rolle, 85; Hall's Case, 6 Leigh, 615; Luster v. State, 11 Humph. 169; Rowe v. State, Id. 491. Visiting the scene of the res gestæ by jurors, without permission of the court, and with a view to obtain information touching the facts of the case on trial, or for explanation of testimony, is ground for a new trial. Such, in effect, was the ruling in Eastwood v. People, 3 Park. Cr. R. 25; Ruloff v. People, 18 N. Y. 179; and Deacon v. Shreve, 22 N. J. Law, 176.

In the light of the authorities to which I have referred, and many others to which reference might be made, if it appeared in the case at bar that the juror held conversations with other parties than the defendant about the merits of the case while the trial was in progress, or visited the defendant's rectifying house for the purpose of examining the same, without defendant's knowledge or cooperation, I should have little hesitation in setting aside this verdict. The question now is, is the defendant in a position to invoke the application of the rule which gives to a party, presumably prejudiced by the misconduct of a juror, the benefit of a new trial. He had knowledge of the refusal of the court to permit the jury to visit the premises. Yet, finding the juror there while the trial was in progress, he conducted him over the premises, and, as appears by his own sworn statement, pointed out localities and objects concerning which testimony had been given. He knew that the court had forbidden the jury to have conversations with persons concerning the case, yet, according to his own affidavit, he held such conversation with the juror while accompanying him through the rectifying house. In view of what had transpired in court in his presence, and in view of the statement in his affidavit that the juror told him that he did not want any one to know he had been at the rectifying house, it is to my mind clear that the defendant knew that the conduct of the juror was a violation of his duty, and was in disregard of the orders of the court. Yet he made no report of the transaction to the court, nor even to his counsel, but sat silent and permitted the trial to proceed without complaint until after verdict when he makes complaint in the form of a motion for a new trial, on the ground that he was prejudiced by the misconduct of the juror, in which he participated, and to which he was a party.

I have examined with care all the cases cited by counsel, and many more bearing upon this question, and I have been unable to find a case in which a new trial was granted for misconduct of a juror, in which the party asking for a new trial participated. The cases in which such misconduct was held ground for a new trial were, so far as my observation extends, where the misconduct was between the juror and a third party, or between the juror and the successful party in the litigation, and of which the losing party was at the time ignorant, and with which he was in no manner connected. Now, although "the utmost precaution should be observed to prevent any attempt to forestall the judgment or to bias the mind of a juror in reference to the merits of an issue which he is called on to decide," and although "all trials by jury ought to be effectually guarded against the exertion of every species of improper influence," the question is, whether, when a defendant makes himself a party to the miscon-

duct of a juror, he can sit silent until verdict rendered, and then if the verdict shall be against him, can be heard to urge such misconduct as a ground for setting aside the verdict. As, for example, suppose a juror communicates a willingness to accept a bribe, and the party pays him a bribe, and the bribe proves ineffectual, and there is an adverse verdict, can the party who has thus dealt with the juror ask for the benefit of a new trial, basing his application upon the corrupt act of the juror? As I understand the rule upon this subject, it is enforced for the benefit and protection of those who are themselves innocent of any participation in the misconduct complained of. It is true that in the present case the juror's visit to these premises was not brought about, nor originally induced, by any act of the defendant. The juror was there of his own volition, and was there when the defendant first met him; but the defendant at once lent his encouragement and co-operation to the act of the juror, and, as I have said, accompanied him over the premises, pointed out different objects upon the premises to which the testimony on the trial related, and conversed with him about particular parts of the establishment which they were then mutually observing. Clearly, both parties—the juror and the defendant—were equally in flagrante delicto. For this offense against the proprieties of judicial investigation, punishment has been inflicted upon one; and now to grant a new trial because of such offense, would be to reward the other, when both are alike culpable. For I cannot but regard both as alike at fault, since the defendant, finding the juror on the premises, actively aided and facilitated him in his examination of the scene of the res gestæ. It is impossible for me to believe that the defendant supposed that the juror had a right at that time to visit and examine the establishment, and his subsequent silence touching the occurrence until after the verdict, looks strongly like a purpose, originally, not to divulge the circumstance unless the verdict should be unfavorable. By his own course of action as a participant in the misconduct of the juror, I think he has foreclosed his right to ask that the verdict be set aside because of such misconduct. No other conclusion is, in my judgment, reconcilable with a regular and proper administration of the law, and I find no authority that supports a contrary determination in such a state of the case.

Motion for a new trial denied.

NOTE. The test of prejudice to a party from misbehavior of a juror is this: Was his misbehavior such as to make it probable that his mind was influenced so as to render him an unfair and prejudiced juror? If the misbehavior appear, the disclaimer of the juror should be wholly disregarded. And it is of no importance whether or not the court thinks the verdict was right. Pool v. Railroad Co., 6 Fed. 844.

Case No. 16,214.

UNITED STATES v. SALISBURY.

[2 N. Y. Leg. Obs. 53.]

Circuit Court, S. D. New York. 1843.

SEAMEN SENT HOME BY CONSUL — SERVICES ON PASSAGE—ASSAULT WITH DANGEROUS WEAPON.

1. Where a distressed American seaman was sent home on board of an American vessel by the consul from a foreign country: *Held*, that he was bound to do duty as a seaman when called upon by the mate, although his passage had been paid by the American consul.

2. The mate had a right to order such seaman to do duty, unless directed to the contrary by the master of the vessel.

3. If such seaman was unable to do duty, the onus probandi lay upon the seaman to show his inability when called upon to do duty.

4. A prisoner indicted for an assault with a dangerous weapon on another, on the high seas on board of an American vessel, under the act of March 3, 1825, § 22 [4 Stat. 121], would be guilty of the offence charged if he could have reached the person intended to be assaulted by extending his arm so as to inflict a blow, although no blow was actually given.

5. The person who flourishes or points a deadly weapon at another, intending personal harm, is guilty of an assault within the act of congress, although no battery had been committed.

6. The pointing of loaded fire-arms with an intent to commit injury, is an assault, although the parties stand at a great distance, provided the distance is such that personal injury may be inflicted by the discharge of such fire-arms.

The prisoner was indicted under the act of congress passed March 3, 1825 (section 22), for an assault with a dangerous weapon, to wit: a knife of the length of 12 inches, and of the breadth of 2 inches, done and committed upon the mate of the American packet ship called the "Mediator," on a voyage upon the high seas from the port of London, in the kingdom of Great Britain, to the port of New York. The act in substance declares, that if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging to the whole or in part to the United States, or any citizen or citizens thereof, shall, with a dangerous weapon, commit an assault on another, such person shall on conviction thereof, be punished by fine not exceeding $3,000, and by imprisonment and confinement to hard labor not exceeding 3 years, according to the aggravation of the offence.

It appeared in evidence that the prisoner was a distressed seaman and consular man, sent home by the American consul at London to the United States. The act gives the consul the right and makes it his duty to send home American seamen who are destitute and found in a foreign country. See the act of congress passed February 28, 1803, § 3 [2 Stat. 203]. And it is also made the duty of the seamen so sent home, to perform such service on board of the vessels bringing them

to the United States, as they shall be able to perform according to their several abilities. And by the same act the masters of vessels are to receive a sum not exceeding $10 for each person so sent home by the consuls, vice-consuls, commercial agents, and vice-commercial agents of the United States. In this case, two or three days after the Mediator had left London, while on her voyage, the 2d mate, while forward, ordered the prisoner to take up a knife and scrape off the tar from some of the buckets belonging to the ship. The prisoner had not thus far been put on duty, but he had lived in the forecastle, and was sitting down at his ease on the spar on the deck of the vessel, smoking his pipe, when the order was given. The prisoner was directed to proceed aft, man the hatchways, and do the duty. He got up reluctantly; indeed, one witness testified that he refused to do the duty pointed out to him. The 2d mate then seized him by the neck, and gave him a strong shove forward. He appeared to have pushed the prisoner about three or four feet from him. The prisoner then drew his knife and turned to the mate, threatened to stab him, and told him he would do so if he did not let him alone. One of the crew then took up a hand-spike, and threatened to knock down the prisoner if he did not go aft and perform the duty; whereupon the man retreated aft. The witness called for the government was here cross-examined by the prisoner's counsel. He stated that when the prisoner drew the knife, and threatened to stab the mate, he was about three or four feet from him; that he flourished his knife, and told him he would cut him open if he approached him.

The counsel for the prisoner and the United States respectively summed up to the jury.

The counsel for the prisoner submitted that the mate was the aggressor. That he had no right to call upon the prisoner to do duty in the manner he did, unless by the order of the captain. That the mate had assumed to put the man on duty without the captain's orders, and the prisoner in such a case was not bound to obey. The counsel also urged, that it had not been shown that the man was able to do duty, within the meaning of the act of congress. That the prisoner, although he had drawn his knife and flourished it at the mate, yet he was not guilty of having committed an assault upon the mate, within the meaning of the act of congress. That in order to bring the prisoner within the act, he must first have been within reaching distance of the mate, so as to have inflicted the blow upon him if he designed it. That the assault, if committed within reaching distance, must have been made in such a manner as that the jury would be bound to infer circumstances of force and harm, in respect to the mate or the person assaulted. There should be such acts of violence, or such threats, menaces, signs or gestures, as might give ground to the person assaulted to apprehend some injury or danger of his person while standing in the defence of himself. In this case the mate had shoved the prisoner, and the fair inference was that he had shoved him beyond the reach of the knife, when the prisoner turned upon the mate, and it then became optional with the mate whether he would come to closer quarters or not. He certainly was not bound to do so, and that therefore the prisoner was entitled to an acquittal.

The district attorney, for the United States, contended that the prisoner clearly had been guilty of an assault with a dangerous weapon; that he was bound to have done duty when called upon by the mate; that the prisoner should have proved on trial his inability to have done the duty required of him, if that was his excuse.

A. Nash, for prisoner.

The District Attorney, for the United States.

THE COURT thereupon charged the jury that distressed American seamen, who are sent home, are bound by law to render what assistance they can in the ship's service, while on their passage, and this, although their passage is paid by the United States. That in the present case, the order of the mate appeared to have been a proper one, and the mate had the right to call on the prisoner to do duty on shipboard, unless the captain had ordered to the contrary. That in case the prisoner refused to do duty, the officer had the right to remove or send him aft in a mild manner. That the pushing in this case did not appear to have gone beyond the line of duty on the part of the mate. The court said that they would not undertake to lay down any definite rule how near the parties must be to each other, to enable one of them to commit an assault upon the other, within the meaning of the act of congress; and with a dangerous weapon, no battery need be proved to have been committed; the assault alone was sufficient; that if the parties stood 20 feet apart, the prisoner could not have been guilty of an assault in this case, but had he held a loaded pistol or gun, and pointed it at the mate in a threatening attitude and manner, he would have been guilty of an assault within the act, even had the parties stood at a great distance, so long as the distance was such that execution or harm might arise to the mate from the discharge of the fire-arms. He said that, in the present case, the mate had sworn that the prisoner was three or four feet from him; that is, he had shoved the man forward three or four feet when he took him by the collar. The prisoner had committed no battery upon the mate, but if the prisoner was so near the mate as to have been able to have inflicted a blow upon the mate with his knife, had he so intended by extending his arm the length of it, he was clearly guilty in law of

the assault, and ought to be convicted; but should the jury be of the opinion, that the prisoner stood at such a distance from the mate when he drew his knife and flourished it, that he could not have possibly reached him, the prisoner was not guilty in law of the offence charged in the indictment.

The jury thereupon retired, and returned a verdict of not guilty.

Case No. 16,215.

UNITED STATES v. SALLY.

[Cited in Re Crittenden, Case No. 3,393. Nowhere reported; opinion not now accessible.]

Case No. 16,216.

UNITED STATES v. The SALLY MAGEE.

[4 Int. Rev. Rec. 134.]

District Court, S. D. New York. Oct., 1866.

PRIZE—LIEN FOR SEAMEN'S WAGES.

[Seamen on board a prize captured and condemned as enemy property have no lien for wages, as against the title of the United States and the rights of the captors.]

In admiralty.

BETTS, District Judge. The above vessel was seized on the high seas in July, 1861, by a ship of war of the United States, at a time of public war between the United States and the rebel states or Confederate States; and in the term of August following, the said vessel and her cargo were proceeded against in this court, by public prosecution, and a decree of condemnation and forfeiture of the vessel and her cargo, as prize of war, was rendered by the court therein, on the first day of the said term of August. [Cases Nos. 12,259 and 12,260.] On the 10th day of August, 1863, the claimants appealed the said cause to the supreme court of the United States, and that court in December term, last past, affirmed the decree of this court in the original cause in all respects. [3 Wall. (70 U. S.) 451.] On the 6th of October last the officers and crew of the aforesaid prize vessel filed their joint petition in this court, alleging they were "loyal officers of the United States at the time they were employed on board of and in the service of said bark, and so continued to the time of her capture in this cause: that they were not knowingly and willingly employed on board the said vessel in hostility to the United States, and that they are advised, and believe, they have an interest in, and lien upon, said bark, her tackle, apparel, furniture and cargo, or the proceeds of the sale thereof, as a security for the wages due to them, respectively, as aforesaid, and the said liens are prior to the claims of the libelants."

No lien for, or priority of right of payment of wages to the crew of the bark in this case, for their services upon the vessel, was imparted to them by the contract of hiring, or accrued by implication therefor. The Sally Magee, 3 Wall. [70 U. S.] 451; 13 Stat. 306, § 10. The ship and cargo were both enemy's property, and the legal title and interest therein was vested exclusively in the United States, on their seizure as prize in this action, and then passed, absolutely, by force of the prize act, above cited, to the captors. The owners of the ship, after she became enemy's property, could authorize no lien or disposal of the vessel or cargo in derogation of the higher and older title of the captors of her as prize of war, and the crew of her, equally with all outside creditors, must resort to and rely alone upon the individual responsibility of their particular debtors. Upton, Mar. Law (2d Ed.) 153, 158. The petitioners accordingly have no right, of course, against the property for the recovery of their wages, seized at sea and condemned as lawful prize of war, and in no way legally exonerated from liability to such seizure.

The act of congress of March 3, 1863 (12 Stat. 762), protecting certain liens upon vessels during the war, does not extend to cases of the class embraced in the present cause. The Sally Magee [supra]. Accordingly there is no statutory law authorizing the lien claimed by the petitioners. Petition denied.

[See, also, Case No. 12,261.]

UNITED STATES v. SALMON. See Case No. 14,820.

Case No. 16,216a.

UNITED STATES v. SAMPERYAC et al.

[Hempst. 118.] [1]

Superior Court, Territory of Arkansas. Feb., 1831.[2]

EQUITY — FEIGNED ISSUES — BILL OF REVIEW — PLEADING — FRAUD — ADMISSIONS — DECREE PRO CONFESSO — ASSIGNABILITY OF DECREES — CONVEYANCE—INNOCENT PURCHASERS.

1. It rests in the sound discretion of the chancellor to award a feigned issue, or not; and it is done to enable him to obtain additional facts, and to arrive at a satisfactory conclusion on the facts of the case.

2. The verdict of the jury on a feigned issue is not conclusive, for the chancellor may have tried again and again, and may even decree against a verdict.

3. Where there is sufficient proof to enable the chancellor to decide, the parties should not be subjected to the delay and expense of a trial at law.

4. The act of May 26, 1824 (4 Stat. 52), confers on this court the powers of a court of chancery, for the purpose of trying the validity of claims mentioned in that act, and a bill of review may be maintained therein.

5. A bill of review lies either for error in law, appearing on the face of the decree, or for new material matter, that has come to light afterwards, and which could not have been used at the time the decree was made.

[1] [Reported by Samuel H. Hempstead, Esq.]

[2] [Affirmed in 7 Pet. (32 U. S.) 222.]

6. The bill must be founded on new matter to prove what was before in issue, for a party cannot be entitled to a bill of review on new matter, to prove a title which was not in issue.

7. Where a fraudulent claim was set up, and sustained by false testimony, the decree may be reversed and annulled, on a bill of review, and no rights can be acquired under such former decree.

8. When the allegations of a bill are distinct and positive, they are taken as true, without proof, after a decree pro confesso; which, in its effect, is like a judgment by nil dicit at law.

9. But where the allegations are so defective or vague, that a precise decree cannot be rendered upon them, proof must necessarily be adduced before a decree can be made.

10. A refusal to deny, where a party is legally bound to speak, is equivalent to an admission of the charges against him. What is admitted need not be proved.

11. The general denial of allegations, by one uninformed as to their truth, will not be sufficient to dissolve an injunction.

12. A bill of review will be barred by the lapse of a reasonable time, after discovery of the new matter; but what shall be considered reasonable time, depends upon the sound discretion of the chancellor, under all the circumstances of the case.

13. Fraud, deduced from circumstances, may be sufficient to outweigh positive proof to the contrary.

14. Startling frauds and forgeries proved and commented on.

15. Judgments and decrees are not assignable at law, so as to vest the legal title in the assignee, and the latter takes only an equitable interest, which is subject to every equity and charge which attached to them in the hands of the assignor.

16. A purchaser for a valuable consideration, without notice, must be clothed with the legal title, and not a mere equity, in order to protect himself.

17. No one can occupy the attitude of an innocent purchaser, under a forged claim and conveyance.

18. Construction of the act of congress of the 8th May, 1830 (4 Stat. 399), and *held* not to require the observance of all the technical rules in the ordinary course of chancery practice on a bill of review, under that act.

19. Almost every law providing a new remedy, affects causes of action existing at the time the law is passed; but such a law is not for that reason invalid.

[Cited in brief in Rich v. Flanders, 39 N. H. 365.]

20. It is incontestable, that a grantee can convey no better title than he possesses, and hence, those who come in under a void grant acquire nothing.

Bill of review in chancery. Bernardo Samperyac, under the act of congress of the 26th of May, 1824 (7 Laws U. S. 300 [4 Stat. 52]), entitled "An act enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims," by R. C. Oden, his solicitor, filed his bill against the United States, in the office of the clerk of the superior court of the territory of Arkansas, on the 21st of November, 1827; stating that he, an inhabitant of the province of Louisiana, on the 6th of October, 1789, addressed a petition to the governor of the said province and its dependencies, asking a grant of land in full property, on Strawberry river in Arkansas district, containing ten arpens in front by the usual depth; that on the 11th of October, 1789, Miro, the governor of the province of Louisiana, made the grant as requested, and at the same time issued an order of survey to the surveyor-general of the province, to the end that the boundaries of the grant might be defined for the purpose of making a title in form; that this grant was secured by the treaty between the United States and France of the 30th of April, 1803, and would have been perfected into a perfect title under the government under which it originated, had there been no change of sovereignty; and the bill prayed the court to confirm the said grant, according to the provisions of the act of congress before mentioned, and that process be issued against the attorney of the United States for the territory of Arkansas, to appear and answer the bill.

The petition of Samperyac, and the order of survey, in the Spanish language, attached to the bill as exhibits, translated by James H. Lucas, the sworn interpreter and translator of the court, were as follows, namely:—

Petition: "To the Governor of the Province of Louisiana and Its Dependencies, &c., &c. Bernardo Samperyac, wishing to establish himself on Strawberry river in the Arkansas district, prays that you will do him the favor to grant him ten arpens of land in front by the usual depth, being the lands of his Catholic majesty, and not causing any prejudice; a favor your petitioner hopes to receive from your bounty; and he will ever pray to God for your health. Bernardo Samperyac. New Orleans, 6th Oct., 1789."

Order of Survey: "New Orleans, 11th Oct., 1789. The surveyor of this province, Don Charles Trudeau, will establish this tract, on the ten arpens of land requested, by the usual depth, and will mention the bounds, in order that they may appear at the time that the boundaries have to be defined, for the purpose of making a title in form. Miro."

Process having been executed on Samuel C. Roane, district attorney, on the 24th of November, 1827, he filed an answer in behalf of the United States, denying the facts and allegations in the bill, and alleging that grants could only be made legally to persons actually residing in the province of Louisiana; that Samperyac, in whose name the bill was filed, was a fictitious person without actual existence; or that if he ever existed he was a foreigner, or then dead, and made no transfer, or assignment, of the claim in his lifetime; that he had no legal representative in existence; that there was no one now living, who was authorized to file this bill or prosecute this suit, and prayed that the bill might be dismissed. On the 19th of December, 1827, the district attorney moved to continue

the cause until the next term, principally on the ground that there were many cases pending in the court, similar in all respects, and involving the same principles, and with regard to which the United States desired to procure evidence if any existed. The court denied the motion, and the district attorney excepted, and the court signed and sealed his bill of exceptions.

The testimony in behalf of the complainants was the exhibits to the bill already referred to, and the deposition of John Hebrard, of the parish of Ouchita and state of Louisiana, taken in open court on the 19th of December, 1827. He testified that he was about seventy-one years old; that he was alcalde in the province of Louisiana, under the Spanish government, from 1789 to 1791, under the appointment of Miro, governor of said province; that he was commandant in Catahoola from 1797, under the appointment of Manuel Gayoso De Lemos, governor of said province, until the country was transferred to the United States; that he was often in the executive offices of those governors during their administration; had often seen them write, and from his official situation had occasion for a continual correspondence with each of them during the times they were respectively governors of said province, and that he was well acquainted with their handwriting; that he had examined the signature to the grant in this case, and found it to be in the proper handwriting of Miro, governor of said province at that time. He further testified, that the grant in this case was in the most usual form and mode of granting lands by the said governors, and would have been perfected into a title in form under the Spanish government; that lands thus granted were considered and treated by the government and the grantee as established titles, and were to be surveyed or not as the grantee chose; that a concession or order of survey, calling for lands fronting on watercourses, were to be run off, when surveyed, as follows: commencing from forty to sixty feet back from the highest high land, after passing all overflowed land if any in front, and the grantees were authorized to locate the grant on entirely good, arable land, so as neither to include inundated nor barren land, unless they chose to do so. He further testified, that the command of Arkansas commenced on the Mississippi river, at a place called Little Prairie, about forty miles below New Madrid, and fronted on the Mississippi down to Grand Point Coupee, now called Lake Providence, in Ouchita parish, state of Louisiana, and extended back west so as to include all the waters which emptied into the Mississippi from the west, between those points. He stated, on cross-examination, that he knew Bernardo Samperyac; that he resided in the province of Louisiana at the date of the order of survey, 11th October, 1789, and was then living on Red river in Natchitoches parish, Louisiana; that in granting lands to individuals, the consideration frequently was for services rendered the government, but more frequently to induce population; that any man from any quarter could and generally did obtain concessions and orders of survey; that the Spanish governors kept records of grants, but that the destruction of the offices at New Orleans by fire, in 1792 or 1793, destroyed the greater part of the records, and that a great many more were said to have been purloined and taken off, about the change of government by officers who had been attached to the Spanish executive offices; that, as to granting lands, the governors-general of Louisiana were limited as to jurisdiction and quantity. They were authorized and empowered by the laws, usages, and customs of the Spanish government to grant lands not exceeding one league square, in the province of Louisiana, which commenced at the mouth of the Mississippi river, and extended back so as to include all Upper and Lower Louisiana.

On the same day, the 19th December, 1827, the superior court, held by Benjamin Johnson and William Trimble, judges, on the foregoing testimony, decreed the confirmation of the said grant to Bernardo Samperyac, as for four hundred arpens of land, and the decree was recorded, and no appeal taken from it by the United States within one year. One hundred and thirty other cases before the same court, against the United States, in the names of different claimants, were confirmed for four hundred arpens of land each, on the same testimony, and decrees entered and recorded, and from which no appeals were taken. On the 14th of February, 1828, Samperyac transferred his claim by deed to John J. Bowie; and in December, 1828, Joseph Stewart, it was admitted on the part of the United States, purchased the claim from John J. Bowie by deed, for a valuable consideration, and in good faith; by virtue of which purchase, Stewart entered at the Little Rock land-office, on the 13th of December, 1828, the north-east quarter of seventeen, the east half of south-east quarter of seventeen, and the west half of north-east quarter of thirteen; all in township eleven south, of range twenty-six west, containing 320 acres, relinquishing the overplus of twenty acres; and obtained the certificate of entry of Bernard Smith, the register thereof. On the 10th of April, 1830, the United States, by Samuel C. Roane, their attorney for the territory of Arkansas, filed in the superior court, by leave thereof, their bill of review against Bernardo Samperyac, setting out the proceedings in the foregoing case, and alleging that the original decree was obtained by fraud and surprise; that the petition and order of survey were forged; that Hebrard, the witness in the cause, committed the crime of perjury; that the order of survey was never signed by Miro, governor of Louisiana, as it purported to have been, and that this fact had come to the

knowledge of the said district attorney since the decree was entered; that Samperyac was a fictitious person, and never had existence; that the district attorney had discovered new and important record evidence, of the existence of which he was not aware, and which was not within his control at the hearing of the cause, and which could be procured, if a rehearing was allowed; and praying that said decree and proceedings might be reviewed and reversed and annulled. Bills of review were filed in each of the other cases, at the same time setting forth the same facts.

On the 8th of May, 1830 [4 Stat. 399], congress passed an act entitled "An act for further extending the powers of the judges of the superior court of the territory of Arkansas, under the act of the 26th day of May, 1824, and for other purposes," continuing in force that act so far as it related to claims within the territory of Arkansas until the 1st of July, 1831, "for the purpose of enabling the court in Arkansas having cognizance of claims under the said act to proceed by bills of review filed, or to be filed, in the said court on the part of the United States, for the purpose of revising all or any of the decrees of the said court in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed in any case on any forged warrant, concession, grant, order of survey, or other evidence of title; and in every case wherein it shall appear to the said court, on the prosecution of any such bill of review, that such warrant, concession, grant, order of survey, or other evidence of title, is a forgery, it shall be lawful, and the said court is hereby authorized to proceed, by further order and decree, to reverse and annul any prior decree or adjudication upon such claim; and thereupon such prior decree or adjudication shall be deemed and held in all places whatever to be null and void, to all intents and purposes. And the said court shall proceed on such bills of review by such rules of practice and regulations as they may adopt for the execution of the powers vested or confirmed in them by this act." 8 Laws U. S. 297, 298.

Samperyac was proceeded against as an absent defendant, after the return of the process that "he was not to be found in the territory of Arkansas." On the 28th of October, 1830, Joseph Stewart was permitted to file his answer, and become a defendant, which was excepted to on the part of the United States, and a bill of exceptions signed and sealed by the court. On the same day, a decree pro confesso was entered against Bernardo Samperyac, he having failed to appear and answer the bill. The answer of Stewart denied the frauds and forgeries alleged in the bill, and averred that if there was any fraud, corruption, or forgery, he was ignorant of it, and that he bonâ fide purchased the claim, for a valuable consideration, from John J. Bowie, by deed, and had entered the same at the Little Rock land-office, and ought not to be divested of the land so entered; and that the said decree, being for less than five hundred acres, and not having been appealed from within one year, was final and conclusive, and could not be annulled or set aside. The cause was set down for final hearing at the next term; and, on motion of the district attorney, it was ordered that he have leave to withdraw from the record files of the court the original Spanish paper in this case, for the purpose of taking depositions, the Hon. James Woodson Bates, one of the judges, dissenting. The clerk was required to retain a copy of the paper.

On the 26th of January, 1831, the cause came on for final hearing, on bill, answers, exhibits, and testimony; and was argued by counsel until the 1st of February, 1831, and was then submitted, and by the court taken under advisement. On the 4th of February, 1831, the defendants filed their written motion that the court submit the question of forgery vel non, of the order of survey, to the decision of a jury; and this motion was taken under advisement. The testimony adduced under the bill of review is sufficiently referred to in the opinion of the majority of the court, and need not here be recapitulated.

On the 7th of February, 1831, the above motion was overruled by the following opinion of the court:—

PER CURIAM.—We are of opinion that the motion to award a feigned issue in this case should be overruled, for the following reasons:—(1) Because it rests in the sound discretion of the chancellor to award a feigned issue or not; and where the truth of the facts can be satisfactorily ascertained by the chancellor, without the aid of a jury, it is his duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law. Dale v. Roosevelt, 6 Johns. Ch. 255. (2) Because the chancellor, when he directs such issue, does it upon the ground that the evidence produced before him in the record is not sufficient to enable him to arrive at a satisfactory conclusion; he, therefore, directs the facts to be tried by a jury, for the purpose of collecting additional evidence; which additional evidence, when so collected, the chancellor considers in connection with that already existing in the records of the chancery court. Bootle v. Blundell, 19 Ves. 500; 1 Archb. Prac. 347–349. (3) Because the verdict of the jury upon such feigned issue is not conclusive upon the chancellor; he may have it tried again and again, if these verdicts are not agreeable to his sense of justice, or he may even decree contrary to a verdict, if he thinks proper. Morris v. Davies, 14 Serg. & L. 534. (4) Because the bill in this case has

been taken for confessed, and every distinct and positive allegation in it must be taken as true. Williams v. Corwin, 1. Hopk. Ch. 471. Motion overruled.

On the 7th of February, 1831, the court decreed that the former decree in favor of Bernardo Samperyac against the United States, for four hundred arpens of land, pronounced and recorded at the December term of this court in 1827, be reversed, annulled, and held for nought; and that Stewart pay his own costs. Decrees of reversal were pronounced in the other cases.

Samuel C. Roane, Dist. Atty., and William S. Fulton, for the United States.

Chester Ashley, Robert Crittenden, William Trimble, and William Kelly, for defendants.

Before JOHNSON, ESKRIDGE, BATES, and CROSS, JJ.

JOHNSON, J.—This is a bill of review, filed by Samuel C. Roane, attorney of the United States for the territory of Arkansas, for and on behalf of the United States, to revise, reverse, and annul a former decree of this court, pronounced and recorded at the December term, 1827, in favor of Bernardo Samperyac, for four hundred arpens of land. The substantial allegations in the bill of review are, that the decree is erroneous, and was obtained by fraud and surprise; that the original petition, or requite and order of survey exhibited in this case, are forged and corrupt; and that the order of survey was never signed by Miro, governor of Louisiana, as the same purports to have been; and that this fact has come to the knowledge of the said district attorney since said decree was entered of record; that Bernardo Samperyac is a fictitious person, and never had an actual existence; that if he ever did exist, he was dead at the time of exhibiting his bill; that John Hebrard, upon whose testimony the decree was made, committed the crime of perjury in giving his testimony; and that the statements sworn to by him upon the hearing of this cause, as set forth in his deposition, are false and corrupt; that the original petition and order of survey in this case, shows upon its face, that it was not made as early as the year 1789, but appears to have been made long since, and that the former decree of this court was obtained by fraud, covin, and misrepresentation, in violation of the principles of equity and of law.

The district attorney, for and on behalf of the United States, avers and says, that since the decree was made in this case, he has discovered new and important record evidence, which was not within his control, and the existence of which he did not know, and had not time to procure at the hearing of this cause; all which he believes he will be able to procure and exhibit upon the final hearing.

The first question made and argued at the bar, which will be considered, relates to the power conferred on this court by the act of congress of the 26th May, 1824, entitled "An act enabling the claimants to land within the limits of the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims."

It is contended by the counsel for the defendants that the act of 1824 constituted a special tribunal, with limited and restricted powers; that full chancery powers were not conferred; that this court possessed no greater powers than have been heretofore delegated to boards of commissioners, created by acts of congress, to decide upon claims similar to those now pending in this court; that this court cannot entertain a bill of review, because the authority to do so is not given by the act of 1824. That this court, sitting as a court for the adjudication of French and Spanish claims, possesses no power not delegated and conferred by the several acts of congress upon that subject, we are ready to admit.

To ascertain the extent of the power and jurisdiction of this court, let us examine the act of 1824. That act provides, that it shall be lawful for certain claimants to present a petition to the district court of the state of Missouri, setting forth their claims as pointed out in the act; praying in said petition, that the validity of such title or claim may be inquired into and decreed by said court; and the said court is authorized and required to hold and exercise jurisdiction of any petition presented in conformity with the provisions of the act, and to hear and determine the same on the petition, in case no answer be filed, after due notice or on the petition and answer of any person interested; and the answer of the district attorney of the United States, where he may have filed an answer, according to the evidence which may be adduced by the parties, in conformity with the principles of justice, and according to the laws and ordinances of the government under which the claim originated; a copy of the petition to be served on any adverse claimant, and on the district attorney of the United States when the government is interested in the defence. The act further provides, that any petition which shall be presented, shall be conducted according to the rules of a court of equity, except that the answer of the district attorney of the United States shall not be required to be verified by his oath, and tried without any continuance, unless for cause shown; and said court shall have full power and authority to hear and determine all questions arising in said cause, relative to the title of the claimants, and, by a final decree, to settle and determine the validity thereof, according to the laws of nations, and all other questions properly arising between the claimants and the United States; and the court may, at its discretion, order disputed facts to be found by a jury according to the prac-

tice of said court, when directing issues in chancery before the same court; and in all cases, an appeal to the supreme court of the United States is allowed, within one year from the rendition of the judgment or decree, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the said district court shall, in like manner, be final and conclusive. By the 14th section of the act of 1824, it is enacted, "that all the provisions of that act shall extend to and be applicable to the territory of Arkansas, and for the purpose of finally settling and adjusting the title and claims to land derived from the French and Spanish governments, the superior court for the territory of Arkansas, shall have, hold, and exercise jurisdiction in all cases, in the same manner, and under the same restrictions and regulations, in all respects, as by this act is given to the district court for the state of Missouri."

The question arises under the foregoing act, whether this court has been clothed with full and complete chancery jurisdiction and power, in adjudicating upon these claims; or whether it has been invested with a limited and restricted authority, capable of performing nothing which is not expressly delegated by the act, resembling rather a board of commissioners than a court of equity? Upon the best reflection which we have been able to bestow upon the subject, we entertain little doubt that the act of 1824 intended to confer, and does confer, upon this court, the full and ample power of a court of chancery. Instead of creating a special tribunal, a board of commissioners to decide and report upon claims like these, congress has referred them to the decision of a court, possessed of common law and chancery jurisdiction; a court invested with a part of the judicial power of the United States.

The cases, when brought before this court, are to be conducted according to the rules of a court of equity. This court, then, possessing both chancery powers and common law jurisdiction, is required to try these cases on the chancery side of the court. The fact that the cognizance of these claims is given to a court possessed of full and ample equity jurisdiction, with the injunction to try the cases according to the rules of a court of equity, goes far to prove that congress intended to refer them to the judiciary, and allow the United States to be sued before her own courts, that a final termination might be put to these demands upon her justice. The provision for an appeal from the decision of this court to the supreme court of the United States, by either party, strongly evinces the intention of congress that these claims should receive their adjudication by the judiciary of the United States. If, then, congress intended to refer them to the judiciary, can it be reasonably inferred that they intended to limit the general powers of the court to which the reference is made? We think not. The act, in terms, does not limit the jurisdiction of this court; and we are not to infer a limitation unless it be expressed, or arises from a necessary implication. If we are correct in affirming the proposition that the act of 1824 authorizing certain claimants to bring suit against the United States, on the equity side, possessed of full chancery power and jurisdiction, it follows, that a bill of review will lie in this court, unless there be something in the act itself forbidding it.

It has been urged that that part of the act which says that the judgment or decree of this court, unless appealed from in one year, shall be final and conclusive, necessarily precludes the idea of a bill of review. We entertain a different opinion. The provision just referred to, relates to the time in which an appeal may be taken. It says nothing about a bill of review, or rehearing. Each of these modes of revising the decrees of this court, according to the practice in chancery, is left untouched, and stands precisely as they existed had no time been limited for an appeal. The court entertains a bill of review, in virtue of the chancery jurisdiction conferred by the act of congress by which it was created, and possessing that power previous to the act of 1824, continued to possess it, with the authority to apply it to these cases, for the adjudication of which the latter act was passed. It is, however, further contended by the counsel for the defendants, that, as the bill of review in this case was filed upwards of two years subsequent to the final decree in the original cause, and more than one year after the time allowed for an appeal had elapsed, this remedy is barred by length of time. In the case of Thomas v. Harvie, 10 Wheat. [23 U. S.] 146, the supreme court of the United States held that a bill of review, for error apparent in the decree, is barred by length of time, unless it is filed before the time limited for an appeal; but, in the same case, the court expressly reserved the question, whether a bill of review, founded upon matter discovered since the decree, is in like manner barred by the lapse of the time limited for the appeal. That question is directly presented in this case, and calls for our decision. We have bestowed upon it all the reflection of which we are capable; and the conclusion to which we have arrived is, that a bill of review, founded on the discovery of new matter after the decree, ought not to be barred by the lapse of one year, the time limited in these cases; nor do we think it ought to be barred by the lapse of two years and four months, the time between the former decree and the filing of this bill. The reasons assigned by the supreme court, in the case cited, for applying as a bar to bills of review for error apparent on the face of the decree, the time limited for an appeal, do not, in our judgment, apply to the case of a bill of re-

view, founded on new matter, discovered subsequent to the decree. Judge Washington, in delivering the opinion of the court, says, "that courts of equity, acting upon the principle that laches and neglect ought to be discountenanced, and that in cases of stale demands, its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts;" and the decision was, that, although bills of review are not strictly within the statute of limitations, yet courts of equity will adopt the analogy of the statute in prescribing the time within which they shall be brought.

In the case of a bill of review for new matter recently discovered, no laches or neglect can, we think, be properly imputed to the party filing the bill. It is allowed only on the ground of his ignorance of the existence of the new matter before the former decree; and it is incumbent on him to file his bill in a reasonable time after the discovery is made; all this is alleged in the present bill. The bill could not be filed within one year after the decree, because the new matter had not then come to light, but was subsequently discovered. If, then, laches or neglect are not imputable, has so great a time intervened that it may justly be denominated a stale demand? Two years and four months can scarcely be considered in that light. It would not bar an action of assumpsit upon a parol contract, and cannot be considered an unreasonable delay in bringing a bill of review. In England, twenty years is allowed; and in the case decided in 10 Wheat. [23 U. S.] 146, before cited, five years was allowed.

We do not think that, to a bill of review for new matter, no lapse of time ought to bar the remedy. Upon the principle of repose, we think the lapse of a reasonable time ought to present a bar; what that reasonable time should be considered, and it is well settled to be in the second discretion of the chancellor, it is unnecessary for us to decide, since we are clearly of opinion that two years and four months is not an unreasonable time for filing a bill of review. Whether the principle settled by the supreme court of the United States, in several cases, that laches are not imputable to the government, ought to apply in this case, we need not decide. The second inquiry which arises in this case, and which has been ably argued at the bar, is, whether a case is made out for a bill of review according to the established principles of equity.

The material allegations in the bill have already been stated, by which it appears that the main and principal ground relied upon for a review, is the discovery of new matter since the making the former decree. The only allegation we deem material to notice is, that the original petition, or requite and order of survey on which the decree was based, is forged and corrupt, and was never signed by Miro, governor of Louisiana; and that this fact has come to the knowledge of the district attorney of the United States since the rendition of the decree, asked to be reviewed; and that he has, since the said decree, discovered new and important record evidence, which was not within his control, the existence of which he did not know, and had not time to procure, at the hearing of the cause.

The objections urged by the counsel for the defendants are, that this is a matter which was put in issue by the pleadings in this case before the former decree was pronounced and recorded; and having been once put in issue, a bill of review will not lie for the discovery of evidence relating to the matter put in issue previous to the decree; that a bill of review will lie only for error apparent in the decree, or for new matter subsequently discovered, which was not in issue between the parties. Let us examine this position. The ordinances of Lord Chancellor Bacon respecting bills of review, are generally referred to as good authority, and have never been departed from. 3 Atk. 26. The doctrine is there asserted that no bill of review shall be admitted except it contain either error in law, appearing in the body of the decree, or some new matter which has arisen after the decree, and not any new proof that has come to light after the decree was made; nevertheless, upon new proof that has come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be granted.

According to the doctrine of the above ordinance, the present bill makes out a good case for a bill of review. New proof, important and material, none could be more so, is alleged to have come to light since the making and recording of the former decree, which could not possibly have been used at the hearing, because it was not known by the district attorney to have existence. This new proof is, that the title papers of the defendant are fraudulent and forged. But this fact is said to have been before put in issue. Admit it, for the sake of argument. What is the doctrine asserted by Chancellor Eldon in the case of Young v. Keighly, 16 Ves. 348. The ground of a bill of review, the chancellor says, is error apparent on the face of the decree, or of new evidence of a fact material pressing upon the decree, and discovered after publication in the cause. Again, he says: "As far as I can ascertain what the court permits with regard to bills of review upon facts newly discovered, the decisions appear to be on new evidence, which, if produced in time, would have supported the original case, and are not applicable where the original cause does not admit of the introduction of the evidence; as not being put in issue originally." The doctrine is to be found in Coop. Pl. 91. The author asserts "that it must be on new matter to prove what was before in issue, for a party cannot be entitled to a bill of review on new matter to prove a title which was not in issue." For this position he cites Cary, 82; Amb. 293. If these authorities are to be relied upon, they prove conclusively, that in the

present bill, a good cause is made out for a review. We are ready to admit, that in the two cases decided by the court of appeals of Kentucky, reported in Hardin's Reports, 342 and 454, a different doctrine seems to be established. But the rule as laid down by Chancellor Eldon, accords better with our views of what the rule ought to be, and accordingly we adopt it as intrinsically correct. But, admitting that the new matter must relate to something not before put in issue by the parties, still we think a case is made out for a bill of review.

It is certainly true that the district attorney, in his answer, denied all the allegations in the petition, and required the petitioner to produce proof of them; but, at the same time that he denied them, he stated that he was wholly uninformed as to their truth. It is like the answer of a guardian, denying the allegations of a bill on the ground of ignorance, whether they are true or false; and such answer has been held insufficient to dissolve an injunction. Apthorpe v. Comstock, 1 Hop. Ch. 143; Roberts v. Anderson, 2 Johns. Ch. 202. By this general denial of the title of the petitioner, no special fact in relation to that title was put in issue. The district attorney made no allegation that the title papers of the petitioner were fraudulent or forged. He could not make such an averment at the time he filed his answer, because he was wholly uninformed as to the authenticity of those papers, and, on that ground, required that they might be proved.

There was no controversy as to the fact whether those papers were genuine or forged; no conflicting testimony was introduced, and all the proof adduced before the court was by the petitioner. This surely cannot be such a putting in issue of the fact of forgery or not, as to preclude a reëxamination of that matter, when subsequently discovered. We suppose the judges of the court of appeals of Kentucky mean to say, that after certain material matters of fact have been put in issue, and evidence adduced by each party to that issue, and a decree rendered, a bill of review will not lie merely upon the discovery of additional testimony to the same point, unless that evidence consists of records, in which event they admit that a bill of review will lie. According, then, to the principles settled in Kentucky, a case is made out for a bill of review; for the present bill contains the allegations that important record evidence has been discovered conducing to prove that the title papers of the petitioner are false, fraudulent, and forged. The court of appeals of Kentucky, in the case of Respass v. McClanahan, Hardin, 346, say: "There is an important difference between the discovery of a matter of fact itself, which, though it existed at the former hearing, was not then known by the party to exist, or which was not alleged or put in issue by either party, and the discovery of new witnesses or proof of a matter or fact which was then known or in issue. In the former cause, the party not knowing the fact, and it not being particularly in issue, there was nothing to put him on the search, either of the fact or the evidence of the fact, and therefore the presumption is in his favor, that, as the matter made for him, his failure to show the matter was not owing to his negligence or fault. They further say, after the most careful search, they cannot find one case reported in which a bill of review has been allowed on the discovery of new witnesses to prove a fact which had been before in issue, although there are many where bills of review have been sustained on the discovery of records or other writings relating to the title which was generally put in issue."

It cannot be affirmed that the forgery of the title papers of the petition was particularly put in issue by the former pleadings. The title only was generally put in issue, and, according to the authority just quoted, as record evidence in relation to that title is alleged to have been discovered, a clear case is made out for a bill of review.

If, then, this court possesses the jurisdiction to entertain a bill of review in the case now before the court, and a case is made out by the bill, according to the principles of equity, the next inquiry is, does the evidence adduced call upon the court to pronounce a decree of reversal? What is the evidence? First, the defendant, Samperyac, the original petitioner in whose favor the former decree was rendered, has failed to answer this bill, and, under a rule of this court, an order of publication was duly published in the Arkansas Gazette; and at the October term, 1830, of this court, the bill was taken for confessed as to the said defendant. The inquiry arises as to the effect of taking the bill for confessed. The doctrine is well settled, that when the allegations of a bill are distinct and positive, and the bill is taken for confessed, such allegations are taken as true without proof. That a decree pro confesso is like a judgment by nil dicit at common law. Williams v. Corwin, 1 Hopk. Ch. 471; 3 Atk. 468. In the case of Hawkins v. Crook, 2 P. Wms. 556, the bill alleged a decree to have been obtained by fraud. The decree assumes that the order to take a bill pro confesso admitted the facts charged as fraudulent, and the court plainly took them to amount to fraud, and without further proof, decreed the appropriate relief. The authorities clearly establish this principle, that if the allegations are of a nature so distinct and positive, that, taking them to be true, the court can make a decree upon them, it will, upon the order pro confesso, decree without proof. Where they are in their nature so defective or vague that a precise decree cannot be made upon them, proof must be adduced from the necessity of the case. No rule can be better founded in reason and propriety.

A refusal to deny where the party is legally bound to speak, is equal to an admission of

the charges made against him. What is admitted, need not be proved. The allegations are incontrovertibly established, when confessed by him against whom they are made. This is the doctrine applicable to original bills; and we have, in our researches, been able to find no case where the doctrine has been applied to bills of review. Perhaps it may be because no such case exists, and that this is the first where a bill of review has ever been taken pro confesso. But the principle applies with equal force and propriety to the latter as to the former. The allegations of this bill are, that the title papers are forged and spurious, and that the witness who proved them committed perjury. These allegations, when admitted, destroy the evidence upon which the former decree was based, are distinct and positive in their nature, and justify a decree without additional proof. But admitting that the doctrine applicable to original bills, in relation to the effect of taking a bill pro confesso, ought not to be applicable to bills of review, still we are of opinion that the evidence adduced in this case is full and conclusive to prove that the title papers upon which the former decree was based are forged, fraudulent, and spurious.

Let us advert to the evidence: Hilary B. Cenas, register of the land-office at New Orleans, states, in his deposition, that he has instituted a careful search among the Spanish records under his charge, particularly in a book entitled "Register de los Primeros Decretos de Concesion"; in which book it was customary to enter any order of survey, as it was first made, from the year 1786 up to 1799, inclusive, and could not find any order of survey of lands in favor of, or granted to, Celestine Armon in the district of Arkansas. He further says that he has examined the form of orders of survey, as sworn to by Judge Tessier and Jean Mercier, the register of mortgages in New Orleans, and found it to correspond with the orders of survey of record in his office; that he has compared the signatures affixed to orders of survey, upon which Messrs. Tessier and Mercier have given their depositions in the cases of the United States against the persons named in said depositions, and that he verily believes that they are false and counterfeit. By consent of parties, this deposition was read in this case, to prove the same facts in relation to the order of survey in favor of Samperyac. Isaac T. Preston, late register of the land-office at New Orleans, asserts that he has examined the papers annexed to the depositions of Jean Mercier and Charles Tessier, in the cases in which they have given their depositions before the Honorable Gillen Preval, purporting to be Spanish orders of survey. The signatures are not in the handwriting of Governor Miro or Gayoso, as they purport to be. Deponent is well acquainted with the signatures of those governors, having seen their genuine signatures to many different records. Deponent further says, that said papers are not in the form in which Spanish orders of survey were given, but that the form annexed to the depositions of Mr. Tessier and Mr. Mercier, were adopted in all orders of survey, except when the nature of the place to be surveyed required a different form. He further states, that he has seen the deposition of Hilary B. Cenas, register of the land-office at New Orleans; and that deponent, when register of the same office, made a similar search with the same result. Charles Tessier deposes that he was a clerk in the office of the late Spanish government, from the commencement of the year 1790 to the end of the year 1802; that he was acquainted with the handwriting of Governors Miros and Manuel Gayoso De Lemos, from seeing them write frequently; and says, positively, that the signature of Miro presented to him, and appended to the order of survey in this case, and which has been signed by me, nevariator is not in the handwriting of said Governor Miro; that the decree or order of survey is not in the form used and prescribed in such case, nor is it recorded, as was the usual practice, in granting lands by the governor; that the practice was to insert at the foot of the said order, the word "Reg'd," with the flourish of the recording clerk; further, that the spelling of the said decree is not according to the rules of Spanish orthography, and that the clerks, whose duty it was to write such orders, were all good Spanish scholars, and would not have been permitted to use such spelling in any official business; that the handwriting of the aforesaid order of survey is not that of any of the clerks that were, at that time, employed in that department of the government, the deponent being well acquainted with the handwriting of all the clerks who wrote in the office during the time he was in the employ of the government, and he is also acquainted with the handwriting of those that preceded him for many years. This witness further states, that he has no recollection of John B. Hebrard, Harea Devere, and Lemuel Masters, and is positive that these men were not familiar in the office of the Spanish government, and never known or seen in that office; that he does not know the handwriting of the order of survey in this case; that it is not in the handwriting of any of the clerks that ever were employed in the office of the Spanish government then existing.

Jean Mercier, a clerk in the office of the late Spanish government in Louisiana, from 1792 to 1801, deposes to the same facts, in all respects, testified to by Charles Tessier, and which it is unnecessary to repeat.

Antoine Cruzat, Sen., deposeth, that he was employed as an officer of the regiment of Louisiana, in the office of Governor Manuel Gayoso De Lemos, all the time he was governor of Louisiana under the Spanish government. That he had frequent opportunities to see and examine the signature of Governor Miro, and to see him also sign his name. He further says that he is well acquainted

with the handwriting and signature of all the clerks of the office of the said governors; and that he had no hesitation in saying, that the signatures of Miro and Gayoso, appended to the orders of survey in which Charles Tessier and Jean Mercier have given their depositions before Judge Preval, pursuant to several commissions from the superior court of the territory of Arkansas, are not genuine, as well as the handwriting of the orders of survey. That the spelling of said orders of survey is incorrect, and that no clerk would have been permitted to use it; that the form of the orders of survey, as given by Mr. Mercier and Mr. Tessier, is the only true and correct one; that he has never known any men by the name of John B. Hebrard, David Devere, and Lemuel Masters; and that he is confident they have never been seen in the office of Governors Miro and Manuel Gayoso De Lemos, at New Orleans.

The deposition of Martin Durald, late register of mortgages in New Orleans, taken in a similar case to the one now before the court, in which the United States is plaintiff, and Martin Durald defendant, has been read as evidence in this case, by consent of parties. He deposes that he was born in Louisiana, and has never had any grant nor any order of survey for any land in the territory of Arkansas; that his father was of the same name with himself, and that, to the best of his knowledge, his father has never had any land in the territory of Arkansas; that he is well acquainted with all the names of the French and Spanish inhabitants of Louisiana, as having kept a public office in New Orleans; and that he knows no person, except his father and himself, of the name of Martin Durald; that he had a brother by the name of Joseph V. Durald, and that, to the best of his knowledge, his said brother never had any land in the territory of Arkansas.

From the testimony, it is manifest that the order of survey in this case is not to be found recorded in the record book at New Orleans, in which it was usual and customary to record any order of survey made from 1786 to 1799. The same fact is also proved in relation to every case amounting to upwards of one hundred, now pending before this court, upon bills of review.

Tessier, Mercier, Preston, and Cenas, all depose to this fact; Tessier, Mercier, Cruzat, all of them well acquainted with the handwriting of Governor Miro, and having frequently seen him write, swear that the name of Miro, signed to the order of survey in this case, is not in his handwriting, and therefore not genuine. Cenas, the present register, and Preston, the late register of the land-office at New Orleans, both swear that they have seen many genuine signatures of Governor Miro; and from the comparison with the present order of survey, the signature is not in the handwriting of Governor Miro. Tessier, Mercier, and Cruzat, depose that they are well acquainted with the handwriting of all the clerks who wrote in the Spanish governor's office, at New Orleans, and that the order of survey in this case, is not in the handwriting of any clerk who ever wrote in the said office, and that the form of the order of survey in this case, is not in the form used by the Spanish government; Cenas and Preston also swear to this latter fact; Tessier and Mercier swear that Hebrard was never seen in the governor's office, at New Orleans.

The fact that the name of Samperyac, the original petitioner and defendant to this bill, is signed in a good handwriting to the petition to the governor for a grant, and that his mark is used in the deed of transfer to John J. Bowie, is also in proof.

It is further in proof, that the defendant, Samperyac, has never made his personal appearance in this court, nor has one of the original claimants, amounting to one hundred and seventeen, ever appeared here, except by John J. Bowie, their agent, and the counsel employed by him; and the counsel admit that they have never seen one of the original claimants in whose favor the former decrees of this court were made. The evidence upon which the former decree was made, is the deposition of John B. Hebrard. In deciding upon this testimony, we think there is no rational ground to doubt, we are entirely satisfied, and believe it to be abundantly manifest, that the order of survey, upon which the former decree was made, is fraudulent, forged, and counterfeit; and that Samperyac himself is an ideal, fictitious being, and never had an existence except in name. The fact that Samperyac, nor any of the other claimants have ever appeared here, or been seen by their counsel employed for them; that no one of them has filed an answer in these bills of review; that their title papers upon which the former decrees of this court rested, are not to be found of record where such papers were generally and usually recorded; that their title papers are not in the form used at the time, by the Spanish government, in making concessions of land; that they are misspelt, and above all, that they have been proven by the testimony of three or four witnesses, who stand above suspicion, having the best opportunity of being well informed, to be counterfeit, forged, and spurious, speak a language not to be misunderstood, and calculated to produce the strongest conviction, that the order of survey, on which the former decree is based, is a forged and spurious paper, and, consequently, that the former decree of this court ought to be reversed, unless there is some other circumstance in the case to prevent it. There is, however, another defendant in this case, besides the original petitioner. Joseph Stewart, at a former term, appeared, and, on his motion, was admitted a defendant to this bill of review, and has filed his answer. In it he alleges that he is an innocent purchaser, without notice, for a

valuable consideration, of the land decreed by a former decree of this court; that he purchased from John J. Bowie, who, he alleges, purchased from Samperyac, the original petitioner, and exhibited the deeds of transfer or assignment. He denies all the allegations in this bill, of fraud, forgery, and perjury, but admits his entire ignorance of these matters, and prays that his interest may be protected by this court.

The question arises, what effect is this answer entitled to have in the decision of this cause? The defendant Stewart, in our judgment, does not occupy the attitude of an innocent purchaser without notice, so as to stand on any higher ground than the defendant Samperyac himself. The interest which he has purchased in the land decreed by this court, is an equitable and not a legal right.

It is well settled, that a judgment or decree is not assignable at law, so as to vest a legal title in the assignee. The act of congress of 1824 does not authorize the assignment or transfer of the decree of this court; and, under that act, the land decreed to the claimant could be entered or located only in his name, or in the name of his legal representatives, in case of his death, and the patent could issue only to the claimant or his legal representatives, not to his assignees. Stewart, then, can only be considered as the purchaser of an equity; and it is an established principle, that a purchaser for a valuable consideration without notice, in order to protect himself, must be clothed with the legal title, and not a mere equity. 2 Brown, Ch. 66; 2 Madd. 258; 1 Atk. 571; 3 Atk. 377. The defendant Stewart, having only an equitable title under the former decree of this court, takes it subject to all equity which attached to it in the hands of his assignor. It cannot be asserted that Stewart is a purchaser under the former decree of this court. This can be true only when there has been a judicial sale, in which case the purchaser is protected, though the judgment or decree is erroneous. Upon this ground, alone, we think it is obvious that the defendant Stewart stands on no other or different ground than the original petitioner, in whose favor the former decree was made. 2d. If, however, we are mistaken in this position, still we think the defendant Stewart is not entitled to be protected as an innocent purchaser without notice, on the ground that the transfer from Samperyac to John J. Bowie is a forgery. The evidence establishing this fact will be briefly detailed. The transfer or deed from Samperyac to John J. Bowie, of the land decreed by the former decree of this court, now claimed by Stewart, bears date on the 14th day of February, 1828, and is attested by Henry Hobbs and John Cook, and proved by the said Cook before John Williams, as justice of the peace in Clark county in this territory. By consent of parties, about sixty-six deeds of transfer from the original claimants, in whose favor this court have made decrees, all of which are now pending in this court upon bills of review, and are similarly situated with the case now under consideration, have been filed as evidence in this cause.

Twenty-four of those transfers, from the original claimants, are made to John J. Bowie, attested by John Cook and another name. The first of these transfers bears date on the 29th day of December, 1827, in a few days after the decree was entered of record. The second bears date on the 18th January, 1829; the third on the 19th; the fourth on the 21st; the fifth on the 24th of the same month and year. The sixth bears date on the fourth February, 1828; the seventh on the 6th; the eighth on the 8th; the ninth and tenth on the 9th; the eleventh on the 10th; the twelfth and thirteenth on the 11th; the fourteenth on the 12th; the fifteenth on the 13th; the sixteenth on the 20th; the seventeenth, eighteenth, and nineteenth on the 21st; the twentieth on the 22d; the twenty-first on the 23d; the twenty-second on the 28th; the twenty-third and twenty-fourth on the 29th February, 1828. These twenty-four transfers, one of which is the transfer in this case, purport to have been executed by the original claimants, in whose favor the decrees of this court were made to John J. Bowie, are all attested by John Cook and another, and certified by John Williams, a justice of the peace in this territory, to have been proved before him by John Cook, the subscribing witness.

How does it happen that this witness, John Cook, should have been present to witness the execution of twenty-four deeds from different persons to John J. Bowie, and most of them on different days? Could it have been necessary that Bowie should have employed this Mr. Cook to travel round with him to become a witness to their execution? Could Bowie have procured witnesses residing near these claimants to attest their deeds or transfer to himself? How does it happen Bowie is so fortunate as to find these original claimants so soon after the decree of the court was made? One of them he found in a few days after the decree, in a shorter time than would be required to travel beyond the limits of the territory. Having been fortunate in the commencement, his good fortune never seems to desert him until he obtains all the transfers. On the 4th February he finds one of them; one of them on the 6th; he is equally fortunate on the 8th; on the 9th he finds two, and on the 11th his efforts are still crowned with greater success, he finds three; on the 23d of the same month he finds three others; and by the 29th February, he discovers all of them. Thus it would seem that these original claimants, not one of whom can now be found to answer these bills of review, these men whom the counsel employed by John J. Bowie to advocate their rights, never saw; not one of whom are proven to be liv-

ing, or that they ever did exist. These are the men whom John J. Bowie finds residing so near each other, that he could obtain the deeds of three of them in one day, and find all of them in little more than one month after the decrees. If, however, we could believe all this, is it not passing strange that Mr. Cook, whom nobody knows, should have happened to be present at all these various times and places ready to attest these transfers from the original claimants to John J. Bowie? Unless we indulge the presumption, that Bowie employed this Mr. Cook to go along with him to attest these deeds, for which we can see no reasonable motive, we are unable to account for his presence whenever wanted or called for by Bowie. Bowie must have had a talisman, possessed of the magical power of Aladdin's lamp, by which he calls up, at his bidding, this omnipresent witness. We have no doubt that this witness, like the genius in the Arabian tales, having performed the office for which he was invoked, has vanished into air, and disappeared for ever. In addition to these twenty-four deeds of transfer, thirty other deeds of transfer or assignment from the original claimants to John J. Bowie and other persons, are by consent exhibited as evidence in this cause; all these deeds are attested by Lemuel Masters and other names, and certified by J. Williams, a notary-public in Louisiana, to have been proved before him by Lemuel Masters on the 29th day of February, 1828. The two first bear date on the 10th January, 1828; the third and fourth bear date on the 20th; the fifth and sixth on the 21st; the seventh on the 24th; the eighth on the 25th; the ninth and tenth on the 26th; the eleventh on the 27th; the twelfth on the 28th; the thirteenth and fourteenth on the 29th January, 1828; the fifteenth and sixteenth bear date on the 2d day of February, 1828; the seventeenth on the 9th; four more on the 10th; one on the 11th; one on the 13th; one on the 21st; two on the 22d; one on the 25th; one on the 26th; one on the 27th, and the remaining three on the 28th February, 1828. Lemuel Masters, the witness who proves these deeds, is not an ideal being, but is one of the three witnesses who proves the original claims, and on whose evidence the former decrees of this court were made. This circumstance adds nothing to his credit. Why should one of these witnesses to the original claims, brought here by John J. Bowie, which fact is known to this court, he being the only person who appeared here as agent of the claimants, have been selected to travel round and attest the deeds of transfer from these claimants? All the remarks made in relation to the twenty-four transfers apply with equal force to the thirty just named. Can it be believed that Lemuel Masters could find eighteen of these original claimants in one month, and four of them in one day? If they resided so near each other, why have not one of them answered these bills? Why has no deposition been taken to prove that any one of them ever had an existence? Why, in short, has not John J. Bowie himself, answered these bills in the character of an innocent purchaser?

The defendant Stewart claims through him, and the answer of Bowie might be received upon the same ground. This circumstance is pregnant with proof that these transfers are fraudulent and base forgeries, and that the original claimants never existed except in name. There is another peculiarity about these transfers calculated to throw discredit upon them. It is this: in thirteen of these deeds, it is manifest, from an inspection, that the name of one of the witnesses thereto is written in the same handwriting with the body of the deed, and in the same ink. It is not usual or common for a witness to a deed to be called on to write the deed itself; and as the witness is never after heard of, the presumption is very strong that he, too, lives only in name. There are also twelve other deeds of transfer filed by consent, as evidence in this cause. We will not waste our time in remarking upon them. To pursue the subject further, would be worse than useless. In investigating frauds like these, the mind sickens and the feelings revolt. From a review of all the evidence in this case, we entertain no doubt that the transfer in this case, which purports to have been made from Bernardo Samperyac to John J. Bowie, is false and forged; and, consequently, upon that ground also, the defendant Stewart cannot be permitted to occupy the attitude of an innocent purchaser, fairly and bona fide, from Bowie. But his recourse is upon Bowie, of whom he purchased; and he cannot stand upon other and different ground than Bowie himself. The act of congress of the 26th May, 1824, from which this court derives its authority to decide in these cases, has been continued in force by several subsequent acts, the last of which was passed on the 8th May, 1830. That act has expressly given the power to this court to entertain bills of review in these cases, and to reverse the former decrees of this court, if, upon a revision, it shall appear that these decrees were based upon forged title papers.

From the view we have taken of this case, it has not become necessary for us to consider the question made, and ably argued at the bar, whether congress have not, in the act of 1830, transcended the limits of sound legislation; and we withhold the expression of an opinion upon it, as we are satisfied that the act of 1824 referred the decision of these cases to this court, sitting as a court of chancery; and that, under the system of equity by which this court is governed, a power exists to entertain a bill of review in the present case.

BATES, J. I dissent from the opinion of the court, as delivered in this cause. I part

with my associates on the threshold, on the point of jurisdiction; and, therefore, in the brief opinion which I shall give for the grounds of my disagreement, I shall not find it necessary, or even proper, to touch the other points which have been raised and so ingeniously and elaborately argued. Obsta principiis, is a maxim dear to the lovers of sound government. I shall endeavor on this, as on all other occasions, to manifest my appreciation of its value. By the treaty negotiated by the United States, in 1803, with the French republic, for the acquisition of Louisiana, our government became bound, in good faith, to perfect certain obligations which the previous governments, Spanish and French, had contracted with their citizens or subjects. But this treaty guarantee had no stipulation as to mode, and the government does not recognize in the citizen a right to sue without its consent. This consent was given by the act of congress of May, 1824. Tribunals were created in the state of Missouri and territory of Arkansas to adjudicate claims to land founded on French and Spanish grants, of which tribunals this is one; a special and extraordinary tribunal, created by the law referred to. Under this law, and before this tribunal, the claimant instituted his suit, which, at its maturity, ripened to a decree in his favor.

The bill of review has been instituted to annul and reverse the decree, on the ground that the grant is a forgery, and the claimant a supposititious character. It is foreign to my purpose to inquire into the well-foundedness of these allegations, for, whatever the decision, in the view I take of the subject, it could lead to no practical result. I assume it as a postulate not to be questioned, that the government going into the courts, is to be tried only by the same rules, and have the same measure of justice meted out to it, that the law secures to ordinary parties litigant. The law of 1824 gave to the party against whom the final decree of this court should be given the right of appeal within one year from the time of its rendition. The appeal not applied for, the decree became final and conclusive. More than a year had elapsed before the filing of the bill of review in this case. I will not moot the point, whether a bill of review would lie at all: it is rendered more than superfluous from the obvious fact, that no revision of the decree, of any kind, was sought for within the year. But it is said that the congressional legislation of May, 1830, puts this question at rest, cures all defects, gives jurisdiction,—gives it, too, to defeat rights and destroy vested interests growing out of, and based on, a former act of congress. Such, it is true, is the import of the language of the law; but is it so? Can it be that the federal legislature has the constitutional competency so to do? We could expect to find such a doctrine prevailing only in the worst days of the most tyrannical governments. It is a language that Sejanus may have whispered to Tiberius. It is a language that may hold at this day in the meridian of Constantinople and St. Petersburg, where the mandate of the sultan, or the ukase of the emperor, supersedes reason, subverts right, and abrogates law. It is a language repudiated even in constitutional monarchies; and it is a language which, if received here as orthodox, goes convincingly to prove that the liberty, of which we have so proudly boasted, has an existence rather in name than in essence. Yet, highly objectionable as I deem this law, I couple with that objection no ascription of motives. It was probably a work of much haste,—the principles it involves not pushed to their conclusions, and not seen in their practical results. I think I heard in argument that the principles of this act might be inoperative when sought to be brought to bear on the property and rights of the citizens of the states, but that congress had unlimited and illimitable power over the territories. This proposition scarcely requires the show of refutation; it is incompatible with the genius of our government, and is, as it regards this territory, palpably in violation of treaty stipulations. I cannot resist the conclusion that we have not cognizance of this case, and that the bill of review should be dismissed for want of jurisdiction. Decree reversed and annulled.

NOTE. From the decree in the foregoing case, the defendants appealed to the supreme court of the United States, and the case was argued at the January term, 1833, by Mr. Prentiss and Mr. White, for the appellants, and by Mr. Taney, attorney-general, and Mr. Fulton, for the United States, and will be found fully reported in 7 Pet. [32 U. S.] 222. At the same term, after stating the facts and pleadings, Mr. Justice Thompson delivered the opinion of the court, as follows:—

The objections which have been taken at the bar to this decree, may be considered under the following points:—(1) Whether, under the act of 1824, the court had authority to entertain the bill of review; and if not, then, (2) whether the act of 1830 is a constitutional law, and confers such authority. (3) Whether the proceedings on this bill of review can be sustained under the act of 1830. (4) Whether, admitting Stewart to be a bona fide purchaser of the claim of Samperyac, he is protected against the title set up by the United States.

1. We think it unnecessary to go into an examination of the questions which have been made under the first point. Although the act of 1824 directs, that every petition which shall be presented under its provisions shall be conducted according to the rules of a court of equity, it may admit of doubt whether all the powers of a court of chancery, in relation to bills of review, are vested in that court. And as the view taken by this court upon the other points renders a decision upon this unnecessary, we pass it over without expressing any opinion upon it.

2. The ground, upon which it has been argued that the act of 1830 is unconstitutional, is, that a right had become vested in Stewart before the act was passed; and that the effect and operation of the law is to deprive him of a vested right. To determine the force and application of this objection, it becomes necessary to look at the claim as it now appears

before the court. It is found, by the decree of the court below, and is admitted at the bar, that Samperyac is a fictitious person. That the petition, purporting to have been presented by him to Miro, governor of the province of Louisiana, and the order of survey, alleged to have been made thereupon, are forgeries. These are the only evidence of title upon which the original claim rests. And it is proved and admitted that the deed, purporting to have been given by Samperyac to Bowie, under whom Stewart claims, is also a forgery. The bill or petition filed in the original cause, alleges that the claim is secured by the treaty between the United States and the French republic, of the 30th April, 1803. This, however, has not been insisted upon on the argument here; and there is certainly no color for pretending that a claim, founded in fraud and forgery, is sanctioned by the treaty. The title to the land in question passed by the treaty, and became vested in the United States; and there has been no act, on the part of the United States, by which they have parted with the title. It is contended, however, that this right of title has been taken away by the original decree in this case, under the act of 1824. By the fourteenth section of that act, all its provisions are extended to the territory of Arkansas; and it is declared that the superior court of that territory shall have, hold, and exercise jurisdiction in all cases, in the same manner, and under the same restrictions and regulations in all respects, as is given by the said act to the district court of the state of Missouri. And by the second section of the act, it is declared that in all cases the party, against whom the judgment or decree of the court may be finally given, shall be entitled to appeal within one year from its rendition, to the supreme court of the United States, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the district court shall in like manner be final and conclusive. No appeal was taken within the year; and the question is, whether the United States, by neglecting to appeal, have lost their right, and if not, whether the remedy provided by the act of 1830, to assert that right, is in violation of the constitution.

If Samperyac was a real person, and appeared here setting up this objection, it might present a different question, although it is not admitted, even in that case, that the United States would be concluded as to the right. But the original decree in this case was a mere nullity; it gave no right to any one. The title still remained in the United States, and the most that can be said, is, that by omitting to appeal within the time limited by the act, the remedy thereby provided was gone, and the decree became final and conclusive with respect to such remedy.

But the act of 1830 provides a new remedy; and it may be added that the act of 1804 declares the decree to be final and conclusive between the parties. And as Samperyac was a fictitious person, he was no party to the decree, and the act, in strictness, does not apply to the case. But, considering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers. It only organizes a tribunal with powers to entertain judicial proceedings. When the original decree was entered, there was no person in existence whose claim could be ripened into a right against the United States by omitting to appeal; Stewart was not only no party to the decree, but his purchase from Bowie was nearly a year after the decree was entered.

Had Samperyac been a real person, having a decree in his favor, and Stewart had afterwards purchased of Bowie the right which that decree established, it might have given him some equitable claim; but it would have been subject to all prior equitable, as well as legal rights. Nor would it be available in any respect in the present case, for Stewart, in no manner whatever, connects himself with Samperyac. As it is admitted that the deed purporting to have been given by Samperyac to Bowie is a forgery, Stewart is therefore a mere stranger to this decree, and can derive no benefit from it. It is said, that if this bill of review was filed under the act of 1830, the court had no jurisdiction, the bill having been filed in April, and the law not passed until the May following. But the act, in terms, applies to bills filed or to be filed, and of course cures this defect, if any existed. Such retrospection is no unusual course in laws providing new remedies.

The act of 1803, amending the judicial system of the United States (3 Bior. & D. Laws, 560 [2 Stat. 244]), declares, that from all final judgments, or decrees, rendered or to be rendered, in any circuit court, &c., an appeal shall be allowed to the supreme court, &c. It therefore forms no objection to the law, that the cause of action existed antecedent to its passage; so far as it applies to the remedy, and does not affect the right.

3. But it is objected, in the next place, that this bill of review cannot be sustained under the act of 1830; that it was not filed and prosecuted under limitations and restrictions, and according to the course and practice of a court of chancery in such a proceeding. We think it unnecessary to examine, whether all the technical rules required in the ordinary course of chancery proceedings, on a bill of review, have been pursued in the present case. The act, clearly, does not require it. It authorizes bills of review to be filed on the part of the United States, for the purpose of revising all or any of the decrees of the said court, in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed, in any case, on any forged warrant, concession, grant, order of survey, or other evidence of title.

If congress had a right to provide a tribunal in which the remedy might be prosecuted, they clearly had a right to prescribe the manner in which it should be pursued. The great and leading object was, to provide for revising the original decree, or granting a new trial. The material allegation required is, that the original decree was founded upon some forged evidence of title; and this is very fully set out in the bill. That it was not the intention of the law, that the court should be confined to the technical rules of a court of chancery, on bills of review, is evident from the provision in the last clause of the first section of the act, which directs the court to proceed on such bills of review, by such rules of practice and regulations as they may adopt, for the execution of the powers vested or confirmed in them by the act.

4. The next inquiry is, whether the appellant, Stewart, has acquired a right to the land, by reason of his standing in the character of a bona fide purchaser. The record contains an admission on the part of the United States, that he purchased the claims of John J. Bowie, by deed, for a valuable consideration, in good faith, some time in November or December, 1828. But this gave him no right to be let in as a party in the bill of review; he was not a party to the original bill, nor could he connect himself with Samperyac, the only party to the bill, he being a fictitious person; and the interest of Stewart, whatever it might be, was acquired long after the original decree was entered. He was, therefore, a perfect stranger to that decree. The deed purporting

to have been given by Samperyac to Bowie, is admitted to be a forgery. Bowie, of course, had no interest, legal or equitable, which he could convey to Stewart. But, admitting Stewart to have been properly let in, as a party in the bill of review, the only colorable equity which he showed was the certificate of entry given by the register of the land-office, December 13, 1828; and this certificate, founded on a decree in favor of Samperyac, a fictitious person, obtained by fraud, and upon forged evidence of title.

This certificate is entirely unavailable to Stewart. He can obtain no patent under it if the original decree should remain unreversed; for the act of 1830 forbids any patent thereafter to be issued, except in the name of the original party to the decree, and on proof to the satisfaction of the officers, that the party appying is such original party, or is duly authorized by such original party, or his heirs, to receive such patent. The original party to the decree being a fictitious person, no title would pass under the patent, if issued. It would still remain in the United States. But Stewart acquired no right whatever under the deed from Bowie; the latter having no interest that he could convey. In the case of Polk's Lessee v. Wendall, 5 Wheat. [18 U. S.] 308, it is said by this court, that on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under the holder of a void grant can acquire nothing.

Upon the whole, we think Stewart was improperly admitted to become a party; but considering him a proper party, he has shown no ground upon which he can sustain a right to the land in question.

The decree of the court below is accordingly affirmed, with costs.

Case No. 16,217.

UNITED STATES v. SANCHEZ.

[Hoff. Dec. 38.]

District Court, N. D. California. Sept. 5, 1861.

CALIFORNIA LAND GRANTS — CONFIRMATION BY COURT—INJUNCTION AGAINST ISSUANCE OF PATENT.

[One claiming title to a confirmed grant in opposition to the confirmee, but under the same original grantee, is entitled, under the 13th section of the act of 1851 (9 Stat. 633), to enjoin the issuance of a patent to the confirmee, pending a suit in the state court to determine the title as between the two.]

[Petition by Elizabeth Martin for an injunction to restrain the issuance of a patent to the persons to whom the court had previously confirmed the grant of the rancho of Las Animas.]

HOFFMAN, District Judge. The rancho of Las Animas, which was originally granted to Josefa Romero, and to her children, the widow and heirs of Mariano Castro, was confirmed by this court [Case No. 16,218] to various parties claiming as heirs of José Maria Sanchez, by whom the claim had been originally presented, and who deraigned title, as he alleged, from the original grantees. A petition for an injunction is now presented under the 13th section of the act of 1851, by Elizabeth Martin, who claims title under a conveyance by Carmen Castro, one of the original grantees. The confirmees also claim title under the same person, but the petitioner alleges that at the time of the alleged conveyance to the confirmees, Carmen was the wife of one Soto; that the said Soto neither executed nor had knowledge of the deed, nor did Carmen acknowledge the same on a private examination, apart from her husband, as required by law. It is therefore contended that the subsequent deed by Carmen, under which the petitioner claims, and which was duly executed after her husband's death, conveyed the title to her portion of the rancho, and that the parties holding that title have the right to enjoin the issuing of the patent to the confirmees. The 13th section of the act of 1851, after enacting that, for all lands finally confirmed, etc., a patent shall issue to the claimant, provides that, "if the title of the claimant to such lands shall be disputed by any other person, it shall be lawful for such person to present a petition," etc. It might seem that the language of this provision is sufficiently broad to include every case where the title of the confirmee is contested by "any other person." But it may be doubted whether it was intended by this proviso to permit any person claiming title under an entirely different grant from that confirmed, and who has omitted to present his claim to the board, to come in after the time for presenting his claim has expired, and set up his title as against a confirmee claiming under a grant to another person. The issue between the confirmee and the contestant is to be tried before the ordinary tribunals. If, then, a title derived from an imperfect or inchoate grant never presented to the board can be set up by the contestant as against the confirmed title of the confirmee, the alleged equitable rights of the contestant to a patent from the United States would be, in effect, submitted to the decision of the state courts, instead of the special tribunals vested by the statute with exclusive jurisdiction over the subject.

It has for these and other reasons been generally considered that to entitle the contestant to obtain an injunction he must show a right derived from the original grantee of the land—or, in other words, that the disputed titles which might thus be litigated before the state tribunals were disputed derivative titles, and not conflicting titles under entirely different grants. It must be confessed, however, that there are several dicta by the supreme court which seem to countenance a much broader construction of the statute. U. S. v. White, 23 How. [64 U. S.] 255; Mezes v. Greer [24 How. (65 U. S.) 268.]

But it is contended, that in the case of disputed derivative titles, the contestant can appear only where he has himself presented a separate claim and obtained a separate confirmation. The language of the statute imposed, however, no such condition. "If the title of the claimant to such lands shall be con-

tested by any other person," etc., are the words of the act. That such a condition should not always be imposed is evident. For it may often happen that the confirmee has obtained a confirmation in his own name in fraud of the rights of the true owners. Thus if the alleged heirs of a deceased grantee should obtain a confirmation in their own names, without including their infant brothers and sisters, it would be clearly unjust that the rights of the latter should be lost, when by reason of their tender years they could have had no means and no knowledge of the necessity of presenting separate claim in their own names. So if a guardian, or executor, or any person charged with a trust, either actual or constructive, should obtain a like confirmation in his own name, it is clear that the rights of the cestuis que trustent ought not to be impaired thereby. But to construe the statute as contended for, on the part of the confirmee in this case, would deprive all such parties of any redress. It is urged that the confirmation enures to the benefit of the confirmee, and for this several decisions of the supreme court are cited. The language of those decisions is certainly very broad and explicit. Whether it can be applied to cases arising under California land grants may be doubted, but at all events reason and justice demand that it must be taken subject to the exception of cases of fraud or breaches of trust such as have been mentioned. But even in cases not of this kind the confirmation enures absolutely to the benefit of the confirmee, that fact would seem to afford a reason for the interposition of the judge to stay the patent under the provisions of the 13th section. It may be that congress, aware that all parties would be concluded by the patent, and that the confirmee would thenceforth hold the undisputable title, intended by the 13th section to afford an opportunity for ascertaining whether or not he was the true owner and representative of the original grantee. The investigations of the board, and of the courts, under the act of 1851, in no way extended to an inquiry into the operation and validity of the mesne conveyances through which the claimant claimed title. "The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a bona fide claimant before it under a Mexican grant; and so this court having repeatedly declared that the government had no interest in the contests between persons claiming, ex post facto, the grant." Kendricks v. Castro, 23 How. [64 U. S.] 442. On this ground the board and this court steadily refused to allow parties disputing the title of the claimant to intervene in the suit, with a view of showing that they, and not the claimants, were the true representatives of the grantee. The fact, then, that the claim has been confirmed to a particular person, as confirmee, in no way proves that he is the true owner, for an inquiry into that question was not permitted, and there would appear much reason for regarding the 13th section as intended to open the door for the determination before the ordinary tribunals, of those questions of private right, into which, under the law of 1851, the board and the courts did not, and could not, enter.

In the present case the survey has been brought into court, and has not yet been passed upon. The injunction can therefore occasion no delay to the claimant. It is understood to be applied for, in anticipation of the objection that a proceeding of this nature should have been taken, as provided for in the 13th, and that in the absence of it the rights of the confirmee are absolute, and the confirmation enures to his exclusive benefit. It will be for the state tribunals to determine whether the contestant, not having herself presented her claim and obtained a confirmation, can be heard as against the confirmee, and if not, in ordinary cases, whether the fact of having made this application, under the 13th section, and obtained an injunction pending the suit in the state courts, alters, in any respect, her situation.

The question as to the absolute right of the confirmee, as against all persons but those claiming under him, or those who have obtained separate confirmations in their own names, is understood to be now before the supreme court of this state.

On the whole, I think the injunction should be granted.

One other point, however, it is proper to notice. It is urged that this application is manifestly inequitable, for the contestant has by her own admission procured a second conveyance to be made by a party who had already parted with all her rights by a bona fide though informal conveyance. On the other hand it is suggested by very respectable counsel that the contestant has bought up the title in question, with the sole view of attempting thereby to secure her homestead, which it is sought to include in the survey of the rancho of the claimant, and the interest in the latter rancho has been acquired as a precaution in the event that this court may feel obliged to direct the survey of the rancho to be made so as to include the homestead. Whether the homestead should be embraced within the survey of "Las Animas" the court can now form no opinion. It is enough, however, to know that there may exist a state of facts which rendered the acquisition of the title set up by the contestant defensible in morals as in law. It is at all events clear that the prima facie impressions of the court as to the inequitable nature of the transaction afford no solid grounds for withholding an injunction to which the contestant seems to be entitled.

Case No. 16,218.

UNITED STATES v. SANCHEZ.

[Hoff. Land Cas. 133.] [1]

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

MEXICAN LAND GRANTS.

The objection that the boundary of an adjoining rancho is affected by this claim is not tenable, the controversy being between and concluding the United States and the claimants only.

[Cited in Meader v. Norton, 11 Wall. (78 U. S.) 457.]

[Claim by the heirs of José Maria Sanchez for the Rancho Las Animas, comprising four leagues of land in Santa Clara county; confirmed by the board, and appeal taken by the United States.]

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

Thornton & Williams, for appellees.

BY THE COURT. The claim in this case is founded on a title issued by Governor Figueroa to the widow of Mariano Castro. It appears from the voluminous documents contained in the expediente, that Josefa Romero, the widow of Castro, petitioned the governor for a revalidation of the title of her husband, or in case the papers on file did not authorize such a proceeding, then for a new grant to herself. The governor directed a search to be made in the archives for the record of the proceedings relative to the first grant. That record is embodied in a report of the secretary, Negrete, and presented to the governor for his examination. It is unnecessary to recapitulate these documents, or to examine the various reports and records of proceedings before the viceroy of New Spain on Mariano Castro's petition. The governor seems to have been satisfied as to the right of Josefa Romero to have the land which Mariano Castro had occupied for many years confirmed to her. He accordingly issued his decree recognizing the right of the party as ascertained from the archives, and ordered the proper testimonial of her title to the property to be issued to her. In this decree the governor mentions that the rancho of Las Animas has been possessed by Castro and his family for more than twenty years "in public notoriety," and as their right is proved to this tract granted to Castro under the name of "La Brea" by the vice royal government in 1802, he ordered a testimonial to issue for their protection, and inasmuch as the boundaries are not expressly defined in the grant of the viceroy, the parties must confine themselves to those set forth in the petition filed on the part of Rufina Romero, leaving uninjured the rights of any third party who may consider himself aggrieved by the proceedings. The authenticity of all the documents in the case is proved, and the long continued habitation and cultivation of the rancho for nearly half a century by those under whom the appellees claim, leave no doubt as to the validity of the title. It was accordingly unanimously confirmed by the board.

Much testimony has been taken on the part of the claimants of the adjoining rancho of San Ysidro to prove the precise location of the boundaries between that rancho and the rancho of Las Animas. But it has already been determined by this court and the board of commissioners that the rights of third parties cannot be adjudicated in this form, and that the question to be determined in this class of cases is merely the validity of the claim as against the United States. Between the United States and the claimants final decrees in these suits are conclusive, but the act of 1851 [9 Stat. 633] expressly declares that such decrees shall not affect the interests of third persons. All questions between claimants arising out of a conflict of boundaries are by the thirteenth section of that act more appropriately referred, in the first instance, to the surveyor general, but leaving to the parties the right of resorting to the proper judicial tribunals. As the "testimonial" or decree made by the governor mentions the boundaries of the tract of "Las Animas" to be those indicated in the diseño which accompanies the petition, leaving uninjured the right of any third party who may consider himself aggrieved by the proceeding, the rights of such parties would seem to have been intended to be left in the same condition as under patent issued by the United States under the law of 1851. It is clear from the terms of the testimonial that the governor intended to confirm and recognize the rights of the petitioners to the land of which they had long been in possession; and that so far as the government was concerned, he was willing to adopt the boundaries indicated by the petitioners on the diseño. But those boundaries were not intended to be conclusive upon the rights of others, and the reservation made in the decree clearly shows that if, in delineating the boundaries of the tract of which they claimed to be owners, the petitioners had exceeded its true limits or included the lands of others, the rights of such parties were not intended to be prejudiced by the decree of concession.

I think, therefore, that a decree should be entered in this court in conformity with the decree of the governor, and that the title of the claimants should be confirmed to the land according to the boundaries indicated on the diseño, but without prejudice to the rights of any parties who may be injured by such location.

[See Case No. 16,217.]

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

UNITED STATES v. SANCHEZ. See Case No. 16,015.

Case No. 16,219.

UNITED STATES v. SANDER.

[6 McLean, 598.] [1]

Circuit Court, N. D. Ohio. July Term, 1855.

INDICTMENT — OFFENSES AGAINST POSTAL LAWS — EMBEZZLING LETTER.

1. A count in an indictment, which alleged that the defendant, did secrete and embezzle a certain letter, is not defective.

[Cited in U. S. v. Atkinson, 34 Fed. 318.]

[Cited in Whelchell v. State, 23 Ind. 90.]

2. When a statute makes one or more distinct acts connected with the same transaction, indictable, they may be charged as one act.

3. Where a letter is delivered to an authorized agent, the letter cannot be charged with having been embezzled. Whether the alleged agency existed, the jury must determine from the evidence.

[Cited in U. S. v. Driscoll, Case No. 14,994; U. S. v. Thoma, Id. 16,471; U. S. v. McCready, 11 Fed. 228; Re Burkhardt, 33 Fed. 27; U. S. v. Safford, 66 Fed. 945, 946.]

[Cited in U. S. v. Smith, 11 Utah, 433, 40 Pac. 709.]

Mr. Morton, U. S. Dist. Atty.

Adams & Bliss, for defendant.

WILLSON, District Judge (charging jury). This is an issue, upon a plea of not guilty, to an indictment founded upon the last clause of the 22d section of the act entitled "An act to reduce into one the several acts establishing and regulating the post office department," of March 3, 1825 [4 Stat. 102]. By this clause of the statute it is provided, "that if any person shall take any letter or packet not containing any article of value or evidence thereof, out of a post office, or shall open any letter or packet which shall have been in a post office, or in custody of a mail carrier, before it shall be delivered to the person to whom it is directed, with design to obstruct the correspondence, to pry into another's business or secrets:—or shall secrete, embezzle or destroy any such mail letter, or packet, such offender, upon conviction," &c. The indictment contains two counts. The first charges that the defendant [John N. Sander], on the 5th day of May, 1855, at Vermilion, &c., did open a letter which had been put into the mail at Coldwater, in the state of Michigan, to be conveyed by post, and directed to Phœbe Sturdevant, Vermilion, Ohio, with a design to obstruct the correspondence, and to pry into another's secrets The second count charges that the "defendant at Vermilion, in the district aforesaid, on the 5th day of May, 1855, did secrete and embezzle a certain letter which had before been in the post office at Vermilion, in said district, before it had been delivered to the person to whom it was addressed and directed, and which letter was then and there directed to Phœbe Sturdevant, at said Vermilion, and which said letter had, before that time, been put into the mail of the United States at Coldwater, in the state of Michigan, and was intended to be conveyed by post to Vermilion aforesaid, and which said letter had before that been conveyed by mail, and was deposited in said post office, at Vermilion, and had not, before the same was so secreted and embezzled by said defendant, been delivered to said Phœbe Sturdevant."

At the commencement of the trial of the cause, the defendant's counsel made a motion to quash the second count of the indictment, for duplicity. The court overruled the motion, with an intimation to counsel, however, that if the court, on reflection, should deem the ruling wrong, they would direct the jury to exclude the testimony, as impertinent to the second count of the indictment.

We are satisfied that the second count is not defective for duplicity. When a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offence, it has been repeatedly held that they may be coupled in one count. Thus, setting up a gaming table, and inducing others to bet upon it, may constitute distinct offences: for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offence, for which one count is sufficient, and for which but one penalty can be inflicted. In describing an offence under this statute, no technical words are necessary. In the case of U. S. v. Mills, 7 Pet. [32 U. S.] 142, the court say—"The general rule is, that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony." In the Case of Mills the indictment was substantially, in form, like the second count of this; both charge the secreting and embezzling in one count, and both are founded on the same section of the post office law. The same ruling has been adopted by this court in the case of U. S. v. Lancaster [Case No. 15,556].

But a more serious and grave question is raised by defendant's counsel in requesting the court to charge the jury, "that if they should find the letter in question had been delivered by the post master at Vermilion to the defendant, who was at the time a fully authorized agent of Phœbe Sturdevant, to receive it, that any embezzlement by him thereafter, and before delivery to her, does not constitute an offence under the statute. It is claimed by counsel that a delivery to an authorized agent is a delivery to the principal, and that when this is done the functions of the post office department, and the powers of the federal government, are at an end in the premises.

We believe this position of counsel to be well taken. It is a familiar principle of law,

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

that an act done by an authorized agent, within the scope of his authority, is an act of the principal: "Qui facit per alium facit per se." Hence it is that the delivery of goods by a third person to an agent, and his acceptance of them for his principal, is, in contemplation of law, a delivery to, and acceptance, by the principal. So, payments made by a third person to the agent in the course of his employment, is payment to the principal, and whether actually paid to the principal or not, by the agent, it is conclusive on him. A letter, packet, or other thing valuable, having been committed to the post office department for carriage and delivery, if once parted with by the post master to a person authorized to receive it, from that moment ceases alike to be under the control of the department and the power and authority of the general government. The sanction, by the federal courts, of the contrary doctrine, would be dangerous in its tendency and subversive of reserved state authority. No power is given to congress to legislate upon the subject, except what is incident to, and necessary to carry out, the grant contained in the 8th section of the first article of the constitution. The grant is simply, "that congress shall have power to establish post offices and post roads," and while we would not adopt the limited and narrow construction given to this grant by President Monroe, in his special message to congress of 4th May, 1822, yet we would not extend implied powers further than what is necessary to carry out, with safety to the public, the legitimate operations of the post office establishment. When the functions of the department are exhausted by the proper delivery of mail matter (once placed in its charge) such mail matter is then beyond the reach and authority of any legislation of congress. It is for the jury to determine from the testimony, whether the defendant was the authorized agent of Phœbe Sturdevant to take this letter from the post office at Vermilion. If he so received it, without any criminal purpose at the time, you will have done with the case by returning a verdict of not guilty. But on the contrary, if you are satisfied from the testimony, beyond a reasonable doubt, that the defendant at the time he obtained the letter from the post office, did it with the criminal intent of opening it for the purpose of prying into another's business or secrets, then, although he may have had the previous consent of Phœbe Sturdevant to bring her letters from the post office, you will be required, nevertheless, to examine the evidence as to the offence charged in the first count of the indictment; for in that case the offence had its inception at the time of his taking the letter from the office, as that act was, in itself, a larceny.

We do not intend to recapitulate the testimony or comment upon it. We will say, however, that there is in this country a growing unwillingness to rest convictions on confessions alone. Yet it is hardly to be supposed that a man who is innocent, will make statements to different persons, and perform acts at different times, which, taken together, go directly to prove an alleged commission of a crime. When it is a question of intention of the accused, for an alleged violation of law, the jury in no case can have furnished them, by the prosecution, positive proof; when the intent is material, however, it must be shown by the government; and this is to be done by proving overt acts of the defendant from which the intention can be implied, as every man is supposed to intend the necessary consequences of his own acts.

Take the case, gentlemen, and under the rules of law, as given to you by the court, return a verdict according to the evidence.

The jury retired, and after several hours' deliberation came into court and asked to be discharged as there was no possibility of their agreeing upon a verdict. They were accordingly discharged by the court and the case continued.

Case No. 16,220.

UNITED STATES v. SANDERS.

[Hempst. 483.] [1]

Circuit Court, D. Arkansas. April, 1847.

PARENT AND CHILD—EVIDENCE—DECLARATIONS—WHO ARE INDIANS—MIXTURE OF RACES—PARTUS SEQUITUR VENTREM—JURISDICTION OF FEDERAL COURTS.

1. The declarations of a father as to the maternity of his child are competent evidence; but the circumstances under which they were made and the weight to be given to them must be left to the jury.

2. The child must partake of the condition of the mother; and if the mother is an Indian, the child will be so considered, for the purposes of the intercourse act of 1834 [4 Stat. 729], whether the father is a white man or an Indian.

[Cited in McKay v. Campbell, Case No. 8,840.]

3. The child of a white woman, by an Indian father, would be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins determining the condition of the offspring.

[Cited in McKay v. Campbell, Case No. 8,840. Disapproved in Ex parte Reynolds, Id. 11,719; U. S. v. Ward, 42 Fed. 322.]

4. The offspring of a free-woman is free, and so on the other hand, the issue of a slave is a slave likewise.

5. The rule partus sequitur ventrem generally obtains in this country.

6. Questions of jurisdiction ordinarily belong to the court as matters of law; but where the jurisdiction depends upon facts to be found by a jury, the latter may, under the direction of the court, as to matter of law, affirm through the medium of a general verdict, that there is or is not jurisdiction.

7. The court has no jurisdiction to punish offences under the intercourse law of 1834 (9 Bior. & D. Laws, 135 [4 Stat. 729]), committed by one Indian against the person or property of another Indian.

Murder. The defendant [Ellis Sanders], a Cherokee Indian, was indicted for the mur-

[1] [Reported by Samuel H. Hempstead, Esq.]

der of Billy, a white boy, in the Cherokee country, west of Arkansas, in 1844. The defendant plead not guilty, and on the trial the proof on the part of the prosecution was, that in the latter part of July, 1844, the defendant, without any provocation or excuse, killed Billy by a blow on the head with a large maul, breaking the skull, and of which blow Billy instantly died. It was proved that the deceased was an inoffensive idiot boy, and was reputed to be white. The evidence fully established the fact that it was a wanton and unprovoked murder, and on that point there was no difference of opinion. The prisoner introduced various witnesses, who proved that they knew the father of the deceased, and had frequently heard him say in his lifetime that the mother of this boy was an Indian woman, and on this the prisoner rested his defence. On this point there was some contradictory evidence, but the weight of it was in favor of the position that the mother of the boy was an Indian woman, although it did not appear to what tribe she belonged, or whether she was a full-blooded Indian or not.

E. H. English, for the prisoner, contended that the exception in the intercourse act of 1834 (9 Bior. & D. Laws, 135) applied to this case, and that the evidence sufficiently established the fact that the offence charged in the indictment was committed by one Indian upon the person of another Indian, within the meaning of that exception, and that, consequently, he was not punishable by this court, however enormous the offence, which the counsel was not disposed to palliate.

S. H. Hempstead, Dist. Atty., for the prosecution, in his argument to the jury, insisted that the deceased was a white boy in contemplation of law. The proof was clear that the father was a white man, of the white race, and although the testimony adduced by the prisoner, if believed, favored the idea that the mother was an Indian woman, or had Indian blood in her veins, yet it was not satisfactorily shown, for no one ever saw her,—no one pretended to say to what tribe, if any, she belonged,—whether she was a full blood, half breed, or quarter breed Indian, where she lived, or when she died. Unimpeachable witnesses had sworn that the boy was generally reputed to be white, and this should outweigh the vague testimony for the defence; and that as to the guilt of the prisoner that could not and had not been disputed, for every one saw it was a cold-blooded and shocking murder.

Before DANIEL, Circuit Justice, and JOHNSON, District Judge.

DANIEL, Circuit Justice, charged the jury that it would not be necessary to give any particular direction as to the law of murder, because there was no contest on that point at all, nor had any justification been attempted for the killing of the deceased. If the jury believed the witnesses, who had not indeed been impeached in any way, it was an atrocious and wilful murder. The prisoner did not rest his defence on his innocence, but on the want of jurisdiction in this court to punish him at all. He is charged in the indictment to be a Cherokee Indian, and the deceased to have been a white boy and not an Indian, thus presenting a case, as far as the indictment is concerned, within the jurisdiction of the court. The witnesses for the government, if believed, establish the averment in the indictment, that the defendant is a Cherokee Indian, and also state that the deceased was called and generally reputed to be a white boy, not of any Indian tribe. To rebut this the prisoner introduced witnesses, who have stated that they knew the father of the boy, that he was a white man, lived in the Indian country, and that they had frequently heard him declare that the mother of the deceased was an Indian woman. The declarations of a father as to the maternity of a child are admissible and competent evidence (1 Phil. Ev. 238, 239: 2 Phil. Ev. [Cowen & Hill's notes] notes 463–466, 468); but the circumstances under which they are made, and the weight to be attached to them are matters for the jury to determine.

There has been considerable discussion as to who ought to be considered an Indian within the purview of the proviso of the 25th section of the intercourse law of 1834, which declares, that the laws of the United States, for the punishment of crimes in the Indian country, shall not extend to crimes committed by one Indian against the person or property of another Indian. Gord. Dig. 430. That act does not define an Indian, but uses a general term without embracing or excluding any particular class of persons. On consultation with my brother judge we concur in laying down this rule as the safest: that the child must follow the condition of the mother. If the mother is an Indian woman her offspring must be considered Indians within the meaning of the proviso alluded to, whether the father be a white man or Indian. And so, on the other hand, the child of a white woman by an Indian father, would, for all the purposes of that act, be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins, determining the condition of the offspring. This is substantially following the common law rule, which was borrowed from the civil law. Just. Inst. bk. 1, tit. 4, p. 13. The rule of the civil law was, that one born of a free mother was free, although the father was a slave; and so on the other hand, if the mother was a slave the offspring partook of her condition. Ruth. Inst. 247; Shelton v. Barbour, 2 Wash. (Va.) 67. There can be no doubt that the rule partus sequitur ventrem generally obtains in this country. Hudgins v. Wrights,

1 Hen. & M. 137; Pegram v. Isabell, 2 Hen. & M. 193; Chancellor v. Milton, 1 B. Mon. 25; Esther v. Akins' Heirs, 3 B. Mon. 60.

If the jury believe from the evidence that the mother of the boy Billy was an Indian woman, we are of opinion on the rule just laid down, that her offspring was also an Indian within the meaning of the exception alluded to, and consequently that the court is destitute of authority to punish the prisoner, however guilty he may be, and that the jury ought to return a verdict of not guilty.

Questions of jurisdiction ordinarily belong to and are decided exclusively by the court as pure matters of law; but here it is necessary that certain facts should be passed upon by the jury before that question can properly arise. Where the jurisdiction, however, depends upon the existence of facts, the jury may, under the direction of the court as to matter of law, affirm through the medium of a general verdict that there is or is not jurisdiction.

Verdict not guilty, and prisoner discharged.

Case No. 16,221.

UNITED STATES v. SANDFORD.

[1 Cranch, C. C. 323.] [1]

Circuit Court, District of Columbia. July Term, 1806.

INDICTMENTS—NAME OF PROSECUTOR.

It is no ground for general demurrer to an indictment, for a misdemeanor under the laws of Virginia of 1792 and 1795, that the name of a prosecutor is not written at the foot of the indictment.

[Cited in U. S. v. Helriggle, Case No. 15,344.]

Indictment, for assault and battery. General demurrer, because the name of a prosecutor was not indorsed according to the act of assembly.

E. J. Lee, for the traverser, cited the law of Virginia of November 13, 1792, and read the title of the act to show the intent to prevent vexatious and malicious prosecutions. The 24th section (page 105) requires that "the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or profession shall be written at the foot of every bill of indictment for any trespass or misdemeanor before it be presented to the grand jury." By the 25th section the prosecutor is to answer for costs, and by the 28th section may be compelled to give security for costs. There must be a prosecutor to every indictment for a misdemeanor. The act of 1802 (page 431), by excepting cases where the indictment is sent up by order of court, or found on the knowledge of two of the grand jury, shows this to be the true construction; so also the act of 1795 (page 346), which requires that the names of the grand jurymen upon whose knowledge an indictment is found, and of the witnesses who have been called upon by the court or the grand jury, shall be indorsed on the indictment, declares that they shall not be liable for costs, implying thereby that if not called upon by the court or the grand jury they would be liable for costs. In the cases of U. S. v. Jamesson [Case No. 15,466], and U. S. v. Singleton [Id. 16,293], the objection was taken in arrest of judgment, which was supposed to come too late.

Mr. Jones, for the United States. The law did not mean that misdemeanors could not be prosecuted without a prosecutor. It did not mean to include those of a public nature, such as perjury, conspiracy, forgery, &c., but contemplated only such as result from an injury to a single individual. The construction depends upon the subject-matter upon which the legislature were legislating. The defendant relies upon a negative pregnant, viz., that no indictment shall be sent to the grand jury without a prosecutor. But the true construction is that where there is a prosecutor his name shall be indorsed; but where there is no prosecutor his name cannot be indorsed. The "prosecutor" means a person who prosecutes in the name of the United States, or in the name of the United States and himself. The civil law calls him "delator." The prosecutor is not bound to pay the costs of the United States; he is only liable for the defendant's costs. The only penalty for not giving security for costs is, that the indictment shall be dismissed with costs, that is, costs against the commonwealth. "Prosecutor" means one who shares the penalty. Cowell, in his Interpreter (tit. "Prosecutor"), defines him as one that follows a cause in another's name. He calls them "promoters"—"promotores," who prosecute in their own name and the king's. The oath of a grand juror is, that he shall present things that otherwise come to his knowledge. The practice in Virginia is variable. It has never been settled by the court of appeals. The construction, contended for by the defendant, would submit the whole penal code to the mercy of an individual.

Mr. E. J. Lee, in reply. It does not put the penal code in the power of an individual. It is not necessary that any one should take upon himself the odium of prosecuting. The grand jury or the court may call upon witnesses. The attorney-general, ex officio, may file an information. The court may order a bill of indictment. If the grand jury do not call on the witness, nor the court, nor the attorney-general, and the witness goes voluntarily to the grand jury, the legislature meant that there should be a prosecutor liable for the defendant's costs. As to the 25th section, if the prosecutor fails to give security for costs, the indictment is dismissed with costs against the prosecutor, not

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

against the commonwealth. Affirmative statutes, giving a remedy, are to be construed as implying a negative of other remedies.

CRANCH, Chief Judge. This is an indictment for an assault and battery, to which there is a general demurrer, on the ground that the name of a prosecutor, &c., was not written at the foot of the indictment before it was presented to the grand jury. The words of the 24th section of the law are: "And the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or profession, shall be written at the foot of every bill of indictment for any trespass or misdemeanor, before it be presented to the grand jury." But the act does not say what shall be the consequence of an omission to comply with the command. It does not say that the indictment shall be quashed or dismissed, nor impose any penalty, or create any disability in the indictment; it does not say that such omission shall vitiate the indictment or render it void. But if it is made a necessary part of an indictment, perhaps the want of the name may be taken advantage of on general demurrer. The question, then, will be, whether it be a necessary part of every indictment for a trespass or misdemeanor, that the name of the prosecutor, &c., should be written at its foot. If the words of this section are construed strictly, and if the omission to write the name of the prosecutor vitiates and renders void the indictment, then it is not in the power of government, nor of the grand jury, to prosecute an offender who has been guilty of the grossest misdemeanor, unless some individual person will become prosecutor, and make himself responsible for costs. For the words of the law are, "every bill of indictment for a trespass or misdemeanor." The grand jury could not find a bill even on their own knowledge, although bound to do so by their oath. The court could not order a bill to be sent to the grand jury even for the most aggravated trespass or misdemeanor. It would be, as has been justly observed in the argument, to subject the whole authority of government as to the whole penal code, (excepting the case of felony,) to the will of an individual. The 38th section speaks of the prosecutor in all offences, not capital, and authorizes the court to compel the prosecutor to find security for costs. There seems, therefore, not more reason for supposing that the legislature meant to require a prosecutor in all cases not capital, than in those of trespass and misdemeanor only. The phraseology, also, of the act of 1795 (page 346, § 2) countenances the suggestion, that the legislature did not mean to require a prosecutor to every indictment for a trespass or misdemeanor. It supposes the case that such an indictment may be found by a grand jury, upon the knowledge of two of their own body, or upon the testimony of a witness called upon by them, or by the court, and then goes on to enact that the names of such witnesses shall be indorsed on the indictment, but provides that they shall not thereby be subjected to costs. This shows, that by the first act, a prosecutor was not always necessary, and even if he was, yet by the act of 1795, there were three cases in which no prosecutor was required. If, then, it be not necessary that the name of a prosecutor should be indorsed on every indictment for a trespass or misdemeanor, the mere want of such indorsement is not a good ground of general demurrer. Besides, it does not appear that the witnesses, whose names are indorsed on the indictment, were not called upon by the grand jury, or the court. By their names being indorsed, it is to be presumed that they were so called upon, because it is not necessary that in any other case their names should be indorsed. If they were thus called upon, it seems to be a fair inference, from the act of 1795, that no prosecutor was required.

But it is said that the act of January 28, 1802 (page 431), contains evidence of a legislative construction of the act of 1792 (pages 102, 105), and that such construction is to be respected, although the act of 1802 itself is not in force in the District of Columbia. The answer to this is, that it is the province of the judiciary, and not of the legislature, to declare what the law is or has been. The legislature can only say what it shall be. A subsequent declaration by a legislature of the meaning of a prior law, cannot alter that law as to past cases. It cannot give to the law any other construction than that which would have been fairly given by the judicial department. But the preamble of the act of 1792, says only, that there have been doubts as to the construction, for the removing whereof, &c., which must mean, for the future. If it was intended as an ex post facto, or rather a retrospective law, it cannot operate here, because subsequent to our separation from Virginia; if it is only evidence of a legislative construction, it is not more binding on the judiciary, than if it had been an executive construction. It is not, in fact, evidence of any legislative construction; it is only evidence of the existence of doubts in the mind of some person or persons; and even those doubts cannot be supposed to extend farther than the remedy which the legislature applied, which was only to the case of an indictment founded upon a presentment made on the knowledge of the grand jury, or of two of their members. Nothing, therefore, can be inferred from the act of 1802. The words of the act of 1792, are not that the name of "a prosecutor," but, the name of "the prosecutor." By thus using the definite article, the legislature must be presumed to speak of some particular prosecutor. The question which naturally occurs upon the words "the prosecutor," is, what prosecutor? The answer must be, the per-

son who voluntarily goes before the grand jury with his complaint. Before, therefore, you can require that the name of such a prosecutor should be written at the foot of the indictment, you must show his existence. You must show that there was some person who voluntarily complained to the grand jury. Even then it seems doubtful whether a general demurrer would be the mode of taking advantage of the omission.

A general demurrer admits the fact, that the traverser did assault and beat the person named in the indictment. The offence is legally, substantially, and technically set forth. The facts stated in the indictment are all well pleaded, and therefore are all admitted by the demurrer. It would be a strange construction of the act, which would suppose that the legislature intended that the traverser, after confessing himself guilty, should avail himself of a provision which was only to enure to his benefit in case of his innocence. It seems to the court, that the only mode of taking advantage of the omission, in the case where the advantage could be taken, would be by a motion to quash the indictment, grounded upon the fact apparent upon the record, or supported by affidavit, that some person (naming him) did voluntarily complain to the grand jury of the offence stated in the indictment.

UNITED STATES (SAN FRANCISCO v.).
See Case No. 12,316.

Case No. 16,222.

UNITED STATES v. SANTOS.

[5 Blatchf. 104.] [1]

Circuit Court, S. D. New York. Nov. 26, 1862.

MISDEMEANORS—FORFEITURE OF BAIL—ACQUITTAL.

Where a defendant in an indictment, who was on bail, departed the court without leave, during the trial, and the recognizance of bail was estreated and ordered to be prosecuted, but, the offence being only a misdemeanor, the trial proceeded in the absence of the defendant, and he was acquitted, the court, under the 6th section of the act of February 28, 1839 (5 Stat. 322), the bail being innocent, set aside the estreat, on the application of the bail.

This was an indictment for fitting out a vessel with intent to employ her in the slave trade. One James Murphy, as surety, entered into a recognizance for the appearance of the defendant, to abide the order of the court. The defendant [Joseph E. Santos] appeared and answered to the indictment, but, during the trial and before it was concluded, he departed, without the leave of the court. He was called and defaulted, and the recognizance was duly estreated and ordered to be prosecuted, but, as the offence charged was only a misdemeanor, the trial proceeded, and the defendant was acquitted by the jury. Murphy now applied to the court, to be relieved from the default and estreat.

E. Delafield Smith, U. S. Dist. Atty.
James T. Brady, for the surety.

NELSON, Circuit Justice. The 6th section of the act of February 28, 1839 (5 Stat. 322), provides, that in case of the forfeiture of a recognizance in a criminal case, the court shall have authority, in its discretion, to remit the whole or a part of the penalty, whenever it shall appear that there has been no wilful default of the parties, and that a trial can, notwithstanding, be had in the case, and that public justice does not otherwise require the same penalty to be exacted. This case is rather stronger in favor of the application than those contemplated in the statute. Here the trial has been had, and the prisoner has been acquitted. The condition of the recognizance has been performed in fact, though not in contemplation of law, for the defendant has stood the trial. The case being a misdemeanor, it was competent to proceed with the trial in his absence. Although it must be assumed that the default was wilful, as it respects the prisoner, for aught that appears the bail is innocent, and he is the person most materially interested in the success of the motion. Under the actual circumstances of the case, I think that the breach of the condition of the recognizance is technical, and that it would be unreasonable to impose it. I shall, therefore, direct the default and estreat to be set aside. The bail must pay to the district attorney the costs of any suit that has been commenced.

Case No. 16,223.

UNITED STATES v. The SARAH B. HARRIS.

[4 Cliff. 147; [1] 12 Int. Rev. Rec. 54.]

Circuit Court, D. Maine. Sept. Term, 1870. [2]

CUSTOMS DUTIES—GOODS FREE OF DUTY—UNLOADING WITHOUT PERMIT—ACT MARCH 2, 1799.

1. Under section 50 of the act of March 2, 1799 [1 Stat. 665], merchandise free of duty cannot be lawfully unladen and delivered without a written permit from the collector, and naval officer, if any, for such unlading and delivery.

2. The permit required by section 50 is the same as the one mentioned in section 49, and that manifestly is a written permit.

3. If congress had intended that goods not dutiable should be unladen and delivered without the permit described in section 49 of the collection act, evidence of such intention would be found in some part of the act. None such is to be found.

4. Innocence of intention cannot, any more than ignorance of law, afford a defence to the master or owner of a vessel for a violation of the prohibition contained in section 50, of the act of March 2, 1799.

[Cited in U S. v. Curtis, 16 Fed. 188.]

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

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 12,344.]

5. If goods (mackerel) were the property of an American citizen, taken on board an American vessel at a foreign port and consigned to American consignees, were landed at a foreign port for transshipment to the American port, were caught in an American vessel by American fishermen, and shipped to the American port in the American vessel, still they could not be unladen at the American port without a written permit under section 50 of the collection act.

Libel of information against the schooner Sarah B. Harris, her tackle, apparel, and furniture, for a violation of section 50 of the act of March 2, 1799. Goods imported or "brought" in any ship or vessel from any foreign port or place, cannot at any time be lawfully unladen or delivered from such ship or vessel, within the United States, without a permit from the collector of the port, and naval officer of the same, if any, for such unlading and delivery; and the express provision is that all such goods, so unladen or delivered contrary to the said prohibition, shall become forfeited, and may be seized by any of the officers of the customs, and where the value thereof, according to the highest market price of the same at the port or district where landed, shall amount to $400, the vessel, tackle, apparel, and furniture shall be subject to like forfeiture and seizure. 1 Stat. 665; Waring v. The Mayor, 8 Wall. [75 U. S.] 118.

Pursuant to that provision, the schooner in this case was seized on the 4th of May, 1867, and the allegation of the information was that she was forfeited to the United States, because one hundred barrels of mackerel, of the value of $2,000, were, at the time alleged in the information, imported in the said schooner from Port Mulgrave, in the province of Nova Scotia, and were at the time and place alleged, to wit, at Deer Isle, in the district of Maine, on the 1st day of November, 1866, unladen and delivered from the said schooner, without a permit for that purpose from the collector, and naval officer of the port where the said goods were so unladen and delivered. Full proof was exhibited in the record that the quantity of mackerel described in the information was imported in the schooner, and that the same were unladen and delivered at the time and place therein set forth, and it was not denied that the mackerel in question exceeded in value the sum of $400.

George F. Talbot, U. S. Atty.
Bradbury & Bradbury, for claimants.

CLIFFORD, Circuit Justice. American ships are forbidden to bring goods from any foreign port into the United States, unless the master thereof shall have a manifest in writing, signed by the proper person, describing the goods and the vessel, and containing the name of the port where the goods were taken on board and the name of the port for which the same are consigned or destined. 1 Stat. 644. Imported goods may be entered for consumption or for warehousing, but the entry, in either case, must be in writing, and must be made to the collector of the district within fifteen days after the required report of the arrival of the vessel is filed by the master. Id. 649. Such goods are required to be landed in open day, and the same section provides that they shall not at any time be landed or delivered from such ship or vessel "without a permit from the collector, and naval officer, if any, for such unlading and delivery." Id. 665. Authority to grant a permit does not exist until the duties are paid or secured to be paid, and the duties are never paid or secured to be paid before the goods are imported, nor before they are entered either for consumption or warehousing. Masters of such ships or vessels, on their arrival within four leagues of our coast, or within any of the bays, harbors, ports, or inlets thereof, are required, upon demand, to produce the manifest of the goods to such officer of the customs as shall come on board their ship, for his inspection, and it is made the duty of the said officer of the customs to certify the fact of compliance with that requirement and the day when it was so produced. Examination of the entry is usually made by the entry clerk, and if found to be correct, the collector proceeds to estimate the duties "on the invoice value and quantity," and if the estimated amount of duty is paid or secured to be paid as required by law, the collector certifies the invoice and grants a permit in due form for the unlading and delivery of the cargo. Waring v. The Mayor, 8 Wall. [75 U. S.] 110; Gen. Reg. 1857, p. 145. Congress, therefore, has prescribed the rule of decision, and while that provision remains in force no goods brought in any ship or vessel from any foreign port or place, unless falling within some exceptional rule not applicable in this case, can lawfully be unladen or delivered from any such ship or vessel within the United States without a permit from the collector, and naval officer, if any, for such unlading and delivery.

Three principal defences are set up by the appellants. (1) They insist that the proofs show that the deputy collector assented to the unlading and delivery of the mackerel at the time and place alleged in the information, and they contend that a verbal permit under the circumstances disclosed in the evidence, is sufficient to shield the schooner from the forfeiture demanded in the act of congress on which the information is founded. (2) Suppose the rule is otherwise, and that a written permit is required where the goods unladen and delivered are dutiable, still they contend that the decree of the district court in this case was erroneous, because, as they insist, the mackerel in question were American caught, and not subject to duty, and they contend that the act of congress, even if it does require a written permit for the unlading and delivery of imported goods subject to duty, contains no such requirement where it appears that the goods are not dutiable,

but that the purpose of the law, at least in all such cases, is as well answered by a verbal permit as by one in writing. (3) Accessories, other than the master, are not liable to the penalty annexed to the offence, unless they were "knowingly concerned or aiding therein or in removing, storing, or otherwise securing the goods," and the claimants insist that the vessel in this case is not liable to forfeiture, because, as they assume, the master supposed and believed that the mackerel were American caught, and that they were not subject to duty as imported goods.

Goods imported from a foreign country are required to be entered at the custom-house where the vessel voluntarily arrives with intent to unlade the cargo. They may be entered for consumption or for warehousing, but they must be regularly entered, and the duties be paid or be secured to be paid, before any authority exists to grant a permit for their unlading and delivery. Until the permit is received by the inspector, no one has authority to remove the hatches or to break bulk, but the cargo is under the charge of the officer of the customs. By the directions of the principal collection act, the collector, jointly with the naval officer, or alone where there is none, shall, according to the best of his or their judgment or information, make a gross estimate of the amount of the duties on the goods to which the entry of any owner or consignee, his or her factor or agent, shall relate, which estimate shall be indorsed upon such entry and be signed by the officer or officers making the same.

Before any permit can be issued, the amount of the duties so estimated must first be paid or be secured to be paid, and the provision then is that the collector, together with the naval officer, where there is one, or alone where there is none, shall grant a permit to land the goods, &c., whereof entry shall have been so made, and then, and not before, it shall be lawful to land the said goods. Permits are to be "granted" by the collector, together with the naval officer where there is one, or alone where there is none, and as a further evidence that permits are to be made in writing, the provision is that they shall specify as particularly as may be the goods to be delivered, namely, the number and description of the packages, whether trunks, bale, chest, box, case, pipe, hogshead, barrel, keg, or any other packages whatever, with the mark and number of each package, and, as far as circumstances will admit, the contents thereof, together with the names of the vessel and master, in which, and the place from whence, they were imported, and no goods . . . shall be delivered by any inspector or other officer of the customs that shall not fully agree with the description thereof in such permit. Evidence that congress intended that the permit should be in writing is derived from every part of the regulations upon the subject; but if more be needed to make it certain that such was the intention of congress, it is found in the fact that the form of the permit is prescribed by law, and the same section enacts that the form of all permits for the purposes aforesaid, and for deliveries from the public stores, shall be as therein directed and prescribed. 1 Stat. 664. Prior to the granting of the permit, the duties are estimated on the invoice value and quantity, and the amount as estimated being paid or secured to be paid, the collector certifies the invoice and grants a permit in due form for the unlading and delivery of the cargo, first designating the packages, one in ten, to be sent to the public store for examination and marking the same on the entry, invoice, and permit. Gen. Reg. 1857, p. 145.

Dutiable goods, therefore, cannot be unladen or delivered without a written permit from the collector as prescribed by law and the regulations of the treasury department, but the appellants contend that the mackerel in this case were American caught, and that as such they were not dutiable, and that imported goods not dutiable may be unladen and delivered without a written permit for that purpose. Evidently the proposition of the appellants embraces two questions, one of fact and one of law; and it is clear that the defence in this respect must fail unless both are found in their favor. Duly enrolled and licensed for the mackerel fishery, the schooner sailed from Deer Isle, in this district, about the last of August, 1866, on a second cruise for mackerel in the bay of Chaleur, with a license to touch and trade at any foreign port during the trip. They proceeded to the bay, and having caught some two hundred barrels, they touched at Port Mulgrave, and there took on board as freight the one hundred barrels of mackerel described in the information, and arrived on the return voyage at Green's Landing, in Deer Isle, on the 21st of the same month. On the day following, the master reported the arrival of the vessel, and produced to the deputy collector of Deer Isle an "inward foreign manifest," describing the cargo as one hundred barrels of mackerel, shipped by Charles R. McDonell, of the American fishing schooner Olivia Maria, taken on board at Port Mulgrave, Nova Scotia, and consigned to Davis & Co., at Green's Landing, Deer Isle. Although there were more than three hundred barrels of mackerel on board, including those caught by the crew during the trip, still the master made oath that the manifest contained a just and true account of all the goods on board the schooner. He also presented at the same time the certificate of Charles R. McDonell, as importer, certifying under oath that he landed at Port Mulgrave, Nova Scotia, for transshipment to the port of Deer Isle, in the United States, one hundred barrels of mackerel, and that the same were caught in said American vessel by American fishermen, and shipped to the said port of Deer Isle by the said schooner.

Appended to the document is the certificate

of Vincent J. Wallace, dated October 15, 1866, that the same was signed and declared before him as comptroller of the customs. Accompanying the certificate there was also the sworn statement of two persons representing themselves as merchants at that port, in which they declare that the statements of McDonell in his certificate were just and true and worthy of full faith and credit. Warren, the deputy collector at Deer Isle, testifies that the master of the schooner came to his office Oct. 22, 1866, and filed with him the before-mentioned certificates, and entered his vessel; that he "made the entry of the one hundred barrels of mackerel before me;" that he gave him no written permit, but thinks that he gave him a verbal one, and that the master asked him if it was all right, and that he told him "Yes, go ahead and land your mackerel." On cross-examination, the witness stated that he did not inspect the cargo nor send any one to inspect it, and that he had no knowledge of the matter, except what he derived from the report of the master and from the papers he filed with him at the time. Beyond doubt, the evidence shows that due report was made of the arrival of the schooner at the port of Deer Isle, and that she brought as cargo one hundred barrels of mackerel, but the vessel was never boarded by an officer of the customs, nor was her cargo ever inspected in any way or to any extent. Informed, as the deputy collector was, that the mackerel were American caught, and that they had been transshipped from an American vessel, he gave the matter no attention, except to say to the master, in answer to his inquiry, that it was all right, and that he might land the goods. Viewed in the light of these facts, as the case must be, several questions arise which must be separately answered. (1) Whether the goods were or were not dutiable; because if they were dutiable, it has already been determined that they could not be lawfully unladen or delivered without a written permit. (2) If the mackerel were not dutiable, whether a verbal permit was or was not sufficient to save the goods and the vessel from forfeiture. (3) Whether the verbal assent of the deputy collector to the landing and delivery of the mackerel constitutes a defence to the charge of forfeiture.

Influenced by the representations of the master that the mackerel were American caught, and believing that a written permit was not necessary for the unlading and delivery of goods not dutiable, the deputy collector admitted the goods to entry duty free, and consented, in the words before mentioned, that they might be unladen and delivered without being inspected, and without any written permit. They were supposed to have been caught by the crew of the Olivia Maria, an American vessel, and to have been the property of her master, Charles R. McDonell, but the district court found that they were British mackerel, the property of one John Moore, a resident of Port Mulgrave, and that the same were exported from that port and that the mackerel were subject to duty under the revenue laws of the United States. Examined in detail as the testimony was by the district judge, as appears by his opinion, it does not seem to be necessary to reproduce the statements of the respective witnesses. Suffice it to say that no doubt is entertained that the weight of the testimony, as then exhibited, fully justified the conclusion formed by the district judge. Some conflict of statement existed in the testimony, but the careful analysis of it made by the district judge showed conclusively that the mackerel were British caught, and that the representations of the master were incorrect. Much additional testimony has been furnished since the appeal, and it must be admitted that the new testimony intensifies the conflict, but the court here is of the opinion that the mackerel were British caught, and that they were exported from Port Mulgrave as the property of John Moore.

Concede the fact to be otherwise, still the court is of the opinion that the mackerel, even under the circumstances assumed by the appellants, could not be lawfully unladen and delivered without a written permit. "Unavoidable accident, necessity, or stress of weather" are not set up in this case, nor is there any evidence exhibited to support any such defence. Authorities founded upon the exceptions in section 27 of the collection act have no application in this case, as the unlading and delivery of the goods were voluntary and intentional, and without any unavoidable accident, necessity, or stress of weather. 1 Stat. 648; U. S. v. Hayward, [Case No. 15,336]; Peich v. Ware, 4 Cranch [8 U. S.] 358. Forfeiture of property, it is said, is not incurred under the revenue laws, unless the acts of the master or owner are attended with fraud, misconduct, or negligence; and it is insisted that the owner is not to suffer for the fraud, misconduct, or negligence of the revenue officer, in which he did not participate. Fraud is not imputed to the deputy collector, but it is clear that he was guilty of negligence and omission of duty so culpable as to amount to misconduct, and it is clear to a demonstration that the master voluntarily participated in that misconduct. Six Hundred and Fifty-One Chests of Tea [Case No. 12,916]. Only one hundred barrels of mackerel were placed on the manifest, and the master voluntarily broke bulk and landed the cargo before the same had been inspected, and without any written permit. Examined in view of these suggestions, it is apparent that the case before the court depends upon the general question whether goods not dutiable, may be lawfully unladen and delivered without a written permit, and that it does not fall within any of the exceptions contained in the collection act, or any such as are recognized as valid by the decisions of the federal courts. Ignorance of the

law furnishes no excuse, nor does it constitute any valid defence that the deputy collector was as uninformed in that behalf as the master. U. S. v. Lyman [Id. 15,647]. Unquestionably the permit required by section 50 of the collection act is the permit, the form of which is given in the preceding section of the same act, and nothing can be more comprehensive or explicit than is the language of that requirement, in which it is provided that no goods brought in any ship or vessel shall be unladen or delivered from such ship or vessel at any time, within the United States, without a permit from the collector, and naval officer, if any, for such unlading or delivery. Had congress intended that goods not dutiable should be unladen and delivered without such a permit as that described in section 49 of the collection act, it must be presumed that some evidence of such an intention would be found in some part of the act; but nothing of the kind appears. Free goods are by that form to be included in the permit, as well as such as are dutiable. Reference is made by the appellants to sections 45–47, as affording such evidence; but it is quite clear that they afford no support to the proposition. Merchandise free of duty is required to be placed on the manifest and entered, as well as that subject to duty, and a written permit for the unlading and delivery of such is just as essential to guard against smuggling and protect the public interest as where the importation is subject to duty.

Innocence of intention will not, any more than ignorance of the law, afford a defence to the master or owner of a vessel, for a violation of the prohibition contained in section 50 of the collection act. They are forbidden to unlade or deliver imported goods brought into the United States, without the required permit, and the provision is that if they do, and the goods so unladen and delivered amount to $400, the vessel, tackle, apparel, and furniture shall be subject to seizure and forfeiture.

Decree affirmed, with costs.

Case No. 16,224.

UNITED STATES v. SARCHET.

[Gilp. 273.] [1]

District Court, E. D. Pennsylvania. Feb. Term, 1832.

TRIAL—PROVINCE OF COURT AND JURY—CUSTOMS DUTIES—CLASSIFICATION—EVIDENCE—BOLT IRON.

1. The court have no right to give the jury any direction upon questions of fact, but it is their duty to call their attention to particular points, and to observe upon the tendency, force, and comparative weight of conflicting testimony.

2. In the construction of laws relating to trade and commerce, such as those of May 22, 1824 [4 Stat. 25], and May 19, 1828 [Id. 270], the vocabulary of merchants is to be adopted in preference to that of mechanics.

3. To authorise the entry of small pieces of bolt iron, under the name of "chain links," it must be proved that they have been previously known in commerce by that name.

[Cited in brief in Cutler v. Currier, 54 Me. 88.]

4. Where a piece of bar or bolt iron has been changed by subsequent manufacture, it ceases to be subject to duty as such, although it may not have become a new and distinct manufacture, or assumed a new name or use.

On the 5th January, 1831, John F. Sarchet, imported into the port of Philadelphia, by the ship Alexander, from Liverpool, fifty-six sheet iron casks containing small pieces of round iron, from three to eight inches in length, and about half an inch in diameter. They were invoiced and entered at the custom house as hardware, and the duties were calculated at the rate of thirty-seven dollars a ton, being the rate of duty chargeable on "rolled bar or bolt iron" under the provision of the act of May 19, 1828. The whole amount of duty on the invoice amounted to four hundred and sixty-six dollars and ninety-one cents, for which three bonds were given. The first of these, for one hundred and fifty-five dollars and ninety-one cents, became due on the 5th September, 1831, and not being paid, the present suit was brought to recover that sum with interest. On the return day, at November sessions, the defendant in open court, the United States attorney being present, made an affidavit that an error had been committed in the liquidation of the duties demanded upon the bond. He specified as the error alleged to have been committed, "that the invoice of iron upon which the said duty had been assessed, was estimated as bar or bolt iron, manufactured in whole or in part by rolling, at thirty-seven dollars per ton, instead of being estimated as a manufacture of iron, not otherwise specified, in the act of May 22, 1824, and therefore as paying an ad valorem duty of twenty-five per cent.; or as scrap iron and therefore paying a duty of sixty-two and a half cents per hundred weight." Upon this affidavit the court granted a continuance. On the 12th March, 1832, the case came on for trial before Judge Hopkinson and a special jury. Numerous witnesses were examined on the part of the United States, and also of the defendant, with a view to prove the character and designation of the articles mentioned in the invoice, both as an object of commercial traffic, and as the subject of manufacture to a greater or less extent.

Mr. Gilpin, U. S. Dist. Atty.

In this case, an invoice of articles was entered by the defendant at the custom house, in Philadelphia, as "hardware." On inspection they were found to consist of pieces of round iron, perfectly straight, varying from three to eight or ten inches in length, and from less than half an inch to more than three quarters of an inch in diameter. They

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

were appraised as pieces of "bolt or bar iron, made by rolling," and the duty was charged at the rate of thirty-seven dollars a ton, pursuant to the second clause of the first section of the act of May 19, 1828. This prescribes, "that, from and after the first day of September, 1828, in lieu of the duties now imposed by law, on the importation of the articles hereinafter mentioned, there shall be levied, collected, and paid the following duties; that is to say; first, on iron, in bars or bolts, not manufactured in whole or in part by rolling, one cent per pound; second, on bar and bolt iron, made wholly or in part by rolling, thirty-seven dollars per ton." The only question in the case is one of fact, whether or not these articles, which, it is admitted are made by rolling, ought to have been appraised and charged as "bar or bolt iron." They are so considered by the officers of the customs, men experienced and disinterested. To confirm this, the evidence of merchants largely engaged in the importation of iron; of American manufacturers of a similar article; and of practical mechanics, who use it as a material for various purposes, has been produced. This testimony supports the construction given by the appraisers, and is amply sufficient to justify the charge of duty which has been made. P. L. 1828, p. 43. The allegation of the defendant, that these pieces are not to be considered as "bar or bolt iron" because they are now a manufacture of iron, cannot be sustained, unless it is shown that they have changed their character and assumed some new use and name. Every partial alteration is not sufficient; it must be such a one as converts them into some new article, adapted to a specific purpose. It has been decided that round copper bars and copper plates, although turned up at the edges, come within the provisions of the laws by which copper in bars and copper in plates are exempted from duty. More than this, it has been decided that round copper plates turned up at the edges, and invoiced by the specific name of "raised copper bottoms," do not lose that privilege of exemption. Can it then be said, that the mere cutting of a long bar of iron into short pieces, so changes its character as to make it a new manufacture? U. S. v. Kid, 4 Cranch [8 U. S.] 1; U. S. v. Potts, 5 Cranch [9 U. S.] 284. But if we were to admit that there had been a change in this article, such as to prevent its being considered any longer "bar or bolt iron," what has it become? According to the defendant's own allegation it has become a "chain link," part of an iron cable or chain; and as such it would be subject to a higher duty than that now demanded. By the fifth clause of the first section of the act of May 22, 1824, the duty to be levied "on iron cables, or chains, or parts thereof is three cents per pound," which is equal to sixty-seven dollars and twenty cents per ton. 3 Story's Laws, 1944 [4 Stat. 25].

Mr. Cadwalader, for defendant.

The first point of view, in which the consideration of this case presents itself, is, as to the construction of the act of congress, under which the right to levy this duty is claimed. That act is to be construed strictly in favour of the defendant. If not altogether a penal statute, it is in the nature of one, because penalties are imposed for its evasion. What is the just construction to be put upon its provisions? Clearly that it means to describe, by its general commercial designation, an article, well known in commerce, which had been frequently before the subject of similar legislative provisions. The act of 1828, is but part of a series of acts relative to the levying and collecting of duties on imported merchandise. In all of them, iron of this character is referred to. In the act of April 27, 1816 [3 Stat. 310], it is referred to as "iron in bars or bolts;" in that of April 20, 1818 [3 Stat. 460], it is called "iron in bars and bolts;" in that of May 22, 1824, it is designated as "iron in bars or bolts;" and finally in the act of May 19. 1828, it is described as "bar and bolt iron." All these expressions denote one and the same commercial article; they are illustrative of one another; and the term "bar and bolt iron," in the last, means the "iron in bars and bolts" alluded to in the previous acts. It is a well established rule, that words of a general signification in a statute, which are in juxtaposition with other words of a more confined and limited sense, are to be understood according to the more limited sense. If there were no such rule, the words in these several acts of congress, all evidently referring to the same subject matter, would impose it upon us. The law of May 19, 1828, meant to tax an article, namely, bar and bolt iron, which had been more particularly described in the previous laws as iron in bars and bolts; an article well known to commerce. There was no intention to tax a new material, but simply to increase an existing duty. In order therefore to subject the articles, which are the object of the present controversy, to the duty imposed on them, they must be iron in bars or bolts. That they are not so, simple inspection, independent of evidence, sufficiently establishes. 3 Story's Laws, 1589, 1706 [3 Stat. 310, 460]; 3 Story's Laws, 1944 [4 Stat. 25]; U. S. v. Tenbroeck, 2 Wheat. [15 U. S.] 248; U. S. v. Goodwin [Case No. 15,229]; Stradling v. Morgan, Plowd. 204; Wiseman v. Cotton, 1 Lev. 79; Waller v. Travers, Hardr. 309; Stevens v. Duckworth, Id. 344; Crowley v. Swindles, Vaughan, 173; Gale v. Reed, 8 East, 80; Miller v. Heller, 7 Serg. & R. 32. These articles therefore, not falling within the description of "bar and bolt iron," as contemplated by the act, and not being a mere raw material, must be either scrap iron, or a manufacture of iron. They bear more resemblance to the former, than to any among the various articles of iron described

in the act, but being prepared for a specific purpose, do not perhaps strictly fall under that designation. They are in fact a manufacture of iron not enumerated, and as such embraced in the fifth clause of the first section of the act of May 22, 1824, which declares that there shall be levied "on all manufactures, not otherwise specified, made of iron, a duty of twenty-five per cent. ad valorem." The term "bar or bolt iron," is not used in the act of congress as descriptive of a manufactured article; it is not so considered either in commerce or by the mechanic; it is in fact the raw material of the blacksmith. If therefore it undergoes any ulterior process, such as being cut, bona fide for a specific purpose, it ceases to be this raw material, it ceases to retain its former denomination, it ceases to be liable to duty as an article so known and denominated. This would be true whether or not it acquired any other known name. It might remain a nondescript, an article partly manufactured, but having ceased by a process of manufacture, however incomplete, to be what it was before, it acquires a new character, by which the duty chargeable is to be regulated. Such is the fact here. It has been proved that these bars of iron have been cut into pieces, bona fide, for the purpose of making chains or chain cables. This has been done in the regular course of manufacture, and it has therefore terminated their character as bar or bolt iron.

But the evidence enables us to proceed a step farther. They have not merely ceased to be bar or bolt iron; they have become a manufactured article, known in commerce. It has been settled that under the revenue laws, the commercial designation of an article of import, is that by which it is to be taken, in estimating the duties. Now these pieces of iron are known in commerce, and among those who deal in them, as "chain links." They are imported as such. They are to be used for certain purposes of manufacture. It is immaterial whether or not they agree in form or appearance with what is meant by the term "link" out of the trade. It is sufficient that they bear that name, among those who use them. That they do so has been proved. It is no answer to say they are "parts of a chain cable;" for that term is well known also in commerce, as designating not a single link but certain portions, some fathoms in length, into which cables are necessarily divided. The result, therefore is, that these pieces are not bar or bolt iron; but that they are a manufacture of iron not specified, and subject to a duty of twenty-five per cent. ad valorem, which the defendant has been always willing to pay.

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

Admitting the view of the several acts, which is taken by the defendant, to be correct, it does not sustain the inference drawn from it. Although it may be true, that "bar and bolt iron," in the last law, embrace the same article as the "iron in bolts and bars" designated in those previous, yet it does not follow that the former is to be construed solely by the latter. It may be true that more precise words sometimes control such as are general, but it is incumbent on him who would restrain the general words, to show that the particular words do of necessity restrain them, and were used intentionally for that purpose. Now such is not the case here. The act containing the more enlarged description was subsequently passed. The inference is, not that it was to be limited by what went before, but that what went before was to be extended by it; that if the term "iron in bolts and bars" was susceptible of an interpretation, which did not include every species of "bar and bolt iron," then such limitation should be removed. But were it otherwise, what is there to exclude these pieces from the description of "iron in bars and bolts?" The length of the bars or bolts is not specified, and, though short, they are unquestionably bars. If not, they are at least pieces of bars, and of course subject to the same duty as the whole bar would be, unless there is a distinction in the commercial character of pieces of iron, according to their length, which no evidence has established. There is nothing therefore in the construction or comparison of these several acts, which exempts the articles in question from duty, either as "iron in bars or bolts" or as "bar or bolt iron," unless its character has been changed by subsequent manufacture.

The real and sole question therefore is, whether each of these pieces of iron has become "a manufacture of iron" not specified in the law. In the first place it is to be observed that it is not so imported; it is designated in the invoice not as a particular manufactured article, but generally as hardware, a term broader than "bar or bolt iron." But admitting that these pieces were imported to be used for a specific purpose, and had been partially prepared for it, surely that is not sufficient to change their character; bolt or bar iron may be so prepared and so imported, but it continues to be what it originally was, until it is actually converted into a new and specific article. Every alteration does not confer on it a new character as a manufacture; if so every ingredient in every form would be an object of distinct designation and charge. To constitute a new and different article, it must be so changed as to have a positive and specific use in its new state. It must not only cease to be a piece of "bar and bolt iron," but it must be an article completely manufactured for, and applicable to, some distinct and positive use. The force of this seems to be admitted by the defendant, when he attempts to prove each of these pieces of iron to be a "chain link." Whether he has done

so or not, is a matter of fact for the jury. That it is not a link in the common acceptation of the word will hardly be denied; and the evidence of the merchants, manufacturers, and mechanics, in our opinion, establishes the same thing. It never has acquired the character of a commercial article designated by a fixed name; it is simply a piece of bolt or bar iron prepared for an ulterior purpose, but until it is used for that purpose it does not assume a new designation, or become a specific object of trade. It continues to be bolt or bar iron until it becomes a "chain link," and the mere fact of importing it for that purpose, or the mere intention of so applying it, does not operate to convert it into the new "manufacture." When it has become part of a chain, or capable of being used as part of a chain, it is then the article which the defendant asserts it to be, but not before. And when it becomes so does it not at once fall within the fifth clause of the first section of the act of May 22, 1824? Is it not to all intents and purposes "part of an iron cable or chain?" The very assertion that it is a "chain link," seems to admit that it must be "part of a chain." The construction, by which it is attempted to limit this expression, has no foundation either in the words or apparent intention of the law. There is no conceivable reason why it should relate to a greater or less number of links; no particular length or number is designated; the object was to lay a duty on chain cables, and chains manufactured wholly or partially abroad; and surely this intention would equally relate to long or short chains, to such as were in one piece, in several pieces to be afterwards united, or in links to be fastened together here. The convenience of transportation, or the difference of profit, may justify the merchant in importing them, in one form or the other, but the manufactured article is the same, and is fully embraced by the broad and general phrase used in the law. If therefore these pieces have ceased to be pieces of "bar or bolt iron," they have become chain links, and, as such, parts of a chain, which are subject to an amount of duty, even higher than that claimed in this suit.

HOPKINSON, District Judge (charging jury): The general question in issue is, to what rate of duty, under the revenue laws of the United States, are certain articles of iron or hardware subject, which were imported by the defendant into this port in January, 1831? The acts of congress impose various rates of duties on iron of various kinds or descriptions, and it is for you to decide under which of these descriptions the importation in question falls. (1) Is it bar or bolt iron? On this article the law of May 19, 1828, lays a duty of thirty-seven dollars per ton, and this is the duty claimed by the United States in this suit. (2) Is it scrap iron? On this article the duty is sixty-two and a half cents per hundred weight. (3) Is it part or parts of an iron cable or chain? On this the law of May 22, 1824, lays a duty of three cents per pound. (4) Is it a manufacture of iron, not specified in the acts of congress? If so it is subject to an ad valorem duty of twenty-five per cent; and this is contended for by the defendant. The controversy then is mainly between the first and the last descriptions; between the bar or bolt iron, and a manufacture not enumerated in the law. Scrap iron seems to be put out of the question by the evidence on both sides. It appears to be neither old iron worn by use, nor pieces of new iron which remain of a large bar, cut or divided for some particular purpose, but too small for the purpose intended. As to the iron cable, or chain, or parts thereof, a good deal of contradictory evidence has been given. At present this may be put aside. It is insisted upon by the United States rather as an alternative, than a direct claim. The real demand in this bond and in this action is for a duty on the articles in question, as bar or bolt iron. The substantial and real allegation of the defendant is, that they are a manufacture of iron not specified under any of the descriptions of iron mentioned in the act.

Your inquiry will be, to ascertain whether these articles are embraced by the description of bar or bolt iron, as used and intended by the act, or whether they fall under the general head of non-enumerated manufactures of iron.

You will observe that it is incumbent on the defendant, on the ground he has taken, to bring them under the clause of the law he contends for, and show not only that they are not specified in the act, but that they are a manufacture of iron. He contends that they are so; that they are so known under the denomination of chain links; so known as an article of commerce. You have seen that the pieces of iron produced are of several kinds; some of them are straight, but cut from the bar in certain lengths, and nothing more done to them; some are also straight, but sloped at the ends; and some are twisted or bent, but not closed at the ends. The last kind, however, you are not now called to decide upon; the importation in question being of the straight pieces only. The defendant contends that these are all equally known as chain links; that chain links are nowhere mentioned or specified in our revenue laws; and therefore that they are a manufacture of iron not enumerated, or subjected to a specific duty. Whether these pieces of iron, cut into various lengths, of various diameters and shapes, are, truly speaking, nothing more nor less than bar or bolt iron, cut into short pieces, but not thereby changing their name and character, nor thereby becoming a new and different manufacture of iron; or whether, by this operation or process of cutting, for a particular object, that is, for the purpose of making chain links, they ipso facto become a new and different manufacture of iron; whether, in the lan-

guage of commerce, they become chain links, and are so received and known by those engaged in the iron trade; these are the questions you are to decide, for they are questions of fact, to be determined by the evidence you have heard.

It is not my right or desire to give you any direction upon such questions, but it is my duty to assist your inquiries as to particular points, to which your attention should be specially directed; to observe upon the tendency and force of the prominent facts given in evidence, and the comparative weight of conflicting testimony. This I shall do briefly and generally, although the witnesses have been unusually numerous and their examination has occupied several days.

(1) The defendant insists, that these pieces of iron are known as an article of commerce, by the name of "chain links." Has he supported this pretension? Has he shown that they have been an article of commerce under that or any other name; that is, under any name descriptive of a known manufacture of iron? Is he not the only person in the United States who has imported them as a distinct, acknowledged manufacture of iron from the bar, as chain links? It is true that one of the witnesses, Amos Noe, a blacksmith and not an importer, says that he knew chain links to be brought from the Peru Iron Works, in the state to the city of New York, and also from England to Philadelphia; but as to the latter, he admitted it was only by Mr. Sarchet. We have no description of what they were, whether like these we have before us, or in a perfect and finished state; nor how they were brought in, whether as a separate article called "chain links"; whether they were so invoiced or not, so entered at the custom house or not. Of all these matters the witness knew nothing. The same remarks may be applied to the testimony of Washington Jackson, who says he never knew an article of commerce called "chain links," but that some were offered to him for sale by an Englishman; the offer was made here and the article was in New York, and Mr. Jackson never saw it. I presume if such importations of chain links were made, eo nomine, or by any specific name of manufacture, other than that of bar iron, the books of the custom house at New York would show it, and would show how they were entered, and received and charged with duty. You will judge whether the articles before you have been known in commerce as "chain links," and have been so imported into the United States by any body but the defendant. I should perhaps notice the examination of witnesses before a committee of congress at Washington, in which chain links are mentioned as a known article; certainly they are; they have been known as long as chains have been known, whose parts have always been called "links"; but the question remains whether the name has ever been applied to such articles or pieces of iron as are now in dispute. That the link of a chain is a manufactured article and has always had that name, cannot be doubted; but you are to inquire whether the pieces before you have or have not been comprehended or classed under that name.

(2) Supposing, however, that the defendant has failed in showing that these things are known in commerce as "chain links," he may nevertheless make out his case and bring himself within the provision of the act of congress, if he has shown that these articles, in their present state, are a manufacture of iron, are manufactured chain links, as he alleges them to be; for when he asserts that they are a manufacture, he must tell you what they are; and he has undertaken to prove that they are, in the language of the trade, or the nomenclature of those who ought to be depended upon for information on this point, manufactured chain links, so considered and known. Upon this subject you have had the benefit of the experience and opinions of three classes of dealers in iron: (1) mechanics; (2) merchants; (3) manufacturers. To which of these classes should you look with the most confidence for information? You have been truly told by the counsel for the defendant, that this is a question of construction of a law relating to trade and commerce; a commercial question. It is certainly so. It would seem to follow from this that the vocabulary of the merchant, of the importer, of the counting house, would be most safely adopted, and not that of the mechanic, of the smith's shop. May you not also put your faith on the manufacturer, the maker of the article, for its appropriate character and name, rather than on the mechanic, who turns it to a new use? All trades have their peculiar names for things, peculiar phrases in their business; a sort of shop short-hand, well understood in the shop, which may be very different from the denomination of the article in the orders and invoices of merchants, or in the usage of the manufacturer, or in common parlance. The shoemaker may say to his journeyman, when he hands him a piece of leather, take this and cut out a shoe; but is it a shoe as soon as cut? The blacksmith may say, take this bar or rod and cut a linch-pin; but is it a linch-pin as soon as the piece intended for the linch-pin is cut off and separated from the bar? So of a horseshoe, and other articles made in a smith's shop.

I. What have the mechanics testified? Seven were called by the defendant: (1) John Sarchet. You will take his testimony with such allowances as his peculiar situation in this cause may suggest to you. He says, he has always heard these pieces called "links"; that they are the raw material of a chain. (2) William Corkley calls them "links." (3) William Pritchett calls those that are bent "chain links"; does not know any other name for the straight ones. (4) Luther Stebbins says when they are cut expressly for links he calls them "links." (5) Amos Noe calls them all "links," and never

heard them called any thing else. (6) Samuel Hulse would call all the articles "links," but will not say as to the straight ones. (7) Joseph Riter calls it a "link" when cut. (8) Wesley Blackman says they are links. These are all the mechanics called by defendant. They do not all agree in respect to the straight pieces. I should add that all of them but one have worked or are now working in the shop of the defendant. I mention this, not to impeach their credibility, but that you may consider how far they have derived their knowledge and opinions from the practice or language of the defendant's shop. You will also keep in mind that they, or some of them, speak of their knowing these pieces by this name at other places than his shop, or than this city. On the contrary, several mechanics, one of them largely concerned in chain making, testify that they have never heard such pieces of iron called "chain links." Their names and testimony must be in your recollection. Allowing credit to all these witnesses, the result would seem to be, that the name of a "link," given to these pieces of iron, although used in some shops, and by some mechanics, is not universal; is not known to and adopted by all the trade. We may remark that all these witnesses agree; and, indeed, it is obvious to your own inspection, that these pieces are not in fact links, that is, perfect links; that they cannot be used as links without a further process of manufacture. The straight ones must be bended, and the bended ones must be welded, before they can become links of a chain for the purposes intended. They have passed the first process of a manufactured link, of a manufacture different from the bar from which they were cut. Are they therefore a manufacture, are they links? These are inquiries you are to make, and to satisfy yourselves in the result. It has been strongly argued by the defendant's counsel, that these pieces were exported, bona fide, for the purpose of making chains, and he concludes from this that they may be called links, or at least a distinct manufacture, not specified in the act. Is not the basis of this argument too broad? If a bar of iron should be cut, in England, into pieces suitable to make a horse shoe, and should be really exported for that purpose, could it therefore be a new manufacture, under the name of a horseshoe, for which it is intended, or under any other name?

II. I will next call your attention to the evidence of the merchants, or importers of iron: (1) Joseph R. Evans says none of these articles answer the denomination of bar iron. He should call the bended ones "chain links," but is doubtful as to the straight ones. He does not know what name is to be given to them. They could be made into spikes and so could the crooked ones. He has never imported any cut iron, or any cut into links. But he says there is no difference between the straight pieces and the bars, except that they are cut into pieces. (2) William Welsh never imported any iron, his father occasionally imports it; he never heard bar iron called so, when cut into pieces for a particular purpose; he would call none exhibited to him bar iron, except the long bar. (3) George Handy never heard of such an article in commerce as "chain links." (4) William Thomas sees nothing here that answers the description of bar iron but the long one. The crooked pieces are links unwelded, the others pieces of rod iron cut off. It is iron cut off for links, and he would call it a piece of rod iron. When a rod is cut up, it loses its quality of bar iron and becomes pieces of iron. (5) Edward Carpenter says the long piece is bar iron but none of the short ones. He would call them pieces of bar iron, but not bar iron. (6) Robert S. Johnson would call the flat piece, "a piece of bar iron." He imports bar iron of all lengths, from the shortest pieces to a long bar. The small pieces come with bundles to make up the weight. He never made an importation of small pieces and would not receive them. He does not know chain links as an article of commerce. These are pieces of bar iron, though not bars of iron. (7) Thomas Haven says it requires length to make a bar. A bar that is broken is called a "piece of a bar"; when cut, a "bolt"; if bent, a "hoop." Has never received bolt iron, less than seven feet long; nor bar iron less than eleven. In this country three feet long, and upwards. He never heard such a piece called a link. He would not enter them as chain links, or as bar iron, but probably as pieces of bars. There is no article of commerce called chain links, and he never heard of their being imported. (8) Samuel Spackman understands bar iron to be of the usual length. A small piece would be called "part of a bar of iron." He never heard of these links imported. He should not call the straight ones links, but part of a bar or bolt, and the twisted ones, pieces intended for links. (9) Henry Cope, by bolt and bar iron, understands long bolts or bars which are straight. He should call a short one a piece of bolt iron. So far the witnesses for the defendant. (10) John Steel, a custom house officer, says they do not estimate the duties on bar or bolt iron by the length. It is usually from ten to fifteen feet. It does not lose its character by being short. He does not consider it to be a manufactured article by being cut; he considers it as bolt iron, hoop iron, or prepared for hoops, but not closed and welded. So iron prepared for railroads is punched with holes. (11) Edward Smith considers the small straight pieces to be short bar iron. He would enter them as bolt iron. They might be applied to many purposes. They were sent short because so ordered. Bolt iron is of various lengths. Varieties of articles of various shapes are sold as bar iron.

If a bar of iron were cut into pieces in England, it would still be bar iron. Hoop iron, rolled out thirty or forty feet and cut shorter and doubled up, is still hoop iron and pays the duty as such; it is not considered as a manufacture of iron. He orders bar iron of different lengths, for the fore and hind wheels of a wagon, but they are not therefore a manufacture, because cut for that purpose. (12) Washington Jackson calls the straight pieces, pieces of round iron, of bolt iron, not chain links. He should not call them a manufactured article if not finished for a particular purpose. He never knew them as an article of commerce. If he wanted bar iron of a shorter length, he would order it as bar iron of a certain or required length. (13) Thomas M. Smith calls the straight pieces, bolts of iron; the bent ones, bent bolts. If he was to import straight pieces cut into lengths, he would enter them as bar iron. He has imported hollow tire iron, to an order, and paid duty as common iron. This is all the testimony of the commercial interpretation of the terms bar iron, bolt iron. Some of these witnesses are both importers and manufacturers; you will remember which of them stand in this double capacity, if you shall think it of importance in considering their evidence.

III. The last class of witnesses is the manufacturers of iron, the forge masters as they have been called, who manufacture iron from the ore to the bar; but not beyond that. It is made into pigs, into blooms, and into bars, which is the third state or process of manufacture. The weight and value of the testimony of these witnesses is impeached on the ground, that as they do not manufacture the iron beyond the bar, they know nothing of these links, or of what is or is not a link, which is a process of manufacture beyond or from the bar. You will judge of the efficacy of the argument, but I may remind you that it is to those manufacturers that orders go from the importer, and that the language of the importers, the commercial name of an article, should be known to the manufacturers, or they would not understand these orders. They must have a common vocabulary as to the things in which they deal together; and in this respect, are both separated from the mechanics or blacksmiths, who buy their iron as they may want it for particular purposes, and have their own manner of designating these purposes, and giving their due orders to the workmen of their shops. It is also to be remarked, that if these iron masters are not judges of what may be called a link, because they do not make it, they are specially competent judges of what is considered to be a bar of iron, or bar iron, it being their business and daily experience to make it, and to sell it as a known article of merchandise.

It has also been urged upon them that they have an interest in this question, and are in fact the true and real plaintiffs in the cause; it is at the same time admitted that the blacksmiths have a common cause on the other side, and it is said they are the real defendants. You have seen and heard all the witnesses, both manufacturers and mechanics, and probably know all or most of them, and can therefore judge for yourselves how far their testimony has probably been influenced by the interest they may have.

The manufacturers of iron are unanimous in their allegations, that these pieces of iron are not chain links; that they are not a manufacture of any description, other than bar iron cut into small pieces, which does not change their quality, their character, or their denomination: (1) Edward Smith, a merchant and manufacturer, considers the small straight pieces to be short bar iron; he would enter the round ones at the custom house as bolt iron. They might be applied to many purposes. To show that the mere act of cutting a long piece of iron into smaller pieces, does not change its character or name, he says, that hoop iron is rolled out into pieces thirty or forty feet long, and then at the same factory, cut into such lengths as may be ordered, but it is still hoop iron, not a hoop, although prepared for one. Sometimes, he says, the holes are punched at the end, still it is not a new manufacture, nor as such entered at the custom house. You may remember here what was said of railroad iron, which are bars of iron, cut into the required lengths, and holes punched in them; they were nevertheless considered to be bar iron, or iron in bars, and paid duty accordingly. (2) Samuel Richards would call these things, "pieces of bar iron," both bent and straight; he often sells pieces three or four feet long, each is called a "bar." Many articles are bought and sold as bar iron, which are not in bars. Should he receive an order for a ton of bar iron three feet, and another fifteen feet long, he would suppose they described the same article. (3) Benjamin Reeves calls the small one a "piece of rod" and the thicker one a "piece of bolt iron." He does not know what to call the large twisted pieces. The shortness of a piece of bar or bolt iron, does not change its character. He often sells short pieces as bar or bolt iron. Many articles are considered as bar iron, that are not straight bars. (4) Andrew M. Jones would call the thick one, a "piece of bolt iron"; the thin, a "piece of braziers' rod"; the bent ones, "pieces of bent round iron," but not at all a separate article of manufacture. He should import it as bolt iron. The shortness does not change the character of the article. He has cut several tons into harrow teeth and invoiced them as square bar iron. (5) Clement M. Buckley, calls it a "piece of bolt iron," a "braziers' rod." The bent piece is a piece of bolt iron bent for the purpose of making a link. The shortness of the piece does not change its character, it retains its character of bar iron. He rolls.

bars from twenty to thirty feet long, and then he cuts them. The cost is trifling. He cuts them sometimes to suit his wagon, sometimes into short pieces two feet long, to make sheet iron; it is nevertheless, known as bar iron, although cut expressly to make sheet iron. He would furnish one hundred tons cut into pieces of six inches long, for the same price as long bars.

These witnesses concur in testifying that these pieces of iron are not chain links; that they are bar or bolt iron cut into short pieces, and in no other respect differing from the long bar and bolt iron; and that this difference of length does not change either the character or denomination of the article. And this is what you are to decide, on a fair and intelligent consideration of all the evidence on the one side and the other. If you should be of opinion that they are not chain links, that they are not a new and distinct manufacture, that they have not assumed a new name or use in their present state, but you should also think they are not iron in bars or bolts, or bar iron, they would then be subject to a duty of fifteen per cent. under the general provision of the law of April 27, 1816, unless you can consider them as part of an iron cable or chain. Upon this there has been much contradictory testimony. Literally speaking a link or two links are a part, a constituent part of a chain, which is made up of many links. But it is alleged that, technically speaking, a part of a chain or iron cable, consists of a length of fifteen or twenty feet long, connected by what are called shackles. There is certainly a difficulty under the law in admitting this signification of "part of a chain." The act intends to put a much higher duty on an iron cable or chain, or part or parts thereof, than on bar iron. But if it may be brought in pieces of ten feet long, and without shackles, it will not pay the duty on iron cables because it is neither an iron cable or chain nor part of one. It will not pay even the duty of bar iron, because it is a manufacture of iron from the bar, not enumerated and specified in the act; and thus a manufacture evidently intended to be heavily taxed, will come in for a very low duty of twenty-five per cent. ad valorem.

It is for you to decide whether these pieces of iron are chain links, and if so, are they parts of a chain cable, and if not parts of a chain, can they be chain links. If you shall reject them as links, and also as parts of a chain or iron cable, are they bar iron? You will observe that the clause of the act of congress under which the thirty-seven dollars per ton is claimed by the United States, uses the terms "on bar or bolt iron," not on "iron in bars or bolts," as in the preceding clause and in other acts. You will naturally inquire whether this change in the expressions is inadvertent or intentional; is meant to describe the same or a different article. If the same, why is the phraseology changed? If different, in what does the difference consist? By "bar iron," are we to understand, a particular description of iron; in a certain state of manufacture; iron of a certain quality, kind, and character? Should you be told that an article was made of bar iron, would you understand that it was made of iron of a certain character and quality, as distinguished from pig iron, from bloom iron, from cast iron, without any reference to the shape, size or length of the bar or piece of iron from which it was made? On the other hand, should one speak of a bar of iron, or of iron in bars, would you not suppose he had reference to their form, shape, size and length? It has been proved that plough shares and sickles, or other articles of manufacture, are properly called "bar iron"; they are bought and sold by that name; but could we say that they are "bars of iron," or "iron in bars"? If we could not, there would seem to be a difference of meaning in the two forms of expression used in the same act of congress, unless this difference is controlled by other parts of the act. To give you another illustration of the effect of this change of phraseology. If we were to speak of a "pig of iron," or of "iron in pigs," would we not mean iron of a certain known quality or manufacture, in pieces called "pigs"; thus describing both the character of the iron, and the ordinary size and shape in which it is made? But if we were to speak of "pig iron," would we not intend to describe or signify the particular quality and kind of that iron, without any reference to its size or shape? If we had in our hand a piece of iron six inches square, we might say this is "pig iron," but could we say this is a "pig of iron," or, if more than one, "iron in pigs"? These are questions for your consideration so far as you shall deem them to be material, in deciding the issue you are trying. If then the terms "iron in bars," and "bar iron," in truth, in their common and proper understanding, as they are taken by commercial usage, do mean and intend the same thing, I would understand them also to mean the same description of iron, the same article of merchandise, in the act of congress. If, on the other hand, they have different significations, the one meaning merely the quality of the iron, and the other iron of the same quality in a particular form, we must so understand the act of congress; we must presume that congress understood the language they have adopted, as it is properly and commercially used and understood; and therefore that when they changed their expressions from "iron in bars or bolts" to "bar and bolt iron," they intended also the change of description imputed by the change of expression.

The defendant's counsel has endeavoured, with great industry and skill, to navigate his case between the bar iron on the one side, and the parts of an iron cable on the other, and to show you that chain links are neither

the one nor the other. It is a narrow strait, but, it may be, not impassable. This you are to determine. He must not have the article to be "bar iron," but a manufacture from it called a "chain link," and intended for a chain cable; and yet this chain link must not be a part of a chain cable, or he falls into a greater misfortune than with the bar iron. It must be neither a bar of iron, which it originally was, nor part of a chain which it is intended to be, but something between them, with a known destination, name, and use. It will hardly meet Mr. Buckley's definition, who says: "An article that is completed and fit for some use, and known by some name, I call a manufactured article."

I submit the whole case to you; the questions in it are questions of fact, to be decided by the evidence you have heard. Your judgment must be on that evidence. Certainly on the construction of the law contended for by the defendant, chain cables may be brought here, in separate links, requiring only to be connected and welded, at a much lower duty than bar iron; while a chain cable or part thereof is subjected to a much higher duty. If, however, this be the fair construction of the act, or if it be a defect of the act, the defendant is entitled to the advantage it gives him. I ought to add that this bond is given for the straight pieces only, and therefore your verdict will have a reference only to them. You are not now called upon to decide upon the bended or twisted pieces.

The jury found a verdict for the United States, for one hundred and sixty dollars and ninety-seven cents.

Case No. 16,225.

UNITED STATES v. SAVAGE.

[5 Mason, 460.] [1]

Circuit Court, D. Massachusetts. May Term, 1830.

REVOLT OF SEAMEN—CONFINEMENT OF MASTER—AUTHORITY OF MASTER OVER MATE.

1. To constitute an endeavour to commit a revolt within the crimes act of 1790, c. 36 [1 Stat. 115], it is necessary that there should be some effort or act to stir up others of the crew to disobedience of the master.

[Cited in U. S. v. Peterson, Case No. 16,037.]

2. To constitute a confinement of the master within the purview of the same act, it is sufficient that there is a personal seizure or restraint of the master, although it may be for the purpose of inflicting personal chastisement upon the master.

[Cited in Lander v. U. S., Case No. 8,039; U. S. v. Huff, 13 Fed. 641.]

3. The master has authority to displace the mate, and all other subordinate officers, during the voyage. If he abuses his authority, he is responsible for the wrong.

[Cited in The Exchange, Case No. 4,594; Setzer v. The Sylvia De Grasse, Id. 12,676; The Topsy, 44 Fed. 634.]

4. Semble, that the mate is a seaman, within the crimes act of 1790, c. 36, § 12.

[Cited in U. S. v. Huff, 13 Fed. 633.]

Indictment against the defendant [Samuel P. Savage] who was mate of the ship Plato, Charles Knapp master: (1) For confining the said master, and (2) for an endeavour to commit a revolt on board of the ship, against the crimes act of 1790, c. 36, § 12. Plea, not guilty.

C. G. Loring, for defendant, in the course of the trial contended (1) that to constitute a confinement within the act, there must be an intention to confine the master. If the party seize the waster to inflict personal chastisement upon him, and not to confine him, it is a case not provided for by the act. Abb. Shipp. 141, note. (2) That the endeavour to commit a revolt must be established by some proof of an attempt to stir up others to revolt; for which he cited U. S. v. Smith [Case No. 16,337]; U. S. v. Hemmer [Id. 15,345]. (3) That the mate is not a seaman within the provision of the act of 1790, c. 36. 7 Conn. 239. (4) He also argued largely upon the facts, to show, that no case was made out against the defendant.

Mr. Dunlap, for the United States, on the first and second points, cited U. S. v. Bladen [Case No. 14,606]; U. S. v. Smith [Id. 16,345]; U. S. v. Hemmer [supra]. On the third point, he cited Baily v. Grant, 1 Ld. Raym. 632. On the fourth point he argued, that the facts were fully made out for a conviction of the defendant.

STORY, Circuit Justice, after summing up the facts, said:

The point, whether the mate be a seaman within the reach of the statute, will be reserved for further consideration, if the verdict shall be against the defendant upon the other facts. But for the present trial, we hold that the mate is a seaman, and is to be so deemed for all the purposes of the statute.

As to the definition of an endeavour to commit a revolt, it seems unnecessary, after the numerous decisions in this court, to go at large into the subject. The court adhere to the doctrine, that to constitute an endeavour to make a revolt, there must be some effort or act to stir up others of the crew to disobedience of the lawful commands or authority of the master. However reprehensible in other respects the conduct of the party may be, if it has no such aim or object, he is not within the provisions of the statute.

In respect to the confinement of the master, we do not concur in the argument of the defendant's counsel. If the person of the master is in fact seized, or if he is in fact held in personal restraint, (whether for a long or a short time is immaterial,) it is a confinement within the meaning of the statute; and of course it subjects the party to punishment, unless he can establish, that it was done in justifiable self-defence, or for some other legal cause. It matters not, that the seizure or re-

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

straint was principally or wholly for the purpose of inflicting personal chastisement upon the master; that it was to beat, or to wound him, and not to deprive him of his command or authority on board the ship; or that the confinement was a means of personal punishment, and not an end. The law looks to the act, and not merely to the intent. If the seizure is unlawful, it is a confinement. The law esteems the person of the master sacred, and protects him from all restraint, which is unlawful.

There is another point, which has been suggested by the argument at the bar. How far has the master a right to displace the mate? We are of opinion, that he has this authority absolutely; and the mate is in such a case bound to submit. The master is the lawful agent of the owner for this purpose, and the authority is entrusted to him from motives of great public policy, to secure due subordination on board, and to promote the vital interests of navigation and trade. If the master abuses his authority, or exercises it in a wanton or malicious manner, he is responsible for his conduct. But his authority is conclusive upon all inferior officers. If he displaces the mate, the latter is bound to abstain from all future exercise of his ordinary authority on board of the ship. He is bound to deliver up the log-book, and resign the state-room set apart for the officers. He is not indeed to be treated in a harsh or disgraceful manner. He is to have suitable food and lodging, and conveniences assigned to him by the master. But like every other person on board, he is bound to submit to all reasonable commands, and to conduct himself in a quiet and inoffensive manner. Being no longer in office, he is to be deemed a quasi passenger; and his remedy for any grievance lies by an appeal to the laws of his country for redress, and not by any attempts to avenge his wrongs, or to inflict personal chastisement on the master.

Verdict for the defendant.

Case No. 16,226.

UNITED STATES v. SAVALOFF.

[See Case No. 16,252.]

Case No. 16,226a.

UNITED STATES v. The SAVANNAH.

[Nowhere reported; opinion not now accessible.]

Case No. 16,227.

UNITED STATES v. SAWYER.

[1 Gall. 86.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

NONINTERCOURSE LAWS—ACTION ON BOND—OYER OF BOND—PLEA OF PERFORMANCE—PRACTICE—CIRCUIT COURTS—ERROR TO DISTRICT COURTS—REVERSAL.

1. Under the 13th section of the act of March 1, 1809, c. 91 [2 Story's Laws, 1118; 2 Stat. 531, c. 24], a bond is well taken which includes in its condition a stipulation to produce at the collector's office within six months the certificate, &c., required by that section. Quære, whether a bond voluntarily given under such section, with a condition different from that required by law, would be wholly void. Oyer of a bond does not include oyer of its condition; nor e converso. If oyer is wanted, it must be prayed of each.

[Cited in Bank of U. S. v. Brent, Case No. 910; U. S. v. Brown, Id. 14,663.]

2. If the defendant, on oyer, does not set out the whole of the bond, the plaintiff may relieve himself by praying it to be enrolled.

3. The court will go back to the first error in the pleadings, and give judgment accordingly.

4. If a plea of performance be too narrow, or contain a flat negative pregnant, it is bad.

[Cited in Jackson v. Rundlet, Case No. 7,145.]

5. A plea seeking to avoid a bond for being illegally taken, colore officii, should specially state all the facts which show that illegality.

[Cited in Jackson v. Simonton, Case No. 7,147.]

[Cited in Atchison & N. R. Co. v. Miller, 16 Neb. 665, 21 N. W. 451.]

6. On a reversal of judgment in an action brought by writ of error from the district court of Maine, the circuit court may, if justice require, award a venire facias de novo triable at the bar of the circuit court.

[Cited in U. S. v. Webber, Case No. 16,656.]

[Cited in Hillsborough v. Deering, 4 N. H. 96, 97.]

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

The original action was debt by the United States, against the defendant in error [Abner Sawyer, Jr.], on a bond dated on the 17th March, 1809, for $3,746. The defendant craved oyer of the condition of the bond; and upon oyer granted, the condition appeared to be in the following words: "Whereas, the following goods, wares, and merchandize, that is to say, 130 thousand feet of boards, 9 thousand red oak hogshead staves, 100 thousand shingles, 150 red oak hogshead shooks, 15 quintals of fish in 20 boxes, as per manifest, now delivered to the collector of the customs for the district of Saco, are intended to be exported in the said vessel, called the Romeo, burthen 179 tons, to the island of St. Bartholomews. Now the condition of this obligation is such, that if the said vessel shall not leave the port without a clearance, nor shall, when leaving the port, proceed to any port or place in Great Britain or France, or in the colonies or dependencies of either, or in the actual possession of either, nor be directly or indirectly engaged during the voyage in any trade with such port, nor shall put any article on board of any other vessel; and if the certificate and other proofs, required by law, of the landing of the whole cargo of the said vessel at the aforesaid island of St. Bartholomews, or at any other island or place other than Great Britain or France, or the colonies or dependencies of either, or in the actual possession of either, shall be produced at this office within six months from the date hereof, then

[1] [Reported by John Gallison, Esq.]

this obligation shall be void, otherwise," &c.

The defendant then pleaded in bar of the action several pleas: (1) "That said vessel did not leave the port of Saco aforesaid, without a clearance; that when leaving the port, she did not proceed to any port or place in Great Britain or France, or in the colonies or dependencies of either, or in the actual possession of either, during said voyage; that she was not directly or indirectly engaged during the said voyage, in any trade with such port; that she did not put any article on board of any other vessel; that said vessel returned from said voyage, and arrived at said port of Saco on the 26th June, 1809, and not before; he having before that time sold and delivered said cargo at said island of St. Bartholomews, pursuant to the condition of said writing; and then and there presented to the collector of said port of Saco a certificate of the sale and delivery of said cargo at said island; but which being informal, was objected to by said collector and refused; all which he is ready to verify," &c. To this plea the United States replied, "that the said vessel, in the writing obligatory aforesaid mentioned, after having departed, as aforesaid, from the port and district of Saco aforesaid, and touching at the island of St. Bartholomews aforesaid, proceeded to a port or place in a colony, province, or dependency of Great Britain, that is to say, of the king of the United Kingdoms of Great Britain and Ireland, to wit, the island of Grenada in the West Indies, said island not being a permitted port, and there delivered her said cargo, contrary to the condition of said writing obligatory, and the laws and statutes of said states, in such cases made and provided, and this they are ready," &c. The defendant rejoined, "protesting that said vessel did not proceed from said island of St. Bartholomews to said island of Grenada, or to any other island, port, or place within any colony or dependency of the United Kingdoms of Great Britain and Ireland, or of France, contrary to the condition of said writing declared on, and the laws of the United States; for rejoinder said, that the said vessel did pursue her voyage to, and arrived at said island of St. Bartholomews, and in the harbor thereof, and then and there duly entered said vessel at the custom-house, and remained five days; and this he is ready," &c. The United States sur-rejoinded, "that after the said vessel had arrived at the island of St. Bartholomews as aforesaid, viz. on the 1st day of May, 1809, the said vessel did proceed from thence to a port or place in the island of Grenada, in the West Indies, the same island of Grenada being a province, colony and dependency of Great Britain, that is to say, of the king of the United Kingdoms of Great Britain and Ireland, and afterwards arrived at said island of Grenada, and there delivered her cargo aforesaid, viz., at Portland aforesaid, contrary to the condition of said writing obligatory, and the statutes aforesaid, and this the plaintiffs are ready to verify," &c. To this sur-rejoinder the defendant demurred, and the United States joined in the demurrer. (2) For a second plea, the defendant pleaded, "that the writing aforesaid declared on, was demanded and received by said collector of said port of Saco of him the said defendant, by color of his, said collector's, office, and that the condition of said writing is not conformable to, or in pursuance of the statute of the United States in such case made and provided; and this he is ready to verify," &c. The United States replied, "that the condition of said writing, in the form that the same was taken, is conformable to and in pursuance of the statutes of the United States aforesaid, in such case provided; and this the plaintiffs pray may be inquired of by the court." The defendant rejoined, "and the said Sawyer likewise." (3) There was a third plea and replication thereto, which need not now be stated. The rejoinder averred, that said vessel did not depart from said island of St. Bartholomews, and proceed with said cargo to a port or place in said island of Grenada, and tendered an issue to the country, which was joined by the United States. This issue was never tried in the court below. The judgment of the court, as stated upon the record, is: "It appears to the court, that the condition of the writing declared on, is conformable to, and in pursuance of the law in such case made and provided, as alleged in the replication to the second plea in bar; and it is the opinion of the court, that the plaintiff's sur-rejoinder to the first plea in bar is bad and insufficient in law. It is, therefore considered by the court here, that the United States take nothing by their writ."

G. Blake, for plaintiff in error.

C. Jackson, for defendant in error.

STORY, Circuit Justice. It is exceedingly to be regretted, that this case comes before the court upon pleadings so informally and incorrectly drawn, and to add to our embarrassment, though a question arises upon the bond, as to its legality, the condition only is spread upon the record. Oyer of the condition of the bond only is prayed, and it is very clear that the oyer of that does not entitle the party to oyer of the bond itself; but it must be demanded of both, if wanted (Cook v. Remington, 6 Mod. 237), for the bond and condition are considered as distinct, the bond being complete without the condition, and oyer may be of one without the other (Cabell v. Vaughan, 1 Saund. 289, 290; 1 Saund. 9b, note 1). The plaintiffs might, indeed, by praying in their replication, that the bond might be enrolled, have relieved us from this difficulty; but they have not so done, and we are left to conjec-

ture what are the contents of the bond itself, unless so far as the declaration states them, though the condition has a manifest reference to them.

I will now consider the various questions, which arise out of the pleadings and record, as they have been presented to the court. The bond is dated the 17th of March, 1809, and the writ was sued on the 18th, and served on the 21st of November, of the same year. Of course more than six months had elapsed before the commencement of the action. I am very well satisfied, that the sur-rejoinder of the plaintiffs to the first set of pleadings is bad, because it contains no matter, that had not been averred before, and was a mere evasion of the rejoinder. But, supposing it to be bad, the court will proceed to consider the other pleadings, and give judgment against the party committing the first fault. 4 Coke, 84; Cro. Eliz. 815; Strange, 302; Doug. 91, 94; 8 Coke, 120, 133b; Moore, 105, 269. It is not necessary to consider the rejoinder (though I have no doubt it is bad) or the replication, whatever may be the unskilfulness with which they are drawn, because, supposing the bond good in point of law, I am satisfied that the first plea is bad. That plea, after negativing any breach of the condition as to other parts, avers "that when leaving the port she (the vessel) did not proceed to any port or place in Great Britain or France, &c., during said voyage." Now this is a plain negative pregnant, and the words of the condition contain no such restriction, as during said voyage, nor is any voyage, on which the vessel was bound, particularly mentioned in the plea, nor otherwise stated, than in the recital of the condition of the bond, where it is said the goods mentioned in the manifest are intended to be exported in the Romeo to St. Bartholomews. The bond, whether well taken or not, is admitted to have been taken under the authority of the 13th section of the act of March 1, 1809 (chapter 91). Now, if by "during said voyage," were meant a voyage from the United States to St. Bartholomew, and back again to the United States, it ought to have been averred in the plea, that such was the voyage, and, perhaps, such a limitation, to wit, to the whole voyage, homeward as well as outward, would be a reasonable limitation of the language of the act. However, as to this, I give no opinion. It is very clear to my mind, that the words of the act, embraced in this part of the condition, comprise a single and distinct provision, and do not connect with the next ensuing clause, so as to make the words in that clause, "during the voyage," ride over both clauses, even if the court should restrict these words to the outward voyage only. On the contrary, each is a single and substantive condition. Any other construction would defeat the manifest intent of the whole act, and I know of no rule, by which a court are authorized to interpose a limitation, where the law has placed none, when the purposes of the law would thereby not only not be furthered, but would be completely frustrated. The object of the act was to interdict all commerce with Great Britain and France, and their dependencies. Now, if the mere proceeding to a permitted port, in the outward voyage stated in the bond, was a complete fulfilment of the condition, although the vessel and cargo ultimately proceeded to a prohibited port, the whole security and purpose of the bond would be completely destroyed. It is, undoubtedly, true, that if the legislative intent were clearly or by necessary inference expressed to this effect, it would be our duty to disregard all subordinate inconveniences. But we are asked to restrain a condition, where the law has used general terms, to exclude cases, which are within the provision, and in manifest violation of the act. I am not bold enough to adopt such a construction. As, therefore, the plea in its most liberal construction only declares, that the vessel, during her voyage to St. Bartholomews did not proceed to a prohibited port, which is too narrow an allegation of performance, and is a flat negative pregnant, it is substantially bad. But even supposing this part of the plea were good, yet the plea itself contains no sufficient answer to that part of the condition, which requires a certificate according to the forms prescribed by law, for it admits that no such certificate was produced, but only an informal certificate, which was no compliance with the law. It follows, therefore, that the plea is bad, in this respect, and if so, then it is clearly bad for every other purpose, for performance should have been shown in omnibus. On this plea therefore the judgment of the court below ought to have been for the United States. And if this were not so, yet the replication alleged facts, which showed a complete breach, standing unaffected by the subsequent pleadings.

I now proceed to the second set of pleadings, which terminates in an issue to the court, praying them to inquire whether the said bond be conformable to and in pursuance of the statutes of the United States in such case made and provided. This is so novel a prayer, and comes in so questionable a shape, that it is difficult to know how it ought to be treated. The rules of pleading are founded in sound sense, and have been relaxed by the courts from time to time as far, and perhaps further, than public convenience has required. Such a relaxation has often tended to negligence on the part of the pleaders, and sometimes to embarrassment in the judgment of courts, impressed as they must be with the desire of doing justice, yet divided by the conflicting and irregular averments in the pleadings. The issue purports to be in form an issue of fact, and in substance an issue in law, to be tried by the court. There is no form or principle, which is known to the common law, that

can in the most remote degree countenance it, and we cannot support it here, unless we deliberately assent to the overthrow of all the principles of pleading. I am not prepared for such a determination, and have no hesitation in pronouncing the replication and rejoinder utterly insupportable. Had this been an original suit in this court, we should probably have decreed a repleader. But it has long been settled, that a court of error cannot award a repleader. 2 Saund. 319; Tidd, Prac. 813 The true mode of pleading would have been, to have spread the obligation and condition by oyer on the record, and if no other facts were necessary, to have demurred for the apparent illegality, and if other facts were necessary, to have averred them by way of plea.

As to the second plea, it is certainly very dry of averments. It does not state any voyage to be performed, any occasion on which the bond was required, or any demand made, or right refused under color of office previous to its execution. The allegations are, that it was demanded and received by the collector of Saco, by color of his office, and that the condition is not conformable to, or in pursuance of the statute of the United States in such case made and provided. Now certainly it is no objection to a legal bond, that it is taken colore officii, and it is quite impossible to say, whether a bond is taken conformable to a statute provided for a special case, unless the court can know, from the pleadings and record, what that case is. The present plea states no case, and alleges no illegal execution of the bond. The illegality, as stated in the plea, consists in the demand and receipt after the execution of it. If the bond were therefore good in its inception, and for aught that appears in the plea, it was so, no subsequent demand and receipt by the collector could ipso facto avoid it.

But notwithstanding the insufficiency of this plea to avoid the bond, yet as oyer of the condition has been demanded and had, the condition becomes, not as has been supposed, a part of the defendant's plea, but a part of the plaintiff's declaration. Com. Dig. "Pleading" (page 1); Carth. 513. Being, therefore, a part of the record, if upon the whole declaration it appears to the court, that the bond is void in law, judgment ought to be pronounced in favor of the defendant. 2 Term R. 669. But inasmuch as the bond itself is not on oyer spread before the court, and no specific facts are presented to show the occasion of giving the bond, the court cannot award such a judgment, if by possibility a single case could exist, in which the bond could be legally supported.

It has been argued on the part of the defendant, that the condition of this bond is not conformable to any prescribed by the laws of the United States, and that therefore it is void at law, because to every contract there must be two contracting parties, and the United States can contract only according to the regulations and authorities of statutes. The assent of the United States can be declared only through its authorized agents, and they cannot effectively assent, unless they are clothed with the authority by law. An assent, therefore, in a manner different from that prescribed by the law, is not valid, and consequently does not bind at all.

In the first place, let us consider whether the condition of this obligation is not conformable to the 13th section of the act of March 1, 1809, c. 91 [2 Story, Laws 1118; 2 Stat. 531, c. 24], for under that act it must in all probability have been taken. The 13th section is as follows: "That during the continuance of so much of the act laying an embargo on all ships and vessels in the ports and harbors of the United States, and of the several acts supplementary thereto, as is not repealed by this act, no ship or vessel bound to a foreign port, with which commercial intercourse shall, by virtue of this act, be again permitted, shall be allowed to depart for such port, unless the owner or owners, consignee or factor of such ship or vessel shall, with the master, have given bond, with one or more sureties to the United States, in a sum double the value of the vessel and cargo, if the vessel is wholly owned by a citizen or citizens of the United States; and in a sum four times the value, if the vessel is owned in part or in whole by any foreigner or foreigners, that the vessel shall not leave the port without a clearance, nor shall, when leaving the port, proceed to any port or place in Great Britain or France, or in the colonies, &c. of either, or in the actual possession of either, nor be directly or indirectly engaged, during the voyage, in any trade with such ports, nor shall put any article on board of any other vessel; nor unless every other requisite and provision of the second section of the act, entitled 'an act to enforce and make more effectual an act, entitled "an act laying an embargo," &c. and the several acts supplementary thereto,' shall have been complied with. And the party or parties to the above mentioned bond, shall, within a reasonable time after the date of the same, to be expressed in the said bond, produce to the collector of the district, from which the vessel shall have been cleared, a certificate of the landing of the same, in the same manner as is provided by law for the landing of goods exported with the privilege of draw-back; on failure whereof the bond shall be put in suit, and in every such suit judgment shall be given against the defendant or defendants, unless proof shall be produced of such relanding, or of loss at sea." Now it is admitted, that the condition conforms to that section in all parts, except the last clause, respecting the production of certificates, which it is argued is not authorized by the section. It is to be regretted, that the legislature on any occasion should express themselves in ambiguous terms; more especially it is to be

regretted, when the ambiguity arises out of laws highly penal. But courts are bound to take the laws as they find them, and to give a consistent construction, if possible, to every part of them. If the expressions admit of various constructions, they should adopt that which will effectuate the intention of the legislature, and avoid apparent absurdities. By this section, in order to entitle a vessel to depart for a foreign permitted port, it is one pre-requisite, that a bond should be given with conditions: (1) that the vessel shall not leave the port without a clearance; (2) nor shall, when leaving the port, proceed to any foreign prohibited port or place; (3) nor be directly or indirectly engaged, during the voyage, in any trade with such prohibited port; and (4) nor shall put any article on board of any other vessel. Another pre-requisite is a compliance with every other requisite and provision (by which undoubtedly is meant every other than the giving the bond) contained in the second section of the act of January 9, 1809, c. 72 [2 Story's Laws 1101; 2 Stat. 506, c. 5]. Now these requisites and provisions are, the lading the cargo under a permit from the collector, and also under the inspection of the proper revenue officers. Had the section stopped here, there would have been no room for doubt. But it then declares, "that the party or parties to the abovementioned bond shall, within a reasonable time after the date of the same, to be expressed in the bond, produce to the collector, &c. a certificate of the landing of the same," &c.; on failure whereof the bond shall be put in suit, and judgment rendered against the defendant, unless proof shall be produced of such relanding or of loss at sea.

It is here required, that the time for producing the certificate shall be expressed in the bond. Now this can only be in the obligatory part, or in the condition. It is hardly conceivable that it should be put in the former, and it could be proper only in the latter. Further, on failure of producing the certificate of the landing of the cargo, the bond is to be put in suit,—why? If the producing of the certificate forms no part of the condition of the bond, it certainly could be no ground for a suit. Every other part of the condition of the bond may be fully performed, and yet the cargo never have been landed in a foreign port. The suit might therefore be altogether nugatory. But this is not all. The section further prescribes, that judgment in such suit shall be given against the defendant, unless proof is produced of a relanding, or of loss at sea. It would be in the highest degree unreasonable to presume, that the legislature would declare an obligation forfeited by the omission to produce proof of things not at all within the condition of such obligation. It would be equally absurd to suppose them to require something as a discharge of an obligation, which never could affect its terms one way or the other. Now if the goods were relanded, or were lost at sea, there might have been a leaving of the port without a clearance, or a proceeding to a prohibited port, either of which would constitute a forfeiture of the bond. On the other hand, there might have been no departure without a clearance, nor proceeding to a foreign port, and yet the cargo might never have been relanded or lost at sea, and so the bond would be saved. When, therefore, the legislature prescribe, that the production of the certificate shall be expressed in the bond, it must mean, that it shall form a part of the condition of it; and when the nonproduction is declared to subject the bond to suit, and the defendant to judgment, it must mean, that the condition of the bond has been broken, and the judgment may rightfully be pronounced for the breach. I have therefore no doubt, that the condition of the present bond is a substantial compliance with the 13th section, and of course the whole foundation of the argument on this head fails. Judgment on this set of pleadings was therefore rightfully given for the United States.

Whether a bond voluntarily given to the United States can be avoided in any case, where it would be good and valid, if given to an individual? Whether such a bond, taken by a collector, under a general authority to take bonds in revenue cases, would be void on account of any irregularity or mistake in the condition? Whether such a bond, where the condition is partly conformable to, and partly variant from, the provisions of the statute, be void in whole, or good as to that part of the condition, which is conformable to law?—are questions, on which I give no opinion. It will be sufficient to decide such questions, when they arise; though with great deference I must suggest, that the principles, on which such bonds are to be adjudged wholly void, will encounter much opposition from the authority of decided cases. See Pigot's Case, 11 Coke, 27; African Co. v. Torrane, 6 Term R. 588; Morse v. Hodsdon, 5 Mass. 314; Bull. N. P. 171, 172; Rex v. Bradford, 2 Ld. Raym. 1327. See, also, Moore, 193, pl. 342; And. 129; 1 P. Wms. 181; Shep. Touch. 359, &c.; Com. v. Lacare, 2 Dall. [2 U. S.] 118. See later cases in courts of United States, and especially those in bonds given by public officers.

The third set of pleadings terminated in an issue to the country, which from the adjudication of the demurrer to the sur-rejoinder against the United States, became unnecessary to be tried in the district court. Tidd, Prac. 676; 1 Saund. 80, note 1. As I am of a different opinion on that point, it becomes an important inquiry, whether the cause can be remanded to be tried in the court below, or whether this court can issue a venire facias for the same purpose.

It has been argued by the counsel for the defendant, that this court, sitting as a court of error, cannot issue a venire facias de novo to try an issue of fact upon a reversal, where justice requires that it should be done. And Street v. Hopkinson, 2 Strange, 1055, and 1

Inst. 227, are cited in support of the position. And it has been farther contended upon the authority of Davies v. Pierce, 2 Term R. 53, 125, that the granting of a venire facias de novo, is of quite modern date, even in England. On examining the citation from 1 Inst. 227, I do not find that it bears at all upon the doctrine; but in the case from 2 Strange, 1055 (which is better reported in Cas. t. Hardw. 330), it was certainly held by Lord Hardwicke and the other judges of the king's bench, that a court of error could not award a venire facias de novo; and the reason assigned is, that no case could be found where it had been done, and it would be inconsistent to continue and transfer the proceedings of another court into a court of error. This reason is certainly by no means satisfactory. When the practice first began is perhaps not exactly ascertained; but about this very time, in Kynaston v. Mayor, etc., of Shrewsbury, 2 Strange, 1051, 7 Brown, Parl. Cas. 396, the house of lords awarded a venire facias de novo on error from the king's bench. The same award was soon afterwards made by the lords in Haswell v. Chalie, 2 Strange, 1124, and has continued downwards, as occasion has required. Lickbarrow v. Mason, 5 Term R. 367. Nor let it be supposed, that this was a peculiar authority, resting in the house of lords, for we have the authority of Lord Mansfield in Harwood v. Goodright, Cowp. 87, 89, that the lords could not as a court of error, have such jurisdiction, unless the court of king's bench had the same. But the doctrine does not rest on these adjudications, well founded as they are. In Grant v. Astle, 2 Doug. 722, on error from the common pleas, the court, on solemn consideration, awarded a new venire, and said, that there was no doubt, but it might be awarded by a court of error, and was not a new practice, and that upon inquiry, a great many cases had been found. The same doctrine has been uniformly recognised and adhered to by the king's bench ever since that time. Harwood v. Goodright, Cowp. 87; Bent v. Baker, 3 Term R. 27. And Davies v. Pierce, 2 Term R. 125, is a very strong authority to show the right, even upon error to a court sitting within another jurisdiction. In the state of New York, the practice invariably obtains (Brown v. Clark, 3 Johns. 443), and it has been deliberately adopted by the supreme court of Massachusetts (Keyes v. Stone, 5 Mass. 391; Wilson v. Mower, Id. 407). See, also, 2 Tidd, Prac. 776, 815; 3 J. P. Smith [Eng.] 39. I take the doctrine to be therefore incontrovertibly established, that at common law a court of error has a perfect jurisdiction to issue a venire facias de novo, whenever upon the record justice requires it.

I should not indeed have deemed it necessary to have examined this point so much at large (for at the argument I entertained no doubt on it) but for the total abandonment of it on the part of the United States. And it was certainly matter of surprise, that a doctrine so fully settled by authority, should have been yielded without an effort. But this authority, does not, as to the circuit court of the United States, depend altogether upon the common law, but is expressly given by statute. By the act of September 24, 1789, § 24 (1 Story's Laws, 63 [1 Stat. 85]), it is provided, "that when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree, as the district court should have rendered or passed; and the supreme court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed or matter to be decreed are uncertain, in which case they shall remand the cause for a final decision." If this court therefore are to render the judgment, that the district court ought to have rendered, then judgment must be, that the first and second pleas be adjudged bad; and that the third plea be tried by a jury. As there is a jury at the bar of this court, I do not perceive any necessity of remanding the cause to the district court, unless we are so required to do by the terms of the act. Now I think it very clear, that the exception in the latter clause of the above-mentioned act, is confined to the case of reversals in the supreme court, and does not apply to reversals in this court. The reason for remanding causes reversed in the supreme court was, that under the act of September 24, 1789 (chapter 20), no jury usually attended at that court; and upon writs of error in causes of equity or admiralty jurisdiction, the court could not examine any new evidence. Wiscart v. D'Auchy, 3 Dall. [3 U. S.] 321; Jennings v. The Perseverance, Id. 336. Whenever therefore the decision of the court below shuts out evidence necessary for the final decision of the cause, as to the plaintiff, no proper judgment could be given without remanding the cause for further proceedings. But the district court of the United States has no jurisdiction in equity causes; and in admiralty causes from that court, the revising power of the circuit court has always been exercised by way of appeal, which, according to well established principles, removes the cause for a hearing de novo, as well as to facts, as law. Yeaton v. U. S., 5 Cranch [9 U. S.] 281; Clerke, Praxis Adm. tit. 54. And in common law causes, this court can well try a cause at its own bar, as they have a jury for trials.

It has been urged, that the clauses in the 11th section of the act of 1789, which prohibit a person from being arrested in civil actions in one district for trial in another, or held to answer to process issuing from a court of any other district, than that wherein he is an inhabitant or commorant; by implication deny the right of this court to try causes from the district of Maine. But it is

a sufficient answer to the argument, that these clauses apply only to original process; and that the same act gives this court appellate jurisdiction by writ of error over the defendants in all such causes.

It has been further urged, that there is no express authority in the act to award a venire facias de novo. But I apprehend, that such an authority is the necessary result of the language of the 24th section. And even in cases not within the words of that section, as on reversals in favor of the defendant, on account of a defective special verdict, (Chesapeake Ins. Co. v. Stark, 6 Cranch [10 U. S.] 268; Livingston v. Maryland Ins. Co., Id. 274), or on a bill of exceptions (Hudson v. Guestier, Id. 285, note), the supreme court have awarded a venire facias de novo. This authority must have been exercised upon the construction of the 24th section of the act, or upon the general principles of the common law. In either case, it seems to me that the authority of the court could not be brought into question.

I am therefore of opinion, that the issue of fact, which was omitted to be tried in the court below [case unreported] should be tried by jury at the bar of this court. As the district judges concurs in this opinion, let the judgment be reversed, and a trial be ordered at the bar of this court.

Trial ordered at bar.

A trial on this issue was had at the subsequent term, and the jury found a verdict for defendant. [Case unreported.]

UNITED STATES (SCHAUMBURG v.). See Case No 12,442.

Case No. 16,228.

UNITED STATES v. SCHILLINGER.

[14 Blatchf. 71.] [1]

Circuit Court, S. D. New York. Dec. 21, 1876.

INCOME TAX—CONSTRUCTION OF STATUTE.

Under section 6 of the act of July 14, 1870 (16 Stat. 257), which imposes a tax on gains, profits and income for the year 1871, and no longer, the amount of a promissory note taken in 1871, on the sale, in that year, of a patent right, but not due until some time in 1872, and paid in that year, is not taxable as income for 1871.

[Error to the district court of the United States for the Southern district of New York.

[This was an action by the United States against John J. Schillinger to recover the income tax on certain promissory notes.]

Roger M. Sherman, Asst. U. S. Dist. Atty.

David L. Williams, for defendant in error.

JOHNSON, Circuit Judge. The question on this writ of error is, whether the defendant was liable to an income tax for the year ending December 31, 1871, upon the amount of certain promissory notes. These notes were received by him during the year 1871, upon a sale of certain patent rights, in part payment of the price thereof. They did not become due until some time in the year 1872, and then they were paid. In my opinion there is no ground for this action. The tax was imposed for the years 1870 and 1871, and no longer, upon the gains, profits and income of every person residing in the United States. Act July 14, 1870, § 6 (16 Stat. 257). In the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at a future time. In this case, the defendant changed his patent rights for promissory notes payable in the future. Their value was uncertain; they might or might not be paid; but, until they were paid, they were not income, but only the ground of expecting income. The notes were no more taxable as income than would have been other patent rights, if the defendant had received them in payment of those he sold. There are in the next section of the statute (section 7) provisions which confirm this construction. It makes interest received or accrued upon all notes, bonds and mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, subject to the income tax. The purpose of this is evidently to prevent a man escaping the income tax, by abstaining from taking that which is due him. On the same principle, had these notes been due, and had the defendant allowed them to remain unpaid, there might have been room to contend that their amount should be regarded as income; but, not being due, when the income had become fixed for the year, they were no part of the defendant's income. The judgment was in accordance with the law and must be affirmed.

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

Case No. 16,229.

UNITED STATES v. SCHIMER.

[5 Biss. 195.] [1]

District Court, N. D. Illinois. Dec. Term, 1870.

INDICTMENT—PLEADING—EXCEPTION IN STATUTE—PARTICULARLY REQUIRED—SPECIFICATIONS.

1. In an indictment under the act of July 13, 1866 [14 Stat. 166], for removing malt liquors without affixing and canceling the proper stamps, it is not necessary to negative the cases where the law authorizes a removal without affixing a stamp.

2. The presumption is that the liquor is only to be removed when sold or ready for sale, and if the removal was in a case allowed by law, that fact should be set up by way of defense.

3. Where an exception in an act does not occur in the enacting clause it is not necessary to set it out or negative it in the indictment. It is matter to be set up by way of defense.

4. In an indictment for a statutory misdemeanor it is not necessary to charge the of-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

fense with the particularity of time, place, and circumstance, required for a felony, or common law offense; and if the defendant desires greater particularity he should apply to the court for a rule for such specifications and particulars as will enable him properly to prepare for trial; the prosecution will be held strictly to their bill of particulars.

[Cited in U. S. v Bayaud, 16 Fed. 383.]

Motion to quash an indictment under the revenue act for removing five kegs of lager beer, without affixing and canceling the stamp required by law.

J. O. Glover, U. S. Dist. Atty.

R. G. Ingersoll, for defendant.

BLODGETT, District Judge. I have examined the law bearing upon these questions which have been raised on this motion to quash, and shall be obliged under the authorities to overrule the motion. The objection taken against this indictment is that the defendant is charged with having removed five kegs of lager beer without affixing and canceling a stamp denoting the tax on said beer, and that by the internal revenue law lager beer was not subject to a tax until it was removed for the purpose of sale; that it might be removed for various purposes, such as to change the place of warehousing and various other purposes under the various provisions of the act of 1866 (Act July 13, 1866; 14 Stat. 166, §§ 53, 54), without subjecting it to a tax, and that it is therefore the duty of the pleader to negative in his indictment any and all of these innocent removals which a party might perform without subjecting his beer to a stamp duty; that is to say, according to the position taken by the defendant's counsel it was the duty of the pleader on the part of the government to negative all cases where the law authorized a removal without the affixing and cancellation of a stamp.

The case comes within the general rule which is laid down in Wharton (Whart. Cr. Law, § 292), and I think it fully answers the argument of the defendant. The clauses quoted and relied upon by the counsel are all of them in different sections from that which prescribes these penalties, and furnish exceptions to the general rule. The act taken together—the act of 1866, and all the acts amendatory of it—provides that beer is not to be removed from the place of manufacture until it is stamped; the presumption is, it is only to be removed when in condition for sale, and when it is sold. The removal is not to take place, under the general scope of the act, until the kegs are properly stamped and the stamps canceled. All the cases where removal can take place without the cancellation of the stamps are exceptional to the general principle of the act, and therefore the case comes within the principle laid down in Wharton: "It is not necessary to charge in the indictment anything more than is requisite to make out the offense." In other words, it is sufficient as a general rule to charge an offense in the language of the statute. That is a fundamental law of pleading.

The principle is understood by all members of the bar that where the exception does not occur in the enacting clause it is not necessary to set it out in the indictment, but where it occurs elsewhere than in the enacting clause, the exception may come in by way of defense, and it is not necessary for the pleader to set it out. The application of this principle disposes of this objection to the indictment.

The next objection made to the indictment is that it is too general. The language is that defendant on a certain time "did carry on the business of a brewer, and did then and there remove from his brewery a large number, to wit, five kegs of lager beer, and did then and there neglect to affix and cancel on said kegs the stamps required by law." The objection taken to this averment is that it is too general, that it does not point out to the defendant with sufficient particularity the specific offense with which he is charged, that is, the time, place and circumstances under which he committed the offense, so as to enable him to prepare for a trial. If this were an indictment for a felony, or was even a common law indictment, I think the objection would hold good, but coming under a class of offenses known as purely statutory, and a misdemeanor, where the pleading is much more loose, the rule has grown up, especially in the English courts under their revenue law, of requiring with these specific charges a bill of particulars whenever the defendant made it appear to the satisfaction of the court that it was necessary for the purpose of trial that he should have such specifications, pointing out the character of the offense so as to enable him to prepare himself properly for trial.

I shall therefore overrule this motion to quash the indictment, with the statement, however, that in all cases where the charge is general, like this, if the defendant asks for a bill of particulars, or that the prosecutor shall file in the case a detailed statement of the time and place of the occurrence described, I shall make a rule to that effect, in order that no excuse of want of certainty may delay the trial of the cause. The prosecution will then be held strictly within its bill of particulars and specifications.

Motion to quash overruled.

NOTE. The same rule above laid down by Judge Blodgett, was applied by Judge Drummond to a case of information for a forfeiture, where he held that it was not necessary for the information to allege that the case was not within a proviso in the statute; that it was for the defense to set up anything coming within the proviso. The Mary Merritt [Case No. 9,222]. Consult, also, U. S. v. One Distillery [Id. 15,929], and notes thereto; U. S. v. Cook, 17 Wall. [84 U. S.] 173; The Merritt, Id. 582.

UNITED STATES v. SCHMIDT. See Case No. 16,316a.

Case No. 16,230.

UNITED STATES v. SCHOLFIELD.

[1 Cranch, C. C. 130.] [1]

Circuit Court, District of Columbia. July Term, 1803.

CONTEMPT—ATTACHMENT OF WITNESS.

An attachment of contempt, for not attending as a witness, must not be served in the court-house. If the witness arrives before service of the attachment, and makes a reasonable excuse, the court will countermand the attachment on payment of the costs of issuing it.

Three of the clerks in the public offices, being summoned as petit jurymen, were excused on that ground, on affidavit.

Attachment for not attending yesterday as a witness. He attended this day before the attachment was served. The deputy marshal (Pratt) had called the witness out of the room in which the court sat, into the corridor or vestibule adjoining, and which was the common entry into the court-room, and there served the attachment. Upon the witness being called upon to answer on oath to the attachment, and giving a reasonable excuse, he was discharged on payment of costs.

Afterwards, the same day, Mr. Woodward, for the witness, moved that he might be relieved from the payment of the marshal's costs of service of the attachment; and the above facts appearing on oath of the witness himself and admitted by the deputy marshal, THE COURT ordered the return of the attachment to be quashed, and the attachment to be entered countermanded, on payment of the cost of issuing the attachment.

MARSHALL, Circuit Judge, doubting whether the presence of the court was to be considered as extending beyond the room itself in which the court sits.

Case No. 16,231.

UNITED STATES v. SCHOLFIELD.

[1 Cranch, C. C. 255.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.

APPRENTICE.

A master cannot bring his apprentice from Maryland and hold him in Alexandria.

Indictment [against Andrew Scholfield] for false imprisonment of James Carter, a mulatto boy.

Mr. Swann, for defendant, moved the court to instruct the jury, that the evidence does not support the indictment. The evidence was that the boy (who was a free mulatto) was bound to the defendant, in Maryland. The defendant brought him into Alexandria. By the law of Maryland the indenture was void if he carried him out of that state. The defendant having brought him to Alexandria, sold his time to Hodgkins.

THE COURT refused to give the instruction.

Mr. Swann then moved the court to instruct them that the indictment could not be supported without proof of a sale by defendant to Hodgkins, that being charged in the indictment.

Refused, the offence of false imprisonment being sufficiently charged, and the sale only matter of aggravation.

Case No. 16,232.

UNITED STATES v. SCHOYER.

[2 Blatchf. 59.] [1]

Circuit Court, S. D. New York. Nov. 12, 1847.

OFFENSES UNDER REVENUE LAWS — FORGERY OF SUPERVISOR'S CERTIFICATE—INDICTMENT.

1. An indictment for forgery under section 19 of the act of March 3, 1825 (4 Stat. 120), in altering a certificate issued under section 41 of the act of March 2, 1799 (1 Stat. 659), alleging that the certificate was issued by the collector ex officio, is bad on demurrer.

2. By the act of 1799, the certificate was to be issued by the supervisor of the revenue, and the indictment ought to allege that the collector was designated by the president to fulfil the duties of supervisor, under the act of March 3, 1803 (2 Stat. 243), and that the certificate was granted by the collector in that capacity.

Indictment [against Raphael Schoyer] for forgery. The 41st section of the revenue act of March 2, 1799 (1 Stat. 659), provides that, in addition to a general certificate to be given to an importer of spirits, wines or teas, the surveyor or chief officer of inspection shall give to him a particular certificate, which shall accompany each cask, chest, &c., wherever the same may be sent within the limits of the United States, as evidence that the same was lawfully imported, and gives the form of such certificate. The 42d section of the same act (Id. 660) provides, that "the supervisors of the several districts shall provide blank certificates, under such checks and devices as shall be prescribed by the proper officers of the treasury, and shall number, sign and deliver the same to the officers who may perform the duties of inspectors of the revenue for the several ports in their respective districts; which blank certificates shall be filled up and countersigned by the inspectors of the revenue aforesaid, who shall be accountable therefor to the supervisors; and the said inspectors shall make regular and exact entries of all certificates which shall be granted as aforesaid, as particularly as therein described." The 44th section of the same act (Id. 660) provides, that every person who shall obliterate, counterfeit, alter or deface any of such certificates, shall, for each and every such offence, forfeit and pay one hundred dollars, with costs of suit. By the act of March 3, 1803 (2 Stat. 243), it is provided,

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

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

that the president may attach the duties of the office of supervisor, in any district, to any other officer of the government of the United States within such district. By the 19th section of the act of March 3, 1825 (4 Stat. 120), it is provided, that any person who shall falsely make, forge or counterfeit, or shall falsely alter, any instrument in imitation of or purporting to be a permit, debenture or other official document, granted by any collector or other officer of the customs by virtue of his office, or shall knowingly pass or attempt to pass as true any such counterfeited instrument or any such falsely altered certificate, with intent to defraud, shall be deemed guilty of felony. The defendant was indicted, under the act of 1825, for forgery, in altering a particular certificate issued under the act of 1799. The indictment alleged the certificate in question to have been issued by the collector of the port of New York, by virtue of his office. The defendant demurred to the indictment.

Francis F. Marbury, for the United States.
James R. Whiting, for defendant.

BETTS, District Judge. The instrument charged to have been forged was one which the supervisor of the revenue was authorized to issue by the act of 1799. The act of 1803 authorized the president to designate any other officer to fulfil the duties of supervisor. The indictment alleges that the collector issued the certificate ex officio. But no act of congress is shown, making him, as collector, supervisor also. If, from the fact of the collector's acting in the capacity of supervisor, it is to be presumed that he was designated, under the act of 1803, to perform the duties of that office, the indictment is still bad, in averring that he issued the certificate ex officio. It should have averred his substitution in place of the supervisor, and the granting of the certificate by him in that capacity.

Judgment for the defendant.

[See Case No. 16,232a.]

Case No. 16,232a.

UNITED STATES v. SCHOYER.

[4 Betts, C. C. MS. 59.]

Circuit Court, S. D. New York. March 3, 1845.

CUSTOMS DUTIES—VIOLATION OF LAWS—COUNTERFEITING COLLECTOR'S CERTIFICATE.

[1. The certificate which the supervisor (or collector) is required by the 41st section of the act of March 2, 1799 (1 Stat. 659), to give to the importer of distilled spirits, to accompany the cask, as evidence that the same has been lawfully imported, is an "official document granted by the collector," within the meaning of the 19th section of the crimes act of 1825 (4 Stat. 120), which makes it a felony to forge or counterfeit such documents.]

[2. The provision of the statute that the certificate is to be "numbered, signed, and delivered" by the collector, and "filled up and countersigned" by the inspector, does not require that the collector shall affix his manual signature, and the instrument may be the subject of forgery, although his signature was printed.]

[3. But even if an original paper, executed with printed signatures, would not be good under the statute, yet, as it purports to be a genuine certificate, it would still be a felony, under the terms of the crimes act, to counterfeit it.]

BETTS, District Judge. To an indictment under the 19th section of the crimes act of March 3, 1825, the defendant, Raphael Schoyer, demurs generally. On the argument two principal grounds were taken in support of the demurrer: (1) That the instrument set forth, appears upon the indictment not to have been signed and granted by the collector, and is therefore void; and (2) that if properly issued, the indictment shows the original, which it purports to represent, was of no value, and could not be legally the subject of a forgery. The instrument is the special certificate required by the 41st section of the act of March 2, 1799, to be given the proprietor, importer, or consignee of any distilled spirits, to accompany each cask, &c., wherever the same may be sent within the limits of the United States, as evidence that the same have been lawfully imported. By the 42d section it is enacted, that the supervisors of the several districts shall provide blank certificates under such checks and devices as shall be prescribed by the proper officers of the treasury, and shall number, sign, and deliver the same to the officers who may perform the duties of inspectors of the revenue, for the several ports in their respective districts; which blank certificates shall be filled up and countersigned by the inspectors of the revenue aforesaid, &c. No distinct officer of the revenue seems to have been created by the acts of congress under the name of "supervisor," but the act of March 3, 1803, seems to recognize the existence of such officer in authorizing the president to attach his duties to any other officer of the United States within such district (3 Laws [Bior. & D.] 560 [2 Stat. 243]), and it is to be assumed, under the pleadings, that the collector was duly empowered to perform those duties.

The indictment alleges the certificate in question to have been granted by the collector by virtue of his office, in the particular form set forth, the signatures to which are "Edward Curtis, Collector, per N. Olcott," and countersigned "William Taggard, Inspector, by W. R. Grey," and the names of the collector and inspector, it is admitted, were printed, and not written by those officers themselves. The 19th section of the act of 1825 makes it felony to falsely make, forge, or counterfeit, &c., any instrument in imitation of, or purporting to be (amongst many others designated), a permit, debenture, or other official document, granted by any collector or other officer or the customs by virtue of his or their office. This is clearly an offi-

cial document, granted under the requirement of the law, and one which must accompany the cask, and to which it applies as evidence that the same has been lawfully imported. It is quite unnecessary to consider whether counterfeiting such an instrument would be forgery at common law for the want of any intrinsic value in the genuine document, because the legislature here have created and defined the offence, and made it felony to falsify an official document of this character, without respect to any fraudulent intent in the act. Congress perceived a mischief, which it deemed important to suppress, in the simulation of its official documents, and has declared such acts felony, whether accompanied by a fraudulent use of them, or attempt or intent to use them.

The averments in the indictment are fully sufficient to bring this case within the description of offence given in the act of congress, and must be held sufficient on general demurrer (Archb. Cr. Pl. 27, 28; 1 Chit. Cr. Law, 231, 232; Fost. Crown Law, 424), if the instrument was so executed as to become an official document [U. S. v. Turner] 7 Pet. [32 U. S.] 132. The last point is not without its difficulties. The certificate is to be "numbered, signed, and delivered" by the collector, and "filled up and countersigned" by the inspector. In ordinary acceptation, when a paper is required to be signed officially or by an individual, the manual signature of the person indicated is understood to be necessary. Letters patent must be signed by the president of the United States. Cutting v. Myers [Case No. 3,520]. The more modern decisions in England hold that wills must be subscribed by the testator (1 Wils. 313; 2 Ball & B. 104; 2 Ves., Sr., 459; 1 Ves., Jr., 11; 17 Ves. 458; 18 Ves. 175), though sealing has been sometimes regarded sufficient (1 Show. 68; 2 Strange, 764); and in Lemayne v. Stanley, 3 Lev. 1, it was held that it was a sufficient signature to a will for the testator to stamp his name thereto.

The word "subscribe" in the statute of wills or frauds has never been construed to require the actual writing of the name of the party with his own hand; making his mark or cross is held a sufficient signature (8 Ves. 185, 504); and undoubtedly directing another to write his name, and then publishing and declaring the instrument, would constitute a valid subscription (Rex v. Inhabitants of Longnor, 1 Nev. & M. 576). And also the direct acknowledgment of a testator or grantor of the signature to a will or instrument in writing is sufficient evidence of the authenticity of the signature, without proving the subscription to have been actually made by him. 2 Rev. St. p. 63, § 40; 2 Starkie, Ev. 228; Greenl. Ev. § 569, note 4. This statute should not be construed with any severer restrictions than are applied to the statute of wills, for it has reference to the transaction of the current business at a custom house, where calls for papers of this character may be exceedingly multifarious, and, if to be actually executed by the collector, might divert to that object a great portion of his time. Although the statute calls for attestation of the document by signing it, yet the certificate takes its effect and operation from being granted by the proper officers, and the terms of the statute would very reasonably, therefore, cover any act of the officers recognizing and acknowledging the validity of the certificate, and make it equivalent to proof of subscription. The collector is by the statute required to number, sign, and deliver the certificate to the inspector, &c., and the "blanks shall be filled up and countersigned by the inspector," &c. No doubt could be entertained that the law would be complied with if the collector had the numbering and delivering of the certificate made by a clerk, without any participation of his in those particulars, or if the inspector also had the blanks filled by another than himself; yet the language of the statute enjoined these services in exactly the same terms as that of signing and countersigning.

I am of opinion that a signature, written or printed, recognized and acknowledged by those officers as their own, is a sufficient signing and countersigning of the certificates to satisfy the requirement of the act, and that accordingly the instrument is valid, and operative as an official document. But, further, if an original paper so executed be not good under the statute, it yet purports to be a genuine certificate, and, within the case of U. S. v. Turner, 7 Pet. [32 U. S.] 132, the defendant would commit a felony by fabricating or attempting to pass it. The indictment charges the false making and counterfeiting, and the uttering, and attempting to utter, the forged certificate, knowing it to be forged, and purporting to be an official document granted by the collector of customs of this district, and on general demurrer I hold these allegations sufficient. Judgment is accordingly rendered against the demurrer, with order that the defendant plead to the indictment.

[See Case No. 16,232.]

Case No. 16,233.

UNITED STATES v. SCHROEDER.

[14 Blatchf. 344.] [1]

Circuit Court, S. D. New York. Oct. 29, 1877.

FEDERAL CONVICTS IN STATE JAILS—COMMUTATION OF SENTENCE—STATE LAWS.

1. The sentence of a convicted prisoner, sentenced to be imprisoned for twelve months, did not fix the place of confinement. The sentence was executed in Ludlow street jail. Ten months of the term having expired, the prisoner applied for his discharge, on the ground that, under the act of March 3d, 1875 (18 Stat. 479), he was entitled to a deduction of five days

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

during every month: *Held*, that, as the state of New York had a system of commutation for its own prisoners, the deduction could not be allowed.

[Cited in Re Terry, 37 Fed. 652; U. S. v. Goujon, 39 Fed. 774; Re Deering, 60 Fed. 267.]

2. The prisoner would be entitled, under section 5543 of the Revised Statutes, to the deduction of one month, there allowed, on the certificate and approval required by that section.

[Cited in Re Deering, 60 Fed. 267.]

Benjamin B. Foster, Asst. U. S. Dist. Atty.

Byron A. Cohen, for defendant.

BENEDICT, District Judge. The prisoner, upon conviction, was sentenced to be imprisoned for twelve months. The sentence, as has been usual in this district, did not fix the place of confinement, and, accordingly, the sentence has been executed in Ludlow street jail, that jail being the one hitherto used for the temporary confinement of prisoners in this district. Ten months of the term of imprisonment having expired, the prisoner now applies to be discharged, upon the ground, that, by virtue of the act of March 3d, 1875 (18 Stat. 479), he is entitled to a deduction from the time of his imprisonment of five days during every month, no charge of misconduct having been sustained against him during his imprisonment. An examination of the terms of the act of March 3d, 1875, shows, that the deduction there provided for can be allowed only to persons confined in a state which has no system of commutation for its own prisoners. The state of New York has a system of commutation for its own prisoners (Laws 1863, c. 415, and Laws 1864, c. 321), and therefore, the deduction of five days per month, prescribed by the act of 1875, cannot be allowed. The fact that the state system of commutation does not allow any deduction to prisoners confined in jails does not affect the question. There is still a state system of commutation, and the fact of the existence of such a system takes the case out of the scope of the act of 1875, without regard to the particular provisions of that system.

To avoid a second application, I may say, that, although the prisoner is not entitled to the deduction allowed by the act of 1875, I am of the opinion he will be entitled to the deduction of one month, allowed by section 5543 of the Revised Statutes, upon the certificate and approval required by that section. The words, "state jail or penitentiary," used in that section, are not to be considered as intended to limit the provision to jails supported by the state at large, if, in any state, there are such jails, as distinguished from the common jails kept by the counties of the state, by virtue of state laws. They refer to the jails and penitentiaries within a state, whether state, city or county institutions, which are permitted by the state to be used for the confinement of the prisoners of the United States. Laws N. Y. 1847, c. 460, § 16. Ludlow street jail, in the city of New York, is, therefore, a state jail, within the meaning of section 5543.

Case No. 16,234.

UNITED STATES v. SCHULER.

[6 McLean, 28.] [1]

Circuit Court, D. Michigan. June Term, 1853.

PUBLIC LANDS—REMOVAL OF TIMBER—INDICTMENT—CONSTRUCTION OF STATUTE.

1. The indictment charged the defendant with being employed in "removing from lands of the United States, at the mouth of the river Muskegon, in the county of Ottawa, and district of Michigan, a large amount of timber, to wit: one hundred thousand shingles and twenty cords of shingle bolts." The court held this description too vague and uncertain. That the locality of the trespass was inseparably connected with the offense, and the particular section or quarter section of the public domain must be stated, so as to protect the defendant from another trial, for the same offense, more particularly described according to the designations of the public survey. That the question was not one of jurisdiction; but pertained to the statutory description of the offense.

2. That the United States, as a great land proprietor, had the public lands officially surveyed, platted and designated, by fixed ranges, townships, sections, and quarter sections. These divisions were of record, and notorious, and the defendant was entitled to such a particular description that he might be apprised of what trespass he was called upon to defend. The mouth of the Muskegon might embrace more or less of the land of the United States, and comprehend townships or counties. The being "employed in removing timber from the lands of the United States," had reference to the well known and legally designated parts of the public survey, by which the national domain, other than that reserved, was purchased and sold.

3. The statute under which the indictment was found, constitutes part of the land law of the United States, and was designed for the protection and the preservation of both classes of the national domain by severe penalties. The term "other land" in the statute, has reference to its surveyed divisions, and contemplates the lands known and described in the public surveys as distinct from those reserved for naval purposes. The one was held for a special object; the other, by various enactments as trustee for subsequent purchasers.

[Cited in U. S. v. Garretson, 42 Fed. 25.]

4. The term "other lands" being general, and the intention manifestly requiring a specific application, in order to charge the particular offense, a particular description was necessary as to place. The general language, "lands of the United States," not sufficient, as descriptive of the offense.

5. The term "timber" in the statute, signifies, the standing and the felled trees prepared for transportation to a vessel or saw-mill, such as saw logs, or lumber in bulk; but does not embrace any article manufactured from the tree, as shingles or boards. The trees are those, the wood of which is generally used in ship and house building.

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

6. It is not necessary in an indictment for removal, to allege that the timber was removed from the land on which it was grown or from which it was cut. But it must be stated that it was removed from the lands of the United States, specially described according to the public survey.

7. The allegation that the defendant knowingly committed the act, is unnecessary.

[Cited in U. S. v. Three Railroad Cars, Case No. 16,513.]

Mr. Hand, U. S. Dist. Atty.

WILKINS, District Judge. This indictment contains two counts. The first charges the defendant with "being employed," and the second with "aiding and assisting" in removing "timber from lands of the United States." The description of the offense is in these words: "That George Schuler, late of the village of Muskegon, in the county of Ottawa, on the 20th of June, 1853, at the mouth of the river Muskegon aforesaid, was employed in removing from lands of the United States, a large amount of timber, to wit: one hundred thousand shingles and twenty cords of shingle bolts, the property of the United States, of the value of one thousand dollars." The description in the second count, is in the same words, with the exception as "to aiding and assisting in removing," instead of "being employed to remove."

The act of congress of March 2, 1831 [4 Stat. 472], entitled "An act to provide for the punishment of offenses committed in cutting, destroying, or removing live-oak and other timber or trees reserved for naval purposes"—defines the offense as follows: "If any person shall cut, or be employed in cutting, or shall remove or be employed in removing, or aid and assist in removing any live oak or red cedar trees, or other timber, from lands of the United States, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States, the person so offending, on conviction thereof, shall, for every such offense, pay a fine not less than triple the value of the tree or trees, or timber so cut, destroyed, or removed, and be imprisoned not exceeding twelve months."

Several reasons are assigned as causes of demurrer. We will notice them in the order in which they have been presented in the argument.

I. It is objected that the offense is not described in either count with sufficient certainty and precision. This objection, especially, has reference to the locality of the trespass. It is not charged that the timber was removed from any designated portion of the public domain. The language is general, "from lands of the United States at the mouth of the river Muskegon aforesaid." Where the locus in quo is so inseparably connected with the offense,—as in this statutory trespass upon the public lands,—such a description should be given, as would certainly protect the defendant from a second trial for the same offense, in which the indictment contained a more particular description as to township, range, section, or quarter section of land from which the logs were actually removed. It is not necessary to specify any of the political divisions of the state, merely as indicative of the jurisdiction of this court. It is sufficient to allege, that the trespass was committed within the district. Such an allegation is all that is necessary in most of the cases triable in the United States court. But this act of congress, (being part of the land law of the United States,) in the creation of this offense, had reference both to the naval reservation and the surveyed lands of the national domain, with the intention of preserving the timber on them from destruction, by the imposition of severe penalties. And the principal divisions and sub-divisions of the public surveys, being specially directed by statute, and of public record and notoriety, are unquestionably intended by the statutory language "other lands of the United States," in contradistinction to "the lands reserved." The usual fiction of "breaking the close" in actions or indictments, for trespass upon lands, or the necessary description in ejectment, is not designative of jurisdiction, but essentially descriptive of the particular property of the plaintiff on or concerning which the offense has been committed. The principle of the fiction is applicable to the indictment. The United States as a great land proprietor, for their preservation, protection, and sale, has had the public lands officially surveyed, and by various agencies and functionaries has had platted off and designated by fixed boundaries and sections, the national domain.

A description, then, omitting the material averment of the particular division from whence the timber was removed, is too vague and uncertain. A removal from a body of water, is not a removal from land. Such would not answer in an action for civil damages, much less then, in an indictment, which should be specially descriptive of the offense charged. An individual owning several parcels of land in the same township and county, must specify in his action, with distinguishing certainty, which one of his farms has been injured by the trespass for which he seeks reparation. It would not do, to describe the same generally as by county or townships, where such description would not specify, and where specification was necessary. The "mouth" of a river may embrace for many miles land on either side, and the land adjacent may comprehend more townships than one, it may be more or less extensive, and the lands on its banks or borders be varied as to ownership. In a case then, so seriously involving character,

property, and personal liberty, the defendant is entitled to a more specific accusation. The river Muskegon may water, and the county of Ottawa may comprehend a large extent of country, and such averment is no notice to a defendant, as to what particular tract of the lands of the United States, he is called upon to defend. It might as well be "the United States lands" in the county of Ottawa, or the "United States lands in the district of Michigan." No doubt, other lands are held in the county, and at the mouth of the river by individual owners, and so far, such description might generally distinguish the government lands from those entered at private sale. But the patent or deed, to an individual, of government lands, describes his purchase by the well known returns of survey, and the marks on the ground, and that which remains unsold is as well known and as easily ascertained. The defendant therefore should be apprised by the indictment of the particular subdivision to which the alleged offense attaches. It is not a question of jurisdiction that the venue settles, but a matter of essential description.

A part of the statutory definition of the offense: material to be proved, and therefore material to be averred. 1 Stat. 465; 4 Stat. 472; 5 Hill, 401; 3 Blackf. 193; 1 Chit. Pl. 234; Cowper, 682; 3 Greenl. Ev. 12; U. S. v. Wilson [Case No. 16,730]. The case of U. S. v. Wilson [supra] does not conflict with this view. The offense was robbing the U. S. mail in the Eastern district of Pennsylvania. Not necessary to prove and therefore unnecessary to aver particular locality, as essentially connected with the crime. But here the offense is not the destruction or removal of timber on wild land, not merely the removal of timber, belonging to the United States, but the destruction or removal of timber on and from the lands of the United States, and (with reference to prior enactments) from the surveyed lands of the United States.

II. But it is urged by the government, that the description of the offense is of sufficient certainty, because such description is in the very words of the statute. The words of the statute are, "employed in removing any live oak, or red cedar trees, or other timber, from any other lands of the United States." The lands of the United States other than those designated and reserved for naval purposes, constitute the premises from which the timber is removed, being employed in which, comprises the offense defined in the statute. What, then, are the essential words of the statute? Certainly those which signify the act, such as "employed in removing;" also its specific character "other timber," and also the place where the act was done, viz: "on other lands." By following, then, the precise words of the statute, is the offense so described as to apprise the defendant with sufficient certainty of the particular matter with which he is charged? If so, the description is sufficient, being in the words of the statute. But, if otherwise, if there be obscurity and uncertainty, the description is not sufficient, although the statute is followed in totis verbis. Such is the rule in [U. S. v. Gooding] 12 Wheat. [25 U. S.] 460, the governing case. Mr. Justice Story, who gave the opinion of the court, says: "That where an indictment follows the language of the creative statute, it is as certain as the statute, and in general such certainty is sufficient;" but he further remarks: "There are cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. Courts have thought such certainty not unreasonable or inconvenient," but "calculated to put the plea of autre fois acquit, or convict, fairly within the power of the defendant." "The course has been," observes the court, "to leave every class of cases to be decided very much upon its own peculiar circumstances." The case of U. S. v. Mills, 7 Pet. [32 U. S.] 138, does not conflict with this general rule and exception. And those cited from McLean, Mason and Gallison, would not modify, even if considered in conflict. This court takes the law from the supreme court of the United States, and if the point in controversy has been there adjudicated and settled, it is unnecessary to waste time or strength in protracted commentary upon either English or state authorities. "Ita lex scripta est,"—the authority is conclusive,—so is the law, and the "stare decisis" of the supreme court is mandatory. This case then establishes this rule, viz.:—That in statutory offenses the description of the statute is to be followed, except where more particularity is required from its "obvious intention, and the application of known principles of law." Cases may arise,—cases have arisen,—where it would not be safe for the pleader to follow the statute; as for instance, where the statute uses general terms, which manifestly require a specific application, in order legally to charge the particular offense.

Now, what is the obvious intention of the statute of March 2, 1831, providing for the punishment of offenses, committed in cutting, destroying, or removing live-oak and other timber, or trees reserved for naval purposes? Its title and history exhibit its object.—The provisions of the prior statute, exclusively protecting lands reserved from sale for naval purposes, were by this act extended to other lands, and measurably to other timber, than live-oak or red cedar. Protection and preservation of the surveyed landed dominion of the United States—whether north or south, whether growing timber or not;—preservation from spoliation of the surveyed lands, and keeping them, as ordained by Nature, attractive to purchasers, was the sole object and spirit of this amended and extended law. This is obvious from the consideration that the naval reservation and the unsurveyed

lands, are not dedicated either to settlement or sale. Within the territorial limits of the United States, and acquired by treaty from the Indians, the unsurveyed dominions await legislative action, the further fostering care of the government, and the progress of population, in order to be appropriately redeemed from the obscurity and helplessness of the wilderness. Conceived, but not born—in embryo, but not legally in existence, they await the breath of law, to give them legal being and ensure them legal protection. The land law, for the punishment of this description of trespass, does not embrace the unsurveyed tracts of the public land. They may need such legislation, but it is not yet given. When the act of 1831 was passed, the revenue arising from the land sales, formed a prominent item in the treasury, and was an important object of national solicitude. Its annual increase by salutary legislation—holding forth inducements to the settler and purchaser, and its collection, were the leading motives of the land legislation for many years preceding. The government did not seek the preservation of the timber growing on its lands (with the single exception of the naval reservation,) with the motive of enhancing their value for ornament, or special use, or speculation, but singly with the view of inducing speedy sale and settlement, and preserving for the purchaser, at government price, the lands as they stood. If the evil then to be remedied by the statute was the spoliation of the surveyed lands; and the remedy to be applied the preservation, by sufficient penalties, of its valuable timber—if regard is to be had to this manifest intention, certainly, cutting timber on the surveyed United States lands, must necessarily be described with reference to their legal notorious divisions and subdivisions, indicated in statutes pari materia, and of public record. It is true, that cutting timber on lands of the United States is the offense, in the words of the statute. But such description would not indicate on what part of the lands of the United States the trespass was committed. And as the lands of the United States are divided and subdivided—by official surveys and plats—the description required by the statute, and the "application of known principles of law" demand that the indictment should conform to a statutory designation, exhibiting the range, township, section, and quarter section, on which the trespass was committed. This is not inconvenient, certainly. This is not, certainly, unreasonable,—this is certainly calculated to "put the plea of former acquittal or conviction fairly within the power of the defendant." Should the defendant be acquitted, on a charge describing the cutting, or removing, on lands of the United States, at the mouth of a river, in a certain county and district, and be subsequently indicted for the same offense, describing the range, township, section, and quarter section, to what purpose could the record of the first case be evidence? The first description did not necessarily include or cover the latter, and without testimony establishing the fact, it could not be inferred. In the post office case, the offense defined was embezzling and secreting, and not stealing the particular enclosure. The breach of official trust was the offense. The descriptive words of the statute are all that are necessary. The name of the bank, or the genuineness of the note, is only necessary as to corroborative evidence, and may or may not be used in the indictment. The article of value, if stated, is proved by the note taken; but the fact itself is not essential to establish the offense of embezzlement, neither is it necessary to describe the letter by its superscription.

This statute itself, illustrates the point in consideration. For cutting down, or removing naval timber, it would not be sufficient to state merely that the act was on lands of the United States; but on specific and reserved lands. So here; cutting on lands of the United States would embrace the extent of the venue or jurisdiction, and leave the defendant on a wide sea, without chart or compass, to direct him to what particular trespass he must apply his defense. The court considers that the land law of the United States furnishes the chart, and that the government must observe it in these prosecutions.

III. But it is further objected to the sufficiency of this indictment, that it does not describe any offense whatever. The words of the statute are, "being employed in removing timber." In the indictment, the word "timber" is used with a videlicit, explaining it to mean "shingles and shingle-bolts." This explanation is material, for without it, no charge is specially expressed. "Timber" is a generic term. The question then arises as to the interpretation of the word "timber." However the word may be used in common intercourse, or whatever construction has heretofore judicially been given to it, in connection with other legislation, this court will be guided and controlled by the manifest intention of the legislature in its use, and the object of the act of congress. Unless the contrary clearly appears from the context, it will be presumed that the word was employed in its ordinary popular sense. It is not the interpretation of an artistic or technical word, or a word of equivocal meaning. It is a word in common use, and has an enlarged or restricted sense, according to the connection in which it is employed. Keeping in view the spirit of the statute, the evil which it designed to prevent, and the remedy intended, looking to this and other statutes on the same subject, such an interpretation must be given to the word as will effect, and not defeat, the legislative will. As a generic term, it properly signifies, only such trees as are used in building—either ships or dwellings. [U. S. v. Castillero] 2 Black [67 U. S.] 281; 1 Crabbe, Real Prop. § 20; 2 Burrell, Law Dict. tit. "Timber." But its signification is

not limited to trees: it applies to the wood, or the particular form which the tree assumes when no longer growing or standing in the ground. Strictly speaking, a tree is that which is growing or standing in the ground whether alive or dead. There are dead and live trees, both standing. But when the trunk is severed from the root, and felled to the earth, it is no longer, properly speaking, a tree. It becomes timber or lumber, according to the use to which it can be applied. A forest of standing trees, if they can be appropriated to building, is called well timbered land, but loses that designation, if swept to the earth by a tornado.

The legislature is presumed to be acquainted with the varied use of the word, and to have employed it in the statute, in an enlarged or a restrictive sense, according to its connection with the subject matter; thus, when used in the act of 1817, in the plural number, "red cedar timber," it signifies "standing or growing trees," and when in the 4th section, (prohibiting its exportation,) it is used in the singular number, "timber," it evidently applies only to the tree cut down, and prepared for transportation in ships. So that in the same act, according to its association, does it bear two different significations; one, enlarged—embracing the trees of the forest, as standing; and the other a restricted, special meaning, applying only to the use to which the wood can be appropriated. And in the act of congress under consideration, the same varied use is made of the word. When the cutting is prohibited, it is synonymous with trees: "Cutting any other timber on—" i. e., felling them to the earth;—when removal is prohibited, removing any other timber "from," it is applicable to the restricted sense of the trees being felled to the earth, and prepared by the labor of man, on the ground where cut for transportation; and where the statute embodies both significations in the phrase "other timber, standing, growing and being." "Standing and growing" mean when alive as trees, erect in the earth; and "being" is applicable to their character, cut and ready for use. That this distinction exists in the statute, and was in the contemplation of the legislature, seems evident from the use of the term in the second section, wherein the timber cut is used with reference to its being taken on board of a vessel. If cut, it was no longer a tree; if to be taken on board of a vessel, it is no longer a tree. Trees are not transported in vessels from place to place; but timber is, and dropping the word tree, in this section, and using the word "timber"—in connection with "red cedar and live oak cut,"—leaves no doubt in my mind, in regard to the legislative use of the word in the first section, prohibiting the being "employed in removing any live oak or red cedar trees or other timber." In this connection it is employed to signify the felled trees, prepared for use and transportation, and embraces the various uses to which timber can be appropriated, either in ship or house building—whether pine logs, square pine timber, or any other form in which the cut trees are prepared, either for the saw mill or transportation. It was not the intention of the act of congress, to punish the removal of any article manufactured from the timber cut upon the public lands; such as masts, bowsprits, oars, breakers, casks, boards, tubs, buckets, barrows or hand-spikes; or, to pursue the felled tree as timber further than such preparation of the wood as was necessary for its transportation to the saw mill, or other place of manufacture. Beyond such purpose the article became transmuted. Its nature and use changed. It was no longer timber. Its character as timber ceased when the labor of the lumberer ceased, and the art of the manufacturer commenced. When the article is once perfected for immediate use, it is only known by its appropriate name; and is no more timber than bread is flour, or flour, wheat, or mutton, sheep,—or beef, oxen;—and such also, are shingles, made of pine timber, because they are perfected by man's art for immediate use. We do not say that a dwelling is timbered, but shingled.

Timber logs or timber bolts are brought from the woodland and converted at the saw mill into boards, or scantling, or laths, or shingles; and the latter has a well known and fixed meaning, known to the legislature, and certainly never meant by their term "timber," in the act of 1831. It is true that "fat oxen" are provision and munitions of war, according to case cited from 2 Peters: there, the genus "provision" covers the species "oxen." But "provision" is not fat oxen—it may consist in something else; and here timber, as a genus, by no means includes a manufactured article, which does not bear to it the relation of a species. Timber is the genus of the various trees dedicated by custom to a particular use—such as the pine, the ash, the oak, the cedar, and the chestnut; but certainly not to the articles manufactured therefrom, or otherwise a frame building might be considered a species of timber. But to make the antecedent terms in the statute limit the word to their specific character as trees, would be unnecessary repetition, and clearly defeat the object in view of inhibiting the principal evil designed to be prevented, viz., the illicit commerce between the cutters and those who traded in timber cut. Such was the object of the act of 1817, and with a like view the provisions of the law were extended to the whole surveyed national domain. The question, then, is not as to the popular meaning of the word, considered as trees growing, or as hewn logs in transitu to the saw mill; but its statutory signification; not its lexicographic, but its signification in the statute, and how it is here legislatively employed. And should such a construction be now given, as to confine the penalty for removal of

trees, as such, the act would defeat itself. If applicable to trees only, the preservation of naval timber so earnestly desired by the government, would be extremely precarious; and if the word is used in its enlarged sense as to naval timber, it must have the same meaning when applied to other lands than naval lands.

But it is further assigned as a cause of demurrer, that more of the counts for removing timber, aver that it was removed from lands on which it was grown and cut down. The charge is that the defendant was employed in removing from lands of the United States. Now, if the indictment contains the proper averment specifying the lands by township, range, section, and quarter section, this statement would clearly indicate the character of the lands from which the timber was removed; and keeping the object of the statute in view, and interpreting the term "lands" as employed in the statute, to refer exclusively to the surveyed national domain, held forth by the government for entry and sale, in contradistinction to other real estate belonging to the general government, such as dockyards and arsenals, we must hold the charge contained in the indictment to be sufficient. Taking timber from the United States arsenal without permission, may or may not be a felony, according to the circumstances which surround the act; but it is not the offense described in this statute. Neither is it necessary to aver in the indictment that the timber was removed from the particular section of the United States lands where it was grown and cut. Such a fact need not be proved, to support the specific accusation that the timber was removed from specific lands. The statute, with a view to preserve the lands from being despoiled, has prohibited not only the cutting down, but the removal. The offenses are distinct. As to the former, such proof is necessarily connected with the cutting; for how could the charge be maintained, without the other fact being established, that the trees were growing or standing when felled? But to remove that which has been already cut down from section to section, and across section lines, either direct to the mill, or to an adjacent stream for floating, is another and a distinct offense, to be established by evidence showing the removal to be from that part of the public domain described. One offender may cut the timber, another may convey it across the section lines to a place of embarkation on the water, and if eventually removed from the United States lands appropriately described, the offense of removal, or being engaged in removing, is fully made out. That the timber was not the timber of the United States is a matter of issue. But as Mr. Justice Story observes in the oft-cited Case of Gooding [12 Wheat. (25 U. S.) 460], the charge is "the precise language of the statute." "Employed in removing timber from the lands of the United States," communicates to the accused a definite accusation, by which he cannot be misled, and is unequivocally stated, so as to apprise him of the offense charged and what he is to defend. Here the particularity required as to the locus in quo is not necessary; and the ruling of the supreme court in the Case of Gooding is directly applicable.

Another exception is taken to the form of the indictment apparently involving the intention, with which the alleged criminal act was committed. It is not stated in the indictment that the act was knowingly committed. The statute does not require such an averment. If the defendant was employed as charged, he must have known the character in which he acted, and the business about which he was engaged. Besides, the offense described in the 2d section of the law clearly shows the intention of the legislature, that, in the case of freighting a vessel with this timber, the guilty knowledge must be established against the owner or captain; while such proof is not required in the offenses described in the 1st section, but the fact will be presumed, leaving to the defense to rebut such presumption by evidence showing mistake, ignorance of the section lines, and that the trespass was committed under the well-grounded belief that the timber removed was timber removed from other lands than those of the United States. It may be otherwise as to the omission of such terms as would exhibit the unlawfulness of the act, but that point is held under advisement and until further argument, as it is involved in the motion in arrest of judgment in the case of Thompson.

I have thus carefully considered the points presented in the unusually protracted argument as to the validity of these indictments. It is much to be regretted that demurrers were not interposed at an earlier period, before jurors and witnesses were brought to attend this court. Not only would it have been expedient for the interests of the government, but more satisfactory to the court called upon to decide grave questions of law, during the progress of its session, with a jury, and parties, and witnesses awaiting its action. Such should not be the case, and where causes of a criminal character are hereafter continued from one term to another, with the opportunity in the interval of presenting the law involved by demurrer, the court will not permit while a jury is in attendance, the objections to the indictment in this form to be discussed, but will compel defendants to proceed to trial, and reserve for the action of the court, after verdict, all considerations involving the construction of statutes, or the sufficiency of the pleading.

In the case of George Schuler and Paul H. Howard, the demurrer is sustained.

Case No. 16,235.

UNITED STATES v. SCHUMANN.

[2 Abb. U. S. 523;[1] 7 Sawy. 439.]

Circuit Court, D. California. 1866.

CRIMINAL PROCEDURE—POWERS OF UNITED STATES DISTRICT-ATTORNEY—OF UNITED STATES COMMISSIONERS.

1. The district-attorney of the United States has no absolute power to dismiss a criminal charge while an examination of the accused is proceeding before a commissioner.

[Cited in U. S. v. Ebbs, 10 Fed. 373, 49 Fed. 152.]

2. After indictment found, and before trial commenced, the district-attorney has absolute power to enter a nolle prosequi. But while the charge is under examination, either before a commissioner or the grand jury, he attends only as counsel of the government, to present the evidence against the accused; and has no control over the course to be pursued.

[Cited in U. S. v. Ebbs, 10 Fed. 373, 49 Fed. 152.]

3. The powers and duties of commissioners, in criminal cases,—explained.

[Cited in U. S. v. Scroggins, Case No. 16,244.]

Question certified for the opinion of the court by a United States commissioner. One Schumann, having been brought before a United States commissioner at the city of San Francisco, for examination upon a charge of having committed a public offense against the laws of the United States, the district-attorney proposed, before the examination was completed, to dismiss the proceeding. The commissioner applied to Judges FIELD and HOFFMAN, then holding the circuit court, for their opinion as to the power of the district-attorney to do so. The following opinion was rendered in answer to this question.

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

FIELD, Circuit Justice. We have looked into the question upon which the commissioner has asked the opinion of the court as to the control of the district-attorney over criminal proceedings pending before him; and will briefly state the conclusion we have reached. The district-attorney, we are informed, asserts an absolute right to dismiss any criminal proceedings before the commissioner both before and after the examination of the accused. The commissioner, on the other hand, denies such control, and insists that his authority is independent of any action of the district-attorney, and is to be exercised in all cases as his judgment may dictate upon the evidence presented.

The office of commissioner was created by the act of February 20, 1812, and his duties were at first limited to taking acknowledgments of bail and affidavits. By several subsequent acts his powers have been greatly enlarged. Among other things, he is invested with all the authority to arrest, imprison, or bail offenders against the laws of the United States, which any justice of the peace or other magistrate of any of the United States can exercise under the thirty-third section of the judiciary act of 1789 [1 Stat. 91]. That section provides that "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." The same act also authorizes the commissioner, upon any hearing before him, when the offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion, to require a recognizance from witnesses for their appearance at the trial. He is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, to summon witnesses for the government and for the accused; and to commit for trial or to discharge from arrest according as the evidence tends or fails to support the accusation. For the faithful discharge of his duty in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government; nor is he subject to any other's control. The district-attorney may appear before the commissioner, and attend to the presentation of the evidence—but in that position he is only counsel of the government; he cannot direct what finding the magistrate shall make, nor what course he shall pursue. The magistrate will, indeed, in any case, hesitate to continue an investigation after the prosecution has been abandoned by the legal officer of the government. Still, there may be cases where he will be justified, and more, bound to take such a course. While the charge is under investigation, before either the commissioner or the grand jury, the district-attorney has no absolute power over the case. His duty requires him to attend the sessions of the grand jury; to advise that body of the law upon points desired; to examine witnesses; and, when directed, to draw indictments. But he cannot control the action of that body, and, by declaring that the government will not prosecute any particular case, prevent its consideration. The duty of that

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

body is to inquire into all matters charged to be offenses against the United States, committed or triable in the district, and its power is in this respect unlimited. It is only at a later stage of the proceedings that the prosecution comes entirely under the direction of the district-attorney. After indictment found and until trial commenced, his authority may be said to be absolute. He can then abandon the prosecution at his pleasure. He can enter a nolle prosequi, even without the consent of the court. He can do this before the arraignment of the accused; or he may do it after issue joined; he can do it at any time until the jury is impanneled; and after the trial has commenced he can do it with the consent of the defendant. Having power to this extent over the prosecution after indictment found, it might seem to be a matter of little practical importance, whether the proceedings terminate at his instance before the commissioner, or subsequently by a nolle prosequi before the court.

But the question is not as to what course the prosecuting attorney of the government may subsequently pursue in case his direction to the commissioner is disregarded, but how far that officer is bound to act upon the direction; and we are clear that he must act upon his own judgment of the law and evidence, and not upon that of any other person. And it is important that each officer of the government should take his appropriate share of responsibility, without reference to the possible action of others.

Case No. 16,236.

UNITED STATES v. SCHUMENANT.

[Cited in Cully v. Baltimore & O. R. Co., Case No. 3,466. Nowhere reported; probably no opinion delivered.]

Case No. 16,237.

UNITED STATES v. SCHWARTZ.

[4 Cranch, C. C. 160.] [1]

Circuit Court, District of Columbia. May Term, 1831.

OBSTRUCTION OF PRIVATE WAYS — INDICTMENT — PUBLIC ROADS.

1. The obstruction of a way laid out for the accommodation of the owners of certain lots, by the original proprietor thereof, and not as a common highway, is not properly the subject of indictment; and the circumstance that the public might pass over a road does not make it a public road, although laid off and dedicated by the original owner of the land as a public road, and ever since used as such.

2. There can be no public road in the county of Washington, D. C., out of the cities and towns, unless it be recorded as such in this court or the levy court.

[Followed in U. S. v. Emery, Case No. 15,052.]

Conrad Schwartz was indicted for obstructing a public highway.

Mr. Key, for defendant, contended that it was only a private way for the accommodation of those who purchased lots of General Forrest. There can be no highway in Maryland unless it be of record, and to be repaired by the county; and he cited Act Md. 1785, c. 49, respecting private ways (3 Har. & J. 436), and Act Md. 1704, c. 21, for the marking and recording of public roads.

Mr. Swann, for the United States, contra, cited Rex v. Lloyd, 1 Camp. 260; Daniel v. North, 11 East, 375; and 1 Hawk. P. C. 366.

Several deeds were produced, and read to the jury, from General Forrest to sundry persons, bounded by this road, calling it a public road, as laid out by Archibald Orme.

THE COURT (THRUSTON, Circuit Judge, contra) instructed the jury, at the prayer of the defendant's counsel, that if they should be satisfied by the evidence, that the road was laid out or reserved by General Forrest, in selling out the lots of his land, as a road for the accommodation of the lot-holders under his sales, and not as a common highway, then the obstructing of the road is not properly the subject of indictment. And further, that if they should be satisfied by the evidence, that the road was intended and laid out by General Forrest for the accommodation of the lot-holders who purchased under him, then the circumstance that the public might pass over it, does not make it a public road.

Mr. Swann then prayed the court to instruct the jury, that if they should be of opinion that it was laid off and dedicated by U. Forrest, the original owner of the lands through which the said road passed, as a public road, and has been, ever since, used as such, then it would be competent for the jury to consider it a public road and common highway.

But THE COURT (THURSTON, Circuit Judge, contra) refused to give that instruction; but instructed the jury that there could be no public road in this county, out of the cities and towns, unless it be recorded as such in this court or the levy court. See Act Md. 1704, c. 21.

Verdict for the defendant.

Case No. 16,238.

UNITED STATES v. The SCIENCE.

[See Case No. 16,239.]

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

Case No. 16,239.

UNITED STATES v. The SCIENCE.

[20 Leg. Int. 68;[1] 2 Pittsb. Rep. 446; 5 Phila. 257; 10 Pittsb. Leg. J. 203; 11 Pittsb. Leg. J. 3-9.]

District Court, W. D. Pennsylvania. Jan. 10, 1863.

NAVIGATION OF STEAM VESSELS—SAFETY OF PASSENGERS—LICENSED PILOTS ON OHIO RIVER—VIOLATION OF STATUTE.

1. The act of congress of August 30, 1852 [10 Stat. 61], providing for the better security of the lives of passengers on board of vessels, propelled in whole or in part by steam, requires that every one connected with the navigation of such vessels, whether upon the rivers, the lakes or the ocean, be held to the strictest accountability.

2. A vessel, with passengers, navigating between ports so distant from each other as Pittsburg and Gallipolis on the Ohio river, having but one licensed pilot on board, the captain acting also as pilot, has not the "complement" of licensed pilots required by the act.

3. If the captain of the boat is deprived of his "complement" of pilots, during a voyage, without his consent, fault or collusion, the deficiency may be temporarily supplied, until others, licensed, can be obtained.

4. But he has no right to begin a new voyage and imperil the lives of passengers, by arrogating to himself the knowledge and responsibility of licensed pilots, whose function alone in the navigation of the vessel the law recognizes.

5. If he does so he incurs himself the penalty of $100, imposed by the act of August 30, 1852, besides subjecting his boat and its owners, under a proceeding in admiralty, to the penalty of $500, under the 1st section of the act of July 7, 1838 [5 Stat. 304].

[Cited in Pollock v. The Sea Bird, 3 Fed. 576.]

In admiralty.

M'CANDLESS, District Judge. This is a libel in rem upon information of the United States district attorney, against the steamboat Science, for a violation of the act of congress of August 30, 1852, which provides for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. It is charged that the said steamboat did carry passengers on the Ohio river, from Gallipolis to Pittsburg, and from Pittsburg to Gallipolis and intervening places, and did leave the ports of Pittsburg and Gallipolis with passengers to perform her said voyages, without a complement of pilots duly licensed by the inspectors, as required by the said act of congress, and did perform said voyage without said complement of licensed pilots; and it is further charged that Wm. Reno, the master of said vessel, who is not a licensed pilot, did perform the duties of one of the pilots, and did assist in navigating said vessel on said voyages. The allegations in the libel being denied by the answer, we must look to the proofs to ascertain whether they have been sustained. It appears from these, that, in the month of April last, this boat, commanded by Wm. Reno, left the port of Pittsburg for Gallipolis with two pilots, and that at Gallipolis, one of them was discharged for drunkenness; that the other pilot and the captain navigated the boat back to Pittsburg, and, on their way up, stopped at Moro Castle, to procure the services of a pilot named Stewart. He could not go, but told the captain if he would call on his way down he would enter his service. On his return, Stewart did go on board, and with Kerr, the other regularly licensed pilot, took the boat to Portsmouth, and back to Pittsburg. At Pittsburg, Stewart stated that his license was about expiring and that he would have to go to Cincinnati to renew it. He made the voyage again from Pittsburg to Gallipolis, and back to Long Bottom or Moro Castle, where he left the boat, and, failing to make the connection with her, either at Pittsburg or Moro Castle, he never returned to her service. The trips made by the boat after the discharge of Franklin Reno, and before the employment of Stewart, and after Stewart left and before Skaggs was employed, were made by Kerr, a regularly licensed pilot, and Wm. Reno, who had no license, operating the wheel which guides the vessel. Here is a plain infraction of the act of congress, for there was not a "complement" of licensed pilots, to navigate a vessel whose trips were between ports so distant from each other.

Although the act imposes a penalty upon those who employ or are employed as unlicensed pilots, yet the very first section of this act of 1852 provides that if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which this is an amendment. It only remains to inquire what are the provisions of this section of the act of July 7, 1838, to which we are referred for the penalty. It declares that "for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer, and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against, summarily, by way of libel, in any district court of the United States having jurisdiction of the offence." If the captain of the boat is deprived of his "complement" of pilots, during a voyage, without his consent, fault or collusion, the deficiency may be temporarily supplied until others, licensed, can be obtained. But he has no right to begin a new voyage and imperil the lives of passengers for whose security this act was passed, by arrogating to himself the knowledge and responsibility of licensed pilots, whose function alone, in the navigation of the vessel, the law recognizes. If he does so, he incurs a penalty himself, besides subjecting his boat and its own-

[1] [Reprinted from 20 Leg. Int. 68, by permission.]

ers to this proceeding in admiralty. The lives of passengers are of more importance than the loss to the purses of the owners by the lapse of a single trip. The latter may be repaired, the former cannot, and every one connected with the navigation of boats propelled in whole or in part by steam, whether upon the rivers, the lakes or the ocean, should be held to the strictest accountability. And as one of the surest ways to reach them, congress wisely provided that the vessel and its owners should be responsible for any breach of the law. This act of congress is a great public protection. Its value can only be estimated by the number of lives it has saved. In passing it, congress designed to require from all the officers connected with the management of the vessel, the utmost vigilance. The pilot, guiding the boat by his bell, commands the engineer. If the pilot is uninstructed, has not passed an examination, or in the words of the act of congress, is not "licensed," the vessel, cargo and passengers, at midnight or midway, may all go to the bottom. Of what consequence are excuses, under such circumstances, to the owners of the boat, to the consignors or consignees, or to the families whose friends have been lost? Unfriendly as this law seemed at the beginning to those peculiarly affected by its provisions, time, and its proper administration by the supervising and local inspectors, have magnified its value and developed its wisdom. The courts should see that it is rigorously executed; and while I sit here, no trivial or pecuniary considerations shall be admitted as reasons for a refusal to comply with its just and wise conclusions.

The steamboat Science is condemned, to be released upon the payment of $500, and the costs of this libel. Decree accordingly.

Case No. 16,240.

UNITED STATES v. The SCIOTA.

[5 West. Law Month. 29.]

District Court, N. D. New York. June 4, 1862.

SHIPPING — LICENSE AND ENROLLMENT — SALE TO FOREIGNER — VIOLATION OF REGULATIONS — FORFEITURE — CONSTRUCTION OF STATUTES.

[1. The provision in the third section of the act of 1831 (4 Stat. 487, which regulates the foreign and coasting trade on the northern, northeastern, and northwestern frontiers) authorizing vessels not registered, but merely licensed and enrolled for the coasting trade and fisheries, to engage in foreign commerce, without a certificate of registry, provided, however, that in all other respects they shall be liable "to the rules regulations and penalties, now in force relating to registered vessels," etc., does not render applicable to such licensed and enrolled vessels the provision in the sixteenth section of act of 1792 (1 Stat. 295, which relates only to registered vessels) declaring a forfeiture of any vessel sold or transferred to a foreigner, unless such sale or transfer is made known by delivering up to the collector the certificate of registry within seven days from such sale or transfer. A provision for a forfeiture should not be imported into a statute by construction.]

[2. A vessel which has been enrolled and licensed under the act of 1831, but whose license has become void by reason of a subsequent sale, is no longer a licensed and enrolled vessel, so as to be subject to forfeiture by her sale in whole or in part to a foreigner, in violation of section 32 of that act.]

[3. In the act of 1793 (1 Stat. 305), relating to the enrolling and licensing of vessels for the coasting trade and fisheries, the provision (section 2) that the same requisites shall in all respects be complied with as are necessary in registering vessels (under the act of 1792) does not render applicable thereto the provision in the sixteenth section of the act of 1792, declaring a forfeiture of the vessel in case the parties applying tor registration shall knowingly swear falsely in respect to any matter of fact.]

[This was a libel of information against the propeller Sciota (William Williams, Andrew J. Rich, and Henry Martin, claimants), alleging a forfeiture because of a violation of the laws relating to enrolled and licensed vessels.]

W. A. Dart, U. S. Atty., and John L. Talcott, for the United States.

John Ganson, for claimants.

HALL, District Judge. This is a libel of information against the Sciota, founded upon a seizure made by the collector of customs for the port of Buffalo Creek. The libel of information, as amended, contains five counts. The first three allege as a cause of forfeiture that the Sciota was a duly enrolled and licensed vessel; that she was sold and transferred to citizens of Canada, subjects of the queen of Great Britain and Ireland; and that the certificate of enrollment was not delivered up to the collector of the customs after such sale and transfer, or the fact made known to him in any manner within the time in such counts mentioned. These counts appear to have been inserted under the impression that the sixteenth section of the act of 1792, entitled "An act concerning the registering and recording of ships or vessels" (1 Stat. 295), was applicable to vessels enrolled and licensed under the acts of 1793 and 1831; and that on the sale of an enrolled and licensed vessel to a foreigner the certificate of enrollment must be delivered up to the collector within the time prescribed for the delivery of the certificate of registry, on the sale to a foreigner of a registered vessel. This makes it necessary to inquire whether that section is applicable to enrolled vessels; and the question depends upon the construction to be given to the act of 1793 and 1831, under which the Sciota was, at different times, enrolled and licensed.

The act of 1792 relates to registered vessels only. The sixteenth section provides that, "if any ship or vessel heretofore registered, or which shall heretofore be registered as a ship or vessel of the United States, be sold or transferred in whole or part by way of trust, confidence or otherwise to a subject or citizen of any foreign prince or state, and

such sale or transfer shall not be made known in manner hereinafter directed, such ship or vessel together with her tackle, apparel, and furniture shall be forfeited," etc. The manner in which the sale or transfer is to be made known in compliance with the provisions is obscurely indicated, rather than distinctly declared, by the seventh section of the same act. This section provides that, previous to the registry of any ship or vessel, a bond shall be executed containing a condition, among others, that if any foreigner or any person or persons for the use and benefit of such foreigner shall purchase or otherwise become entitled to the whole or any part or share of or interest in such ship or vessel, the same being within a district of the United States, the said certificate (of registry) shall in such case, within seven days after such purchase, change, or transfer of property, be delivered up to the collector of said district, and that if any such purchase, change, or transfer of property shall happen when such ship or vessel shall be at any foreign port or place or at sea, then the master or person having charge or command thereof shall, within eight days after his arrival within any district of the United States, deliver up said certificate to the collector of such district.

The act of 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same" (1 Stat. 305), provides for the enrollment and license of vessels, and authorized to engage in the coasting trade and fisheries during the continuances of their respective licenses; but they were not by that act authorized to engage in the foreign trade of the United States.

American vessels, when duly registered under the act of 1792, could engage in foreign trade with certain privileges and advantages denied to foreign vessels. But enrolled and licensed vessels could not engage in foreign commerce until the passage of the act of 1831, entitled "An act to regulate the foreign and coasting trade on the northern, northeastern, and northwestern frontier of the United States, and for other purposes" (1 Stat. 487). The third section of that act provides that, "from and after the passage of this act, any boat, sloop or other vessel of the United States navigating the waters on our northern, northeastern and northwestern frontiers otherwise than by sea shall be enrolled and licensed in such form as may be prescribed by the secretary of the treasury; which enrollment and license shall authorize any such boat, sloop or other vessel to be employed in either the coasting or foreign trade; and no certificate of registry shall be required for vessels so employed on said frontiers: provided that such boat, sloop or vessel shall be in every other respect liable to the rules, regulations and penalties now in force relating to registered vessels on our northern, northeastern and northwestern frontiers." Under this statute, the secretary of the treasury has provided (Regulations 1857, p. 113, arts. 156, 157) that the same proceedings, requirements and forms are to be pursued and complied with as in the case of the enrollment and licensing of ships or vessels under the general law regulating the issue of that description of marine papers, except that the enrollment and license shall be in the form by him particularly prescribed which is substantially the form prescribed in other cases of enrollment and license, with the addition of a particular reference to the act of 1831.

The Sciota had never been a registered vessel, but she had been at different times enrolled and licensed under the act of 1831 (hereafter more particularly referred to); and, while her license continued in force, she was authorized to engage in trade with Canada under the last-mentioned act. She was nevertheless, although authorized to engage in foreign trade, and subject to the rules, regulations, and penalties imposed by the third section of the act of 1831, above cited, an enrolled and not a registered vessel. Wilkes v. People's Fire Ins. Co., 19 N. Y. 184; and the case of The Black Hawk, before Judge Conklin [Case No. 1,469], there cited. Not being a registered vessel, she had no certificate of registry to deliver up, and a sale of her to a foreigner could not, therefore, be made known in the manner required by the sixteenth section of the act of 1792. The provisions of that section, which in express terms apply to registered vessels only, cannot be extended by judicial construction to a case like that now under consideration, so as to condemn a vessel to forfeiture for the omission of an act which it was utterly impossible to perform. But the third section of the act of 1831, above quoted, provides that vessels enrolled and licensed under that act shall be in every other respect (that is except as to their enrollment and license and their requirement of certificate of registry) liable to the rules, regulations, and penalties now in force relating to registered vessels on our northern, northeastern, and northwestern frontiers. The question whether this provision has extended the provisions of the sixteenth section of the act of 1792 to this case is perhaps not free from doubt.

It may possibly be doubtful whether a forfeiture of the vessel should be held to be included in the term "penalties," used in a penal statute, but the terms, rules, and regulations in the act of 1831 are probably sufficient to include the provisions by which a forfeiture was declared for a violation of such rules and regulations. There are, however, other and very serious objections to a construction which would extend the provisions of the sixteenth section to the present case. The fact already referred to, that in the case of an enrolled vessel a sale or transfer thereof cannot possibly be made

known in the manner required by this section, is quite enough to prevent the application of its provisions in a penal action. And as all licensed vessels were already subject to forfeiture under the thirty-second section of the act of 1793 whenever transferred in whole or in part to a foreigner (as will be hereafter more particularly mentioned), it may well be presumed that congress intended the thirty-second section of the act of 1793, and not the sixteenth section of the act of 1792, should give the rule in regard to the forfeiture of vessels enrolled under the act of 1831, in case such vessels should be transferred to a person or persons not being citizens of the United States. Again, the proviso of the third section of the act of 1831 in express terms only applies to the boats, sloops, and vessels mentioned in the preceding portion of that section, and therefore only applies to vessels enrolled and licensed under the provisions of that act; and as the Sciota was not a licensed vessel at the time of the alleged sale (as will be hereafter more particularly stated), this third section of the act of 1831 does not make the sixteenth section of the act of 1792 applicable to that vessel.

For these reasons, no forfeiture can be decreed under the first three counts in the libel of information in this, so far as the same must depend upon an alleged violation of the sixteenth section of the act of 1792.

The fourth count is substantially like the first three, except that it avers that the Sciota was transferred to a foreigner, and that her license was not surrendered or notice given of such sale or transfer. The reasons already given are sufficient to show why no decree upon this count can be based upon the sixteenth section of the act of 1792.

But there is another question arising on these counts. They aver that the Sciota was duly enrolled and licensed for the coasting trade, and they allege, in substance, that she was sold and transferred to a foreigner, although they contain other averments intended to bring the case within the sixteenth section of the act of 1792. The other averments may be rejected as surplusage; and it was therefore contended at the hearing that the vessel was forfeited under the thirty-second section of the act of 1793, which provides that if any licensed ship or vessel shall be transferred in whole or in part to any person who is not at the time of such transfer a citizen of, and resident within, the United States, or if any ship or vessel shall be employed in other trade than that for which she is licensed, or shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited. In order to entitle the United States to a decree of forfeiture under this section, it is necessary to show a transfer, and that the vessel was a licensed vessel at the time of such transfer. It appeared upon the hearing that although the Sciota had been licensed, before the alleged sale, to a foreigner or foreigners, such license had become void some time prior to such sale, by reason of her sale and transfer from the Western Transportation Company, (her owner at the time of her license,) to the claimants in this suit. She was not therefore a licensed vessel, within the meaning of the thirty-second section above quoted (section 5, Act 1793; 1 Stat. 30; Two Friends [Case No. 14,289]; section 46, p. 30, of Regulations under the Revenue Laws published in 1857); and this was substantially conceded by the learned counsel for the government. There can therefore be no condemnation under the thirty-second section on either of the first four counts of the libel.

The fifth and last count of the libel of information presents other questions, which will now be considered. It alleges in substance that on the 2d of May, 1860, the Sciota was owned by the claimants, and that an enrollment of the vessel was on that day applied for; that one of the claimants thereupon, and for the purpose of procuring an enrollment of such vessel, made oath, as required by law, that the claimants were the sole owners of the Sciota, and that there was no subject or citizen of any foreign prince, directly or indirectly, by way of trust or otherwise, interested therein, or in the profits or issues thereof; that thereupon the vessel was enrolled and licensed; and that such affidavit was untrue, to the knowledge of the party making the same; certain subjects of her majesty the queen of Great Britain and Ireland, and citizens of Canada, being interested in the said vessel, and in the profits and issues thereof, to the knowledge of such party. This count is based upon the fourth section of the act of 1792, which requires, as a condition precedent to the registry of a ship or vessel, that an oath or affirmation shall be taken and subscribed, containing the statements contained in the affidavit referred to, and which further provides that, in case any of the matters of fact in the said oath or affirmation alleged which shall be within the knowledge of the party so swearing or affirming shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel in respect to which the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall be made (1 Stat. 279, § 4); and also upon the second section of the act of 1793, which provides that, in order for the enrollment of any ship or vessel, she shall possess the same qualifications, and the same requisites in all respects shall be complied with, as are made necessary for registering ships and vessels (by the act of 1792), and the same duties and authorities are hereby given and imposed on all officers, respective-

ly, in relation to such enrollments, and the same proceeding shall be had in similar cases touching such enrollments, and the ships or vessels so enrolled, with the master or owner or owners thereof, shall be subject to the same requisites as are in those respects provided for vessels registered by virtue of the aforesaid act. This act of 1793 does not contain any provision expressly declaring a forfeiture of the vessel in case the oath or affidavit shall be false, but provides for the indictment and punishment of any party who shall knowingly swear falsely in making such affidavit. But it was contended at the hearing that the provision above quoted extended the provisions for forfeiture above set forth to the case of vessels enrolled under the act of 1793.

This raises a question in regard to the construction of those provisions, in respect to which, and to the last count in the libel of information, I shall adopt the language of the late Justice Story in the case of The Two Friends [supra], as follows: "As to the last count I doubt if it alleges any matter to which the law has attached any forfeiture. It is true that the act for registering vessels, in section 4, declares that a false oath by the owner in any matter of fact required to be sworn, in that section, previous to the grant of a registry, shall work a forfeiture of the vessel. And the act for enrolling and licensing vessels in the coasting trade and fisheries, in section 2, provides that, in order to obtain an enrollment, vessels shall possess the same qualifications, and the same requisites in all respects shall be complied with, as are made necessary to the registry of vessels, and the same duties and authorities are given and imposed on officers, and the same proceedings are to be had in similar cases touching such enrollment; and the ships or vessels so enrolled, with the masters and owners thereof, are to be subject to the same requisites as are provided for the registry of vessels. But it is nowhere declared that a violation of these provisions shall be followed with like penalties and forfeitures. On the contrary, the coasting act, in section 30, has substantially declared that the false swearing in any oaths required by that act shall be punished as willful perjury. Now, it is certainly not the duty of the court to seek out new modes of punishment where the legislature has prescribed a specific punishment in its own direct terms; nor can it be proper to pronounce that to be a qualification, requisite duty, or proceeding within the act which is a forfeiture for a willful violation of the same act." This is directly in point; and confirming, as it does, my own impression in respect to the question under consideration, I do not deem it necessary to give other reasons for my conclusion.

To say that there is very great doubt whether there could be a decree for the United States upon the last count in the libel of information in case the affiant's knowledge of the falsity of the affidavit therein referred to had been established is not putting the case too strongly in favor of the claimants. The supreme court of the United States in the case of The Burdett, 9 Pet. [34 U. S.] 682, declared that no "individual should be punished for the violation of a law which inflicts a forfeiture of property, unless the offence shall be established beyond reasonable doubt"; and it was very properly declared by Mr. Justice Livingston in the case of The Enterprise [Case No. 4,499], that a court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused. I shall therefore dismiss the libel in this case, upon the question of law already discussed without inquiring whether the affidavit made on the enrollment of the Sciota was true or false. The libel is dismissed, but there will be the usual certificate of probable cause.

Case No. 16,240a.

UNITED STATES v. SCHMIDT.

[See Case No. 16,316a.]

Case No. 16,240b.

UNITED STATES v. SCOTT.

[Betts, Scr. Bk. 221.]

District Court, D. Massachusetts. June, 1851.

CONSTITUTIONAL LAW — FUGITIVE SLAVE LAWS — EXECUTIVE AND JUDICIAL FUNCTIONS.

[1. Congress had power to pass the acts of 1793 (1 Stat. 302), and 1850 (9 Stat. 462), providing for the rendition of fugitive slaves. Prigg v. Pennsylvania, 16 Pet. (41 U. S.) 559, followed.]

[2. The rendition of a fugitive slave under the acts of 1793 and 1850 is an executive, and not a judicial, proceeding, and trial by jury is not necessary therein, under the federal constitution.]

[3. The fugitive slave acts of 1793 and 1850 are constitutional, although they provide for rendition by state officers. Prigg v. Pennsylvania, 16 Pet. (41 U. S.) 558, followed.]

[This was an indictment against James Scott for the rescue of one Shadrach, a fugitive slave.]

SPRAGUE, District Judge. It does not belong to the judiciary to decide upon the wisdom or expediency of acts of congress. But we must of necessity decide upon their constitutionality. In doing so, however, we must remember that we are sitting in judgment upon the action of another great coordinate department of the government, every member of which was under oath to support the constitution. We must begin the inquiry, then, with the presumption that their legislation is rightful.

Several objections are made to the act of 1850: First, that congress has no right to

legislate upon the subject; second, that the act does not provide for a trial by jury, as required by the seventh amendment of the constitution; third, that it gives the commissioners judicial power, which, by the third article of the constitution, can be exercised only by courts of the United States, held by judges appointed by the president and senate. These objections apply with equal force to the statute of 1793, for—First, that was legislation by congress; second, it did not provide for trial by jury; third, it not only authorized judges when not holding court, and out of their district, to hear the cause and grant a certificate, but also state magistrates who were not appointed by the president and senate, and held no office under the United States; and the certificate of such magistrate is made a sufficient warrant for the removal, and could be no more intercepted by habeas corpus, or other process, than can the certificate of the commissioner under the act of 1850.

We are under the necessity, therefore, of inquiring whether the act of 1793 be constitutional. The first objection has been solemnly and unanimously decided by the supreme court of the United States in a case where it was directly in issue, and which will hereafter be referred to. The last two objections are those which have been most strenuously urged, and to them, therefore, I shall more particularly direct my attention. Most of the remarks, however, which I shall make will apply with equal or greater force to the first. These questions are not new, nor do I propose to treat them as such. Still, it may be useful to look at them for a moment, as if now presented for the first time, and afterwards to consider the contemporaneous construction of the constitution by the statute of 1793, the practice and acquiescence under it, and the opinions and decisions of judges and courts, both state and national.

Do the proceedings prescribed by congress for the delivery of fugitives from labor require the exercise of judicial power by a court, or may they be summary before a magistrate? If the latter only, no one contends that there must be a trial by jury. Ever since the profound argument of Chief Justice Marshall in the house of representatives, in the celebrated case of U. S. v. Robins [Case No. 16,175], more than fifty years ago, it has been the established doctrine and practice, that the delivering up a fugitive under a treaty is an executive, and not a judicial, proceeding. Such, also, has been the invariable practice in delivering up fugitives from justice under the constitution. Is not the case of a fugitive from labor to be classed with or governed by the principles of extradition? Compare this with extradition under a treaty. In both there is a claim that the person shall be delivered up as a fugitive, to be carried out of one jurisdiction into another. In both the claim is made under a law established, in the one case by a treaty, and in the other by the constitution and statute. In one, the claim is made by a citizen, under an alleged right given by the law of his state; in the other, it is by an officer or agent, under an alleged authority given by his government. Thus far they are similar. But it is strongly urged that they differ in the purposes for which the delivery is made; that in the one case it is for a regular trial, and in the other as the absolute property of the claimant, who may immediately exact service, and treat the prisoner in all respects as a slave. The objection derives its apparent force from confounding, or, at least, blending two sources of power, that should be kept perfectly distinct. The certificate, of itself, gives no authority whatever to treat the party as a slave. It is merely a warrant to remove him to a certain place. If, while in transitu, or after the transportation, the claimant exacts service, he must find his justification, not in the certificate, but in the laws of the state where the service is required. The certificate is simply an authority for transportation, nothing more. Under this statute, therefore, as well as under a treaty, the party is delivered up, to be disposed of according to the laws of the state or country into which he is carried, without any stipulation what those laws shall be, or whether proceedings shall be there instituted by the government or the individual, or in what manner the law shall be administered, or its protection obtained. In making treaties of extradition, we have confidence that the foreign nation has laws, and that they will be properly administered. So, also, the framers of the constitution, and congress had confidence that our sister states had laws, and that they would be fairly administered. In 1794, the laws of Great Britain, authorising the impressment of seamen, were in full practical operation. Suppose the law of that country had authorized any officer to whom the fugitives should be delivered, at his option, to place him on board any British man-of-war, to serve indefinitely as an impressed seaman, and we had known such to be her law when we made the treaty of 1794 [8 Stat. 116], would a delivery under that treaty have ceased to be a case of extradition, because by the known law of Great Britain, the man would be subject, at the will of the person receiving him, to be reduced to practical slavery? That such might be the fate of the alleged fugitive, might be a reason against making such a treaty, but, if we choose to make it, the delivery would still be extradition. The act of surrender, and the inquiries and proceedings which precede it, are the same, whether the subject be afterwards, by other laws, sent to a court of justice, or service in the navy.

The first case that arose under the treaty of 1794 was that of U. S. v. Robins, above re-

ferred to. He had been guilty of murder and mutiny on board a British frigate. Suppose that he was an impressed seaman, which is not improbable, and that the officer making the demand had informed our government that, by authority of law, he should, immediately upon receiving the fugitive, place him again in the naval service, from which he had escaped, and our executive had, thereupon, delivered him up, would that have changed the character of the act of delivery, or of the inquiries which preceded it? Instead of being delivered up to certain death, under the laws of Great Britain, as he was, he would have been delivered up to involuntary and coerced service, on board a man-of-war, at the pleasure of the commander. Still it would have been merely extradition under the treaty; the disposal of the fugitive being left to the laws of the country to which he was carried.

But even if the case of the fugitives from labor be not one of extradition, still we are to inquire whether it is judicial in the sense contended for. That certain facts are to be ascertained, and questions of law solved, does not render the proceeding judicial. This is to be done in all cases of delivering up fugitives from justice under the constitution of a treaty. Magistrates also in criminal examinations must investigate and form an opinion upon questions both of law and fact, and executive officers are often obliged to do the same, and to act upon the conclusions to which they arrive This may be illustrated by the case already referred to. Robins, the alleged fugitive, was claimed on a charge of murder and mutiny on board a British frigate. It involved very difficult and important questions of law and fact; such as his identity. Had he sought an asylum in this country? Were the proceedings for his reclamation regular under the treaty? Was the officer presenting the claim duly authorized? Was the alleged act within British jurisdiction? Being on the high seas, was it not piracy, and to be punished in this country? These questions the president decided, with such legal advice as he chose to take, and issued his certificate or warrant for his surrender. The fugitive was soon after executed, as it was foreseen he would be. But this result had no tendency to change the character of the act of extradition.

A proceeding then is not judicial merely because a magistrate or officer must ascertain facts and law, and act thereon in a particular case. As a general rule, to render the proceeding judicial under our jurisprudence, the tribunal must have the power to render a judicial judgment as to the questions at issue, which, if not annulled by appeal or reversal, will conclude the parties in future controversy upon the same question. The matter in controversy becomes res judicata, judicially settled, and not open for future litigation between the same parties. It has been urged that this is not so, because after judgment upon a writ of entry the same question may again be litigated in a writ of right. This is a mistake. It is not the same question. The matters in issue in those two actions are quite different. The mere right is never in issue in a writ of entry. In a writ of entry on a disseisin, and a plea of .nul disseisin, the only question is whether the defendant did disseise the plaintiff, and that, being adjudged, cannot be again litigated. The mere right may be afterwards tried, because it is legally a different question.

In order, then, to determine whether the proceedings before the commissioner are judicial, let us see what is the result. He is to grant or withhold a certificate. What is the legal force of that certificate? It is merely an authority to carry the person named from one state to another. This is its whole legal effect. What may be legally done with that person in the state to which he is carried depends upon the laws of that state, and not upon anything in the certificate. It is true that the certificate states that certain facts exist, that is, in the opinion of the commissioner. But those facts are not thereby judicially established, but may be controverted, in any future proceeding between the same parties, and the certificate would not be even admissible in evidence. Neither party would be precluded from immediately contesting the same question in any other proceeding. If, for example, a suit for assault and battery and false imprisonment were brought in the circuit court against the claimant, for the original arrest without a warrant, and the justification set up was that the plaintiff was a fugitive from labor, and were this question thus directly in issue, the certificate could not even be given in evidence, any more than the opinion of any other person.

But it is earnestly insisted that the facts to be found in the two cases of fugitives from labor and fugitives from justice are different; that in the latter the executive has only to find that the party is charged and has fled, whereas the commissioner has to find that the party actually owed service and has fled. But it is not the nature or importance of the facts to be ascertained that makes the inquiry judicial, but that a judicial judgment may be pronounced. Suppose the law had required only that the certificate should state that the fugitive was alleged or charged to owe service, would that have changed the legal character of the inquiry? It would have made the law more objectionable, but not have rendered the proceeding more or less summary. Suppose that a treaty, instead of saying that a person charged, should say that a person guilty of a crime in a foreign country should be delivered up. In such case, the president must be satisfied of the party's guilt, but thereupon his action in making the surrender and the consequences that would follow would be precisely the same as they now are, when he has ascertained that the person is charged. So if the law require an

examining magistrate to be satisfied that the accused is guilty before he issues his warrant for his commitment. In neither case would the guilt be res judicata, but open to contestation in any future inquiry.

It is said that in criminal cases the person may be arrested and confined without a judicial trial, because, by the social compact, every one has agreed that if suspected of crime he may be so dealt with. In the first place, the social compact is a mere theory. In the second place, it supposes an agreement to abide by all laws which society may make, civil, as well as criminal, besides which, running away from labor might be made a crime. The remark made in the opinion delivered in Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539, that a claim for a fugitive from labor was a case within the judicial power, was an obiter dictum, and can be reconciled with what was deliberately decided in the same case, only by supposing that the judge who delivered the opinion intended that congress might legislate for it as within the judicial power, and provide for its being tried by a court, not that they must do so.

Let us next consider what is the force of the contemporaneous construction of the constitution. Here we must remember that in construing the fundamental, as well as any other, law, the sole inquiry is, what was the intention of those who established it? The real intention of the people who adopted the constitution is to be ascertained. If in sixty years language has been deflected or acquired new shades of meaning, still our inquiry is, what was the sense in which it was originally used? How did those who adopted the constitution understand its language and provisions? Had the congress who passed the act in 1793 the means of knowing the views and intentions of those who adopted the constitution and amendments? The convention that framed the constitution closed their labors in September, 1787. The government went into operation on the 4th of March, 1789. Nearly the whole of the intervening time, and especially of the year 1788, was spent in earnest discussions of its provisions by the people and conventions in the several states. The amendments were framed and adopted by the first congress, under the lead of Mr. Madison, and subsequently established by the legislatures of three-fourths of the states. The act we are now considering was passed by the second congress in February, 1793. That congress met on the 24th day of October, 1791, and its members must have been elected some time previously. In 1788, therefore, when the constitution was before the people for adoption, and subsequently, when the amendments were submitted to them, every one of these members must have been of sufficient age, ability, and distinction to take a prominent part in the discussion and action which preceded and attended the adoption of the constitution and amendments, and they had been elected by the very people who had adopted both, for the purpose of representing their views and intentions in carrying the constitution into effect by practical legislation. More than one-third of the members of the convention which framed the constitution were members of congress in 1793, and a still greater proportion of the members of the first congress, which adopted the amendments, were also members of the second congress when this act was passed. The act of 1793 bears the signature of Jonathan Trumbull, of Connecticut, as speaker, of John Adams as vice-president, and George Washington as president. Thomas Jefferson, Alexander Hamilton, and Henry Knox, were cabinet advisers; and among the members of congress at the time were Caleb Strong, Elbridge Gerry, George Cabot, Fisher Ames, Theodore Sedgwick, Artemas Ward, John Langdon, Roger Sherman, Oliver Ellsworth, James Hillhouse, Rufus King, Robert Morris, James Madison, and James Monroe. George Cabot was one of the committee of the senate which reported the bill, and it was subsequently sent to a committee of which Roger Sherman was also a member. Such men were members of the congress which passed the act of 1793 as being in accordance with the constitution. It was immediately sent forth, and put into actual practical operation amongst the same people who had so recently established the constitution. Was it a violation of that instrument? No motion was made nor voice raised for its repeal in either house of congress; no movement against it in any state legislature or popular assembly; no petition or remonstrance from any source whatever. No one appears to have doubted its constitutionality, and it was received, so far, at least, as the public records and the history of the times show, with the general, if not the universal, acquiescence of the generation which adopted the constitution. And it was not until years afterwards, and when a new generation had arisen, that its constitutionality was questioned.

It is now insisted that by this act congress was guilty of an unauthorized assumption of power, and a violation of personal liberty, by subjecting any party to a trial by an unconstitutional tribunal, and by the depriving him of the right of a trial by jury, as secured by the seventh amendment. How could this have happened? Was it a time of apathy and indifference? So far from it, the spirit of liberty was never higher or more vigilant in any people. They had just fought for it through a seven years' war, and endured extreme privations, sufferings, and sacrifices. Apprehension of abuse of power by the national government was not only keen, but almost morbid, producing the utmost vigilance and unsparing scrutiny. Let us recur to a few historical facts. The convention that framed the constitution closed their labors on the 17th day of September, 1787, and it was soon after submitted to the people for

adoption by conventions chosen for that purpose in the several states. The states came into it slowly and reluctantly. Eleven only acceded to it when it went into operation on the 4th of March, 1789. North Carolina and Rhode Island did not accept it until November, 1789, and May, 1790. During the whole year 1788 the question of its adoption was pending. Discussions before the people, and in their conventions, were able, earnest, and thorough. The objections to it all arose from the apprehension that the powers conferred on the general government would be so exercised as to endanger the rights of individuals and the states. Many of the states, in adopting it, recommended some further guaranty for liberty, and several would not have acceded to it but for the confident assurance that amendments would be made for that purpose. In this spirit the first congress assembled, and soon afterwards framed and adopted twelve amendments, all designed to be further securities for the rights and liberties of the people, and to make more explicit the powers of the general government. These amendments were submitted to the legislatures of the several states for ratification. The only objection made to them was that they did not go far enough, that there should have been other and further guaranties for liberty. All but two, however, were ratified by the states, and those two related merely to the compensation of members of congress. Ten amendments were thus adopted by congress and the states, and among them the seventh, which it is now insisted was violated by the statute of 12th of February, 1793, passed only a short time afterwards. The second congress assembled on the twenty-fourth day of October, 1791, and most of its members must have been chosen during, or immediately after, the discussion of those amendments in the states, and as true representatives to carry out the intentions of the people in adopting them. The spirit of the times may be still further illustrated: In this very year of 1793, exhausted, as the people had been, by their protracted struggle, prostrate, as they were, without means, without credit, yet a large portion of them were eager to rush into the vortex of the French Revolution, and wage a foreign war for liberty; and it required all the wisdom, firmness, and popularity of Washington himself to maintain his proclamation of neutrality, which was issued in April of that year. Jay's treaty, made in 1794, now so universally approved, was then, from the mere apprehension of its being adverse to liberty, met with the most vehement denunciation, not only by the press, but by public meetings from one end of the country to the other, and in congress produced one of the warmest contests and most memorable debates ever known in the halls of legislation. During the administration of the elder Adams, the single case of extradition which has been referred to, that of Robins, produced violent attacks upon the president, both in and out of congress. The passage of the alien and sedition laws in 1798, intended to protect the government, was deemed an assumption of power so dangerous to freedom as to throw the nation into a ferment, and arouse state legislatures to pass the celebrated resolutions of that year. Soon afterwards the administration was overthrown by one of the most vehement contests for political power that was ever waged, during which every measure of the government from its organization was severely scrutinized, and many of them unsparingly assailed as invading or dangerous to the rights of the people. Yet during all this time, and for many years afterwards, while the love of liberty was most fervid, watchful, and jealous, the constitutionality of this law was never questioned. Indeed, it has been acquiesced in by the whole people for fifty-seven years, during all which time not a movement has been made, in or out of congress, to repeal or impair its provisions. It has been carried into actual practical operation in most, if not all, of the free states which were original parties to the constitution. In this state, one the most remote from the slaveholding, it appears in [Com. v. Griffith] 2 Pick. 11, that both my excellent and able predecessors have had occasion to give construction to the act, and there are those who recollect that Judge Davis, so justly revered for wisdom and benevolence, in several instances, delivered up slaves pursuant to its provisions. This he did, not only by holding a court, for no entry or record was made, and no decree or judgment entered up, but acting as a judge or magistrate, summarily granted a certificate, which was merely a warrant to convey the person to a certain place, and then, being functus officio, had no further legal efficacy.

The intention of those who adopted the constitution must govern. It is their views which we are endeavoring to ascertain, and to that end what can be more satisfactory than such contemporaneous exposition, such practice and acquiescence of the fathers of the constitution, and all those who participated in its adoption, and their successors for more than half a century? Those who, impressed only with the feelings of the present time, find it difficult to believe that our fathers in the North could have intended to render persons of color liable to be carried out of the state as slaves without trial by jury, and with a hearing only before a magistrate, will find it useful to go back to the period when the constitution was established, and see the actual condition of things at that time. Then all the states, with the exception of Massachusetts, were to a greater or less extent slaveholding, and in this state it had been abolished only eight years before by her bill of rights. Connecticut and Rhode Island had in 1784 passed laws looking to its ultimate extinction, by providing that children born after that time should be free. All the men of that day

had been born in the midst of that institution, and had been accustomed to its practical operation. Runaway negroes were taken back to their masters generally, it is believed, by mere recaption, without legal process, certainly without trial by jury or formal protracted proceedings before a court of record. Massachusetts ratified the constitution on the 7th of February, 1788. She was the only free state, and the views and purposes of this commonwealth with respect to negroes coming from other states are shown by a statute passed by her on the 26th day of March of the same year, that is, within fifty days of her adoption of the constitution. That act is as follows: "Sec. 6. Be it further enacted," &c., "that no person being an African or negro, other than a subject of the emperor of Morocco, or a citizen of some one of the United States (to be evidenced by a certificate from the secretary of the state of which he shall be a citizen) shall tarry within this commonwealth for a longer time than two months; and upon complaint made to any justice of the peace within this commonwealth, that any such person has been within the same more than two months, the said justice shall order the said person to depart out of this commonwealth; and in case that the said African or negro shall not depart, as aforesaid, any justice of the peace within this commonwealth, upon complaint and proof made that such person has continued within the commonwealth ten days after notice given him or her to depart as aforesaid, shall commit the said person to any house of correction within the county, there to be kept to hard labor agreeably to the rules and orders of the said house, until the sessions of the peace, next to be holden within and for the said county; and the master of the said house of correction is hereby required and directed to transmit an attested copy of the warrant of commitment to the said court on the first day of their said session; and if, upon trial at the said court, it shall be made to appear that the said person has thus continued within the commonwealth contrary to the tenor of this act, he or she shall be whipped, not exceeding ten stripes, and ordered to depart out of this commonwealth within ten days; and if he or she shall not so depart, the same process shall be had and punishment inflicted, and so toties quoties."

Thus it appears that Massachusetts at that time made all negroes from other states, whether bond or free, unless the prescribed certificate of citizenship was produced, liable after remaining here two months, and a notice of ten days, to be sent by a single magistrate to the house of correction to hard labor until the next general sessions of the peace, which was held by justices of the peace, and then liable to be sentenced by that court to punishment by whipping, and ordered out of the state; and if this order were disobeyed, the same confinement in the house of correction and punishment by stripes might again be inflicted; and for every successive neglect of ten days to obey the order to depart from the state, the same proceedings might be repeated indefinitely. The reason why a certificate of citizenship protected the holder from being thus dealt with was, doubtless, because the constitution, which she had just before sanctioned, declared that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." [Const. U. S. art. 4, § 2.] Verily, since the year 1788, when the constitution was adopted, we of Massachusetts and the North have undergone a change, but this cannot alter pre-existing facts. If from the progress of benevolence we have acquired a stronger sympathy for the African, a more zealous desire to aid and protect him, our change cannot retroact so as to change the views and intentions which actually existed at the time the constitution was adopted.

Let us now examine the opinions and decisions of courts and judges, state and national. The state courts have, in several instances, affirmed, and in no one denied, the constitutionality of the act of 1793. The supreme court of Pennsylvania, with Chief Justice Tilghman at its head, in the case of Wright v. Deacon, 5 Serg. & R. 62, after full consideration, decided that the act of 1793 was constitutional, that the party claimed as a fugitive was not entitled to a trial by jury, but the proceedings were to be summary, and that the certificate of a state judge, pursuant to the act, authorised the removal, and could not be intercepted by process from the state court, and a writ de homine repliegiando, which had issued under the state law, was quashed. Here the authority of the state magistrate and the legal effect of his certificate were directly in issue, and the pivot on which the decision turned. This was in 1819, more than thirty years nearer to the adoption of the constitution than the present. The next case was that of Com. v. Griffith, 2 Pick. 11. This was an indictment for assault and battery and false imprisonment against an agent who had seized a fugitive slave in order to carry him before a magistrate, pursuant to the statute. The court unanimously affirmed the power of congress to legislate upon the subject, and the constitutionality of the act of 1793. But Thacher, J., thought that by a true construction of the act, a warrant to arrest was required. The purpose of the arrest was to carry him before a magistrate pursuant to the statute, yet the constitutional authority of the magistrate was not discussed or questioned. This was in the year 1823. In Jack v. Martin, 12 Wend. 311, a certificate had been given by the recorder of the city of New York. A writ de homine replegiando was afterwards sued out. Several questions arose, and among them this question of the authority of the state magistrate. The supreme court of New York, in their opinion, delivered by Nelson, J. (page 328), use this language: "The question of slave or not, according to

the laws of the state from whence the fugitive fled, belonged to the magistrate under the law of congress to decide, and his decision is conclusive in the matter so far as the state courts are concerned." And again (page 329): "The decision of the magistrate and certificate is conclusive upon the fact as to the state court." This was in 1834. This case was carried to the court of errors, where an opinion against the constitutionality of the act of 1793 was delivered by Mr. Chancellor Walworth, but it does not appear that any other member of the court concurred with him. In Sims's Case, before the supreme court of Massachusetts, in April last [7 Cush. 285], these very questions of the power of the commissioner, the right of a trial by jury, and the right of congress to legislate, were zealously argued and fully considered, and the constitutionality of the act of 1850 unanimously affirmed. The very able opinion of the court, delivered by Chief Justice Shaw, is so recent that it need only be referred to. The same result is ably sustained by the opinion of Mr. Commissioner Curtis in the same case.

Let us next look at the opinions and decisions of judges and courts of the United States. In Ex parte Simmons, in the year 1823 [Case No. 12,863], Mr. Justice Washington of the supreme court heard an application, under the act of 1793, out of court summarily, without any question of its constitutionality. He refused the certificate, on the ground that the alleged fugitive was free. In Hill v. Low [Id. 6,494], which was error from the district court, the constitutionality of the act of 1793, and the right of the state magistrate to grant a certificate, seemed to have been conceded without question; the points raised being only as to the construction of the act. So in Worthington v. Preston [Id. 18,055], where a certificate had been granted by a state magistrate, no question was raised as to the constitutionality of the act of 1793, but other grounds of defence were successfully relied on. See, also, Johnson v. Tompkins [Id. 7,416], and Jones v. Van Zandt [Cases Nos. 7,501, 7,502]. Judge Story, in his work upon the Constitution (volume 3, p. 677), referring to the fourth article, says: "It is obvious that these provisions for the arrest and removal of fugitives of both classes contemplate summary ministerial proceedings. and not the ordinary course of judicial investigations, to ascertain whether the complaint be well founded, or the claim of ownership be established beyond all legal controversy."

We now come to the decision of the supreme court of the United States in Prigg v. Pennsylvania, in the year 1842, 16 Pet. [41 U. S.] 559. In this case the court emphatically affirm the act of 1793. In the opinion of the court, as delivered by Mr. Justice Story (page 622), we find the following decisive language: "We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point in different states, whether state magistrates are bound to act under it, none is entertained by this court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation." The question of the power of congress to legislate was an essential and turning point in the cause. It is true that the question of the power of the state magistrate to act summarily was not necessarily raised by the record, but the court nevertheless purposely and deliberately decided it. What they say is not to be classed among obiter dicta. It was not thrown in arguendo, as tending to the conclusions to which they had arrived, but is itself a conclusion which they take that occasion to pronounce, and mean to establish by all the authority of the court. In this all the judges seem to have concurred. Mr. Justice McLean, in a separate opinion given by him, held that state magistrates were not only constitutionally authorized, but bound, to act under the statute. Since that decision was pronounced, there have been three changes in the members of the court, all in the free states, Justices Grier, Nelson, and Woodbury having succeeded Justices Baldwin, Thompson, and Story. In the Case of Garnett, brought as a fugitive before Judge Grier at Philadelphia, in October last [Case No. 5,243], he expressed his determination in the strongest manner to enforce the act of 1850. Its constitutionality was not discussed. A letter subsequently written by Judge Grier holds this language: "A person held as a fugitive under the certificate of a judge or magistrate under this act is legally imprisoned under process from a court or magistrate having jurisdiction." And, again: "Those who believe that the constitution and laws of their country should be regarded and obeyed have no ground of complaint." Here the constitutionality of the act is assumed as unquestioned.

Judge Nelson, in a charge to the grand jury in March last, takes occasion, in very decided language, to affirm the constitutionality of the act of 1850, without exception, and Mr. Justice Woodbury has also expressed his concurrence in those views.

We have thus not only the decision of the highest judicial tribunal in the United States, which alone would be conclusive upon all subordinate courts, but the opinions of all the members of the court in 1842, and all its present members, in support of the constitutionality of the act. Against all this not one decision of any court, state or national, and not one opinion of any judge of the United States, can be produced.

These questions must now be considered as

settled by contemporaneous exposition, by practice, and acquiescence for more than fifty years, by the opinions and decisions of courts and judges, state and national, and especially by the supreme court of the United States. To overturn the construction of the constitution so established would be a most dangerous violation of principle and duty. If a court may do this, it may overturn established rules of property, of personal rights, and of evidence, upon which the community have for a long time acted, and thus shake every man's title, put in jeopardy every man's liberty, and render the law so uncertain that no counsel could advise, and no man act, with safety.

Case No. 16,241.

UNITED STATES v. SCOTT.

[4 Biss. 29.] [1]

District Court, D. Indiana. May Term, 1865.

INDICTMENT—MISJOINDER OF COUNTS—DEFECTIVE COUNTS—MURDER.

1. Counts for conspiracy can not be joined with counts for murder.

[Cited in Ex parte Hibbs, 26 Fed. 427; U. S. v. Lancaster, 44 Fed. 894.]

[Cited in State v. Lockwood (Vt.) 3 Atl. 540.]

2. In what cases an indictment will be sufficient, which charges the crime in the terms of the statute creating it.

3. Requisites of a good indictment for murder under an act of congress punishing opposition to the enrollment of the national forces.

4. In the national courts there can be no indictment unless some act of congress authorizes it.

[This was an indictment against George T. Scott for murder.]

John Hanna, U. S. Dist. Atty.

McDonald & Roach, for defendant.

McDONALD, District Judge. The indictment in this case contains three counts. The first count, in general terms, charges that the prisoner conspired with divers persons named, to prevent the execution of three distinct acts of congress, the titles of which it recites. The second count charges a like conspiracy with the same persons with a like purpose, and alleges that, in pursuance of that purpose, the prisoner and his co-conspirators assaulted one Eli McCarty while "in the performance of his legal service" in relation to the due execution of said acts of congress, and murdered him. The third count charges that the prisoner, intending to prevent the execution of said acts of congress, assaulted said "McCarty being then and there a person employed in the performance of service relating to the enrollment of the national forces duly ordered by the proper legally constituted authorities," and that while he was thus employed, the prisoner murdered him.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Counsel for the prisoner now move to quash the whole indictment for a misjoinder of counts. They also move to quash each count as being defective on its face.

I. As to the question of a misjoinder of counts. In examining this question, it is not important to consider whether each count in itself is either good or bad. In civil actions there may be duplicity, though a part be ill pleaded. Gould, Pl. 427. So, though some of the counts be defective in an indictment, there may be a misjoinder. This rule, however, would not prevail, where the part supposed to produce the duplicity or misjoinder is mere surplusage. But that is not the case here. The first count in this indictment charges a mere conspiracy, which is only a misdemeanor, or at most a felony not punishable capitally. The second and third charge murder, a capital crime. At common law, the general rule is, that if the legal judgment on each count would be materially different, as in the case of a misdemeanor and a felony, there can be no joinder. Whart. Am. Cr. Law, § 418. Here the judgment on the first count could only be fine and imprisonment. 12 Stat. 284. On the second and third counts, the punishment, on conviction would be death. 13 Stat. 8. Judged, therefore, by the rules of the common law, there is plainly a misjoinder of counts in this indictment.

The district attorney, however, insists that an act of congress on this subject cures this defect. The act referred to provides that "whenever there are or shall be several charges against a person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined," the whole may be joined in one indictment. 10 Stat. 162. The latter provision of this act evidently does not alter the common law. Weinzorpflin v. State, 7 Blackf. 186; State v. Smith, 8 Blackf. 489. And, in our opinion, the former part of the statute cited does not help the case. For we can not see from any allegation in the indictment before us, either that all these counts refer to "the same act or transaction," or that they all are "acts or transactions connected together." Indeed, the contrary appears by the indictment itself; for the first and second counts charge a conspiracy between the prisoner and divers other persons; the third charges a murder committed by him alone. The indictment is plainly bad as having a misjoinder of counts. But, as this defect may be cured by a nolle prosequi to some of the counts, we will examine the motion to quash the separate counts.

II. The motion to quash each count as being defective on its face.

1. The first count charges, in general terms, a conspiracy between the prisoner and several other designated persons "to prevent,

hinder, and delay, by force, the execution" of three acts of congress relating to the military, and particularly designated in the indictment. The count is on the act of July 31, 1861, which declares that if two or more persons shall conspire together, by force, to prevent, hinder, or delay the execution of any law of the United States, they shall be deemed guilty of a high crime, &c. 12 Stat. 284. The count is in the words of the act, which, as a general rule, is sufficient; and we think it sufficient in the present case. We hold the first count good.

2. The second count is, in our opinion, clearly bad. It substantially charges a combination between the prisoner and others to prevent, hinder, and delay the execution of certain acts of congress, and that, in attempting to consummate this unlawful purpose, the prisoner murdered Eli McCarty. In the national courts there can be no indictment unless some act of congress authorizes it. There is no act of congress punishing murder committed under the circumstances stated in this count. Such a killing is exclusively cognizable in the state courts.

3. The third count charges that the prisoner did assault, hinder, and impede one Eli McCarty while in the performance of his legal service, under and in pursuance of, and in relation to the due execution of, a law of the United States, &c., he the said Eli McCarty being then and there a person employed in the performance of service relating to the enrollment of the national forces, duly ordered by the proper and legally constituted authorities, in pursuance and by virtue of the laws aforesaid, and murdered said McCarty in that assault. The indictment states these facts with more formality than we have done; but the above is the substance of them. The act of congress under which this indictment is framed, provides that whoever shall "assault, obstruct, hinder, impede, or threaten any officer or other person employed in the performance of any service in any way relating" to the enrollment of the militia, shall be deemed guilty of murder, if, in such opposition to the officer or other person, death shall ensue. 13 Stat. 8. We think the allegations in this count are not sufficiently particular and definite. In indictments for murder, the utmost certainty has always been required. Here it is not stated whether McCarty was an officer or not, or under what or whose authority he was acting. Nor is it stated what particular duties connected with the enrollment of the national forces he was performing at the time of the assault and murder. The indictment indeed alleges that McCarty was "a person employed in the performance of service relating to the enrollment." But it omits to state whether he was an officer or a mere servant of an officer. It says that he was "duly ordered by the proper legally constituted authorities" to perform these duties. But it fails to state who were those authorities. It avers that certain things were "legally" and "duly" done. But this is merely pleading matter of law. How they were legally and duly done ought to have been averred. All these are very vague allegations in an indictment for murder. Where a man was indicted for stealing coin, the indictment was held bad for not stating the species of coin stolen. Rex v. Fry, Russ. & R. 482. Where an indictment charged that the accused "retarded" an officer in the discharge of his duty, it was held bad for not showing the acts by which the officer was retarded. Rex v. How, 1 Strange, 699. It is true that the third count follows the words of the act on which it is founded. This, we have already said, as a general rule, is sufficient; and we have applied this rule to the first count. But it is a rule seldom applicable to indictments for capital crimes; and it is subject to many exceptions even in lower offenses. It is, indeed, often difficult to determine when such a mode of pleading may be safely adopted. The supreme court of Indiana say, "as an approximation to a test," that where a statute defines the offense generally, and designates the particular acts constituting it, it is sufficient, in charging the crime, to follow substantially the language of the statute; but where the statute defines the crime generally without naming the particular acts which constitute it, it might be necessary to set out the acts done, so that it might appear to the court whether the acts done amount to the crime. Malone v. State, 14 Ind. 219. We are of opinion that this is a distinction worthy to be followed; and we think it applies even in cases not capital, and is strongly applicable to the case at bar. We are clear that the third count is bad.

Upon this ruling, the district attorney entered a nolle prosequi to the second and third counts. The prisoner thereupon pleaded guilty to the first count, and was sentenced to the penitentiary for six years.

NOTE BY McDONALD, District Judge. The prisoner, George T. Scott, and his co-conspirators were afterwards indicted for the murder of Eli McCarty under the 12th section of the act of February 24, 1864 (13 Stat. 8). One of them pleaded guilty, and died in jail before judgment was pronounced on him. The others, on plea of not guilty, were tried by a jury and found guilty. [Case unreported.] On a motion in arrest of judgment on this verdict, and on a certificate of difference of opinion between Judges Davis and McDonald, the case was transferred to the supreme court of the United States. That court held that there was no act of congress reaching the case, and therefore ordered the judgment to be arrested. And it was arrested accordingly. See 3 Wall. [70 U. S.] 642. All the conspirators, however, stood indicted for conspiracy under the act of July 31, 1861 (12 Stat. 284). To these indictments they pleaded guilty, and were sentenced to the penitentiary for six years.

An indictment must be certain to a certain intent in general. U. S. v. Forrest [Case No. 15,131]; U. S. v. Watkins [Id. 16,649]. It is in general sufficient to describe a statutory offense in the words of the statute. U. S. v.

Lancaster [Id. 15,556]. And it is sufficient if it be substantially set out, though not in the precise words of the statute. U. S. v. Bachelder [Id. 14,490]; U. S. v. Pond [Id. 16,067]; U. S. v. Wilson [Id. 16,730]; U. S. v. La Coste [Id. 15,548]; State v. Cook, 38 Vt. 437; Harrison v State, 2 Cold. 232; Com. v. Turner, 8 Bush, 1. The federal courts have no common law jurisdiction in criminal cases. U. S. v. Wilson [Case No. 16,731]; U. S. v. Worrall [Id. 16,766]; U. S. v. Hare [Id. 15,304]; U. S. v. Hudson, 7 Cranch [11 U. S.] 32. Nothing can be punished under the United States laws which is not made criminal by statute. U. S. v. Lancaster [supra]; U. S. v. Libby [Case No. 15,597]; U. S. v. New Bedford Bridge [Id. 15,867].

Case No. 16,242.

UNITED STATES v. SCOTT et al.

[3 Woods, 334.] [1]

Circuit Court, W. D. Texas. June Term, 1878.

JUDGMENTS—LIEN ON LANDS—EQUITY—PLEADINGS AS EVIDENCE.

1. A judgment rendered by the United States circuit court for the Western district of Texas is a lien upon all the lands of the defendant within the district, without being recorded in the several counties where his lands lie.

[Cited in Cooke v. Avery, 147 U. S. 390, 13 Sup. Ct. 346.]

[Cited in brief in State v. Smalley, 50 Vt. 741.]

2. Where a suit in equity is submitted on bill and answer. the answer must be taken as true, and where it denies the case made by the bill, the bill must be dismissed.

In equity. Heard on bill and answer. This was a bill filed to set aside a deed for fifty-seven sections of land made by the defendant William T. Scott to his co-defendant Hiram G. Austin. The bill alleged in substance as follows: Scott was surety on the bond of the late collector of internal revenue, who had died in default to the United States in the sum of $127,000. The penalty of the bond was $50,000. Suit was brought against Scott, on said bond, in United States circuit court for the Western district of Texas, and on December 11, 1873, a judgment was rendered against him, in favor of the United States, for the full amount of the penalty of the bond. That on October 3, 1873, Scott was the owner of fifty-seven sections of land in Bexar county, in the Western district of Texas. On that day he was largely indebted to the United States, and in failing circumstances. Nevertheless, he made a deed of that date for said land to his son-in-law, the said Austin. This deed was not acknowledged until December 15, 1873, and was not recorded till January 14, 1874. Austin, at the date of the deed, knew of the pendency of the suit against Scott. The deed was without consideration, and was made by Scott and accepted by Austin, as a device to hinder, delay and defraud the creditors of Scott, and especially the United States. The bill further averred that, by virtue of its judgment, the United States had acquired a lien upon said lands, and that said conveyance was a cloud upon the title. The bill prayed that said deed might be declared fraudulent and void, and the lands subjected to the payment of the judgment against Scott, in favor of the United States. The answer denied that the judgment was a lien upon the lands, and traversed all the averments of fraud made in the bill. The cause was submitted on bill and answer.

A. J. Evans, U. S. Atty.

C. S. West, for defendants.

BRADLEY, Circuit Justice. The defendants contend that the judgment was not a lien upon the lands until it was recorded in the county where the lands lie. I do not think this position is tenable. The judgment is a lien upon all lands in the district within the jurisdiction of the court, and within reach of its process.

But whether so or not is not a question in this cause since that is a matter affecting the legal rights of the parties. This suit was brought to remove the cloud on the title which it was supposed the deed created, and was based on an allegation that the deed was made to defraud the United States. The defendants answered the bill fully, denying all fraudulent intent, averring that the deed was made bona fide and for full consideration, and without any reference to the action against Scott, he supposing, as he swears, that there was a good and valid defense to the suit. The plaintiff set the cause down for hearing on bill and answer only, and the answer must be taken as true. The charge of fraud being purged by the answer, and the bill being unsupported by evidence, the bill must be dismissed. Dismissed accordingly.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

Case No. 16,243.

UNITED STATES v. SCROGGINS.

[Hempst. 478.] [1]

Circuit Court, D. Arkansas. April, 1847.

CRIMINAL LAW—MAIMING—MODE, OR INSTRUMENT USED.

1. To disable or disfigure any limb or member of a person by means of shooting, stabbing, cutting, biting, gouging, or any other means, with intent to maim or disfigure, constitutes an offence under the 13th section of the crimes act of 1790, and is punishable as therein prescribed (1 Stat. 115).

2. The particular mode of effecting this disfiguration or disability, or the particular weapon, or instrument, or means used, are not material, provided the result is maiming or disfiguration with intent so to do.

3. It is not necessary that it should be done by cutting or by the use of some sharp instrument or edged tool. This is one mode, but not the only mode

Maiming. Indictment that [John W.] Scroggins, a white man, shot James Rawles,

[1] [Reported by Samuel H. Hempstead, Esq.]

also a white man, with a rifle gun, in the right arm, with intent to disable and maim.

E. H. English, for defendant, moved to quash the indictment, on the ground that to disable the limb or member of a person by means of shooting, was not embraced by the act of congress. He argued that the act punishing maiming was a literal transcript of the Coventry act, and that the construction of that act in the English courts had been that the maiming or disfiguration must be done with some sharp instrument or edged tool, and that the language of the act seemed to contemplate maiming by means of cutting or stabbing.

S. H. Hempstead, U. S. Dist. Atty., resisted the motion, and contended that the obvious policy of the law was to punish maiming, and that to narrow it down to maiming by cutting or stabbing merely would present a strange anomaly, and would be imputing to the lawmaker the absurdity of attaching a penalty to the means employed rather than the offence itself. Maiming is depriving another of the use of such of his limbs or members as may render him less able in fighting, either to defend himself or annoy his adversary. 4 Bl. Comm. 206; 1 Hawk. P. C. 111. The statute in question among other things, provides in effect, that if any one shall "disable any limb or member of any person with intention in so doing to maim or disfigure." The indictment is founded on this particular part of the statute, and although the maiming was effected by shooting, yet the indictment is believed to be well founded. It would certainly be difficult to assign a sensible distinction between maiming by shooting and cutting; and it cannot be denied that the act of congress is comprehensive enough to embrace a case like this. Gord. Dig., p. 938, art. 3196.

JOHNSON, District Judge. The indictment with requisite particularity of time and place, and by proper averments, charges that the defendant disabled the right arm of James Rawles, a white man, and not an Indian, by means of shooting with intent to maim, and the question is, whether the case is within the purview of the 13th section of the act of 1790, relative to maiming. If it is not, it is conceded that there is no law to punish the offence. I have carefully examined this section upon which the indictment is founded, and entertain no doubt that the motion ought to be overruled. In some parts of that section cutting is contemplated as a mode by which maiming or disfiguration may be effected, but not the only mode; and indeed there could be no reason for confining the offence to that particular mode. Now to "disable the tongue" or "put out an eye" is punishable, but according to the argument of the defendant's counsel, it would not be within the statute unless it was done by cutting, by the use of some sharp instrument or edged tool. The correctness of this position cannot be admitted. No adjudged case has been adduced to sustain it. To disable any limb or member of a person is expressly declared to be an offence, and that is the crime charged in this indictment.

If any person should purposely and maliciously disable the tongue of another by biting, or put out an eye by shooting, striking, gouging, or such like means, or should disable any limb or member of another, by cutting, shooting, or any other means, with intent to maim or disfigure, such person would, undoubtedly, be liable to conviction on this statute. That position is clear enough to my mind. The particular mode of doing it, as by stabbing, cutting, shooting, or striking, or the particular weapon or instrument used, are not material. The real inquiry is, whether a limb or member has been disabled or disfigured purposely and maliciously, and with intent to maim or disfigure; and if so, the offence is complete. This is deemed to be a fair construction of the statute in question, and to give it any other would enable offenders to evade it at pleasure.

It is urged, however, that this section is almost a literal transcript from the statute of 22 and 23 Car. II. c. 1 (Gord. Dig. p. 938, art. 3196; 1 Hawk. P. C. 108), commonly called the "Coventry Act," and that the English courts have put the construction upon it contended for by the defendant's counsel. I can find no case to that effect, nor has any been referred to or produced; and even if there were such cases, I should not feel at all bound by them, for such a construction would, in my judgment, be manifestly absurd, and contrary to the obvious intention of the law. It would be destroying it, by astute construction and unmeaning refinement. It would be carrying technicality much further than it ought to be carried; and it is difficult to perceive any sense or reason in it. Considering this case to be within the act, and the indictment to be good both in form and substance, the motion to quash is overruled, and the defendant ordered to plead to the indictment. Ordered accordingly.

The prisoner was found guilty, and was sentenced to pay a nominal fine and to be imprisoned one year.

Case No. 16,244.

UNITED STATES v. SCROGGINS.

[3 Woods, 529.] [1]

Circuit Court, N. D. Georgia. March Term, 1879.

UNITED STATES COMMISSIONERS AND ATTORNEYS—WARRANTS OF ARREST.

1. A United States marshal, who receives a warrant to be served from a circuit court commissioner, is bound to make return of his doings thereunder.

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

2. The United States attorney has no authority to take from the hands of the marshal warrants regularly issued to him by a circuit court commissioner, for the purpose of deciding whether or not such warrants shall be executed.

[Cited in U. S. v. Ebbs, 10 Fed. 373; 49 Fed. 152.]

[3. Cited in Ex parte Perkins, 29 Fed. 911, to the point that a commissioner, as an examining magistrate, has the same powers, and derives them from the same source, as the chief justice or other justices or judges of the United States would have when acting in the same capacity.]

W. H. Smyth, a commissioner of this court, filed his petition, in which he represented that as such commissioner he had issued a warrant for the arrest of one Wesley Scroggins, directed to the United States marshal for the Northern district of Georgia; that this warrant was dated January 17, 1879, and on that day placed in the hands of the marshal for execution; that on February 10, 1879, he, the said commissioner, addressed an official letter to the marshal inquiring what disposition he had made of said warrant; that the marshal replied to said letter, and to other letters of the same tenor, subsequently addressed to him by the commissioner, declining to give the information sought, and refusing to make any return to the commissioner of his actings and doings under said warrant. The petitioner, therefore, prayed for a rule upon the marshal to show cause why he had not executed the warrant, and why he should not make a return thereof to the commissioner.

The court granted the rule prayed for by the petition, and in compliance therewith the marshal answered: (1) That he had not made return of his actings and doings on said warrant to the commissioner, because he was not required to do so by any law known to him. (2) That he had not executed said warrant because, after the same was placed in his hands by the commissioner, it was taken from him by the district attorney for consideration and determination by that officer, whether or not the public interests required it to be executed, and it was still in the hands of the district attorney for that purpose. The matter came on for hearing upon the sufficiency of these answers to the rule.

A. T. Akerman and H. K. McCay, for the marshal.

W. H. Smyth, contra.

WOODS, Circuit Judge. 1. There is no ground for the idea that a marshal can receive warrants, commanding him to arrest parties therein named, and make no return thereon. He is clearly bound to make return, either that he has arrested the party against whom the warrant was issued, or that the party could not be found in his bailiwick, or give some other excuse for not making the arrest. The oath of office prescribed for the marshal requires him to "faithfully execute all lawful precepts directed to him under authority of the United States, and true returns make." Such, also, is the course required by the common law. The officer may retain the warrant for his own protection, but he must return to the justice what he has done in pursuance of his command: 2 Ld. Raym. 1196; Beck. Just. Arrest, 14. So, by the Code of Georgia, constables may be ruled by their respective justices' courts, and compelled to give an account of their actings and doings. Code 1873, § 4170. What they may be ruled to do, it is their duty to do without rule. The idea that a ministerial officer may pocket a warrant issued to him by lawful authority, and refuse to make any return, or give any reason for not executing it, is, in my judgment, without any foundation, at either the common law, or in the statutes of the United States. The marshal may, it is true, make his return to the commissioner before whom he takes his prisoner for examination, but he must make a return to him. If the person against whom the warrant issues cannot be found, a return of that fact should be made to the commissioner who issues the warrant. By a rule of this court, adopted June 10, 1878, every commissioner of the court is required, at the close of every fiscal year, to file in the office of the clerk of the court a report of all warrants issued by him during the year, stating against whom and on whose affidavit issued, and stating how many, and which of said warrants have been executed, etc. Clearly, it is impossible for the commissioner to comply with this rule, if the marshal refuses to make return of the warrants placed in his hands; or if he has made return of the warrant to another commissioner, before whom he has taken the prisoner, and refuses, when officially inquired of by the commissioner who issued the warrant, to state that fact. Under this rule, it clearly becomes the duty of the marshal to give to the commissioner at least a report of his actings and doings under the warrant placed in his hands.

2. The second question presented by the answer of the marshal to the rule, is, whether the district attorney has authority to take commissioners' warrants from the hands of the marshal, in order to determine whether they should be executed or not. I can find no statute law or usage which confers such a power on the district attorney. The Revised Statutes of the United States (section 1014) expressly confer on any justice or judge of the United States, and on the commissioners of the circuit court, power to arrest, imprison or bail offenders against the laws of the United States, agreeably to the usual modes of process against offenders in the state where the arrest is made. This power, conferred on the commissioners by this section, is precisely the same as that conferred on the justices of the United States

supreme court and the judges of the circuit courts. It is not made subject to the supervision of the marshal or district attorney. The judge or the commissioner acts on his own responsibility, and is not accountable to, or subject to the control of either of these officers. If the district attorney has no authority to suppress a warrant issued by the chief justice of the United States, he cannot interfere with the warrant of a circuit court commissioner, for both derive their powers from precisely the same law. As well said by Justice Field, in U. S. v. Schumann [Case No. 16,235]: "The commissioner is made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, and to commit for trial or to discharge from arrest, according as the evidence fails or tends to support the accusation. For the faithful discharge of his duty in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government, nor is he subject to any other's control." And in the case from which this citation is made, Justice Field held that even after the offender was arrested and the case was under examination before the commissioner, the district attorney had no absolute power to dismiss the proceeding. Much less has he power to suppress a warrant before arrest. If the district attorney can suppress a commissioner's warrant after it is issued and before it is executed, he can forbid the commissioner to issue the warrant. If he has this supervision of the conduct of the commissioners, he has the same over the conduct of the circuit justices and the circuit and district judges, and can forbid them to issue warrants, although, in their judgment, the warrants should issue. Such a power will hardly be claimed for the district attorney, and yet such a power is the logical sequence of what is claimed for him on this hearing. No claim that the power is exercised by the district attorney, to prevent abuses or control expenses, can justify it. The power does not exist in that officer, and it would be a most dangerous power, and liable to the greatest abuses, if it did.

We have been referred to sections 838 and 3164 of the Revised Statutes, as warrant for the action of the district attorney in this case. A glance at section 831 will show that it has no reference to criminal proceedings, and an examination of both sections will show that neither confers on the district attorney any supervision over circuit court commissioners, or the warrants issued by them. In my judgment, the answers of the marshal to the rule are insufficient. It is his duty to execute all warrants that lawfully come to his hands, and to make due return thereof, and the officer issuing the warrant is entitled to know what is done under it. As both the marshal and district attorney have acted in this matter in the highest good faith, and from a sense of duty only, it will not be necessary to do more than to pass an order requiring the marshal to make return to the commissioner of his actings and doings under the warrant against Wesley Scroggins. And it is so ordered.

Case No. 16,245.

UNITED STATES v. SEAGRIST et al.

[4 Blatchf. 420.] [1]

Circuit Court, S. D. New York. March 31, 1860.

REVOLT OF SEAMEN — NATIONAL CHARACTER OF VESSEL—HOW PROVED—JURISDICTION OF FEDERAL COURTS—WHAT ARE "HIGH SEAS."

1. On the trial of an indictment for an endeavor to make a revolt on board of an American vessel in a foreign port, under the 2d section of the act of March 3d, 1835 (4 Stat. 776), it is not necessary to give documentary proof establishing the national character of the vessel, but it is sufficient to prove orally that she is owned by an American citizen.

2. A vessel lying in a harbor, fastened to the shore by cables, and communicating with the land by her boats, and not within any inclosed dock, or at any pier or wharf, is, within the common acceptance of the term, on the "high seas," outside of low water mark on the coast.

[Cited in Ex parte Byers, 32 Fed. 407.]

3. The act of March 3d, 1825 (4 Stat. 115, § 5), giving directly to the courts of the United States jurisdiction over certain classes of offences committed on board of American vessels in foreign ports, was not designed to abrogate or curtail the jurisdiction of the United States over crimes committed at sea, but to remove doubts whether that jurisdiction could be exercised when the locus in quo was a locked harbor, adapted by nature or artificially to protect vessels from the perils of an open coastage.

4. The act of 1825 does not afford the exclusive rule of decision with respect to offences which are not alleged and proved to have been committed on or against the persons of individuals on ship board.

5. The crime of endeavoring to make a revolt on board of a vessel, is one against the master of the vessel; and it is sufficient to charge it in the words of the act of 1835, to give the court cognizance of it, even within the requirements of the act of 1825.

[Cited in U. S. v. Huff, 13 Fed. 637.]

[6. Cited in U. S. v. Stone, 8 Fed. 252, to the point that if the different acts mentioned in section 2 of the act of March 3, 1835, constituted different offences, they may yet be united in the same indictment.]

This was an indictment against [Henry Seagrist and others], four of the crew of the American brig Humming-bird, of New York, for an endeavor to make a revolt and mutiny on board of her, in the harbor of Palermo,

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

Sicily, on the 31st of December, 1859. On the trial they were convicted, and they now moved for a new trial.

James L. McLane, Asst. Dist. Atty.
James Ridgway, for prisoners.

BETTS, District Judge. The ground urged for a new trial, in this case, is the alleged misdirection of the court to the jury, that the port of Palermo, where the offence is charged by the indictment to have been committed, is a place within the admiralty jurisdiction of the United States. The objection would have been more appropriately taken in arrest of judgment, but the validity of it may well be determined in either mode of proceeding.

The objection that no documentary proof, such as a bill of sale, or registry, was put in, establishing the national character of the vessel, cannot avail the defendants. The master testified that she was owned in this city, by American citizens, and it was only necessary for the prosecution to prove that she was American property, to support the indictment. It was not, in any way, an issue, on the trial, whether she was entitled to the privileges of an American bottom, under our revenue laws. The only fact 'nvolved was whether she was American property, and of this there can be no doubt. 3 Kent, Comm. 130, 132, 150.

The main point contested on the trial and on this motion, rests on an exception to the jurisdiction of the court. The generic offence of endeavoring to make a revolt, was first declared to be a crime, by the United States laws, in the crimes act of April 30th, 1790 (1 Stat. 115, § 12); and the courts have recognized the offence as sufficiently described and specified under that denomination, to be subject to judicial cognizance. U. S. v. Kelly [Case No. 15,516]; Id. 11 Wheat. [24 U. S.] 417; U. S. v. Smith [Case No. 16,337]. It was decided in the First circuit, that the offence, when committed within a harbor of the United States, was punishable under the act, and that it was not a condition to the jurisdiction of the court, that the offence should have been committed on the high seas. U. S. v. Hamilton [Id. 15,291]. In U. S. v. Keefe [Id. 15,509], Judge Story ruled, that an indictment under the act of 1790, for an endeavor to make a revolt, was triable in the circuit court, although the offence was committed in a foreign port, the criminal jurisdiction in admiralty being deemed to be, in a general sense, co-ordinate as to place with the civil jurisdiction. This last decision was made in 1824, and the argument on the present motion maintains that the act of congress of March 3d, 1825 (4 Stat. 115, § 5), in giving directly to the courts of the United States jurisdiction over certain classes of offences committed on board of American vessels in foreign ports, necessarily limits the jurisdiction to those specified cases, and that an endeavor to make a mutiny on board of a ship in a foreign port is not an offence on any person, and is, therefore, not subjected to the cognizance of the courts of the United States, by the provisions of that act. The language of the statute is: "If any offence shall be committed on board of any ship or vessel belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any person belonging to the company of said ship, or any other passenger, the same offence shall be cognizable and punishable by the proper circuit court of the United States."

In considering this objection, it is worthy of notice, that the place where the vessel lay at the time, although called the port of Palermo, was not within any enclosed dock, nor actually at any pier or wharf. She lay out in what was called the harbor, fastened to the shore by cables. She communicated with the land by her boats. This position of the vessel would leave her, within the common acceptance of the term, on the "high seas," outside of low water mark on the coast. U. S. v. Hamilton [Case No. 15,290]; The Abby [Id. 14]; U. S. v. Kessler [Id. 15,528].

The act of 1825 was not designed to abrogate or curta'l the jurisdiction of the United States over crimes committed at sea, but manifestly to remove doubts whether that jurisdiction could be exercised when the locus in quo was a locked harbor, adapted by nature or artificially to cover and protect vessels from the perils of an open coastage. I do not find any construction given authoritatively by the courts of the United States, which establishes the doctrine, that the act of 1825 affords the exclusive rule of decision with respect to offences which are not alleged and proved to have been committed on or against the persons of individuals on shipboard.

A case occurred in 1834, before the circuit court in Pennsylvania, in which the judges (Baldwin and Hopkinson) adopted that view of the law, but only decided that larceny within a port in the Bahamas, committed on board of an American ship, was not an offence punishable under the laws of the United States (U. S. v. Morel [Id. 15,807]), because it was an offence against property alone; and the court, in illustration of their conclusion, referred to the act of 1825 as omitting to extend the admiralty jurisdiction over any description of offences within foreign ports, not committed on or against some person. If that suggestion of the court offers the true exposition of the act of 1825, the crime charged in this indictment, and proved on the trial, may, without any impropriety of language, be defined to be one against the master of the vessel, and, being charged in the words of the 2d section of the act of March 3d, 1835 (4 Stat. 776), may be deemed sufficiently alleged, without any more pointed averment. Whart. Cr. Law (2d Ed.) 132. The first count of the indictment charges, that the vessel, owned by a citizen or citizens of the United States, whereof Joseph Davis was then and there

master and commander, being within a foreign port, and within the admiralty and maritime jurisdiction of the United States, the defendants, being four of the crew of the said vessel, "did then and there endeavor to make a revolt," against the peace, &c. In the second count, after the like preliminary averments, it charges that the same parties "did then and there combine and confederate with each other, to make a revolt and mutiny." The third count, after the like preliminary averments, charges that the defendants "did then and there solicit, incite and stir up each other to disobey and resist the lawful orders of the master of the said ship, and to neglect and refuse their proper duty on board thereof, and to betray their proper trust therein." The first section of the act of 1835 defines, in very precise terms, the crimes of revolt and mutiny, and affixes a specific punishment to them; and the second section particularizes the acts of seamen on shipboard which shall subject them to the same punishment, as an endeavor to make a revolt or mutiny. It is practically unimportant whether the provisions of the second section are expounded as so many instances or methods in which the offence of an endeavor to make a revolt or mutiny may be manifested, or whether they are taken distributively, and understood to be so many separate and distinct offences, each being sufficient of itself to sustain an indictment. The three counts of this indictment are so framed as to secure to the United States the advantage of either construction. It appears to me, therefore, that the court did not err in instructing the jury, that if the acts charged in the indictment were satisfactorily substantiated by the evidence, and if the defendants committed those acts with intent to resist the master in the free and lawful exercise of his authority and command on board of the vessel, they would amount, in law, to an endeavor to make a revolt. I also consider that the court was correct in further instructing the jury, that the offences of mutiny, and the endeavor to make a mutiny, specified in the act of 1835, are, as defined in that law, by necessary implication, offences against the person and authority of the master, and that an averment of the crime in the language of the statute, is all that is required to make the charge of the offence complete, within the supposed requirements of the act of 1825, so as to come within the cognizance of the court.

But, independently of that view of the case, the act of 1835, in subjecting the offences therein created or described, to the admiralty and maritime jurisdiction of the court, gives to the court, in my opinion, in relation to those cases, a cognizance co-ordinate with what it could exercise under any antecedent law, in causes of like character.

The motion is, accordingly, overruled, and judgment is pronounced against each defendant, that he pay a fine of ten dollars, and be imprisoned for thirty days.

Case No. 16,245a.

UNITED STATES v. SEAMAN.

[2 Hayw. & H. 151.] [1]

Circuit Court, District of Columbia. April 27, 1854.[2]

PUBLIC PRINTING — ACT OF AUG. 26, 1852 — CONTROL BY JOINT COMMITTEE — MANDAMUS.

1. By the terms of the act of congress of August 26, 1852 (10 Stat. 30), the superintendent of public printing is subject wholly to the control of the joint committee on printing, provided by said act.

2. This court has no jurisdiction to grant the relator relief by writ of mandamus, the respondent having a discretion to decide the matter in controversy, and this court cannot control him in the exercise of that discretion.

[This was a petition by Beverly Tucker for a writ of mandamus against A. G. Seaman, printer for the United States senate, to require him to deliver a certain document to the relator.]

The petition sets forth that the relator is the public printer for the senate of the United States, duly elected and qualified, and in the actual exercise of said office; that A. G. Seaman is the superintendent of the public printing, duly appointed and qualified, and in the actual exercise of the said last mentioned office. That the said superintendent hath received and now holds a certain portion of a certain public document to wit: the agricultural portion of the annual report of the commissioner of patents, and that the said document hath been ordered to be printed by both houses of congress, but was first ordered to be printed by the senate; and that such document in such case is by the terms of the act of congress, in such case made and provided, to be printed for both houses by said relator, as printer of the senate, which house of congress first ordered the same to be printed, and that it is the duty of the said superintendent, according to the terms of the said act, now to deliver the matter or copy of the said document to the said relator, as such printer, and that to him, the said relator, it belongs by the terms of the said act to receive and print the same, and to have and enjoy the profits and advantages resulting from such delivery and printing, and that the duty of so delivering the said matter or copy is a merely ministerial duty imposed by the said act. And that the said superintendent hath refused, and still refuses to deliver the same to the said relator, and threatens and intends to deliver the same to the printer of the house of representatives, whereby the said relator will be deprived of his rights and profits in the premises.

The motion to show cause, &c., being argued by counsel, and considered by the court, it is ordered that the motion be granted.

The following is the answer of the respondent: That he was duly appointed to the office

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

[2] [Affirmed in 17 How. (58 U. S.) 225.]

of superintendent of the public printing, and that he is in the exercise of the duties of said office; that his duties are defined and prescribed by the act of congress, approved the 26th day of August, 1852; that the provisions of the act in regard to the delivery by this respondent of all matter ordered to be printed have been strictly complied with; that on the 3d day of January, 1854, the commissioner of patents communicated to the senate the mechanical report from his office, which was ordered to be printed and on the 1st of February the same document was communicated to the house of representatives and ordered to be printed, and according to the provisions of the 7th section of the act of congress of August 26, 1852, which provides that "when any document shall be ordered to be printed by both houses of congress the entire printing of such document shall be done by the printer of that house which first ordered the same." The entire printing of this document was required by this respondent to be executed by Beverly Tucker, the senate printer, and the copy was placed in his hands for this purpose. He further shows that on the 20th of March, 1854, the commissioner of patents communicated to the house and senate the agricultural report from his office, which was in each house on motion, ordered to be printed, the order being first made by the house of representatives; and in compliance with the law referred to, this respondent required the entire printing of this last mentioned document to be executed by A. O. P. Nickolson, the printer of the house. And he respectfully submits that the discharge of the duties of his said office of superintendent of the public printing is not subject to the control of this honorable court.

Mr. J. M. Carlisle commenced for the relator.

Mr. P. B. Key, U. S. Atty., in reply to Mr. Carlisle's argument, contended that the agricultural portion of the patent office report was a distinct document. If it was not a separate document it would have been printed by the first order of congress, and not have been the subject of a separate order. The letter notifying the making up of the agricultural portion from the commissioner of patents was received by the president of the senate on March 20th, and notified on the same day to the senate, two months after the vote upon the printing of the other portion of the patent office report on January 31st. They were, in consequence, two distinct and separate documents. He maintained that the 7th section of the act of 1852 was not in favor of the relator, and quoted the section to prove that the printing would go to the public printer, either of the house or senate, who first received the order. If the two portions of the patent office report had been sent together, Mr. Beverly Tucker would have been entitled to the printing of them both, but when they were, as they are now, separate documents, the printer of the house, if the order was first given, then he was entitled to it. It had been contended that the advantage of time was in favor of the house printer by half an hour, which was sufficient to entitle him to the preference, under the act of 1852, and was bound to distribute it accordingly.

In answer to the inquiry from the court, Mr. Key said the superintendent of public printing still held the document.

Mr. Key resumed, going over the argument that he had already adduced, and referred to the opinion expressed by the court, whether the duties of the superintendent of public printing were purely ministerial, which he maintained them to be by the 3d section of the act, which he then read.

Mr. Reverdy Johnson spoke at some length in favor of his client.

The cause having been heard upon the petition, answer and proof, touching the question, whether or not the different portions of the report of the commissioners of patents for the year 1854 constitute one and the same document.

BY THE COURT. That by the terms of the act of congress, approved the 26th day of August, 1852, entitled "An act to provide for executing the public printing and establishing the prices thereon, and for other purposes." The superintendent, as public printer, is subjected wholly to the control of the joint committee on printing, provided for by said act, in the matter complained of by the relator, and that by consequence this court has no jurisdiction to grant the relator relief by writ of mandamus. One of the judges, Judge Dunlop, being also of opinion, that if the court have erred in the above construction of the statute of the 26th of August, 1852, and the joint committee on printing have no control of the superintendent, then the superintendent of the public printing has a discretion to decide the matter in controversy in this case, and this court cannot control him in the exercise of that discretion on this last ground. Also the said judge thinks this court has no jurisdiction to grant to the relator the relief prayed by him; that if the subject was made the ground of an action at law, the court would then exercise its judgment, and would not consider itself bound by what Mr. Seaman did.

It is considered by the court and so ordered and adjudged, that the said writ of mandamus, as by the relator prayed for, be refused, and that the said petition be dismissed with costs.

[A writ of error was subsequently sued out from the supreme court, where the judgment of this court was affirmed, with costs. 17 How. (58 U. S.) 225.]

Case No. 16,246.

UNITED STATES v. SEARS.

[1 Code Rep. 128; 1 West. Leg. Obs. 80.]

District Court, D. Iowa. Jan. Term, 1849.

POSTMASTERS—ACTION ON OFFICIAL BOND—LIMITATION.

A suit was instituted by the United States against the surety of a postmaster on the official bond, nearly three years after the date of the last item charged against him in the accounts with the department. *Held*, that the action was barred by the third section of act of congress of 1825 [4 Stat. 103].

This was an action of debt against the defendant [Daniel Sears], as one of the securities of Samuel Shuffleton, deceased, late postmaster at Fairfield, in this state. Alleged breach of the bond, that the said "Shuffleton did not well and truly execute the duties of the said office of postmaster, aforesaid, but made default therein, as follows, to wit: At Fairfield, in the county of Jefferson, on the 8th day of October, A. D. 1846, a large sum of money of the said plaintiff, viz. $700, came into the hands and possession of said Shuffleton, in his capacity of postmaster, which large sum of money said Shuffleton hath not paid or accounted for in the manner prescribed by the postmaster-general," &c. Plea of the statute of limitations, to which the plaintiff replied.

C. W. Slagle, for defendant, contended that the third section of the act of 1825 releases the obligor in the bond, if suit is not brought within two years from the time of default; that the thirty-second section of the same act makes it the duty of the postmaster to account with the department at the end of every three months and pay over the balance. Shuffleton's last account was rendered September 22, 1845, at which time he was in default. This suit was commenced September 1, 1848, nearly three years from the time of the default.

J. M. Preston, U. S. Atty., took the ground that the certificate of the auditor of the post-office department, which was dated October 8, 1848, was the true time from which the statute should run; and that two certain drafts drawn on Shuffleton, within two years before the commencement of this suit, brought it within the statute.

BY THE COURT (DYER, District Judge). The act provides "that if any postmaster, or other person authorized to receive the postage of letters and packets, shall neglect or refuse to render his accounts, and pay over to the postmaster-general the balance by him due at the end of every three months, it shall be the duty of the postmaster-general to cause a suit to be commenced against the person or persons so neglecting or refusing." The copy of the account in evidence is for balance due at the end of each quarter commencing ——, and ending September 22, 1845. The last charge in the account is of the date of September 22, 1845. Suit was brought against the defendant on the first day of September, 1848, nearly three years after the date of the last item charged. Defalcation occurred at the time the balances were due, and were required to be paid, to wit, at the end of every three months, and the statute begins to run from that time. The first draft drawn on the postmaster for the balance due was in February, 1846, nearly five months after the date of the last item in the account, when the balance for that quarter was due. If at that time it was unpaid, it was the duty of the postmaster-general to bring suit. Default in the payment of balances was not made at the time of the dishonor of the draft, because they were due and unpaid long before the draft was drawn.

It is contended, on the part of the United States, that the statute begins to run from the date of the adjustment of the postmaster's account of his entire indebtedness, and that the copy filed as evidence of such settlement and adjustment of his account is dated in 1848. The copy of the account is only a statement from the department of such settlement and adjustment at the end of every three months, when it is made the duty of the postmaster to pay what is due; and the postmaster-general must adjust the accounts of such postmaster at the end of three months, to know what is due and unpaid.

This suit having been brought nearly three years after the date of the last item in the account, the court is clearly of opinion that it is barred by the statute.

Case No. 16,247.

UNITED STATES v. SEARS et al.

[1 Gall. 215.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

EMBARGO ACTS — INSPECTION OF VESSEL — GOODS ILLEGALLY LADEN—PROOF OF INSPECTOR'S APPOINTMENT—OBSTRUCTION.

1. An inspector is an officer of the customs, the obstruction of whom is an offence within the 71st section of the collection act of 1st March, 1799, c. 128 [1 Story's Laws, 633; 1 Stat. 678, c. 22]. An inspector had a right to go on board of any vessel, to discover if any goods, &c. were illegally laden on board, contrary to the embargo acts: and if obstructed in so doing, an indictment lay under said 71st section.

[Cited in Hooper v. Fifty-One Casks of Brandy, Case No. 6,674.]

[Cited in Jones v. Gibson, 1 N. H. 271.]

2. If an inspector be commissioned and sworn, and in the actual execution of the duties of the office, with the knowledge of the treasury department, it is sufficient proof of his being regularly appointed, even supposing (which may be doubted) that the approbation of the secretary of the treasury were necessary to such specific appointment.

[Cited in U. S. v. Bachelder, Case No. 14,490; Frelinghuysen v. Baldwin, 12 Fed. 397.]

[Cited in Bishop v. Cone, 3 N. H. 516. Cited in brief in Com. v. Ford, 5 Pa. St. 68.]

[1] [Reported by John Gallison, Esq.]

3. On a trial for obstructing an inspector, it is not necessary to produce the commission of the collector who appoints him. Proof that the collector acts in such office de facto is sufficient.

Indictment for resisting Chipman, an inspector of the customs, in the execution of his office, viz. in attempting to enter the schooner Dinah, for the purpose, as was alleged, of ascertaining, first, whether any breach of the law had been committed; secondly, whether goods were on board, intended to be illegally exported. A verdict of "guilty" having been found against all the defendants, Prescott, of counsel for the defendants, moved for a new trial, for the following reasons:—(1) That an inspector is not an officer within the 71st section of the collection law. (2) That no evidence was produced of the secretary's having approved the inspector's appointment, in conformity to section 21. (3) That the collector's commission should have been produced; the United States choosing to rely on documents, not on reputation. (4) That there was no evidence, that the defendants knew Chipman as an inspector, claiming to act as such. (5) That the court instructed the jury, that an inspector had a right to enter for either of the purposes mentioned in the indictment.

The motion for a new trial was argued by Mr. Prescott, for defendants, and by Mr. Blake, Dist. Atty., for the United States.

As to the first reason, Prescott contended, that the collector, naval officer and surveyor, were alone to be considered as officers, within the meaning of section 27 of the coasting act (2 Laws U. S. 191), and section 71 of the collection law. 1 Story's Laws, 633 [1 Stat. 678, c. 22]. The 21st section of the collection law describes the officers' duties, after having first named them, and among the collector's duties is, "with the approbation of the principal officer of the treasury department, to employ proper persons as weighers, gaugers, measurers and inspectors, at the several ports within his district." The inspector is appointed only for a single port in a district. By the 54th section, inspectors are, together with others, authorised to go on board vessels for certain special purposes. By section 71, it is made unlawful to impede, &c. any officer of the customs, or their deputies. Inspectors, &c. are, in all cases but one provided in section 54, to be considered as always acting under the direction and superintendence of the collector.

On the second reason, Prescott did not enlarge.

As to the third reason, he contended, that even though it might be sufficient, as to Chipman, to prove him a reputed officer of the customs, yet as he derived his authority from Otis, the collector, it was necessary to show Otis's right to appoint. Reputation can extend no farther than the agent, and does not apply to the person appointing. The record having been relied on in the first instance, it must be followed.

In support of the fourth reason, Prescott cited Tidd, Prac. 818; 3 Wils. 47.

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

STORY, Circuit Justice, said, that Chipman's boat was not a revenue cutter, there being only ten of those commissioned by the president, and making a part of the naval force. He also remarked, that inspectors were either general or special.

DAVIS, District Judge, referred to the act of April 25th, 1808, § 7 [2 Stat. 501], "Revenue Cutters or Boats."

Prescott. Chipman appeared as cutter-master, not as inspector. There is a distinction between cutters and revenue-boats. The latter must be open row-boats, or sail-boats. Chipman's boat was not of this description.

As to the fifth reason, Prescott argued, that the statute gave no authority to the inspector to enter for the purpose of ascertaining an intended breach, and only in one case, that provided in the 54th section, authorized him to enter for the purpose of ascertaining a breach actually committed, unless under the direction of the collector. By the 68th section authority is given to the collector, naval officer, and surveyor, to search for dutiable goods (obtaining a warrant, if on land), but none to the inspector. By a section of the embargo law, vessels were to be loaded under an inspector, but this must be by direction of the collector on his permit.

STORY, Circuit Judge, suggested the case of a coasting vessel, having a cargo beyond $800, and asked, whether an inspector could not enter to ascertain, whether such vessel was about to sail without a clearance.

Blake, e contra, was told by the court, to confine himself to Prescott's two last reasons, the court having no doubt as to the others. He was also requested to speak to so much only of the fifth reason, as respected goods illegally laden for exportation. He contended, that it would have been enough to allege generally, that Chipman went on board, in the execution of his duty. An inspector may seize, as well as examine. The object of the revenue act is to search as to an offence committed; that of the 11th section of the embargo act, to search as to offences contemplated. In the case of an inspector resisted, but overcoming, and sued for an assault, he would not be required, in his defence, to show his purpose; it would be enough, if he show his authority as inspector. If an inspector may board without any reason assigned, can the indictment be bad on account of the particular fraud alleged? Blake compared this case to that of a sheriff.

In answer to Prescott's fourth reason, Blake contended, that it was not necessary that the jury should have evidence, that the defendants knew Chipman's authority. They resisted at their peril. It was like resisting a sheriff. But, in fact, their behavior to Chipman, and conversation with him, show, they were not ignorant of his character.

STORY, Circuit Justice, referred to Act (Jan. 9) 1809, § 4 [2 Stat. 507], and Act April 25, 1808, § 2. From these acts it should seem, the inspector may enter and report to the collector, whether a vessel is entitled to a clearance.

Prescott answered, that the inspector's authority cannot extend to all cases. It is confined to particular vessels; otherwise, he becomes collector.

In reply to Blake, Prescott contended, that there was not a dictum to support the extent of power, now attempted to be given to the inspector; that it could not be supposed, so large a power was intended to be given to an inferior and irresponsible officer. The 68th section of the collection law is explicit, as to the duties of officers. The collector, naval officer or surveyor, may enter to search for goods subject to duty, and concealed. There is nothing about an intention to offend. It appeared from the evidence, that the vessel was laden before the enforcing act. This act passed on the 9th March, and was received in Boston on the 16th. There was no evidence to show, that on the 20th, when the offence, if any, was committed, this act was known to the collector, much less to the inspector, then absent from the collector. No offence was committed against this act, until, after notice, the owner had refused to unload or give bond. As to the other reason, in civil causes, a verdict will be set aside, if found without evidence; a fortiori, in criminal causes. If the jurors have any knowledge upon the subject, they must disclose it at the trial under oath.

STORY, Circuit Justice, observed, that formerly such a disclosure on oath was not necessary.

STORY, Circuit Justice. The indictment charges, that on the 20th of January, 1809, one John Chipman was "an inspector and officer of the customs for the port and district of Barnstable," and on the same day, with certain assistants, "did attempt to go on board of a certain schooner or vessel called the 'Dinah,' then being at the aforesaid port of Chatham, and laden with a cargo of goods and merchandize, and about to proceed therewith on a voyage to sea; which said vessel was then and there a vessel of the United States, duly enrolled and licensed, according to the directions of the law in such case provided, for the coasting trade; and that the said John did attempt to proceed and go as aforesaid, on board of the said vessel, with the intent, and for the purpose of inspecting, searching and examining the said vessel and her papers, in order to ascertain if any breach of the laws of the United States had been committed, whereby the said vessel, or the goods and merchandize then on board, or any part thereof, was or were liable by law to forfeiture or seizure; and also to discover if any goods and merchandizes had been laden and put, and then were on board of the said vessel, for the purpose of being exported therein from the United States, and from the port aforesaid, contrary to the laws of the United States:" and then charges that the defendants, while the said John and his assistants were "in the execution of the duty aforesaid," assaulted the said John and his assistants, and then and there resisted, obstructed, prevented and impeded them "in the execution of the laws of the United States, and of their duty aforesaid," against the statutes in such case made and provided.

At the trial the jury found all the defendants guilty, and now their counsel has moved for a new trial, as well as in arrest of judgment, upon certain exceptions, which I will now proceed to consider.

The first is, that an inspector is not an officer of the customs; for obstructing whom, an indictment lies on the 71st section of the act of 2d March, 1799, c. 128 [1 Story's Laws, 633; 1 Stat. 678, c. 22]. The charge in the indictment is, that he was "an inspector and officer of the customs;" and the latter, if properly alleged and proved, would have been sufficient to support the indictment. But we entertain no doubt that an inspector is "an officer of the customs," and so is within the purview of the 71st section. He is an officer known to and recognised by the law; his duties are in many instances prescribed, and the omission of those duties, or any fraudulent conduct in his office, will subject him to heavy forfeitures (see sections 53, 73, Act March 2, 1799 [1 Story's Laws, 664; 1 Stat. 704, c. 23]). In the same act he is sometimes called an "inspector of the revenue" (sections 30, 35, 37, 38, 40–42); sometimes an "inspector of the customs" (sections 38, 46, 53); sometimes an "officer of inspection" (sections 39, 62); and sometimes an "officer of the revenue" (section 53). It seems difficult to raise a doubt, that the officer so named is an officer of the customs. But there is a still more direct expression, which puts the meaning beyond all controversy. In section 73, it is provided, that if "any inspector or other officer of the customs" shall certify the shipment of any merchandize, without inspection, &c. he shall be subject to certain forfeitures, &c. The same act (section 25) provides, that manifests of the cargo shall be produced to such officer of the customs as shall first come on board of any vessel, on arriving within four leagues of the coast, for his inspection: and further (section 54) declares, that an inspector may go on board of such vessel for the purpose of examining such manifests. There can therefore be no possible doubt, that an inspector is, in contemplation of law, an officer of the customs. See Act March 2, 1799, c. 129, § 2 [1 Story's Laws 664; 1 Stat. 704, c. 23.]

A second objection is, that no proof was adduced at the trial, to show that the secretary of the treasury had approved of the appointment of Chipman, as inspector. The words of

the act as to this point are (section 21), that the collector "shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers and inspectors, at the several ports within his district." It may well be doubted, if this clause require an approbation of the specific officer appointed, or amount to any thing more than that the employment shall not be created without the approbation of the secretary. But admitting that it does, the commission of the inspector reciting such approbation was proved at the trial; a copy, from the treasury department, of the oath taken by him, and an actual execution of the duties of the office, which we are satisfied was sufficient evidence to support the allegations in the indictment, and to prove him lawfully an inspector.

A third objection is, that the commission of the collector, who appointed the inspector, was not produced, and therefore there was no proof of his authority. But it is a sufficient answer to this objection, that the commission was not necessary to be proved. It was shown that the party had actually executed the duties of the office of collector for many years; and nothing more is necessary to be proved in cases punishable with the highest of human penalties, even the forfeiture of life. 2 McNal. Ev. 487; Berryman v. Wise, 4 Term R. 366; 1 Leach, 381n.; 2 Leach, 381; Harg. Law Tracts, 225, 226; 3 Camp. 432; Wightw. 67; Doe d. James v. Brown, 5 Barn & Ald. 243.

A fourth objection is, that it was not proved at the trial that the defendants knew that Chipman acted or claimed to act as inspector; and it is said, that if the jury find a verdict without evidence, it is as sufficient a ground for a new trial, as if it be found contrary to evidence; and 2 Wils. 47, and 2 Tidd, Prac. (4th Ed.) 802, are cited to support the position. Admitting the doctrine to be true, (and it may well admit of qualification,) still we are of opinion that there were facts in the case sufficient to warrant the inference made by the jury, that the defendants knew the character in which Chipman acted.

The last objection, and the only one which seemed of much weight is, that the inspector had no authority by law to proceed on board the vessel "to discover if any goods, &c. had been laden, &c for the purpose of being exported &c. contrary to the laws of the United States," according to the charge in the indictment; and therefore, if the officer were attempting to proceed for this purpose, it was not in the execution of the duties of his office: whereas the court directed the jury, that in point of law the officer had such authority. The direction of the court was given, as is supposed in the objection, and with the view of reserving the point for more solemn consideration. No statute has been shown, which directly and explicitly gives the authority to any officer of the customs. If it exists, it is an authority implied from the provisions of the acts regulating the trade of the United States. At the time when the offence was committed, as charged in the indictment, all the embargo acts were in full operation. It will be recollected that this was a coasting vessel, which by the ordinary laws, under no circumstances, could be allowed to engage in foreign trade while her license was in force; and that the proceeding on a foreign voyage, or being employed in any other trade than that for which she was licensed, subjected her to forfeiture. Act Feb. 18, 1793, c. 8, §§ 8, 32 [1 Stat. 305]. By the embargo acts these provisions were sedulously enforced, and new restrictions followed up with successively increasing rigor. A licensed vessel was not allowed to depart from port, or to receive a clearance, without giving bonds that she would not proceed to any foreign port. Act Jan. 9, 1808, c, 8, § 1 [2 Stat. 453]. The departure without a clearance, or proceeding to a foreign port, incurred the penalty of forfeiture. Id. § 3. It was declared unlawful to export from the United States any goods, wares or merchandises whatsoever, under a like forfeiture. Act March 12, 1808, c. 33, § 4 [2 Stat. 474]. No vessel was allowed to receive a clearance, unless laden under the inspection of the proper revenue officers (Act April 25, 1808, c. 66, § 2 [2 Stat. 299]); and if bound to a district adjacent to a foreign country, without the special permission of the president of the United States (Act April 25, 1808, § 6). The collectors were authorized to detain any vessel, ostensibly bound with a cargo to some other port of the United States, whenever, in their opinions, there was reason to suspect an intended violation of the law. Id. § 11. The putting on board of any ship any goods or merchandise, with an intent of illegal exportation, subjected the property to forfeiture. Act Jan. 9, 1809, c. 72, § 1 [2 Stat. 506]. The lading of goods on board ships was declared illegal, unless made by permission of the collector and under the inspection of the revenue officers. Act Jan. 9, 1809, c. 72, §§ 2, 4. Vessels already laden were required to be unladen, or to give the bonds required by the law. Id. § 3. The president of the United States was authorized to give instructions to the "officers of the revenue" for carrying the embargo into effect (Act Dec. 22, 1807, c. 5, § 1 [2 Stat. 451]); to instruct the collectors as to the detention of vessels, and of goods having an illegal destination (Act April 25, 1808, c. 66, § 11), and as to the refusal to grant clearances (Act Jan. 9, 1809, c. 72, § 10); and to employ the land and naval forces and militia of the United States in suppressing assemblages which should be resisting "the custom-house officers in the exercise of their duties" (Id. § 11). And finally, the penalties and forfeitures incurred under these statutes

were to be recovered and distributed in general, as under the collection act of March 2, 1799, c. 128.

These are a part of the provisions, which composed the system of restrictions on commerce and navigation. Almost all the provisions were to be carried into effect by the vigilance of custom-house officers. Though not expressly named, it seems quite impossible to presume, that the provisions which I have cited did not presuppose their agency. The collectors could alone grant or refuse clearances. The lading could alone be made under the inspection of the inspectors and other officers of the customs. The authority of interposing to prevent an illegal exportation or departure, or of seizing upon the commission of an offence, could not be exercised without examining the state and condition and papers of the vessel and cargo. In short, without an implied authority, from the nature of their offices and the requisitions of the laws, to enter on board, and, in the language of the indictment, "to discover if any goods, &c., had been laden, &c.,on board of the said vessel, for the purpose of being exported therein from the United States," I do not see that it could have been possible, either to execute the known provisions of the law, or to have avoided infringements of the rights of the citizens. Indeed, the authority in the president of the United States to instruct "the officers of the revenue," in carrying into effect the embargo, and aiding with military force "the custom-house officers," in the execution of their duties, presupposes that the law had already devolved these duties upon them. It is conceded that an inspector had a right to go on board a vessel to examine, &c., if any breach of the laws of the United States had been committed. Now, at the time when this transaction took place, it was a breach of law to lade goods, &c., for the purpose of illegal exportation. It would follow, therefore, that the inspector had an authority to go on board to examine into this fact. If the inspector had not this authority, neither had the collector; for it is no where expressly given; and if it be necessary or proper completely to execute other duties, it would result by implication to an inspector as well as a collector. As I have before observed, the laws seem to consider it already existing, and extend the authority to commanders of revenue boats, which by law are to be appointed for the use of surveyors and inspectors. Act March 2, 1799, c. 128, § 101 [1 Story's Laws, 633; 1 Stat. 678, c. 22]; and Act April 25, 1808, c. 66, § 7 [2 Stat. 501].

It is certainly not to be inferred from this reasoning, that officers of the customs have an unlimited authority over the commercial property of the citizens. In the nature of things they must have some implied powers. The legislature would, in vain, attempt to enumerate them; and I think it may be safely assumed, that they may exercise all powers necessary and proper to effectuate the manifest intentions of the law connected with the duties of their office. To them is committed the general management of the revenue laws, be they of exportation or importation; and I think it would be dangerous in the extreme to adopt the position that every act of theirs must be shown sub pede sigilli. They act at their peril. If they invade the rights of the citizens under color of office, this court will, I trust, be the last to afford them a shelter or a refuge.

On the whole, after some doubt and much reflection, I am now satisfied that the last objection ought not to prevail; and that the opinion of the court at the trial was well founded in principle. My search in the books has not enabled me to detect a single authority or principle, which is shaken or opposed in coming to this determination.

Judgment on the verdict.

UNITED STATES (SEARS v.). See Case No. 12,592.

Case No. 16,248.

UNITED STATES v. SECOND NAT. BANK OF NEW JERSEY.

[Cited in U. S. v. Central Nat. Bank, 6 Fed. 135. Nowhere reported. Tried by jury in district court, and affirmed on writ of error in circuit court. No opinion filed in either court.]

Case No. 16,248a.

UNITED STATES v. SEELEY.

[2 Betts, C. C. MS. 58.]

Circuit Court, S. D. New York. Jan. 15, 1844.

OBSTRUCTING JUSTICE—CONTEMPTS—CONSTRUCTION OF STATUTE—TAKING AWAY AN ATTACHED VESSEL.

[1. The taking away of a vessel by her owner, after she has been attached by the marshal, but while she is not in the actual custody of himself or a keeper, does not constitute the offence of impeding or obstructing justice, within the meaning of the second section of the act of March 2, 1831 (4 Stat. 487), entitled "An act declaratory of the law concerning contempts of court."]

[2. It seems that the act was not intended to create any new offences, but is limited to cases which were recognized as contempts under the pre-existing law, and that the second section relates to those cases known as "constructive contempts."]

[3. But even if it were intended to create a new offence, unknown to the common law, yet in construing the statute the common-law meaning of the terms employed is to be observed.]

[4. The expressions "obstruct" and "impede" the due administration of justice, as used in the act, refer only to direct acts of violence or menace, disturbing the ordinary functions of the court.]

[Indictment of Albert Seeley and others for obstructing and impeding the due administration of justice, contrary to the act of March 2, 1831.]

BETTS, District Judge. The defendant, together with three other persons, was indicted under the 2d section of the act of congress entitled "An act declaratory of the law concerning contempts of court." The section provides that, if any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall corruptly, or by threats or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor by indictment, and shall, on conviction thereof, be punished by fine not exceeding $500, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offence. The first count in the indictment alleges, in substance, that a suit in rem was instituted on the side of the district court of this district, and that an attachment was duly issued therein, on which the brig Joseph Gorham, her tackle, &c., was arrested on the 4th day of August last, by a deputy of the marshal, the brig then lying and being at Brooklyn, &c., and that on the 7th day of August, whilst the brig was in the custody of the said deputy marshal under such attachment, the defendants, well knowing the premises, but corruptly devising and intending to obstruct and impede the due administration of justice, with force and arms, corruptly and by threats and force, did remove, take, and carry away the said brig, out of the custody of the deputy marshal, and thereby, there and then, corruptly, and by threats and force, did obstruct and impede the due administration of justice in the said district court, &c. The second count setting forth the same inducement, charges the offence, that the defendants, well knowing the premises, but corruptly devising (as before stated), corruptly did take and remove, and thereby then and there did corruptly impede the due administration of justice in a court of the United States. The third count charges that the vessel was removed by the defendants by force and arms, corruptly and against the will and consent of the deputy marshal, and thereby, they did, by threats and force, obstruct and impede the due administration of justice, &c. The remaining three counts set forth acts of the defendants to the same effect, with some variation of averments, so as in that mode to charge a substantive offence against such provision of the statute. To this indictment Albert Seeley demurred and the district attorney joined in the demurrer.

The indictment does not aver that the defendant by force or threats impeded, or endeavored to impede, the due administration of justice, raising thereby an issue open to any species of pertinent proof; but it sets forth specifically the acts done by him, and charges that by those acts he impeded, or endeavored to impede, justice, &c. It becomes then wholly a question of law, whether the acts alleged to have been committed are, of themselves, competent proof of the illegal intent and obstruction of justice, charged by the indictment. First, there is no allegation that the marshal was dispossessed of the property attached, either by force or threats, or was in any way hindered in the execution of his process or the custody of the vessel. It not being charged that the defendants deprived him of the actual custody of the vessel, it must be intended that he had no other than a legal custody, resulting from the due service of an attachment, and that the interference of the defendants consisted in removing the property so circumstanced, and with intent to defeat the arrest. This is also the extent of the intimidation or impeding of the marshal in the discharge of his duty, supposed to be inferable from the facts stated. It must accordingly be accepted, upon this indictment, that nothing was done by the defendants directly operating upon the officer, or the court, to obstruct or impede the due administration of justice; and the argument for the United States to uphold the prosecution is, that the action of the court being in rem, the removal of the res, whilst it was subject to that action, though at the time found derelict, as it avers, brings the parties so proceeding within the spirit and intent of the statute, and subjects them to conviction for a criminal offence.

As the levy of process on property places the property under the legal possession of the officer, and in custody of the court or the law, the deduction is that a wrongful interference with the property so situated, for the purpose of taking it from such custody, becomes a misdemeanor under this act, the same as if the vessel was rescued forcibly or tortiously.

To determine the just scope and application of the statute, it must first be considered whether it is intended to act only on what the law recognized as contempts of court. If its meaning is to be so restricted, then the acts charged against the defendants, however injurious to the administration of justice, would not be subject to indictment, without it is clearly established that they would have been punishable as contempts under the law as it stood previous to this enactment. The act assumes, in taking its name and title, to be a law concerning contempts of court. The first section very carefully defines and limits the power of the United States courts to issue attachment and inflict summary punishments for contempts of court. The second section subjects parties to indictment for impeding, or endeavoring to impede or obstruct, justice in certain methods; and for the defendant it is urged that congress only designed to modify or change the mode of punishment, and that it is still necessary to show that the matter

charged as an offence would have been a contempt, and punishable as such, but for the statute.

It is argued for the United States that the second section introduces a new class of substantive offences, and which are to be proceeded against without respect to any construction or remedy the courts might have given in regard to them, independent of the statute.

I am inclined to the opinion that the sound construction of the act would limit the second section to those cases which were reconized by the law as constructive contempts of court. The title is a very significant index to the intent of congress, and, without resorting to the special history of the period which induced the interference of the legislature [Preston v. Browder] 1 Wheat. [14 U. S.] 116, the ordinary principles of interpretation would leave courts to hold that both parts of an act so designated are in pari materia, and subject to like rules of construction. This inference is fortified by the consideration that congress had already provided punishments for offences in hinderance of justice, and if this statute designed to constitute the malfeasances therein referred to, of the same class, it would seem that an equal punishment would be prescribed. Whilst the offences of hindering justice may be punished by imprisonment for a year (2 Laws U. S. 97, §§ 22, 23), the misdemeanants under the act are subjected to imprisonment not exceeding 30 days, and the same grade of punishment they would have received if proceeded against summarily as contempts. Those indirect or consequential contempts, not committed in presence of the court or its officers, by suitors, jurors, &c., and subject to be punished by fine and imprisonment, are enumerated by Blackstone, and comprehend the description of cases designated in this second section of the act of congress. 4 Bl. Comm. 284–286; 3 Burrows, 1564; 1 Wils. 75; 6 Davis, Abr. 528; 7 Davis, Abr. 307–312. The impeachment of Judge Peck, and the trial that ensued, developed before congress the doctrine of courts of all orders of jurisdiction, in respect to contempts, and the usages of the United States courts in taking cognizance of them under the judiciary act of September 24, 1789 [1 Stat. 73]. The final judgment of the court of impeachment was rendered July 31, 1831, (Peck's Trial, 474), and this act was reported by the judiciary committee of ——, on the ——, as finally passed March 2, 1831.

This statute may have been designed to sustain the doctrine of the house of representatives advanced by their managers on that trial, that the power to punish contempts was of common-law origin, and belonged to the body of criminal jurisdiction of common-law courts, but its construction, alike upon its terms, and with a view to the history of the terms, most naturally applies its provisions to those matters theretofore regarded as within the summary jurisdiction of courts, and punishable by them as contempts. It designates, with marked precision, the boundaries of that authority to be thereafter observed, and then subjects to the jurisdiction of criminal courts those acts which may incidentally or consequentially interfere with the due administration of justice, but not falling within the limits of that summary jurisdiction as so defined.

Admitting, then, that the second section of the act embraces all cases of contempt tending to obstruct or impede the due administration of justice, the question arises whether the removal of property on which an attachment or execution had been levied amounts to such contempt, when the property taken was not found in the actual custody of the officer. A rescue of a party or property under arrest will be punished as a contempt (5 Vin. Abr. "Contempt," p. 443, art. 9), for then the process and authority of the court is opposed by violence, but no such violence accompanies the removal of property which the officer, after arrest, leaves without a keeper, and will the law imply that such taking is by force or threats, or in opposition to the authority of the court? At common law there can be no rescue but where the officer has the actual possession of the person or property (Co. Litt. 160; Fitzh. Nat. Brev. 226; 1 Hale, P. C. 606); and though more appropriately the proceeding by attachment in case of rescue is in protection of arrests of the person on mesne process (Hetl. 145; 2 Dana, Abr. 352), yet in cases of high treason or felony the king's bench will attach for contempt for rescuing a prisoner in execution (Co. Litt. 161; Co. Ent. 614). But it is not a rescue for a stranger to take goods seized by a sheriff on fi. fa. (Litt. 296; Sheriff of Surrey v. Alderton, Het. 145; Cro. Eliz. 639; 2 Sandf. 343–411); and the supreme court of this state refused an attachment against the defendant himself, for taking his property levied on forcibly from the sheriff (People v. Church, 2 Wend. 262).

If, then, the statute is to be understood as substituting a prosecution by indictment only in cases before subject to attachment as for contempts, it would seem clear, upon authority and principle, that the matter charged against the defendant could not have been cognizable by the court as a contempt previous to the act, and cannot accordingly be the foundation for an indictment under the act. But if the statute is to be construed as creating a new offence, and bringing acts for which the law before had supplied no remedy in the courts of the United States, within the criminal jurisdiction of those courts, it becomes necessary to consider whether the allegations of the indictment describe the offence designated by the statute.

It has been already observed that the gist of the indictment is, that the defendant took

away, with force and arms, out of the jurisdiction of the district court, a vessel arrested by warrant of attachment in a civil suit, in that court. It is not charged that any officer or keeper was dispossessed of the property, or that threats, intimidation, or force was applied to any officer having custody of the property for the purpose of taking it away. The indictment alleges that the defendant did the act corruptly, but the corruption is not averred to have any relation to any third person, and must accordingly be understood only as his own purpose of heart.

If the prosecution can be supported upon the facts set forth, it must be on the ground that it is a criminal offence for a person to take away property, his own or that of a third person, being under seizure by process of law, though after the arrest the property is left in the same situation in which it was arrested, and without any officer or other depository for him holding it in keeping.

The allegation that the transportation was with force and arms is mere surplusage, unless there was an actual or constructive force applied to dispossess the arrest of the officer or impede justice (1 Chit. Cr. Law, 198); and the averment is particularly inefficacious here, because the facts constituting the crime are all set forth, and no force, violence, or threats in respect to any third person is alleged to have accompanied them. It may have been technically a trespass, but higher force is requisite to subject the act to an indictment, unless accompanied by circumstances, constituting a breach of the peace. 4 Bl. Comm. 148; 3 Burrows, 1731; Russ. Crimes, 70. Do then the facts spread out upon the indictment constitute the offence of obstructing or impeding, or endeavoring to obstruct or impede, the due administration of justice, corruptly, or by threats or force?

Obstructing or hindering justice is a common-law offence, and was, as to various modes of committing it, one already provided against by the crimes act of 1790 [1 Stat. 112]. And if the act of 1831 creates in this particular an offence unknown to the common law, yet, in construing it, the common-law meaning of the terms employed is to be observed and applied to the act. 6 Dane, Abr. p. 598, art. 12. "Obstructing or impeding the due administration of justice" would be of the same character of offence as obstructing or opposing an officer in serving, or attempting to serve, process, and the act constituting either such obstruction or holding should accordingly exhibit the like constituents in both cases. The act or endeavor in the latter instance would necessarily apply to a different state of the proceedings in a suit, but would be comprehended in the general common-law description of the offence of obstructing or hindering justice. 2 Hale, P. C. c. 17, § 1; 4 Bl. Comm. 129; 1 Russ. Crimes, 519. To "obstruct," independent of the acceptation the word has obtained in the criminal law, would seem to stand ex vi termini a direct and positive interposition, which prevented, or tended to prevent, the action of the officer or court in respect to a matter then to be proceeded in. "Impede" must necessarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the legislature to give these terms an application only to direct acts of violence or menace disturbing the ordinary functions of courts is inferrible from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, &c., by threats or force, would necessarily imply the effort to put forth some act, which in its natural, if not necessary, consequence, must be attended with an obstruction, and with a forced and compelled, interruption of further progress in the administration of justice. The indictment would seem to assume that any act of trespass connected with a subject-matter in litigation, which may lead to delay in such litigation, is an offence within this statute. The legislature could hardly be supposed to have intended to cover a ground so broad as that. Mere delay or procrastination of a suit, though produced wrongfully or by superior force, could not necessarily become an offence, affecting public justice. A replevy of property under levy; an arrest and imprisonment of the libellant in an action for an illegal seizure or levy of the property in question; or if a quarrel had arisen between the parties in respect to the arrest, and the defendant had beaten the libellant to the degree that he was disabled from attending to and prosecuting his action, these and other instances that might be put would each delay the case, and in that sense impede the immediate administration of justice; but they are not regarded at common law as the offence of hindering justice, nor is there any reason for holding that the language of this should be so extended as to embrace them. The evils in view of the legislature were acts of violence, or improper and corrupt dealings with the officers and ministers of justice, parties, or the process of the law. This is plainly shown by the first section of the act, and the second, in calling in the aid of the criminal court, ought to be understood to refer to that tribunal the cognizance of offences of like quality and bearing, and the remedy should not to be construed to depart entirely from and outrun the evil intended to be punished and expressed. Again, the indictment fails to show that the due administration of justice has been any way obstructed or impeded. The libellant attached the vessel by a proceeding in rem; but that arrest imparted no

title or right to the thing other than to have the value of the vessel applied towards the satisfaction of a decree, should one be rendered in his favor, provided the vessel was in law responsible for that demand.

The due administration of justice, on the demand of the libellant, if his right is sustained in court, is not necessarily the condemnation of the vessel; it is only the adjudication and settlement of his right, and as consequent satisfaction of the demand decreed in his favor out of the property seized. The primary question is his right to a decree of damages, and, secondary to that, is that of his right to, or the necessity for, a remedy against the vessel; and it cannot be asserted that the administration of justice is any way affected by the removal or destruction of the thing arrested, without it is made palpable that the specific thing would be subjected to, and was required for, the satisfaction of this demand, and that this consequential decree was a constituent and essential part of the procedure in administering the justice of the case. Further, if this arrest was valid and the vessel was legally responsible in the action, then his remedy is perfect against the marshal because of an insufficient execution of the process. Had the proceeding been in personam, and the respondent after arrest, and before giving bail on stipulation, had been persuaded or forcibly abducted out of the district of the defendant, such act could not have been criminally prosecuted under this statute, because justice is administered upon the right of such libellant just as duly by enforcing satisfaction out of the officer, or out of bail, as from the defendant or his property. To obstruct or impede the due administration of justice upon the ordinary signification of language must be something further than pleading embarrassment or difficulties in the way of a convenient enjoyment of the fruits of a litigation. A trespass or waste committed by one party upon property under litigation would render the property less valuable to his antagonist should it be awarded him, and, in so far as the due administration of justice requires that the entire benefit adjudged a party should be secured him, would to that extent obstruct and impede such administration; and upon like principle any spoliation of part of the tackle or furniture, or destruction of any part or appurtenance of this vessel, by the defendant, would be a criminal offence. But it must be manifest that such remote and contingent consequences, to acts not otherwise criminal, could not be intended by congress to be embraced within the scope of this section, if it is understood as introducing a class of criminal misdemeanors before unknown to the law.

It would seem palpable that the administration of justice which the act intended to defend and protect from being obstructed or impeded consists of that action of the courts, through their officers and other direct instrumentality, essential to the free and full consideration and determination of the matter, and the enforcement of their orders and decisions. To this extent the community has a common concern. The public is deeply interested in maintaining without disturbance, for the court, their officers, processes, and the parties litigant before them; the powers and privileges by means of which questions of right and wrong are investigated and settled. But when the law has by its penal sanctions protected against molestation the action of these agencies, so far as they are direct and necessary to this common good, it may well be supposed that the accidental disturbances or procrastinations an individual may encounter, in realizing the fruits of his success, and which, in their nature, are personal to himself alone, would be left to be redressed by that mode of remedy the law furnishes for particular torts and injuries. But, again, the due administration of justice does not necessarily import that its course must always be expeditious or direct. If by the removal of this property the remedy of the libellant has been less prompt and immediate, his relief is still within the competency of the court by its ordinary course of proceeding. The more circuitous and dilatory method of redress would be the due administration of justice, as much as the most summary and peremptory; and changing the course of the court from one method of remedy to the other, both in the end being the same, would not be obstructing or impeding justice.

If it be conceded that the due administration of justice in behalf of a party who obtains judgment or decree for damages requires that those damages should be satisfied to him, such administration is not necessarily obstructed or impeded because the party fails obtaining the satisfaction in one mode, if it be equally secure to him in another; and it would therefore be necessary in the indictment in this case to charge that, by means of the wrongful removal of the vessel, the libellant was deprived of all remedy for his demand, because if thereby the marshal has become responsible to him for his damages, or he can have direct satisfaction by decree against the respondent, the administration of justice in his behalf is in no way defeated or obstructed by depriving him of recourse against the vessel. The offence is not put upon this ground by the indictment. The subject is susceptible of much more extended illustration, but the discussion has been sufficiently minute to indicate the opinion of the court, that the facts set forth upon this indictment do not constitute a criminal offence, within the meaning of the second section of the act of March 2, 1831, and judgment is therefore pronounced in favor of the demurrer and against the indictment.

Case No. 16,249.

UNITED STATES v. SEGARS.

[16 Leg. Int. 388;[1] 3 Phila. 517.]

District Court, E. D. Pennsylvania. 1859.

CUSTOMS DUTIES—FORFEITURES—EFFECT OF SEIZURE—INCREASE OF PENALTIES—DELIVERY BOND—PENAL SUM—RECEIPTS.

1. Upon information filed against goods alleged to be forfeited under the revenue collection act of 1799 [1 Stat. 627], and its supplements, the goods pass out of the hands of the collector who seizes them into the hands of the marshal, whose custody is thenceforth that of the court.

2. No penal increase of duties can afterwards be exacted by the collector from a claimant of the goods, though such a penalty might lawfully have been imposed before the goods were seized as forfeited.

3. If such a penal increase has been received by the collector before the seizure, the goods, though they would otherwise have been liable to forfeiture, are exempt from such liability.

4. His exaction of such an increase after information filed, though an illegal act on his part, does not affect the prosecution against the goods.

5. Under proceedings upon a petition of the claimant for the delivery to him of the goods on his giving a bond, with surety, for their appraised value, he is to pay no greater amount of duties than would have been demandable of him if the fairness of the importation had not been impeached.

[Cited in note to U. S. v. Twelve Thousand Three Hundred and Forty-Seven Bags of Sugar, Case No. 16,555.]

6. If the goods are afterwards condemned, he loses the amount of the regular duties thus assessed, as well as the value of the goods forfeited.

[Disapproved in Four Cases of Silk Ribbons, Case No. 4,986. Cited in note to U. S. v. Twelve Thousand Three Hundred and Forty-Seven Bags of Sugar, Id. 16,555.]

7. The bond, in such a case, is a substitute for the proceeds of the goods which, if it had not been given, would have been sold by the marshal.

8. It must, therefore, be given for the market value of the goods at the place of seizure, without any deduction for the regular amount of duties which are thus payable at all events.

[Disapproved in Four Cases of Silk Ribbons, Case No. 4,986.]

9. If, under such a proceeding, the collector and naval officer should refuse to give a receipt, conformably to the act of 1799, for the regular amount of duties, and require the payment of a penal excess, the court will order the delivery of the goods to the claimant upon the execution of the bond, and payment of the proper amount of duties.

10. Where payment of such an excess had been exacted unlawfully by the refusal of such a receipt, and had been made under protest, the goods having been afterwards condemned, and the amount of the bond paid into court, the excess was, by the court's order, repaid to the claimant out of the fund in court.

11. A case in which such a payment has been thus made after information filed, and in the course of a proceeding under the direction and control of the court is not within the statutes and rules of decision applicable to other cases of duties paid under protest.

[1] [Reprinted from 16 Leg. Int. 388, by permission.]

Upon a petition of the claimants [Mayoz and others], praying that the segars might be appraised, and delivered to them upon their executing a bond with surety for the amount of the appraisement, a question arose whether the amount of the duties upon the segars was to be deducted by the appraisers from the market value, and the difference to be returned as their valuation, or their appraisement at the market value was to be returned without any such deduction.

CADWALADER, District Judge. The 89th section of the revenue collection act of 1799 provides that when vessels or goods have been seized and prosecuted as forfeited, the court may, upon the prayer of a claimant that they be delivered to him, appoint three sworn appraisers, on the return of whose valuation, if the claimant shall, with one or more approved sureties, execute a bond for the amount of the appraisement, and produce a certificate of the collector and naval officer that the duties have been paid or secured in like manner as if the vessel or goods "had been legally entered" the court shall order the same to be delivered to such claimant. The section provides that the bond shall remain in court, and, upon judgment in favor of the claimant, shall be cancelled, but that if the judgment shall be in whole, or in part, against him, and he shall not, within twenty days thereafter, pay into court the amount of the appraised value of the vessel or goods condemned, with costs, judgment upon the bond may, forthwith, be entered upon motion in court. The 90th and 91st sections enact that vessels and goods condemned for which bond shall not have been given as above shall be sold, under the court's order, by the marshal, and the proceeds, after deducting all proper costs and charges, paid, one moiety to the United States and the other moiety to designated officers of the revenue collection service, with distinct provisions for cases in which there is an informer. The 36th section of this act required the production to the collector and naval officer of the original invoices of the goods imported. The 66th section enacted that if any such goods should be falsely invoiced as to their cost, with design to evade the duties, or any part thereof; the goods, or their value to be recovered of the person making entry, should be forfeited, and that where the collector should suspect the goods to be invoiced below their market value at the place of exportation, he should take possession of them and retain them until their value should be ascertained by appraisement in a prescribed mode, and the duties, according to such valuation, paid, or secured in the manner therein required. The latter provision of the 66th section explains the clause in the 89th section which provides that in a case like the present the amount of duties to be paid by

the claimant is the sum that would have been payable if the property seized had been legally entered. These, which may be called regular duties, are, in the case of goods alleged to be falsely invoiced, the duties which would have been assessed if the fairness of the invoice had not been impeached. Had the 89th section contained no such definition of their amount for a case like the present, the collector and naval officer, instead of assessing, in such a case, the amount of duties that would have been payable according to the invoice, might, as in the case of a suspected invoice, have exacted from the party giving bond the payment of the duty assessed upon a higher valuation. This the 89th section prevents. The present question, however, concerns the regular duties only. The question is whether the amount of these duties, which is to be paid by the claimant at all events, is to be deducted by the appraisers in their ascertainment of the value for which he is to give the bond. The question, in other words, is, whether, if judgment of condemnation be rendered, he is to lose the amount of these duties as well as the value of the property forfeited.

A series of subsequent laws has established a system of appraisement under which all subjects of ad valorem duty are valued by sworn public officers. These laws have imposed, in certain cases, a penal increase of the duties upon important merchandize invoiced at a designated rate below the proper valuation. It is also indictable as a misdemeanor to make out, or pass, or attempt to pass, any false, forged or fraudulent invoice through the custom house. In [Wood v. U. S.] 16 Pet. [41 U. S.] 342, [Taylor v. U. S.] 3 How. [44 U. S.] 197, and [U. S. v. Sixty-Seven Packages of Dry Goods] 17 How. [58 U. S.] 86, the supreme court has decided that these enactments have not impliedly repealed the provision in the 66th section of the act of 1799, that where imported goods are falsely invoiced with a design to evade the payment of any part of the duties, the goods or their value are liable to forfeiture. In the last of these cases the court say that if the additional duty of twenty per cent. imposed when the appraised value exceeds the invoice price by ten per cent. has been levied upon the goods by the government, it cannot forfeit them under the 66th section of the act of 1799, but if the collector is satisfied that such an undervaluation in the invoice has been made with intent to evade the duties, then, instead of levying the additional duty, a forfeiture may be declared. The court added that a forfeiture may be declared in cases of undervaluation of less than ten per cent. of the invoice price where the fraudulent design exists. [U. S. v. Sixty-Seven Packages of Dry Goods] 17 How. [58 U. S.] 93, 94. If the court had been of opinion that no duties whatever could be levied upon forfeited goods, they would not have made this remark distinctively as to the additional duty alone. The distinction between the additional and the regular duty was recognized conversely in Stairs v. Peaslee, 18 How. [59 U. S.] 529, in certain remarks of the court upon the case of Bartlett v. Kane, 16 How. [57 U. S.] 263. In this case goods entered at the invoice price had been found by the appraisers to be invoiced ten per cent. below the dutiable value. The penal duty of twenty per cent. had therefore been exacted. A portion of the goods were warehoused, and afterwards entered for exportation. On these goods the regular duty was returnable to the importer. But the court was of opinion that the collector could retain the penal duty upon them, which had been levied. The reason of the distinction had been partially indicated in the previous case of McLane v. U. S., 6 Pet. [31 U. S.] 404, 427. There prohibited goods, which could not regularly have become dutiable, were the subject of consideration. The supreme court said that "no duties, as such, can legally accrue upon the importation of prohibited goods," assigning as the reason that "they are not entitled to entry at the custom house." This language implies that the contrary should be the rule as to such forfeited goods as have been or ought to have been entered at the custom house. The liability of the importer for the duties upon goods of the latter class depends upon a personal contract implied in his act of importation. But the implication of such a contract cannot be extended to a penal addition to the duty. It may, for some purposes, be extended so as to include such a simple addition to the invoiced value as the appraisers may make without a penal increase of its amount. But this is not the rule for the purposes of the 89th section of the act of 1799, under which the proper assessment of the duties is upon the invoice as if it were fair and unimpeached. This rule could not here be departed from without prejudging, more or less, the question for ultimate adjudication. A case in which a forfeiture is insisted upon should not be thus prejudged in any degree in a preliminary stage of the proceedings.

The existence and character of the distinction between the additional and the regular duty having been thus ascertained, we may now consider some authorities which bear less indirectly upon the question whether an importer of dutiable goods is liable, personally, for the duties upon them when they are forfeited. Hereafter the word "duties" will be understood as designating what have hitherto been called "regular duties."

Salter v. Malapert, 1 Rolle, 383, was an action of debt for the recovery by farmers of the customs of a statutory duty of twelve pence in the pound for goods imported by foreign merchants and unladen without payment of the duty. The farmers had received the grant of the customs, but not of the forfeitures. These the king had reserved. The

importers had compounded for the forfeiture with the king, and pleaded this in bar of a suit against them by the farmers for the duty. The plaintiffs demurred to the plea. Judgment was given for the plaintiffs. The reason of the judgment, as delivered by Chief Baron Tanfield, was that the duty of a shilling in the pound became a debt upon the bringing of the goods into port, when the plaintiffs acquired a vested right of action. Upon the authority of this decision Chief Baron Comyns (Dig. tit. "Dett.," art. 9), under the head of "debt upon contract implied" states the law to be that debt lies for customs due for merchandize, though the goods are forfeited for nonpayment.

In Swinerton v. Wolstonholme, reported by Sir M. Hale in his Treatise on the Customs (Harg. Law Tracts, 214), the reason upon which the above decision is founded was reconsidered. A majority of the barons of the exchequer were of opinion that the "duties grow due by the unlading." The opinion afterwards entertained in England by the crown lawyers appears to have been that the voluntary bringing of goods within the limits of a port of entry with intent that they shall be unladen renders them liable to duty. Reeves. Shipp. 260, 261. In Meredith v. U. S., 13 Pet. [38 U. S.] 493–496, this rule was recognized as having been established in [U. S. v. Vowell] 5 Cranch [9 U. S.] 368, and [Arnold v. U. S.] 9 Cranch [13 U. S.] 104. The court said that, in a fiscal sense, the right of the government to duties upon goods accrues on their arrival at a port of entry, that, under the credit system then in force, the duty was not extinguished by taking a bond which either did not cover the whole sum due, or was not executed by all the parties liable, and that the amount justly due might be recovered in an action of debt, although no such bond as was then required by law had been given, and might be thus recovered independently of any official or other assessment of the duties. The court said, "An action of debt lies against the importer for the duties whenever by accident, mistake or fraud no duties or short duties have been paid." See, also U. S. v. Lyman [Case No. 15,647.]

In Wood v. U. S., 16 Pet. [41 U. S.] 362, and Taylor v. U. S., 3 How. [44 U. S.] 197, goods imported at New York, after having been passed, in regular form, through the custom house there, had been seized in the one case at Philadelphia, in the other case at Baltimore, in the hands of agents of the respective importers. The goods, in each case, were condemned as forfeited for fraudulent undervaluation in the invoices upon which they had been entered. These cases decide that the payment by the importer to the United States of the full amount of duties assessed by the collector and naval officer upon goods passed by the appraisers of the customs at the invoiced value; and delivered under a formal permit, is no bar to such a subsequent proceeding to forfeit the goods. The success of the fraud by which the officers of the customs had been deceived, was, of course, no justification. The importers, in these cases, lost the goods as well as the amount of the duties which had previously been paid. The 66th section of the act of 1799, under which the goods were condemned, imposes, in the alternative, as we have seen, a forfeiture, either of the goods, or of their value to be recovered of the importer. If those goods, instead of being still in the hands of the importers, or of their own agents, had been previously sold in the market, the pecuniary value could, therefore, have been recovered from the respective importers in actions of debt at the suit of the United States. See Caldwell v. U. S., 8 How. [49 U. S.] 366. The amount of the duties previously paid could not then have been set off as a deduction from the full value which would have been recoverable.

The circumstance that the duties have not been paid when the proceeding to forfeit the goods is instituted is, in reason, attended with no difference in favor of the importer. If the proceeding is groundless, the goods are to be restored to him, but the regular duties are to be paid. If the goods are condemned, he loses them, but this does not exempt him from liability for the duties. In [Meredith v. U. S.] 13 Pet. [38 U. S.] 493, the supreme court cited with approbation, a decision of the English court of exchequer (Anstr. 558), that where a dutiable article was lost or destroyed by a casualty before it became available to the party personally liable for the duty, his liability nevertheless continued. If the loss of the property by misfortune does not exempt him, his loss of it from his own fraud should not cause an exemption. In the present case, if the goods are not bonded, a personal action for the duties will be maintainable against the importer. He could not plead in bar of it that the goods are the subject of a pending prosecution for an alleged forfeiture. He could not have avoided this liability by omitting to claim the goods. He cannot escape from it by withdrawing his claim, or by confessing the forfeiture of the goods or otherwise abandoning them to the United States. The liability for the duties as a debt may thus be enforced as well before as after their condemnation. If the goods are to be delivered to him upon substituting the proposed bond for them, it should be a substitute for their full value, not for the value less the amount of the duties which are, at all events, to be paid. The bond stands in the place of the property which, in case of condemnation, would, if no bond had been given, have been sold by the marshal. Under such a sale by the marshal, the whole proceeds must be paid into the court, if any ques-

tion as to their distribution is to be determined. It may be said that as there was a lien for the duties, they must, if not previously paid, be discharged out of the proceeds when they are thus paid into court. It is true that such a lien exists, and that it may, in case of the importer's insolvency, be the only available security to the United States for the duties. But the existence of such an additional security for them cannot alter the rule of law that the importer of goods which are forfeited or forfeitable is personally liable for the duties.

In Hoyt v. U. S., 10 How. [51 U. S.] 137, goods had under a petition like the present been appraised, and a bond given for the appraised value. They were afterwards condemned whereupon the amount of the bond was paid into court. The collector, naval officer and surveyor were entitled to, and received, one-half of this amount, and the United States the other moiety. The collector, suggesting on behalf of himself and his brother officers, that the amount of the duties on the goods had been deducted from the valuation before the return of the appraisement, and that the sum paid into court was therefore less by that amount than the full value of the forfeited goods, insisted that the duties were a part of the forfeiture, and that their amount should be divided by the United States with the officers. In support of the position thus assumed, it was contended that no duties are demandable upon forfeited goods. The opinion of the court contains an abstract of the relevant provisions of the 89th, 90th, and 91st sections of the act of 1799. The decision was, that when the claimant elects, under their provisions, to give a bond and pay the duties, with a view to the delivery of the vessel or goods to him, "the duties thus paid constitute no part of the proceeds of the goods forfeited." The court in arriving at this conclusion, remarked incidentally that if the vessel or goods are condemned, the claimant "loses as well the duties paid or secured, as the property seized and condemned." This would not be the case if the amount of duties had been deducted by the appraisers from their valuation, before its return to the court. The case might have been adjudged without a decision of this question. But the simplest mode of adjudication was to decide the question; and this mode was adopted. The question, therefore, cannot be considered as an open one. Consequently these goods are to be appraised at their market value here, from which there should be no deduction before the return of the appraisement. If the authorities had not furnished a reason and rule of interpretation of the 89th section of the act of 1799, which seem to be decisive of the question, the words of the section could scarcely have been strained so as to warrant any deduction whatever by the appraisers, from the market value.

Case No. 16,249a.

UNITED STATES ex rel. JONES v. SELDON.

[2 Hayw. & H. 332.] [1]

Circuit Court, District of Columbia. Oct. Term, 1859.

MANDAMUS TO MARSHAL—WITNESS FEES.

A writ of mandamus will be refused to command the marshal of the District of Columbia to pay the petitioner, an attorney of this court, witness fees. Especially will it be the case when the judge of the criminal court decides the petitioner is not entitled to the same.

[This was a petition by Charles L. Jones for a writ of mandamus to be directed to William Seldon, marshal of the District of Columbia.]

Petitioner in person.

Respondent in person.

The petition in substance says: That he was duly summoned as a witness for the United States in the criminal court of the District of Columbia. That he attended as such witness for nine days. That he exhibited to the marshal of the District of Columbia a certificate of the clerk of the said court proving such attendance. That the said marshal has received from the treasury of the United States a sum of money for the payment of the fees allowed to witnesses and persons attending the said term of said court, and has money in his hands applicable to the payment of his demands, but he, the marshal, says that he is advised that your petitioner is not entitled to receive the fees because he was, during the time of his attendance, a member of the bar of said court, and for this reason alone refuses to pay said fees. Wherefore, and for as much as the said marshal is a mere ministerial officer, and the duty of paying is purely a ministerial act, and as your petitioner has no other remedy, prays the court to grant the United States writ of mandamus, &c., commanding him to pay to him according to law the full amount of his demand, &c.

The answer of the respondent: That he is the marshal, and that proper and sufficient funds have been placed in his hands to defray the necessary and proper expenses of criminal justice here. He admits that the petitioner attended as a witness in the trial of Daniel E. Sickles. He refused to make payment, not upon his own judgment, but upon that of the Hon. W. Hartley Crawford, sole judge of the criminal court in which the witness attended. Whether the opinion of the learned judge against the legality of the petitioner's demand was founded wholly or in part upon the law of congress of 1856 (11 Stat. 50) this respondent cannot say; but believes, and therefore states, that his honor drew a distinction between attorneys who had become nominal practitioners and seldom in court and lawyers like the petitioner, who regularly attend the bar; deeming it proper

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

to allow witness fees to the former, on the ground that they were taken from their pursuits, and ought to be paid for the value of their time; but to refuse fees to the latter, who would be in court whether brought there by summons or not. The learned judge placed the regular attendant at the bar upon the footing of public officers, who were, he stated, no better entitled to witness fees than the clerk, the marshal or the bailiffs, none of whom could receive such fees.

Whether the distinction taken by the learned judge be correct or not, it was not the province of this respondent to doubt, since he is himself but a ministerial servant of the court and in duty bound to respect the judges. In cases like the present there is an obvious necessity to conform to the construction which the judge places upon the disbursement of public money in the marshal's hands; for the judge under the laws is required to examine each item of account which the marshal renders and without the approval of his honor, the accounting officers of the treasury will allow the marshal no credit whatever. Now the petitioner is a gentleman of learning and liberality, and cannot expect the marshal to make payment and present vouchers for which he can obtain no credit at the treasury, and therefore without the intervention of a superior power, policy and duty require this respondent to acquiesce in the declared judgment of the learned judge. Having made answer, the respondent submits the matter to the honorable judges, and will respect any decision which they shall think proper to render.

Motion for mandamus refused.

Case No. 16,250.

UNITED STATES v. SEMPLE.

[Hoff. Dec. 14.]

District Court, N. D. California. Sept. 1, 1860.

CALIFORNIA LAND CLAIMS — PROCEEDING TO CONTEST OR REFORM SURVEY—INTERLOCUTORY AND FINAL DECREES.

[1. The act of June 14, 1860 (12 Stat. 33), relating to the settlement of private land claims in California, declares that all cases in which proceedings "are pending" for the purpose of contesting or reforming surveys made and approved by the surveyor general "are made subject to this act." *Held*, that a case in which an order had been entered rejecting the original survey, and giving directions for a new and reformed survey, was still "pending," so as to be subject to the act: for such an order is merely interlocutory.]

[2. In such proceedings no decree can be deemed final which does not adopt and approve some survey and plat, fixing with precision every line of the land.]

HOFFMAN, District Judge. The counsel for the claimant [C. D. Semple] in this moves for an order approving a survey made by the surveyor in pursuance of an order heretofore entered, rejecting the original survey, and giving directions for a new and reformed survey to be made. Before proceeding to inquire whether the last survey is in conformity with the directions heretofore given, a preliminary question must be determined.

By the recent act of congress (June 14, 1860), "all cases in which proceedings are pending for the purpose of contesting or reforming surveys made and approved by the surveyor-general, are made subject to the provisions of the act." If, then, in this case, such proceedings are pending, the provisions of the act must be applied to it. To determine whether proceedings are pending within the meaning of the act, the nature of the order or decree heretofore made must be considered. If that decree be a final decree, the case can no longer be said to be pending, and vice versa. It is obvious that, in a large majority of cases, no decree by which one survey is rejected, and another directed to be made, can be deemed a final decree. The directions contained in such a decree must usually be general, and rather determine the principles on which the new survey is made than fix the precise location of the lines. In carrying into effect such directions, new questions, not discussed or considered, may arise, for the previous discussions will naturally have turned rather on the correctness of the original survey, than on the precise location of the new lines directed to be run. In all such cases it is clear that no decree can be deemed final which has not adopted and approved some survey and plat, fixing with precision every line of the land.

It is argued that only one decree is spoken of in the act, viz. the decree determining the true location of the land, and that the order approving such location, when afterwards made, is merely a decretal order, entered after final decree. But from what has been said, it is apparent that in many cases most important questions may arise, upon which testimony must be taken and argument heard, before the court can finally determine to approve and adopt the survey made under its first order. While such questions remain open and undetermined, the decree cannot be said to be final. It may be true, therefore, that the act speaks of only one decree; but if so, it is the decree by which some survey, previously made, is adopted and approved, not the interlocutory order by which a survey is rejected, and directions for the making of another survey given. The language of the act confirms this view. The fifth section provides that "the said plat and survey, so finally determined by publication, order or decree, as the case may be, shall have the same effect, and validity in law as if a patent for the land so surveyed had been issued by the United States." It is obvious that the effect and validity of a patent is here attributed, not to the decree which determines how the survey should be made, but to the plat and survey finally determined by decree or otherwise; clearly showing

that a plot and survey must be before the court, and finally passed upon by it, before the provisions of the act can apply. That a decree adopting and approving some survey before the court was, previously to the passage of the act, alone considered by the supreme court as a final decree, is evident from the case of U. S. v. Fossett [21 How. (62 U. S.) 445]. In that case, this court had given directions in its decree for the location of the land, and had determined every question relative to the location referred to it by the supreme court, or raised by the parties. But the supreme court refused to entertain the appeal, because no survey had been made and adopted by the court. The act of 1860 was not intended to repeal the existing law on this subject, but to define and regulate the jurisdiction already possessed by this court. The decision of the supreme court is therefore an express authority as to the nature and essential elements of a final decree of this court on the location of a land claim.

It is objected that the publication, as required by the third section, cannot be made in this case, and, therefore, that that provision does not apply. This is admitted; for it is obviously too late to make a publication "before any testimony shall be taken," as that section requires. But the important provisions of the act relative to the admission of parties to the suit—the effect of the decree of this court, and the time within which an appeal may be taken, are still susceptible of easy application to this case, and must be deemed to apply to it if it be a pending case, unless the provision of the sixth section, by which pending cases are made subject to the provisions of the act, is wholly nugatory. An advertisement for all parties to intervene can therefore be made in analogy to the advertisement required to be made in cases initiated under the act, and mutatis mutandis to suit the difference between the cases. Again, if this be not a pending case, none of the provisions of the act of 1860 can apply to it. The right of appeal must then exist, if at all, under the provisions of the act of 1851 [9 Stat. 631]. But the appeal heretofore taken from the decree of this court, confirming the claim, has been dismissed by consent. It may thus admit of doubt, whether any appeal from the order or decree of this court, determining how the location shall be made, can be taken. For this cause has not been like the cases decided by the supreme court, remanded to this court for further proceedings. If, however, an appeal will lie, it may be taken at any time during five years. The practical effect, therefore, of withdrawing this cause from the operation of the act of 1860, is so inconvenient, that it affords an argument against adopting any view of the case which would involve such a result.

The cause is in other respects peculiarly within the class with regard to which congress intended to make new provisions and afford new remedies. In passing the act of 1860, congress has in view three great objects: (1) to fix and define the jurisdiction of this court over surveys—by authorizing it within a period strictly limited, to order them before it. (2) To permit all persons, whose interests were involved, to intervene in the proceedings. (3) To limit the time within which appeals were to be taken. These important remedial provisions were, by the act, extended to all cases pending in this court.

In the case at bar it appears that the land, as located by this court, is wholly embraced within the survey and location of an adjoining rancho. The survey of that rancho has been ordered into court, and is now a pending case. The claimant in the present case will have the right, which he will, no doubt, exercise, to intervene in that proceeding. But his adversary has not had, nor if this case be held not to be a pending case, will he ever have, an opportunity to intervene in this cause, for the protection of his interest. The court might thus in this cause, where only one side has been heard, arrive at a conclusion wholly irreconcilable with that which it would reach in the subsequent case, where all parties would be heard, and testimony on both sides be taken. It thus appears that this case is one to which the provisions of the act of 1860 should, if it be possible, be applied. As the act of 1860 prescribes a short period within which appeals may be taken, it is important that no doubt should exist as to the time when the final decree of this court is entered, for from the date of its entry the six months within which the appeal may be taken requires to run. If the decree by which a plat and survey actually before the court is adopted and approved be considered the final decree, a clear and uniform rule is prescribed, admitting of no misapprehension. But if the decree determining the mode in which the survey is to be made be considered final or interlocutory, according as the directions contained in it are more or less precise, the date from which the six months are to begin to run will be left open to doubt and dispute.

Various other considerations might be suggested. Enough has been said to show that on principle, as well as on grounds of convenience, no decree of this court with respect to the location of a land claim should be held to be a final decree which does not approve and adopt a plat and survey previously made, and actually before it. All cases, therefore, in which no such decree has been made, are to be regarded as pending cases, and subject to the provisions of the act of 1860.

The motion for a decree approving the survey made under the previous decree of this court in this case is denied, and the cause must be proceeded in subject to the provisions of the act of 1860. A special order will be entered, directing the proper monition to issue, admonishing all parties to intervene for their interest; and the cause must be

further prosecuted in conformity with the rules adopted by the court in this class of cases

UNITED STATES (SEMPLE v.). See Cases Nos. 12,661 and 12,662.

Case No. 16,251.

UNITED STATES v. The SENECA.

[1 Biss. 371;[1] 1 Am. Law Reg. (N. S.) 281; 4 West. Law Month. 78.]

District Court, D. Wisconsin. Sept., 1861.

STEAM VESSELS—INSPECTION OF HULLS AND BOILERS—INTERNAL COMMERCE OF STATE.

A steamboat employed in transporting passengers between ports in the same state is not liable to a penalty for not having the hull and boilers inspected under the act of congress of August 30, 1852 [10 Stat. 61], and the district court has no jurisdiction.

[Cited in The Daniel Ball, Case No. 3,564. Disapproved in The City of Salem, 37 Fed. 848.]

In admiralty.

J. B. D. Cogswell, U. S. Dist. Atty.

W. P. Lynde, for respondent.

MILLER, District Judge. It is propounded in the information, that at the port of Superior on Lake Superior, in this district, the collector of customs for the collection district of Michillmackinac, did seize said steamboat, and now holds her in his custody within the district, as forfeited to the United States for carrying and transporting goods and passengers betwen the ports of Superior and Bayfield, on Lake Superior, within this state, without license, and the inspection of her hull and boilers, required by the act of congress of July 7, 1838 (5 Stat. 304), and August 30, 1852, and in violation of those acts. By the information, this steamboat was employed exclusively in transporting passengers and property, between the ports mentioned in the information, which are located on Lake Superior, and within the state of Wisconsin. It is well settled that the constitutional power of congress "to regulate commerce with foreign nations and among the several states," does not embrace the purely internal commerce of a state. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Brooks v. The Peytona [Case No. 1,959]; Whitaker v. The Fred Lorents [Id. 17,527]; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344; Allen v. Newberry, 21 How. [62 U. S.] 244.

The act of congress of July, 1838, provides, that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport goods, etc., or passengers in or upon the bays, lakes, rivers or other navigable waters of the United States, without having first obtained from the proper officer a license under existing laws and without the inspection required, under a penalty of five hundred dollars for each violation of the act. And the act of August, 1852, continues this penalty for transporting or carrying passengers, without inspection. The terms of the act embrace the legal employment of this steamboat; but the act must be construed according to the constitutional provision as expounded by judicial authority. The steamboat was employed between places within this state. The contract of affreightment with the steamboat Fashion, in Allen v. Newberry, was for the transportation of leather on Lake Michigan, between ports in this state. The contract with the steamboat Lorents was for a passage on the Mississippi river, between ports in this state. The license required by the act is for carrying on the coasting trade, and the inspection is for the security of the lives of passengers on board of steam vessels. It is evidently an act for the regulation of commerce under the constitution. From the decisions referred to, it is apparent that this court of admiralty would not have jurisdiction of this steamboat, while engaged as propounded in the information. And it appears very plain that jurisdiction cannot be maintained of this information, for the reason that the steamboat is not alleged to be employed in the foreign or coasting trade, but was running between ports and places within the state of Wisconsin; and she was exclusively within and subject to state regulations and control. The district court for the state of Missouri, in U. S. v. The James Morrison [Case No. 15,465]; and U. S. v. The William Pope [Id. 16,703], hold the same opinion.

The information will be dismissed for want of jurisdiction.

For further authorities on the subject of admiralty jurisdiction on inland waters, consult The Belfast, 7 Wall. [74 U. S.] 624; The Eagle, 8 Wall. [75 U. S.] 15; The Flora [Case No. 4,878]; The Celestine [Id. 2,541]; Maguire v. Card, 21 How. [62 U. S.] 248; Smith v. The Pekin [Case No. 13,090]; Wilson v. The Ohio [Id. 17,825]; The Sarah Jane [Id. 12,349]; The Brooklyn [Id. 1,948]; The New World v. King, 16 How. [57 U. S.] 469; Leonard v. The Volunteer [Case No. 8,260]; Carpenter v. The Emma Johnson [Id. 2,430].

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Case No. 16,252.

UNITED STATES v. SEVELOFF.

[2 Sawy. 311;[1] 17 Int. Rev. Rec. 20.]

District Court, D. Oregon. Dec. 10, 1872.

"INDIAN COUNTRY" DEFINED—INTERCOURSE LAWS—SALE OF SPIRITS IN ALASKA—REVENUE LAWS—JURISDICTION OF DISTRICT COURT OF OREGON.

1. The "Indian country," within the meaning of the act declaring it a crime to introduce spirituous liquors therein, is only that portion of

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

the United States which has been declared to be such by act of congress; and a country which is owned or inhabited by Indians in whole or in part is not, therefore, a part of the "Indian country."

2. The act of June 30, 1834 (4 Stat. 729), defining the limits of the "Indian country," and regulating the trade and intercourse with the Indian tribes therein, is a local act, and was therefore not extended propria vigore over the territory of Alaska, upon its cession to the United States.

[Cited in Waters v. Campbell, Case No. 17,264; U. S. v. Williams, 2 Fed. 62; U. S. v. Bridleman, 7 Fed. 896; Kie v. U. S., 27 Fed. 352.]

3. The act of July 27, 1868 (15 Stat. 240), extending the laws "relating to customs, commerce, and navigation," over Alaska, construed not to extend the Indian intercourse act of 1834 (supra) over that territory, although the latter is a regulation of commerce "with the Indian tribes."

[Cited in U. S. v. Leathers, Case No. 15,581; U. S. v. Stephens, 12 Fed. 53.]

4. Section 20 of the act of 1834, supra, as amended by act of March 15, 1864 (13 Stat. 29), making the disposing of spirituous liquors to Indians a crime, is in this respect a general act, and prima facie applies wherever the subject-matter exists—an Indian under the charge of an agent appointed by the United States; but Alaska being acquired by the United States after the enactment of such amendment, it is doubtful whether it was extended over that territory propria vigore, upon its acquisition; and the act of July 27, 1868, supra, having provided for the subject of the introduction and use of distilled spirits in Alaska, by implication, congress thereby excluded such amendment therefrom.

5. The act of July 20, 1868 (15 Stat. 125), imposing a tax on distilled spirits, being a general act, and passed since the acquisition of Alaska, is in force there.

6. The jurisdiction of the district court for the district of Oregon over offenses committed in Alaska is conferred by section 7 of the act of July 27, 1868, supra, and by such section confined to violations of that act and the laws "relating to customs, commerce, and navigation," and therefore it has no jurisdiction over the crime of distilling spirits therein without paying a tax therefor.

[These were indictments against Ferueta Seveloff for unlawfully introducing liquors into the Indian country; and for being a distiller without paying the required tax. On demurrers to the indictments.]

Addison C. Gibbs, for plaintiff.

H. H. Northrup, for defendant.

DEADY, District Judge. These indictments were found by the grand jury of this district on November 11. The defendant was then in custody, upon a commitment issued by the United States commissioner, he having been before that time arrested in Alaska and brought to this district by "the military force of the United States," under section 23 of the Indian intercourse act of June 30, 1834 (4 Stat. 733).

The first indictment substantially alleges that the defendant, in the district of Oregon, and within the jurisdiction of this court, on June 8, 1872, did unlawfully introduce spirituous liquors, to wit, whisky, "into the Indian country, to wit, the island of Sitka, Alaska, United States of America."

The second one alleges that the defendant, of Sitka, Alaska, in the United States of America, and within the jurisdiction of this court, "on June 9, 1872, and prior thereto, without having paid the tax therefor, did presume to be and was a distiller of spirituous liquor, producing one hundred barrels or less of distilled spirits annually."

The third one alleges as the second one, that the defendant is of Sitka, and within the jurisdiction of this court, and that he, on June 8, 1872, at Sitka aforesaid, did dispose of spirituous liquors, to wit: whisky, to one John Doe, an Indian, whose name is unknown, and who resides at the Sitka Indian agency, and was, and is under the charge of one Major Harvey A. Allen, an Indian agent, appointed by the United States, and in charge of said agency, and commanding the military post at that place.

The defendant demurs to the indictments, and assigns for cause of demurrer to each of them: (1) That it does not state facts sufficient to constitute a cause of action. (2) That this court has not jurisdiction of the action.

The demurrers were argued and submitted together, on November 29. On the argument the points made in support of the demands, were: (1) The territory of Alaska, whether inhabited or owned by Indians or not, is not, in a legal sense, a part of the "Indian country," because not made so by act of congress. (2) That this court has no jurisdiction over crimes committed in the territory of Alaska, except in pursuance of section one of the act of July 27, 1868 (15 Stat. 240), and that the jurisdiction thereby conferred is limited to violations of that act and the laws of the United States relating to customs, commerce and navigation, then and thereby extended over Alaska.

The district attorney maintained that Alaska is a part of the Indian country, because it is inhabited by Indians, and because the act defining the Indian country, and regulating trade and intercourse with Indians, and all other acts of congress not locally inapplicable, were extended over the country, proprio vigore, as soon as it was acquired from Russia.

"The Indian country," within the meaning of the statute, making it a crime to introduce spirituous liquors therein, is only that portion of the United States or its territories, which has been declared to be such by an act of congress. Because a country is inhabited or owned in whole or in part by Indians, it is not therefore an Indian country, within the purview of the trade and intercourse acts.

This is plain upon the reason of the thing, and has long since been settled by the highest authority. The act of June 30, 1834 (4 Stat. 729), defining "the Indian country," is as much a local act as the donation act of

Oregon, or the penal code of the District of Columbia. By its terms, "the Indian country" was limited to "that part of the United States west of the Mississippi, and not within the states of Missouri or Louisiana, or the territory of Alaska, and, also, that part of the United States east of the Mississippi river, and not within any state, to which the Indian title has not been extinguished."

At an early day, a question arose as to whether the territory of Oregon was at the date of the act, 1834, "a part of the United States west of the Mississippi," and therefore within the limits of "the Indian country," as defined thereby. Congress assuming that it was not provided by the act of June 5, 1850 (9 Stat. 437): That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the territory of Oregon.

In 1853, the supreme court of the territory of Oregon in U. S. v. Tom, 1 Or. 27, held that the act of 1834 was not in force to the westward of the Rocky Mountains, until specially extended over the territory of Oregon, by the act of June 5, 1850, (supra.) In delivering the opinion of the court, Chief Justice Williams says: "Great Britain and the United States made a treaty in 1818, by which the northern boundary of the latter was extended west on the forty-ninth parallel of north latitude, to the Stony Mountains; and the territory beyond this was described as country to be held in the joint occupancy of the two powers. The Rocky Mountains were then the western boundary of the United States for legislative purposes, and so continued until 1846. The act of 1834 shows in terms, that it was intended for a country over which the general government had absolute and exclusive jurisdiction. Congress, by express enactment in 1850, extended said act to this territory, for the reason, as must be supposed, that it was not in force before that time. The act of 1834 then has no vitality here, because Oregon is Indian country, but by virtue of the act of 1850, which gives it effect here, so far as its provisions may be applicable." Olney, J., in the same case, speaking of the act of 1834, says: "It was a local statute, and was no more extended by the last clause of our organic act" (9 Stat. 329) "than were the local laws of the District of Columbia." McFadden, J., says: "I concur in opinion that whatever vitality the act of 1834, entitled, etc., may have in this territory, is derivable from the act of congress of June, 1850, which extends the act of 1834, or so much of it as may be applicable to the situation of affairs in the territory of Oregon."

Contrary to this, there is an "opinion" by Attorney-General Cushing, 7 Ops. Attys. Gen. 295, to the effect that Oregon was a part of "the Indian country," because at the date of such opinion, 1855, it was "a part of the United States west of the Mississippi." But this process of reasoning ignores the real inquiry, whether Oregon was such "a part of the United States," at the passage of the act, 1834, defining the Indian country, and within the real purview and intent of such act; and if it was not, being a local act, how and when did it become extended over Oregon, without and prior to the act of congress of June 5, 1850? The opinion also asserts that "the Indian country" in the acts of congress is not limited by any specific boundaries, but includes generally all "such portions of the acquired territory of the United States, as are in the actual occupation of the Indian tribes," while the Indian title thereto is unextinguished. In this conclusion, the "opinion" is in direct conflict with the decision of the supreme court in American Fur Co. v. U. S., 2 Pet. [27 U. S.] 358, where it was held, in an action to forfeit an Indian trader's goods, for taking whisky into "the Indian country" for the purpose of disposing of "the same among the Indian tribes," that a country purchased from the Indians subsequent to the act of March 30, 1802 (2 Stat. 139), and therefore no longer within the specific limits of "the Indian country" as defined by section 1 of said act, was not such country within the meaning of the trade and intercourse act, although it was then frequented and inhabited exclusively by Indian tribes. The fact that the Indian title to the country in question had been extinguished, subsequent to March 30, 1802, was only material to the decision, because the act of that date defining the boundary line between the said Indian tribes and the United States, expressly provided that if said line should thereafter be varied by treaty, then the provisions of such act should "be construed to apply to the line so varied," as if it were the original one. Therefore, it appears that the court held that the treaty of purchase of the lands wherein the supposed offense was committed, changed the line between the tribes and the United States, so as to exclude the lands so purchased from the limits of the Indian country.

But the act of 1834, supra, defines the Indian country absolutely by metes and bounds, and no subsequent purchase of lands within these limits would of itself operate to take them out of the category of Indian country, or except them from the laws regulating trade and intercourse with Indians who might be found thereon. Nor can the act of 1834 be held to have extended itself or migrated over Alaska upon its cession by Russia to the United States; for although such act by its terms applied to a large tract of country, and it were even uncertain whether its western boundary stopped at the Rocky Mountains or extended to the Pacific Ocean, still it was purely a local law, and contained no provision by which it should in the future be extended in any direction—as to California or Alaska—upon the contingency of their acquisition by the United States.

Did the act of 1868, supra, extend the act of 1834, supra, over Alaska? By section 1 of that act "the laws of the United States relating to customs, commerce and navigation" were extended over that country, and this language, taken unqualifiedly, is broad enough to carry with it the laws regulating "trade and intercourse" with the Indian tribes in Alaska.

The power to regulate commerce is conferred upon the national government by the constitution (article 1, § 8), in the same language, and upon the same terms in the case of "foreign nations," the "several states," and the "Indian tribes." It is under this clause that congress exercises the power to regulate trade and intercourse with the Indian tribes, as well without as within the Indian country. U. S. v. Cisna [Case No. 14,795]; U. S. v. Holliday, 3 Wall. [70 U. S.] 416. In the leading case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 189, Chief Justice Marshall says: "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse."

Unless, then, there is something in the circumstances of the case or in the act, from which it appears that congress did not intend to use the phrase, "laws relating to commerce," in an unqualified sense, it follows that the act of 1834 is in force in Alaska, as a regulation of commerce with the Indian tribes therein.

Considering that the laws regulating what is deemed commerce with the Indian tribes are generally confined to intercourse with them, and are mostly of a local character, and intended as a restriction upon commerce in the popular sense of the word, rather than otherwise—as a sort of police regulation to preserve the Indians from the injurious consequences of unrestricted intercourse with the white population, it does not appear probable that congress intended to extend any laws over Alaska, relating to commerce, except those relating to commerce "between foreign nations and the several states."

But in addition to this consideration, it appears that the whole subject of the introduction and use of distilled spirits in relation to all the inhabitants of Alaska, whether Indians or other, is regulated by the act of 1868. Section 4 provides: "That the president shall have power to restrict and regulate or to prohibit the importation and use * * * * of distilled spirits into and within the said territory," and also for the forfeiture of such spirits introduced or used contrary to such regulation, and for the punishment of the persons engaged in the violation thereof.

Under these circumstances, I conclude that the territory of Alaska is not a part of "the Indian country," so declared by law, whatever it may be in fact, and therefore it is not a violation of section twenty of the act of 1834, under which the first indictment is found to introduce spirituous liquors therein.

As to the second indictment, its sufficiency does not turn upon the point whether Alaska is a part of "the Indian country" or not. Section 20 of the act of 1834, as amended by the acts of February 13, 1862 (12 Stat. 339), and March 15, 1864 (13 Stat. 29), makes the disposing of spirituous liquors to any Indian under the charge of any Indian agent a crime, without reference to the locality in which the act was done. U. S. v. Holliday, supra, 418.

In this respect the act is a general one, and prima facie applies wherever in the United States the subject matter exists—that is, "an Indian under the charge of an Indian agent appointed by the United States." But this feature of the act being enacted as early as 1864, before Alaska was a part of the United States, it is not clear upon authority whether it extended proprio vigore, to Alaska upon its cession to the United States. It has been so common a habit of congress upon the acquisition of territory to specially extend the laws of the United States over it, that an impression seems to prevail that without such action these laws would not affect territory acquired after their passage. For my own part, I can see no good reason why any general law of the United States does not become in force at once, in any country acquired by it, without reference to the time of its passage.

Nevertheless, I am inclined to the opinion that if congress had intended this or any other provision of the intercourse act to be in force in Alaska, it would, in accordance with its common practice, have so declared in the act of July 27, 1868. This consideration, taken in connection with the provision already referred to in section four of such act, apparently intended to give the president power to provide by regulation for the whole subject of the introduction and use of distilled spirits in Alaska, points to the conclusion that congress has by implication excluded the amendment of 1864, touching the disposition of spirituous liquor to Indians, from the territory of Alaska, and left the subject to be governed by the act of 1868, supra.

I would not be understood as stating this conclusion without doubt. On the contrary, I have reached it with hesitation, and express it subject to correction. But in this case, it is safer to err, if at all, by declining the jurisdiction than to accept it. If congress should think it desirable that this or any other provision of the Indian intercourse act should be in force in Alaska, it can so provide, beyond doubt.

The third indictment is founded on section 44 of the act of July 20, 1868 (15 Stat. 142), imposing taxes on distilled spirits, etc. The treaty of purchase was concluded March 30, 1868, and this act being a general one and passed after that date, there can be no doubt that it is in force in Alaska as in any other part of the United States. But, notwithstanding this, it is equally clear that the demurrer is well taken. The jurisdiction of this court over offenses committed in Alaska is conferred by section seven of the act of July 27,

1868, and by such section confined to violations of that act and of the laws "relating to customs, commerce and navigation," thereby extended over that territory. It is only necessary to state, that the crime charged in this indictment is not a violation of either of these acts, and therefore not within the jurisdiction of this court.

The demurrers are sustained.

Case No. 16,253.

UNITED STATES v. SEVEN BARRELS DISTILLED OIL.

[6 Blatchf. 174.] [1]

Circuit Court, E. D. New York. July, 1868.

INTERNAL REVENUE LAWS — FORFEITURE OF PERSONALTY BY MORTGAGOR—RIGHTS OF MORTGAGEE.

1. Where the owner of personal property, mortgaged by him to another person, remains in possession of it after giving the mortgage, and commits acts in respect to such property, which work a forfeiture of it to the United States, under the 25th section of the internal revenue act of March 2, 1867 (14 Stat. 483), it must be condemned, even though the mortgagee is not shown to have been concerned in such acts.

[Cited in Boggs v. Com., 76 Va. 994.]

2. Nor can the demand of the mortgagee be paid by the court out of the proceeds of the property condemned.

3. The remedy of the mortgagee is, to apply to the secretary of the treasury for a remission of the forfeiture, as respects his demand.

[4. Cited in Coffey v. U. S., 6 Sup. Ct. 436, 116 U. S. 433, to the point that the circuit courts have original jurisdiction of suits in rem for forfeitures under the internal revenue laws.]

This was an information in rem, against certain crude oil and a still and apparatus for distilling such oil, alleged to have become forfeited to the United States, under the provisions of the 25th section of the internal revenue act of March 2, 1867 (14 Stat. 483). The only claim interposed, was by one Clauson, who intervened as claimant, by virtue of a mortgage upon the property, executed to him by one Seeley, the owner. On the trial, it was conceded, that acts and frauds shown to have been committed by Seeley while in possession of the property, as the owner thereof, were sufficient to forfeit it as against him. It was also admitted, that the property had been conveyed by the claimant to Seeley, in good faith, prior to the commission of the acts complained of; that the claimant then, in good faith, took back a mortgage upon the property, as security for the purchase money; and that there was justly due on the mortgage the sum of $2,400. It was further admitted, that the only interest of the claimant in the property, at the time of the commission of the acts entailing the forfeiture, was that derived from his mortgage; and that there was no evidence showing that the claimant had any knowledge of the frauds which were being committed by Seeley. On these facts the court directed a verdict for the government, condemning the property to be sold as forfeited to the United States, reserving the question, whether the fact that the claimant held a bonâ fide mortgage on the property, and was not shown to have committed any unlawful act, would preclude a decree condemning the whole property as forfeited.

BENEDICT, District Judge. The question raised certainly presents a case of hardship, but it must be decided adversely to the claimant. By the 25th section of the act of 1867, which is substantially a re-enactment of the 68th section of the act of June 30th, 1864 (13 Stat. 248), it is provided, that unlawful acts similar to those proved against the owner of this property, shall, when committed by the owner, agent, or superintendent of any still, boiler, or other vessel used in distillation, work a forfeiture of all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers and other vessels used in distillation, and all materials fit for use in distillation, found on the premises. The provisions of the 25th section are, by the 94th section of the act of June 30, 1864 (13 Stat. 265), made applicable to distilleries of coal oil, and are, therefore, applicable to the property in question, which consists of crude oil and a still, with the accompanying apparatus, used by Seeley, the owner, in the distillation of oil. If these provisions of law are to be taken to mean what they say, it cannot be doubted, that the only decree which can be rendered in this case is a decree which shall condemn this property to be sold as the absolute property of the United States, for, nowhere in the act can any provision be found which, by express terms, exempts from the effect of the decree any interest whatever in property condemned, whether acquired by mortgage or otherwise. The articles themselves and every part of them are made to become the property of the government, by operation of law.

But, it is said that the forfeiture is intended to be a punishment for a criminal act, and that, therefore, only the property of the offender is to be considered as intended to be affected by the act. No such intention, however, is disclosed. On the contrary, the statute expressly provides, that the act of the agent or the superintendent, without the knowledge of the owner of the still, shall forfeit it, thus clearly indicating a different intention. By the act, the still itself is treated as the offender, and is seized and sold because of its guilty use. The forfeiture results from the mode of use, and is created to enable the government to put an end to such use, by the apprehension of the thing used. This mode of enforcing obedience to revenue laws is common, and arises from necessity, by reason of the temptation to disregard laws of this class, and the difficulty of securing crim-

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

inal conviction under them. The effect of such provisions is to make every person interested in any way in apparatus capable of being used to defraud the government, responsible, to the extent of that interest, for the use of the apparatus, and, therefore, vigilant to aid the government in preventing an unlawful use of it. But, if it be held that only the interest of the actual offender is affected, a door for fraud and collusion is open, which would go far indeed to nullify the act. I find no such open door in the law. It is true that this construction of the statute will often work hardship; and the present may be an instance. It is to relieve such cases, while at the same time the efficiency of the law is maintained, that the power of remission is conferred on the secretary of the treasury. To that power alone this claimant can appeal.

I have not arrived at the conclusion above indicated without consulting, with great care, the views expressed by the learned judge of the Eastern district of Missouri, in the case of U. S. v. 396 Barrels of Distilled Spirits [Cases Nos. 16,502 and 16,503], where it was held, that the interest of a qualified owner, to the extent of his interest in the res, is to be protected by the court, but where, as I also notice, the learned judge remarks, that, if the res be in actual custody, a venditioni exponas will issue, and the lien demand will be paid out of the proceeds of the sale. How can this be? If only the interest of the offender be forfeited, how can any thing more than his interest be sold; or, if the court decrees a forfeiture of the res, and sells it as forfeited to the government, under what provision of law is it authorized to pay the proceeds of the sale to other parties than the government? To exempt a certain portion of the proceeds of the sale of the property condemned from the effect of the condemnation, seems to me to be an exercise, by the court, of a power which the law has conferred on the secretary of the treasury alone. With great deference, therefore, I feel obliged to differ with the judge who decided that case, and must hold that, upon the finding of the jury in this case, a decree must be entered, condemning the whole property, as forfeited to the United States, and declaring that the claimant has no remedy in this court for his demand.

Case No. 16,253a.

UNITED STATES v. SEVEN BARRELS DISTILLED OIL.

[8 Int. Rev. Rec. 162.]

District Court, E. D. New York. 1868.

FORFEITURES UNDER INTERNAL REVENUE LAWS — COSTS.

In proceedings in rem against merchandise, under the 48th section of the internal revenue act of 1864 [13 Stat. 248], in cases of adjudged forfeiture to the United States, claimants contesting such forfeiture are subject to costs.

At law.

BENEDICT, District Judge. This case presents the question as to what should be the judgment in regard to costs in proceedings in rem, taken to enforce the forfeiture which are provided for by the laws relating to the internal revenue.

The facts are as follows: An information was filed in the circuit court of this district against certain personal property, which was thereafter seized under process issued in rem. Upon the return day of the process, John H. Clausen appeared, and filed a claim to the property, averring that he was the mortgagee of the property, and entitled to the possession thereof, by virtue of the mortgage at the time of the seizure of the property by the marshal. No exception to the claim and intervention of the claimant was filed on behalf of the United States, and thereafter the claimant duly filed his answer, denying that the property in question had become forfeited, as alleged in the information, and at the same time, in pursuance of the rules and practice of the court, the claimant filed a stipulation, executed by himself, with a surety, in the sum of $250, conditioned that the claimant should pay all costs and expenses which should be awarded by the final decree of this court, or upon appeal by the appellate court, the parties thereto consenting that, in case of default of contumacy on the part of the claimant or his surety, execution for the sum of $250 may issue against their goods, chattels and lands. No stipulation for value was given, and the property remained in custody until sold by order of court pending the suit, in pursuance of a consent, and the proceeds paid into the registry.

Thereafter the cause came on to be tried before the court and jury, when it appeared by the admissions of the parties that the act set forth in the information had been committed by the owner of the property while in possession thereof, but no unlawful act had been committed by the mortgagee, who was the only claimant before the court. The court therefore directed a verdict for the government, subject to the opinion of the court, and thereafter ordered judgment to be entered upon the verdict, condemning the goods as forfeited to the United States, reserving, however, the question as to what judgment should be entered in regard to costs. That question, having been argued by the respective counsel, is now to be disposed of by the court.

The proceeding in question is purely a statutory one, and the authority for it is given in the forty-eighth section of the act of 1864, which declares that proceedings to enforce the forfeiture imposed by the act "shall be in the nature of a proceeding in rem in the circuit or district court where such seizure is made." According to the act, the proceeding, it is to be observed, is only required to be in the nature of a proceeding in rem. It is left to the courts, by rules and regulations, to establish the practice to be observed in conducting such proceedings, which practice

must, however, conform in nature to the well-known proceedings in rem, and which must, of course, be subject to any general statutory regulations which are applicable thereto. Such a statutory regulation in regard to the question of liability for costs is found in the act of May 8, 1872 (1 Stat. p. 277), where it is provided that "in every prosecution for any fine or forfeiture under any statute of the United States, and if judgment is rendered against defendant, he shall be subject to the payment of costs." The word "defendant" as used in this act must be held to include a claimant in action in rem for a forfeiture. No other party is before the court in such a proceeding to whom the word "defendant" can be applied. According to this act, then, in all cases like the present, when a verdict is rendered in favor of the government, a judgment must be entered condemning the property as forfeited to the United States, and condemning the claimant to pay the costs; and such a decree will cover all the costs of the cause. The act makes no allusion to any exceptions, nor does it permit the court to exercise any discretion in the premises. The claimant is made by law subject to the costs and all the costs incurred in the cause. If this view be correct, the court is not only without power in this case to exempt claimant from liability for costs, but it has no power to strike from the costs the items of custody fees incurred previous to the intervention of the claimant, nor the expenses attending the sale of property. These are legal items of costs in the cause, although not caused by the intervention of the claimant.

The effect thus given to the statute does not differ from the effect of an ordinary decree in proceedings in rem. In admiralty, where costs are awarded, the claimant is held liable for the costs, in addition to the value of the vessel and to the items attending her arrest and her sale. The John Dunn, 1 W. Rob. Adm. 160; The Dundee, 2 Hagg. Adm. 142; Coote, Adm. p. 95. In prize cases these items have not in all cases been charged against the claimant, as in the case of The Sally [Case No. 12,258]. In the case of The Langdon Cheves [Id. 8,063], they were allowed; but prize cases are exceptional, and, besides, in admiralty proceedings the costs are always at the discretion of the courts.

The present is a proceeding at common law, in which no such discretion can be exercised, unless given by statute. It follows, therefore, that in this case there must be a judgment in favor of the United States against the claimant for the amount of the costs of the cause, and this amount is not limited to the amount fixed in the stipulation for costs. The fact that the claimant signed the stipulation did not increase his liability, nor can the stipulation have any effect to diminish that liability, which the statute imposes upon him.

As to the stipulator, the case is different. He is only liable by virtue of his stipulation, and that liability cannot exceed the amount of the stipulation. The judgment will accordingly provide that for that sum, which in the present case is $250, execution will issue against the goods, chattels, and lands of the stipulator, according to the terms of the stipulation, in accordance with the practice in this particular in admiralty proceedings in rem (Gaines v. Travis [Case No. 5,180], and Holmes v. Dodge [Id. 6,637]), which, when applicable, are directed by the rules of this court to be followed in cases of seizure on land upon information.

Case No. 16,253b.

UNITED STATES v. SEVEN HUNDRED AND THREE CASKS OF RICE.

[N. Y. Times, Sept. 20, 1862.]

District Court, S. D. New York. Sept. 16, 1862.

PRIZE—JURISDICTION—CAPTURES ON LAND.

[1. The practice of the federal courts in admiralty is governed by the rules of admiralty law found in the English reports.]

[2. Prize jurisdiction does not depend on the locality of the seizure, but on the subject-matter. A capture by naval, as distinguished from land, forces, of property stored in a warehouse near the shore of a harbor, is a subject of prize jurisdiction, and the property may be condemned as prize.]

Prize. Certain rice was stored in a warehouse close by the river, which communicated with Charleston harbor, and was captured by the launches of the Albatross and her consort.

HELD BY THE COURT (BETTS, District Judge): That the practice of the United States courts is governed by the rules of admiralty law disclosed in the English reports. That in England the prize jurisdiction does not depend upon locality, but on the subject-matter. It is said by Sir Wm. Scott in The Rebeckah, 1 C. Rob. Adm. 227, that "a maritime capture effected by naval persons using a force subject to their use, distinguished from an ordinary land force subject to military persons, was a maritime prize."

Decree, therefore, condemning this property as lawful prize.

Case No. 16,254.

UNITED STATES v. SEVEN LARGE FERMENTING TUBS.[1]

District Court, E. D. New York. Feb. 8, 1867.

FORFEITURES AND PENALTIES—CONDEMNATION OF PROPERTY—INFORMER—PERCENTAGE.

[When property has been condemned, and the proceeds of sale do not exceed $500, the informer is entitled to his percentage upon the

[1] [Not previously reported.]

gross proceeds of sale; to be paid him, however, after payment out of the fund of the costs of the proceedings.]

At law.

BENEDICT, District Judge. This case comes before me upon a motion for distribution of the funds in court. The question is as to the sum to which the person adjudged to be the informer is entitled under the circular of the secretary of the treasury, where property has been condemned, the proceeds of sale amount to not exceed $500. According to the terms of the treasury circular, I am of the opinion that the percentage of the informer must be calculated upon the gross proceeds of the sale of the property condemned. The costs of the proceedings through which the fund in court is realized, and which, moreover, are for services rendered before any right of the informer attaches, are, however, a charge upon the whole fund, and, in the distribution, must be paid out of the proceeds of sale before the share of the informer can be distributed to him.

Case No. 16,255.

UNITED STATES v. SEVENTEEN EMPTY BARRELS.

[3 Dill. 285;[1] 8 Chi. Leg. News, 74; 21 Int. Rev. Rec. 391.]

Circuit Court, W. D. Missouri. Nov. 23, 1875.[2]

SEIZURE OF DISTILLED SPIRITS—REV. ST. §§ 3453, 3459, CONSTRUED—INFORMATION OF FORFEITURE.

1. Section 3459 of the Revised Statutes prescribed the notice required and not the previous rules of the court.

2. In an information under section 3453 of the Revised Statutes, it is sufficient to follow the language of the statute and the allegation *held* sufficient without an express averment that the taxes on the spirits were not paid.

3. The tools etc., found and seized in the place where the distilled spirits were found and seized, were, under the averments, subject to seizure and forfeiture.

[Error to the district court of the United States for the Western district of Missouri.

[This was an information of forfeiture against seventeen empty barrels, etc., Adler & Furst, claimants.]

C. H. Krum, Jeff. Chandler, and H. S. Musser, for plaintiffs in error.

J. S. Botsford, U. S. Dist. Atty.

DILLON, Circuit Judge.—The seizure of distilled spirits, raw materials, tools, etc., was made under section 3453 of the Revised Statutes. The claimants, as owners, applied under section 3459 of the Revised Statutes for the return of the property seized, and executed the bond therein provided for, which was filed with the proper district attorney. The district court ordered personal service of notice of the pendency of the proceedings to be given to the parties executing the bonds ten days before the term fixed for trial. The required notice was given. A motion was made on a special appearance to quash the notice, because twenty days notice had not been given as required by rule 45 of the United States district courts for the districts of Missouri.

The answer to this objection is that section 3459 of the Revised Statutes prescribes the mode of proceeding in the case as to notice, and not the rule of the court referred to.

The third article of the information was demurred to and the demurrer was overruled and judgment of forfeiture entered. Without going into detail my judgment is that the allegations of the third article using and following the language of the statute are sufficient in substance. Under this article it is specially urged that it should be alleged that the taxes were not paid on the spirits. But the averment is that the spirits "were in the possession and ownership of the claimants for the purpose of being sold and removed by them in fraud of the internal revenue laws, and with the design to avoid the payment of said taxes." This is sufficient.

And it is my opinion that the tools, etc., found and seized in the place and inclosure where the distilled spirits were found and seized, were, upon the averments of this article, subject to seizure and forfeiture. It is my opinion, too, that the fourth article is also good, upon a general demurrer. The court cannot judicially notice and on demurrer decide that the averment that certain materials were "raw materials" were not so in the face of the direct allegation of fact to the contrary.

I have some doubt whether the kind of article subject to tax, into which it is alleged these "raw materials" were intended to be manufactured for the purpose of fraudulently selling such manufactured article with the design to evade the payment of said tax, ought not to have been specifically averred, yet I am inclined to think this generality of statement would not be sufficient ground of reversal where judgment went upon a general demurrer. But, however this may be, the third count is sufficient to support the judgment.

I have no doubt as to the jurisdiction of the district court. Affirmed.

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

[2] [Affirming Case No. 14,424.]

Case No. 16,256.

UNITED STATES v. SEVENTEEN PACKAGES, ETC.

[2 Am. Law Rev. 785.]

District Court, E. D. Texas. March Term, 1868.

DUTIES PAID TO THE CONFEDERATE GOVERNMENT.

[Payment of duties on goods imported at a place entirely in control of the insurrectionary power during the war of the Rebellion was not a discharge of the duties. The acknowledgment of belligerent rights did not make the rebel power a government, either de jure or de facto.]

[In this case, decided at the March term, 1868, the goods were imported into Brownsville in 1864. The claimant, Juan Rico, paid the duties to the Confederate authorities, the then only existing and de facto government at the place of import, and claimed that such payment was a satisfaction of all liability for duties, and the government of the United States could not rightfully set up any claim for duties; and relied upon the case of U. S. v. Rice, 4 Wheat. [17 U. S.] 246, better known as the Castine Case, and the rulings of the treasury department, in support of his view.

The United States district attorney, D. J. Baldwin, denied the applicability of the Castine Case to the one at bar, and contended, that by the statutes of the United States, as well as by the law of nations, the goods were liable.

THE COURT (WATROUS, District Judge) held, that payment of the duties to the rebel authorities was no satisfaction; that the rebel power was not a government at all, neither de jure nor de facto; that it was a belligerent power, but not a sovereign authority, state, or nation; and that the acknowledgment of belligerent rights was only made in the interests of a common civilization and humanity to take the rebels out of the category of pirates, &c., and subject them to the treatment accorded to prisoners of war by civilized nations.

Case No. 16,257.

UNITED STATES v. SEVENTY-EIGHT BARRELS.

[7 Int. Rev. Rec. 4.]

District Court, S. D. New York. 1867.

VIOLATION OF INTERNAL REVENUE LAWS — FORFEITURE OF SPIRITS—PRESUMPTIONS—CONSTITUTIONAL LAW.

[1. Where spirits seized for alleged violation of the forty-fifth section of the internal revenue law (14 Stat. 163) are claimed by one who asserts that he purchased them in the open market, the fact that the barrels bear all the brands indicating payment of the taxes does not create a presumption that such taxes have been paid.]

[2. The forty-fifth section of the internal revenue law (14 Stat. 163) is not rendered unconstitutional by the provision which requires affirmative proof on the part of the claimant of the payment of the taxes due on the spirits seized.]

This was an action to forfeit the spirits under the 45th section of the internal revenue act [14 Stat. 163]. The goods were seized in different lots, some at the rectifying establishment of Mr. Wechsler, corner of Sheriff and Houston streets, and some in transit thither from the rectifying establishment of Mr. Bunn, the claimant in the case. The government gave testimony to show that the spirits were branded as rectified spirits, when they were in fact raw spirits, and that the claimant offered the officers $500 to let the spirits go, and afterward went to Mr. Blake, the collector, to get him to decide that it was rectified, and said he would send a friend to see him and that the friend intimated that in case of such a decision a $1,000 bill could be left at his house.

The barrels were branded as required by law when seized, and the claimant testified that he bought the spirits in open market of various dealers, and paid over $2 a gallon for it, and that the barrels were properly branded when he bought them. That it was utterly impossible for him to prove the payment of taxes on the identical lot of spirits seized, for the reason that the same had changed hands frequently in the market; that the brands had been frequently erased as required by law, and the identity of the spirits was gone, and that it was impossible for any rectifier or dealer to prove the payment of taxes on spirits bought in the open market. Mr. Wechsler testified to the same effect.

Counsel for claimant then raised the following points, and requested the judge to direct a verdict for claimant. (1) That the presumption in the absence of direct proof to the contrary, if the 45th section is constitutional, is that the taxes on the spirits seized were paid, because all the brands indicating the payment of taxes required by law were on the barrels seized. (2) The only ground on which government can recover is, because the claimant has failed to prove affirmatively in accordance with the 45th section the payment of the taxes on the spirits seized. (3) The 45th section requiring this affirmative proof on the part of the claimant is unconstitutional, because it amounts to a virtual prohibition of the traffic and commerce in spirits. (4) That congress has no power to forbid and prohibit the commerce and traffic in spirits. (5) Congress cannot indirectly do that which it has no power to do directly. (6) That exacting and requiring of a trader or dealer the performance of some impossible thing, as a condition of permitting him to trade or deal in spirits is virtually but an indirect way of forbidding and prohibiting him of trading in spirits at all. (7) That in this case the evidence is that it is utterly impossible for claimants to prove the payment of taxes of spirits seized, or for

any rectifier, dealer or trader to show payment of taxes on spirits bought and sold in open market, for the reason that by frequent change, &c., the identity is gone.

Mr. Phelps, Asst. U. S. Dist. Atty.

A. J. Dittenhoeffer, for claimant.

THE COURT overruled these points and directed a verdict for the government.

Case No. 16,258.

UNITED STATES v. SEVENTY-EIGHT CASES OF BOOKS.[1]

[2 Bond, 271.][2]

District Court, S. D. Ohio. April Term, 1869.

CUSTOMS LAWS—FORFEITURE FOR UNDERVALUATION — INFORMATION — NECESSARY AVERMENTS — INTERCOURSE WITH CANADA—REPEAL OF STATUTES.

1. In an information under section 66 of the act of congress of 1799 [1 Stat. 677], alleging fraud in the importation of merchandise at an undervaluation, it is necessary to aver that the valuation was under cost at the place of exportation.

2. The information in this case not containing this averment is defective, but the district attorney is permitted to amend.

3. In the additional or amended information, based on section 1 of the act of congress of March 3, 1863 [12 Stat. 737], it is not necessary to allege that the person making the fraudulent entry, was either owner, consignee, or agent of the property, if it appears from the statements of the information that the person making the entry was the owner, or acted as an agent of the owner.

4. An averment that the requirements of the statute have been complied with, which are merely directory to the officers of the revenue and the importer, is not necessary under the act of March, 1863.

5. The acts of 1799 and 1863 extend and apply to commercial intercourse between Canada and the United States as well as to other foreign countries.

6. Section 66 of the act of 1799 is not repealed by section 1 of the act of March, 1863, the latter being in aid of, or auxiliary to, the act of 1799.

Information of forfeiture for violation of customs laws.

Durbin Ward, U. S. Dist. Atty., and Henry Stanbery, for the United States.

Tilden & Stevenson and F. Lincoln, for claimants.

LEAVITT, District Judge. The questions before the court arise on exceptions in the nature of a demurrer to the original information, and the first charge in the amended information. The original information alleges as the ground of forfeiture that seventy-eight boxes of books were imported into the United States from the port of Sarnia, in Canada, to the port of Port Huron, in the United States; that on November 4, 1868, some person, to the district attorney unknown, made an entry at the last-named port on an invoice, purporting to be an invoice of all the books contained in said boxes, at their actual cost, as required by the act of congress of March 3, 1799; that it was afterward found that said invoice and entry were false and fraudulent, and that the person who had possession of said books unlawfully, knowingly, and fraudulently entered the same at said port, and invoiced them below the actual cost thereof, with intent to defraud the United States of the duties imposed thereon by law, contrary to the statute, whereby said books became forfeited to the United States. This information is based upon section 66 of the act of March 3, 1799, which provides, "that if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof, at the place of exportation, with design to evade the duties thereon, or any part thereof, all such goods, wares. or merchandise, or the value thereof, shall be forfeited."

It is objected to this information that it is defective in not averring that the alleged false and fraudulent invoice of the books was below their actual cost at the place of exportation. The averment is, that they were invoiced below their actual cost, but it is not averred that it was below their actual cost at the place of exportation. The question is, whether such an averment is not necessary to sustain the information. The courts of the United States, in administering the navigation and revenue laws, have been uniformly liberal in their practice, and in their construction of statutes on these subjects. But I can find no case in which they have held that an information, which did not describe substantially the statutory offense on which a forfeiture was claimed, could be sustained. The case of The Hoppet, 7 Cranch [11 U. S.] 389 (2 Pet. Cond. R. 542), and the case of The Nancy [Case No. 10,008], have a direct bearing on this subject.

Now, it is clear, as to this information, that there is no averment that the offense defined in section 66 of the act of 1799 has been committed. It is merely alleged that the goods were invoiced below their actual cost, but the important averment, that it was below their actual cost at the place of exportation, is omitted. The statute makes this a material element as a ground of forfeiture, and it should have been averred in the information. In the case referred to, Chief Justice Marshall held, "that the information is not made good by the averment that the offense was committed against the provisions of certain sections of the act of congress." The offense must be specifically defined, that the claimants may know with certainty what are the grounds on which a forfeiture is claimed.

[1] [The proceedings embraced in this and the two following reports (Cases Nos. 16,258a and 16,258b) are comprised in one report in 2 Bond, 271–286.]

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

The averment, merely, that the books were invoiced below their actual cost, without alleging that it was below the actual cost at the place of exportation, does not advise the claimant of the charge he is required to meet. If desirous of taking testimony to rebut the charge of a fraudulent invoice, as being below cost, the information leaves it wholly uncertain as to the place and it would be impossible for him to prepare a defense. The exception to the original information is, therefore, sustained on the ground referred to, but the defect is amendable, and the district attorney has leave to amend his information.

And this brings the court to the consideration of the exceptions to the amended, or, as it is called, additional information, filed by the district attorney on the 17th of March.

I. The first ground of exception to the second information is, that it does not allege "that the person who caused the goods mentioned in said information to be imported into the United States, and who made an entry thereof below their value, by means of an undervaluation in a false and fraudulent invoice, was either the owner, consignee, or agent of the owner of said goods." The second or additional information is based on section 1 of the act of congress of March 3, 1863. It avers, in substance, that one Henry J. Shaw, having the custody and control of two hundred and four boxes or packages of books, subject to duty, caused the same to be transported from Sarnia, in Canada, in a boat or vessel, across the St. Clair river, to the port of Port Huron, in the United States, and imported the same at said port, and made, or caused to be made, an entry of the books, upon an invoice setting forth their value greatly below their value at Sarnia, or in said dominion of Canada, or at Port Huron, and greatly below their cost in the country from which they were imported; that such undervaluation was with the unlawful intent of causing an entry to be made to evade the payment of the just and full amount of the duties chargeable thereon; that seventy-eight cases or boxes, of the two hundred and four cases or boxes so entered, were sent to Cincinnati for sale, and were there seized as forfeited, and that said seventy-eight cases were by Shaw, or by his procurement, knowingly and fraudulently invoiced greatly below their true value at Sarnia, or in the dominion of Canada, or at Port Huron, or the principal markets of Canada, or in the country whence they were exported, with intent to evade the payment of duties, and contrary to the statute.

The question arising on the first exception to the first count of the amended information just referred to, is, whether it is necessary to aver in the information that the entry of the books alleged to have been fraudulently invoiced, was made by the owner, consignee, or agent. It is not so alleged in the information, but it is averred that the books were in the custody of, and under the control of Shaw, and that he caused the same to be fraudulently entered at an undervaluation.

Section 1 of the act of March 3, 1863, after prescribing with great minutenes the prerequisites to a legal entry of property imported from a foreign country, subject to an import duty, provides that after July 1, 1863, no goods, wares, or merchandise imported into this country, shall be admitted to entry without a full compliance with the requirements of the statute; one of which is, that the invoice shall be verified by the oath of the owner, or consignee, or an authorized agent of the owner or consignee. And the penal clause of the section declares, "that if any such owner, consignee, or agent . . . shall knowingly make, or attempt to make, an entry thereof, by means of any false invoice, . . . or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, . . . such goods, wares, and merchandise shall be forfeited," etc.

Does the first count of the second information contain averments of a fraud, which, within the scope of the statute, subjects the property in question to forfeiture, and sufficient to require the claimants to answer the charge of fraud? As before stated, the exception insisted on, to this part of the information, is, that it does not allege that the party making the false invoice was either owner, consignee, or agent. It is true there is no direct averment of this fact. But it is averred that the books were in the custody of, and under the control of Shaw, who is charged with making the fraudulent invoice. This is equivalent to an allegation that he was the agent. He who has for the time being, and for a special purpose, the custody and control of another's property, is his agent. And it would not be a strained construction of the statute, that Shaw, who made the entry of the books, acted as the agent of the owners within the fair import of the law.

But if this view is erroneous, another inquiry pertinently arises, namely, whether it was necessary to allege the fact, that the person making the entry was either owner, consignee, or agent. It is well settled law, that what is mere matter of defense need not be set out in an information. All that is required, is that enough should be stated to show a violation of the statute. The gist of the offense which subjects property to forfeiture under the section of the law referred to, is the procurement of an entry of goods imported from abroad by means of a false and fraudulent invoice. It is distinctly charged that Shaw caused an entry to be made, under such an invoice, with knowledge that the prices were greatly below the actual value of the property, and with the intent thereby to defraud the government of the legal duties imposed by law. This is the substan-

tial charge relied on as the ground for the forfeiture of this property, set forth by clear and distinct averments, and which the claimants are required to meet. Whether Shaw was or was not the agent of the owner is an incidental fact, in no sense affecting the charge of fraud in the entry of the books. If the invoice made by him was false and fraudulent, it is immaterial in what capacity, or under what pretenses he made it. If false and fraudulent, the property entered was forfeited when the fraud was perpetrated, without reference to the capacity in which he acted.

It may be said, also, as showing the sufficiency of the count under consideration, that no skillful pleader would consider it safe to make the positive averment in the information, that Shaw was either the owner, consignee, or agent of this property. If such an allegation had been made, it would be necessary to prove it as alleged. But the person making the entry may have given false information to the collector, and represented himself as owner, consignee, or agent contrary to the fact. It would be unsafe, therefore, to allege as a fact what on the hearing would be disproved, and thus prevent a decree of forfeiture. Or the case may be supposed, that the person making the entry refuses to declare in what relation he stands to the property; shall the object of the law be thwarted by such refusal?

There is still another exception to the first count of the second information strenuously urged by counsel, namely, that it is not alleged that the invoice by which the fraudulent entry was made, was made, or certified to, before a consul, vice-consul, or other commercial agent of the United States. Section 1 of the act of March 3, 1863, before referred to, requires all invoices of goods or merchandise, imported into the United States from a foreign country, to be made in triplicate, and signed by the person owning or shipping the same; and that the invoices shall, at or before the shipment, be produced to the consul, vice-consul, or commercial agent of the United States nearest the place of shipment, and shall have indorsed on them a declaration by the purchaser, manufacturer, owner, or agent that the invoices are in all respects true.

Such are the plain requirements of the statute, but it does not follow, that in a proceeding to condemn property for a fraudulent entry by means of a false invoice, it is necessary to aver in the information that all the formal requirements of the statute, as to the verification of the invoice prior to the shipment, are to be specially set out, with an averment that they have been complied with. These provisions are directory to, and obligatory upon, persons importing goods from a foreign country, and on all officers of the United States intrusted with the execution of the import laws. They are intended to insure the payment of all lawful duties imposed by law, and to guard the government against frauds in the collection of its revenue. But in a proceeding to condemn property for frauds in its importation, it is surely no defense that the owner or importer has failed in any particular to comply with the law; nor can it be tolerated that neglect of duty by an officer of the United States, whether resulting from his ignorance or corruption, shall shield property infected with fraud from the condemnation to which it is subject by law. It would be strange, indeed, if the default of the foreign owners or shippers of the property in question, in not having made out and authenticated triplicate invoices of the property shipped, could be a vindication of a fraud committed at the port of entry in this country. If it were so, the government would have a beggarly account of import duties, as it would be a facile way for a foreign owner or shipper to evade the payment of duties, and secure himself against a forfeiture of his property, by willfully neglecting to comply with a prerequisite of the law. It seems clear, therefore, that any irregularities or omissions, on the part of the importers or owners in doing what the law required, is no answer to the charge of fraud in causing the goods to be entered at an undervaluation, with intent thereby to evade the payment of the lawful duties.

From these considerations, without enlarging on this point, the court is led to the conclusion that the second ground of exception to the information must be overruled.

But there is a further ground urged in argument, though not set forth in the exceptions filed, that as the importation alleged in the information was from a port or place in Canada, the acts of March 3, 1799, and March 3, 1863, do not apply, and that no legal ground of seizure is therefore stated. This point not being presented in the exceptions filed, might perhaps be passed without notice. The argument is that the acts of 1799 and 1863 refer to, and embrace only, ocean commerce, and do not extend it to commercial intercourse with countries adjacent to the United States, under foreign dominion. And the acts of 1821 and 1823, and perhaps other statutes regulating trade and intercourse between the United States and Canada, as applicable to the importation of the books in question, are referred to. Without stopping to examine and analyze these acts, it seems to the court that the exception under consideration is fully answered by a reference to the first section of the act of 1863. That act, being the latest in date on the subjects embraced in it, must be regarded as superseding any prior legislation in conflict with its provisions. The first clause of the first section of that act in terms applies "to all invoices of goods, wares, and merchandise imported from any foreign country into the United States." And in a subsequent clause, before recited, specifies

and denounces the penalty for any fraudulent practices, in invoicing and entering property subject to duty, with intent to evade the payment of duties. Among these the act of knowingly making, or attempting to make, an entry by means of "any false invoice" is mentioned, and a forfeiture provided for, as the penalty for the act. Now, if an importation from a port in Canada is an importation from a foreign country, which can not, of course, be controverted, it follows that it is not only within the scope and intention of the act of 1863, but within its terms. And this remark applies with equal force to the act of 1799, so far as it is not repealed by repugnant and conflicting provisions of subsequent acts.

It is perhaps not material to notice the argument of the learned counsel for the claimants, intended to prove that the act of 1799 is wholly repealed by the later legislation of congress. On that question there is an authority, which, I think, is applicable and decisive. I refer to the case of Wood v. U. S., 16 Pet. [41 U. S.] 342. It is true the case was decided in 1842, and could, therefore, have had no reference to the act of 1863. But the principles laid down by the learned Judge Story, in giving the opinion of the court, have a direct application to the question of the repeal of section 66 of the act of 1799. After referring to the fact that there had been legislation on the subject of foreign importations, subsequent to the passage of that act, the court say, at page 362: "The question then arises whether section 66, of the act of 1799 has been repealed, or whether it remains in full force. That it has not been expressly or by direct terms repealed, is admitted; and the question resolves itself into the more narrow inquiry whether it has been repealed by necessary implication. We say, by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, the cases provided for by it; for they may be merely affirmative, or accumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy. And it may be added, that in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous, to guard against frauds by importers, it would be a strange ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud, should be deemed repealed, merely because in subsequent laws other persons and authorities are given to the custom-house officers, and other modes of proceeding are allowed to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary inference in all such cases, is that the legislature intend the new laws to be auxiliary to, and in aid of the purposes of the old law, even when some of the cases may equally be within the reach of each. There ought certainly under such circumstances, to be manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former."

This reasoning certainly applies to the question before the court, and sanctions the conclusion that section 66 of the act of 1799 is not repealed, so far as it contains provisions not repugnant to the act of 1863. While the latter act changes and makes more specific the duties of importers and collectors of customs, it leaves unrepealed many of the provisions of the old law, showing, in the language of Judge Story, that it was intended the later law "should be auxiliary to, and in aid of the purposes of the old law."

I have only to add, that with the amendment indicated as necessary to the information originally filed, it may be sustained under section 66 of the act of 1799.

The exceptions to the first count of the additional or amended information are overruled.

[See Cases Nos. 16,258a and 16,258b.]

Case No. 16,258a.

UNITED STATES v. SEVENTY-EIGHT CASES OF BOOKS.

[2 Bond, 281.] [1]

District Court S. D. Ohio. April Term, 1869.

CUSTOMS LAWS—FORFEITURE FOR UNDERVALUATION—EVIDENCE—RULE OF VALUATION—PROVINCE OF JURY.

1. The first count in the information is based on section 66 of the act of 1799, and the second on section 1 of the act of March, 1863, but they both contain substantially the charge of fraud in entering books at the custom-house, at a fraudulent undervaluation. Both counts charge that the entry at a false valuation was with an intent to defraud the United States of the full legal tax or duty.

2. The evidence must satisfy the jury that the books were invoiced below their value, and also that this was done with the intent charged in the information.

3. The entire entry at Port Huron embraced 204 boxes, but of these, 78 only were sent to Cincinnati and seized there, and are all now proceeded against for forfeiture; but in considering the question of undervaluation, the jury may look to the entry of the 204 cases. Eight of the 78 cases having been released from seizure, there are but 64 cases to which the question of forfeiture applies.

4. The books were purchased in London and Edinburgh, were shipped to Montreal, and there the invoices were made out, and were verified before the vice-consul of the United States at that place, and the invoice prices should have been the value of the books at that

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

place, but in determining the value at Cincinnati, the cost of transportation from Montreal to that place is to be added.

5. The question in the case is one of fraud, which is partly a question of fact and partly of law. It is for the jury to find the facts proving the alleged fraud, and for the court to determine whether the facts proved import a fraud in law.

6. There can be no question, if the jury are satisfied that the claimant entered the books knowingly at a false valuation, it is a legal fraud, and subjects the books to forfeiture.

[This was an information of forfeiture against seventy-eight cases of books, under the customs laws, on the ground of a fraudulent undervaluation. Certain exceptions to the information were heretofore overruled. Case No. 16,258.]

Warner M. Bateman, Dist. Atty., and Henry Stanbery, for the United States.

Lewis H. Bond, for interveners.

LEAVITT, District Judge (charging the jury). You will have understood from what has taken place in your presence, since you took your places as jurors, the nature of this proceeding and the questions on which you are to pass. It is a suit prosecuted by the United States for the forfeiture of a large quantity of books, alleged to have been fraudulently imported, in violation of law. In the information filed by the government, which presents the issues you are to decide, there are two counts or charges, on which a verdict of forfeiture is claimed by the counsel for the United States. The first is based on section 66 of an old statute, passed March 3, 1799; and the second charge is framed under section 1 of the act of March 3, 1863. As these sections are of great length and somewhat complicated in their provisions, I will not recite them at length to the jury. They are evidently intended to provide for and punish, by forfeiture or otherwise, every possible fraud in the importation of goods or merchandise from a foreign country, entered at a false valuation, with an intent to defraud the government of the legal tax or duty. Without attempting to dissect or analyze separately the charges stated in the two counts of the information, it may be stated that they both aver substantially, that seventy-eight cases of books were imported from Sarnia, a port in Canada, into Port Huron, a port in the United States, and fraudulently entered at the custom-house at the latter port, at a price greatly below their actual value, with the fraudulent intent of evading the just and legal duties to which they were subject; whereby, it is averred, the books are forfeited to the United States.

This brief statement exhibits the case which you are to decide by your verdict. The inquiry for your consideration is whether the fraud charged is proved to your satisfaction by the evidence adduced. The alleged fraud is denied by Thomas J. Shaw, who is before you claiming the books in his own right, or as agent for others, and denying, by his answer duly filed, all the allegations of fraud as set forth in the information.

It is claimed by the United States that the proof shows that there were 204 cases of books entered at the custom-house at Port Huron, at a false valuation, by the claimant Shaw, as to which the charge of fraud applies. But, of these 204 cases imported, only 78 were sent for sale at Cincinnati, and were all that were seized here. It is only, therefore, the 78 cases that are in controversy in this proceeding, but in the consideration of the question of undervaluation, it will be competent for the jury to consider the entire importation of the 204 cases. It may be proper here to remark, that of the 78 cases sent to Cincinnati, which are brought by the seizure within the jurisdiction of this court, eight cases have been released by order of the secretary of the treasury, upon the application of Bell & Dolby, booksellers of London, as to these the charge of fraud in their importation does not apply, and the counsel for the United States do not claim a forfeiture as to them. There are, therefore, 64 cases only now in controversy, and which are claimed as forfeited. But it is claimed by the United States, that there was fraud in the entire importation; and that, if the jury is not satisfied of the fraud as to all these books, the proof as to the 64 cases is clear.

It will be obvious to the jury that their principal inquiry will be, whether these books were imported and entered by Shaw at a false or undervaluation, with the design of evading the payment of the 25 per cent. ad valorem duty imposed by law. If the jury find that the evidence justifies the conclusion that the books were knowingly entered at an undervaluation, with the fraudulent intent charged, the verdict of forfeiture is an unavoidable result. The law is clear either that there must be a forfeiture of the books, or a recovery of the value of the property infected by the fraud. The government proceeds in this case for the forfeiture, and your verdict must respond to that claim.

There has been a very protracted investigation in respect to the value of these books, and their importation. It seems they were purchased in London and Edinburgh by the claimant Shaw, and have been traced to Montreal, where they were landed early in October, 1868. The invoices for the purpose of entry at the custom-house at Port Huron were made at Montreal. It is proved that the invoices embraced 204 cases of books, and were made out in triplicates, as required by our law. Were the prices fixed in the invoices below their true value? These invoices were submitted to and verified before the vice-consul of the United States at Montreal. In fixing their value, the market prices at Montreal should have been the

rule of value; and in order to determine their value here, the cost of transportation from Montreal to Cincinnati should be added.

As to the market value of the 78 cases sent to Cincinnati, the testimony is very clear and explicit. Two witnesses, Hill and Rickey, both booksellers in this city, acted as appraisers of the books, and examined them critically, with a view to an appraisement to be returned under oath. Clarke, also a bookseller, and of long experience in the business, inspected the books, with a view to their market value. These intelligent and perfectly reliable witnesses unite in saying the books were invoiced greatly below their value. If the jury give credit to this testimony, their only inquiry will be, was Shaw, who made the invoices, aware of this undervaluation, and was it with an intent to defraud the government of the legal tax? This inquiry is submitted to the jury, to be answered in the light of all the facts in evidence in the case.

It has been often held by courts and judges, that fraud is partly a question of fact and partly a question of law. It is the province and duty of a jury to decide what facts are proved, sustaining the allegations of fraud, and for the court to determine whether such facts are sufficient in law to constitute a fraud. The fact of fraud is not to be presumed without evidence sustaining the charge. In this case the jury must be reasonably satisfied that Shaw was actuated by a fraudulent purpose in valuing these books, and in their entry at the custom-house, but if they are convinced the invoice rates were greatly below the true value of the books, the fraudulent intent might well be presumed. And I may remark in closing, that this not being, in a legal sense, a criminal case, it is not required that the evidence should be such as to exclude all doubt, and the jury may properly decide according to the preponderance of the evidence.

The jury returned as their verdict that the books were forfeited to the United States.

[See Case No. 16,258b.]

Case No. 16,258b.

UNITED STATES v. SEVENTY-EIGHT CASES OF BOOKS.

[2 Bond, 285.] [1]

District Court, S. D. Ohio. April Term, 1869.

CUSTOMS LAWS — FORFEITURES FOR UNDERVALUATION—BONA FIDE ADVANCES BY AUCTIONEERS—LIEN.

1. Where packages of books were fraudulently imported into the United States and placed in the possession of auctioneers to be sold, and advances were made by them on said books without knowledge of or reason to suspect any fraud in such importation, and before the United States had made its election to proceed for a forfeiture, or to sue for the value of the property: *Held*, that such advances were a lien upon the proceeds of the sale of the books in the registry of the court, and that an order for payment should be made.

2. Where such lien exists, and the fund from which it ought to be paid is within the jurisdiction of the court, there is no necessity for requiring the person having such lien to apply to the secretary of the treasury for payment.

[This was an information of forfeiture against certain cases of books, for fraudulent undervaluations on importation into this country. Exceptions to the information were overruled (Case No. 16,258); and, after a trial, the jury returned a verdict of forfeiture (see Case No. 16,258a).]

After the sale of the books forfeited, and the payment of the proceeds into the registry of the court, the attorney for Hubbard & Heaton, auctioneers in Cincinnati, moved the court for an order for the payment to said Hubbard & Heaton of $3,000, for money advanced by them to the claimant Shaw, after the books were in possession of the auctioneers for sale in Cincinnati, and before the seizure. But the counsel for the United States urged, that it was not competent for the court to order the payment of Hubbard & Heaton's claim from the proceeds in the registry, and that the entire amount must be deposited to the credit of the United States, and that the claim of Hubbard & Heaton could only be paid on the allowance and order of the secretary of the treasury.

Warner M. Bateman, Dist. Atty., and Henry Stanbery, for the United States.

Lewis H. Bond, for interveners.

LEAVITT, District Judge. The claim of Hubbard & Heaton, for the sum advanced by them to Shaw, is admitted to be just and equitable, and that when made they had no knowledge of or reason to suspect any fraud in the importation by Shaw. It was paid to Shaw after the employment of Hubbard & Heaton as auctioneers, and after the books were placed in their possession for sale, and before their seizure for the fraud in their importation. There would seem to be no doubt that Hubbard & Heaton have an equitable lien on the fund in the registry, and that the order for its payment should be made. The case of Caldwell v. U. S., reported in 8 How. [49 U. S.] 366, decides that a bona fide claim upon property before seizure, or before the government has made its election to proceed for a forfeiture, or sue for its value, may be paid out of the proceeds. Hubbard & Heaton's claim is within the principle decided by the supreme court in the case referred to.

But it is insisted by the counsel of the United States, that under an act of congress passed in 1867 [14 Stat. 546], that the entire proceeds must be paid into the treasury, including all charges and expenses incident to the proceeding. This provision applies only to the legal charges and expenses incident to the case, and does not extend to

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

a private claim on the proceeds, based on a legal lien. That Hubbard & Heaton's claim is such a lien, there can be no doubt. And the fund from which it ought to be paid being within the jurisdiction of the court, the order for its payment may be entered. There would seem to be no necessity for requiring them to be at the trouble and incur the expense of an application to the secretary of the treasury for payment.

Case No. 16,259.

UNITED STATES v. SEVENTY-EIGHT CASKS OF WHITE WINE.

[9 Int. Rev. Rec. 105.]

District Court, D. Louisiana. March, 1869.

VIOLATIONS OF CUSTOMS LAWS—FORM OF OATH—FALSE DESCRIPTION—FORFEITURES.

1. Where a party in making an entry of imported wines took the oath prescribed by the act of March 1, 1823 [3 Stat. 729], not so modified as to conform to the provisions of the act of March 3, 1863 [12 Stat. 737], *held*, that it was not the requisite oath, but that the entry or attempt at entry was in violation of the said act of 1863, and worked a forfeiture of the goods.

2. A false description in the invoice of the goods so sought to be entered, subjects the same to forfeiture.

[This was an information against seventy-eight casks of white wine, forty half casks of red wine, and five hundred cases of red wine, on the ground that the same were imported in violation of the customs laws.]

DURELL, District Judge. The libel of information in this case is framed under the act of March 3, 1863 (12 Stat. 737). That act changed the method in which importation should be made, both as to the forms to be observed abroad and the forms to be observed at the port of entry. The importance of that change is shown by an examination of the acts touching importations, passed prior to the statute of 1863.

Under the acts of 1818 and 1823 (3 Stat. 435, 733), all invoices of goods imported into this country by persons residing out of the United States were required to be verified, by oath before a consul or other officer of the United States residing abroad. By the act of 1862 (12 Stat. 558), all invoices, whether by persons residing in the United States, or otherwise, were required to be verified, by oath, before the consul or commercial agent of the United States, in the district where the goods are manufactured, or from which they are sent; and if there be no consul or commercial agent of the United States, in the said district, the verification shall be made by the consul or commercial agent of the United States at the nearest point, or at the port from which the goods are shipped; in which case the oath shall be administered by some public officer duly authorised to administer oaths, and transmitted, with a copy of the invoice, to the consul or commercial agent for his authentication. The act of 1863 changed the entire system with regard to invoices. The verification abroad, by oath, was dispensed with, and it provided that the owner should present to the nearest consul of our government invoices in triplicate, giving the cost, or actual market value of the merchandise sought to be imported; and that these invoices should have thereon endorsed a declaration that "they were in all respects true," and that they contain a true statement of the actual cost or market value of said merchandise at the time when, and at the place where, the same was purchased, or produced. It further requires that if any owner, etc., shall knowingly make, or attempt to make an entry of merchandise by means of any false invoice, or by means of any other false or fraudulent practice or appliance whatever, the said merchandise shall be forfeited. The act also requires that the form of the oaths required by the act of 1823 shall be so modified as to conform to the provisions of the act of 1863.

This statute appears to me to have been most ably devised to secure true and complete information as to all importations, thus to enable the officers of customs to collect the just revenues of the government; and it is the duty of the court to apply it firmly and strictly in aid of so important an object of legislation. The violations of the statute charged in the libel, and which it will be necessary for me to consider, are three; first—the entry of the wines made by Piaggio without taking the requisite oath; second—an entry made knowingly with an invoice and declaration containing false and fraudulent undervaluations; and third—an entry made knowingly with an invoice and declaration containing false and fraudulent statements touching the character of the merchandise imported.

First, as to the entry made by Piaggio, without taking the requisite oath. Piaggio took the oath prescribed by the act of 1823, and not the oath prescribed by the act of 1823, so modified as to conform to the provisions of the act of 1863. Without such conformity, the invoice or entry made would, in some important particulars, have no verification other than the declaration signed abroad. The taking of the oath prescribed by the act of 1823, not so modified as to conform to the provisions of the act of 1863, was an entry, or an attempt to make an entry by means of a "fraudulent document or paper," or by means of a "false or fraudulent practice or appliance" under the statute, and is punished with a forfeiture of the goods so entered, or attempted to be entered.

Second, as to the undervaluation. The value invoiced was five francs the case. The weight of testimony shows that the actual value of the red wines was eight and one-half francs the case. The cost of box, bottles, corks, capsules, labels, and other requisites

of preparation for shipment is shown to be four francs sixteen centimes the case; leaving, according to the invoice valuation, but eighty-four centimes, or about sixteen cents, as the value of the contents of the twelve bottles; being one and one-third of a cent per bottle. I cannot come to the conclusion that such a valuation carries with it the truth. The invoices of subsequent importations, introduced on the part of the government, and wherein wine of the same quality, as that libelled in this case, is valued as high as seven and a half francs, while the testimony shows little or no intermediate variation in price, weigh heavily with the court. Therefore, after a full review and careful consideration of the evidence adduced on both sides, I am satisfied that the undervaluation is made out.

Third, as to the false and fraudulent statements touching the character of the merchandise imported. That the wine was falsely described in the invoice is admitted, nay, urged by the claimant. This admission is conclusive against him; for the invoice is not "in all respects true," and the false description or naming of the wine, was a "false, fraudulent practice," under the statute [U. S. v. One Hundred and Twenty-Five Baskets of Champagne] 3 Wall. [70 U. S.] 560, 564. Moreover, the act of June 30, 1864 [13 Stat. 202], subjects imitations to the highest rate of duty imposed upon the "article imitated." This wine, the red wine, is labeled "Blaye Superieur," and is so called in the invoice. If it is "Blaye Superieur," then it should have paid duty at the rate of eighteen francs the case, such having been shown to be the value of the best qualities of "Blaye." If it is an imitation, then again it should have paid a duty at the rate of eighteen francs the case, that being the value of the wine imitated; thus in either case there was a palpable fraud upon the revenue attempted.

I find as the facts of the case that the allegations contained in the first article of the original libel of information, and in the first, second and third articles of the amended libel of information have been proved. My judgment, therefore, is that the property libeled in this suit be condemned and forfeited to the government of the United States.

Case No. 16,260.

UNITED STATES v. SHACKELFORD.

[3 Cranch, C. C. 178.] [1]

Circuit Court, District of Columbia. Nov. Term, 1827.

DUELING—INDICTMENT FOR CARRYING CHALLENGE.

Upon an indictment for unlawfully carrying a challenge to fight a duel, a scienter must be proved.

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

Indictment for unlawfully carrying a challenge to fight a duel.

Mr. Taylor, for defendant, contended that it was necessary for the United States to prove that the defendant knew it to be a challenge. It could not be "unlawfully" carried if he was ignorant that it was a challenge.

Mr. Swann, for United States, contended that the defendant was bound to know; and that he carried it at his peril.

THE COURT decided, nem. con., that the scienter must be proved; and the circumstances that the letter was not sealed, and that the defendant declared that he thought it was a legal notice, were for the consideration of the jury in deciding whether the defendant knew it was a challenge.

Case No. 16,261.

UNITED STATES v. SHACKELFORD.

[3 Cranch, C. C. 287.] [1]

Circuit Court, District of Columbia. April Term, 1828.

INDICTMENT FOR MISDEMEANORS — PROSECUTOR'S NAME.

The name of a prosecutor must be written at the foot of every indictment for a misdemeanor, in Alexandria county, before it is sent to the grand jury, unless it be founded upon a presentment made upon the knowledge of two of the grand jurors, or upon the testimony of a witness called upon by the court or the grand jury.

Indictment for assault and battery upon Jacob Millan. The indictment had been sent to the grand jury by Mr. Swann, attorney of the United States, in consequence of a presentment of the grand jury at November term, 1827, which stated that evidence had been heard before them whereby it appeared that Richard Shackelford, one of the constables of the county of Alexandria, was guilty of an assault on the body of Jacob Millan, but that the time limited by law for the prosecution of misdemeanors had passed.

Mr. Taylor, for defendant, moved to quash the indictment because the name of a prosecutor was not written at the foot of it, according to the law of Virginia (page 105, § 24); and cited the case of U. S. v. Helriggle [Case No. 15,344], at the last term.

THE COURT (MORSELL, Circuit Judge, absent) quashed the indictment, and said they would hear a motion to order the witness to be sent to the grand jury.

See Rev. Code Va. p. 105, § 24; Id. p. 106, § 38; Id. pp. 346, 431; and U. S. v. Hollinsberry [Case No. 15,380].

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

Case No. 16,262.

UNITED STATES v. SHACKFORD.

[5 Mason, 445.] [1]

Circuit Court, D. Maine. May Term, 1830.[2]

SHIPPING—NON-DELIVERY OF REGISTER—LIABILITY OF MASTER.

To affect the master of a vessel with the penalty provided for his non-delivery of a temporary register, granted under the 3d section of the coasting act of 1793, c. 52 [1 Story's Laws 286; 1 Stat. 306, c. 8], there must not only be an arrival at the port, to which the vessel belongs, but it must be an arrival there, not by accident, or from necessity, but intentionally, as one of the termini of the voyage.

[Cited in U. S. v. Helriggle, Case No. 15,344; Parsons v. Hunter, Id. 10,778; Toler v. White, Id. 14,079; Harrison v. Vose, 9 How. (50 U. S.) 378; The Javirena, 14 C. C. A. 350, 67 Fed. 155.]

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

Debt for the penalty of one hundred dollars, against the defendant [Jacob Shackford], as master of the schooner Sarah, of Eastport, for not delivering up a temporary register, obtained in the district of New York, within ten days after the arrival of the vessel at Eastport, where she belonged, according to the provisions of the 3d section of the coasting act of 1793, c. 52. The case came before the district court upon an agreed statement of facts, as follows: "In this case it is agreed, that the schooner Sarah, of which the defendant was master, belonged to Eastport, and was there duly enrolled and licensed; and thence she proceeded to New York, where she took a temporary register and sailed on a voyage to St. Johns, New Brunswick; landed her cargo there, and took a return cargo and passengers for New York. On her way to the latter place, she stopped at Eastport, in the American waters, and within the district of Passamaquoddy, and anchored off the town, and waited about two hours for the tide; during which period, she landed some passengers and their baggage, having permit from the custom-house for that purpose; took on board some other passengers and small stores, and sailed under the same temporary register to New York, and did not deliver up her temporary register to the collector of Passamaquoddy within ten days. Upon this evidence, the cause is submitted to the decision of the judge, reserving the right of appeal, as from a judgment rendered on verdict."

The district court pronounced a judgment in favour of the defendant [Case No. 16,263], upon which a writ of error was brought to the circuit court.

Mr. Shepley, U. S. Dist. Atty.
Mr. Greenleaf, for defendant.

STORY, Circuit Justice. The third section of the coasting act of 1793, c. 52 [1 Story's Laws, 286; 1 Stat. 306, c. 8], provides, that the collectors of the several districts may enroll and license any ship or vessel, that may be registered, upon such registry being given up, or register any ship or vessel that may be enrolled, upon such enrolment and license being given up. And when any ship or vessel shall be in any other district than the one to which she belongs, the collector of such district, &c., shall make the exchanges aforesaid. But in every such case, the collector to whom the register or enrolment and license may be given up, shall transmit the same to the register of the treasury; "and the register or enrolment and license granted in lieu thereof, shall, within ten days after the arrival of such ship or vessel within the district, to which she belongs, be delivered to the collector of the said district, and be by him cancelled. And if the said master or commander shall neglect to deliver the said register, or enrolment and license, within the time aforesaid, he shall forfeit one hundred dollars."

The question upon the facts is, whether in this case there was an arrival of this vessel within the district of Eastport, to which she belongs, in the sense of the act, so that the penalty of one hundred dollars was incurred by the neglect of the master to deliver up the temporary register to the collector of the district within the ten days prescribed by the act. The argument of the district attorney is, that every coming into the district is an arrival, in the sense of the act, although it may not be in the course of the voyage on which the vessel is bound, nor within the original contemplation of the parties when it was undertaken. It goes then to this extent, although not so stated in terms, that if the vessel come in from necessity, or be driven in by stress of weather, or seek the port to avoid capture by an enemy, it falls within the reach of the act, as much as if it was a voluntary arrival, however short may be the stay, or fugitive the purpose of it. The argument on the other side is, that the arrival must be within the district as a port or place of destination on the business of the voyage, and so contemplated by the parties, as one of the termini, if not the sole terminus of it.

It is doubtless true, that the term "arrival" is susceptible of either interpretation, according to the language of the context, and the objects of the legislature. It may be used in the most general sense, as importing a mere entry within the local limits of the district; or it may be restrained to such an entry as is purely voluntary, for objects connected with the voyage, and a part of the enterprise. Whether the one sense or the other is to be adopted, depends upon a just survey of the language, and the policy of the statute. There are many instances in our revenue laws, where the word is used in the more limited as well as in the larger sense. In the 22d section of this very act,

[1] [Reported by William P. Mason, Esq.]
[2] [Affirming Case No. 16,263.]

there is a provision applicable to coasting vessels putting into a port, other than that to which they are destined, where the master is required to make a report to the custom-house within twenty-four hours after his arrival, if he continues so long in port. The word "arrival" is here manifestly used in its most general sense, as a mere putting or coming into port, for any purpose whatsoever. On the other hand, there seems little doubt, that the arrival, spoken of in the sixth section of the act, refers to an arrival at the port of destination, as the arrival spoken of in the 15th and 17th sections certainly does.

The question then resolves itself into a question of the true construction of the terms of the act, with reference to the context and policy of the act. Now, we are to recollect, that this is a penal clause, and if either of the two constructions may be adopted, and each tallies with the language, and interferes with no known policy of the act, that ought to be adopted which is most liberal to the citizen, and burthens him with the least restraints. But if one construction be exceedingly inconvenient, and the other safe and convenient, a fortiori ought the latter to be deemed the true exposition of the legislative intention; for it can never be presumed that the government means to impose irksome regulations, unless for some known object, or from some express declaration.

Now, the plain object of the legislature is, generally, to have vessels registered, enrolled, and licensed, in the ports or districts to which they belong. But it is not required if a change from a registry to an enrolment, or è contra, is desirable to the owner, with a view to his own accommodation or business, when the vessel is absent from her home-port, that she should be compelled to return to the home-port directly, without embarking in any intermediate voyage. The language of the act justifies a totally different construction. If a vessel is enrolled, and is in a distant port, the owner may surrender her enrolment, and have her registered so as to embark on a foreign voyage; and it is no violation of the policy of the act, that she should perform several foreign voyages under such temporary register before her return to the home-port. All that is required is, that when she does return, the temporary register shall, within ten days after her arrival there, be surrendered. No period is provided, after which the temporary register shall cease to have a valid operation, unless there be such an arrival at the home-port. No known policy of the act is broken in upon by any delay to return, however long. The object of the legislature is, to promote the interests of the ship-owner, and the encouragement of trade. The natural presumption is, that the vessel will return home, that she has, so to say, the animus revertendi, as soon as the interests of the owner require it; and as the ship in the mean time carries in all her papers, complete proofs of her domicil and her ownership, there is no danger of loss to the revenue of the government, or of mistake of her real character and trade.

If the district attorney is right in his argument, then, in all cases of a change of the ship's papers, the vessel may be materially retarded in her commercial operations from unforeseen casualties. Suppose a vessel, engaged in a foreign voyage, is driven by storm or other necessity into her home-port, it will then become the duty of the master, even if his stay might not otherwise be intended for an hour, or a day, to wait until he can communicate with the custom-house, and surrender his papers and procure new ones. Now, in the home-port, in order to procure a new register or enrolment, the owner is required to take an oath of ownership, and the master, if present, an oath of his citizenship. The owner may be temporarily absent on a journey; the vessel may arrive in the night, or in hours when the custom-house is closed; she may arrive on a Sunday, or at an out-port at a great distance from the collector's residence; she may arrive in an inclement season, when access to him is difficult; her voyage may be vitally affected by the retardation of a few hours or days. In cases of this sort, (and many such may be imagined,) it is easy to see, if a rigid construction be adopted, that great embarrassments, if not material injuries, may arise to merchants and owners, from causes wholly beyond their control. Could the legislature have intended to impose restraints upon trade, unless for some great and obvious benefit? Ought not maritime laws, affecting employments so liable to accidents and disasters, and unforeseen emergencies as navigation and trade, to be liberally construed in doubtful cases, so as to ward off, rather than to add weight to, the pressure of uncontrollable misfortunes? My opinion is that they ought, and that it would be highly inconvenient, not to say unjust, to make every doubtful phrase a drag-net for penalties.

It appears to me that the true interpretation of the section under consideration is, that the arrival of the vessel pointed at, is an arrival within the scope of the voyage; an arrival in the district, not only voluntarily, but as a port of destination, or terminus of the voyage. I do not say the sole or the ultimate port of destination, for I readily admit, that if the home-port constitutes one of the places within the contemplation of the parties, where the vessel is to stop for the trade or business of the voyage, that would bring the case within the act, notwithstanding any ulterior destination. But a mere arrival in the district in the transit from one port to another, either accidentally or voluntarily, but for no purpose originally connected with the employment or objects of the voyage, and as a mere emergent incident, or

fortuitous occurrence, is not within the purview or policy of the act. The act contemplates an intention to abide in the port, or at least it indulges a supposition that the vessel may, in some cases, remain there ten days; for it inflicts no forfeiture for a non-delivery within that period. It looks, therefore, to some intentional arrival, which may last for such a period by design; and this may well be deemed a provision unlocking its real meaning.

Upon the whole, I entirely concur in the opinion of the district judge, and think that an arrival within the purview of the section must be an arrival with an intention to return to the home-port, as one of the termini of the voyage, and in the course of prosecuting it. It must not be a mere touch or stay for accidental and transitory purposes, having nothing to do with the original enterprise.

The judgment must therefore be affirmed.

Case No. 16,263.

UNITED STATES v. SHACKFORD.

[1 Ware (171), 169.] [1]

District Court, D. Maine. Feb. Term, 1830.[2]

SHIPPING—NON-DELIVERY OF REGISTER—LIABILITY OF MASTER.

By the arrival of a vessel, sailing under a temporary register, at her home port within the meaning of the third section of the coasting act (Acts 1793, c. 52, § 3 [1 Story's Laws, 286; 1 Stat. 306, c. 8]), is meant an arrival in the regular course of her employment as to one of the termini of her voyage, or for an object connected with and making part of the business in which she was engaged. The master is not rendered liable for the penalty for the non-delivery of his register, by merely touching at the port to land passengers, when on his way to another port.

[Cited in The Javirena, 14 C. C. A. 350, 67 Fed. 155.]

This was an action of debt, brought to recover a penalty of one hundred dollars, against the master of the schooner Sarah, of Eastport, under the act of congress of 1793, c. 52, § 3 [1 Story's Laws, 286; 1 Stat. 306, c. 8]. This section provides that any enrolled and licensed vessel, being in any district other than that to which she belongs, may surrender her enrolment and license, and take out a register, which register, "within ten days after the arrival of such vessel within the district to which she belongs, shall be delivered to the collector of said district, to be by him cancelled;" and if the master neglects to deliver the register he is liable to a penalty of one hundred dollars.

The case was submitted on the following agreed statement of facts: "In this case it was agreed that the schooner Sarah, of which the defendant [Jacob Shackford] was master, belonged to Eastport, and was there duly enrolled and licensed; and thence she proceeded to New York, where she took a temporary register, and sailed on a voyage to St. John, New Brunswick, landed her cargo there, and took in a return cargo and passengers for New York. On her way to the latter place she stopped at Eastport, in American waters, and within the district of Passamaquoddy, and anchored off the town, and waited about two hours for the tide, during which period she landed some passengers and their baggage, having a permit from the custom-house for that purpose, took on board some other passengers and small stores, and sailed, under the same temporary register, to New York, and did not deliver up her temporary register to the collector of Passamaquoddy within ten days. On this evidence the cause is submitted to the decision of the judge, reserving the right of appeal as on a judgment rendered on a verdict."

Mr. Shepley, U. S. Dist. Atty.

Mr. Greenleaf, for defendant.

WARE, District Judge. The decision of this case, which is submitted to the court on an agreed statement of facts, turns wholly on the construction of the third section of the act of February 18, 1793, for enrolling and licensing vessels for the coasting trade and fisheries, commonly called the coasting act. Acts 1793, c. 52, § 3 [1 Story's Laws, 286; 1 Stat. 306, c. 8]. This section authorizes the collectors of the customs to give to any enrolled and licensed vessel a register, or to any registered vessel, an enrolment and license, on the surrender of the old enrolment and license or register. But when this change of papers is made in any other district than that to which the vessel belongs, the collector who gives the new papers is directed to transmit those which are surrendered to the register of the treasury, and the master is required, within ten days after the vessel's arrival within the district to which she belongs, to deliver to the collector the new temporary papers, to be by him cancelled; and in case of neglect to comply with this requirement, the master incurs the penalty of one hundred dollars. It is this provision of the law which is alleged to be violated, and the present suit is brought to recover the penalty. The only question which the case presents, is, whether, in the present instance, there was such an arrival as is contemplated by the law. The strict and etymological meaning of the word arrival is to come to the shore, ad ripam; and in the French language, through which the word comes to us from the Latin, this meaning is preserved. In our language, the etymological meaning has not been so closely adhered to; but the radical signification of the word is to come to some place by water. The word implies a transitus and a terminus, a voyage made and a point at which it terminates. In the revenue laws of the United States the word is sometimes used in a sense somewhat loose and indeterminate, as

[1] [Reported by Hon. Ashur Ware, District Judge.]

[2] [Affirmed in Case No. 16,262.]

to the term or end of the voyage, and a vessel is said to arrive within a collection district, and to arrive within four leagues of the coast. Laws U. S. 1799, c. 128, §§ 25, 26 [1 Story's Laws, 595; 1 Stat. 646, c. 22].

But the ordinary meaning of the word in the revenue laws is the coming of a vessel to some place of her destination in the course of a voyage—some terminus embraced within the range of her employment, or of the expedition or enterprise in which she is engaged. In this way it is used as contradistinguished from the phrase touching at a port, though in a more loose sense a vessel is said to arrive at a port at which she touches. And this is a distinction which is made in other parts of the statute on which this action is founded. By the 21st section of this act, a vessel licensed for carrying on the fisheries, on obtaining a permission from the collector, is allowed to touch and trade at a foreign port. The touching and trading here is not supposed to be a primary object of her destination; not a terminus coming necessarily within the range of her employment. In the 22d section, the distinction is more clearly marked. It provides that if a vessel employed in the transportation of merchandise from district to district, shall put into a port, other than that for which she is destined, the master shall, within twenty-four hours after his arrival, if there be an officer residing at such port, and she continues there so long, make report, &c. Here the going into a port for which she was not destined, is described by the words "put into," and in the language of the law it only becomes an arrival when she has remained there long enough for the fiscal laws of the country to operate upon her. Before the twenty-four hours have expired, she is, within the words of the act, permitted to depart without making a report.

It appears to me that the spirit and intention of the third section of the act, are answered by giving to the word its most usual signification, that of coming to her home port in the regular course of her employment, as one of the termini of a voyage, or for an object connected with and making a part of the trade or business in which she is engaged. In the present case, the vessel was bound to New York, where she had taken out her temporary papers, with a return cargo, and she touched or put into Eastport merely to land some passengers. This was not part of her principal employment, nor incidental to the primary object of her voyage, but merely casual, and, so to say, fortuitous. It was an act which, in the ordinary use of language, would be described by the expression, to touch, or to put into the port.

That this touching at her home port is not such an arrival as is contemplated by this section, may be argued from the terms of the whole section. The master is allowed ten days after his arrival to make the change of papers which is required. The natural inference is, that the law was not intended to operate, unless she makes a stay of some time at the place; that it was not designed to attach to the case of a mere casual or fortuitous touching. I do not mean to be understood that if a vessel come to her home port in the ordinary course of her employment, and engage there in business, as in the delivery or taking in of a cargo, that she would be authorized to depart at any time within ten days without delivering up her temporary papers. In such a case, it would seem that her papers ought to be surrendered, although her stay at the port is less than ten days. This construction seems to me to satisfy the policy of the law, which requires all vessels to be enrolled or registered in the port to which they belong, and it is not inconsistent with its words. Judgment must therefore be rendered for the defendant. But as the true construction of the statute certainly admits of considerable doubt, a certificate of reasonable cause of prosecution will be given to the collector.

[Subsequently a writ of error was sued out from the circuit court, where the judgment of this court was affirmed. Case No. 16,262.]

Case No. 16,264.

UNITED STATES v. SHARP et al.

[Pet. C. C. 118.] [1]

Circuit Court, D. Pennsylvania. April Term, 1815.

JOINT INDICTMENT—SEPARATE TRIALS—EVIDENCE OF SANITY — REVOLT OF SEAMEN — LOG AS EVIDENCE—SEAMEN PUT ON BOARD BY CONSUL—CONFINING MASTER.

1. When several persons are charged in one indictment, with the same offence, each defendant has a right to be tried separately.

[Cited in U. S. v. Bladen, Case No. 14,606; U. S. v. Watkins, Id. 16,649; U. S. v. White, Id. 16,682; U. S. v. Peterson, Id. 16,037.]

[Cited in Fife v. Com., 29 Pa. St. 438; Hawkins v. State, 9 Ala. 137. Cited in brief in State v. Kring, 64 Mo. 592.]

2. A journal kept by the master of a ship, who was alleged to be insane, was allowed to be read in evidence, to prove his sanity by the style in which it was kept; but not as evidence of any fact stated in it.

3. The log book kept by the master, is not evidence, in an indictment for a revolt, and confining the master.

4. A protest which was not offered to discredit the testimony of any one who had signed it, and had given testimony, is not evidence.

5. Seamen of the United States, put on board a vessel of the United States by a consul, are within the meaning of the act of congress, entitled "An act for the punishment of certain crimes against the United States" (2 Bior. & D. Laws, 93 [1 Stat. 112]); and they are bound by the same obligations which exist in cases of articled seamen.

6. What constitutes the offence of making, or attempting to make a revolt on board a ship.

[Cited in U. S. v. Hemmer, Case No. 15,345.]

7. Laws which create crimes, ought to be so explicit in themselves, or by reference to some

[1] [Reported by Richard Peters, Jr., Esq.]

known standard, as that all may know what they prohibit.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; U. S. v. Brewer, 139 U. S. 288, 11 Sup. Ct. 541; Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 876; Tozer v. U. S., 52 Fed. 920.]

8. Any confining of the master, whether by force or intimidation, is a confinement, within the meaning of the act of congress.

[Cited in U. S. v. Smith, Case No. 16,345.]

9. One who joins in the general conspiracy, and by his presence countenances acts of violence, but who does not individually use force or threats, to compel the master to resign the command of his vessel; is guilty of the offence of confining the master.

[Cited in U. S. v. Peterson, Case No. 16,037.]

10. A master of a vessel may so conduct himself, as to justify the officers and crew in placing restraints upon him, to prevent his committing acts, which might endanger the lives of all the persons on board; but an excuse of this kind must be listened to with great caution, and such measures should cease, the moment the occasion for them ceases.

This was an indictment [against Sharp, Steward, Anderson, Macky, Smith, Williams, and Johnson] for making a revolt, endeavouring to make a revolt, and for confining the master. The prisoners upon their arraignment, severally pleaded, not guilty. The counsel for the three first, moved that they might be tried by one jury, distinct from the other four; as their defence was not only different in some respects, but at variance with that of the other four. The difficulty of making their challenges, where some of the prisoners might approve of the men challenged by the others, was stated as a reason, why they had a right to claim separate trials. The court granted the motion.

In justification of the conduct of the prisoners, in confining the captain, and transferring the command to Sharp, the mate, they gave evidence, tending to prove mental derangement in the captain. To disprove this charge, the district attorney offered the journal kept by the master, (in which, the master swore he made the entries every night,) from the style of which, the jury would be able to judge of the state of the master's mind, during the period in which he was charged with insanity. This evidence was objected to, but THE COURT allowed the journal to be read, for the purpose for which it was offered; but not as evidence of any fact stated in it.

THE COURT overruled the motion of the district attorney, to read the log book kept by the mate. A protest made at Bordeaux, was also offered in evidence by the district attorney, and rejected by the court; as it was not to be used for the purpose of discrediting any one who had signed it, and who had given evidence in the cause.

The facts proved in the cause, and upon which the points of law arose, were, that the four prisoners then on trial, were distressed seamen, taken on board by Risborough, master of the letter of marque, the Vixen, at Bordeaux, upon the request of the American consul there; who paid ten dollars for each of them, being the sum to which the master was entitled, under the act of the 28th February, 1803 (3 Bior. & D. Laws, 527 [2 Stat. 203]); for transporting distressed seamen, from foreign ports to the United States, upon request of the consuls of the United States. That during the voyage, the crew getting dissatisfied with the master, compelled him by threats of personal injury, to confine himself to her cabin, and to resign the command of the vessel; which they, by vote, transferred to Sharp, the next officer on board, who assumed and retained it for more than a fortnight; when he left the Vixen, in order to conduct a prize into the United States; and the command was, by a plurality of votes of the crew, restored to Captain Risborough.

Upon these facts, it was contended by the counsel for the prisoners; that they were not such seamen, as are intended by the act of congress, constituting the offences with which the prisoners are charged (2 Bior. & D. Laws, 93, 94, §§ 8, 12 [1 Stat. 112]); as they are not seamen of the vessel, bound by any contract with the master, entitled to any compensation or owing him obedience.

Secondly. It was contended, that the word revolt, is not defined by any act of congress; nor is it defined by the common or civil law, nor by any judicial decision to be met with in any reporter, or in any elementary writer upon law. That if the philological meaning be sought for, it is so various, so diffusive, as to furnish no safe definition for a crime; particularly for one so highly penal, as this is made, by the act of congress. The statute of 11 & 12 Wm. III. c. 7, made it a capital offence to make, or endeavour to make a revolt, or to confine the master; but yet it does not appear, that from that time to this, any decision has been made, by which a definition of the word revolt, has been given. The case which comes the nearest to it, is to be found in East, Crown Law, 796. Both sides referred to Johnson's Dictionary, word "revolt." The French dictionaries and Barretti's Italian Dictionary, give the same word. They also referred to Shakespeare. The material facts in the case are stated in the charge.

C. J. Ingersoll, U. S. Dist. Atty.

Mr. Sergeant and J. R. Ingersoll, for defendants.

WASHINGTON, Circuit Justice. Before the case is examined upon the evidence, it will be proper to settle the points of law which have been discussed. It is contended for the prisoners: First. That they are not such seamen, as are contemplated by act of congress creating the offences, with which they are charged; because they were not seamen of, or belonging to the vessel, not having been engaged as such by the master, and not having entered into a contract, to entitle

them to wages, or the master to their services. The counsel was mistaken in supposing, that the 8th or 12th section of the law, speaks of seamen of, or belonging to the vessel, in reference to the offences charged in this indictment. That expression is used in one part of the 8th section, in relation to certain acts of piracy; but the clause which declares it to be piracy to make a revolt, and a misdemeanor to endeavor to make one, or to confine the master, speaks of seamen generally. But if the supposed expression had been used, it would have made no difference, in as much as the men received on board at Bordeaux by the master, upon the application of the American consul, were as much seamen of the vessel, and belonging to her, as those who had signed the shipping articles. By the 4th section of the act of congress, of the 28th February, 1803, the American consuls and vice consuls at foreign ports, are required to provide passages, for all destitute American seamen, within their districts, to some port of the United States; and to pay for the passage of each seaman, a sum, not exceeding ten dollars. The master of every American vessel is bound, upon the requisition of the consul, to receive such seamen, not exceeding two in number, for every ton of his vessel; and to transport them to the United States, under a penalty; and on the part of such seamen, they are bound, to do duty on board such vessel, according to their abilities. Here then is a contract created by the law, which, in consideration of support and transportation by the master, obliges the seaman to perform all the duties of one, and creates all the relative obligations and duties of master and servant, which exist in cases of articled seamen.

It is objected, that the offence of making a revolt, is not sufficiently defined by this law, or by any other standard, to which reference could be safely made; to warrant the court in passing a sentence upon the prisoners, in case of conviction.

I confess I have always considered, (although without having examined the matter with much attention,) to make a revolt, was to throw off all obedience to the master; to take possession by force of the vessel by the crew; to navigate her themselves, or to transfer the command to some other person on board. A revolution, going to such an extreme, appeared to me to bear a strict analogy to treason against the state; amounting to a falling off from the allegiance due from an inferior to a superior; and, which might be attended with consequences equally mischievous, to the owner, as preventing him from defending his vessel. I thought it applied as well to merchant vessels in time of peace, as in time of war; whereas the other clause was confined to hostile resistance, against a public enemy, or against a pirate. This was certainly the impression of the court, in the case of U. S. v. Smith [Case No. 16,318], upon an indictment for confining the master, and endeavouring to make a revolt. But although this is still my opinion, yet I am not able to support it, by any authority to be met with, either in the common, admiralty, or civil law. If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature. Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid. For these reasons, the court will not recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be. But there is an offence laid in this indictment, the definition of which is perfectly clear. That is, confining the master; which is declared to be a misdemeanor, by the 12th section of this law. In the same case, of U. S. v. Smith, this court laid it down; that any confinement of the master, whether by depriving him of the use of his limbs, or by shutting him up in the cabin, or by intimidation, preventing him from the free use of every part of the vessel; amounts to a confinement, in contemplation of law.

The next enquiry is, whether according to this definition, Captain Risborough, the commander of this vessel, was confined by his crew. The evidence upon this point is clear. It appears, that about four o'clock in the afternoon, of the 28th February last, nearly three weeks after the vessel had commenced her voyage, the weather being squally, the captain went forward to the forecastle, and called the men upon deck to assist in taking in the sails; some of them replied, that the watch was on deck, and upon the order being repeated, two of them, Parker and Dougherty, (or probably only the latter,) answered that they did not come on board to work. The captain said he would see to that, and immediately returning to the cabin, came again upon deck with a pistol in his hand, where he found those two men standing; he reproached them (as he says) for their disobedience, and according to the testimony of some of the witnesses for the prisoners, added some abusive language. The captain states, that Parker bared his breast, and told him to fire: other witnesses do not mention this fact, and rather exculpate this man from the charge of insolence. The captain struck Parker with the pistol, and then snapped it at him. They immediately cried out, and the captain swears that the cry was general, to throw him overboard. There is no doubt but that there was immediately a tumultuous assemblage of the crew aft, accompanied by such circumstances of menace, as to induce Captain Stafford, a passenger, and the only

friend Captain Risborough seems to have had on board, to advise him to retire to the cabin, as it was impossible for him to encounter the whole crew. He followed this advice, and was probably saved from the grasp of Smith, one of the prisoners who rushed after him, by the mate Mr. Sharp. It appears that after the captain had retired to the cabin, the tumult seemed to subside upon deck for a short time. About an hour afterwards, Captain Stafford overheard some of the crew, in the steerage, conversing upon the late occurrence, and declaring, that Captain Risborough was not fit to command the vessel; that they would throw him overboard, and give the command to Sharp. Upon communicating these threats to the captain, it was deemed necessary to provide immediately for his defence, and they accordingly loaded some of the muskets. In a short time after this, the crew again assembled, and cried out a sail. By some of the witnesses for the prisoners, it was stated that the cry was made only by the man at the helm. It was near dark, and one of the witnesses declares, that he thought he saw a sail, but it was a mistake. Captain Stafford, who was on deck at the time, believing that this was only a feint intended to draw the captain on deck, for the purpose of doing him some injury; went below and communicated this opinion to the captain. The captain, however, desirous of satisfying himself as to the fact, ascended the steps with caution, and had scarcely put his head above the companion way, when he was seized by one or more of the crew, and with great difficulty he was able to extricate himself from the hold they had taken of him. The tumult was now considerable, and Sharp being on deck, drew the slide over the companion, probably with a view to prevent the crew from descending into the cabin; there was then a general cry upon deck for an axe, to cut a hole in the trunk of the companion way, in order to get the captain out that way. One of the witnesses for the prisoners, has sworn that the axe was called for by Dougherty. Soon after this, the crew being generally assembled, a paper was presented to Mr. Sharp, signed by twenty-one of them, the purport of which, so far as we can ascertain it from the witnesses, was to require the captain to resign the command in favour of Sharp. Sharp declining to take the paper, it was delivered to Mr. Lloyd, the supercargo; who conveyed it to Captain Risborough. After consulting with Captain Stafford, they concluded that the captain's safety required his acquiescence; and he accordingly signified his assent to Mr. Lloyd, who communicated it to the crew. Risborough then sent for Sharp, and desired him to do his best to conduct the vessel to the first port in the United States. Every thing was now tranquil, and the captain went upon deck that night without further molestation.

The following night the crew again assembled aft, and sent to the cabin for Sharp, and soon after for Captain Stafford, to come to them. They said that the captain was mad, and they were afraid he might put fire to the magazine; they therefore desired, that a centinel might be placed over it, and that the muskets which had been loaded, should be discharged. Some of them proposed that the captain should be put in irons. At length it was determined to discharge the muskets and to guard the magazine by a centinel; which determinations were accordingly executed.

On the 2d of March an order was given by Mr. Sharp, to the centinel, not to permit Captain Risborough to come on deck at night, in consequence, as it is said, of a report made to him by Mr. Lloyd, that he had heard the captain say he would as leave throw himself overboard as not. This order was strictly executed until the 16th of March; when by a new election of the crew, Captain Risborough was restored to his command, in consequence of Sharp going on board of an English prize, in order to conduct her into port. About ten days prior to this capture, they had brought to a Portuguese vessel, and got from her some supplies; which on the part of the prosecution it is contended, were piratically taken, and on that of the prisoners, that they were freely gave. This transaction however forms no part of the question for the consideration of the jury. Upon this summary of the evidence, it cannot be denied; that Captain Risborough was compelled, by the threats and violent proceedings of his crew, to confine himself to his cabin, from about four o'clock of the afternoon of the 28th of February, until he consented to abdicate his command of the vessel, upon the requisition of his mutinous crew, and with a view to the preservation of his life. This state of confinement was removed for a day or two, and was then renewed and rigidly enforced, during the nights. The offence therefore, of confining the captain, by intimidation, is fully established, if the witnesses are believed by the jury.

Secondly. The remaining enquiry under this head is, whether the prisoners at the bar are implicated in the offence, proved against the crew generally. It is not necessary that they should be proved individually, to have used any force or threats to compel him to confine himself to his cabin or to resign his command. It is sufficient, if they joined in the general confederacy, and by their presence countenanced the acts of violence which produced these consequences. If a number of men associate themselves together, to commit a felony or trespass, and only one of them do the act in the presence of the others, all the confederates are guilty as principals. In this case it is proved, that the crew were all assembled, except a sick seaman and a degraded officer, at the different periods when the before mentioned acts of violence were committed and the prisoners are proved to

have been present at some of them. Had they not joined in the conspiracy, they ought, and certainly would have separated themselves from the mutineers. Had they done so, it is not improbable, but they might have prevented the perpetration of the offence, which is so clearly proved; by holding themselves up to the rioters, as persons who might at least be dangerous witnesses against them, when called to answer for their conduct. Independent of this evidence against the crew generally, it is proved that Smith, one of the prisoners, pursued Captain Risborough, when he was returning to the cabin, and was arrested by the mate; that Macky was one of the signers of the paper, requiring the captain to resign; and that the whole of the prisoners, at different times, actually kept guard in the cabin over the magazine.

Thirdly. The prisoners, however, have attempted to excuse themselves, by alleging the violence of the captain against two of their comrades, and his threat, made at the same time, to throw a barrel of gunpowder into the forecastle, and blow them up, if they refused to obey his orders; which it is proved he did; and lastly, upon the plea of the captain's insanity. It cannot be doubted, but that the master of a vessel, may so conduct himself, as to justify his officers and crew placing restraints upon him, to prevent the commission of acts, which might endanger the lives of the whole. It is true, the law does not provide for such an emergency, nor was it necessary; the law of our nature, which is paramount to all human laws, would justify such conduct in such a case. But an excuse of this kind, should be listened to with great caution. Precarious indeed would be the interests of commercial men, if the occasional violence of the master they have selected, or the suspicions of the crew, that from any cause he is unfit to command; should be a sufficient justification to them, for removing him from the station to which he was appointed, and substituting one of their own choice, to fill his place. If he attempts to commit unjustifiable acts of violence against an individual, or individuals of the crew, he may be resisted. Parker and Dougherty, when he approached them with a loaded pistol, would have been justified in any act, necessary for their preservation. Had he been really deranged; or had he given such evidence of an intention to commit the desperate act, of which he was suspected; a restraint, accommodated to the emergency, might have been lawfully applied. But as to the rash attempt to take the life of Parker, which cannot be held in too great abhorrence, the danger had passed away, before the offence was committed with which the prisoners are charged. Even Parker and Dougherty could not justify themselves, (and much less could the rest of the crew,) for their subsequent acts, in confining the captain, and depriving him of the command. A man may, in self defence, even take the life of his opponent; but if the danger is at an end, he cannot justify himself for afterwards committing any act of violence whatever against him. In like manner, the threat of Captain Risborough, to throw a barrel of gunpowder into the forecastle, if the crew refused to obey his orders, was rash and foolish, but it was obviously the threat, as the former was the act, of a man, under the temporary influence of passion; from which no danger could be reasonably apprehended, nor does it appear that any was apprehended in consequence of it.

It is next said, that the captain was mentally deranged, and that fears were entertained by the crew, that he would blow up the magazine. The question is not, what were the apprehensions of the crew; but is their evidence to satisfy the jury, and such as ought to have satisfied a reasonable and firm man, that such was the state of the captain's mind, and such the danger of his going at large? What are the circumstances relied upon, to prove him a madman, and a mischievous one? They are, his snapping a pistol at one of the crew; his threat in relation to the barrel of gunpowder; his asking the steward, on the 1st of March, which way his pistol pointed; and his expression to Lloyd, on the 2d of March, that he would think very little of jumping overboard. This conduct, and these declarations, as proofs of derangement, are entirely equivocal. In connection with other circumstances, they might prove that fact; or they might be the effect of an irritable temper, and a wounded sensibility, brooding over the degraded state to which a mutinous crew and a cold hearted set of officers, had reduced him. In his apprehension of personal danger, he might well talk incoherently, in relation to his means of defence; and in the despondency of his heart, he might look with a desperate indifference at a criminal act of suicide. But let it always be remembered, that this state of his mind, might be the consequence of his disgrace, and not the cause of it. No witness pretends to say, that he was at any time unsound in mind, until after the crime imputed to the crew, was committed; and shall the prisoners be allowed to excuse their crime, upon the plea of derangement in the captain, which their conduct had occasioned? Certainly not.

But let the sincerity of those who make this plea, be tested by their own conduct. In the first place, it should be observed, that when the witnesses for the prisoners were asked, why they thought the captain mad, scarcely any of them agreed in assigning the same reason; but Captain Stafford, his only friend on board, and who was constantly with him, declares, that he saw no symptom of derangement, and that he did not consider him so at any moment of time. That the crew, for whom this plea is made,

did so consider him, may well be suspected; from their sending to him a paper, requiring his acquiescence in the measures proposed, for deposing him from the command, and the appointment of a successor. It is the dictate of common sense, that a person of unsound mind, cannot bind himself or others by his consent; and they must have known, that a compulsory change in the government of the vessel, could not be legitimated, by the acquiescence of an insane commander. In the next place it appears, that Sharp, on some occasions occurring after his usurpation, consulted with Captain Risborough; which would have been very absurd, had he thought the captain insane. Another strong proof of the recollection and prudence of Captain Risborough, was his directing the supercargo, to read the consul's letter to the crew; with a view to prevent them from committing any act of hostility against the Portuguese vessel.

But, even suppose the transactions of the 28th, had so operated upon the mind of Captain Risborough, as to derange it; and that this, if made out, would excuse the act of confining him; still this violent measure of precaution, should not have extended a moment beyond the existence of the danger which occasioned it; and a continuation of the confinement, after the captain was restored to his senses, would, in the eye of the law, amount to the crime of confining the captain. Further, such conduct would afford strong evidence, that the excuse now set up was affected and not real; since, if the latter, upon the cause ceasing the effect would naturally cease. Now it is in evidence by the prisoners' witnesses, those who thought him insane; that they considered him to be of sound mind, some days before they overhauled the British vessel; upon which occasion, and in consequence of Sharp quitting the vessel to go on board the prize; the captain, instead of receiving back his authority as of right, was by a plurality of votes, elected master against Captain Stafford, who was set up as his competitor by some of the crew.

With these observations the case was left with the jury.

Verdict: Guilty of confining the captain, and not guilty as to the residue of the indictment.

Judgment was arrested, for the reasons on which the indictment was quashed upon the trial of the other prisoners, Sharp and others. See Case No. 16,265.

Case No. 16,265.

UNITED STATES v. SHARP et al.

[Pet. C. C. 131.] [1]

Circuit Court, D. Pennsylvania. April Term, 1815.

INDICTMENT — JCINDER OF CAPITAL CRIME AND MISDEMEANOR.

An indictment, which charges in the same count, an offence made capital by one section of an act of congress [1 Stat. 112], and another offence, declared in another section of the same law, to be a misdemeanor, is bad.

[Cited in U. S. v. Peterson, Case No. 16,037; U. S. v. Cadwallader, 59 Fed. 681.]

[Cited in brief in State v. Cameron, 40 Vt. 560.]

Messrs. Binney and Chauncey, counsel for the prisoners [Sharp, Anderson, and Stewart], when their trial was called up, moved to quash the indictment, because there was no count in it, for an offence, as described in the statute. They stated that the first count, was for making a revolt, and confining the captain, which is not described as an offence in the 8th section; although making a revolt, is a capital offence, under the 8th section; and confining the captain, is a misdemeanor, under the 12th section. In like manner, the second count, is for confining the captain, and endeavouring to make a revolt; to which the same exceptions apply. It is essential to justice, that the grand jury should have it in their power, to ignoramus any offence in the indictment, which is not supported by evidence. But if two or more offences, are thus blended together, in one count, they must find the whole, or ignoramus the whole; whereas, if they are arranged in different counts, they may find one a true bill, and ignoramus as to the other. How are the petty jury, in a case of this kind, to find their verdict? If they say the prisoners are guilty of part of the offence described in one count, and not guilty as to the others; they do not find them guilty "in manner and form;" but where there are different counts, they are the same as different indictments. 4 Hawks, 2.

THE COURT decided that the indictment could not be supported.

The district attorney entered a nolle prosequi, as to the defendants.

[See Case No. 16,264.]

Case No. 16,266.

UNITED STATES v. SHAW et al.

[1 Cliff. 317.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1859.

CONTRACTS BY UNITED STATES—RESCISSION—AUTHORITY OF DEPARTMENTAL OFFICERS—CONTRACTS BY CORRESPONDENCE.

1. Contracts made by the United States, through the secretary of the navy, to furnish provisions for the naval service, cannot be rescinded by the chief of the bureau having charge of such contracts and supplies, without the sanction of the head of the department.

2. Evidence that the chief of such bureau informed a contractor that a written proposition to rescind such a contract, if forwarded to him, would be laid before the secretary, is no defence to an action to recover damages for the non-fulfilment of the same, although it appears that the proposition was duly made, and

[1] [Reported by Richard Peters, Jr., Esq.]

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

that it was retained six months, and not answered.

3. If a contract is to be sought in correspondence, or if the discharge of a right or obligation is to be deduced from it, then the court, and not the jury, must construe the correspondence, although it may extend over a considerable length of time, and embrace a great variety of circumstances.

Error to the United States district court of Massachusetts.

The action was upon a contract dated October, 1851, for the delivery, at his own risk and expense, free of charge, to the plaintiffs, at their navy yard in Brooklyn, between the 1st of January, 1852, and the 1st of May of the same year, of twelve hundred barrels of pork, of a specified quality, at a stipulated price, and in case of failure that the defendant and his sureties were to pay liquidated damages.

Among other defences, the defendants [James M. Shaw and others] pleaded as their fourth plea that, in April, 1852, they being willing to perform their contract, but plaintiffs not being ready to receive performance, the parties thereupon agreed to discharge each other. Issue was joined on this plea, and a verdict was rendered for defendants. The defendants exhibited a power of attorney from Shaw, their principal, dated May 12, 1852, to one Wilson, by which the latter was empowered to negotiate with the chief of the bureau of provisions and clothing in the navy department, concerning those contracts dated October, 1857, for the delivery, among other things, of pork at Brooklyn, and to renew contracts, or to annul entirely said contracts, or either of them, vary the terms of either of them, or to agree to any arrangement in his name with the chief of the bureau that he might deem expedient. The attorney had two interviews with Mr. Sinclair, the chief of the bureau. On the 18th of May, he advised his principal of the result by letter, from which the following is an extract:—"Mr. Sinclair says they have a good supply of pork, and should probably need no more for consumption before another summer; and if you wish to cancel that part of the contract, he should be happy to accommodate you. I told him you had begun to provide for the pork, and would be ready to deliver it at the prescribed time, but that you were dissatisfied with the treatment you had received from the inspectors, and I felt at liberty to say you would accept his proposition, and give up the contract entirely. He replied he did not need the pork, and would rather it would not be delivered, as he did not wish to keep over any more than he could help. He says you must make a written proposition to him to the effect that you are desirous to give up the contract for pork, and he will lay your communication before the secretary of the navy; and if you are not advised to the contrary, you may consider the pork contract at an end. I am also satisfied it is a good arrangement for you, especially when you take into consideration the trouble that always occurs in regard to the inspection of government merchandise. If you like my arrangements, just write to him to that effect, and also write to me at Newport, where I hope to be in the early part of next week. I shall leave here (Washington) to-morrow, for Baltimore," &c. In his testimony, the attorney affirmed the accuracy of this statement, and said in the second interview Mr. Sinclair stated that Shaw need not deliver the pork.

B. F. Hallett, for plaintiffs.

H. F. Durant, for defendants.

CLIFFORD, Circuit Justice. Upon this testimony it is difficult to find support for the plea. The attorney does not assume to agree to a cancellation of the contract, but merely solicits information whether the officer would be willing to do it, in order to communicate that fact to his principal. If the contract had been dissolved, there is no reason why the papers should not have been drawn for that purpose at that time. But the attorney refers the whole subject to his principal, and another act on the part of the principal is required before the arrangement can be treated as complete. This interpretation of these conversations receives full confirmation from the subsequent interview between the department and the defendant. On the 24th of May, Mr. Sinclair writes to him as follows: "Respecting your contract for pork, if you will make a direct proposition to the bureau, the same shall be submitted to the secretary of the navy for his consideration and directions in the case." Here is explicit evidence that nothing conclusive had resulted from the interview between the chief of the bureau and Wilson, at least in the opinion of the former, and the reply of Shaw two days afterwards is equally explicit in evincing his understanding. He says: "Your letter of the 24th instant has been received and noticed. I am now making inquiries and arrangements for beef. In regard to my contract with your bureau for pork, I will suggest for your consideration, first, to extend the time of delivery; second, to relinquish the pork contracts altogether. Waiting your early reply, I am," &c., &c. There was no reply to this letter, and no further correspondence, until the 30th of November, 1852. On that day the chief of the bureau writes to the defendant: "You are required to deliver to the navy yard, Brooklyn, New York, the pork in accordance with the stipulations of your contract, and should you fail to do so by the 10th of December next, the bureau will direct a purchase of such quantity as may be required at your risk and cost." The question arises here, did the failure of the department to answer the letter of the 26th of May operate a rescission of the contract, whether considered alone or in con-

nection with the testimony of Wilson? Two alternatives were presented by the letter for the consideration of the navy department, in respect to the terms of an existing contract, but it retains for the writer the power to accept or reject the offer which was anticipated as the result of that consideration. Neither alternative is proposed by the writer in such a manner as to conclude himself. He reserves the right to have the last word. Nor does the testimony of Wilson put a different face upon the matter. Wilson learned from the chief of the bureau of the willingness of the head of the department to accommodate the obligor by discharging the contract, and invited a proposition for that purpose. Subsequently, in a letter to the principal, he asks for a communication on the subject. That communication was made, but no action took place upon it, and it is equally clear that the remark of the chief of the bureau to Wilson, "that he would lay the communication of Shaw before the secretary of the navy, and if he (Shaw) was not advised to the contrary, he might consider the contract at an end," cannot properly be incorporated into the subsequent correspondence. Shaw's letter was not written as a sequel to the communication of Wilson, nor does it properly form a part of the negotiation commenced by him. It is an answer to a letter from Sinclair directly, and presents two distinct subjects for consideration merely, and the writer asks an early reply. Under these circumstances, it could not be maintained by the United States with any success that the omission of the chief of the bureau to examine or answer the overtures of the writer of the letter was an abrogation of the contract, either when considered singly or in connection with the testimony of Wilson; and, in the judgment of this court, the evidence does not show a rescission of the contract by mutual consent. The plaintiffs requested the court to instruct the jury that the testimony of Wilson and the correspondence did not in law amount to a cancelling or rescinding of the contract. But the court declined so to instruct the jury, but did instruct them that the question for them to decide was, whether the evidence shows only an extension of the time of delivery, or a giving up of the contract by mutual agreement, when said Shaw was ready and offering to fulfil it, and before the time had expired, and unless the contract was given up, the jury must find for the plaintiffs. It was for the defendants to make out that there was a valid and binding agreement for the cancellation of this contract. His evidence shows that a subordinate officer in the navy department intimated to the agent that this was feasible. But in this conversation, as well as in the subsequent correspondence, he declared that the head of the department must be consulted. In effect, the principal submitted two subjects for the consideration of the department, and asked for a reply. But the department retained the letter six months, and then demanded the fulfilment of the contract. There is nothing that can be drawn from these facts, except an acquiescence of the department in a delay for that period of time. It is the duty of the court to construe written instruments, and that principle is not affected by the fact that the instruments consist of written correspondence extending over a considerable length of time, or that it may embrace a great variety of circumstances. If a contract is to be sought in such a correspondence, or if the discharge of a right or obligation is to be deduced from it, the duty must be performed by the court, and not by the jury. Bliven v. New England Screw Co., 23 How. [64 U. S.] 420; Begg v. Forbes, 30 Eng. Law & Eq. 508; Hutchinson v. Bowker, 5 Mees. & W. 535. Decided cases undoubtedly may be found, in which it has been held, that where the effect of a written agreement collaterally introduced as evidence depends, not merely upon the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. It was so held by the supreme court in Eting v. Bank of U. S., 11 Wheat. [24 U. S.] 75; and in Barreda v. Silsbee, 21 How. [62 U. S.] 168. But the principle involved in those decisions has no application to the present case. As the decision of this question will probably be decisive of the case in another trial, I abstain from examining any other questions at the present time.

Judgment reversed.

Case No. 16,267.

UNITED STATES v. SHAW.

[4 Cranch, C. C. 593.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

ACTIONS ON ADMINISTRATION BONDS.

An action may be maintained upon an administration bond, by a creditor of the intestate, after a return of non est upon a capias ad respondendum against the administrator, although thirteen months have not elapsed since the granting of the letters of administration. The Maryland act of 1720 (chapter 24) is still in force in the county of Washington, D. C.

Debt on administration bond. Breach assigned in not paying a note due by the intestate to Keirle & Son, and averring a previous return of non est inventus upon a capias ad respondendum against the defendant, in this county, in which he resided. General demurrer.,

W. L. Brent, for defendant, contended that the Maryland act of 1720 (chapter 24) was repealed by the inconsistent provisions of the act of 1798 (chapter 101), as stated in the preceding case against Kenedy's administrator, and

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

that no suit could be brought upon the bond before the expiration of thirteen months after administration granted, except in the particular cases specified in the act of 1798.

C. Cox, for plaintiff, contra, to show that the act of 1720 was still in force notwithstanding the act of 1798, and that a return of non est is sufficient to justify a suit on the administration bond, cited Dorsey's Case, 4 Gill. & J. 471, and the case of Laidler's Adm'r v. State, 2 Har. & G. 277, 281.

THE COURT, being of opinion, as in the preceding case, that the act of 1720 was not repealed by the act of 1798, and that an action may be brought against the administrator within the thirteen months allowed by the 14th section of the 8th sub-chapter, overruled the demurrer, and rendered judgment for the plaintiff (nem. con.).

Case No. 16,268.

UNITED STATES v. SHAW-MUX.

[2 Sawy. 364;[1] 5 Chi. Leg. News, 352.]

District Court, D. Oregon. March 27, 1873.

INTERCOURSE BETWEEN INDIANS — INDIAN GIVING LIQUOR TO INDIAN.

1. Congress has the power to regulate intercourse between Indian tribes and the members thereof, and may therefore prohibit the traffic in spirituous liquors between such tribes or members, within as well as without the limits of a state.

2. The word "person" in section 20 of the intercourse act of June 30, 1834 (4 Stat. 729), as amended by the act of March 15, 1864 (13 Stat. 29), includes an Indian, and under such section an Indian may be punished for disposing of spirituous liquors to another Indian.

[Cited in U. S. v. Winslow, Case No. 16,742.]

This indictment charges that the defendant, at Umatilla county, on November 24, 1872, did dispose of spirituous liquor to an Indian, one Moo-los-le-wick, who was then and there under the charge of an Indian agent of the United States. On the trial it appeared that the defendant was an Indian living on the Umatilla reservation, at the time of the commission of the alleged crime. The defendant being convicted, moved for a new trial, upon the ground that the court erred in charging the jury that an Indian was a "person" within the meaning of that term, as used in section twenty of the intercourse act of 1834, as amended by the act of March 15, 1864 (13 Stat. 29). The section in question provides: "That if any person shall * * * dispose of any spirituous liquor * * * to any Indian under the charge of any superintendent or agent appointed by the United States, * * * such person, on conviction thereof," shall be imprisoned, etc.

Addison C. Gibbs, for the United States.

William B. Gilbert, for defendant.

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

DEADY, District Judge. The word "person" in its ordinary sense includes an Indian, whether he be uncivilized, under the charge of an Indian agent, in the Indian country, or otherwise. The burden then is upon the defendant to show that, although he is plainly within the letter of the statute, he is not within the true intent and meaning thereof.

The argument in his behalf is, that the principal power of congress in the premises does not extend to the regulation or control of conduct or intercourse between Indians, within the limits of a state, and therefore the statute should be construed so as to exclude this case, which is one of intercourse between Indians only.

The constitution gives congress power "to regulate commerce * * * with the Indian tribes," and this includes any member of such tribe within as well as without the limits of a state. U. S. v. Holliday, 3 Wall. [70 U. S.] 418

In U. S. v. Tom, 1 Or. 26, the defendant was an Indian, and was indicted and convicted under this section for selling liquor to Indians. The case was argued and considered at length, but this precise question does not appear to have been raised. But the fact could not have escaped the attention of the counsel and the court, and the inference is, that it was not deemed material.

Commerce, intercourse with an Indian tribe, or the individual members thereof, may be carried on with or by means of Indians as well as white men. The power of congress is not limited to the regulation of commerce between the Indian tribes and white people or any particular people or persons, but extends to commerce, with such tribes or any member thereof, however carried on.

Suppose it should be deemed necessary by congress to regulate the intercourse between two distinct Indian tribes, as, for instance, to prohibit the one from furnishing the other ammunition, would not this be a regulation of commerce with an Indian tribe? Because the regulation would necessarily affect both tribes, and therefore the commerce, in this respect, between them, it would be none the less a regulation of commerce with either of them.

In U. S. v. Holliday, supra, the court say, that "commerce with the Indian tribes means commerce with the individuals composing those tribes." This being so, it follows that, if congress can regulate the commerce between different tribes, it may also between individual Indians. Other considerations make it probable that this word person was used in this section with intent to include Indians. In other sections of the act (sections 7 and 8, 4 Stat. 729), the intention not to include Indians in the word person, is manifested as follows: "If any person other than an Indian shall," etc.

By section three of the act of March 27, 1854 (10 Stat. 270), it was enacted that noth-

ing contained in this section (twenty), "which provides for the punishment of offenses therein specified, shall be construed to extend to any Indian committing said offenses in the Indian country."

What particular circumstance, if any, led to the enactment of this clause, does not appear, but it is probable that either the word "person" had been construed to include Indians, or in the nature of things would be, in the absence of any provision to the contrary.

But in the revision and re-enactment of the section in 1862 (12 Stat. 339), and 1864 (supra), its operation, so far as the disposition of liquor to Indians is concerned, was limited to Indians under charge of a superintendent or agent, whether within or without the Indian country, and the provision of the act of 1854, restraining the natural signification of the word "person" was not inserted; so that the section stands in this respect as it did prior to the passage of said act.

It being premised that congress has the power to regulate the disposition of spirituous liquors to an Indian by whomsoever such disposition is made, in considering the question of whether congress intended to include Indians in the word "person" as used in this section, weight ought to be given to the argument of convenience.

Upon all the Indian reservations in the country, Indians will be found, if permitted to do so with impunity, through whom white men will be able to introduce spirituous liquor among the Indians, with comparative security to themselves. The traffic can scarcely be prevented unless the Indians who are employed as go-betweens are held to be within the purview of the law prohibiting it.

The motion is denied.

Case No. 16,269.

UNITED STATES v. SHEA.

[5 Blatchf. 546;[1] 1 Am. Law T. Rep. U. S. Cts. 14; 6 Int. Rev. Rec. 198.]

Circuit Court, E. D. New York. Nov., 1867.

INTERNAL REVENUE LAWS—NONPAYMENT OF SPECIAL TAX—INDICTMENT.

A person is not liable to indictment, under the 23d section of the internal revenue act of July 13, 1866 (14 Stat. 153), for carrying on the business of a distiller without having paid a special tax, where he has complied with the provisions of the 24th section of the act, as to giving a notice and a bond, &c., and a special tax has been assessed against him by the assessor and returned to the collector, but ten days have not elapsed since the receipt by the collector of the assessment list.

This case came before the court on a motion for a new trial, and in arrest of judgment, after the conviction of the defendant [Thomas J. Shea] on an indictment framed under the 23d section of the internal revenue act of July 13, 1866 (14 Stat. 153), and containing but a single charge, namely, carrying on the business of a distiller, without having paid a special tax. The evidence on the trial showed, that the defendant was found engaged in distilling on the 29th of December, 1866, and that he had not then paid his special tax. By way of defence, it appeared that he had, in the previous November, given due notice of his intention to engage in distilling, and had given a proper bond, and otherwise complied with the 24th section of the act; that, in pursuance of his notice, his special tax had been assessed against him by the assessor, and returned to the collector in the monthly list for December; and that such list was put into the hands of the collector on the 20th of December, less than ten days prior to the commission of the offence charged. [The question of law raised by this evidence was reserved, and the case went to the jury, who rendered a verdict of "guilty." [Case unreported.] The present action is to determine the question reserved on the trial.] [2]

Benjamin F. Tracy, U. S. Dist. Atty.
William H. Hollis, for defendant.

BENEDICT, District Judge. Upon consideration of the various provisions of the internal revenue law, I am of the opinion that the point raised on the evidence introduced in defence is well taken. The various provisions of the law in regard to special taxes, as set forth in sections 20, 28, and 73, as amended in the act of 1866, and elsewhere, and which seem to make no substantial difference, as regards the particular defence in question, between the business of distilling and other kinds of business subject to a special tax, must, when taken together, be considered to import, that a distiller is not in default for the mere non-payment of his special tax of one hundred dollars, until ten days after the receipt by the collector of the assessment list, in which the special tax is to be inserted, and that he cannot be held to be guilty of the offence created in the 23d section, unless it appears that he carries on the business after he is in default for non-payment of the tax. The words of the act are, "without having paid the special tax, as required by law;" and these words, "as required by law," must be considered to refer to the time and place of payment, as well as to the amount. Therefore, the distiller can not be said to carry on business without payment of the special tax, as required by law, so long as he has taken all necessary steps towards the ascertainment and payment of his special tax, and stands ready to pay it in the manner required by law, that is, within ten days after the assessor

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

[2] [From 1 Am. Law T. Rep. U. S. Cts. 14.]

shall have returned to the collector the assessment list in which such tax is required to be inserted. This construction of the provisions of the act seems reasonable, and to be necessary to prevent infinite confusion and injustice in the collection of the taxes, as a consideration of the effect of similar provisions made applicable to various trades will show. Although it is true that, under this construction, a distiller may carry on his business a short time without having actually paid his special tax of one hundred dollars, as may persons in other kinds of business, yet he has given security for its payment when due, while the various other provisions in regard to his notice, his bond, his distillery, &c., all necessary to be complied with before commencing business, put the distillery fully within the observation of the government and enable it to enforce compliance with the law.

According to this view of the law, the facts proved by the defendant amount to a perfect defence to an indictment framed on this one section, and he is entitled to be discharged.

Case No. 16,270.

UNITED STATES v. SHELDON et al.

[Hoff. Land Cas. 171.] [1]

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

MEXICAN LAND GRANTS.

The validity of this claim not disputed.

[Claim of Catherine Sheldon and others for the Rancho Omochumnes, embracing five leagues of land in Sacramento county; confirmed by the board, and appealed by the United States.]

William Blanding, U. S. Atty.
Robinson & Morrison, for appellees.

HOFFMAN, District Judge. This case has been confirmed by the board and submitted to this court without argument or the production of additional testimony. There cannot, we think, be any doubt as to the genuineness of the grant; nor does such an idea seem to have been suggested. The temporary loss of the first expediente and its subsequent discovery among the archives, and the confusion and mistake which arose, of themselves afford strong evidence of the authenticity of the proceedings. The grantee appears to have resided on his land from 1844, a few months after he received his grant, until his death in 1851. We see no reason to reverse the decree of the board, and a decree affirming must therefore be entered.

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

Case No. 16,271.

UNITED STATES v. SHELLMIRE.

[Baldw. 370.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1831.

COUNTERFEITING—CHECKS ON BANK OF THE UNITED STATES—PRESUMPTIONS—PERJURY.

1. An order or check drawn by the president of a branch bank of the Bank of the United States, on the cashier of the bank at Philadelphia for the payment of money, is an "order or check" within the 18th section of the act chartering the bank. The bank is bound to pay such orders or checks, and the indictment may charge the passing such counterfeit order to be with the intent to defraud the bank, or the person to whom it is passed.

[Cited in U. S. v. Morris, Case No. 15,813.]

2. The law presumes the intention in passing counterfeit paper to be to defraud any person who may suffer a loss by receiving it as genuine.

[Cited in Com. v. Starr, 4 Allen, 305.]

3. Perjury consists in swearing falsely and corruptly, contrary to the belief of the witness, not in swearing rashly and inconsiderately, according to his belief.

[Cited in U. S. v. Moore, Case No. 15,803; U. S. v. Edwards, 43 Fed. 67.]

[Cited in brief in Com. v. Brady, 71 Mass. (5 Gray) 79.]

The defendant was indicted for uttering, passing and publishing as true a counterfeit order, purporting to be an order upon the cashier of the Bank of the United States in the words and figures following:

"(5) A. 10,363. A. 10,363. (5)
"Cashier of the Bank of the United States,
"Pay to Thomas Mather, or order, Five Dollars.
"Office of Discount and Deposit, Mobile, the 13th day of Oct. 1829.
"Geo. Poe, Cashier. Philip M'Closkey, President.
"Fairman, Draper, Underwood & Co."

Indorsed: "Pay the bearer, Thomas Mather."

—knowing the same to be false, forged and counterfeited with intent to defraud the Bank of the United States.

On the trial it was objected by Mr. Brashier and D. P. Brown, for defendants, that the order laid in the indictment was not within the law, and that the indictment could not be sustained, because the offence was not laid to be with the intent to defraud the person to whom the order was passed. Among other questions which arose on the evidence was this: several witnesses by the name of Burke testified to the presence of a person by the name of Rush at the time of passing the order in question, in which they are contradicted by a number of witnesses for the defendant. It was contended by the defendant's counsel that they were perjured if they swore rashly and inconsid-

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

erately, though according to their belief, if their evidence was untrue in relation to the presence of Mr. Rush, they were not to be believed, and relied on the case of [Com. v.] Cornish, 6 Bin. 249.

Mr. Dallas, defendant's attorney, contended, that perjury consisted in swearing falsely and corruptly, contrary to the belief of the witness.

BALDWIN, Circuit Justice (charging jury). The counsel of the defendant has presented to the court the question, whether the orders or checks of a president of a branch Bank of the United States, drawn on the cashier of the mother bank, come within the meaning of the words "order or check," mentioned in the eighteenth section of the law incorporating the bank. The point has not been argued, but it has been made. It arises necessarily, is vital to the prosecution, and must be decided by the court. The words of the law are very plain, "or any false, forged or counterfeited order or check upon the said bank or corporation or any cashier thereof," broad enough to embrace this paper, which on its face purports to be such an order, and if genuine, would be one, or any order or check on the bank or any of its cashiers at the branches or here, or any draft or bill for the payment of money, which in law would be deemed an order or check. Is this comprehensive description narrowed by any other parts of the law? We find in it no prohibition direct or indirect against issuing this kind of paper either by the bank or any of its branches, or any word or expression by which congress has excluded it from the purview of the eighteenth section; neither can we perceive any thing in its nature which would justify such inference. The only restriction on the issuing of any paper, is in the proviso to the twelfth fundamental article in the eleventh section of the charter. The bank can make no bill obligatory or of credit under its seal for the payment of a less sum than 5,000 dollars; the bills or notes issued by order of the corporation, signed by the president and cashier, are made as binding and obligatory on the bank as those of private persons, but all their bills and notes must be payable on demand, unless of a sum not less than 100 dollars, and payable to order; none of these restraints apply to an order or check; the notes or bills alluded to are such as contain a promise to pay money, and the bills obligatory are such only as are under seal, and for sums not less than 5,000 dollars. The bank is left free to contract debts by any other mode than by their promissory note or an obligation under seal, with no other limitation than is contained in the eighth fundamental article, which is merely as to amount, the only effect of which, is not to exempt the bank from liability for the excess, but to make the directors, under whose administration it shall happen, personally liable. The words of this article are, in our mind, very conclusive on this point. "The total amount of debts which the said corporation shall at any time owe, whether by bond, bill, note, or other contract, over and above the debt or debts due for money deposited in the bank, shall not exceed the sum of 35,000,000 dollars," &c. This is an explicit declaration that the bank may make, and are bound by contracts other than those by bond, bill, note or deposit. These other contracts must be taken to mean and be coextensive with ordinary transactions of banks. We certainly cannot confine them to limits narrower than those subjects which the charter recognises as those on which the bank are to act. Deposits, discounts, drawing, indorsing, buying, selling bills of exchange, or taking them for collection, dealing in gold or silver bullion, paying for buildings, improvements, salaries and contingent expenses, are "other contracts," by which the bank may incur debts, and are bound to pay them to any amount to which they may be contracted by them or under their authority. In all these operations, checks or orders on the bank or its cashiers, are indispensable to conducting the business of the bank. They are peculiarly so when we consider the connection between the bank and the government and its branches. Being the depositories of the public money,—bound to transfer it without charge or commission from the place where it is received to the place where it is wanted or required to be deposited,—bound to distribute the money of the government among its creditors,—to pay the salaries of public officers,—to act as commissioner of loans in the different states, in the payment of the public debt and pensions,—there must of necessity be drafts, orders and checks by the bank on its branches, and by the branches on each other, and on the bank. The branches are offices of discount and deposit. Independently of the duties enjoined on them by the charter, for the convenience of the government, there were great and powerful reasons for the incorporation of the bank, and the establishment of its branches, to create and continue a sound, uniform currency, facilities for internal exchange and remittance. It cannot be contended that drafts, orders or checks, drawn by or on the bank, or any branch, are not legitimate means by which all these objects, both public and private, could be accomplished, or that they can be accomplished without them. There is no pretence that there is any express or implied prohibition making them unlawful, and no good reason can be assigned why the bank, individuals and the public should not have the same protection against any injury which might result from their being forged or circulated, as the promissory notes of the bank, or the drafts, orders, or checks of individuals upon a cashier of the bank. It is, in our opinion, no answer to these views, that the law has not expressly

authorized the officers of the branches to draw on the bank: it is enough for this point that they are not prohibited from doing so: it is an act indispensable to the transaction of their ordinary business, in order to meet the wants of the public and others. The bank may contract otherwise than by bond, note, or bill. They may authorize the branches to draw orders, checks, or bills upon them, whether in funds or not, —but authorized or not, the paper has the same validity; if genuine, the drawer or drawee is bound for payment. It would be introducing a new principle into our code of criminal law, to say that the guilt or innocence of the accused would depend on the fact of the person in whose name a paper is forged having funds or authority on which he could draw his order or check. If a genuine bill is wanting in some requisite to give it currency, as the indorsement of the payee when payable to order—or if a positive law directs that besides the proper signatures, some other act should be done to give it any validity between the parties or to permit it to be read in evidence—as that it should be stamped—the crime of forgery is as complete by forging or knowingly passing it before indorsed or stamped, as after. Bailey, Bills, 442 (Am. Ed.) 382; U. S. v. Mitchell [Case No. 15,787].

To save the party from the penalty on account of the invalidity of the paper if genuine in fact, it must be shown to be wholly illegal and void in its operation, so that no one could be injured by its being forged or passed upon him. The genuine paper must be as worthless as its counterfeit. The law embracing then all orders or checks on the bank or any cashier thereof, with intent to defraud the bank or any other person, containing no exceptions, excluding no paper which comes within the definition or common acceptation of an order or check, or prohibiting the issuing or circulation of those drawn by the presidents of branches, we are bound to declare them to be within the words, spirit and meaning of the law, equally with the notes of the bank or the checks or orders of individuals. You will therefore understand us as distinctly laying down the law to be, that it is criminal to forge or pass paper of this description.

The next question of law which arises in the case is, whether that part of the indictment which charges that the accused passed the order or check in question, with intent to defraud the Bank of the United States, has been made out. On this part of the case the law is well settled; the indictment must allege the offence to have been committed with the intention of defrauding some person or corporation, and this allegation must be proved as laid. This is the general rule, but it must be taken with this qualification. If the person in whose name a forged note, bill, order or check is drawn, or the one on whom it is drawn, would, if genuine, be bound to pay it, the law infers and takes as proved the intention to defraud and injure such person, from the act of forging, or knowingly passing such paper. Bailey, Bills, 442 (Am. Ed.) 386; Russ. & R. 169, 291, 292; 2 Taunt. 333, 334. It is not necessary that there should be any actual injury sustained or fraud practised in fact, on the person who was the subject of the meditated fraud or injury; this part of the offence consists in mere intention, and if that intention can be consummated the offence is complete. It is enough that it may probably or possibly be done. 2 Strange, 749; 2 Law Rep. 1469; 2 W. Bl. 787; U. S. v. Moses [Case No. 15,825]; 2 Taunt. 333. The passing of this order or check is alleged to be done with intent to defraud the Bank of the United States; it therefore becomes necessary for us to inquire whether the bank might or could be defrauded or injured if the paper was genuine. By the fourteenth fundamental article of the charter of the bank, it is bound to establish branches in certain cases. It is authorized to establish them wheresoever they think fit, within the United States, and to commit the management and the business thereof to such persons and under such regulations as they may think proper, not being contrary to law or the constitution of the bank; or instead of establishing branches, they may employ other banks, with the approbation of the treasury, to manage the business proposed, other than for the purposes of discount, under such agreements and under such regulations as they may deem just and proper. It thus appears that the branches are legitimate emanations from the parent bank, who may commit their management to such persons, and subject to such regulations as they think proper, under no other limitations to their power than the laws of the land and their own charter. The operations of the branches are carried on with the funds of the corporation by officers of its appointment, and under its regulations; they are its agents, capable of binding it by their contracts; all their transactions are for the benefit of the bank, who cannot disavow them unless in a clear case of an excess or abuse of their powers, under such circumstances as would invalidate the contract of an agent of any other corporation or an individual. Any business may be done at the branches in relation to discounts and deposits which may be done at the parent bank; it is liable to depositors for all balances due at the branches, for all drafts, orders or checks drawn by its officers on their own cashier, by their own authority.

The act of establishing a branch, is, per se, the creation of an agency; it is an authority not only to the extent of the regulations under which their agent acts, but to the extent of all acts and transactions of the officers of the branches which the bank have been in the habit of adopting and confirming, on the same principle that individuals are liable on

the contracts of their wives and servants, who have been permitted to deal on their credit, and in their names; or a merchant, whose clerk is in the habit of writing letters, signing notes, bills and checks in his name, though without any written or express authority, by the adoption and recognition of which he authorizes the public to consider his clerk as his agent, authorized to do in future what he has been in the habit of doing with his knowledge and assent. It would be strange indeed that the bank should not be liable for checks or orders drawn by its agents at their own branches, which not only form a very important item in the currency of the country and the operation of the branches, but which the bank have for years daily ratified and sanctioned by their payment; the uniform course of business transacted between the bank and its branches, furnishes such a strong legal inference and presumption of its being authorized by the regulations under which they have been established, that the burthen of proof to the contrary is clearly thrown on the bank or any other person who would attempt to show that the paper was not obligatory upon them. It would be a severe reflection on the bank to suppose that they would for a moment refuse payment of these checks and orders, and our system of jurisprudence would deserve little of public respect or confidence if the law would not coerce it. But the charter is not silent. The eighth fundamental article makes the bank liable for all debts, though they exceed the amount limited; the fourteenth makes the offices of discount and deposit its agents; the sixteenth section makes the bank the depository of the public money, and imposes on it the obligation of transferring, distributing and paying it under the directions of the treasury; and by the seventeenth article, the bank is bound to pay in gold and silver all its notes, bills and obligations, and all deposits in the bank or its offices; and the proviso enacts, that congress may enforce and regulate the payment of other debts under the same penalties as are prescribed for the refusal to pay its notes, bills, obligations and deposits. The mode in which the bank contracts a debt, the shape it assumes, or the places where contracted, is of no importance. The offices being its agents, the debts contracted by them become the debts of the corporation, imposing a duty to pay them, which may be done at or by the branches or the bank. If the payment is made in coin, the debt is extinguished; if made by a draft, order or check, the debt remains until they are actually paid. Unless the holder expressly takes them as payment, and at his own risk, they create a new duty or obligation, which the bank is as much bound to perform as the old one for which it is intended to make satisfaction. It is a matter of mutual convenience, whether the old debt or duty shall be extinguished by payment or taking paper, whether in the promissory notes of the bank, or orders or checks drawn upon it. They may be in large drafts or orders for remittance, or small ones for currency or circulation, and in any form, with or without ornaments, devices, or marks. Whether they resemble in these particulars the notes of the bank, is immaterial; their substance and legal effect are the same; they create a new debt or duty obligatory on the bank. It is bound to honour all the paper which it issues or gets into circulation by its authority or agents. Paper of the kind now under consideration, can be put into circulation in no other way than by being issued in payment of a debt or other equivalent. If, on the requisition of the treasury, an officer of the branch at a place in which public funds were deposited, should draw his order on the cashier of the bank or any branch at a place to which it was required to transfer them, or in distributing the public money among public creditors, and disbursing officers of the government, paying salaries, pensions, or the public debt, should as a matter of mutual convenience and consent, give drafts, orders, or checks, either for remittance or circulation, on the bank or another branch, the bank would be as much bound to pay them as they would to pay the same amount to an officer or creditor of the government, who would deposit to his own credit the amount thus received through the bank. The same rule would apply to an individual depositor, a creditor of the bank, or one who had an order or check on them, and would receive payment in the shape of branch orders; so, if a branch makes a contract of discount, and pays the proceeds by drafts on the bank, or any other kind of paper to suit their convenience, these obligations necessarily result from the contracts of deposit and discount. But there is another contract equally binding, that of purchase and exchange. An individual desirous of procuring a medium of remittance or circulation, exchanges with a branch his gold, silver, or any paper which they accept, as an equivalent for their drafts, orders or checks, large or small, as the case may be; stands in the same position to the bank as a previous creditor, depositor or holder of any demand upon them. He pays his money into the coffers of the bank, who receive it from their agents as the product of the contract made by their drafts and orders, all the profits of which go directly to the bank. To refuse payment in any of these cases, would be a fraud too palpable to be tolerated—wholly repugnant to every dictate of justice and rule of law.

The bank then being liable to pay paper of this description, if genuine, it follows that the forging or knowingly passing it, could and might be intended, and operate to defraud the bank. This raises the legal inference and presumption that such was the intention of the accused. When the law infers or presumes a fact, or an intention as resulting from the evidence, a jury may and ought to find it as if it was in direct proof before

them; the inference and presumption of the payment of a bond after twenty years, without demand or payment of interest—the existence of a deed of land after thirty years' possession—the malicious intent which is implied from the act of speaking or publishing scandalous words in civil cases—the inference of malice aforethought which the law draws from the unlawful killing of another not explained—the inference of larceny from a man being found in the possession of stolen goods and not accounting for them; and what you have heard in this case, the legal presumption of the accused knowing the order in question to be forged, drawn from his having passed another forged order of the same description, are among the familiar cases where a jury ought to and will take legal inferences, when not rebutted by positive testimony. The jury will so view it in this case, and though they may think that there is direct evidence of the intention to defraud Burke, and that he was actually defrauded, and the indictment would be sustained if it was so laid, yet it does not follow that there was not also an intention to defraud the bank. In our opinion, the facts of the case amount to an intention to defraud both Burke and the bank; that the indictment would be good in law, and supported by the evidence, if the offence was said to have been done with the intent to defraud either or both, and therefore instruct you that the allegation of the indictment in this particular is sufficient in law, and made out by the evidence if you believe the witnesses.

An important question on the evidence has arisen in this case on which we deem it necessary to give you our opinion. It has been contended by the counsel for the prisoner, that if you shall believe that Mr. Rush was not present at the races, that Burke and others who have sworn to his being there, and to his identity, are perjured if they have done so rashly, without knowledge, or using proper means of obtaining it, though they may believe in the truth of what they attest. To this position we cannot assent; with all possible respect for the private and judicial character of the learned judge, who pronounced the opinion of the supreme court of this state in the case referred to, we feel bound to express our decided dissent to the decision given. The statute (5 Eliz. c. 9; 2 Ruff. 549; 3 Inst. 163) adopted in Pennsylvania in 1718 (1 Dall. St. Laws, 143) makes it of the essence of the offence of perjury, that it be committed "wilfully" and "corruptly." Such are the very words of the law, which in our minds are not and cannot be taken as synonymous with "rashly" and "inconsiderately" swearing as the belief of the witness prompts him. His negligence or carelessness in coming to that belief or conclusion of the mind, without taking proper pains to enable him to ascertain the truth of the facts to which he swears, does not make his oath corrupt, and perjury cannot be wilful where the oath is according to the belief and conviction of the witness as to its truth. It could not be asserted, consistently with any legal principle, that an indictment for wilful and corrupt perjury could be sustained, by proof of a witness having sworn rashly and inconsiderately to what he believed to be true. The case in 6 Bin. 249, is supported by only one decision, and that in the star chamber. 3 Inst. 166. We should be sorry to follow in this court the precedents of that in criminal prosecutions, and deem it unnecessary to apply to their proceedings, any other remarks than those which fell from the greatest common law lawyer in Westminster hall (Justice Yeates). "Next we are told of some proceedings in the star chamber, a court the very name whereof is sufficient to blast all precedents brought from it." 4 Burrows, 2373.

On this subject we therefore give you our most decided opinion, that you cannot be justified in imputing perjury to the witnesses, who have sworn to the presence of Mr. Rush on the race ground and to his identity in court, unless you shall believe, not only that Rush was not there, and that the fact is contrary to their oath, but that they swore wilfully and corruptly, contrary to their belief of the truth, whether they did so, is a matter for you to judge. It is in our opinion of infinite importance in this case for you to decide with the utmost deliberation on this point, as we think the prosecution mainly turns upon it. If in your opinion the Burkes have committed wilful and corrupt perjury, touching any thing in this case materially affecting the guilt or innocence of the accused, they are wholly unworthy of credit as to any other matter; a witness perjured as to one fact, ought not to be believed in any other. This we do not say to you as matter of law, for you may believe him in other respects if you will. But if we should in any such case, pass sentence on a prisoner convicted on such evidence, it would be with great reluctance, and little satisfaction with our administration of the penal justice of the union. On the other hand, if you should think these witnesses testified under a belief in the truth of their story as to Rush, you would probably not think it would be doing them or yourselves justice in disbelieving such facts of their evidence, as were not contradicted, disproved, or explained by the accused. If you should believe they swore rashly and inconsiderately as to one material fact, it might very properly give such a tinge to all they said, as to induce you to take their relation of other facts with great allowance, but would not justify you in wholly rejecting it. In making up your opinion on this part of the case, you must remember that an indictment is depending against Mr. Rush; we would recommend to you, not to examine very closely into the evidence which bears on his presence on the race ground; for the purposes of this trial, it is better to consider that in this respect, the witnesses on the part of the United States are

at least mistaken, and decide on the case of the prisoner on that supposition. In making this suggestion, however, you will not consider us as expressing our opinion on the weight of evidence, so far as it applies to Mr. Rush, it is due to him and the United States to suspend any opinion.

Verdict, guilty.

Case No. 16,272.

UNITED STATES v. SHELTON et al.

[1 Brock. 517.] [1]

Circuit Court, E. D. Virginia. May Term, 1821.

DEBTS DUE UNITED STATES—PRIORITY—INSOLVENCY OF PARTNERSHIP.

Where a partnership firm, being indebted to the United States for duties, makes an assignment of all their effects for the payment of their debts, for which the social fund is inadequate, this is an act of insolvency, quoad the social fund, under the act of congress, which gives the United States the preference to other creditors, "in all cases of insolvency:" and it seems, that such an assignment amounts to an act of general insolvency, and that the private property of the individual partners, will also be subjected to the payment, in the first instance, of the debt due to the United States, in the event of the inadequacy of the partnership fund.

[Cited in brief in U. S. v. Lewis, Case No. 15,595.]

[Cited in Morris v. Morris, 4 Grat. 313.]

MARSHALL, Circuit Justice. In this case, P. T. Shelton & Co., consisting of P. T. Shelton, and Walter Shelton, being indebted to the United States for duties, made a voluntary assignment of all their effects for the payment of their debts. Walter Shelton, was in possession of some estate in his private character, which he afterwards conveyed for the payment of his private debts. The United States have filed their bill, claiming priority out of the social fund, and have also, in a supplemental bill, claimed priority out of the private fund. The controversy is, between the creditors under the first and last deed. Those under the first deed, contend that its execution was not an act of insolvency, inasmuch as one of the partners remained solvent. The creditors under the second deed insist, that the claim of the United States, if it can now be asserted, ought to be charged on the first deed. Some other questions have been made in the cause, but they are contingent questions, depending on the manner in which the first shall be decided.

The act of congress gives a preference to the United States, "in all cases of insolvency." And these "shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all of his, or her debts, shall have made a voluntary assignment thereof, for the benefit of his, or her creditors," "as to cases in which an act of legal bankruptcy shall have been committed." 1 Story's Laws, c. 74, p. 465, § 5 [1 Stat. 515, c. 20]. P. T. Shelton & Co., executed their bond to the United States, as partners, for a partnership debt. In that character, they were the "debtor" of the United States. In that character, they had not "sufficient property to pay all their debts." In that character, they "made a voluntary assignment of all their property for the benefit of their creditors." This would, I think, have been "an act of legal bankruptcy," under the act of congress, passed afterwards on the subject, as well as under the bankrupt laws of England, and would, probably, have constituted an act of bankruptcy, under any state law, which might exist at the time. Of this, however, I am not certain. I cannot, therefore, say positively, that the question, whether this assignment is an act of insolvency, under the act of congress, derives any illustration from the reference it makes to "an act of legal bankruptcy;" though I am inclined to think it does. But be this as it may, I am disposed to think, that on the mere reason of the case, it is a fair exposition of the words of the act of congress, to consider it as an act of insolvency. It was an alienation of that whole fund, which was immediately, and in the first instance, chargeable with this debt. Had a commission of bankruptcy been sued out, the debt of the United States, being a partnership debt, would have been paid out of the social fund; and recourse would not have been allowed against the private fund, till the social fund was exhausted, or shown to be inadequate to the satisfaction of the debt. It seems to be the dictate of justice, that partnership transactions should be charged in the first instance, on the partnership fund, and private transactions on the private fund, when there is not enough for the payment of all.

I shall, therefore, direct the trustees, under the first deed, to pay the debt due to the United States, with liberty to apply to the court, should that fund prove insufficient.

See a summary of the cases, decided by the supreme and circuit courts of the United States, involving the question of the priority of the United States, arising under the insolvent laws. 1 Pet. Cond. R. 430, and 6 Pet. Cond. R. 603. See, also, a very interesting decision on the subject, in the case of U. S. v. Marshal of District of North Carolina [Case No. 15,727.]

[1] [Reported by John W. Brockenbrough, Esq.]

Case No. 16,273.

UNITED STATES v. SHEPARD.

[1 Abb. (U. S.) 431; [1] 2 Chi. Leg. News, 317; 12 Int. Rev. Rec. 10.]

District Court, E. D. Michigan. June Term, 1870.

ARREST OF OFFENDERS—EXAMINATION—REMOVAL TO OTHER DISTRICT—FEDERAL COURTS—CRIMINAL INFORMATIONS.

1. Where a motion to quash an indictment is founded upon the allegation that no evidence

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

whatever of defendant's guilt was adduced in support of the application for a warrant for his arrest, the court may inquire into this allegation, and, if it is established, quash the indictment; though they cannot inquire into the sufficiency of such evidence, if any was produced.

2. A certified copy of an information filed for an offense against the laws of the United States, without copies of some oath or affirmation to facts showing probable cause to believe the defendant guilty, does not authorize issuing a warrant of arrest.

[Cited in U. S. v. Pope, Case No. 16,069.]

3. It is not lawful to arrest a person in one district, for an alleged offense against the laws of the United States, and remove him to another district for examination; nor can a district judge authorize such removal. The offender, upon being arrested, is entitled to be taken before the proper officer of the district in which the arrest is made, for examination; and if probable cause is not shown, or if (the case being bailable) he gives bail, he is entitled to be discharged. It is only after a commitment upon the results of such examination that an order can be made to remove him to the district in which the trial is to be had.

[Cited in Re Alexander, Case No. 162; U. S. v. Haskins, Id. 15,322; U. S. v. Jacobi, Id. 15,460; U. S. v. Brawner, 7 Fed. 88; U. S. v. Reilley, 20 Fed. 46; Erwin v. U. S., 37 Fed. 489; U. S. v. Wallace, 46 Fed. 571.]

[See In re Bailey, Case No. 730.]

4. Criminal proceedings in the courts of the United States are according to the course of the common law; except so far as has been otherwise provided by the constitution or acts of congress. They are not affected by the laws of the several states.

[Cited in U. S. v. Coppersmith, 4 Fed. 205.]

5. Hence it is not necessary that the names of witnesses for the prosecution should be indorsed on the indictment or information preferred in one of those courts; although such indorsement may be required by statute of the state.

6. An offense against the laws of the United States, which is of a character not capital or infamous, may be prosecuted in the courts of the United States, by an information, according to the course of the common law.

[Cited in U. S. v. Ebert, Case No. 15,019; U. S. v. Maxwell, Id. 15,750. Distinguished in U. S. v. Ronzone, Id. 16,192. Cited in Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939; U. S. v. Baugh, 1 Fed. 787.]

7. The proper course of proceeding in issuing a criminal information explained.

Motion to quash an indictment. In September, 1869, the district-attorney filed an information in the district court for the Eastern district of Michigan, against G. Shepard. The offense with which the accused was charged was the knowingly and fraudulently bringing into the United States certain personal property in violation of section 4 of the act of July 18, 1866 (14 Stat. 179); [and the punishment is by fine not exceeding $500, or imprisonment not exceeding two years. This may be in the penitentiary.][2]

The defendant having been arrested upon this charge, and having given bail, now moved to quash the indictment.

A. B. Maynard, U. S. Dist. Atty.

Alfred Russell, for defendant.

WITHEY, District Judge. The facts exhibited as the grounds of the motion are, that the information upon which the government seeks to hold the defendant to answer and trial, was filed by the district-attorney without oath or proof of probable cause, and without application to or leave of court. Before the information was filed, complaint was made before a commissioner at Detroit, and a warrant for the arrest of the accused was issued to the marshal of the Eastern district of Michigan. But the accused being absent from the city no arrest was made upon the warrant. The information was then filed by the district-attorney, as above stated. As no arrest could be or was made upon the warrant issued by the commissioner, the arrest and holding to bail rests solely on the information. A certified copy of the information was taken to Chicago, when the district judge of the Northern district of Illinois, on proof of the identity of the accused, but upon no other evidence of probable cause than such copy, indorsed thereon his warrant for the arrest of defendant, and for his removal to this district for trial.

Defendant was arrested and brought to this city; here he was taken before the United States commissioner, waived examination, and gave bail for his appearance to answer the charge contained in the information.

The court will consider three questions involved by the motion to quash: (1) Was the arrest lawful, and, if not, can the defendant be held to answer? (2) Is the information legally sufficient, the names of the witnesses for the prosecution not being indorsed thereon? (3) Can a person be held to answer for an offense, not capital or infamous, on an information filed by the law officer representing the government?

The first question is answered by the fourth constitutional amendment, which declares that "no warrant of arrest shall be issued but upon probable cause, supported by oath or affirmation," &c. Had there been any showing for the arrest at Chicago, supported by oath or affirmation, this court could not inquire whether the showing was sufficient to justify the issuance of the warrant by the district judge of Illinois; but when it is alleged there was no showing supported by oath or affirmation, and the illegality of the warrant is made the basis for arresting all further proceedings in the cause, it is our duty to inquire whether the fact is as asserted.

We have already stated what is proved here,—namely, that the certified copy of the warrant was all that was shown to procure the order of arrest. The constitution declares that "no warrant of arrest shall issue but upon probable cause," &c.; the information is not supported by oath or affirmation; it follows, as a corollary, that the warrant was not authorized. There was no proof of proba-

[2] [From 12 Int. Rev. Rec. 10.]

ble cause, supported by oath or affirmation to justify it. Doubtless, the learned judge who issued the warrant, acted upon the presumption that the proceedings here had been such as to establish probable cause; treating the information as having been filed upon cause shown, and regarding the certified copy as affording the same evidence as a certified copy of an indictment would furnish, when the evidence of probable cause is presumed to have been given to the grand jury. It now turns out that the proceedings anterior to the issuance of the warrant, laid no foundation for the arrest, and all proceedings based upon such unlawful arrest must fail.

Under the question we have been considering, a point was made that the warrant to remove defendant from Chicago, in one district, to Detroit, in another district, was unauthorized under the facts exhibited. The only act of congress upon the subject of the arrest and removal of offenders against the laws of the United States, is that of September 24, 1789, § 33 (1 Stat. 91), in reference to removal of offenders in one district, to be tried in another. It is this: "If such commitment of the offender . . . shall be in a district other than that in which the offender is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender . . . to the district in which the trial is had." By consulting the previous portions of this section, in connection with the clause I have read, it will appear that the warrant of removal is authorized only where the offender has been first arrested and committed for want of bail, in a bailable case. The statute does not seem to contemplate or warrant removing a person from one district to another in the summary way pursued in this case. He is first to be taken before the proper officer, who is to examine as to the crime alleged against the accused. If there be not probable cause of his guilt, he is entitled to be discharged; whereas, if there be found reasonable cause for holding the accused to answer, upon tendering sufficient bail, he is entitled to his discharge from arrest. Only on failure to give bail, in a bailable case, can he be committed.

Defendant was at liberty in the city of Chicago; was arrested and immediately removed to Detroit, without opportunity to confront the charge at the place of his arrest. We are at a loss to understand how the defendant could thus be dealt with under the statute. Suppose defendant had been a resident of Galveston, in Texas, or San Francisco, in California, instead of Chicago, and was thus arrested and summarily removed nearly across the continent, before having the opportunity of meeting the charge on which he was arrested. We will suppose, when examined here, before the proper officer upon the charge, it should turn out that the charge is not sustained. Does not this plainly illustrate the wrong and injury which may be done to a citizen under such forms of legal proceedings? We regard the removal as having been wholly without the authority of law.

In reference to the second question, we remark that state laws do not control in criminal proceedings in the United States courts, either in the mode or form of charging the offense, in the rules of evidence, or in the manner of conducting the trial. On the contrary, the proceedings throughout are according to the course of the common law, except so far as has been otherwise provided by the laws of congress or by constitutional provision. U. S. v. Reid, 12 How. [53 U. S.] 365. It was not required by the common law that the names of witnesses for the prosecution should be indorsed on the indictment or information, and there is no act of congress requiring it. In treason a list of the government witnesses is to be furnished to the accused. The Michigan statute does require the names to be indorsed on the indictment; but if the state statute governed our proceedings we should regard this provision as directory, and the omission as not affecting the validity of the indictment or information.

The other question to be considered presents an interesting inquiry. We have said the common law governs in criminal cases in the United States courts; hence the question whether the accused can be held to answer to a criminal information must be solved by determining, first, what is the common law on that subject; and second, what modifications have been effected through the laws of congress or the constitution. The English system of jurisprudence brought by our ancestors as the common law, and those statutes of parliament applicable to the situation of the colonies, which extended to them and were adopted by usage or acts of assembly, have been by the United States courts held to be the common law of this country. Patterson v. Winn, 5 Pet. [30 U. S.] 241; Bains v. The James and Catherine [Case No. 756].

At the time of the revolution and of the adoption of the constitution, it was the practice in the court of king's bench for the king's attorney-general to file informations in the name and behalf of the king, in a class of cases not above the grade of misdemeanors, without any previous showing to the court, but in the discretion of that officer. This discretion was not, however, exercised, except in cases where the offense tended to disturb or endanger the king's government, or to molest him in the regular discharge of his royal functions, and where delay would be dangerous.

There was another class of offenses of the same grade, which could be proceeded against by information filed by the master of the crown office—a person appointed as the king's attorney to prosecute in behalf of the public, on complaint made by a sub-

ject or by a common informer. This officer could not substitute an information for the indictment of a grand jury, unless upon a showing and leave of court. The practice was to present affidavits of the offense, and move the court for a rule on the accused to show cause, and if the affidavits were not sufficiently answered leave was granted to file a criminal information in cases below the degree of felony. 4 Bl. Comm. 308, 309, 311; 1 Chit. Cr. Law, 845, 846, 849, 856.

Now what changes have been produced by the constitution or laws of the United States, affecting the practice in form or substance, so far as regards the question at bar? Congress has passed no law on the subject, and the only constitutional provision affecting the question is the fifth amendment, proposed the same year that the original instrument went into operation—1789. It declares: "No person shall be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury," &c.

Congress by proposing, and the states by ratifying that amendment, left all offenses not capital or infamous to be prosecuted by information or by indictment, as the circumstances of each case should seem to require, and as the common law would sanction. Indeed, this constitutional provision produced no change in the practice or law, except, perhaps, as regards a class of misdemeanors regarded as infamous crimes, and which might, before the amendment, be prosecuted by information. The amendment, however, fixed the matter, beyond the power of congress or the courts to alter the course of proceeding in bringing forward a charge of crime, in the class of cases embraced by the provision.

We regard the converse of the fifth amendment to be that persons may be held to answer for crimes other than such as are capital or infamous, upon information or indictment, according to the course of the common law. We have examined all the cases referred to by counsel, and find no well considered decision which conflicts with the views we have expressed, and therefore we conclude that, so far as the question rests on the common law, it is the right of the government, by its proper law officer, the district-attorney, to charge offenses against individuals through the forms and mode of informations.

There are, however, two considerations growing out of this subject, to which we should allude to give a proper understanding of our full views. It was said on the argument that the usage since the organization of the United States courts, has been to present offenders, in all classes of criminal cases, only through the instrumentality of a grand jury by indictment. If the practice of prosecuting by criminal information has fallen into disuse for eighty years, it certainly presents a strong reason for urging that such proceeding has become obsolete. Our reply, however, is, that the fifth amendment, adopted almost at the start of the government under our present constitution, recognized the right to pursue the common law course by criminal information, in all but capital and infamous crimes. And if such rights existed then, not only at common law, but by clear implication in the fifth amendment, as we have shown, then, even though such right has been in abeyance for eighty years, there has been no abrogation of the power of the government to assert that right, particularly as the courts do not seem to have refused, by any well considered case, the exercise of such right, though we find some intimations by the courts adverse to its exercise.

The other consideration concerns the necessary preliminary steps before the right to file a criminal information can be asserted. We incline to the opinion and hold that there must first be a complaint, supported by oath or affirmation showing probable cause, followed by an arrest and examination, agreeably to section 33 of the act of September 24, 1789.

If the accused is held to bail or committed, the district-attorney, on filing the magistrate's or commissioner's return, with the proofs, will have leave to file a criminal information.

This course would seem as nearly adapted to the method of procedure in these courts, and to our laws, as any thing which suggests itself. It would certainly be quite foreign to any known practice in the United States courts to pursue the English practice of requiring a rule for the accused to show cause before the court, and there contest the question whether the evidence justified placing him upon trial.

The right of the accused to contest the probable cause shown by the prosecution is secured to him on his examination before the commissioner or magistrate, under the complaint on which he was arrested.

We ought, perhaps, to remark that the position assumed by the defendant's attorney, that the charge in this case involves a felony, is not sustained. The fact that the accused is liable on conviction to be imprisoned in the penitentiary does not determine the offense to be a felony. On the contrary, a felony at common law embraces only such crimes as are punished capitally. Nor is it an infamous crime; for if the defendant should be convicted on such charge it would not render him incompetent to testify as a witness, as would be the result if it were a crimen falsi. Neither does the charge necessarily involve perjury—which would be a crimen falsi, and infamous.

The information in this case, as we have shown, was filed without right or authority. The arrest and holding to bail were also unauthorized; and for both grounds the court must refuse to hold the accused to answer.

Motion granted.

UNITED STATES v. SHEPHARD. See Case No. 16,273.

Case No. 16,274.

UNITED STATES v. SHEPHERD.

[1 Hughes, 520.] [1]

Circuit Court, E. D. Virginia. April 13, 1875.

CRIMES UNDER NATIONAL BANK LAWS—FELONIES —MISDEMEANORS—TRIAL IN ABSENCE OF ACCUSED.

1. Under the Revision of 1874, that clause of section 59, c. 106, of the act of congress of 3d June, 1864 [13 Stat. 117], relating to the national banks, which makes the offence it creates a felony, is repealed, and an indictment charging such an offence need not charge that it was feloniously committed.

2. There are no crimes against the United States which are felonies by virtue of the common law, except such as may be committed on the high seas, or in the places in the states which are under the exclusive jurisdiction of the United States.

[Cited in U. S. v. Coppersmith, 4 Fed. 205.]

3. Except offences committed on the high seas or in such places, there are no felonies against the United States, cognizable by courts of the United States, except those which are expressly made such by act of congress.

[Cited in U. S. v. Coppersmith, 4 Fed. 205.]

4. Trials for misdemeanors may be had after service of summons upon the accused, without the actual presence of the accused in court, especially if he is represented by counsel, certainly in the state of Virginia.

[Cited in U. S. v. Coppersmith, 4 Fed. 207.]

5. The verdict of guilty upon an indictment for misdemeanor may be rendered by a jury in the absence of the accused, if his counsel be present; and when so rendered, judgment will not be arrested.

The indictment [G. A. Shepherd] was for attempting to pass a falsely altered note of the national currency, knowing it to be falsely altered, in violation of the 5145th section of the Revised Statutes, which declares, as to this offence, that "every person who attempts to pass any falsely altered circulating note purporting to have been issued by any banking association authorized under the laws of the United States, knowing the same to be falsely altered, shall be imprisoned at hard labor not less than five years nor more than fifteen years, and fined not more than one thousand dollars." The act of congress passed in 1864, from which this section is taken, contained a clause declaring that such a person shall be deemed and adjudged guilty of felony and shall be imprisoned, etc., but this clause is omitted in the revision of 1874. The note was falsely raised from a one dollar to a ten dollar note. The case was tried on the 8th of April, and given to the jury, and on the 9th, the jury found a verdict of guilty, but brought in their verdict at a late hour of the day, after the prisoner had been taken to jail. And he was present only by counsel. Before finding the verdict, the jury had been in deliberation for thirty hours, and a few hours before rendering their verdict, had come into court and asked instructions on parts of the case which are adverted to in the opinion of the judge.

Immediately on the rendering of the verdict the prisoner's counsel moved in arrest of judgment, and for a new trial. The grounds of these motions were: 1st. That this was by law a felony and the indictment did not charge that the prisoner "feloniously" attempted to pass the falsely altered note, and should be quashed. 2d. That whether a felony, or a misdemeanor, punishable by an imprisonment, which the court might fix for fifteen years, the prisoner ought to have been allowed the privilege of being present when the verdict was rendered; and that, having been held in jail at the time by the United States, the verdict ought to be set aside. 3d. That the verdict ought also to be set aside because it was contrary to the law and the evidence.

HUGHES, District Judge. The court overrules the first objection. The repealing chapters at the end of the Revised Statutes of the United States of 1874, repeal all former acts of congress, "any portion of which is embraced in the revision." The revision therefore repeals that part of section 59 of chapter 106 of the act of 1864, relating to the national banks, which makes the offence named a "felony." Not being a felony, of course the offence should not have been charged as having been "feloniously" committed. Except those committed on the high seas and within the forts, arsenals, and other places exclusively within the jurisdiction of the United States, and except high treason, there are no common law offences against the United States; and all crimes are statutory. There are therefore no felonies against the United States except those expressly declared to be such by act of congress. It has not been the policy of congress to multiply felonies; comparatively few offences are declared to be felonies. As a general rule, offences against the United States are misdemeanors punishable by imprisonment, by fine and imprisonment, by fine or imprisonment, or by fine alone. If punishable by fine alone, the offenders may be proceeded against by indictment for the fine or by action of debt for the penalty. Therefore a very large number of offences against the United States may be tried in the absence of the accused, if his counsel be present.

The court also overrules the second objection. The cases cited by prisoner's counsel only go to the extent of ruling that verdicts in trials for felony must be rendered in the presence of the prisoner. They do not invalidate verdicts rendered in the absence of the accused in cases of misdemeanor. This exception in respect to misdemeanors has not been made merely because in misdemeanor trials the accused is usually on bail, and if

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

absent, is voluntarily so. The cases make no distinction in such trials between those in which the accused is on bail, and those in which he is not. The Code of Virginia (page 1243, c. 201, § 25) allows the trial of misdemeanor to proceed, provided a summons has been served, whether a capias has been returned, executed, or not executed, and whether the accused be present in person or not. In such matters the practice in the courts of the state, furnishes the rule of practice in this court. The old formula of the common law practice, requiring the clerk when the jury appeared with their verdict, to say: "Gentlemen of the jury, look upon the prisoner and hearken unto your verdict," originated at a time when the penal code of England was a very bloody one, and denounced capital punishment for the most trivial offences; when the pleadings even in criminal prosecutions were written in a foreign language, and when prisoners were not allowed the advice and assistance of counsel. The barbarities of criminal justice were then so gross, that great and humane judges availed themselves of the most technical irregularities in the pleadings and proceedings as an excuse for discharging prisoners standing dumb and helpless before them, and threatened with the most awful punishment for the most venial offences. But the penal code has in modern times been stripped of its barbarities; penalties are apportioned in degree to the crimes which they are intended to prevent; prisoners enjoy the assistance of counsel, and are provided with opportunity and means of full and complete defence. All proceedings are conducted in the venacular of the country and of the accused, unless he be a foreigner, in which case they are humanely interpreted to him. The old technicalities of the criminal practice have been gradually discarded, as the necessity for them decreased, and finally ceased; and now, the rules of the criminal practice are as little arbitrary and technical, and as reasonable and just as they are in civil proceedings. The prisoner at bar was ably defended at every stage of the trial, and though he was not personally present when the verdict was rendered, both of his counsel were. They did not ask that he should be brought in; they moved instanter for an arrest of judgment and a new trial, and did all that the prisoner could have done or demanded if he had been present in person. The second objection is therefore overruled.

3d. The prisoner's counsel also make several objections to the verdict, as contrary to the law and evidence of the case: (1st.) One is, that it was not proved beyond doubt that the accused knew that the note was falsely altered when he attempted to pass it. (2d.) Another is, that a confession made to the arresting officers at a considerable interval of time after the arrest, was given in evidence, so as to have an effect upon the views of the jury, in spite of the instructions of the court, that they should not be regarded. (3d.) Still another objection is, that the extraordinary length of time during which the jury were in deliberation, indicated that they were doubtful of the guilt of the prisoner.

(1) It is true that there was not much positive proof that the prisoner knew that the note was falsely altered. This knowledge on his part was inferred in part from circumstances; but these were such as could leave no doubt on the mind of the jury of the guilty knowledge. The alteration of the note, though skilfully enough done to escape notice in the hurry of business, was so perceptible when once suspected, that the prisoner could not but have known it when he attempted to pass it. The appearance of the note was of itself conclusive of the fact of guilty knowledge, in any attempt to pass it in broad daylight, after it had been examined by the holder.

(2) The court positively instructed the jury that confessions elicited by an officer from a prisoner while in duress and alarm, and without warning as to the use that would be made of them, were not evidence. I cannot infer in the present case, that the jury disregarded this instruction. A similar admission to that afterwards made to the officer was made by the prisoner when arrested in the presence of the person to whom he offered the note, and was evidence as a part of the res gestæ.

(3) My own understanding is that the jury were held a long time in doubt by the misapprehension that the attempt to pass the note was not an offence, and that the prisoner could only be convicted in the event that he actually passed it. After they were instructed by the court that the law made the attempt to pass, an offence, as well as the passing, and that the indictment charged the attempt, the jury were but a short time in deliberation.

I do not, therefore, think the case is one in which it would be proper to set aside the verdict and to award a new trial. It is, indeed, emphatically a case in which neither jury nor court can give relief. It is the case of a young man of good character, reputable connections, industriously engaged in making an honest livelihood, who is cheated on a railroad train, probably in the night-time, by some swindler, into receiving a spurious bank note, and who on discovering his misfortune, endeavors to get rid of the note the next morning in market by victimizing somebody else, who fails in the attempt, and is arrested and brought to trial for a first offence against the law, committed in an evil moment, without due reflection upon the nature and consequences of his act. It is a strong case for an appeal to executive clemency, but one in which neither the jury nor the court have a right or the power to exercise the high function of pardon.

The most that the court can do is, to suspend the sentence, so as to allow the friends of this young man to make appeal to the

president for a pardon, which I hope will be granted him. Sentence will be suspended until the 20th instant.

Case No. 16,275.

UNITED STATES v. SHEREBECK.

[Hoff. Dec. 11.]

District Court. N. D. California. Dec. 5, 1859.

CONSTRUCTION OF FOREIGN STATUTES — MEXICAN LAND GRANTS—PUEBLO LANDS—AUTHORITY OF PREFECT—EVIDENCE—RECITATION IN GRANT.

[1. In the absence of any judicial decision determining the construction and effect of a foreign statute, the practical interpretation given to it by those whose duty it was to apply and administer it affords the best means of ascertaining its true construction; and such construction will be followed, unless it be clear that such officers have misinterpreted it.]

[2. Mexican prefects in California had power, under the 77th article of the organic law of 1837, to grant the common lands of a pueblo.]

[3. In a grant of pueblo lands by the prefect, a mention of the land granted as "within the demarkation" of the pueblo affords presumptive proof, in the absence of opposing evidence, that the land was so situated, and that the officer acted within the limits of his authority.]

HOFFMAN, District Judge. The claim in this case is for 800 varas of land on Rincon Point, in this city, alleged to have been granted to the claimant by Manuel Castro, prefect of the Second district of California. It was rejected by the board for want of evidence that the land was part of the common lands of the pueblo of Yerba Buena. The same tribunal, in the subsequent case of City of San Francisco v. U. S., confirmed the claim of the city to certain lands within boundaries mentioned in their decree. In this decision the United States have acquiesced by dismissing the appeal that had been taken to this court. [Unreported.]

It is not disputed that the land claimed in this case is within the demarkation of the pueblo of Yerba Buena, as ascertained by the decision in question. But as that case was between other parties, the point cannot be considered as res adjudicata in this; nor can the evidence on which that decision was based be regarded, for it has not been, by stipulation or otherwise, introduced in this cause.

The case now before the court must be determined on the evidence contained in the record above. No additional testimony has been taken in this court by either party. No argument has been made or brief filed on the part of the United States, and the case is submitted without the statement of any objection as to its validity, except that contained in the brief opinion of the board, and which relates solely to the defect of proof on a point which has since been thoroughly investigated and determined. It is to be regretted that in a case of so great importance the court is left to determine questions of law without argument from both sides, and to decide questions of fact which it would seem could be ascertained with entire certainty merely by a preponderance of testimony. The cause was submitted to the court on the 26th of August, 1857, on briefs to be filed. The claimants have frequently called the attention of the court to the case, and they have a right to insist that a decision be rendered. I, therefore, proceed to decide it on the evidence before me.

The claimant has produced the grant made to him by the prefect, and an expediente containing the petition of Sherrebeck, dated November 24, 1845, the marginal order of reference of the prefect, and the "informe" of the local authority; also a letter signed "Pedorena," addressed to the prefect, and inclosing a sketch, and giving other information as to the place where Sherrebeck was soliciting. This letter is dated November 20, 1845, and the reply of the prefect, dated November 21, addressed to Sherrebeck, is also produced, in which he tells him that he can make his petition in conformity with this letter and diseño, as he, the prefect, could not properly draw up the petition as requested by Pedorena. The petition seems accordingly to have been drawn up three days afterwards, and the grant issued on the 5th December of the same year. The genuineness of the signatures to all these documents is proved by the testimony of the prefect himself and other witnesses. It does not appear from the transcript of the evidence before the board that any attempt to impeach their authenticity was made by the United States, nor is there any doubt on the subject any where suggested. The title papers must therefore be considered as gained.

Assuming them to be so, two questions are presented: (1) Had the prefect authority to grant the common lands of a pueblo? (2) Were these lands part of the common lands of the pueblo of Yerba Buena? The power of the prefect to grant the common lands of the towns is claimed to be derived from the 77th article of the organic law of 1837. This article is as follows: "They (the prefects) shall regulate (arreglaran) and conformably to the laws, the distribution (separtimiento) of the common lands (terrenos communes) in the towns (pueblos) of the district where there is no litigation pending in the tribunals respecting them, reserving to the parties their right of appeal to the governor, who, without further recourse, will decide the matter as may be proper, with the concurrence of the departmental junta." In the case of Lanos v. U. S., the construction of this article was considered by the board of commissioners, and it was decided that it conferred upon the prefects the power of granting the common lands. In the opinion delivered by Mr. Commissioner Thompson, the objections to

this construction, and the reasons for adopting it, are stated with his usual force and perspicuity. It was contended that the authority to "regulate" ("arreglar") did not impart an authority to grant, but merely a right to prescribe rules by which the distribution should be governed. This objection Mr. Commissioner Thompson admits would undoubtedly be correct if the word stood alone in the sentence, but he considers that the context indicates that the word was used in its technical sense, and that it means "to adjust the administration of provinces,—to enact laws for them." The subject which the prefect is empowered to regulate (arreglar) is the distribution ("separtimiento") of the common lands, which, he observes, is the word generally used to signify the granting of such lands. The prefect is further empowered to regulate this distribution executively ("gubain ativamente"). It appears from the provision of the organic law of March, 1830, that almost the same powers, functions, and duties were attributed to the governors and the prefects within their respective spheres, and the latter officers seem to have possessed, within their districts and over the matters committed to them, an authority nearly identical with that of the governor within his own department. They were, of course, subordinate to and under the control of the governor, but the nature of their functions was similar. When, therefore, the power to regulate the distribution of lands in the towns "gubernatively" is given to the prefect, it may justly be presumed that it is intended to confer on him the same authority with regard to those lands which the governor exercised over the department at large.

It was for these reasons that the board adopted the construction of the article which has been mentioned. I am much impressed with their force. They do not seem to me, however, entirely conclusive. It will be observed that the power of the prefects to regulate the distribution of lands, is limited to cases "where there is no litigation pending in the tribunals respecting them." This limitation or exception would seem to indicate rather an authority to settle disputes between the vecinos of the pueblo as to their occupation, than a power to grant them as property. To enable the inhabitants of a pueblo to avail themselves of the common lands of the pueblo in any other way than by pasturing cattle upon them in common, and procuring wood, etc., from them, it would obviously be necessary that an allotment of portions of them for the temporary but exclusive use of individuals should be made, for the purposes of cultivation. Unless such a distribution were made, it is not to be supposed that the necessary labor would be undergone by a few for the benefit of all. It was necessary, then, to secure to him who sowed the right of reaping; and in this way various allotments would be made, and lands distributed among the vecinos.

It may, therefore, have been intended by the law to give the prefects the power of regulating this distribution, and for this purpose the exception of cases pending before the tribunals is natural and proper. The succeeding clause reserves to the parties their right of appeal to the governor, etc. It will be noticed that this right is not reserved to the "party interested," the usual phrase applied to a person soliciting a grant, but to the "parties," indicating, it would seem, two disputants; and the right reserved is not the right of presenting petitions for land to the governor, but the right of appeal to him; seeming to indicate that the matter appealed from was to be a quasi judicial determination. On this appeal the law directs that the governor "shall decide the matter as may be proper, with the concurrence of the departmental junta." The law does not direct him "to accede or not to the petition," or to "determine upon the solicitation," or use, with regard to his action, the phraseology employed with reference to an application for a grant, but it directs him to "decide the matter with the concurrence of the junta"; thus again seeming to indicate a proceeding, like an appeal to the king in council for the determination of a dispute, rather than an application for a gratuitous concession of land. If, then, this were a solitary instance of the assumption of the granting power by a prefect, I should be inclined to hold, notwithstanding my great respect for the opinion of the board on the subject, that the law of 1837 did not confer the power claimed. But it appears that the authority in question has been exercised by the prefects on various occasions. Nor have the rights attempted to be conferred by them even, so far as we can ascertain, been disputed. They appear to have been generally acquiesced in by adjoining proprietors, and even expressly recognized by the departmental authorities. In the absence of any judicial decisions which determine the construction and effect of a foreign law, the practical interpretation given to it by those whose duty it was to apply and administer it affords the best means of ascertaining its true meaning. Unless, therefore, it be clear that the officers charged with its administration have misconstrued it, a foreign court, with necessarily an imperfect acquaintance with the subject, ought to be slow to substitute its own construction of the law for that of the government which established it, or to declare that powers frequently exercised and generally acquiesced in were usurped. No objection on this point has been made by the United States, and in the face of the opinion of the board, and the practice of the former government, I do not feel that certainty that the construction I

feel inclined to adopt is the correct one, which would justify me in deciding that the prefect was mistaken as to the nature and extent of his powers.

2. The evidence that the land granted in this case was part of the common lands of Yerba Buena is contained in the two depositions of Castro, the prefect, and in the expediente. Manuel Castro swears that the lands granted by him to Sherreback, as also those granted to Presentacion Miranda de Ridley, were within the demarkation of Yerba Buena; that he was informed that the limit of Yerba to the south was a line drawn to the south of Rincon Point, across the estero and cienga or swamp, in a westerly direction to the Mission road; that all the citizens recognized the lands lying to the north of this line as belonging to Yerba Buena; that the judges reported to the same effect, and the line was established by custom. By the expediente it appears that the petition of Sherrebeck was referred to the "chief local authority" of Yerba Buena for the usual "informe." This official reported that "in the opinion of this juzgade, only land upon which to build a house and corral, and to plant, should be granted to him." The prefect accordingly grants him el Rincon, embraced within the demarkation of Yerba Buena to the extent of 800 varas square, and subjected him to the payment of the tax which might be assessed to him by the most excellent departmental assembly. In the grant the prefect recites that it is made in virtue of the power vested in him by the law of the 20th March, 1837, the provisions of which have been considered in a former part of this opinion. The provisions of that law give, as we have seen, authority to the prefect to regulate the distribution of the common lands of the pueblos, and the reference to it in the grant, and the mention of the land granted as "within the demarkation of Yerba Buena," afford, in the absence of opposing testimony, presumptive proof that the land was so situated, and that the officer acted within the limits of his authority.

In the case of U. S. v. Reading [18 How. (59 U. S.) 1], the supreme court held the recital in the grant, that the grantee was a citizen by naturalization, to be satisfactory evidence of the fact. So in this case the recital that the land is within the demarkation of Yerba Buena, and a reference to a law giving power to the prefect to regulate the distribution of the common lands of pueblos, as the source of his authority to make the grant in question, ought to be received as evidence of the fact. Castro himself testifies to the same effect, and states positively that the land granted to Sherrebeck was within the demarkation of Yerba Buena. Upon the whole, I think that, without reference to the evidence of the decision of the case of City of San Francisco v. U. S. [unreported], and looking alone to the evidence in this record, I am compelled to presume that the land granted was within the limits of the pueblo of San Francisco.

With respect to the occupation and cultivation of the land there is some conflict of testimony. On the part of the United States two witnesses have testified that they never saw any occupation or cultivation. On the part of the claimants several witnesses testify that a house was built, and a considerable part of the land cultivated, in 1845 or 1846. Obliged, as I am, to decide the case upon the evidence submitted, I have no alternative but to determine that the preponderance of testimony is on the side of the claimant. If the fact be otherwise than as testified to by them, it would have been easy for the United States to have established it. The condition of Rincon Point, and the existence of a house, with a considerable cultivation around it, on that point, at so recent a period as the years 1845 and 1846, could have been shown, it would seem, beyond all room for doubt. But, as before observed, no testimony whatever has been taken by the United States since January, 1846, when the transcript was filed in this court. No objection to the claim, for want of occupation and cultivation, is noticed in the opinion of the board, nor is any objection, whatsoever, to its validity, taken by the United States in this court. Under the evidence before me, I do not feel warranted to declare that the claim in this case has been forfeited by abandonment.

With respect to the location of the land, the testimony shows that in 1846, the alcalde of Yerba Buena pointed out to Sherrebeck, on the place called "El Rincon," the boundaries of the tract. He directed him to measure 400 varas in four different ways from an oak tree in the centre of the land, and the situation of which is identified by the witnesses. It was at the foot, or near this oak tree, that, as testified by the witnesses, the house of Sherrebeck was placed. Sanchez testifies that when he pointed out this tree as the place from which to begin the measurement, there was a brush house there, and that afterwards Sherrebeck built a log house, into which he was putting the windows, when the witness was on the point in 1846. There can be no doubt, therefore, if this testimony is to be believed, as to the precise location of the 800 varas granted to Sherrebeck, or, rather, of the land which he was authorized to occupy and cultivate under his grant.

Since the above was written, the testimony in the case of City of San Francisco v. U. S. [Case No. 12,316], has been filed by consent in this cause. I do not understand it to be disputed that that testimony establishes the existence of the pueblo of San Francisco, at the date of the grant in this case, or that the land granted was within the demarkation of the pueblo.

Case No. 16,276.

UNITED STATES v. SHERIFF OF CHARLESTON.

[Bee, 196.] [1]

District Court, D. South Carolina. March 23, 1803.

REVENUE LAWS — INSOLVENCY — PRIORITY OF UNITED STATES.

The revenue laws of the U. States give a preference over other creditors in several cases; but must not be so construed as to destroy a prior legal lien.

[Cited in Re Hambright, Case No. 5,973.]

The United States have obtained judgment and execution against the late collector of this port, for a debt incurred after the passing of the act of congress of 3d March, 1797 (3 Folwell's Laws, 423 [1 Stat. 515]).

It appears that a citizen of this state has a previous lien by judgment and execution in the state court. The sheriff has proceeded by virtue of that execution, to levy on the property so bound; and this suit is brought to stop the sale: to this a demurrer is filed.

BEE, District Judge. The single question is, whether, under the 5th section of the above mentioned act of congress, the United States have a preference or not.

The cases in which that preference is established are: 1st. Property in the hands of executors. 2d. Where assignments of property are made. 3d. In cases of attachment. 4th. In cases of bankruptcy.

The first act that contemplates any preference in favour of the United States was passed 4th August, 1790 [1 Stat. 145]. The 45th section provides that in cases of insolvency, or where an estate in the hands of executors or administrators is insufficient to pay all the debts of the deceased, bonds to the United States for securing payment of duties shall be first satisfied. The next law on the subject was passed 2d May, 1792 [1 Stat. 263], and provides in section 18, that where sureties pay such bonds, they shall be entitled to the same preference that the United States would have had. The act of 3d March, 1797, provides that no voluntary assignment of his property by a debtor of the United States, nor any attachment of said property nor act of bankruptcy, shall prevent the United States from being first paid what may be due to them. The same provision is contained in the last revenue act,—4 Folwell's Laws, 387 [1 Stat. 627]. I cannot find that these acts do in any manner comprehend the present case. There is not a syllable in either of them that can be fairly construed to divest a prior legal lien. I am, therefore, of opinion, that this demurrer must be sustained, and the suit dismissed.

[1] [Reported by Hon. Thomas Bee, District Judge.]

Case No. 16,277.

UNITED STATES v. SHERLOCK et al.

[18 Int. Rev. Rec. 5.]

Circuit Court, S. D. Ohio. 1873.

SURVEYORS OF CUSTOMS—COMMISSIONS ON MONEYS.

[A surveyor of customs is entitled to commissions on moneys paid to him for the treasury department, but not on moneys, already in the treasury, which are transferred to him from other places of deposit.]

This was an action brought upon the bond of T. Jefferson Sherlock, as surveyor of customs, and designated depositary at Cincinnati, Ohio, for the amount of a balance stated against him by the treasury department. He claimed in defence that he was entitled to an additional allowance for commissions upon deposits to the credit of pension agents and other disbursing officers.

Warner M. Bateman, U. S. Atty.
Stanley Matthews, for defendants.

Before SWAYNE, Circuit Justice, and EMMONS, Circuit Judge, and SWING, District Judge.

SWAYNE, Circuit Justice. The court held that he was entitled to commissions only upon moneys paid to him for the use of the treasury department, and was not entitled to commissions upon funds already in the treasury, although transferred to him from other places of deposit, as was the case with funds held by him to the credit of disbursing officers.

Case No. 16,278.

UNITED STATES v. SHIVE.

[Baldw. 510.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1832.

CONTINUANCE — FORGERY — PEREMPTORY CHALLENGES—CONSTITUTIONALITY OF LAWS—PROVINCE OF JURY.

1. It is no cause for a continuance that defendant has not been furnished with a copy of the indictment, and a list of the jurors, if he has not applied for them.

2. In an indictment for forgery, defendant has no right to peremptory challenges.

3. The constitutionality of the charter of the Bank of the United States is not a proper subject for the consideration of the jury.

[Disapproved in U. S. v. Morris, Case No. 15,815. Cited in Sparf v. U. S., 156 U. S. 73, 15 Sup. Ct. 282.]

4. The construction of the constitution of the United States by the supreme court is binding on a jury as well as the court.

[Cited in State v. Wright, 53 Me. 334; Pierce v. State, 13 N. H. 565; Com. v. McManus, 143 Pa. St. 95, 22 Atl. 764; State v. Croteau, 23 Vt. 62; State v. Burpee, 65 Vt. 28, 25 Atl. 972.]

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

This was an indictment [against David Shive] for passing a counterfeit note of the Bank of the United States.

Mr. Phillips, for defendant, moved for a continuance of the case on the ground that the defendant had not been furnished with a copy of the indictment and a list of the jurors. But inasmuch as it appeared that they had not been applied for, the motion was overruled.

When the case was ordered on, Mr. Phillips claimed the right of peremptory challenges.

Before BALDWIN, Circuit Justice, and HOPKINSON, District Judge.

BY THE COURT. The state law giving the defendant a right to challenge peremptorily, does not apply to proceedings in this court; forgery is not a felony at common law, and though the act of congress declares the offence laid in the indictment to be a felony, that does not carry with it a right of peremptory challenge as an incident, and it has never been allowed in this court in a case like the present.

The jury were sworn and the trial had. Among other grounds of defence taken by the counsel of the defendant, he contended that the act of congress chartering the bank which created the offence, was unconstitutional, and that therefore the jury ought to acquit the defendant.

BALDWIN, Circuit Justice, after charging the jury on the law and evidence in the case, proceeded to the objection to the constitutionality of the law.

We could have wished that these would have been the only considerations, which it was our duty to submit to you, but one of the counsel for the defendant has raised another question, on which it is necessary for us to give you our opinion, and that is, whether the act of congress on which this prosecution is founded, is valid or void.

That it has passed through all the forms and branches of legislation, that it has been sanctioned and declared to be the law of the land, by the highest branch of the judicial power; that it is clothed with every sanction and carries with it every obligation known to the constitution, has not been and cannot be denied. If there is law in the land, if there is a rule by which courts and juries are bound to administer the criminal justice of the country, it is that which, having been enacted by the legislative authority of the nation, has been solemnly pronounced by the supreme judicial power, to be within the constitutional province of the legislature. Beyond that tribunal, there is no other revision of the acts of congress, that will not end in the prostration of all law and all legitimate government, unless by an amendment to the constitution.

In courts of justice, the law of the land is the law of every case, criminal as well as civil, the safety of the public, the rights of individuals do not depend on their opinion of what the law ought to be, but on what it is. The ministers of justice are not the makers of the laws, judges and jurors are, in the words of the defendant's counsel, magistrates to enforce and execute the laws; they are as much bound by them as the criminal they condemn. We sit here by the authority of the law, our duty is prescribed and defined by law, and if we wilfully violate or disregard it, if we sentence a prisoner without a previous law prescribing a punishment, or acquit in opposition to the enacted and established law of the country, we should be the greatest criminals in the nation. We are judges of law, but what is law? Not the opinions of judges and jurors merely, it is the will of the people, expressed through that department of the government, to whom they have confided the law-making power. An act of congress is the exercise of that power conferred by the nation; a judgment of the supreme court affirming its validity and decreeing its binding force, is the constitutional exercise of the judicial power of the nation, confided to that high tribunal. And when a law thus carries with it the imposing authority of the people, the states of this union, and of every department of the government created by the constitution, shall the ministers of justice, its sworn administrators, be the first to trample under their feet the supreme law of the land? Shall we, the creatures of the law, the servants of the constitution, dare to assume the power of abrogating its provisions, disobeying its injunctions, and dispensing with its penalties? The sixth article of the constitution, declares itself and all laws and treaties made pursuant thereto, to be the supreme law of the land, and that all judges shall be bound thereby, notwithstanding any thing in the law or constitution of any state to the contrary.

When the most solemn acts of a sovereign state, in opposition to an act of congress, are thus declared nullities, will a jury assume no moral responsibility by substituting their opinion for the supreme law of the land? If the defendant has violated an act of congress, though not sworn to make it his rule of action, the supreme law declares him a felon. What are you or we if we put ourselves above it? The power to judge of the law as well as the fact in a criminal case, is to ascertain the existence of a law; if you see it in the statute book, you cannot on your oaths say there is no such law, or exercise a power denied to the people of a state by the most solemn constitutional provision, declare the supreme law to be void, because it does not comport with your opinion. Should you assume and exercise this power, your opinion does not become a supreme law, no one is bound by it, other juries will decide for themselves, and you could not expect that courts would look to your verdict for the construction of the constitution, as to the powers of the legislative or judicial departments of the

government; nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow citizens or for the court. If juries once exercise this power, we are without a constitution or laws, one jury has the same power as another, you cannot bind those who may take your places, what you declare constitutional to-day, another jury may declare unconstitutional to-morrow. We shall cease to have a government of law, when what is the law, depends on the arbitrary and fluctuating opinions of judges and jurors, instead of the standard of the constitution, expounded by the tribunal to which has been referred all cases arising under the constitution, laws and treaties of the United States.

The counsel of the defendant has referred you to the message of the president, as the true exposition of the constitution in relation to the power of congress to charter the bank. We have no jurisdiction to judge of the propriety of the course of the executive; in the exercise of his constitutional power to prevent the passage of a law, he acts on his responsibility; but the judicial power cannot be exercised on the reasons which have governed the exercise of the veto power. We therefore forbear all remarks upon it. For a similar reason we cannot look to the construction given to the constitution by the executive department as a guide to our judgment; for no appellate or supervisory power over our proceedings, has been confided to that department. We must follow the rule prescribed by the tribunal to whom has been confided the power of expounding the constitution and laws, and of directing our judgment. That tribunal has adjudged this law to be valid, we cannot, and think you will not declare it void.

The jury found the defendant guilty.

Case No. 16,279.

UNITED STATES v. SHOEMAKER.

[2 McLean, 114.] [1]

Circuit Court, D. Illinois. June Term, 1840.

CRIMINAL LAW—AUTHORITY OF PROSECUTING ATTORNEY—NOLLE PROS—DISCHARGE OF JURY.

1. The prosecuting attorney has a right, with leave of the court, to enter a nolle prosequi on a bill of indictment, and it constitutes no bar to a subsequent indictment for the same offence.

2. A jury sworn in a criminal case may be discharged by the court, under any sudden and uncontrollable emergency, and such discharge is no bar, even in a capital case, to another trial.

[Cited in U. S. v. Morris, Case No. 15,815.]

[Cited in Ellis v. State (Fla.) 6 South. 769; Hawes v. State (Ala.) 7 South. 310; State v. Walker, 26 Ind. 354; Woodworth v. Mills, 61 Wis. 50, 20 N. W. 731; State v. Davis, 31 W. Va. 393, 7 S. E. 26.]

3. But after the jury are impanneled, and witnesses sworn, the prosecuting attorney has no right to enter a nolle prosequi, because the evidence is not sufficient to convict.

4. Such an abandonment, by the prosecuting attorney, is equivalent to a verdict of acquittal.

[Cited in Weinzorpflin v. State, 7 Blackf. 191; State v. Walker, 26 Ind. 350. Cited in brief in State v. Champeau, 52 Vt. 315.]

The District Attorney, for plaintiffs.

Gatewood & Fields, for defendant.

OPINION OF THE COURT. At the last term the defendant [Andrew Shoemaker] was indicted for feloniously taking letters from the mail, he having possession of it as carrier, which contained bank notes, &c. The jury were impanneled, and witnesses sworn, when the prosecuting attorney abandoned the prosecution, and entered a nolle prosequi on the indictment.

Two points are raised for consideration and decision in this case: First. Had the prosecuting attorney a right to enter a nolle prosequi in this case? Second. Does such an abandonment amount to an acquittal of the defendant? There can be no doubt that, before the trial is gone into, the prosecuting attorney has a right, under leave of the court, to enter a nolle prosequi on an indictment, and such entry is no bar to a subsequent prosecution for the same offence. But, in the case under consideration, the defendant having pleaded not guilty, a jury were sworn to try the issue. That a court may discharge a jury, in a criminal case under peculiar circumstances, after they are sworn and have heard all the evidence, is well settled in the courts of the United States. In the case of U. S. v. Coolidge [Case No. 14,858], the court decided, that they had power to discharge the jury impanneled to try the issue in a criminal cause, whenever it is necessary for the purposes of justice; and that there was no exception of capital cases. And in the case of U. S. v. Perez, 9 Wheat. [22 U. S.] 579, the supreme court say "that courts of justice have the authority to discharge the jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; and that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon his trial." But there was no discharge of the jury by the court in this case. Nor does it appear, from the record, that the prosecution was abandoned on account of any defect in the indictment. The usual mode of taking advantage of such defect is, either by a motion to quash, or, in arrest of judgment; but the supreme court have said [U. S. v. Gooding] 12 Wheat. [25 U. S.] 460, that the sufficiency of the indictment, in the discretion of the court, may be discussed and decided during the trial before the jury. In 1 Chit. Cr. Law, 631, it

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

is said that it would be absurd to suppose that after evidence given, the prosecutor might be allowed to withdraw a juror merely because the proof would not amount to conviction. And it would seem to be equally unreasonable to allow a nolle prosequi to be entered, because the proof was not sufficient to convict. In the case of Com. v. Wade, 17 Pick. 395, the court say—"There are some stages of a trial in which the right to enter a nolle prosequi clearly ceases; as after a verdict of manslaughter on an indictment for murder; in others, a question might be made, as after the evidence is closed, or after it is summed up to the jury. In some cases, it would seem, the cause must be taken from the jury of necessity; as if the jury cannot agree, or, if one of them be taken ill," &c. And they say the case under consideration was one where there was no necessity, no unforeseen cause of delay, no accident, no mistake, no extraordinary exigence. It was an ordinary case of a good indictment in point of form, but a failure in the proof. And they decided that the prisoner was entitled to a verdict of acquittal. In the case of State v. Davis, 4 Blackf. 345, the court held that it was not error in the circuit court to refuse permission to the prosecuting attorney to enter a nolle prosequi after evidence had been heard in the cause. The fifth article of the amendments to the constitution of the United States declares, that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb. Under this provision it has been held, in the case of U. S. v. Gibert [Case No. 15,204], by the circuit judge, that, in a capital case, a new trial is prohibited where a verdict of guilty is rendered, as it would place the defendant a second time in jeopardy. With this view I do not concur, but it was taken by a most able and learned judge, and shows great strictness in criminal proceedings.

The offence charged against the defendant does not subject him, if convicted, to the loss of either life or limb, and it is not, therefore, within this provision of the constitution; but the rights of the defendant are equally guarded by established principles. Where the judgment is arrested for some defect in the indictment, it is admitted that the defendant may be prosecuted a second time for the same offence. And that a discharge of the jury by the court, under some sudden emergency, constitutes no bar to another trial. In the first case the defendant could not be said to have been in jeopardy, as the indictment was radically defective; and, in the second case, from the sudden indisposition of a witness, a juror, the court, or an irreconcilable difference of opinion among the jurors, having occurred, over which neither the court nor the parties could exercise any control, the discharge of the jury became indispensable. The trial could not proceed; no verdict could be rendered; and, for this reason, the defendant, in such a case, was not considered in jeopardy. The fault was not with the prosecuting attorney, nor with the defendant, and the circumstance was so imperious as to lead to a failure of public justice, unless the court should discharge the jury. Formerly it was held that this discharge of the jury might be entered with the consent of the defendant, but his consent is not now deemed necessary.

The jury were not discharged by the court in the case under consideration. No emergency occurred which called for, or authorized, such discharge. The prosecution was abandoned by the United States, which left the jury nothing to try, and they were, consequently, dismissed. The ground on which the prosecution was abandoned does not appear on the record. The jury were regularly impaneled and sworn to try the issue; witnesses were sworn, and then a nolle prosequi was entered. From the record it would seem probable that the prosecution was abandoned, because of the insufficiency of the evidence to sustain it. But whether this or some other was the true ground, the question arises as to the right of the prosecutor, under the circumstances, to enter a nolle prosequi. If the prosecutor have this right, at what stage of the trial must it be exercised? May he abandon the prosecution after the jury shall have returned into court prepared to render their verdict, or on the close of the evidence on both sides, or on its close by the United States; or must the entry be made before any evidence is heard, and immediately after the jury are sworn? If the right to abandon the prosecution be in the prosecuting attorney, with the view of commencing it de novo, it is not perceived on what principle its exercise can be limited. If it exist it would seem to follow that it may be exercised at the discretion of the attorney who represents the government. This would lead to endless vexations in the prosecution of criminal cases.

The first trial might be considered an experiment to draw forth the evidence in the case, and ascertain if it be insufficient, whether, on another trial, it might not be made strong enough to convict. Such a course would not be tolerated in a civil cause, much less in a criminal one. Nor could this right be safely exercised under the discretion of the court. What shall govern this discretion? Shall the court determine, on hearing a part of the evidence, whether or not the defendant is guilty, and permit the prosecuting attorney to enter a nolle prosequi or not, as they shall think the ends of justice require. The discharge of a jury in a criminal case, on the ground of a necessity which could neither be foreseen nor controlled, imposes no hardship on the defendant of which he has a right to complain. He, alike with the government, must submit to the law of necessity, which, of all other

laws, is the most inexorable. But the entry of a nolle prosequi is imposed by no necessity. It may be a matter of discretion, or, of policy; a discretion founded upon no fixed principle, or guided by no known rule; or a policy which may have for its object the oppression and conviction of the defendant.

An abandonment of the prosecution, before the defendant is put upon his trial, is the undoubted right of the prosecuting attorney; but after the trial has been commenced the relation of the defendant to the case is materially changed, and this must, to some extent, control the power of the prosecutor. He, it is true, may, in effect, abandon the prosecution by failing to call witnesses, but, it would seem that, he can not do so to the prejudice of the defendant. He can not abandon it in form, and afterwards renew the same charge. The prisoner stands charged as a culprit, but the law is jealous of his rights, and shields him from oppression. However guilty he may be, he can be convicted only according to law. And a jury having been sworn to try his case, he has a right to their verdict, unless some inevitable occurrence shall interpose and prevent the rendition of a verdict. Before he goes in to trial the prosecutor should see that his witnesses are in attendance, and that he is prepared to try the issue. If, then, the prosecuting attorney had no right to enter a nolle prosequi after the jury were sworn, how does such an entry affect the defendant? If the defendant had a right to claim a verdict, and did not receive a verdict of acquittal on account of the abandonment of the prosecution by the United States, it is contended that such abandonment should not operate to his prejudice. The plea of auterfois acquit consists of matter of record, and matter of fact. Of record, the indictment and acquittal of fact, that the defendant is the same person, and that the offence is the same. To sustain this plea the first indictment must have described the offence with legal certainty. If, in this respect, the indictment be essentially defective, it can constitute no bar. The indictment, in this case, appears to be technical, and, on its face, is subject to no fatal exception. And, it is admitted, that the defendant in the second indictment is the same person named in the first, and that the offence is the same. This admission renders an inquisition to ascertain the facts unnecessary. If a defendant be acquitted on the misdirection of the judge, still his acquittal may be pleaded. 2 Co. Inst. 318. To sustain a plea of a former acquittal there must be a judgment on the verdict of not guilty. 2 Hale, P. C. 243, 246; 2 Hawk. P. C. c. 35, § 6; 1 Chit. Cr. Law, 457; 4 Coke, 44, 45.

The record introduced to support the plea in this case, after stating the appearance of the prosecuting attorney, and the defendant, in proper person, stated that "jury were called, who were elected, tried, and sworn, to try the issue joined between the United States and the defendant, and true deliverance make according to law, and evidence. Whereupon, the said plaintiffs, by their said attorney, say, that they will no further prosecute their said indictment against the said defendant. It is, therefore, considered by the court that the defendant go hence without day." Here is no verdict of acquittal, and, consequently, no judgment on the verdict. The plea of a former acquittal is not, therefore, technically sustained. But there is a judgment in favor of the defendant, that he go without day; and this necessarily followed the abandonment of the prosecution. Can this judgment be considered as substantially sustaining the plea? On this point I confess that I entertain strong doubts. From the limited access to books, which I have had at this place, I can find no case in point. In the cases referred to in 17 Pick. and 4 Blackf. the court decided that, where the jury were sworn, and some evidence heard, the prosecuting attorney had no right to enter a nolle prosequi, and that the defendant was entitled to a verdict. It is not said, however, in either of these cases, what the effect to the defendant would have been, had the nolle prosequi been entered. In Com. v. Cook, 6 Serg. & R. 577, the court decided that a discharge of the jury once sworn, in a criminal case, was an acquittal of the defendant. The case must be considered on principle, if the point has not been decided. It is a rule in criminal proceedings that nothing shall be done, within the discretion of the court, to the prejudice of the defendant. And, hence, in some instances, where his interests may, possibly, be injuriously affected by an order, his consent is necessary. So regardful of his rights are the court, that they will not encourage, or, indeed, suffer him to assent to that which is manifestly to his prejudice. In some respects the court are said to be the counsel of the prisoner. If the court instruct the jury that it is essential to prove the offence was committed on the day laid in the indictment, and on this ground the defendant be acquitted, the acquittal may be pleaded. 2 Hale, P. C. 247.

In the case under consideration the prosecuting attorney had no right to enter a formal abandonment of the prosecution; and, from this, it follows that the defendant had a right to a verdict. There is no defect apparent on the face of the indictment. But the prosecution was formally abandoned, which left the jury nothing to try. And if this proceeding shall not be regarded as a verdict of acquittal, is not the defendant manifestly prejudiced? Was he not in peril? The nolle prosequi was entered without the consent of the defendant, and against his remonstrance; and it was entered against his rights, and without power, or right, by the prosecutor. On principle, therefore, we feel bound to say, that the proceeding must be considered equivalent to a verdict of ac-

quittal, and, as such, with the judgment of the court thereon, is a bar to the present indictment.

Case No. 16,280.

UNITED STATES v. SHOREY.

[9 Int. Rev. Rec. 201.]

Circuit Court, D. New Hampshire. May, 1869.

CRIMINAL LAW—DOUBLE PLEAS—DEMURRER.

S. was indicted for an offense against the tariff act of August 30, 1842 [5 Stat. 548], and pleaded the general issue, and also pleaded specially the statute of limitations, in the crimes act of April 30, 1790 [1 Stat. 112], in bar. *Held*, that double pleading was inadmissible, and the special plea would be stricken out. The defendant might withdraw his plea of not guilty, and demur to the indictment, with leave to plead over should the demurrer be overruled.

The indictment against the defendant [Alanson J. Shorey] is founded upon the 19th section of the act of the 30th of August, 1842, which provides that if any person shall * * * smuggle or clandestinely introduce into the United States any goods, wares or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, he shall be deemed guilty of a misdemeanor. Defendant appeared and pleaded the general issue that he was not guilty, and also pleaded especially that he was not guilty at any time within two years next before the finding or institution of the indictment. Allegation of the indictment is that the offence was committed on the 10th of October, 1865, more than two years before the indictment was found and filed in court. The district attorney demurred to the special plea, and the defendant joined in demurrer. Treason and certain other capital offences are defined by the crimes act of the 30th of April, 1790, and the 32d section of that act provides that no person or persons shall be prosecuted, tried, or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same be found by a grand jury, within three years next after the treason or capital offence aforesaid shall be done or committed. Evidently that provision is limited to the crimes defined in that act, but the section further provides that no person shall "be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid."

Before CLIFFORD, Circuit Justice, and CLARK, District Judge.

BY THE COURT. Argument for the defendant is that the indictment is barred by that provision, but there is a preliminary question to be decided before that proposition can be considered. Two pleas are pleaded by the defendant, and the first question is whether double pleading is allowable in criminal cases. No such objection was taken by the district attorney, but the question is one affecting the regularity of the proceedings in criminal cases in the federal courts, and cannot be allowed to pass without notice. Special matter which is in law a bar to an indictment, may in certain cases be so pleaded in misdemeanors, but the rule is well settled that the defendant cannot plead specially in bar of the indictment if he pleads the general issue, as double pleading is unknown in criminal procedure. 1 Starkie, Cr. Pl. 335; Heyrick v. Foster, 4 Term R. 701. Double pleading is not allowable, and if autrefois acquit be pleaded with not guilty, one of the pleas will be struck off. Reg. v. Strahan, 7 Cox, Cr. Cas. 85; 1 Am. Cr. Law (4th Ed.) § 530; State v. Copeland, 2 Swan, 626; Morgan v. Luckup, 2 Strange, 1044. At common law there was but one rule which applied alike to civil and criminal proceedings that the defendant must rely upon one ground of defence, and that double pleading was never to be admitted. 4 Bl. Comm. 332; 2 Hale, P. C. 236; Hawk. P. C. 32. Inconvenience, however, resulted from such strictness, and the rule was relaxed by St. 4 Anne, c. 16, §§ 4, 5, which enabled the defendant by leave of the court, to plead as many matters as he saw fit, but the statute contained a proviso that nothing contained therein should extend to any indictment or presentment of treason, felony, or murder, or any other matter, or to any action upon a penal statute. 1 Chit. Cr. Law, 434.

Injustice might be done to the defendant if the court should strike out the first plea, and decide the case upon the second, and in view of the circumstances the court decides to strike out the second plea, and allow the case to stand for trial, but the defendant, if he sees fit, may withdraw his plea of not guilty, and demur to the indictment, with leave to plead over if the demurrer is overruled.

[See Case No. 16,282.]

Case No. 16,281.

UNITED STATES v. SHOREY (two cases).

[9 Int. Rev. Rec. 202.]

Circuit Court, D. New Hampshire. 1869.

COUNTERFEITING—STATUTE OF LIMITATIONS.

S. was indicted for having counterfeit United States notes in his possession and attempting to pass the same at divers times, and pleaded that the indictment had not been found within two years subsequent to the commission of the acts charged. *Held*, that the indictments were barred by the statute of limitations.

CLIFFORD, Circuit Justice. The first indictment charges that the defendant [Alanson J. Shorey] at Portsmouth, on the fifteenth day of September, 1865, attempted to pass counterfeit United States fractional currency treas-

ury notes, and that he had similar notes in his possession with intent to pass the same, and the other charges similar offences, alleged to have been committed on the 20th of September, 1865, under 12 Stat. 712, 713; Id. 347; 13 Stat. 221, § 10. Counterfeiting is a crime recognized in the constitution of the United States, and has been defined as such in the laws of congress since the first crimes act was passed. It was known as such at common law, and is punished as such by the laws of every state in the Union. Regarding the proposition as self-evident, we do not think it necessary to attempt to fortify it by argument. Laws defining such offence, and providing for the punishment of the offenders, are as distinct from crimes arising under the revenue laws of the United States as any two offences can be which are defined by acts of congress, and within the jurisdiction of the federal courts. Persons found guilty of the offence are declared to be guilty of felony, and may be punished by fine not exceeding five thousand dollars, and by imprisonment to hard labor not exceeding fifteen years according to the aggravation of the offence. 12 Stat. 347; 13 Stat. 221.

In one of the indictments the offence is alleged to have been committed on the fifteenth of September, 1865, and on the other on the twentieth of September in the same year, and in each more than two years before the indictment was found. Demurrers are filed in each case by the defendant, because the respective offences were committed more than two years before the indictments were filed by the grand jury. Beyond controversy the case falls within the two years' limitation as provided in the thirty-second section of the act of the thirtieth of April, 1790 [1 Stat. 119], and the conclusion accordingly is that the demurrers must be sustained. Judgment that the respective indictments are barred by the statute of limitations, and that the defendant be discharged.

Case No. 16,282.

UNITED STATES v. SHOREY.

[9 Int. Rev. Rec. 202.]

Circuit Court, D. New Hampshire. May, 1869.

VIOLATION OF TARIFF LAWS—INDICTMENT—LIMITATION.

S. demurred to an indictment for an offence against the tariff act of August 30, 1842 [5 Stat. 548], that the same had not been found within two years subsequent to the commission of the act charged *Held*, that the indictment, having been found within five years subsequent to the act charged, was within the terms of the act of March 26, 1804 [2 Stat. 290], and was good.

[This was an indictment against Alanson J. Shorey for smuggling. Defendant was heretofore allowed to withdraw his plea of not guilty, and demur to the indictment. Case No. 16,280. The case is now heard on a demurrer, which was accordingly filed.]

CLIFFORD, Circuit Justice. Persons who knowingly and wilfully, with intent to defraud the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, are declared by the nineteenth section of the act of the 30th of August, 1842, to be guilty of a misdemeanor. 5 Stat. 565. Charge against the defendant is founded upon that provision, and the indictment is in the usual form.

The defendant demurred to the indictment, and the district attorney joined in demurrer. Leave being granted to the defendant to plead to the merits in case, the indictment is adjudged sufficient. Cause of demurrer is, that the offence, as alleged in the indictment, was not committed within two years next before the time when the indictment was found. As alleged, the offence was committed on the 10th of October, 1865, but the indictment was not found till the May term, 1868, more than two years after the offence was committed. Limitation of the crimes act of the 30th of April, 1790, is that no person shall be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid. Tested by that provision, the decision of the court would necessarily be in favor of the defendant, but it is quite certain that the provision relied on by the defendant, as applied to the case at bar, has been repealed by the third section of the act of the 26th of March, 1804, as contended by the district attorney. 2 Stat. 290. By that section it is provided that any person or persons guilty of any crime arising under the revenue law of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within five years after committing the offence, or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding. Argument is not necessary to show that the offence of smuggling, as defined in the 19th section of the act of the 30th of August, 1842, is a "crime arising under the revenue laws of the United States"; and, as such, the provision is express that it may be prosecuted, tried and punished, provided the indictment or information, as the case may be, is found at any time within five years after committing the offence or incurring the fine or forfeiture. Beyond question that provision applies to offences against the revenue laws passed subsequently to that date, as well as to those defined under laws existing at the time the limitation was enacted; and, if so, then it is clear that the question before the court is controlled by that provision. Adams

v. Woods, 2 Cranch [6 U. S.] 336; U. S. v. Mayo [Case No. 15,755]; Johnson v. U. S. [Id. 7,418]; U. S. v. Ballard [Id. 14,507].

Comment upon the 4th section of the act of the 28th of February, 1839, need not be made as it is obvious that it refers only to penal actions, and to proceedings in rem to enforce a forfeiture, and not to crimes. Simpson v. Pond [Case No. 13,455].

But notice must also be taken of the 14th section of the act of the 3d of March, 1863 [12 Stat. 741], not referred to by the counsel on either side. Express provision is there made for the repeal of so much of the 3d section of the act entitled "An act in addition to the act for the punishment of certain crimes against the United States," approved March 26, 1804, as imposes any limitation upon the commencement of any action or proceeding for the recovery of any fine, penalty, or forfeiture incurred by reason of the violation of any law of the United States relating to the importation or entry of goods, wares or merchandise. 12 Stat. 741. Viewed in any light, however, it is clear that that provision cannot benefit the defendant, as it does not purport to repeal that part of section 3 of that act which authorizes indictments for crimes to be found at any time within five years after the offence was committed. Smuggling is a crime, and by the 4th section of the act of the 18th of July, 1866, may be punished by fine or imprisonment, or by both, in the discretion of the court. 14 Stat. 179.

Demurrer overruled. Leave granted to plead over.

Case No. 16,283.

UNITED STATES v. SHORTER.

[1 Cranch, C. C. 315.] [1]

Circuit Court, District of Columbia. June Term, 1806.

COMPETENCY OF WITNESSES — INTEREST IN FINE.

The wife of him whose goods are stolen is not a competent witness for the prosecution unless the husband has released to the United States his share of the fine.

[Cited in U. S. v. Gray, Case No. 15,252.]

Indictment [against Elizabeth Shorter] for stealing a gold ring and a pair of shoes, the property of Samuel Long. Phœbe Long, his wife, was called as a witness on the part of the United States.

Mr. Caldwell, for the prisoner, objected to her being sworn, because of the interest of her husband in the one half of the fine.

THE COURT (DUCKETT, Circuit Judge, absent) said she was not a competent witness, without a release by her husband, of his right to the fine.

Verdict, guilty.

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

Case No. 16,284.

UNITED STATES v. SHORTER.

[1 Cranch, C. C. 371.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

SLAVE AS WITNESS.

A slave is a competent witness for a free black man on a criminal prosecution.

[Cited in U. S. v. Mullany, Case No. 15,832.]

Indictment against [William Shorter] a free black man.

The traverser offered a slave as a witness. Admitted, upon the authority of U. S. v. Terry [Case No. 16,454], at the last term.

DUCKETT, Circuit Judge, absent.

See Acts Assem. Md. 1717, c. 13, §§ 2, 3.

Verdict, not guilty.

Case No. 16,285.

UNITED STATES v. SHUCK.

[1 Cranch, C. C. 56.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

AMENDMENT OF INFORMATIONS—SERVANT SELLING LIQUOR.

1. An information may be amended.

2. A servant selling spirituous liquors for his master is not personally liable for the penalty.

[Cited in U. S. v. Paxton, Case No. 16,013; U. S. v. Voss, Id. 16,628.]

Information for selling spirituous liquors, permitted to be amended, by inserting the date of the offence, and also the words "sold and to be drank at the circus, instead of at his own house." On the trial, the defendant attempted to prove that he acted as servant or agent of another person.

THE COURT instructed the jury that if they should be of opinion, from the evidence, that the defendant acted as the servant of another person, and had no part of the profits, it was not to be considered as his selling, but that of his master.

See U. S. v. Paxton [Case No. 16,013], and U. S. v. Voss [Id. 16,628].

Case No. 16,286.

UNITED STATES v. SHULTS.

[6 McLean, 121.] [2]

Circuit Court, D. Ohio. Oct. Term, 1854.

CRIMINAL LAW—INSANITY AS DEFENSE—TESTS OF SANITY.

1. An individual is liable to punishment, when he can discriminate a right from a wrong act.

[Cited in State v. Lewis, 20 Nev. 333, 22 Pac. 248.]

2. And this can be best ascertained, not by any theory as to the mind, but by the acts of the party.

3. The concealment of the offense, an endeavor to elude the officers of justice by an escape,

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

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

a judicious use of the money stolen, all show a knowledge of the offense.

4. And this is the point to be ascertained, when insanity is set up as a defense.

[Cited in U. S. v. De Quilfeldt, 5 Fed. 279.]

Mr. Morton, U. S. Dist. Atty.

Carrington & Haber, for defendant.

OPINION OF THE COURT. This is an indictment against the defendant [Nicholas Shults], charging him, while employed in carrying the mail of the United States, on a horse route, with the abstraction of certain letters, which contained bank notes and other articles of value. Plea not guilty—jury sworn.

John Keller, who is post master at Mount Ephraim post office, Noble county, in Ohio, states that defendant carried the mail from Sarahsville, in Noble county, to Washington in Guernsey county, a distance of twenty miles. In June, latter part, or first of July, witness mailed two letters for California, which were forwarded to the distributing office at Wheeling or Cleveland, directed to Nicewall. The envelope was returned to witness as being found in the road more than a month after it was mailed. The second letter was reported to have been found on defendant's route. Another letter was found on the same route, which had been mailed on the 6th or 7th of June. Mr. Chance says, there must have been two violations of the mail while defendant carried it, which was about a week. Witness found a letter on the route on Friday after defendant commenced carrying the mail on the route. Another letter was found on the route which must have passed through the office of witness. Mr. Forman is post master at Senecaville. He designates a letter picked up on the route; another letter found on the road must have been a letter forwarded in the mail. Other witnesses proved that other letters were found on the route, which had been mailed by the post masters on the route, and which from their face purported to have contained money. William Young, saw defendant first of June, and received from him a debt of sixty or seventy dollars. He had a watch, and witness asked him how he got so much money; he replied that he had sold a colt for sixty dollars. Witness exchanged with him ten dollars, giving silver for paper; next day he came and bought thirty dollars in gold from witness. Mr. Renderneck, arrested the defendant near Marietta, in a wood boat, at which time he admitted that he had taken from the mail seventy-six dollars. Several witnesses were examined to show mental imbecility in the defendant, so as to be incapable of committing a crime; and his defense rested on this ground. Several medical gentlemen were examined, who differed somewhat in their opinions, some of them stating that in their view he was not a proper subject of punishment.

In the charge to the jury, the court said, there seems to be no doubt that during the short time the defendant carried the mail, he repeatedly violated it by abstracting letters from it. This is established by the numerous letters picked up on or near the route, which had been mailed at one of the post offices on the route, or were carried on it; and by the confession of the defendant that he had taken from the mail seventy-six dollars. He was destitute of money before he was employed as carrier, after which it appears he had money to a considerable amount. All this evidence is uncontradicted, and the only ground of defense is, mental imbecility.

This defense has often been made, and much has been said and written upon the subject. Nothing is more common than for medical men to differ as to the fact of insanity, which should exculpate an individual from punishment. Where the insanity is in a degree which destroys the reasoning faculty, there can be no difference of opinion amongst professional men or jurors. But where the individual is subject to occasional aberrations of mind, or where the mind seems to be under peculiar excitement and error on a particular subject, as is often the case, and rational on other subjects, or where the individual reasons illogically and strangely, which brings him to results in action which violate the laws; in all these cases, and others which might be enumerated, a close investigation is required, and a wise discrimination should be exercised. In such cases, the important fact to be ascertained is, whether the person charged can discriminate between right and wrong. If he be unable to do this, he is not a proper subject of punishment. And this fact can be best ascertained, not by any medical theory, but by the acts of the individual himself. Every person who commits a crime reasons badly. The propensity to steal in some persons is hard to resist. Where the moral development is weak and the passion of acquisitiveness strong, it will often prevail. This, in one sense, may be evidence of a partial insanity, but still the person is a proper subject of punishment. And there is no other test on this point, except the knowledge of the individual between right and wrong. And this knowledge is best ascertained by the acts of the individual in the commission of the offense, and subsequently.

Does the individual commit the offense by embracing the most favorable opportunity, in the absence of witnesses, and under circumstances likely to avoid detection. And if he steal money does he account for the possession of it in an honest way. And does he, under an apprehension of an arrest, endeavor to elude the officers of the law. All this conduces to show a knowledge that he had not only done wrong, but that he was liable to punishment.

The defendant in this case accounted for

the amount of money he had in possession by saying, he received it as the price of a colt. He changed the notes he had for gold and silver, knowing that the notes might not be current at the places to which he might go. Or he might fear that the notes might be identified, by those who forwarded them in the mail. On either supposition it showed a sound reflection on the consequence of his acts should he be arrested. He absconded, and was arrested several miles from home, on his way to the West. He was found in a close room of a boat, the door of which was locked; and it is proved that when he came to the boat the previous evening, he engaged the room and requested that the door should not be opened to any one. This shows an apprehension that he would be pursued, and a desire to escape the pursuit. These acts would seem to be unmistakable evidence of a sense of guilt, and a desire to escape punishment. He acted under a motive which usually influences culprits. When carrying the mail, on a suggestion being made to him that he might steal from the mail, the penitentiary immediately occurred to his mind. He bought and sold articles, and evidenced in such matters, no deficiency of mind. He knew the value of money and understood the matter of exchange, and the uncurrency in remote parts of bank notes.

Upon the whole, gentlemen, if you think from the evidence in the case, that the defendant in violating the mail knew he was doing wrong, and that he was liable to be punished for the act, he is a proper subject for punishment. It is true he did not conceal the letters he took from the mail, but left many of them scattered along the road he traveled, which shows a great want of caution, still, if the other qualities of his mind were in such rational exercise as to enable him to discriminate right from wrong, you will find him guilty.

The jury found the defendant guilty, and the court sentenced him to ten years in the penitentiary.

Case No. 16,287.

UNITED STATES v. SHUSTER.

[Cited in U. S. v. Noble, Case No. 15,895. Nowhere reported; opinion not now accessible.]

Case No. 16,287a.

UNITED STATES v. SICKLES.

[2 Hayw. & H. 319.] [1]

Criminal Court, District of Columbia. April 20, 1859.

MURDER—PRESUMPTION OF MALICE—INSANITY AS DEFENSE—PROVINCE OF JURY—REASONABLE DOUBT OF SANITY.

1. The burden of rebutting the presumption of malice by showing circumstances of alleviation, excuse, or justification rests on the prisoner, and it is incumbent on him to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him.

2. The law does not require that the insanity which absolves from the crime should exist for any definite period, but only that it exists at the moment when the act occurred with which the accused stands charged. The time when the insanity is to operate is the moment when the crime charged upon the party was committed, if committed at all.

3. Every one is presumed to be sane who is charged with a crime, but when evidence is adduced that a prisoner is insane, conflicting testimony makes it a question for the jury, and raises a reasonable doubt which should avail a prisoner on a defence of insanity as to any other matter of fact.

The following indictment was read to the jury by Mr. Ould: "District of Columbia, County of Washington, to wit: The jurors of the United States, for the county aforesaid, upon their oaths, do present that Daniel E. Sickles, late of the county of Washington aforesaid, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 27th day of February, A. D. 1859, with force and arms, at the county aforesaid, in and upon the body of one Philip Barton Key, in the peace of God and of the United States, then and there being feloniously and willfully, and of his malicious aforethought, did make an assault; and that the said Daniel E. Sickles, a certain pistol of the value of two dollars, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Daniel E. Sickles, in his right hand then and there had and held, then and there feloniously, willfully and of his malice aforethought, did discharge and shoot off, to, against and upon the said Philip Barton Key; and that the said Daniel E. Sickles, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Daniel E. Sickles, discharged and shot off as aforesaid, then and there feloniously, willfully and of his malice aforethought, did strike and penetrate and wound him, the said Philip Barton Key, in and upon the left side of him, the said Philip Barton Key, a little below the tenth rib of him, the said Philip Barton Key, giving to him, the said Philip Barton Key, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the said pistol as aforesaid by the said Daniel E. Sickles, in and upon the left side of him, the said Philip Barton Key, a little below the tenth rib of him, the said Philip Barton Key, one mortal wound of the depth of ten inches and of the breadth of half an inch; of which said mortal wound he, the said Philip Barton Key, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Daniel E. Sickles, him, the said Philip Barton Key, in manner and form and by the means aforesaid, then and there feloniously, willfully and of his mal-

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

ice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and government of the United States. Robert Ould, Attorney for United States."

The indictment having been read, the prosecution opened the case for the United States. After the opening by Mr. Ould, the judge stated that it had been the practice in this court for the defence to follow the prosecution in opening, prior to entering upon the testimony. If the defence, however, preferred to reserve their opening, they were entitled to do so.

Mr. Brady, for the defence, stated that they preferred to open to the jury after the evidence for the United States should be given.

The witnesses for the prosecution were then called by the clerk.

On the close of the testimony on the part of the prosecution the jury was addressed by John Graham, Esq., for the defence. On his completion the witnesses on the part of the defence were examined.

After the testimony on both sides was given, the prosecuting attorney, Mr. Carlisle, proceeded to read the instructions, which, as prepared by the district attorney and copied from the instructions given by the court in the Case of Day were: (1) If the jury believe from the evidence that the deceased was killed by the prisoner by means of a leaden bullet discharged from a pistol, such killing implies malice in law, and is murder. (2) That the burden of rebutting the presumption of malice by showing circumstances of alleviation, excuse or justification rests on the prisoner. (3) And it is incumbent on him to make out such circumstances to the satisfaction of the jury, unless they arise out of the evidence produced against him. (4) That every person is presumed to be of sound mind until the contrary is proved, and the burden of rebutting this presumption rests on the prisoner, with the addition of the following: (5) If the jury believe from the evidence that the deceased, previous to the day of his death, had adulterous intercourse with the wife of the prisoner, and further that the deceased on the day of his death, shortly before the prisoner left his house, made signals, inviting to a further act or acts of adultery, which said signals, or a portion of them, were seen by the prisoner; and that influenced by such provocation, the prisoner took the life of the deceased, such provocation does not justify the act or reduce such killing from murder to manslaughter.

Mr. Brady then proceeded to read the instructions asked by the defence: (1) There is no presumption of malice in this case, if any proof of "alleviation, excuse or justification" arises out of the evidence for the prosecution. State v. Johnson, 3 Jones [N. C.] 266; McDaniel v. State, 8 Smedes & M. 401; Day's Case [unreported]. (2) The existence of malice is not presumable in this case, if on any rational theory, consistent with all the evidence, the homicide was either justifiable or excusable, or an act of manslaughter. State v. Johnson, 3 Jones [N. C.] 266; McDaniel v. State, 8 Smedes & M. 401; U. S. v. Mingo [Case No. 15,781]; Com. v. York, 2 Benn. & H. Cr. Cas. 505. (3) If on the whole evidence presented by the prosecution there is any rational hypothesis, consistent with the conclusion that the homicide was justifiable or excusable, the defendant cannot be convicted. (4) If the jury believe that Mr. Sickles, when the homicide occurred, intended to kill Mr. Key, he cannot be convicted of manslaughter. (5) It is for the jury to determine, under all the circumstances of the case, whether the act charged upon Mr. Sickles is murder or justifiable homicide. People v. Ryan, 2 Wheeler, Cr. Cas. 47. (6) If the jury find that Mr. Sickles killed Mr. Key while the latter was in criminal intercourse with the wife of the former, Mr. Sickles cannot be convicted of either murder or manslaughter. (7) If from the whole evidence the jury believe that Mr. Sickles committed the act, but at the time of doing so was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he is not in law guilty of murder. Day's Case [unreported]. (8) If the jury believe from any pre-disposed cause the prisoner's mind was impaired, and at the time of killing Mr. Key he became, or was mentally incapable of governing himself in reference to Mr. Key as the debauchee of his wife, and at the time of committing said act by reason of such cause, unconscious that he was committing a crime as to said Mr. Key, he is not guilty of any offence whatever. Day's Case [unreported]. (9) It is for the jury to say what was the state of the prisoner's mind as to the capacity to decide upon the criminality of the particular act in question—the homicide—at the moment it occurred, and what was the condition of the parties respectively, as to being armed or not at the same moment. These are open questions for the jury, as are any other questions which may arise upon the consideration of the evidence, the whole of which is to be taken into view by the jury. Jarboe's Case [unreported]. (10) The law does not require that the insanity, which absolves from crime, should exist for any definite period, but only that it exists at the moment when the act occurred with which the accused stands charged. (11) If the jury have any doubt as to the case, either in reference to the homicide or the question of sanity, Mr. Sickles should be acquitted.

Mr. Carlisle stated the grounds on what he thought the instructions asked by the prosecution should be granted; and those asked by the defence, or some of them, should be rejected.

After summing up of the case on the part of the defence by Mr. Stanton, Mr. Brady proceeded to argue the instruction on behalf of the defence.

Mr. Ould, the district attorney, made the

closing argument on the evidence, and the instructions prayed for by the prosecution and the defence.

Robert Ould, U. S. Dist. Atty., and J. M. Carlisle, for the United States.

James J. Brady, John Graham, E. N. Stanton, Ratcliffe, Clinton & Magruder, and Mr. Philips, for the prisoner.

CRAWFORD, J. (charging jury). The court is asked to give to the jury certain instructions, whether on the part of the United States or on the part of the defence. The first instruction asked for by the United States embodies the law of the case on the particular branch of it to which it relates, and is granted with some explanation as to insanity, with a reference to which the prayer closes. A great English judge has said on the trial of Oxford (who shot at the queen of England), 9 Car. & P. 525, "that if the prisoner was laboring under some controlling disease, which was in truth the acting power within him which he could not resist, then he will not be responsible." And again: "The question is whether he was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequence of the act he was committing; or in other words, whether he was under the influence of a diseased mind and was really unconscious at the time he was committing the act that that was a crime. A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is doing, a knowledge and consciousness that the act he is doing is wrong and criminal and will subject him to punishment. In order to be responsible he must have sufficient power of memory to recollect the relation to which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under a partial insanity, if he still understands the nature and character of his act and its consequences; if he has knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know if he does the act he will do wrong and receive the punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts." See Com. v. Rogers, 7 Metc. [Mass.] 500, 501, 503.

The second and third instructions asked for by the United States are granted.

The fourth instruction is answered by prayer eleven of the defence.

The fifth instruction asked for by the United States the court thinks is the law, and grants the instruction.

Now we come to those asked on the part of the defence, the first of which is in these words: "There is no presumption of malice in this case if any proof of alleviation, excuse or justification arise out of the evidence for the prosecution.' There is, gentlemen, a legal presumption of malice in every deliberate killing, and the burden of repelling it is on the slayer, unless evidence of alleviation, mitigation, excuse or justification arise out of the evidence adduced against him. The alleviation, mitigation, excuse or justification must be such as the law prescribes, and within the limits already laid down in the instructions given to you.

In regard to the second instruction asked for by the defence, I would say: The answer to the first prayer will be taken in connection with my response to prayer number two: "If upon any course of reasoning consistent with all the evidence" and the law as laid down to you by the court, and the rules by which it is ascertained what is legal provocation, what is justification or excuse, you should come to the conclusion that there was such justification or excuse, or that the homicide was manslaughter, then the presumption of malice which the very killing of a human being involves, is met. You recollect that manslaughter is the killing of a man without malice.

The third prayer on the part of the defence is answered in the same manner as prayer number two.

The fourth prayer the court declines to grant; manslaughter may exist, and most frequently does, where the slayer intended to destroy life, but under circumstances which reduce the offence.

The fifth prayer cannot be granted, as to the jury belongs the decision of matters of fact, and to the court the decision of matters of law, which it is the duty of the jury to receive from the court; and from the evidence and the law applied to the facts it is the province and legal right of the jury to return a guilty or not guilty of murder or manslaughter.

In regard to the sixth instruction for the defence I would remark: If this prayer refers to actual (existing at the moment) adulterous intercourse with the wife of the prisoner, the slaying of the deceased would be manslaughter; and by existing adultery I do not mean that the prisoner stood by and witnessed the act of adultery progressing, for it is easy to suppose the actual fact to be established simultaneously with the killing by other evidence, in perfect consistence with the law; if, for instance, the husband saw the adulterer leave the bed of the wife, or shot him while trying to escape from the chamber. If, however, a day or half a day intervened between the conviction of the husband of the guilt of his wife and the deceased, and after the lapse of such time the husband take the life of the deceased, the law considers that it was done deliberately, and declares that it is murder.

The seventh and eighth instructions can be answered together. They are granted.

In reply to the ninth instruction the court responds thus: "It is for the jury to say what was the state of Mr. Sickle's mind as to his capacity to decide upon the criminality of the homicide, receiving the law as given to them in relation to the degree of insanity, whether it will, or not, excuse they (the jury) finding the fact of the existence or non-existence of such degree of insanity." The gist of this prayer is "what was the condition of the parties respectively as to being armed or not at the same moment"? So much of the instruction as I have now read I grant without qualification.

The tenth prayer reads thus: "The law does not require that the insanity, which absolves from crime should exist for any definite period, but only that it exists at the moment when the act occurred, with which the accused stands charged." That instruction is granted. The time when the insanity is to operate is the moment when the crime charged upon the party was committed, if committed at all.

The eleventh and last instruction asked reads this way: "If the jury have any doubt as to the case either in reference to the homicide or the question of insanity, Mr. Sickles should be acquitted." This instruction, as I mentioned in referring to prayer four of the United States will be answered in conjunction with it. It does not appear to be questioned that if a doubt is entertained by the jury, the prisoner is to have the benefit of it. As to the sanity or insanity of the prisoner at the moment when he committed the act charged, it is argued by the United States that every man being presumed to be sane, the presumption must be overcome by evidence satisfactory to the jury that he was insane when the deed was done. This is not the first time this inquiry has engaged my attention. The point was made and decided at the June term, 1858, in the case of U. S. v. Divilins [unreported], when the court gave the following opinion, which I read from my notes of the trial: "The prayer is based on the idea that the jury must be satisfied beyond all reasonable doubt of the insanity of the party for whom the defence is set up, precisely as the United States is bound to prove the guilt of a defendant to warrant a conviction. I am well aware, and it has appeared on this argument, that it has been held by a court of high rank and reputation, that there must be a preponderance of evidence in favor of the defence of insanity to overcome the presumption of law that every killing is murder; and that the same court has said that if there is an equilibrium, including, I suppose, the presumption mentioned of evidence, the presumption of the defendant's innocence makes the preponderance in his favor. Whether a man is insane or not is a matter of fact. What degree of insanity will relieve him from responsibility is a matter of law, the jury finding the fact of the degree too. Under the instructions of the court murder can be only committed by a sane man. Everybody is presumed to be sane who is charged with a crime, but when evidence is adduced that a prisoner is insane, and conflicting testimony makes a question for the jury, they are to decide it like any other matter of fact; and if they should say or conclude that there is uncertainty, that they cannot determine whether the defendant was or is not so insane, as to protect him, how can they render a verdict that a sane man perpetrated the crime and that no other can?"

Nor is this plain view of the question unsupported by authority. In the case of Reg. v. Ley, in 1828, Lewin, Crown Cas. 239, on a preliminary trial to ascertain whether a defendant was sufficiently sane to go before a petit jury on an indictment, Hullock, B., said to the jury: "If there be a doubt as to the prisoner's sanity, and the surgeon says it is doubtful, you cannot say he is in a fit state to be put on trial." This opinion was approved in Freeman v. People, 4 Denio, 9. This is a strong case, for the witness did not say the prisoner was insane, but only that it was doubtful whether it was so or not. The humane, and I will add, just doctrine, that a reasonable doubt should avail a prisoner, belongs to a defence of insanity, as much, in my opinion, as to any other matter of fact.

I believe, gentlemen, that that answers all the questions.

On the completion of the judge's charge the indictment was handed to the jury. The jury retired, and after an absence of a little over an hour they entered the court, and their finding as stated by their foreman was "not guilty," whereupon the court ordered the prisoner discharged from custody.

Case No. 16,288.

UNITED STATES ex rel. HEWETT et al. v. SILVERMAN.

[4 Dill. 224.] [1]

Circuit Court, E. D. Arkansas. 1878.

MANDAMUS TO LEVY TAXES — JUDGMENTS AGAINST MUNICIPALITIES — INTERFERENCE BY STATE COURTS—CONTEMPTS.

1. The execution of writs of mandamus issued by the circuit court of the United States cannot be interfered with by the process or judgments of the courts of the state, and such interference is illegal and void.

[Cited in U. S. v. Jefferson Co., Case No. 15,472; Hill v. Scotland Co. Ct., 32 Fed. 717.]

2. The relators obtained in this court a judgment against a county, and a peremptory writ of mandamus issued commanding the respondent, as county judge, to levy a tax to pay such judgment. He obeyed. Subsequently the state court, in a proceeding to which the relators were not parties, set aside the order for the tax levied by the respondent in obedience to the mandamus, and directed the respondent to enter an order on his records annulling the levy of

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

the tax. The respondent obeyed. At the relator's instance a rule issued against the respondent to show cause why he should not be attached for contempt: *Held*, that he was in contempt, and liable to be punished therefor.

3. The order made in the case is given at the end of the opinion.

A rule was issued against the respondent [Frank Silverman], the county judge of Jefferson county, Arkansas, at the instance of the relators [Hewett and Cooper], to show cause why he should not be punished for contempt. Shortly, the facts are these: Hewett recovered judgment in this court against Jefferson county. The county did not appeal from that judgment. Hewett assigned part of the judgment to Cooper. This court awarded a peremptory writ of mandamus to compel the county authorities to levy a tax to pay the judgment. The tax was levied and afterward set aside, under the circumstances hereinafter stated. On a showing that the peremptory writ had not been obeyed, a rule was issued by this court against the county judge of Jefferson county, the Hon. Frank Silverman, to show cause why he should not be punished for contempt in not obeying the writ of mandamus directed to him by this court. He set up in his defence that he obeyed certain orders of the state court hereinafter referred to, and disclaimed any intention to disobey the mandates of this court. The respondent, after the service of the rule upon him, entered an order setting aside the order vacating the levy, and restoring the levy made under the writ of mandamus.

The following opinion, orally given, accompanied the order of the court made in the premises.

Mr. Brown, for relators.
Mr. Yonley, for respondent.

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

DILLON, Circuit Judge (orally). The county officers, on the alternative writ which issued, had full opportunity to be heard against the demands that were made against them. No sufficient reason was shown by the county or its officers why the peremptory writ of mandamus should not issue, and the court adjudged that it ought to be awarded. If the court erred in originally rendering the judgment, the county had a remedy on writ of error in the supreme court of the United States. So, if this court erred in the proceedings had on the alternative writ, or in granting the peremptory writ, the county had its remedy by taking a writ of error to the supreme court of the United States; but its officers pursued no such course, and therefore they should have rendered obedience to the peremptory writ.

The peremptory writ was directed to Frank Silverman, county judge, and Craig and others, justices of the peace, composing the county court of Jefferson county. It commanded them "to meet and convene together at the court-house in the town of Pine Bluff, in said county, upon the day fixed by law for levying taxes for county purposes for the year 1877, then and there to organize, open, and hold a county court of said county, and to levy the tax of five mills on the dollar of all the taxable property of said county, provided for by the constitution of the state of Arkansas, for the payment of indebtedness contracted and created before and existing at the time of the ratification of this constitution, payable only in United States currency, and cause the same to be collected at the same time and in the same manner that other county taxes are directed by law to be collected, and to cause the proceeds of the said tax, as soon as collected, to be paid into the registry of our said circuit court, for the payment and satisfaction of the said judgment, interest, and costs."

It appears that this writ was duly served, and that, in pursuance of this command, they did meet and levy the tax which the writ commanded them to cause to be levied. Afterwards, at the instance of certain taxpayers of that county, a proceeding upon certiorari was instituted to have the order of the county court made in obedience to this writ reviewed by the circuit court of the county; and that proceeding was begun and carried on in the local court without any notice being given to the relators or parties interested in the judgment, and in that proceeding the state circuit court undertook to annul the order of the county court made in obedience to the command of this court, and certified its action to the county court in that regard. When that action was certified to the county court, commanding that court to enter an order annulling its prior levy of taxes, the county court obeyed and caused that order to be made. The tax had been extended on the tax books of the county, and the warrant for collection was in the hands of the sheriff, who, by the statutes of this state, is ex-officio collector. When it was known in the community that the circuit court of the county had made such order, the collector makes return (in obedience to a rule issued upon him) that, although he demanded the tax, he was unable to collect it; that the tax-payers refused to pay it, and so, practically, the command contained in the writ we issued has been of no avail.

In the state of Iowa, some years since, we had a conflict between the state and federal judicial tribunals concerning the validity of bonds issued by municipalities to aid in the construction of railroads. The supreme court of that state held that those bonds were unconstitutional, having, however, previously decided otherwise; and under the first decision a large number of such bonds had been issued. The state supreme court after-

wards changed their judgment, and held the bonds to be invalid, and proceedings were begun by tax-payers in the courts of that state to enjoin the counties from levying any tax to pay judgments rendered in the federal courts on municipal bonds.

The leading case in the supreme court of the United States upon this subject, which is well known to the profession, is the case of Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166. The case is not so strong for the relators as the one now at the bar, because in that case the injunction from the state court against the officers of Johnson county was issued before the writ of mandamus was issued by the federal court. The following is a correct synopsis of the point ruled in that case: "After a return unsatisfied of an execution on a judgment in a circuit court of the United States against a county for interest on railroad bonds, issued under a state statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a mandamus from the circuit court of the United States will lie against the county officers to levy a tax, even although prior to the application for the mandamus a state court has perpetually enjoined the same officers against making such levy; the mandamus, when so issued, being regarded as a writ necessary to the jurisdiction of the federal court which had previously attached, and to enforce its judgments, and the state court, therefore, not being regarded as in prior possession of the case."

Now, the state officers in the state of Iowa supposed they were between two fires. First, the state court enjoined them from levying the tax, and a subsequent mandamus from the federal court commanded them to levy precisely the same tax which the writ of the state court forbade. If they obeyed the mandamus of the federal court, and levied the tax, the state court would, they said, arrest them for contempt of its writ and punish them. If they disregarded the command of the writ of mandamus, the federal court would attach them for contempt and punish them. Now, what was to be done?

It was this dilemma the county judge, in the case at bar, said he supposed he was in: "I am subject to two commands; the federal court commands the levying of this tax, and the circuit court for the county has commanded me to annul the levy." He obeyed the orders of the local court, and in so doing he simply obeyed the wrong tribunal.

The subject is very fully considered by the supreme court of the United States in the above mentioned case of Riggs v. Johnson Co. It would consume too much time to refer to it at length; but the effect of it is, that in judgments rendered in this class of cases the writ of mandamus is a writ necessary to enforce the judgment, and that judgment can no more be interfered with by the state courts than they can undertake to interfere with an ordinary writ of execution in the hands of the marshal of this court, nor can the state court any more interfere than the federal court could interfere with their judgments or process. It is a rule that one court shall not interfere with the processes of the other, and when this rule is observed harmony exists in both, and there can be no conflict.

(After reading some extracts from that case, the judge continued:)

Such is the law of the land, as declared by the highest tribunal of the country, and all courts, federal and state, must accept it and yield obedience to it. It is so understood in this state, for I have before me an opinion of the supreme court of Arkansas, delivered by the present distinguished chief justice, in which he considers this subject. Vance v. City of Little Rock, 30 Ark. 435, 452. Speaking on this point, Chief Justice English says: "We cannot undertake to say that the circuit court of the United States had not jurisdiction to award the mandamus, nor that in exercising its jurisdiction it committed an error, for this court has no appellate jurisdiction over that court. The city had the right to appeal from its judgment awarding the mandamus to the supreme court of the United States, and failing to do this, no complaint it can make to us of the effect of the judgment awarding the writ can be made of any avail."

That is the true doctrine, and it is the one recognized alike by the supreme court of the state and the supreme court of the United States. The effect of this is, that the action of the circuit court of Jefferson county, and the action of the county court in pursuance thereof, were nullities. The county judge has been examined on oath, and he disclaims any intention to disregard the mandate of this court, but he has made a mistake which may result to the prejudice of the relator's interests. We will reserve any further action against the county judge, in order to see whether his action shall in the end result injuriously to the parties.

CALDWELL, District Judge, concurs in the foregoing views, and in the following order:

"It is now ordered that the said rule against said Silverman be reserved for the further action of the court, and that John M. Clayton, sheriff and ex-officio collector of said county, do proceed to collect the taxes levied to pay the relator's judgment the same as if the said certiorari proceedings had not been had, and the judgment and orders of the circuit court, and of the county court setting aside said levy, had not been made. The said collector will collect the said tax as other delinquent taxes are collected, but without penalty upon all such taxes which

may be paid before the day when, by law, he is required to advertise real estate for sale for such delinquent tax. It is further ordered that a duly certified copy of this order shall forthwith be served by the marshal on said collector."

Ordered accordingly.

Case No. 16,289.

UNITED STATES v. SIMMONS.

[14 Blatchf. 473.] [1]

Circuit Court, E. D. New York. May 27, 1878.

NEW TRIAL—DELAY OF APPLICATION.

After the conviction of a defendant, he moved in arrest of judgment, and the case went to the supreme court on a certificate of a division of opinion. After a decision by that court, the defendant moved in this court for a new trial: *Held*, that it was too late to make such a motion.

[This was an indictment against Stephen J. Simmons charging the violation of certain provisions of an act of congress relating to distilled spirits. Heard on a motion for a new trial.]

Asa W. Tenney, U. S. Dist. Atty.

John J. Allen, for defendant.

BENEDICT, District Judge. The defendant was tried and convicted in May, 1875. There is no minute of any motion for a new trial having been then entered. A motion in arrest of judgment was made, which was argued and re-argued, and, a difference of opinion having arisen, the case went to the supreme court of the United States, upon a certificate of division. The decision of the appellate court having been made during the present month [96 U. S. 360], the defendant now applies to have a day fixed for the hearing of a motion for a new trial. The application comes too late. If any objection was intended to be made to the verdict, a motion for a new trial should have been promptly made. No reason for the delay has been suggested, and, to permit such a motion to be now made, after the lapse of three years, and where, as may well be supposed, the witnesses are scattered, would be highly improper. Ordinarily, it is too late, after a motion in arrest of judgment has been made, to apply for a new trial; and, although, when a motion for a new trial and a motion in arrest of judgment have been entered simultaneously, and the latter is first argued, by direction of the court, the former may be thereafter argued, yet, in a case like this, when the question of a new trial is, for the first time, raised after the decision upon the motion in arrest, it cannot be entertained. The motion is, therefore, denied.

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

Case No. 16,290.

UNITED STATES v. SIMS.

[4 Cranch, C. C. 618.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

ROBBERY—LARCENY BY SLAVE.

1. To constitute robbery, there must be fear or force.

2. A slave charged with larceny is to be tried and punished by a justice of the peace.

Indictment [against the negro Henry Sims] for highway robbery of one Latimer, by snatching his watch from his side pocket, it being fastened to his neck by a ribbon, which was broken by the first snatch, the owner not having been put in fear.

Mr. Key, for United States, cited Russ. & R. 419; 3 Chit. 805.

Hoban & Morfit, for prisoner, cited Rex v. Gnosil, 1 Car. & P. 304, 12 Serg. & L. 182.

THE COURT (nem. con.) was of opinion that, in this case, the force was not sufficient to constitute the offence of robbery, and intimated that the law was correctly stated by Garrow, B., in Gnosil's Case, 1 Car. & P. 304.

The jury found the prisoner guilty of simple larceny, and that he was a slave; whereupon THE COURT, not having jurisdiction of simple larceny by a slave, ordered him to be taken before a justice of the peace, to be dealt with according to law.

Case No. 16,291.

UNITED STATES v. SIMONS.

[1 Abb. (U. S.) 470; 12 Int. Rev. Rec. 10; 7 Phila. 607; 3 Pittsb. Rep. 261; 18 Pittsb. Leg. J. 60; 27 Leg. Int. 236; 5 Am. Law Rev. 187.] [2]

District Court, W. D. Pennsylvania. June Term, 1870.

INTERNAL REVENUE—"PRODUCE BROKER."

One whose occupation is to sell agricultural produce in public market, is not exempted from the tax imposed by the internal revenue law of 1866 [14 Stat. 98], upon "produce brokers," by the fact that the produce sold is not purchased by him for sale, nor sold as agent for another, but is raised by himself upon his farm.

Trial of an indictment. The defendant, Charles Simons, was indicted for carrying on business as a produce broker, without paying the special tax required by the internal revenue laws. The evidence upon the trial showed that the defendant owned a piece of land in the vicinity of the city of Williamsport, on which he raised vegetables; and he was accustomed to dispose of these vegetables on the regular market days, in the markets of the city.

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

[2] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 5 Am. Law Rev. 187, contains only a partial report.]

H. B. Swope, Dist. Atty., for the government, contended that there were only two ways in which the defendant could dispose of his produce without paying tax—one by selling it at the place of production, and the other by hawking it in the manner of a pedlar; and that when he entered the market place regularly and competed with other dealers who were compelled to pay tax, he made himself equally liable.

Allen & Bartles, for defendant, contended that the defendant had the right to dispose of produce raised by himself, on his own land, without payment of any tax.

McCANDLESS, District Judge. The courts of the United States are tribunals which were created by the constitution to stand between the government and the people. Whilst we see that the laws are enforced, we must take care that the citizen is not oppressed. The decisions of the several departments at Washington are entitled to great respect, but they can not and do not control the judgment of our courts. Otherwise we would not be, as we are designed to be, an independent branch of the government, wholly irresponsible for the soundness of our decrees, to either congress or the executive. In this matter of taxation, which has annoyed the world from the days of the tribute to, and the image and superscription of Cæsar, and which is always a source of discontent, in protecting the people we must preserve the faith of the nation. To re-establish the Union and place it upon a permanent basis, we have contracted a large public debt, the principal and interest of which must be paid to the uttermost farthing. Anything else would be derogatory to our personal integrity, and disgrace us in the face of all nations. Every citizen, therefore, is bound to contribute to the common fund, and his omission or refusal to do so inflicts an injury upon his fellow citizens, and upon the government to which he is indebted for the protection of his life, liberty, and property.

Before announcing the conclusion at which I have arrived, I have thought it proper to make these preliminary observations, because there is a large class of people who think they are or should be exempt from the onerous burden which is laid upon us all.

Simons is indicted for carrying on the business of a produce broker without having paid the special tax. Nothing criminal, in the ordinary sense of the term, is attributed to him. The proceeding against him is designed as a test case to ascertain whether, in the exercise of his occupation as a market gardener, he is liable to its payment.

We think he is. The evidence shows that he is the owner of forty acres of ground on Lycoming creek, in the vicinity of this city, which he cultivates in raising vegetables; that, except in December and January, he attends the market of Williamsport with his horses and wagon, backs up at the curbstone at different points on Market and Third streets, erects a temporary stand at the tail of his wagon, and there, twice a week, on the days fixed by an ordinance of the city as market days, sells the products of his garden.

It has been contended, with much ability, that he does not come within the category of produce broker. At one time in the consideration of this case I was inclined to concur with the learned counsel for the defense, and designed to request a further argument from the able district-attorney, but am now clear that the defense is not tenable.

If the question depended upon the common acceptation of the word "broker," the argument for the defendant would be sound, for a broker is a middle man, an intervenor between the buyer and seller, a factor or agent who contracts for the one or the other.

We have exchange brokers, stock brokers, pawnbrokers, and insurance brokers, who negotiate between vendor and vendee; and as Simons sells his own products, he could not very well be called a broker. But congress has not left it to the courts to define what the word "broker" means. They have given us a legislative definition by which we are bound.

In section 79 of the act of 1866, they say that a "produce broker" is a person "whose occupation it is to buy or sell agricultural or farm products." If he buys or sells, whether he does it for himself or for another, he is to be "regarded," in the language of the act, as a "produce broker." Congress might have used a better term, but all refinement upon the words is at an end in the face of this definition. It was doubtless the design to exempt, as far as practicable, the agricultural portion of the community from burdensome taxation; but as almost every person and everything is necessarily subject to taxation, there was no good reason why the producer, who brings his articles to market and comes in competition with merchants, or those who only buy and sell, should be so highly favored. If he sells from his farm or his garden he pays nothing, but if he acts in the capacity of a merchant or dealer, he must pay a tax upon that occupation. That is but just to his fellow tax-payers, and he ought not to complain of the government which exacts it.

But there is still another reason why I consider this the true construction of the statute. Farmers and gardeners are exempt from taxation as pedlars; that is, they may go from house to house in town or country and sell their produce without paying a special tax. They are also exempt as "manufacturers or producers." Here the maxim "expressio unius est exclusio alterius" ap-

plies. If congress intended that they should not be included in the class of produce brokers they would have said so. If they pursue any other occupation than that of tilling the soil, and selling directly from their farms or gardens, they incur the liability of the additional employment, and I think properly so.

All this is a case of the first impression, no published opinion of my brethren of the bench having yet appeared; as it involves large interests to both the government and the people, I have given to it careful consideration, and the more I reflect upon it the better I am satisfied the decision is right.

Your verdict should be against the defendant.

The jury immediately returned a verdict of "guilty in manner and form, &c. &c.," whereupon the defendant was sentenced to pay a fine of ten dollars, the special tax for two years, twenty dollars, and the costs.

Case No. 16,292.

UNITED STATES v. SINGER et al.

[2 Biss. 226;[1] 18 Pittsb. Leg. J. 5; 12 Int. Rev. Rec. 98, 209; 3 Chi. Leg. News, 81.]

Circuit Court, N. D. Illinois. Jan., 1870.[2]

BONDS AND TAXES OF DISTILLERS — RETURNS OF PRODUCTION—LIABILITY OF SURETIES.

1. The 20th section of the act of July 20, 1868 [15 Stat. 133], cannot be construed as authorizing the collection of a tax on spirits which have never been actually produced.

2. A distiller is not bound to return more spirits than he has produced. If his return is less than eighty per cent. of the producing capacity of the distillery, the assessor should assess him for the deficiency, but to the claim for a tax on such alleged deficiency, the fact that such deficiency does not exist is a sufficient answer.

[Cited in U. S. v. Bicket, Case No. 14,590.]

3. The sureties on distillers' bonds, executed previous to the act of March 29, 1869 [16 Stat. 52], are not liable to reimburse to the United States the expenses and salaries charged against distillers in said act.

4. Sureties are not liable for the performance by their principal of duties not within the scope of the particular office, and which they cannot be supposed to have contemplated at the time they executed the bond.

This was a demurrer to pleas filed by the defendants [Jacob Singer and others] in an action by the United States on a distiller's bond, and also a demurrer to one of the breaches alleged in the declaration.

J. O. Glover, U. S. Dist. Atty.

George A. Meech, for defendants.

DRUMMOND, Circuit Judge. In this case the facts are, that Singer & Bickerdike as principals, and the other defendants as sureties, gave a bond on the 18th of January, 1869, to the United States in the penal sum of ninety-two thousand dollars, with the condition that as Singer & Bickerdike on and after that day intended to be engaged in the business of distillers, they should in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and pay all penalties incurred or fines imposed on them for a violation of any of the said provisions.

The declaration alleges several breaches on this bond. The first is that Singer & Bickerdike made return of the amount of spirits that they had manufactured during the month of November, 1868, and that the quantity was less than eighty per cent. of the producing capacity of their distillery as estimated under the provisions of the internal revenue law, and that on the 10th of February, 1869, the assessor made an assessment against them for the deficiency, viz. $26,089.60, which they have not paid.

To this breach the defendants have pleaded what is termed the third amended plea, and which declares that Singer & Bickerdike made return to the assessor of all the highwines and spirits produced at their distillery during the month of November, 1868, and that an assessment was made against them for the full amount of tax on the same, and that the amount so assessed has been paid, and that no other highwines or spirits were produced at their distillery during the month of November, 1868, than what were so returned.

To this plea there is a demurrer by the plaintiffs. The declaration also contains an additional breach or count, to the effect that one Davis, an internal revenue storekeeper, was appointed by the secretary of the treasury and assigned to the distillery of Singer & Bickerdike at a salary of five dollars a day from March 4 to March 25, 1869, inclusive, thereby becoming entitled to $110 as such storekeeper, and which amount has been paid by the plaintiffs, and thereupon it became the duty of Singer & Bickerdike to reimburse to the plaintiffs this amount, but to do this they have failed.

To this breach there is a demurrer by the defendants. The first question turns upon the validity of the plea, and consequently upon the true construction of the 20th section of the act of congress of July 20, 1868. That section declares that the assessor, in order to determine whether all the spirits produced in a distillery have been returned, shall ascertain the whole quantity of materials used for the production—"and forty-five gallons of mash or beer brewed or fermented from grain, shall represent not less that one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses, shall represent not less than one gallon of molasses. If the return is less than the quantity thus ascertained, the distiller or other person shall be assessed for the deficiency, * * * and the collector shall proceed to collect the same as in cases of other assessments for deficiencies." Now, it will

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

[2] [Reversed in 15 Wall. (82 U. S.) 111.]

be observed that the language of the section as referred to above seems to proceed on the basis that it has given a mode of ascertaining the quantity of spirits produced, by declaring that forty-five gallons of mash shall represent one bushel of grain, under the implication that when the number of bushels of grain is known, the quantity of spirits produced is exactly ascertained, an implication contrary to the fact, as is well understood by all practical distillers. If the section had arbitrarily declared how much spirits one bushel of grain should represent, then this part of the difficulty would be removed. The section concludes with this provision: "But in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act."

This 20th section appears to have been framed for the purpose of prescribing a method of ascertaining the product of the distillery, or to impose a tax on its capacity as such, or to unite both, and thus if the distiller should in fact produce eighty per cent., then it was to be a tax on the product; and if less, on the capacity.

In order to determine which of these is the true meaning of this section, the facts of this case should not be forgotten. It has been conceded in the argument by the district attorney that, so far as is known and believed by the officers of the government, the distillers in this case returned all the spirits they manufactured in the month of November, 1868, and that the assessment in controversy was made upon a quantity of spirits that never existed.

In examining the act of July 20, 1868, the inquiry naturally arises—what was its object as to distilled spirits. It is entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes." The first section declares what tax shall be levied and collected on distilled spirits, and the following sections contain various provisions for ascertaining and securing the payment of the tax. The tenth section designates in what manner the true producing capacity of each distillery shall be determined, and how errors in such estimate shall be corrected. The thirteenth section imposes a daily tax upon the distiller in proportion to the capacity of his distillery for mashing and fermenting grain, etc.

The 14th, 15th, 16th, 17th, 18th and 19th sections contain various and minute directions as to the construction of buildings and machinery, and the mode of manufacture, in addition to those previously prescribed, and the main object of which appears to be to guard against dishonest practices by the distiller. Besides all this, the distiller or principal manager is to make his return three times a month, under oath, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced, and he is bound to include all, because he must asseverate there was no more used or produced. After this follows the 20th section, the substance of which has been already stated, and numerous others, all of the same general purport up to the 59th, which imposes an annual special tax upon distillers in proportion, not to the capacity, but to the actual product of the distillery.

If it were the purpose of the law to assess also a tax upon the capacity alone of a distillery as representing its actual product, and in this way tax the supposed product itself, and if it be true that such a tax is something else than an assessment upon the distillery and machinery, merely because they possess a certain property or quality, then it is singular that such multifarious and complicated provisions were considered necessary to ascertain and collect the amount. If the producing capacity of a distillery is known—as so many gallons a day—then it is a simple thing to say it shall pay fifty cents as a tax on every gallon it is capable of producing; and the complex and expensive arrangements and safeguards to prevent fraud, thrown around the manufacture of distilled spirits, could be dispensed with at once. The object of so much legislation must have been to ascertain the product, and thus compel the payment of a tax on the whole of the article manufactured. Such a tax may be said to be just, as having something on which to operate, whereas a tax on the producing capacity of a distillery, if it be not a tax on the distillery itself, is often on a mere imaginary thing. It is like the attempt to tax an income where there is none.

If we examine the language of the 20th section in connection with that part of the 19th section already referred to, this view of the law will be strengthened. The distiller must return the whole of the spirits manufactured, under oath, but in no case shall the quantity returned be less than eighty per cent. of the producing capacity of the distillery, so that literally, if the distillery has produced less than eighty per cent., which is alleged to be the fact in this case, then the distiller is required to make a false return and swear to it. This certainly cannot be the meaning of this section, because a previous part of the section, after assuming—contrary to the fact—that a test of quantity had been given, directs an assessment to be made if the quantity returned shall be less than that thus ascertained.

The only construction that can be given to this section, consistent with reason and the general scope and purpose of the law, in my opinion, is. if the return is not equal to eighty per cent. of the producing capacity of the distillery, the assessor shall assume that

it ought to have been, and the distiller shall then be assessed on that basis, as a method of discovering the actual product. It could not have been intended the distiller should return what he had not produced, nor that he should pay a tax on nothing. My conclusion is that the object of this section of the law is accomplished when the distiller has paid the proper tax on all the spirits he has manufactured. The letter of the section seems to be framed on a certain theory, but it is not possible, even for an act of congress, to make a bushel of grain produce more spirits than nature has supplied and science and skill can extract. One bushel of grain is not always precisely like another, nor is distilling always carried on under precisely the same circumstances, nor with precisely similar machinery and appliances of manufacture. And if a distillery has run part of a month and it is accidentally destroyed by fire or otherwise, is the letter of the statute still to be followed and an assessment of eighty per cent. made and enforced for the whole month, when the product may have become impossible? And if not, why not? Such is a case in actual controversy in this court.

Admitting then it may have the effect of compelling the distiller to establish, when he has not returned eighty per cent. of the producing capacity of his distillery, that it was because the distillery did not produce it, I must hold, when that is done, it is an answer to the claim set up under this section for an alleged deficiency—the fact then being the deficiency does not exist. My attention has been called to the Case of Dutcher [Case No. 15,014], in this court as having some bearing on this case; but the point decided there was different from that which the government seeks to establish here against the distiller. That was where a bond had been given under the act of July 13, 1866 [14 Stat. 98], on the removal of certain highwines from one bonded warehouse to another, and where the quantity of wines was ascertained by government inspection, when delivered at the one warehouse to the owner, and received at the other from him. The highwines were delivered to the owner on condition that he would agree to pay the tax on the difference between the number of gallons as delivered and as received, less certain allowances. In that case the government held the highwines for the tax. It parted with them on a particular guaranty voluntarily entered into by the owner. The court held that he was bound by the terms of his contract, though it operated with some hardship in that instance. If it were clear that the intent of this 20th section of the act of 1868 was that the distiller should pay a tax on what his distillery did not manufacture, then, however unjust or oppressive such a provision might be, it could not be disregarded by the courts unless, indeed, on the ground that congress could not impose such a tax, which point need not now be considered. In conclusion, on this part of the case, it must be said once more that if the position of the government is correct, that the law intended to levy and collect a tax of fifty cents on every gallon of distilled spirits that a distillery was capable of producing, without regard to the fact that it was ever actually manufactured, it is to be regretted the meaning was not more clearly expressed. It was only necessary to determine the producing capacity of the distillery, and the beginning and end of its operations, and the thing was done. Instead of which we have a series of restrictions and impositions, and a system of inquisition and espionage upon distilling—admitted by the act to be a lawful occupation—which if extended to all other kinds of business, would make the collection of taxes odious and oppressive and indeed well nigh intolerable.

Nothing has been said, because the question was not made in the argument, of the application of this bond to an alleged omission of duty on the part of the principals at a time prior to the execution of the bond, a point perhaps by no means free from difficulty as affecting the sureties, whatever may be its bearing on the principals.

Neither has any stress been placed on what is said to be true, that the commissioner of internal revenue, on being satisfied in some other cases that all the spirits manufactured were returned and the tax paid thereon, directed that the assessments should not be enforced, because the question really is whether it is a matter of discretion with the commissioner or of right upon the part of the distiller The demurrer to the third amended plea will therefore be overruled.

The second question arises on the demurrer of the defendants to the second breach in the declaration. The law in force at the time this bond was executed (section 52, Act July 20, 1868) required that the United States should pay the internal revenue storekeeper, and in conformity therewith, Davis, the storekeeper in this case, was paid by the government the sum of $110, being at the rate of five dollars a day while employed and assigned to the warehouse of Singer & Bickerdike, and all of which was after the execution of the bond in this case. On the 29th of March, 1869, congress passed a joint resolution directing that certain items omitted in the enrollment of the appropriation act of March 3d, 1869 [15 Stat. 301], were to be added as amendments thereto, among which was this proviso: "That after the passage of this act the proprietors of all internal revenue bonded warehouses, shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses, and the same shall be paid into the treasury and be accounted for like other public moneys."

It will be seen, therefore, that Singer & Bickerdike by this were required to repay to the United States what the latter had paid to Davis, and the question is—to say nothing

about its effect on the principals—whether the sureties are liable by such an ex post facto resolution of congress operating upon the condition of this bond, executed the 18th of January previous, in such a way as to give it validity against them. I think they are not. It is a matter of grave doubt whether this bond stands on the same footing as an official bond; but conceding that to be so, what is the true rule on the subject?

One of the best considered cases to which the attention of the court has been directed, is that of Governor of Illinois v. Ridgway, 12 Ill. 14, where the supreme court of Illinois discusses and decides upon the effect of subsequent legislation on the liability of sureties to official bonds, and where this rule is stated. The sureties of an officer on his official bond are liable for the faithful performance of all duties imposed on him, whether by laws previous or subsequent to the execution of the bond, if they properly belong to and are within the scope of the particular office, and not for those unconnected with it and which cannot be supposed to have been contemplated by the parties at the time they executed the bond.

Some such principle as this must be adopted or the contract of a surety, instead of being construed strictly, as confessedly it should be, is extended so as to include obligations that he never assumed. Can it be fairly said to have been within the contemplation of the sureties in this case, that their principals would be required to refund money which the government by existing law, if a storekeeper was employed and assigned, was obliged to pay, and that thus they were to be held accountable for such an act done and default made after they signed the bond?

If this be so, where is the limit to the responsibility which may in this manner be cast upon a surety to an official bond? The contract of a surety is secondary. He is bound for the acts of his principal and not his own, and if it be true, that for what is fairly within the contemplation of the parties, though ex post facto, he is bound, yet if we go beyond that, it would seem to violate the fundamental principles of the contract of the surety.

If the rule insisted on by the government in this case is maintainable, it is difficult to see why the sureties to this bond could not in the same manner and by equivalent legislation be made to reimburse the United States for the whole expense of collecting every dollar of tax paid on distilled spirits by their principals.

The decisions of the courts of the United States, which are collected and cited by Mr. Brightly in his "Federal Digest," 822, upon the contracts of sureties, are in conformity with the opinion here given.

The demurrer to the second breach will therefore be sustained.

[Judgment having been given for defendants, a writ of error was sued out from the supreme court. The judgment of this court was reversed, and the cause remanded for further proceedings, with leave to the defendants to plead anew to the first count of the declaration. 15 Wall. (82 U. S.) 111.]

Case No. 16,293.

UNITED STATES v. SINGLETON.

[1 Cranch, C. C. 237.] [1]

Circuit Court, District of Columbia. June Term, 1805.

INDICTMENT FOR MISDEMEANOR—NAME OF PROSECUTOR.

The want of the name of a prosecutor upon an indictment for a misdemeanor in Virginia, is not sufficient cause for arresting the judgment.

[Cited in U. S. v. Helriggle, Case No. 15,344.]

Indictment [against George Singleton] for assault on Julia Drake.

Mr. Taylor, for defendant, moved the court to arrest the judgment upon the verdict, because the name of a prosecutor was not indorsed on the indictment; and cited the Virginia law, New Rev. Code, p. 105, c. 74, §§ 24, 25; Id. p. 346, c. 188, § 2; and Act 1802, p. 431, c. 303.

THE COURT, after taking time to consider, was of opinion that the want of the name of the prosecutor indorsed upon the indictment, is not sufficient ground to arrest the judgment, and overruled the motion. See Virginia v. Leap [Case No. 16,964], at April term, 1801.

UNITED STATES (SINN v.). See Case No. 12,906.

Case No. 16,294.

UNITED STATES v. SIX BARRELS OF DISTILLED SPIRITS.

[5 Blatchf. 542; [2] 6 Int. Rev. Rec. 187; 15 Pittsb. Leg. J. 127.]

Circuit Court, E. D. New York. Nov. 25, 1867.

INTERNAL REVENUE — FORFEITURE OF DISTILLED SPIRITS—BURDEN OF PROOF.

Under the 45th section of the internal revenue act of July 13, 1866 (14 Stat. 163), which provides, that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited; * * * and the burden of proof shall be upon the claimant of said spirits, to show that the requirements of law in regard to the same have been complied with," where rectified spirits are seized while in process of sale by a rectifier as free of tax, the burden of proof is on the claimant of such spirits to show that the tax on them has been paid.

[Cited in Boyd v. U. S., Case No. 1,749; Coffey v. U. S., 6 Sup. Ct. 435, 116 U. S. 433.]

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

[2] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

This was a libel of information, filed against certain distilled spirits as forfeited, under the 45th section of the internal revenue act of July 13, 1866 (14 Stat. 163), which provides, that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited; * * * and the burden of proof shall be upon the claimant of said spirits, to show that the requirements of law in regard to the same have been complied with." The evidence, about which there was no controversy, showed, that the spirits in question were found elsewhere than in a bonded warehouse, being, at the time of seizure, in process of delivery by a rectifier in New York to a buyer in Brooklyn. The rectifier was called as a witness, and testified that the spirits were rectified by him; that he bought two barrels of raw spirits from a broker, which purported to have been distilled in Brooklyn and to have paid the tax; that he mingled with these two, four other barrels, which he had bought of other rectifiers as rectified spirits, and re-rectified the whole; and that he was selling the product at a price less than the cost of manufacture with the tax. No offer was made to show that the tax on any of the spirits had been paid, nor was any effort made to explain how any of it had been removed from the bonded warehouse. The barrels were all marked "Rectified," with the name and place of business of the rectifier, as required by section 26 of the act, and were marked "Inspected by F. A. Stevens, Government Inspector, May, 1867." At the trial, upon the close of the testimony, the court was asked to direct a verdict in favor of the claimant, upon two grounds—First, that no probable cause of seizure was shown by the government, other than the fact that the spirits were found elsewhere than in a bonded warehouse, and that, in the absence of other proof, the claimant was not called on to prove anything; second, that, assuming that the burden of proof was upon the claimant, he was entitled to judgment, having shown that the spirits, being rectified spirits, were marked and branded as required by sections 26 and 43. On the other hand, it was asked that a verdict be entered for the government, under the construction given to the 45th section by Mr. Justice Nelson, in the case of U. S. v. 508 Barrels of Distilled Spirits [Case No. 15,113], inasmuch as no evidence was offered to show that the spirits had been removed from the bonded warehouse according to law, upon payment of the tax.

Benjamin F. Tracy, U. S. Dist. Atty.

William H. Hollis, for claimant.

BENEDICT, District Judge. I consider the various propositions of law involved in this case to have been disposed of by the decision in the case of U. S. v. 508 Barrels of Distilled Spirits [Case No. 15,113]. Under the law, all distilled spirits must go into a bonded warehouse, whence they can be withdrawn only for certain purposes and in certain specified ways. They can be withdrawn for export, upon certain bonds; for transportation to another collection district, upon being duly gauged, inspected and marked, and a bond given for their transportation; for re-distillation or rectification, when they must be restored to the same warehouse from which they were taken; and, lastly, upon payment of the tax. The Case of the 508 Barrels was a case of spirits purporting to have been removed for transportation from Illinois to the Third district of New York, which were found in the Third district of New York; out of a bonded warehouse; and, on that evidence, it was held, that the burden was upon the claimant to show that the requirements of the law, to enable spirits to be removed from the bonded warehouse for transportation, had been complied with, and proof that the barrels had upon them brands purporting to be the inspector's brands, and the possession of a permit from the collector, were held insufficient. The present case is one of rectified spirits, found in the street, in process of sale by a rectifier as free of tax. They cannot legally be in that position without having been removed from the bonded warehouse upon the payment of the tax. It differs from the Case of the 508 Barrels only in that the spirits purport to be rectified spirits, removed from a bonded warehouse upon the payment of the tax, instead of being spirits removed for transportation upon bonds. It is conceded by the claimant, that the 45th section applies to both rectified and raw spirits; and as, in the Case of the 508 Barrels, which purported to have been removed on bonds, proof from the claimant of the giving of the bonds was required, so, in the case of spirits purporting to have been removed on payment of the tax, proof must be given that the tax was paid. The words, "requirements of law in regard to the same," as used in the 45th section, refer to the particulars specified previously in the section, as entailing a forfeiture, that is, removal from the bonded warehouse according to law and payment of the tax, where that is necessary to a removal in the manner in which these spirits purport to have been removed. It was earnestly contended, that such a construction of the law would require an impossibility and cause a total cessation of trade. The law so construed, if enforced with reasonable diligence, will undoubtedly hamper the trade in fraudulent spirits; but it is not seen that it will require impossibilities of persons who desire to obey the law. Care and caution will undoubtedly be required of rectifiers and of dealers, and trade in the article will not be wholly free from embarrassment. But such is the necessary effect of every revenue law.

This case being in the circuit court, and the question of law involved an important one,

I have thought it proper to submit this opinion to Mr. Justice NELSON, and am authorized to say that he concurs in the views here expressed. A verdict in favor of the government must, accordingly, be entered, condemning the goods.

Case No. 16,295.

UNITED STATES v. SIX BOXES OF ARMS.

[1 Bond, 446.] [1]

District Court, S. D. Ohio. June Term, 1861.

REBELLION — SUSPENSION OF COMMERCIAL INTERCOURSE—CONTRABAND GOODS—ARMS AND MUNITIONS.

1. By the law of nations where a war exists between two distinct and independent powers, there must be a suspension of all commercial intercourse between their citizens; but this principle has not been applied to the states which joined the so-called "Southern Confederacy."

2. The destination of arms and munitions of war, and the use intended to be made thereof, at the time of seizure, must furnish a test of their status as contraband or otherwise.

Flamen Ball, U. S. Dist. Atty.

Lincoln, Smith & Warnock, for claimants.

LEAVITT, District Judge (charging jury). This is an information filed by the district attorney in behalf of the United States, praying for the condemnation and forfeiture of certain property as contraband of war. The information avers, in substance, that six boxes containing guns and other munitions of war, were shipped from the port of Baltimore on May 10, 1861, to Little Rock, in the state of Arkansas; that on the 27th of April last, and ever since, that state, with others, was, and has been, in a state of insurrection, rebellion, and war; and that the ports and places within the same have been declared by the proclamations of the president of the United States under blockade; and that the property specified in the libel was shipped to the state of Arkansas in violation of the blockade and the laws of the United States, and is legally subject to forfeiture as contraband of war. The property has been seized by and is now in the custody of the marshal, under the process of this court. William J. Syms and Samuel R. Syms, doing business in, and being citizens of the city of New York, under the name of W. J. Syms & Brother, have intervened in the case, and have filed their answer, verified by oath, in which they allege in substance, that on the 15th day of February last, at the city of New York, they entered into a written contract with two individuals, as commissioners of the state of Arkansas, by which they agreed to furnish the articles named in the information at the prices stipulated, together with others not now in controversy of the same character; that pursuant to said agreement, the property was shipped, a part on the 3d and a part on the 9th of April last, from the port of New York, directed to their agent at Little Rock, in Arkansas, by way of Baltimore, and thence westward by the Baltimore and Ohio Railroad; and that the articles now in question were taken on the 17th of April, without legal warranty or authority, by a number of citizens at Cincinnati, and a day or two afterwards were delivered to the chief of police of said city for safe-keeping, until the circumstances of the shipment could be legally investigated, and were retained by him until seized by the marshal. The claimants allege that they are loyal citizens of the United States, and that at the date of said shipment there was no blockade of the ports or places within the state of Arkansas, and that none has yet been formally proclaimed, and they deny that the property, either when shipped or seized, was liable to condemnation as contraband of war. They also aver that on the 15th of February, the date of the contract, and for two months subsequently, the state of Arkansas was reputed and believed to be in favor of the Union, and that a convention of the state had voted against secession. They further allege that it was not until about the 25th of April that there were any marked indications of the purpose of the state to secede, and that the act of secession did not pass until the 7th of May, and that about the 25th of April their agent in Arkansas repaired to Cincinnati, countermanded the order for shipment to that state, and ordered all the property not delivered to be returned to New York; and that the claimants thereupon made a contract with the Union defense committee of that city for the sale to them of such of the property as should be returned to that place.

The evidence offered by the claimants sustains the allegations of their answer, as to the sale and shipment of this property and its seizure and detention at Cincinnati. The testimony of George P. Williams, in behalf of the claimants, is before the court. He was the clerk of Lyons & Brother at the time of the contract made with the Arkansas commissioners, and identifies the property libeled as a part of that furnished by the claimants, and shipped by them from New York on the 3d and 9th of April. He proceeded to Arkansas in the early part of that month, to receive and deliver the property as the agent of the claimants. He traveled a good deal through the state, and swears that while the sentiment of the people in the southern part of the state was favorable to secession, in other parts they were for the Union; and that assurances were made to him that the state would not secede. He also states that it was not until after the information was received of the proclamations of the president, of the 15th and 19th of April, that there were any decisive indications of the purpose of seceding; and that on the 25th of April

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

he left Arkansas, and proceeded to Cincinnati for the purpose of stopping all further shipments to Arkansas, and that such an order was given, and no further shipments were made. He also states that the claimants agreed to sell the property to the Union defense committee of New York, when it should be returned to that place. The testimony of the witnesses to the state of things in Arkansas, prior to the 25th of April, is sustained by other witnesses offered by the claimants.

On these facts, it is insisted by the district attorney that the articles seized are liable to forfeiture: first, as having been shipped in violation of the president's proclamation of blockade; and second, that the state of Arkansas was at war with the United States, and the property was, therefore, when seized, contraband of war.

The first of these positions is clearly not sustained. The state of Arkansas was not embraced in the proclamations of the president of the 19th and 27th of April [12 Stat. 1259, 1260], declaring the ports of the seceded states under blockade. The formal act of secession by the state of Arkansas, as before stated, did not take place until the 7th of May. Until after that date the president could not properly declare the blockade of her ports; and trade with her was not, therefore, interdicted on that ground. But the question still remains whether this property was subject to condemnation as contraband of war on general principles of national law. The affirmative of this principle is strenuously urged by the attorney for the government. Without attempting an extended investigation of this subject, I propose to state some of the reasons which lead me to the opposite conclusion. And in the first place I may remark that there is no question that, by the well-settled rule of the law of nations, where a war exists between two distinct and independent powers, there must necessarily be a suspension of all commercial intercourse between them. When two nations are arrayed in war against each other, every subject and citizen of the one is regarded and treated as the enemy of the other. But does this principle apply strictly to the so-called "Southern Confederacy," or to any of the individual states which have joined it? The president of the United States, in all his proclamations and public acts, has cautiously avoided the recognition of the Southern Confederacy, as an independent sovereignty, and has properly proceeded on the doctrine that the right of secession has no warrant in the constitution, and that the exercise of the right is simply a nullity; and when attempted to be sustained by arms, it places all who give aid or countenance to the movement in the attitude of rebels against the government. It results from this view, that every citizen of a seceding state is not necessarily to be regarded as an enemy, with whom all commercial intercourse is to be prohibited. The government of the United States has acted on the principle, in the case of western Virginia and eastern Tennessee, that the people of these sections, though within the geographical limits of seceded states, are to be viewed as loyal, and entitled to the sympathy and protection of the government.

But this view of the subject seems to have no practical application to the case before the court. At the time of the shipment of the property described in the libel, and at the time of its stoppage at Cincinnati, Arkansas had not seceded from the Union; nor does the evidence warrant the conclusion, that the state of things there was such as to render it probable she would take this course. In fact there were no indications of this until the assault upon and surrender of Fort Sumter had rendered it a political necessity, that the president should call on the states for a force sufficient to subdue the rebellion then palpably existing. This requisition was made on the 15th of April, and included Arkansas as a loyal state, and was followed on the 19th of that month, by a proclamation declaring the seceded states in a state of blockade These acts, in Arkansas as in other states, excited all the slumbering elements of secession, which in the case of that state culminated in the passage of the ordinance of the 7th of May.

There is, however, a view of the case before the court, which seems clearly to warrant the conclusion, that this property was in no sense contraband of war, when seized as such at Cincinnati. The destination and the use intended to be made of the property at the time of its seizure, must furnish the tests of its status, as contraband or otherwise. If there were grounds for the presumption of a disloyal motive in the sale and shipment of the property, no such presumption is warranted in regard to it, when taken by the marshal on the 23d of May. The evidence already referred to clearly establishes the fact, that the agent of the claimants, upon the first intimation of a probability that Arkansas might adopt the ordinance of secession, repaired to Cincinnati, and promptly directed that the property should not be sent according to its original destination, but should be forwarded to New York. It was not then in transitu to Arkansas, nor could it by possibility ever reach that state, as it was under an order for shipment for New York, to be there used in defense of the Union. In the light, then, of this fact, negativing, as it does, every presumption of a disloyal or unpatriotic purpose on the part of the claimants, I do not feel that I am justified in a decree, which not only forfeits the property in question, but would place a stigma on their reputation, which their conduct has not merited. And the view here stated is corroborated by the circulars of the secretary of the treasury of the 2d of May and the 12th of June. In both these papers, the secretary enjoins great vigilance on the part of collectors in preventing the shipment of contraband goods

to seceded states, or where there is just reason to suppose they will be used by persons in rebellion against the government. If satisfied that the property is not intended to be used for any unlawful purpose, they are merely to notify the shipper or his agent of the fact and the cause of the detention. In the order of the 12th of June, this clause occurs: "If any such shipment, personally or by agent, shall satisfy you that the merchandise so arrested will not be sent to any place under insurrectionary control, but will be either returned whence it came, or be disposed of in good faith for consumption within loyal states, you will restore possession of the same, and allow such disposition to be made thereof, as the parties in interest may desire." Under this instruction, with the knowledge that the property of the claimants had been ordered to New York, the officer of the customs would have been fully justified in restoring it, without any further investigation.

The case, then, before the court is that of a loyal citizen of a loyal state, whose property has been libeled for condemnation, and who has availed himself of his legal right to assert his claim, and to show that there is nothing in the facts to warrant a decree of forfeiture. In making this remark, I am not to be understood as intimating that the public officer at whose instance the seizure was made, is in any decree censurable. So far from this, it is probable that under the circumstances supposed to exist, the institution of this proceeding was a proper act of official duty. And I do not see any ground on which a certificate of probable cause of seizure, if applied for, could be refused by the court. But this is a wholly different question from that involving the legal right to the property, and its liability to condemnation and forfeiture. There may be good reasons for the seizure of property; and yet upon a full investigation of the facts, no sufficient ground for holding that the owner has forfeited his right to it.

With these views, I can do no otherwise than decree in favor of the claimants, and order the restoration of the property to them.

Case No. 16,296.

UNITED STATES v. SIX FERMENTING TUBS.

[1 Abb. U. S. 268;[1] 8 Int. Rev. Rec. 9; 1 Am. L. T. Rep. U. S. Cts. 126; 7 Am. Law Reg. (N. S.) 751.]

District Court, D. Wisconsin. April Term, 1868.

PROSECUTIONS FOR FORFEITURES—LIMITATIONS OF TIME—INTERNAL REVENUE LAWS.

1. The defendant, in an information to enforce a forfeiture under the internal revenue laws, may take advantage of the fact that the prosecution was not instituted within the time limited by law for commencing it, under the general issue. He is not required to plead specially.

[Cited in U. S. v. Hodson, Case No. 15,376.]

[See U. S. v. Twenty-Five Barrels of Alcohol, Case No. 16,562.]

2. In general, where an action for the recovery of a penalty or a proceeding to enforce a forfeiture is pending at the time of the repeal of the statute imposing such penalty or forfeiture, or is instituted afterwards, the repeal is a bar to the action or proceeding, unless the repealing act contains a saving clause.

[Cited in U. S. v. Barr, Case No. 14,527.]

3. The internal revenue act of 1866 [14 Stat. 98], in repealing the act of 1864 [13 Stat. 233], contains a saving clause (section 70) which operates to preserve and continue demands which vested, and proceedings which were commenced under the act of 1864.

Motion to set aside a verdict against the defendant in an information for a breach of the revenue laws. The information in this case was filed against certain apparatus used in the distillation of spirits, in violation of the internal revenue law. It charged that the violations of law relied upon as a ground of forfeiture took place between September 3, 1864, and March 1, 1866. [Claimant sold, and removed from his distillery for consumption and use, fifty thousand gallons of spirits by him manufactured and distilled, without first paying the duties required by law, and without having the spirits gauged and inspected, or the casks branded.][2] The claimant answered generally "that the said several articles and property seized did not, nor did any part thereof, become forfeited in the manner and form in the said information in that behalf alleged." Upon the trial of the issue, after evidence upon the question of forfeiture had been produced, the counsel for the claimant offered to prove that the facts relied upon to support the information were substantially brought to the knowledge of the collector and deputy collector of the district in the month of September, 1866, and a seizure of the same property in the distillery was then made, but was not prosecuted. The proof was offered for the purpose of taking advantage of the limitation prescribed in section 68 of the act of June 2, 1864 (13 Stat. 248), authorizing seizures. It provides "that such seizures shall be made within thirty days after the cause for the same shall have come to the knowledge of the collector, or deputy collector, and that proceedings to enforce said forfeiture shall have been commenced by such collector within twenty days after the seizure thereof." The evidence was objected to on the part of the prosecution, as not responsive to the information, and not evidence under the answer. The objection was overruled, and evidence admitted. The evidence showed an investigation of the affairs of the claimant, by the collector of his district, and a seizure of the distillery in September, 1866;. a subsequent abandonment of that seizure;

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[2] [From 1 Am. Law T. Rep. U. S. Cts. 126.]

a further investigation by the collector, and a second seizure made in September, 1867, upon which the present information was filed within the twenty days allowed by law.

[A letter from the collector of the district to the commissioner of internal revenue, dated November 10, 1866, was read in evidence. It contained these statements: "The following facts have recently come to my knowledge in relation to the distillery of William Hodson, at Turtleville, in this district. From September, 1864, to February, 1866, Hodson made report of 25,200 gallons of spirits as having been manufactured and sold by him, upon which tax has been paid by him. It was suspected that his reports were not entirely reliable, and in May last Inspector Burpee commenced looking up facts, and as I believe has continued his investigation with diligence up to the present time. He ascertained that Hodson, by himself, or his sons, had made sales of distilled spirits at Janesville and Chicago to an amount considerably exceeding his report, and he thereupon wrote to United States Inspector H. F. Hopkins, of Illinois, to assist him in the matter and ascertain the amount of sales made by or through John H. Hodson, at Chicago. An examination showed that the amount of sales so made, between September, 1864, and February, 1866, was 96,000 gallons, being in excess of the amount 70,100 gallons. He ascertained further, that the distilled spirits were being or had been sent across the country from the distillery to Janesville at night fourteen miles, and that large quantities of spirits had been shipped from Janesville to Chicago by Charles W. Hodson, a son, to John R. Hodson, another son, under the head of sundries. Upon the above information Deputy Collector Capron accompanied by Inspector Burpee, and pretended revenue agent by the name of C. C. Cogswell, went to Turtleville on the 21st day of September last, and seized upon the distillery and its contents and surroundings, consisting of steam engines, boilers, &c. Ira P. Nye, special assistant assessor, being in charge of the same, was placed in charge of the property seized as keeper. Since then, Burpee has continued his investigations and reports to me that he has discovered the following facts in relation to the management of said distillery, which he says can be fully sustained by proof: 1,445 highwine casks have been ascertained to have been sent into the distillery, between the 3d day of September, '64 and the 27th of January, '66—1,345 were shipped by rail from Chicago, and 100 were manufactured for Hodson by Samuel Miller of Shopiere. Of those from Chicago, 598 were sent to Shopiere, in care of John R. Hodson, 100 were sent to Janesville to Wm. Hodson, and the balance to same place to Charles H. Hodson, and all of them were delivered to Hodson's teamsters and hauled away by him. 56,100 pounds of malt, sufficient to make 98,000 gallons of high wines have been shipped from Chicago to Shopiere, the station nearest the distillery, to John R. Hodson during the time above stated. I have no personal knowledge of the foregoing facts, but report them to you as I received them from Inspector Burpee. It seems that something should be done in the matter." The commissioner replied under date of November 16, 1866, acknowledging the receipt of the letter of the collector, "relating to the case of William Hodson, charged with making false returns of spirits distilled, whose distillery and property therewith were seized in September last by Deputy Collector Capron." The commissioner then instructs as to further proceedings. That seizure was abandoned, and in pursuance of instructions from the commissioner, the assessor of the district, with the aid of Inspector Burpee, made enquiry into the returns of Hodson; between the times mentioned in the information, and after examination of witnesses and claimant, an assessment was made against him to a large amount. The affidavits taken before the assessor and the testimony at the trial correspond in substance with the contents of the above letter of the collector. The seizure on which this information is founded was made a day or two after the assessor concluded the inquiry, and this information was brought on the 14th of October, 1867, within twenty days after the seizure.] [3]

The jury found a verdict for the United States, which the claimant now moved to set aside, upon the ground that it was against the law and the evidence.

Smith & Carpenter, for the motion.
Lakin & Palmer, opposed.

MILLER, District Judge. The inquiry is in regard to the knowledge of the collector and deputy collector of the cause for seizure more than thirty days before this seizure was made. Knowledge of the cause for seizure means knowledge on the part of the officer of facts tending to establish a cause for seizure prescribed in the statute. Mere vague rumor or suspicion, or loose assertions of irresponsible persons, are not sufficient. It must consist of, or be founded upon, such facts communicated to or ascertained by the officer from reliable sources, as prima facie to establish a fraud upon the law.

The facts relied on in support of this information, and substantially upon which the verdict was rendered, were known to the collector and deputy collector, and to Inspector Burpee, who is the informer, in the fall of the year 1866, a year before this seizure was made. The evidence upon the subject of the statute limitation was submitted to the jury, together with all the evidence in the cause, with instructions upon the law of the case. The jury were charged that claimant can take advantage of the statute of limitation; and that the law requires

[3] [From 8 Int. Rev. Rec. 9.]

prompt action on the part of revenue officers. [Claimant moved the court, to set aside the verdict against him, and for a new trial, upon the ground that it is against the law and the evidence.][4]

After much reflection I should not feel justified in disturbing the verdict upon the merits. Finding the verdict upon the evidence, mostly circumstantial, was no abuse of the prerogative of the jury. The evidence was sufficient to bring the mind to the conclusion that the alleged cause of forfeiture was well founded. The impeached witnesses were sufficiently sustained and corroborated to authorize the jury in finding the verdict in part on their testimony. The means taken by claimant to procure counter-affidavits from those witnesses no doubt prejudiced his case with the jury.

I will confine this investigation to the subject of limitation allowed to be raised at the trial upon the pleadings. The answer is in the nature of a plea of the general issue. It is a general denial of the facts alleged in the information. In cases of seizure this mode of pleading is allowable. Conk. Prac. 590.[5] Special pleadings in actions for penalties and forfeitures, or in criminal prosecutions, are almost entirely disused. A demurrer to an indictment is occasionally interposed. The general practice is either a motion to quash, or a motion in arrest, after a verdict of guilty. In criminal prosecutions, although a defendant may plead to the jurisdiction of the court, there are but few instances in which he is obliged to have recourse to such a plea. He may take advantage of the matter under the general issue. Archb. Cr. Pl. 80. In a case under the statute of 31 Eliz., which provides that all actions for any forfeiture upon any penal statute shall be brought within two years, the court held that the defendant may take advantage of the statute on the general issue, and need not plead it. Bull. N. P. 195. In Johnson v. U. S. [Case No. 7,418], the court did not permit the party indicted to take advantage upon habeas corpus of the limitation of indictments, where the objection had not been made of record by plea. In U. S. v. Ballard [Id. 14,507], the question of limitation was raised upon the date mentioned in the indictment, upon which the alleged perjury had been committed, and the act was held to bar the prosecution. In U. S. v. Mayo [Id. 15,755], there was a plea of the statute of limitation. But in Parsons v. Hunter [Id. 10,778], the same court declares in the opinion, that in suits on penal statutes, the statute of limitation need not be pleaded; but may be taken advantage of under the general issue. By section 32 of the crimes act of 1790 (1 Stat. 119) it is enacted, "that no person shall be prosecuted, tried, or punished for treason or other capital offense, willful murder and forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offense shall be committed; nor shall any person be prosecuted, tried, or punished for any offense not capital, unless the indictment for the same shall be found within two years from time of committing the offense; provided, that nothing herein contained shall extend to any person or persons fleeing from justice." By acts of congress, the period of limitation for the prosecution of any crime arising under the revenue law, and suits for fines and forfeitures, is five years.

Cases arising under the act limiting prosecutions have been presented to the consideration of courts under different forms of pleading. In U. S. v. Slacum [Case No. 16,311], the limitation was specially pleaded. In U. S. v. Porter [Id. 16,072], the limitation was not pleaded. In U. S. v. Watkins [Id. 16,649], the question was raised by demurrer. In U. S. v. White [Id. 16,676], it is decided that limitation may be given in evidence by the defendant under the general issue in a criminal cause, and the United States may give in evidence the fact that defendant fled from justice, and therefore was not entitled to the benefit of the limitation. In the opinion on page 82, the court remarks: "The court is bound to take notice that the defendant, upon the plea of not guilty, had a right to avail himself of the limitation of time, if he was entitled to it; and that the United States had a right to show that he was not entitled to its benefits. If, from accident or ignorance of his rights, the defendant should have been prevented from asserting or using his right, it might be ground of a motion for a new trial." In the case of Lee v. Clarke, 2 East, 333, 336, an action of debt for a penalty given by the game laws, upon the plea of nil debet, the verdict was for the plaintiff. Lord Ellenborough, during the argument, said: "That notwithstanding the allegation that the offense was committed within six calendar months, yet if it were not computed within the time prescribed by the statute, the plaintiff must have been nonsuited." Lawrence, J., remarked: "The time having elapsed would have been evidence for the defendant on the plea of nil debet." See, also, 1 Chit. Cr. Law, 471, 475, 626; Esp. Pen. St. 78.

The statute limitation seems to require that evidence of the time the officer obtained knowledge of the cause of forfeiture should be received under the general issue. It is an appropriate inquiry upon the trial of the cause. Proof on the subject might involve a more extended range than if the seizure were prohibited after or between certain dates. Seizure is an open and notorious

[4] [From 8 Int. Rev. Rec. 9.]

[5] [See Case No. 16,562.]

act on the part of the officer, known to the party in possession; but on what day or time the cause of seizure came to the knowledge of the officer may have to be ascertained from proof of several facts.

From this examination of the subject I am satisfied that the evidence was properly admitted, and that the verdict, under the instructions of the court upon this subject, should have been for claimant.

A question arises,—What effect the repeal of section 68 has on this case, if any? The information charges the offenses against the act to have been committed between September 3, 1864, and March 1, 1866. And the seizure is alleged to have been made on October 11, 1867, under and in pursuance of the act of June 30, 1864, and the acts amendatory thereof and supplementary thereto.

It is an established rule, that where an action for the recovery of a penalty, or a proceeding to enforce a forfeiture prescribed in a legislative act, is pending at the time of the repeal of the act, or instituted after the repeal, such repeal is a bar to the action or proceeding, in the absence of a saving clause in the repealing act. A clause of the repealing act provides that the repeal shall take effect on September 1, 1866. The act of March 3, 1865 (13 Stat. 472), continues in force section 68 of the act of 1864. These two last acts were in force at the time of claimant's operations in the distillery, and for six months thereafter. The act of July, 1866, repealing section 68, provides, in section 70, "that all the provisions of former acts repealed shall be in force for collecting all taxes, duties and licenses properly assessed, or liable to be assessed, or accruing under the provisions of acts, the right to which has already accrued, or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties and forfeitures incurred under and by virtue thereof, and for carrying out and completing all proceedings which have been already commenced, or that may be commenced to enforce such fines, penalties, and forfeitures under said acts." It is, therefore, apparent that section 68 of the act of 1864 remains in force as to this case, including the proviso of limitation, notwithstanding the repeal. The distillery apparatus was subject to seizure as forfeited for offenses propounded in the information before the repeal affected the section in any manner; and the above provision of the repealing act reserves to the government the right to institute and prosecute these proceedings to enforce the forfeiture.

The court being satisfied that the seizure upon which this information is founded was not made within thirty days after the cause for the same had come to the knowledge of the collector and deputy collector, it is therefore ordered that the verdict be set aside and the information dismissed.

UNITED STATES (SIX HUNDRED AND FIFTY-ONE CHESTS OF TEA v.). See Case No. 12,916.

Case No. 16,297.

UNITED STATES v. SIX HUNDRED AND SIXTY-ONE BALES OF TOBACCO.

[24 Int. Rev. Rec. 77.]

District Court, S. D. New York. Feb. 21, 1878.

CUSTOMS DUTIES—FRAUDULENT ENTRIES — FORFEITURE—FALSE AFFIDAVIT OF DAMAGE—EVIDENCE OF INTENT—PRESUMPTIONS—BURDEN OF PROOF.

[1. In a proceeding to enforce a forfeiture under the 12th section of the act of June 22, 1874 (18 Stat. 188), for making, or attempting to make, an entry by means of any false or fraudulent invoice, affidavit, etc., it is immaterial whether the purpose to make a fraudulent entry is carried out or not. An attempt by the means stated, with intent to defraud, completes the ground of forfeiture.]

[2. The making of an affidavit of damage is a part of the entry, so that if such affidavit be false, and be made with intent to defraud the revenue, it is within the provision of the above section, and is sufficient to incur a forfeiture.]

[3. An affidavit of damage, untrue in fact, and made without such personal inspection and examination as to warrant the affiant in saying that he had personally inspected and examined the whole of the merchandise, or to warrant him in saying that it had sustained damage on the voyage of importation, is a false affidavit, in the meaning of the statute.]

[4. If an affidavit of damage is in fact false, the jury are authorized to presume an intent to defraud the revenue, and the burden is on the claimant to satisfy them, by a fair preponderance of evidence, that he had no such intent.]

[5. If it be shown that an affidavit made in course of entering merchandise was in fact false, then evidence of other fraudulent transactions, in connection with other entries of goods by the same claimants, may be considered, not for the purpose of proving the body of the offence, but for the purpose of characterizing the intent with which the act was committed.]

[6. In order to incur a forfeiture of goods imported by a partnership, it is not necessary to show that both partners participated in the illegal act or acts charged. It is sufficient to show that one of them was guilty thereof.]

[7. It is not necessary, in order to obtain an allowance for damage to part of a consignment of merchandise, that the claimant should make an affidavit that the entire importation was damaged.]

[8. Where probable cause of seizure is shown, the burden is on the claimants to show, by a fair preponderance of evidence, that the illegal acts charged were not committed.]

[9. Cited in U. S. v. Nine Trunks, Case No. 15,886, to the point that in proceedings to forfeit goods for fraudulent importation, the goods themselves, and not the importer, are regarded as the offender, and that the claimant is a mere voluntary intervenor.]

[This was an information of forfeiture against 661 bales of tobacco, of which Weil & Co. were claimants, charging a violation of the laws in relation to fraudulent entries at the customhouse.]

Roger M. Sherman, Asst. U. S. Atty.
Ethan Allen, for claimants.

THE COURT (charging jury). We have been engaged, gentlemen, now for eleven days, in the investigation of this important cause—important to the government, important to the claimants, and involving as important questions respecting the transactions of these merchants with the government on the other side, as can be involved in any suit coming before a court and a jury in this court. Nearly eleven years ago, when I commenced my judicial labors in this court, the first case that I tried was a case of seizure of merchandise for alleged frauds in the entry of it at the custom house, and during my judicial labors in this court I have tried a very large number of such cases; and this case, to all appearances the last jury cause connected with the revenue of the government which I shall try in this court, is a case of the same character. I allude to this only to show that these cases are cases which have received, in the principles which govern them, and in the application of those principles to the circumstances of a given case, a great deal of consideration in this court. The principles which govern a case like this are well settled in the jurisprudence of the United States, not only in this court but by the adjudications of the supreme court of the United States in review of such questions. And in laying this case before you, I have to say, first, that I recognize in you, and in the attention you have given to this cause, an understanding and an appreciation of the questions of law and of fact involved in this case which will enable you without difficulty to possess your minds of the points to which you will have to address your attention. I shall not comment upon the evidence in the case. You have listened to it, it has been laid before you slowly, carefully, patiently, and thoroughly by the eminent and assiduous counsel on both sides of this case, and it has been spread before you in a compact manner in their addresses to the jury. I shall content myself with putting before you the legal principles which govern such cases generally, and the legal principles which govern this case in particular, and in such order as I hope will enable you to apply the evidence to the case as I go along, without any difficulty. In the first place, gentlemen, I shall bring to your attention the statute under which this forfeiture of these 661 bales of tobacco is claimed by the government; and I shall refer you only to the 12th section of the act of June 22, 1874 (18 Stat. 188). That section is a re-enactment, to all substantial intent, so far as this case is concerned, of a previous statute, the first section of the act of March 3, 1863 (12 Stat. 737), and is to this effect—That "if any owner, importer, consignee, agent or other person"—any person—"shall, with intent to defraud the revenue, make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement written or verbal," or "shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission," he may be indicted and punished criminally, and "in addition" "such merchandise shall be forfeited." You will perceive that this penalty is imposed not only for the making of an entry by means of any fraudulent or false affidavit or paper, but for an attempt to make it. So, likewise, if the entry be made by means of the fraudulent or false affidavit or paper or false written or verbal statement, and the intent to defraud the revenue exists, it is immaterial whether the party is successful or not in what he thus undertook. If he makes the entry, or attempts to make it, by those means and has that intent, then, though his plan may be nipped in the bud, the forfeiture takes place. This statute, which is but a re-enactment of provisions of law which have been in force on the statute book of the United States from the earliest revenue act that was enacted in the year 1789 (1 Stat. 42, § 22), is a part of a fixed policy of the government, thought to be necessary by the wise framers of the first series of revenue statutes that were enacted by congress, and since maintained by the judgment and wisdom of congress, as the exponent of the judgment and will of the people of the United States. Provisions of this kind are found necessary, absolutely necessary, and they are enforced by the courts for the protection of you, gentlemen, as honest merchants, in your business; and without such provisions you could not do business in your callings, so far as you have anything to do with the importation of merchandise, and, in other respects, even though not directly connected with the importation of merchandise, in so far as your business may be affected by such transactions, you could not do an honest business unless there were these stringent rules to compel people to observe the law.

It is alleged in this case that this house of Weil and Company, acting through one or the other of the gentlemen composing it—Mr. Baer and Mr. Aron—has been guilty of what is denounced in this statute which I have read to you, in such wise as to warrant and call for a forfeiture of these 661 bales of tobacco. It is claimed by the government that Mr. Baer, as a part of this entry—and the court charges you, as matter of law, that the acts or omissions relied upon by the government in this case are a part of the entry of the merchandise, a part of the passage of the merchandise through the cus-

tom house, a part of the passage of the merchandise through the hands of the officers of the government, until it reaches the body of merchandise for consumption in the country, a part of the machinery for the ascertainment of the proper duties to be paid upon the merchandise, whether it should pay on the full weight of the bales of tobacco, so many pounds, at 35 cents a pound, or whether it should pay on a less number of pounds, because of damage on the voyage, all that is a part of the entry of the merchandise—it is claimed by the government that this house, with intent to defraud the revenue, made this entry, or a part of this entry, a step in this entry, by means of a fraudulent or false affidavit of damage. It is also claimed that this house has been guilty of a wilful omission after the allowance of damage, knowing that the allowance was a false and fraudulent one, a wilful omission to inform the government, and that by means of that omission the government has been defrauded of a part of the lawful duties accruing upon the merchandise in question. In the oath which he took on the back of the original entry, Mr. Aron, one of the claimants, swore as follows: "I solemnly and truly swear that this entry, now delivered by me to the collector, contains a just and true account of all the merchandise embraced in the invoice; and I further swear that I have not in the said entry or invoice concealed or suppressed anything whereby the United States may be defrauded of any part of the duty lawfully due on said goods, wares and merchandise; and that if at any time hereafter I discover any error in the said invoice or in the account now rendered of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district." This oath was taken on the 6th of June, 1876. The affidavit of Mr. Baer for the damage allowance was made on the 13th of June, 1876. The oath of Mr. Aron refers to the entry and invoice which he then was presenting at the custom house. It refers to the entry, upon the back of which it is endorsed. It refers to the invoice annexed; and the oath is to the effect that that entry and that invoice are true, and that he has not in them suppressed or concealed anything whereby the United States may be defrauded of any part of the duties lawfully due on the goods; and that if at any time thereafter he shall discover any error in the said invoice or in the account then produced of the said goods, wares, and merchandise, or receive any other invoice of the same, he will immediately make the same known to the collector of this district. The act of 1874 says that if any one shall attempt to make an entry by means of any false affidavit or statement, or shall be guilty of any wilful act or omission, by means whereof the United States shall be deprived of the lawful duties on the goods, they shall be forfeited. I do not hold, as a proposition of law, that if this was a fraudulent claim, the omission, after the damage allowance, to make the fraud known to the government, was an omission of what Mr. Aron was required by this oath of his to do; but I charge you that, irrespective of that oath, irrespective of any obligation taken by Mr. Aron in that oath, casting that aside entirely, if this was a false damage allowance, a fraudulent damage allowance, then the affidavit taken by Mr. Baer was false. But if you shall be of opinion, upon the evidence, that Mr. Baer was warranted, from the examination which he made, in saying, and that he did say, in good faith, believing it to be true, that the whole of the merchandise had sustained damage on the voyage of importation, then it was not a false affidavit. And, if you shall believe, from all the evidence in the case, that Mr. Baer had not given to the merchandise such a personal inspection and examination as to warrant him in saying that he had personally inspected and examined the whole of it, or to warrant him in saying that the whole of it had sustained damage on the voyage of importation, and that he did not and could not have made this affidavit in good faith, having reasonable cause to believe that its contents were true, then it was a false affidavit. If you shall come to the conclusion that it was false, then you have a right to presume that it was made with an intent to defraud the revenue of the United States, because, tobacco being subject to so many cents duty upon the pound, if the number of pounds to be multiplied by the rate of duty were to be fraudulently diminished by the proceedings based on this affidavit, if there was no damage when Mr. Baer asserted that there was, you are authorized to infer, and the legal presumption is, that he had an intention to accomplish the result which the affidavit tended to accomplish, of getting in the whole of the tobacco, it being sound, at a less number of pounds than it actually weighed, and thus depriving the government of the duty on the difference. In such case you are authorized to presume that there was an intent to defraud the revenue; and it will be for the claimants to satisfy you, by a fair preponderance of evidence, that they had no intent to defraud the United States. If, under the observations which I have already laid before you, you shall come to the conclusion that there ought to be a verdict for the plaintiffs, it is not necessary, in order to give that verdict, that you should believe that Mr. Kelly and Mr. Hamilton were corrupted, or that there was any unlawful intimacy or collusion between them and any member of the house of Weil and Company. If, upon the evidence, you find such guilty intent on the part of Mr. Baer or Mr. Aron, it is no matter in what way they calculated

or expected that that intent might be accomplished—whether they relied upon direct communication, collusion, or intimacy with, or corruption or bribery of, Mr. Kelly or Mr. Hamilton, or any one else, or whether they relied upon anything that they may have been acquainted with in the movements inside of the custom house, ignorance, inattention, incapacity, negligence, non-observance of rules—it is immaterial, as long as such intent existed, how they expected or calculated that that intent should be carried out. So, also, the fact that, for the purpose of getting these goods into the warehouse, these claimants had to give a bond for the duties, is wholly irrelevant to any question in this case. It is not a matter for consideration on the one side or on the other. Moreover, any comments which have been made in regard to the policies of insurance, are out of this case, and are not to be taken into consideration by you. And, so, in regard to any claim, under the bill of lading, against Alexander and Company, that is not a circumstance to be taken into consideration by you. You will throw out entirely the policies of insurance, the bill of lading, the claim against Alexander and the bond.

There has been introduced into this case, as bearing upon this question of intent on the part of the claimants, and with a view of enabling you to judge of what intent they had in this transaction, some evidence as to their transactions in other matters—the suit here, the judgment record in which was read to you; the suit in San Francisco; and the evidence of Mr. Covert as to his conversations with Mr. Baer about merchandise on storage, on a previous occasion. Such evidence is evidence, under the decisions of the supreme court of the United States, not for the purpose of proving the body of the offence, the corpus delicti, the guilty act, in the case on trial before you, but for the purpose of characterizing the intent with which a given act may have been done. In other words, it is evidence not for the purpose of showing the falsity of the damage allowance in this case, not for the purpose of showing the falsity of the oath taken by Mr. Baer; but, if you find that the damage allowance was false, if you find that such oath was false, such evidence is evidence for the purpose of enabling you to arrive at a conclusion upon the other branch of the question, as to the intent with which the oath was made, or the damage allowance was procured, upon the oath. In regard to the judgment record in New York, in regard to the suit in San Francisco, in regard to any testimony of Mr. Covert or any other person bearing upon any question of the transactions in other cases by Weil and Company alleged to have been fraudulent, you are to take into consideration, if you should reach the question, all the evidence on both sides in regard to them, the explanations made to you by Mr. Baer and the testimony of Mr. Aron, in so far as they gave any, in regard to the New York transaction, and the San Francisco transaction, and in regard to any conversation with Mr. Covert. You are to take all the testimony as you understand it, and the explanations made, as to whether they are or are not satisfactory to you, and give to the transactions in New York and San Francisco, and the other matters, such weight as, on the whole evidence, affirmative and explanatory, you shall think they are entitled to, in applying them to the question both of the credibility of Mr. Baer and Mr. Aron, and the question of the intent of Mr. Baer and Mr. Aron in the transactions in regard to the 661 bales of tobacco. So, also, it is not necessary, in order to enable you to find for the government that you should find that both of the claimants participated in the illegal acts charged. If any person does so and so, in regard to goods, the goods are forfeited. In all these statutes the merchandise is personated, the merchandise is called the offender; and, if any person does, in regard to that merchandise—and, for the purposes of this case, I will limit it to any person lawfully connected with the merchandise—if any person does the forbidden acts, the merchandise is forfeited. It is not like an indictment in a criminal case, where personal guilt must be brought home to the individual, and where he is not responsible criminally for the acts of another; but, in this case and in all cases of this kind, the merchandise is responsible for the forbidden act of any person connected with it. In the same view, it is not necessary to find that both of the claimants had an actual intent to defraud the United States, if one of them had such intent—if either of them had it. It has been very properly asserted to you by the counsel for the defence, that he does not question the proposition on the part of the government, that the oath taken by Mr. Baer on the damage application is an oath of equal dignity, and imposes an obligation of equal gravity, with any other oath, lawfully taken, with the oath which each of you has taken in this case, and that there is to be no distinction drawn between this oath, as a custom house oath, and any other oath lawfully taken in the course of a lawful proceeding. I am requested to charge you, and I do charge you, that the law did not make it necessary, in order to enable Weil and Co. to obtain a lawful allowance for damage as to some of their merchandise, if some only were damaged on the voyage of importation, that Mr. Baer should subscribe an oath that the entire 661 bales were damaged on the voyage of importation; because, the statute and regulations provide for the means of designating and individualizing by numbers the particular bales in regard to which an application for damage allowance is made.

I believe, gentlemen, that I have called your attention to all the principles of law which

you are to apply to the evidence in this case; and that I have covered in my charge, either affirmatively or negatively, all the propositions laid before me by the counsel on either side, which are material to this case, or which are raised by the evidence; and I am to be considered as declining to charge in regard to the requests on both sides otherwise than as I have charged in regard to them in what I have said to you.

There is but one other point which it is my duty to lay before you, and that is this: I am required to submit to you, as a distinct and separate proposition, whether the alleged acts charged to have been done in this case—if you shall find that they were done—if you shall find that the affidavit of Mr. Baer was false, in the sense in which I have explained the word "false" to you, in connection with such affidavit—if you shall find that the damage allowance was false, then I am required to submit to you whether these alleged acts were done with an actual intention to defraud the United States; and I am directed by the statute to require from you, upon that proposition, a special finding. Whichever way you find, whether you find for the United States or for the claimants, you are also to find either that the acts alleged in the information were done with an actual intention to defraud the United States, or that they were not done with an actual intention to defraud the United States. Of course, you are only to render such a verdict in case you find that the alleged acts were done. If you find that they were not done, there is nothing for you to find on the question of intent. The statute goes on to say, that, unless the jury shall find an intent to defraud, the court has no authority to impose a forfeiture. Hence this proposition on the part of the claimants is a correct proposition—that, if you shall find any act or acts on the part of the claimants, or either of them, to have been done, tending in their results to defraud the United States, you must find that such act or acts were done with an actual intention to defraud the United States, and, unless you find such actual intention to defraud the United States, your verdict will be for the claimants. But, in considering the questions in this case, you are to bear in mind that there is probable cause for the prosecution, and that the burden of proof is on the claimants, to satisfy you by a fair preponderance of evidence, that this entry was not made or attempted to be made by a false affidavit, and that there was no wilful omission by means of which the United States has been deprived of any lawful duty on any of this merchandise.

I understand the position of the district attorney in regard to this whole question to be, upon the evidence, that there was no damage to this tobacco on the voyage of importation; that whatever damage there was, whatever damaged tobacco may have been picked out or culled out in the warehouse of Mr. Foster, and whatever the damage was that any witnesses have testified they saw in it, was not damage that occurred on the voyage of importation; that there was not a particle of damage sustained by this tobacco on the voyage of importation, no matter what damaged state it may have been in, in point of fact, when it was landed here; and that the damage occurred at another time and at another place than on the voyage and on the vessel. The opposite of that contention is claimed on the part of Weil and Company. In considering this entire question you will bear in mind the law upon the burden of proof; and you will bear in mind also that the damage spoken of throughout, in the statute, in the application, in the affidavit of Mr. Baer, and in the appraisement, is damage on the voyage of importation and damage no where else.

The report of the appraisers in this case is dated the 8th of July, 1876. "Appraiser's office, 8th July, 1876: To the collector of customs: In pursuance of your order we have examined the following described merchandise, and do certify that the same has sustained damage on the voyage of importation" —not that the same is damaged, but that the damage visible, the damage found, is damage sustained on the voyage of importation—"as follows, to wit: W. and C. 35 bales of tobacco rate of damage, 50 per cent.; 60 bales of tobacco, 40 per cent.; 75 bales of tobacco, 30 per cent.; 130 bales of tobacco, 20 per cent.; 170 bales of tobacco, 15 per cent.; 191 bales, including P. S." (public store) "bales, no damage allowed. Cause: sea water and heat of vessel. Effect: mouldy, musty, sweated, loss of strength, and flavor destroyed. Satisfactory evidence of sound shipment stencilled 7-8. Theodore P. Kelly, Geo. W. Hamilton. W. Allen, Assistant Appraiser. Approved, S. B. French, Appraiser." That is all the contents of that paper which were on it when it left the appraiser's office. The figures in red ink are figures put on afterwards in applying the percentage of damage reported, to the bales, to arrive at the number of pounds of sound tobacco on which to impose the duty. I believe that these are all the observations which it is incumbent upon me or proper for me to make in this very important cause. You will have before you these two papers, the application and affidavit for damage allowance and the appraiser's report. You will give a careful consideration to all the evidence, under the rules of law which I have laid down, and as you shall find in accordance with those rules, such will be your verdict. I commit the case now into your charge.

A juror.—There is one point on which I did not clearly understand your honor. In case this tobacco was damaged partially before it left Havana, do I understand that a further damage on the voyage of importation is to be considered, under the law, as damage on the voyage of importation.

THE COURT.—I do not think, gentlemen, that there is any evidence in the case upon which any such question as that put by the juror legitimately arises in the case. The district attorney claims that there was not a particle of damage on the voyage of importation, while the claimants insist that the whole damage which they have proved, if they have proved it, occurred on the voyage of importation.

The jury did not agree on a verdict.

Case No. 16,298.

UNITED STATES v SIX IRON BOXES, etc.

[See Case No. 16,465a.]

Case No. 16,299.

UNITED STATES v. SIX LOTS OF GROUND.

[1 Woods, 234.] [1]

Circuit Court, D. Louisiana. April Term, 1872.

EVIDENCE — CONFIDENTIAL COMMUNICATIONS — WRITS OF ERROR—CLERICAL MISTAKE—DECREE OF CONFISCATION—EFFECT OF PARDON—CONDITIONAL AMNESTY.

1. The correspondence between a district attorney, representing the United States, and the attorney general, is confidential in its nature and cannot be cited by third persons.

2. If in the copy of a writ of error, lodged with the clerk of the court for the defendant in error, the return day of the writ is correctly stated, and the record be actually returned and filed in due time, a mere clerical error in the return day, in the original writ, is immaterial and is cured.

3. A district court of the United States cannot, three years after rendering a decree in a confiscation case, sit as a court of error upon its own decree and reverse it.

4. It is a general rule, that a judicial sale made by virtue of a judgment which the court had jurisdiction to render will stand, though the judgment itself be afterwards reversed for error.

5. Pardon and amnesty do not annul past transactions so far as to invalidate a previous judicial confiscation and sale of a claimant's property.

6. A pardon containing a condition, that the person to whom it was granted should not claim any of his property or the proceeds thereof, that had been sold by the order, judgment or decree of a court, under the confiscation laws of the United States, is a bar to his claim.

7. A pardon may be partial or subject to conditions, but the conditions must be lawful ones.

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

At chambers.

J. R. Beckmith, U. S. Atty.

T. J. Semmes and Robert Mott, for claimant.

BRADLEY, Circuit Justice. This is a writ sued out by the United States to reverse a judgment of the district court, rendered June 27, 1868, dismissing the libel of information, and restoring to the claimant the property seized, which had been sold under a decree of confiscation rendered in the case in April, 1865.

A preliminary motion is made to dismiss the writ of error. This must be denied: (1) The first ground assigned is, that the district attorney had been instructed by the attorney general to dismiss it. This, if proved, is no reason for dismissing the writ. The district attorney represents the United States, and the correspondence between him and the attorney general is confidential in its nature and cannot be cited by third persons. But I see no proof of the fact. (2) The second ground is, that a writ of error does not lie in the case. This has been settled to the contrary by the supreme court. (3) The third ground is, that the writ of error, being sued out in July, 1868, was made returnable on the first Monday of December then next; whereas, the next term of the court was to commence on the first Monday of November, and the citation was returnable generally to the next term. The error in the writ seems to have originated from using a blank printed writ intended for removing judgments to the supreme court, and is evidently a mere clerical oversight. A recent statute authorizes an amendment of the test and return of writs of error, and would probably authorize the amendment of this. But the copy of the writ, lodged with the clerk of the district court for the defendant in error, is correct, having the return day on the first Monday of November; and the record was actually returned and filed in this court before the first Monday in November. I think, therefore, that the defect is immaterial, and is cured.

The error relied on by the government for a reversal of the judgment is this: that a regular default was made in the case, and entered on the 8th of September, 1863, and a decree of confiscation made, upon due proof, on the 5th of April, 1865; and that, upon this decree, a venditioni exponas issued on the 11th of April, 1865, under which the marshal regularly sold the property at auction on the 13th of June, 1865, and one Edward W. Burbank became the purchaser; and that the marshal executed a deed to said Burbank for the property; that the claimant did not apply to have the judgment opened and the sale set aside until March 4, 1868, nearly three years after the rendition of the judgment; that, nevertheless, the default was opened and the claimant was allowed to file a claim and answer on the 15th of April, 1868; and that, upon his pleading a pardon granted in October, 1865, and the proclamation of amnesty of September 7, 1867, and showing that he had taken the requisite oaths and performed the conditions required by the pardon and amnesty, the district court adjudged that the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

libel of information be dismissed, and the libelled property restored to the claimant upon the payment of all costs.

It is contended, on behalf of the government, that this last proceeding, in 1868, is entirely erroneous and without authority.

The counsel for the defendant in error attaches some importance to the fact that the decree of confiscation had, by consent, been partially opened before and set aside as to one of the lots seized. This took place before the sale by the marshal, on the application of a man by the name of Blum, who showed that he had long before purchased that lot from claimant. But I do not regard this transaction as having the slightest effect on the decree further than as it related to the lot claimed by Blum. The opening of the decree and the dismissal of the libel were expressly confined to that particular lot; and the decree remained in full force with regard to all the residue of the property. And I do not perceive any error in the proceedings up to and including the decree of condemnation and sale. And, if there had been error, I do not think that the district court, three years after the rendering of the decree, could sit as a court of error upon its own decree, and reverse it.

But the court has done more. It has not only reversed its decree, but has made a decree to restore the property to the claimant after its sale under and by virtue of the decree. It is a general rule that a judicial sale, made by virtue of a judgment which the court had jurisdiction to render, will stand though the judgment itself be afterwards reversed for error. In my judgment the district court had no general authority, as at common law, thus to set aside its judgment regularly rendered and the judicial sale made by virtue thereof. If it had authority so to do, it must have been derived from the particular circumstances of the case as affected by the pardon and amnesty pleaded by the defendant.

Do such pardon and amnesty annul past transactions so far as to invalidate the previous judicial confiscation and sale of the claimant's property? Such a proposition seems to me utterly untenable on general principles. And, besides, the pardon itself, which was pleaded in this case, contained an express condition that the defendant should not claim any property or proceeds of any property that had been sold by the order, judgment or decree of a court under the confiscation laws of the United States. This condition is a bar to the defendant's claim. It has been repeatedly held that a pardon may be partial, or subject to conditions. Of course the condition must be a lawful one. As far as I can see, the condition in question is entirely free from any taint of illegality. Whether it would have been binding on the defendant if he could have shown that the confiscation proceedings were illegal and void, it is not necessary to decide. They were legal and valid when they were taken.

The order of the district court opening the default and the decree dismissing the information and restoring to the defendant in error the property sold, must be reversed [case unreported], and the original decree of confiscation and the proceedings thereon must stand confirmed.

Case No. 16,300.

UNITED STATES v. SIXTEEN BARRELS OF DISTILLED SPIRITS.

[10 Ben. 484.] [1]

District Court, S. D. New York. June, 1879.

INTERNAL REVENUE LAW — FORFEITURE OF PERSONAL PROPERTY UNDER REV. ST. § 3453.

Upon an information under Rev. St. § 3453, charging that certain distilled spirits seized, were found in a place mentioned and in the possession of persons unknown, for the purpose of being sold and removed in fraud of the internal revenue laws, and with design to avoid payment of taxes thereon, and claiming the forfeiture of a large number of other articles of personal property found in the same place: *Held*, that under that section it is not necessary, in order that such other personal property be forfeited, that raw materials intended to be used in the manufacture of articles subject to tax should be found in the same place.

The case of U. S. v. 33 Bbls., etc. [Case No. 16,470], disapproved.

[This was an information of forfeiture against sixteen barrels of distilled spirits, seized at No. 340 Delancey street, New York City. Heard on a motion for a new trial.]

E. B. Hill, Asst. U. S. Dist. Atty.

E. T. Wood, for claimant.

CHOATE, District Judge. This is a motion for a new trial after verdict for the plaintiffs. The information was under Rev. St. § 3453. It charges that the 16 barrels of distilled spirits seized were articles upon which taxes were imposed, and were found in the place mentioned, in the possession of persons unknown, for the purpose of being sold and removed in fraud of the internal revenue laws, and with design to avoid payment of taxes thereon. It claims the forfeiture of said spirits and a large number of other articles of personal property found in the same place. A claim was interposed for the personal property other than the spirits, and upon the trial it was insisted, and now upon this motion it is insisted, that under that section of the Revised Statutes there can be no forfeiture of this personal property because it was not alleged or proved that any "raw materials" intended to be used in the manufacture of articles subject to tax were found in the place. The argument of the claimant is that the words "articles or raw materials" do not refer to the words "all goods, wares, merchandize, articles or objects," but only to the words "all raw materials found in the

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

possession of any person intending to manufacture the same into articles." But the proper antecedent of the words "such articles" is the words "all goods, wares, merchandize, articles and objects." These things before enumerated are here described under the general term "articles." There is no other sensible construction of the language nor anything else to which the term "such articles" can be held to refer with any regard to the grammatical meaning of the words. The words refer to something before mentioned in the section and are called articles as being "found" in the place. They cannot refer, therefore, to "articles" which might be in the future manufactured out of the raw materials found in the place, but which are not now found there. "Such articles" cannot, therefore, mean the articles which it is intended to manufacture out of the raw materials. The construction given to the section in this respect is that which it has uniformly received in this court and in the circuit court in this circuit. Quantity of Distilled Spirits [Case No. 11,494]; U. S. v. Quantity of Tobacco [Id. 16,105]; U. S. v. Distillery at Spring Valley [Id. 14,963]. The construction is perhaps obscured by a change in punctuation made in the reenactment of the law in the Revised Statutes, but it is evident that there was no change of meaning intended. In the original statute there is no full stop after the words "shall be forfeited to the United States," as there is in this section of the Revised Statutes. 13 Stat. 240.

It is further objected that the personal property subject to forfeiture under this section is only such personal property other than "tools, implements and instruments" as are in some way connected with the intended illegal sale or removal of the taxable articles or with the intended illegal manufacture of such articles from the raw materials; and the case of U. S. v. 33 Barrels of Spirits [Case No. 16,470], is relied upon as authority for this limitation of the words "other personal property whatsoever." While that decision sustains the point taken by the counsel for the claimant, I think it is in conflict with the views expressed in this district and circuit in the cases cited above. It seems to me, also, that the possible consequences of great hardship and injustice that might result from giving the words "other personal property whatsoever" their full and proper meaning, upon which the restrictive construction adopted by Judge Lowell is at least to a considerable extent based, namely, that in the case of a building occupied by many different and independent occupants personal property of enormous value in the possession of persons having no connection whatever with the proscribed articles or raw materials might become forfeited without any fault on their part, do not necessarily result from the construction giving the words "other personal property whatsoever" their full meaning. To be forfeited they must be in the "building or place" where the proscribed articles or raw materials are found. The word "place" seems here to refer to a place less than a building or to a part of a building, as well as to a place other than a building or part of a building. There appears to be a reference to the "place" where the person who has in his possession the guilty articles has also other personal property. Therefore, the statute may be read as providing that all other personal property in the same building or the same place other than a building, occupied by the person or persons having the possession in such building or other place of the prohibited articles, shall be forfeited. It seems to me that this limitation of the language is much more in accordance with the spirit of the statute than that suggested by Judge Lowell, and that it avoids all forfeitures which are not clearly within the purpose of the internal revenue laws. Those laws are very severe in declaring forfeitures as against violators of the law, and it is entirely consistent with their spirit and provisions in other respects that all the personal property found in the same occupation with the proscribed objects should be forfeited, subject, of course, to the power of remission vested in the secretary of the treasury in case the property of innocent persons should, by some mischance, be included in the forfeiture.

The case of U. S. v. Locomotive Boiler [Case No. 15,621], decided in the Eastern district, has no bearing on this case. The demurrer to the information in that case was properly sustained because it did not allege the finding either of articles on which taxes were imposed, etc., or raw materials.

Motion denied.

Case No. 16,301.

UNITED STATES v. SIXTEEN CASES OF SILK RIBBONS.

[12 Int. Rev. Rec. 175.]

District Court, S. D. New York. 1870.

VIOLATION OF CUSTOMS LAWS — FORFEITURE FOR UNDERVALUATION — IMPORTS BY MANUFACTURERS—EVIDENCE OF MARKET VALUE—ESTOPPEL.

[1. In cases of importation of goods by the manufacturer thereof, the value at which he is required, by the act of March 3, 1863, to invoice them, is the actual market value at the time and place of manufacture.]

[2. By "market value" is meant the price at which the manufacturer holds them for sale, the price at which he freely offers them in market, the price which he is willing to receive, and purchasers are willing to pay, in the ordinary course of trade. Following Clicquot's Champagne, 3 Wall. (70 U. S.) 114.]

[3. The law presumes that there was at the time and place of manufacture an actual market value for the goods, and no evidence can be received to show that there was not in fact such an actual market value.]

[4. Among the best evidences of market value would be a series of sales, general in their character, not accompanied by any exceptional circumstances tending to make one or more of such sales higher or lower than it would otherwise be; also a single sale, if made in the or-

dinary course of trade. Other evidence would be offers by merchants or manufacturers to sell to persons supposed by them to come in good faith as buyers, such offers being made in the usual course of trade, and under such circumstances as generally attend the sale of merchandise.]

[5. It is only in cases where such evidence as the foregoing is wanting that it becomes proper to resort to such inferior evidence as the actual cost of the raw materials to the manufacturer, with the addition of a manufacturer's profit. Even in such cases this cost is not to be received as a substitute for market value, but only as evidence tending to show market value.]

[6. In cases where such inferior evidence is resorted to, the cost of the raw materials is not to be based upon the actual price paid for them by the manufacturer, if he purchased them long prior to making them up, and at a time of depression in the market, but rather upon the actual price of raw material at the time when the manufacture of the goods was completed.]

[7. The fact that the United States consul at the place of exportation has, in compliance with his duties, certified that the invoice is correct, and the fact that the goods have been appraised, entered, and delivered to the consignee by the officers of the customhouse, on the theory that the invoice stated the true value, are not conclusive upon the question of a fraudulent undervaluation in a proceeding to forfeit the goods. The offence, if any, is complete when the entry is made, and it is immaterial that the invoice was used in the estimation of the duties; for the government is not bound, in respect to the question of forfeiture, by the acts of its officers based upon false and fraudulent statements.]

[8. Evidence of the value of goods in New York cannot be received, in a suit to forfeit them on the grounds of an entry by means of a false invoice, except as evidence of value at the place of exportation, and to contradict other evidence given in regard to the value there.]

[9. Evidence of prior undervaluations by the same importers is admissible only for the purpose of showing the intent with which the present undervaluation was made, and can only be considered by the jury in case they find that there is in fact an undervaluation in the present case. Nor can alleged prior undervaluations be considered for this purpose, unless the jury are satisfied that such prior undervaluations were knowingly made.]

[10. The rule prescribed by Act 1799, § 71 (1 Stat. 678), that, where probable cause of seizure is shown, the burden of proof is cast upon the claimants, is in force under the act of 1863, though the latter act is silent on this subject. Whether probable cause is shown is a question for the court.]

[This was a proceeding to forfeit sixteen cases of silk ribbons, on the ground that the same were entered by means of a false invoice.]

Edwards Pierrepont, Dist. Atty., and William G. Choate, for the United States.

Edwin W. Stoughton, Sidney Webster, James B. Craig, and C. Bainbridge Smith, for claimants.

BLATCHFORD, District Judge (charging jury). The prosecution in this case is instituted on the seizure of the goods, and a suit in rem against the goods seized is promoted for their condemnation and forfeiture under two statutes of the United States which apply to the subject. The first one is the fourth section of the act of May 28, 1830 (4 Stat. 410), and the second is the first section of the act of March 3, 1863 (12 Stat. 737). The substance of the act of 1830 is, that if any invoice on which foreign goods are entered at any customhouse is made up with an intent, by a false valuation to evade or defraud the revenue, all the goods embraced in the entry made on such invoice are forfeited. If any article inserted in the invoice has a false valuation put upon it, with an intent to evade or defraud the revenue, then not only that article, but all other goods embraced in the same invoice, are forfeited to the United States. It will not be necessary to call your attention any further to the act of 1830.

The questions which arise in this case under the act of 1863 are substantially the same, but there are certain provisions of the act of 1863 to which it is necessary I should call your attention. The first section of that act provides that all invoices of goods imported from any foreign country into the United States shall be made in triplicate,—that is, there shall be three sets of invoices signed by the person owning or shipping the goods, if the same have actually been purchased, or by their manufacturer or owner, if the same have been procured otherwise than by purchase, or by the duly authorized agent of such purchaser, manufacturer, or owner. The invoice so signed must, at or before the shipment of the goods, be produced to a consul, vice-consul, or commercial agent of the United States nearest the place of shipment, and must have endorsed thereon, when so produced, a declaration signed by such purchaser, manufacturer, owner, or agent, setting forth that such invoice is in all respects true. That is to be a declaration not on oath, and is to state what the invoice contains, if the goods were obtained by purchase, and are subject to ad valorem duty,—a duty by a percentage on the valuation,—a true and full statement of the time when and place where the same were purchased, and the actual cost thereof, and of all charges thereon, and that no discounts, bounties, or drawbacks are contained in the invoice but such as have actually been allowed thereon. When the goods are obtained in any other manner than by purchase —as when they are sent by their manufacturer, or when they are presented to the individual as a gift—then this declaration is to state that the invoice contains the actual market value thereof at the time and place when and where the same were procured or manufactured, and that no different invoice has been produced or will be furnished to any one. The person producing this invoice to the consul must, at the same time, declare to the consul at what port it is intended to make entry of the goods. This presentation to the consul of the invoice, accompanied by

the declaration, is the second stage of the proceeding. The third stage is this: The consul must endorse upon each one of the three invoices a certificate, under his hand and seal, stating that the invoice has been produced to him, with the date of its production, the name of the person by whom produced, and the port in the United States at which it shall be the declared intention to make entry of the goods. Thereupon, the consul must hand back to the person producing the three invoices, one of them, to be used in making entry of the goods; he must file the second one in his own office, to be there carefully preserved; and he must transmit the third one to the collector of the port where it is intended to make entry of the goods. Such is the disposition to be made of the three sets of invoices, with the three declarations, and the three certificates of the consul. The statute then provides that no goods imported into the United States after the first day of July, 1863, shall be admitted to entry, unless the invoice shall in all respects conform to the requirements above mentioned, and shall have such certificate of the consul. Therefore the invoice must come from the foreign country, containing, in the case of the manufacturer, the actual market value, accompanied by the declaration, not on oath, and a certificate of the consul, to the effect that the invoice has been produced to him, and that the goods are to be entered at a specified port. The statute goes on to say that no goods shall be admitted to entry unless the invoice be verified—now is the first time an oath appears in the matter—unless the invoice be verified, at the time of making the entry, by the oath or affirmation of the owner or consignee, or the authorized agent of the owner or consignee of the goods, certifying that the invoice and the declaration are in all respects true, and were made by the person by whom the same purport to have been made, nor, except as thereinafter provided, unless the triplicate invoice transmitted to the collector shall have been received by him. You thus see the machinery provided—the invoice made up abroad, in a certain way, the declaration accompanying it, and the certificate of the consul, the appearance of those three papers at the customhouse, and the addition to them, at the customhouse, of the oath or affirmation that the invoice and declaration are in all respects true.

The act of 1863 then goes on to make this provision, under which this prosecution is brought: "If any such owner, consignee or agent"—that is, if the consignor abroad, or the consignee here, or the agent of either of them—"of any goods, wares or merchandise shall knowingly make, or attempt to make, an entry thereof by means of any false invoice or false certificate of a consul, vice-consul or commercial agent, or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, said goods, wares, and merchandise, or their value, shall be forfeited and disposed of as other forfeitures for violation of the revenue laws." Any infraction of this provision forfeits all the goods embraced in the entry. * * * All the papers correspond with the machinery provided by law; and the question raised in this case is whether this entry was made by means of a false paper, and, if so, whether the paper was false to the knowledge either of these parties in Switzerland or of their agent or consignee here, who made the entry. Knowingly making an entry by means of a false paper, such as a false invoice or a false oath, where the fact that it was false was known to the agent or consignee here, forfeits the goods just as much as if the knowledge was possessed by the consignor abroad.

There have been heretofore before this court cases in regard to various descriptions of merchandise, involving the same questions that are now before you; and I have had occasion to charge juries heretofore on these subjects. I shall, therefore, in what I have to say to you, draw somewhat at large upon what I have heretofore said on like questions in some other cases. You have seen that the language of the act of 1830 is, that if the invoice is made up with an intent, by a false valuation, to evade or defraud the revenue, the goods shall be forfeited. The language of the act of 1863 is that if the entry, or the attempt to make the entry, is by means of a false invoice, and is done knowingly, the goods shall be forfeited. The only material and substantial apparent difference between the two statutes is that the one speaks of making up an invoice with intent to evade or defraud the revenue, and the other speaks of knowingly making an entry by means of a false invoice. "Intent to evade or defraud," is the wording in the one case; "knowingly," in the other. * * * In the case of a purchaser of goods, the cost to him to buy the goods abroad is assumed, as a general rule, by the law, to indicate the actual market value of what he buys, it being presumed that he buys at the ordinary actual market value; and, to put the purchaser upon the same footing with the manufacturer, to make no unjust discrimination against the purchaser, and in favor of the manufacturer, and to enable the government to collect substantially the same amount of duty, at the same ad valorem rate, on the same quantity of the same description of merchandise, whether shipped here for account of the purchaser of it, or for account of its manufacturer, the law requires the manufacturer, to invoice his goods, when he imports them, and enters them here as his own, at their actual market value in the principal markets of the country where they

were manufactured, no matter what their cost to him, no matter whether they cost more or less than such actual market value. The whole thing comes to this, in substance and effect—that the manufacturer is required to invoice them in this way, at what the purchaser is also required to invoice them at, for the purpose of producing uniformity. That is the theory and the object of the law; and its language endeavors to carry out that theory and object, as far as it is possible for human legislation to carry out a principle. * * * "Actual market value" has been decided by the supreme court of the United States in the case of Clicquot's Champagne, 3 Wall. [70 U. S.] 114, to mean the actual market value of the goods at Basle, in Switzerland, at the time of their manufacture, the price at which the manufacturer holds them for sale, the price at which he freely offers them in the market, the price which he is willing to receive for them if they are sold in the ordinary course of trade. That is a definition which commends itself to the good sense of every man. A manufacturer who sends his goods to this country under the circumstances under which the goods in this case were sent has no right to substitute, in his invoice, anything else for the actual market value. He has declared, in the first place, that the invoice contains the actual market value. In addition to that, there is the oath of his agent at the customhouse that the invoice contains the actual market value. Therefore, the first question for consideration will be, whether the invoices contain the actual market value of the goods at the time and place when and where they were manufactured; and, in the next place, if they do not, whether they were made up by the manufacturers with the intent to evade and defraud the revenue of the United States, or with a knowledge, either on their part or on the part of their consignee or agent here, who entered them at the customhouse, that the invoices did not contain such actual market value. * * *

It is quite apparent, in this case, that the cost of the raw silk used in making these ribbons enters into the expense of making them to the extent of from seventy to eighty per cent. of the entire cost of manufacturing them; and, of course, the variation in the cost of making them must depend a great deal on the price of raw silk. It is also in evidence, both by Viollier and by the depositions on the part of the claimants, that there was a time, during the year 1866, when, in consequence of the apprehension of war, and of the existence of war between Austria and Prussia, there was an interruption of trade, the demand for ribbons lessened, and there was a fall in the price of raw silk; and that, after the war closed, raw silk advanced in price. As to when these things happened, I shall speak hereafter. I refer to the subject now, for the purpose of saying, that, if the claimants in this case purchased raw silk at low prices, and manufactured ribbons out of that silk, but did not have them completed and ready for market until raw silk had advanced considerably, and if they afterwards made out their invoices of such ribbons on the basis of the cost of raw silk bought at those low prices, it is manifest that the cost of the goods so arrived at would not represent their actual market value at the time when they became a completed manufacture, which is what the law of the United States requires. It would undoubtedly represent the cost of the goods to the manufacturer, because he procured his raw silk at a low price, and he had, or was entitled to, a market for his manufactured goods afterwards, at a price for those goods based upon an increased price of raw silk—a price to the benefit of which, as against him, the United States were entitled. This case furnishes an illustration of why the United States can never admit that a manufacturer shall invoice his goods at their cost to him, with a profit added, unless such cost, with the profit added, is in fact the actual market value of the goods when their manufacture is completed. He cannot invoice them at the price he paid for the raw silk which he put into the particular goods, with the other expenses of manufacture, and a profit added, unless the result is in fact the actual market value of the goods. If any such principle of valuation were to be admitted by the United States as cost with the profit added, the cost which, in reference to raw silk, the United States would have a right to insist upon in a case like the present would be a cost based upon a price for raw silk at the advanced rate at which it stood when the goods were completely manufactured ready for market; otherwise the United States would be defrauded of that to which they are entitled by law. Therefore it is that no individual has any right whatever under any circumstances to substitute in his invoice for the actual market value cost. with a manufacturer's profit added. He must put in the actual market value. The manner in which he arrives at it is of no consequence. * * * The entries in this case show, there being three separate entries—one on the first invoice and two on the second invoice—that is, in each of the three entries, one case was designated and sent in the usual course of business to be appraised: and all of the invoices show that the invoices were accepted by the authorities at the customhouse as correct; that the duties were computed at the rate of 60 per cent. on the face of the invoices; that the government delivered the goods on the payment of that duty to the parties claiming them; and that afterwards the goods were seized. * * * The claimants state that not only in reference to the goods in question, but in reference to like goods which they had been in the habit of sending for a long time before to the United States, they made up their

invoices on the principle of arriving at the cost and adding 5 per cent. thereto, and calling that the market value. * * *

It is quite apparent, on the evidence, that the cessation of the war between Prussia and Austria sent up the price of raw silk. It is for you, in view of all the evidence on the subject, to determine when it was at its lowest point, and when it began to advance after the cessation of the war, with reference to the time of the completed manufacture of the ribbons under seizure. This is to be done, bearing in mind the principle of law I have laid down, that, if the cost of the goods, with the manufacturer's profit added, is the only means to which resort can be had to fix the market value of the goods, the government is entitled to the price of raw silk in the market, as entering into the goods, at the time of their completed manufacture. * * * On the subject of what resort you shall make to the different classes of evidence, the law is this: If these claimants, when Viollier and Farwell came there, believed that they came as customers, in good faith, intending to purchase ribbons, and if you shall believe that the offer to sell made by the claimants was a bona fide offer to sell on the terms named, uninfluenced by any considerations which would modify the apparent effect of the terms, you have a right to regard that offer as evidence to be taken into consideration in determining the question of the actual market value of the goods under seizure at the time and place of their manufacture; but if, on the evidence, you shall think that the prices given in the letter were influenced by the considerations I have mentioned in regard to smuggling, you will allow those considerations the weight to which they are entitled, and give to the letter, under those circumstances, the weight to which you shall think it is entitled on the question of actual market value, and also on the question of intent. The law, in all departments of its administration in courts of justice, always requires the best evidence to be produced of any fact. In regard to the actual market value of merchandise abroad, a series of sales, general in their character, not accompanied by any exceptional circumstances tending to make any one or more of such sales higher or lower than it would be but for such exceptional circumstances, or even a single sale, in the ordinary course of trade, is one of the best evidences of market value. This rule will apply to the Bachofen sale, taking into consideration the date of it, the 28th of June, and all the circumstances surrounding it. So, also, offers by merchants or manufacturers to sell their goods to persons who are supposed by them to come as buyers, in good faith, such offers being made in the usual course of trade, under such circumstances as generally attend the sale of merchandise, are among the best evidences of the actual market value of the goods in respect to which the transactions take place. It is only when such evidence is wanting, in a case of this kind—it is only when you are unable to arrive at the market value of the goods from actual sales of similar goods about the same time, or from offers to sell, made under the circumstances which I have specified as necessary, in respect to the same goods, or goods of the same quality—that you have a right to resort to an inferior class of evidence, as evidence of market value, that is, to the cost, with a manufacturer's profit added. But, as I said before, if, in this case, you shall consider that there is no evidence of actual sales at Basle of goods like those under seizure, and no evidence of offers by claimants to sell at Basle similar goods, from either of which you can arrive at a conclusion as to the actual market value at Basle of the goods in the invoices in question, and if you shall then have to resort to the cost of the goods with a manufacturer's profit added, you will not be authorized to compute such cost on the basis of the cost of the raw silk to the claimants, if you shall find that the claimants were paying for raw silk a higher price, at the time of the completion of the manufacture of the goods, than the actual cost to them of the same quality of raw silk as that which went into the manufacture of such goods. The government is not bound to accept such low cost of the raw material. It is entitled to the benefit of the price of the raw material at the time when the goods were completed in their manufacture. * * * Evidence is introduced by the government on the question of intent, it being claimed that the invoices of 1866, and particularly the invoice of the 8th of January, 1866, were undervalued knowingly by the claimants; and that, therefore, in case you shall find that the invoices in suit were undervalued, you must find that such undervaluation could not have been an accidental undervaluation, but that there was a design running all through, and a knowledge on the part of the claimants. * * *

In determining the question of knowledge or intent on the part of the claimants, in the undervaluation of their goods in the invoices, if you shall find that such undervaluation was made, the question for consideration will be, whether such undervaluation was made knowingly, that is, with a knowledge, on the part of the claimants, that the value stated ought to have been higher, in order to be the actual market value, or designedly; or whether it was the result of honest mistake or an accident. If you shall find that it was made knowingly or designedly, your verdict must be for the United States; otherwise, for the claimants. So, also, if you shall find that the claimants knowingly or designedly stated, in any invoice, a value less than the actual market value, knowing what that actual market value was, and that it was greater than the value stated in the invoice, it makes no difference as to what was the motive, or the reason, or the process of reasoning, on the part of the claim-

ants, upon or by which they arrived at the value stated in the invoice.

The question as to the meaning of the word "knowingly," in the act of 1863, has been before the supreme court of the United States. The difference in language between the act of 1830 and the act of 1863, the former requiring an intent to evade or defraud the revenue, and the other requiring that the party shall knowingly make or attempt to make an entry by means of a false invoice, has been called to your attention; but there is no real difference in the meaning of the two expressions, as was decided by the supreme court in the Case of Clicquot's Champagne, before referred to. In that case, the district court in California was requested to charge the jury "that the word 'knowingly,' in the first section of the act of March 3, 1863, means, in connection with the language which accompanies and surrounds it, 'fraudulently.'" The district judge refused to give that instruction, and held that such was not the law, and his charge on that subject was approved by the supreme court, to which the case went, and which affirmed the judgment, in these words: "The court below was pressed to instruct the jury that 'knowingly' is used in the statute as the synonym of 'fraudulently.' The instruction given was eminently just, and we have nothing to add to it." The instruction given by the district court was this: "With regard to the question of intent, I am asked to charge you, that you should be convinced that these goods, if invoiced below their market value, were invoiced fraudulently below their market value. The previous statutes passed by congress had introduced, in many instances, the word 'fraudulently,' had defined the offence to be, making a false invoice 'with intent to defraud' the revenue, or evade the payment of duties." The learned judge here refers to the language of the act of 1830. He proceeds: "This statute," the statute of 1863, "apparently, ex industria, omits these expressions, and substitutes the words 'if the owner,' etc., 'shall knowingly make an entry by means of any false invoice,' etc. I do not feel at liberty, when the legislature had left out the word 'fraudulently,' and inserted the word 'knowingly,' to reinstate the word 'fraudulently.' At the same time, I am bound to say, that I cannot conceive any case where an entry could be knowingly made by means of a false invoice, unless it were fraudulently made. I do not tell you, in terms, that you are obliged to find that the entry was made fraudulently, but you are obliged to find that it was made knowingly, by means of a false invoice; and, for myself, I cannot imagine any case where it could be knowingly done, without being fraudulently done. What, then, shall we understand by this word, 'knowingly,' as here employed? It is, that, in making out this invoice, and in swearing before the consul that such was the actual market value of the goods, the claimant knew better, and that he was swearing falsely." So, also, in regard to Thomass, in making the entry. If, when he swore on that entry, that the invoice and the declaration were true, and that the invoice contained the actual market value of the goods, he knew better, and knew that he was swearing falsely, he did it knowingly. In all the cases that have come before the courts of the United States, on this subject, a distinction is drawn between an undervaluation that takes place by mistake or accident and one that does not take place by mistake or accident. Where the undervaluation is shown to have occurred by mistake or accident of course it is excused; but where it is not shown to have occurred by mistake or accident it necessarily follows that it must have been made, in the sense of the statute, knowingly or with an intent to defraud the revenue. On that subject I cannot do better than to read to you a few words from the judgment of an eminent judge in a similar case—Judge Hopkinson, of Pennsylvania. The case is that of U. S. v. Twenty-Five Cases of Cloths [Case No. 16,563]. The judge says: "Supposing that you shall find that these goods are undervalued in the invoices, how are you to decide upon the fraudulent intent or design? In doing this, you will be influenced by the extent of the undervaluation. Is it enough to have been a temptation to fraud? Could it, on a large business, afford a great profit? Does it run, generally, through all the invoices? or is it only an occasional undervaluation that might have happened by accident, by mistake, without any design?" That shows the view of this learned judge as to the true test of this question of intent. Was it by accident or mistake on the one hand, or by design on the other? If it was by design or intent, then it was not by accident or mistake. If it was by accident or mistake, then it was not with intent or design. * * * The law presumes that there was at the time and place of the manufacture of the goods seized an actual market value thereof, and no evidence can be received or considered, under the law and under the oaths to the invoices, to show that there was not in fact such actual market value thereof. The cost of the goods will come under consideration, if at all, not as a substitute for market value, but merely as an item of evidence on the question as to what was the actual market value. Therefore, you must assume in this case that there was an actual market value for these goods at the time and place of their manufacture, the only question being to ascertain what such actual market value was. The claimants had no right to adopt any other standard of value than such actual market value; nor do I understand them as claiming that they had such right. They have stated in their declarations, and their agent has sworn in their oath on such entry, that such invoice

contains the actual market value; and their claim is not that they had a right to set forth anything except the actual market value, but that the actual market value was the cost with the manufacturer's profit added at the per centage named in the testimony, and that such actual market value was no greater, according to their idea of actual market value. So, also, the claimants were required to state in their invoices the actual market value of their goods at the time and place of their manufacture, not only without regard to the cost thereof, but without regard to the profit or loss which might result from their consignment thereof, or any loss which may be shown in the end to have resulted therefrom. If they chose to take the cost and add a profit, and made up the actual market value in that way, and it turns out in the end that that is the actual market value, very well; but if it turns out in the end that that is less than the actual market value, the claimants cannot maintain under the law that they had a right to put in place of the actual market value the cost with the manufacturer's profit added. Nor is the manufacturer relieved or excused from stating in his invoice such actual market value, or justified in adopting any other standard of value, because he may not himself make sales at home of similar goods, but may consign all such goods for sale to foreign markets. Although he may adopt such course of trade, he is nevertheless required to state in his invoice the actual market value of such goods at the time and place of their completed manufacture.

Very many remarks were made to you in the course of the trial and summing up upon the subject of informers, the seizure of books and papers, the seizure of goods, and other subjects of a like character, which are entirely foreign from this case, and upon which I shall spend no time, except to say they have nothing to do with any question on which you are to pass.

I have been requested by the counsel for the claimants to give you seventeen instructions which have been presented to me. Most of them are covered by what I have already said, but there are some things in them to which it is my duty to refer in order that nothing material may be omitted.

The first proposition is a correct one, and I charge you accordingly: "There are two questions of fact to be considered and determined by the jury: (1) Were the ribbons under seizure invoiced by Frey, Thurneyson & Christ at the actual market value thereof at the time when and in the country where the same were manufactured? (2) If they were not so invoiced was the false valuation made knowingly, or with intent to evade the payment of duty legally chargeable thereon? Before the jury can return a verdict for the United States in this case, they must answer both of these questions in the affirmative."

The second, third, fourth, and fifth requests relate to matters that are kindred to each other. I do not charge in accordance with those requests, except to the extent that I shall hereafter indicate. The substance of the second request is, that, inasmuch as the invoice is required to be produced to a consul abroad, accompanied by a declaration endorsed thereon, and inasmuch as the consul is required to place upon it a certificate of a certain character, and inasmuch as the law requires that no invoice shall be admitted to entry unless it has this certificate, and inasmuch as it also requires that no consular officer shall certify any invoice unless he shall be satisfied that the statements made in it by the manufacturer are true, and inasmuch as a punishment is imposed upon the consul if he knowingly and falsely certifies to any invoice, and inasmuch as all consular officers are to be governed by regulations and instructions to be given by the secretary of state, in respect to certifying invoices under the provisions of the first section of the act of March 3, 1863, and inasmuch as the secretary of state of the United States, by circular No. 59, dated April 20, 1866, officially instructed all consular officers that they will be held responsible for any want of truth and correctness in invoices certified by them, and will be expected to keep themselves informed as to the kinds, qualities, and market value of the merchandise exported from their respective districts to the United States, and to see that each invoice exhibits a fair and true description of the merchandise to which it relates, and contains a true statement of the price and value thereof, the jury are at liberty to presume that the consul did his duty as to investigating and certifying the correctness of the value of the ribbons stated in the invoices under seizure. I do not charge that.

I am also requested to charge the third proposition, which I do not charge. The substance of it is, that the law made it the duty of the collector here to cause the actual market value of the goods at Basle to be appraised by officers appointed for that purpose, and that, if the jury shall find that the collector failed to cause such appraisement to be made according to law, but seized the goods for undervaluation in the invoices, without any such appraisement, and delivered them to the importers on the payment of duty computed on the values contained in the invoices and stated in the entry, then they are permitted to take into consideration, as a part of the evidence in this case, such failure of the collector to submit the goods under seizure to the judgment of the appraisers, to ascertain their true market value in Switzerland at the time of their exportation therefrom, and also to take into consideration, as a fact in this cause, that if the importers or their consignee had been dissatisfied with the value of the ribbons fixed by the local appraisers, the former would have been entitled to a reappraisement made

by an official appraiser familiar with the character, quality, and value of the goods.

I am also requested to charge the fourth proposition, which I do not charge. The substance of it is, that the jury are entitled to take into consideration, as facts in this cause, that if the ribbons under seizure had been appraised by the official appraisers of the government, as the law requires, and the appraised value had exceeded by the amount of as much as ten per cent. the value thus declared on entry, then, in addition to the regular duty of sixty per cent. on the appraised value, the law required the collector to levy an additional duty of twenty per cent. on such appraised value; and, also, that there is no evidence that the government ever levied or exacted duty on the theory of valuation set up by it in this suit, but, having all the property in its hands, delivered it to the importers without any such exaction, and on the theory that the invoice valuation was correct.

I am also requested to charge you the fifth proposition, which I do not charge. The substance of it is that, as all the invoices produced by the government, from Frey, Thurneyson & Christ, of importations made prior to the goods under seizure, were reported by the official appraiser at the customhouse to the collector to be correct, the jury are entitled, and it is their duty, to take that fact into consideration, especially if they shall find that the collector refused or failed to submit the sixteen cases of ribbons under seizure to the judgment of the appraisers as to the foreign market value thereof.

What I have to say on the subject of the second, third, fourth, and fifth requests is this: You have a right to take into consideration, as part of the evidence in this case on the subject of market value, the declaration before the consul, the certificate of the consul, everything that appears on the invoices and the entries, all the evidence that has been given in explanation of what appears on the faces of the invoices and entries, the fact that the duty was paid at the invoice valuations, and the fact that there appears to have been no raising by appraisement of any of the invoice valuations,—all these facts in reference not only to the invoices of the goods in suit, but to all the invoices put in evidence. But, upon that subject, I must give you some further instructions, in order to show you precisely the effect of these declarations, certificates of consuls, entries at the customhouse, and raising or not raising of invoice valuations on appraisement in a case of seizure of goods for fraud. The appraisement and reappraisement of goods is for the purpose of getting at the duty, and for no other object. It is a mode of litigation between the parties,—the government, on the one side, and the importer, on the other,—to find out how much duty is to be paid on the goods; and, when that machinery is gone through with, by appraisement and reappraisement, and the duties are paid, and the merchandise is delivered, that transaction is settled, so far as the duties are concerned, and the government afterwards, even though it finds that there has been a mistake, cannot recover from any one, by a lien on the goods or by a suit against the individual, any more duty. It is conclusive upon that subject, but only upon that subject. It is not conclusive if a fraud has been committed. It does not condone or pardon any fraud that has been committed by any false invoice, or any knowing, intentional, wilful undervaluation. A forfeiture for fraud can be enforced after appraisement, reappraisement, payment of duty, and delivery of the goods. The appraisement system is for all cases, and ordinarily presupposes an honest invoice, but a mistaken one, and a payment of too little duty.

This subject came up before the same learned judge (Judge Hopkinson) in the case to which I have already referred (U. S. v. Twenty-Five Cases of Cloths), on a seizure of twenty-five cases of cloths. His remarks on it were these, and I give them to you as part of my instructions: "To invoice the goods below their actual value and cost, and to enter them by that invoice, with design to evade the duties, is, per se, an offence which forfeits them, whether the invoice was afterward instrumental in the estimation of the duties for that purpose or not." So, in this case, the offence was completed, if there was any offence, when the entry was made, because the offence consisted in making the entry; and whether the invoice, if it was a false one, was used as an instrument to estimate the duties, is of no consequence with reference to the offence, because the offence was completed before any such use was made of the invoice. "The evidence must follow the issue, and must depend upon the facts to be proved. When the question is, whether an importer has paid the duties legally chargeable upon his goods"—and that is not the question in a case of seizure—"it may be enough for him to say, 'I have paid all that the officers of the government appointed to ascertain them declared to be due,' and the question should rest. But when the inquiry is, whether he has been guilty of a specific fraud or not, it would be extraordinary if the acts or opinions of men in reference to another subject should be conclusive, either for his condemnation or acquittal." In that case it was pressed upon the court that the goods had been appraised at the invoice prices. Such fact amounted to no more than the utmost effect that can be given to what appears, in this case, on the face of the invoices, because nothing more can be inferred in this case than that there was in fact an appraisement at the invoice prices. The judge says: "It is contended that, as these goods were appraised at the customhouse in New York at the invoice prices, that, as they were passed through that customhouse on

that appraisement, paid the duties according to that appraisement, and were thereupon delivered to the importers, they are now exempted from all further inquiry into their cost or value, not only in relation to the amount of duties legally chargeable on them, but on a prosecution for fraud in making up those invoices, and on any or every other account, that the very fraud by which it is alleged, in this prosecution, the passing of the goods through the customhouse was obtained,—that is, the false invoices,—cannot now be inquired into. I can by no means assent to this doctrine, which, in my judgment, would be to offer a premium for successful fraud, and punishment only to the unskilful. I adhere, on reflection, to the opinion I gave on the trial. I will add but a remark. It is said these officers are the appointed agents of the government, and that the government is bound by their acts. The answer is plain. The government does not claim any right or privilege for itself that every citizen does not possess. Suppose one of you should appoint an agent to sell your house or goods, with even more clear and full powers than those given to the appraiser by the acts of congress. Your agent makes a sale, but it is afterward proved that he has been grossly defrauded by the purchaser, by false representation, by the suppression of the truth, by that which constitutes fraud in the law. Would you suppose you are bound by such a transaction—that the cheat is safe, and may retain your property only by saying that it was delivered to him by your agent?"

It has not been contended by the counsel for the claimants in this case, who have had too much experience in this class of cases to advance any such proposition, that the doctrine thus contended for before Judge Hopkinson, and which he declared not to be the law, is the law; and I have made these remarks on the subject only in order that you may see clearly the distinction between the questions involved in the mode of arriving at the duty, and the questions that arise on the seizure of goods.

I charge you in accordance with the sixth proposition: "The actual market value which the law required to be inserted in the invoices in suit was the fair and real worth in money of the ribbons described therein, at the time and in the country of manufacture, which was Switzerland, or, in other words, the sum which the manufacturer would have been willing to receive therefor, and persons familiar with the character and quality of the merchandise, and the condition of the market, and desiring to purchase, would have been willing to pay." That is what I have already charged.

I decline to charge the seventh proposition: "The government assails the correctness of the valuation of the ribbons in the given invoices under seizure, and asserts that such invoices are false in respect to market value. It is, therefore, necessary for the government to satisfy the jury, beyond reasonable doubt, that there was an ascertainable market value of these identical ribbons, within the meaning of the law, and what that value was. The government must establish a standard of value in centimes or francs to which the invoices ought to have been conformed, before it can ask the jury to say that the inculpated invoices are false; and, if the government fails to establish such standard to the satisfaction of the jury, their verdict must be for the claimants."

Then comes the eighth proposition, in reference to which I shall be obliged to make some remarks: "The market value to which the law required Messrs. Frey, Thurneyson & Christ to conform the invoices now on trial is to be predicated of the markets in Switzerland, not in the United States. Prices anywhere except in Switzerland are to be disregarded by the jury; and, therefore, prices which the consignors in Basle either urged or directed their consignees to realize in New York, with or without deducting all expenses, are as irrelevant and impertinent to the issue the jury are to try as would be prices for which the seized ribbons actually sold in this city. It is not the price at which these manufacturers held their ribbons for sale in New York, the prices at which, taking into consideration all the incidents and risks of the adventure, the ribbons stood them in New York, the prices at which they freely offered them in the market of New York, the prices they were willing to receive for them if sold in the ordinary course of trade in New York, but it is to Switzerland alone the law looks in respect to all these things, and, therefore, such valuations put upon their property when in New York are utterly foreign to the issue now to be submitted to the jury." These propositions are true to a certain extent. Undoubtedly, the selling price in New York, the value in New York, has nothing to do with this question, as you have seen in the course of the trial; and the evidence derived from the letters of Frey, Thurneyson & Christ, as to what they said the goods cost them, laid down in New York, is of no value or weight in this case, except so far as it is evidence of cost in Basle, to contradict other evidence given in regard to cost in Basle. The government has produced the letters as the statements of Frey, Thurneyson & Christ, as to what certain goods cost them delivered in New York; and you have heard the testimony of Viollier, whereby, after making certain deductions from such cost, he arrives at what the government claims was the cost in Switzerland, and a cost higher than that contained in invoices made up on the basis of cost, with five per cent. addition, and which the manufacturers stated to be the true market value at the time. It is only in that aspect that such evidence is of any value whatever, and it is only of consequence upon the question of intent, because it has no bearing except upon the valuations contained in in-

voices that were made long prior to the invoices in suit. Prices in New York are of no consequence whatever as evidence of market value in Basle, except in reference to that particular branch of the case of which I have just spoken.

I charge you in accordance with the ninth proposition: "The government does not claim that the invoices of the ribbons under seizure are false in any other respect than their value in Switzerland, and, therefore, the provision of the act of March 3, 1863, which forfeits merchandise entered at the customhouse by a consignee, on an invoice which he thinks false in that particular, does not relieve the government from the obligation of establishing, to the satisfaction of the jury, what was the real worth of the property, in the sense of a fair buying and selling value, at the time and place of its production. The intelligent or unintelligent, the honest or dishonest, opinion which a consignee may entertain of the real foreign value of the property he enters at the customhouse in behalf of its foreign owner, cannot work a forfeiture thereof, in the face of countervailing evidence as to its value abroad."

The tenth proposition is correct: "If the jury find the market value of the ribbons under seizure to be set forth in the invoice, then it is of no consequence what prices were given by Messrs. Frey, Thurneyson & Christ to Viollier, or, twenty days after, to Jones. The law of the United States, in this particular, takes no cognizance of fictitious prices, which, in the opinion of the jury, are different from the fair market value, as determined by real transactions of trade and business. A foreign manufacturer, sending his merchandise to the United States, is entitled to give to strangers or other persons whatever prices therefor he pleases, provided he places in his customhouse invoices its value in the actual markets of the country of production."

I charge you in accordance with the eleventh proposition: "If the jury shall find that the invoice prices of the ribbons under seizure are as much as they were worth or would have brought if offered for sale in the markets of Switzerland, at the time of the manufacture of the ribbons was complete, then it is of no consequence what was the actual cost of manufacturing the merchandise, or what Messrs. Frey, Thurneyson & Christ may have told Thomass or his firm was its cost, or how the manufacturers arrived at the prices stated in the invoices."

I charge you in accordance with the twelfth proposition: "The invoices and entries of ribbons imported by Messrs. Frey, Thurneyson & Christ, prior to the sixteen cases under seizure, are not admitted in evidence as showing or tending to show the market value of the said sixteen cases, but are permitted to go to the jury solely in relation to the intent with which the seized ribbons, now proceeded against, were undervalued, provided the jury shall come to the conclusion that such undervaluation exists. The jury must find undervaluation of the sixteen cases before they can take said prior importations into consideration." That is true, and I have already so charged you.

The thirteenth proposition is correct: "The invoices and entries of importations prior to those of the ribbons now proceeded against are not entitled to consideration by the jury in respect to the intent with which the invoices under seizure were made up, until the jury are satisfied, by evidence in the cause, of the actual market value of the ribbons contained in the first-named invoices and entries, at the time and place of their manufacture, and that such invoice valuations were knowingly or fraudulently made by Messrs. Frey, Thurneyson & Christ at less than said fair market value. To entitle the prior invoices to consideration on the question of intent, as before mentioned, the jury must be as well satisfied that such invoices were knowingly undervalued as they must be that the invoices now proceeded against were knowingly undervalued before they can find a verdict for the United States." That is true, and I have already so stated.

I charge you in accordance with the fourteenth proposition: "Among the methods of ascertaining the true interpretation to be put on the letter of Messrs. Frey, Thurneyson & Christ to Messrs Lefman, Kiefer & Thomass, dated Basle, July 1, 1862, in respect to the following prices named therein, to wit:

No.	1	1¼	2	3	4	6	9	12	16
	12½	17½	25½	30½	40	67	98	1.16	1.56

the description of currency referred to in such figures, and the general character and purpose of the valuations therein, the jury are entitled to take into consideration the price at which the ribbons contained in the invoice, dated July 11, 1862, and in the accounts sales of June 30, and July 8, 1862, were sold in currency or greenbacks, in New York, as follows, to wit:

No.	1	1¼	2	3	4	6	9	12
	11½	16½	21½	27½	37½	57½	87½	1.05

—with sales at auction at very much less prices."

I also charge in accordance with the fifteenth proposition: "In determining the actual market value of the ribbons under seizure at the time and place of their manufacture, or of the ribbons of prior importations, given in evidence in this cause, the jury are not entitled to take into consideration the price at which their owner held or holds them for sale, or freely offers them for sale, or which he is willing to receive for them, if they are sold in the market of New York."

I charge you in accordance with the sixteenth proposition: "The witness Thomass having sworn on the trial that, for a series of years prior to and including the early

part of the year 1866, he had repeatedly committed the offence of perjury under the law of the United States (Act March 3, 1825, § 13, 4 Stat. 118), by swearing falsely to the truth of invoices produced by him at the customhouse, and, having also sworn on behalf of the government, on this trial, that the said invoices so produced were false as to the market value therein, and that he then knew them to be thus false, and the last-named testimony of the witness Thomass being in direct contradiction in relation to the same transaction to the oaths made by him at the customhouse, it is not entitled to credit, and ought not to be regarded by the jury unless supported by other evidence to the same point."

The seventeenth proposition I decline to charge: "In respect to the contents of letters asserted by the witness Thomass to have been destroyed, his evidence is unsupported by any other testimony, and, therefore, ought to be and must be disregarded by the jury." That proposition I refuse to charge, because it is a matter of fact, and one for your consideration solely.

There is but one other point to which it is necessary I should call your attention, and that relates to the burden of proof. The law on that subject has been the law since the year 1799, and was affirmed by the supreme court no longer ago than in December, 1865, in the Case of Clicquot's Champagne, to which I have already referred, where the court say: "It is argued that the rule relating to probable cause and the onus probandi, prescribed in the seventy-first section of the act of 1799, is confined to prosecutions under that act, and has no application to those under the act of 1863, which is silent upon the subject. It would be a singular result, if in a prosecution upon an information containing counts upon this and later statutes in pari materia, the rule should apply to a part of the counts and not to others. The seventieth and seventy-first sections must be construed together. They both look to future and further legislation. In all the changes which the revenue laws have undergone, neither has been repealed. The authority to seize out of the district of the seizing officer, and this rule of onus probandi, have always been regarded as permanent features of the revenue system of the country." And they affirm the charge of the district judge, and his refusal to charge as requested by the claimants in that case, that the burden of proof was not upon the claimants, but was upon the prosecution. Now, the law upon that subject is this—that where probable cause is shown for the prosecution—and in this case, and in all cases, it is for the court to decide whether probable cause is shown for the prosecution, and the court decides that there is such probable cause by throwing the claimants upon their defence, as it did in this case—where probable cause is shown for the prosecution, the burden of proof is thrown upon the claimants to dispel the suspicion, and to explain the circumstances which seem to render it probable there has been a knowing undervaluation. The government in this case, having established probable cause, it is for the claimants to show their innocence, and dispel and clear up the suspicion which the government in the beginning raised against them. Under this rule it is for you to say whether the claimants have made out their defence, and have shown that these ribbons were invoiced at a value as high as their actual market value in Basle, at the time they were manufactured, or that the failure so to invoice them was the result of accident or mistake, and not of knowledge or intent. The actual undervaluation must be found by you as a matter of fact in this case, in order to warrant a verdict for the United States. If there was no undervaluation, your verdict will be for the claimants. If there was an undervaluation, you will then proceed to the next question which is whether there was any knowledge on the part either of the manufacturers and consignors in Switzerland, or of their agent here, who entered the goods at the customhouse, that there was such undervaluation. You must find that fact also in favor of the United States, in order to find a verdict for the United States; because, it may happen in some cases, that there may be an undervaluation and yet not a knowing undervaluation. You must find that there was not only an undervaluation, but a knowing undervaluation, on the part of the consignors or the consignees, before you can find in favor of the government; and, if you find either that there was not an undervaluation, or, if there was, that there was no knowledge of it, but it was made by accident or mistake, and not by design, on the part either of the senders of the goods or of their consignees here, you will find for the claimants.

This case being one of so great importance to the parties interested, and to the public, no apology is needed for the time I have occupied in presenting it to you. I have desired that you should have a full and clear view of every question connected with it which could possibly come up in the course of your discussions, and of the application of the evidence to the law, and I now commit it to you, satisfied that you will bestow upon its decision the same attention and patience which you have manifested throughout the trial.

The jury found a verdict for the claimants.

Case No. 16,302.

UNITED STATES v. SIXTEEN HOGSHEADS OF TOBACCO.

[2 Bond, 137.] [1]

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

FORFEITURES UNDER INTERNAL REVENUE LAWS—SEIZURE OF TOBACCO—TOOLS, IMPLEMENTS, ETC.—FRAUD—PLEADING.

1. Under section 9 of the act of July 13, 1866 [14 Stat. 101], in a proceeding against a manufacturer of tobacco, alleging frauds under said section, the raw material found, if intended to be used for a fraudulent purpose, may be seized, and is subject to forfeiture, without reference to the place where it is found.

2. It is not necessary to set forth the facts from which the fraudulent intention alleged is inferred. It is sufficient that the charge of fraud is made in the words of the statute.

3. But in reference to tools, implements, and other personal property, the statute makes it necessary, as a ground of forfeiture, that they should be found in the place or building, or within the yard or inclosure, where they were intended to be used; and an article in an information, claiming a forfeiture of such property, is defective without such averment.

4. As there is no such averment in this information, the exception to that part of the fifth article, claiming the forfeiture of tools, implements, etc., is sustained.

5. The district attorney is, however, allowed to amend said article; but, if not amended, the court will order this part of the property seized to be restored to the claimants.

Information of forfeiture.

R. M. Corwine, U. S. Dist. Atty.

Stallo & Kittredge, for claimants.

LEAVITT, District Judge. This is an information, filed by the district attorney, claiming the forfeiture of sixteen hogsheads of tobacco and other property, on five different allegations of fraud set forth in separate articles in the information. The claimants of the property proceeded against are Meyerman & Kenneweg, extensive dealers in and manufacturers of tobacco, in the city of Cincinnati. They have appeared by counsel, and have filed exceptions to the information, which present the first question for the consideration of the court.

The exceptions are to the fifth article in the information, and are based upon the ground that the property specified in that article was not subject to seizure, and is not liable to forfeiture under this information. The claimants ask, therefore, that this property may be released from seizure and restored to their possession. The decision of this question does not require a special notice of the other articles in the information. All the articles are based on section 9 of the revenue statute of July 13, 1866. They allege several distinct acts of fraud, on the part of the claimants, in conducting their establishment as manufacturers of tobacco. It is claimed by the district attorney, that under the sweeping operation of the section referred to, not only the manufactured tobacco, found in the possession of the claimants, or within their custody or control, but also all raw material, and all the tools, implements, furniture, and other personal property pertaining to the manufactory, were infected with fraud and subject to seizure and forfeiture. Section 9 is very comprehensive in its language. It authorizes the seizure and provides for the forfeiture of all articles or property, subject to taxation, in the possession or custody of the manufacturer, for the purpose of being removed or sold, with intent to evade the payment of the tax imposed on them, and the collector has reason to believe fraud is intended. The section also provides, that all raw material on hand, intended to be used for a fraudulent purpose, shall be liable to seizure and forfeiture. And then follows a clause, declaring that "all tools, implements, instruments, and personal property whatever, in the place or building, or within any yard or inclosure where such articles on which duties are imposed as aforesaid, and intended to be used in the fraudulent manufacture of such raw material, shall be found," shall be forfeited.

As stated before, the exception is to the fifth article of the information, so far as it claims the forfeiture of the raw material, and the tools, implements, and other personal property of the claimants. The counsel for the claimants insist that this article is defective, and does not come within the terms of section 9 of the statute, in not averring that the raw material, tools, etc., were found "within any yard or inclosure," as provided for in that section. In other words, it is claimed that this property, under the allegations of the fifth article, was not liable to seizure, and no judgment of forfeiture can pass against it. As to the raw material seized, it is clear the exception can not be sustained. It is immaterial where it was found, or in whose possession, if it be alleged it was intended to be fraudulently used or disposed of. This is distinctly averred in the fifth article in the information, and is within the words of the statute referred to. It is not necessary to set forth the facts from which the fraudulent intention alleged is inferred. It is sufficient that the charge of fraud is made in the words of the statute. The fact of the fraudulent intent will be a matter of inquiry and proof on the hearing. But the fifth article, in relation to the tools, implements, etc., is clearly defective, in not alleging they were found in the place or building, or within the yard or inclosure where they were intended to be fraudulently used. The object of this provision obviously was, to prevent the future use of the tools and implements for a fraudulent purpose. And the statute makes it material, as a ground of forfeiture, that they should be found on or about the manufactory in reference to which the charges of fraud are made.

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

They may, by a fair sale, have passed into the possession of a bona fide holder, and may be found at a place and under circumstances negativing any presumption of their use for any fraudulent purpose. It is, therefore, a just and reasonable requirement of the statute, that to subject them to forfeiture the property should have been found on the premises of the manufactory. And if this, under the statute, is a necessary basis of forfeiture, it must be set forth in the information. This exception to the information must therefore be sustained.

But leave will be given to the district attorney to amend the information, by adding to the fifth article the necessary averment, if it can be so amended, in reference to the facts of the case. If not so amended, the court has clearly the power to order the restoration of the property in question to the claimant; and such an order will be made on application for that purpose.

Case No. 16,303.

UNITED STATES v. SIXTEEN PACKAGES.

[2 Mason, 48.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1819.

CUSTOMS DUTIES—FORFEITURES FOR UNDERVALUATION—"ACTUAL COST."

The 66th section of the revenue act of 1799, c. 128 [1 Story's Laws, 631; 1 Stat. 677, c. 22], by the terms "actual cost," means the true and real price paid for the goods in case of a bona fide sale, and the forfeiture is not inflicted by that section, when the goods are invoiced according to such price, on a real bona fide sale, although the purchase be below the ordinary market price. But the terms "actual cost" do not apply to the case of a voluntary gift or conveyance, where the substantial consideration is not money, or its equivalent estimated at a money price. Nor do they apply to a case where the consideration is partly money and partly love and affection.

[Cited in Alfonso v. U. S., Case No. 188; Carroll v. The Leathers, Id. 2,455.]

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

Information on the 66th section of the collection act of 1799, c. 128 [1 Story's Laws, 631; 1 Stat. 677, c. 22], for a forfeiture of the goods in question. Upon the issues joined in the district court, the jury found a verdict for the claimant, on which judgment was rendered in that court. [Case unreported.] A bill of exceptions was taken to the charge of the judge, and the present writ of error was brought to reverse that judgment.

The facts of the case were as follows: In the month of August, 1817, the merchandise in question was duly entered at the custom house in Boston, by Messrs. Whitwell, Bond and Company, on behalf of Thomas Winterbottam, a British subject, to whom the said merchandise belonged at the time of its importation into the United States. At the time of the entry of the said merchandise, an invoice of the same, bearing date at Huddersfield, in England, July 5th, 1817, was exhibited to the collector, by the said Whitwell, Bond and Company, as the true and original invoice, by which it appeared that the actual cost of the said merchandise, after a deduction of certain allowances therein specified as having been made to the said Thomas Winterbottam, was the sum of £2,293 7s. and no more. The said Thomas Winterbottam was the son of Benjamin Winterbottam, an extensive cloth manufacturer of Huddersfield, in England, and it appeared that he had purchased these goods of his father, sometime in June, 1817. These goods were appraised by order of the collector, and in conformity with the provisions of the 66th and 67th sections of the act of congress, of March 2, 1799, regulating the collection of duties, in consequence of the collector's suspicions that they were not invoiced at their true value. Upon this appraisement the value of said merchandise was estimated at £2,830 2s. 8d. sterling, after a deduction of all such charges thereon as in the opinion of the appraisers ought to have been deducted. The testimony of respectable merchants residing in Boston, who were importers and extensive dealers in cloths of every description manufactured in England, was produced, showing that the prices of some of the cloths, as estimated in the said invoice, were from twelve and a half to twenty-five per cent. lower than cloths of the same description and quality purchased by them, at about the same time, although they purchased under great advantages; and that the cloths in the said invoice were estimated at a lower rate than the market price at that time, and in that country. It was also testified by the same witnesses that the allowance of five per cent. for measures on some of the articles as mentioned in the said invoice, or any allowance whatever for measure on articles of that description was a circumstance which they had never before heard of, and was altogether unusual. It was also given in evidence, on the part of the United States, that the customary allowance at the manufactories in England, for prompt pay, on the purchase of goods of the description here alluded to, was at the time of this purchase, from five to seven and a half per cent. And none of the witnesses had ever known an instance of so large a discount as ten per cent.

The deposition of Benjamin Winterbottam, the father of the importer, was produced, stating that the said Benjamin, being a manufacturer of cloths residing at Saddleworth, sold to his son, the claimant, the goods mentioned in the said invoice, in the month of

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

June, 1817, and that the prices stated in the said invoice thereof, before mentioned, were the fair and true prices at which the goods were sold by him, and that the several discounts therein stated to have been made by the deponent were correct and true, and that the prices at which he sold the goods in question were higher than he could have obtained for them at that time in any market in England. It was also stated in the deposition of one John Kilner, a woollen merchant of the said Huddersfield, that he was called upon by the claimant and his father to make out the said invoice of goods for a foreign market, that he did make out the same, and at the time he so made it, he was of opinion that the prices of some of the goods were charged too high, and that he then so stated his opinion. The district judge charged the jury, that by the words actual cost and real cost, as they are employed in the first paragraphs of the 66th section of the act of congress before mentioned, was to be understood merely the price or sum of money which should appear to have been actually paid by the importer for the merchandise therein referred to at the place of exportation, and that though such price should be in any case at the place of exportation below the ordinary current value, still that the goods so purchased and so imported, could not be considered liable to the forfeiture provided in that section, in case it should appear, that the original invoice and entry at the custom house here were in conformity with the price thus actually paid by the purchaser, and the purchase was real and genuine. And the judge furthermore delivered his opinion to the jury, that in case a father, being a manufacturer of cloths in England, should make a sale of merchandise to his son, and being disposed to shew him some indulgence in the bargain, should fix the price of the goods so sold at a sum below their common and ordinary value, and the invoice thereof should be made out and delivered accordingly, and the son should afterwards bring such goods to the United States, and cause their entry with the collector to be made in conformity with such invoice without apprising the collector of the indulgence so given in the purchase, this circumstance alone would not subject such goods to forfeiture under the provisions of the 66th section of the act before mentioned: provided the jury should be of opinion that such sale was real and genuine, and that the deduction from the usual price was not for the purpose of giving an advantage in the estimation of duties. The said judge further gave it as his opinion to the jury, that if an importer of merchandise into the United States from a foreign port should happen to have purchased such merchandise at the place of exportation, at auction or otherwise, at a price below their ordinary value at such place, and receive his invoice accordingly, the entry of such merchandise with the collector of a port in the United States, in conformity with such invoice, would not subject the merchandise to forfeiture, under the provisions of the section of the act above mentioned, unless from the great difference of price, or some other circumstance proved, the jury should infer an intent to evade the duties; and that in case they should be satisfied, from the evidence in the case, that the said Thomas Winterbottam did in reality purchase the goods in question of his father Benjamin, at the prices mentioned in the invoice; and if the jury should be of opinion that the sale was true and bona fide, although these prices might be below the rate at which the said Benjamin would have been willing to sell them to a third person, not thus connected with him, and also below the ordinary value at the place of exportation; yet, that the subsequent entry of said goods at the custom house in Boston, by the said Thomas, in conformity with said invoice, would not subject said goods to the forfeiture provided in the before mentioned section of the act of congress, unless the jury should believe, from the circumstances proved in the case, that there was a design to evade the duties on the goods.

G. Blake, U. S. Dist. Atty.
Hubbard & Webster, for claimant.

STORY, Circuit Justice. It is unnecessary to give any opinion as to the exactness or regularity of the pleadings in this case, because the only errors relied on by the district attorney, are, if at all, to be found in the charge of the learned judge of the district court, as it stands in the bill of exceptions.

The count in the information, which alone is material in the present inquiry, is founded on the 66th section of the revenue act of 1799, c. 128 [1 Story's Laws, 631; 1 Stat. 677, c. 22], which enacts "that if any goods, &c. of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c. or the value thereof, to be recovered of the person making the entry, shall be forfeited." The section then proceeds to provide for a valuation to be made of any goods, which the collector shall suspect not to be invoiced at a sum equal to that for which they have been usually sold in the place or country from which they were imported, according to which valuation the duties are to be paid or secured; with a proviso that such valuation shall not, in case of a prosecution for the forfeiture under the first clause, exclude at the trial other proof of the actual and real cost of the goods at the place of exportation.

The 36th section of the same act requires the owners and consignees of imported goods to make an entry thereof at the custom house, specifying, among other things, the prime cost and charges thereof; and at the same time to produce the original invoices of the same goods; and further to make oath that the entry contains a just and true account of the cost of the goods, including all charges, and that the invoices are true and genuine. The 61st section of the same act declares that the ad valorem rates of duties on imported goods shall be estimated by adding twenty per cent. to the actual cost, if imported from the Cape of Good Hope, or any place beyond the same; and by adding ten per cent. to the actual cost, if imported from any other place, including all charges; commissions, outside packages and insurance only excepted.

It is apparent that the terms "actual cost," "real cost," and "prime cost," used in these sections, are phrases of equivalent import, and mean the true and real price paid for the goods upon a genuine bona fide purchase. The language is wholly inapplicable to any case of a gift or voluntary conveyance, or where any thing but money, or its equivalent, mingles substantially in the consideration. In such cases there is no pretence to say that any specific price is paid as the whole estimated value or actual cost of the goods; and the sections apply, in terms only, to sales where there is a real invoice price charged and accounted for between the parties. For a like reason cases of barter of goods for goods, or goods for services, or goods for lands, where no specific value in money is fixed in the purchase, are without the purview of these sections, and are to be regulated by the other provisions of the act. But if in point of fact the sale be real and genuine, and the invoice exhibit what was the true and entire consideration, which passed between the parties on such sale, it is immaterial, so far as respects the forfeiture inflicted by the 66th section, whether the purchase be at a public or private sale, or whether the price fall below the ordinary current value or not. All that this section requires is that the invoice should contain a true statement of the actual cost of the goods in a case of a bona fide purchase; and the forfeiture does not and cannot attach, unless the goods are not invoiced according to that actual cost, with design to evade the payment of the proper duties. The forfeiture therefore stands upon the ground of meditated fraud; and was not meant to be applied to cases of innocent mistake, or unintentional error. If indeed the goods be invoiced greatly below the ordinary price, it affords a very strong presumption, that the sale is not genuine, but is infected with fraud in its very concoction; and cases may easily be imagined in which this presumption would be so very urgent that it would justly outweigh all positive testimony and be conclusive on the party. Between such cases however and slight deductions from the ordinary price there are many shades of distinction, which would cast more or less darkness on the presumption, and it is not difficult to reach a point at which it would wholly vanish. The presumption in all these cases is but a presumption of fact, of which the jury are to judge and to give their verdict accordingly.

And there is the soundest reason and justice in the law as thus interpreted; for it requires the party to swear to the actual cost; and if he has purchased somewhat below the ordinary price, he cannot, in foro conscientiæ, be justified in making oath to a higher invoice. It would not be the true original price and invoice. The law demands of him entire good faith, and does not mean to ensnare him to his ruin by disclosing the real bargain. If the price however be below the usual price, the collector has a right to have the goods appraised; and the duties paid according to such appraisement. But it is not a necessary consequence, if such appraisement exceed the invoice price, that the goods are forfeited. The act expressly provides otherwise; and if it did not, the same must have been the correct judicial interpretation. Two facts must concur to produce a forfeiture; first that the goods are not invoiced according to the actual cost: secondly, that this is done with a design to evade the payment of the regular duties.

If with these principles in view we examine the charge of the learned judge of the district court, it will not be found difficult to vindicate its entire correctness. The first point in that charge, containing an exposition of the words "actual cost" and "real cost," in the 66th section, has been already sufficiently considered. The next clause puts the case of a sale by a manufacturer to his son, as to which the learned judge declares that if the sale be real and genuine, and the father, on such sale, with a view to a parental indulgence to his son in the bargain, sell to him at a price below the ordinary value of the goods, and such deduction in price is not with intent to evade the payment of duties, and the goods are invoiced at the price, and entered according to the invoice at the custom house, the circumstance of such a sale would not alone subject the goods to forfeiture. In order to bring this declaration to a legal test, we must examine it with all its limitations. In the first place there must be a real and genuine sale between the father and the son. This of course excludes the case, where the consideration is substantially in part money, and in part love and affection; or where the case is in whole or in part a gift. As for instance where the father transfers goods to the son for fifty per cent. below their ordinary market value, with the intent of making a present of the other half price. There is no pretence to say that this is a genuine sale, or that an invoice at such a diminished price could be the "actual cost," in the proper sense of those terms as used in the act. It would seem hardly possi-

ble, if such an invoice were produced at the custom house, and the goods entered thereby, that a jury should hesitate to pronounce that it was a fraud upon the law. But there is a wide distinction between such a case, and the case, where a father, with a view to favor his son, and not to drive a hard bargain with him, makes a small deduction from his ordinary prices, for in such a case the transaction is in substance a sale. It will not do to say that all the motives which lead to a sale at a diminished price are to be nicely weighed, and that if other considerations than money or its equivalent, in however minute a degree, mingle in these motives, the case is to be stripped of its character as a sale; we must look to the substance of the transaction and see, not whether favor, friendship or kindness, in small portions, mingled in it, but whether there was in fact in the contemplation of the parties, a gift, or a sale, or a mixture of both, resulting from considerations partly pecuniary and partly of love and affection. In the next place, the learned judge limits his remarks by adding that the diminution in price (and of course the statement of it in the invoice) must not be "for the purpose of giving an advantage in the estimation of duties;" that is, in the language of the 66th section, not with a design to evade the payment of the duties. And certainly if there be not such a design, the forfeiture cannot arise under the terms of the act. There is therefore no error in law in this part of the charge. Without doubt a transaction of this kind between father and son, where the invoice prices are below the ordinary prices, is open to suspicion; and if the reduction from the ordinary prices be very considerable, the suspicion must necessarily be inflamed to a high degree. And a jury would be well justified, under such circumstances, in requiring the most plenary proof of the purest evidence, before they should place confidence in the transaction as a real sale, or acquit the party of an intent to evade the law. But after all it is but a question of fact, and no court can pronounce what deduction per se is, of itself, conclusive evidence of fraud.

The next case, put by the learned judge, of a purchase at auction, is certainly far less strong than that already considered; and I am yet to learn how in the case of a real purchase at auction, where a genuine correspondent invoice is used without any intent to evade the payment of duties, it is possible to contend with success for a forfeiture under the act. If it be, then it must be upon the ground that sales at auction are ipso facto fraudulent; or that the disclosure of the truth and innocence of a bona fide purchase is forbidden by the law. Consequences so absurd cannot be justly deduced from any fair construction of the statute.

The next and last point stated by the district judge in his charge is merely an application to the present case of the principles which he had already illustrated. If those principles were correct, then there is no error in the application; and after what has been said, it is scarcely necessary to add, that in the judgment of this court, there is nothing in this charge on which to hang a reasonable doubt. Whether, under the circumstances of this case, the jury might not have been well warranted in coming to a different verdict, is no part of our duty to consider. Let the judgment be affirmed. Judgment affirmed.

Case No. 16,304.

UNITED STATES v. SIX THOUSAND TWO HUNDRED AND FIFTY CIGARS.

[11 Int. Rev. Rec. 11.]

District Court, D. Louisiana. 1869.

FORFEITURES UNDER INTERNAL REVENUE LAWS—PAYMENTS TO INFORMERS.

In this, a case of seizure under the internal revenue, the judge ordered the property to be condemned. Harroll Wright intervened, claiming, as informer, one-half of the proceeds of forfeiture under the laws of congress. It appearing by the testimony of Collector Stockdale that the informer's claim was just, he was granted the fraction asked for.

Case No. 16,305.

UNITED STATES v. SIXTY 5-8 CARATS BRILLIANTS.

[10 Blatchf. 221.] [1]

Circuit Court, S. D. New York. Nov. 25, 1872.

ERROR TO DISTRICT COURT — QUESTIONS REVIEWABLE—DECISIONS OF FACT AND LAW.

1. After the condemnation of property, in the district court, as forfeited to the United States, for a violation of the customs laws, W. and E. each claimed a share as informer. That court adjudged that neither was informer, but awarded a share to W., as seizing officer, under section 1 of the act of March 2, 1867 (14 Stat. 546). E. then sued out a writ of error from this court. *Held* that, on such writ, the decision of the district court that, as matter of fact, E. was not the first informer, could not be reviewed.

2. It was not an error in law for the district court to so decide, although the commissioner who, by order of that court, took the proofs, reported them with his opinion in favor of E.

3. A writ of error to the district court brings to the consideration of this court questions of law only.

[Error to the district court of the United States for the Southern district of New York.]

Theodore N. Melvin, for Esmond.
William Stanley, for Whitely.

WOODRUFF, Circuit Judge. The property proceeded against was seized by the

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

officers of the United States, and, on information filed, was condemned, in the district court, as forfeited, because it was introduced into this country without the payment of duty. [Case unreported.] After condemnation, H. C. Whitely and F. S. Esmond each applied to the district court for an order adjudging him to be the informer entitled to share in the proceeds of the condemnation. Act March 2, 1867; 14 Stat. 546, § 1. The district court, on a contest between the two claimants, decided and adjudged that neither of them was the first informer, nor entitled, as such, to share in the proceeds, and, there being no other claimant, the court decided that H. C. Whitely, as seizing officer, was entitled to share in the proceeds. Thereupon, a writ of error was procured and allowed, for the purpose of correcting what the said Esmond alleges to be error in the said order, to his prejudice.

Without considering the objection that no writ of error will lie for the correction of a proceeding of this kind, or the objection that, if it will lie, it is not in proper form, it must suffice to say, that a writ of error brings to the consideration of this court questions of law only. The complaint here is, that, upon questions of fact, strenuously contested, and in relation to which there was conflict of testimony, the district court came to an erroneous conclusion. It is quite immaterial to this party alleging error, whether the decision that Whitely was not the first informer was correct or not; and, if Esmond was not the first informer, then it is immaterial to him whether Whitely was or was not entitled as seizing officer. Esmond, in either case, is not aggrieved by the decision or adjudication. If he was not the first informer, he has no possible interest in the matter, and is not aggrieved. The district court found, as a fact, upon the evidence, that Esmond was not the first informer. That finding of fact is not the subject of review by writ of error, when the record does not show that any rules of law were violated, or any erroneous construction of the statute was applied to the facts proved.

The circumstance, that the proofs were, by order of the court, taken before a commissioner, and were reported with his opinion in favor of Esmond, does not affect this question. The district court was not bound, by law, to adopt the opinion of the commissioner as conclusive. It had power to, and did, look into the conflicting proofs reported by the commissioner, and, on finding, as a fact, that Esmond was not the first informer, made an adjudication, which, upon that finding, was a necessary legal result, namely, that he was not entitled to share in the proceeds of the forfeited property. I find no error of law which calls for any reversal of the order. Let it be affirmed.

Case No. 16,305a.

UNITED STATES v. SIXTY-FIVE PACKAGES OF GLASS.

[Betts, Scr. Bk. 23.]

District Court, S. D. New York. 1838.

CUSTOMS DUTIES—FORFEITURE OF GOODS FOR FALSE ENTRY—BURDEN OF PROOF—PRINCIPAL AND AGENT.

[1. In a proceeding to forfeit goods because of fraudulent undervaluation, the fact that they were invoiced and entered at only about one-half the invoice price of like goods purchased by other importers at the same time and imported by the same vessel, justifies the customs officials in making the seizure, and puts the burden on the claimants to substantiate the invoice by clear proofs, admissible under the ordinary rules of evidence.]

[2. Where an importer purchases goods through an agent in Europe, and the agent, though having a lien for advances, surrenders the goods to the importer for much less than the purchase price, because the latter is unable to pay more, the sum for which they are thus surrendered is not the proper invoice price, but the invoice should be at the original price at which the agent purchased the goods.]

[3. But, if the agent violated his authority in purchasing the goods, and thereby made them his own, the importer would have a right to purchase them from the agent as owner; and, if he obtained them at a reduced price, this would be the price at which they should be invoiced and entered, although much below the prevailing price of like goods.]

This was a suit for the forfeiture of 65 packages of glass, imported by the claimants in October, 1838, and alleged to have been entered at the custom house below their cost, in order to defraud the revenue.

In opening the case to the jury, the district attorney, Mr. Butler, said: It is supposed by some of those persons who take it upon themselves to enlighten public courts and juries, that cases of this kind are to be regarded as mere controversies between the custom house and the importer, and that if the latter can prove he committed no fraud, and the jury find for him, it seems some persons think that the custom house officer is subject to reproach. This is inconsistent with the very first principles of public liberty. An act of congress has imposed certain duties and established various regulations for the protection not only of the manufacturer, but also of the honest merchant. And when these regulations are carried into effect, in good faith, by public officers, and that they, acting on their oaths, consider that goods have been entered far below the cost at which they could be imported, and far below the ordinary cost of articles of that description, in such case, the collector, as a faithful public officer, has no more right to let those goods pass, without a judicial procedure, than he would have to remit one-half the duty to any person he chose, at the expense of the government and the honest merchant. The goods were entered at 8,665 francs, and entered by the claimants as owners, in which case they

were bound to enter the goods at the price they cost where they were purchased. On being examined at the custom house, the articles appeared to have been entered so much below the ordinary price of such goods, so much lower than goods which were imported in the same vessel, that the collector seized them and had them appraised, and several dealers in the article appraised these goods at 16,753 francs, being nearly 100 per cent. more than the price at which they were entered. This was the case for the United States.

Mr. Cutting opened the case for the claimants, and said: The district attorney has made observations of rather a singular character for the opening of such a case as this, in relation to which I shall make one or two remarks. The learned gentleman wishes you to believe that a great deal of odium or reproach has been cast on the custom house officers, and that you ought not, by your verdict, make that odium greater than it is. I came not here to cast odium on any person, but I came here to protect the character of respectable men, and I ask you, gentlemen of the jury, if you are bound to protect the custom house officers, are you not at least equally bound to protect an honest merchant from the imputation of perjury? Whether odium exists in relation to the custom house, I will not say, but I will say that when the whole public once form an opinion, such opinion is generally correct, and, if odium does exist, I must necessarily come to the conclusion that there was good cause for it. Mr. Hoyt may rest assured that if he acts fairly and correctly he will be fully sustained by the public, but if he prosecutes merchants, locks up their goods, puts them to unnecessary cost, trouble, and inconvenience, and drags them before a court and jury, and does it too often, public odium will most certainly and deservedly attach to him.

Mr. Cutting then stated that, notwithstanding the goods had been invoiced and entered at a price so much below the ordinary cost of such goods, it was nevertheless the actual price which the claimants paid for them. And in order to account for the articles having been purchased so low, it was stated that in the spring of 1837 the claimants sent an order to the house of Allamand, Freres & Herseut, of Paris, with whom the claimants had considerable dealings, to procure the articles in question, and forward them to this city, and that Allamand & Co. so far acted on this order as to procure the articles from Launay, Hauton & Co., glass manufacturers at Paris, who agreed to execute the order for 14,238 francs. In consequence of the then commercial embarrassments in this city, and also a considerable debt being due them by Morlot & Co., Allamand & Co. did not forward the goods, and retained them in their own possession. In September, 1838, R. Morlot was in Paris to settle the affairs of his house with Allamand & Co., who had the glass then in their possession, and who sold it to Morlot for 8,565 francs. Of the reduction thus made by Allamand & Co. from what the goods cost them they were allowed ten per cent. by the manufacturers, who deducted so much from the price, because they had not delivered the goods to Allamand & Co. in due time, and the remaining loss of 4 and 5,000 francs Allamand & Co. thought proper to submit to, in order not to have the goods lying on their hands, and therefore sold it to Morlot & Co. for 8,655 francs, being the price at which it was entered at this custom house.

In support of these allegations, the deposition of Allamand, taken at Paris, was read, and in this deposition he swore that his house sold Morlot the glass in question at the price at which it was entered at the custom house in New York, and that they did so as they had a large quantity of glass on hand. A deposition made by one of the firm of Launay & Co., the persons who manufactured the glass, was also read, which stated they were to have been paid 14,236 francs for the glass, but owing to peculiar circumstances they had taken 12,865 francs for it from Allamand & Co.

This was the case for the defendant. There was no evidence to show the exact time when Morlot & Co. ordered the glass from Allamand & Co., but the latter did not receive the glass now in question from the manufacturer until August, 1838, only a few weeks before they sold it to Morlot & Co.

BETTS, District Judge (charging jury). The issues upon the information are: (1) Whether the packages were made up with intent by a false valuation to evade and defraud the revenue, in this: that the goods, &c., cost the importer thereof a higher price than the prices set forth in the entry thereof at the custom house. (2) Whether the invoice was made up with intent, by a false valuation to evade and defraud the revenue, in this: that the goods, &c., were charged at a less price than they actually cost the importer thereof. (3) Whether the entry was made up with intent by a false valuation to evade and defraud the revenue, in this: that the goods were charged in the entry at a less price than they actually cost the importer.

The United States having given proof sufficient in the first instance to show that the invoice in this case was made up at a great undervaluation of the goods, and that undervaluation being so great as to well justify the jury in inferring that it was made with intent to evade the payment of duties which would have been chargeable on the market value, the claimants are put in a situation where they are required by the law to prove that they purchased the goods at the prices charged. The law subjects articles of this

description to an impost calculated upon their market value at the place where purchased; but the cost on a bona fide purchase is regarded as the true market value, and if the claimants establish by satisfactory evidence that the goods are invoiced at the actual purchase price, they will rescue them from seizure, however much such price paid may be below the current or standard value of the commodity in the foreign market. The reasonableness of the rule calling from the importer proofs to support his invoice is clearly illustrated by the evidence in this cause; for other goods of the same description purchased for cash by merchants here of the same house in Paris, and imported in the same vessel with those now under seizure, cost nearly 100 per cent. more than these are charged. The government, by permitting an invoice so circumstanced to pass unquestioned, would not merely accept of half less duties from one merchant than is exacted from another under precisely like circumstances, and thus give one an unreasonable advantage over the other in the home market, but would also promote endeavors in others to escape burdens which should be fair and equal to all. When claimants are put to proof on a charge like the present, the law gives this attitude to the case, that they are to substantiate the variety of the invoice by affirmed and clear proofs, admissible under the ordinary rules of evidence.

In this point of view, the affidavit of the claimants, attached to the entry, is of no avail and cannot be regarded as making evidence either directly or indirectly. It has no relevancy to the issue on trial, further than as a declaration of theirs which may be used as evidence against them, and was thus introduced by the United States to show that they imported and entered the goods as purchasers. The argument, that the jury must find that Mr. Morlot committed perjury, if they decide against his claim as purchaser of Allamand, is aside of the point on trial. The jury can have only regard to and weigh the legal evidence the claimants produce to support their claim, and their affidavit can have no more influence in considering this question than their mere assertions, without oath, could. It is not, therefore, in any sense, a question now to be investigated and decided, whether this oath is wilfully false or not.

The allegation on the part of the claimants is, that the goods were bought of the house of Allamand & Co., and the testimony of persons connected with the house is offered to establish the allegation. If there was nothing more in the case than the single transaction between the claimants and that house, of September 6th, upon which the goods were transferred to them, the jury would probably feel no hesitation in declaring it an actual purchase, and upon the terms stated; that is, if they give full credit to the testimony of Mr. Allamand. But proofs have been offered by the United States with a view to show that the goods at the time were really the property of the claimants, and had become such on the antecedent purchase of them made by Allamand & Co. This branch of the case is the only one giving complexity or difficulty to the subject.

It is for the jury to ascertain the facts upon a careful survey of the whole testimony. The court is only to state the law as applicable to the facts. The proposition of facts advanced by the respective parties are these: The United States insist that Allamand & Co. made the purchase of these goods of Launay & Co. in the character of factors or agents of the claimants, and that the price paid by the factors was the actual cost at which the goods should have been invoiced. The claimants insist that Allamand & Co. did not pursue the authority given them in making the purchase, and that therefore the goods became their own property; that, Allamand & Co. holding the goods as their own, the claimants had a right to deal with them for the purchase, and that the sum actually paid on such transaction was the cost price to the claimants, at a bona fide purchase, and that such price was the sum stated in the invoice. If the jury find that Allamand & Co. acted within their authority in making the purchase in behalf of the claimants, then, as between them, that was the purchase of the claimants; the goods became theirs, and their factors could compel them to pay the price agreed. The property was theirs in law, but still the factors might have the right to detain the goods until their advances or liabilities in the purchase were discharged. Still, though subject to a lien in this behalf, the goods could be regarded in law as purchased by the claimants and their property. If the jury further find that the property being so situated, was delivered over to the claimants upon a composition of the debt, the factors to receive so much as the principals were able to pay, this new arrangement as to payment would not vary the relationship of the parties, in respect to the property; it would be no new sale, the actual price, in contemplation of the law, being that agreed to by the factors on the original purchase, although the sum they ultimately collected and consented to receive of their principals in discharge of the debt was greatly less. In such case the goods ought to have been invoiced at that purchase price, and putting them down at the composition sum would be a false valuation, which may subject them to forfeiture. If the jury find that Allamand & Co. did not pursue the authority given them by the claimants in making the purchase of Launay & Co. by an unreasonable delay or postponement of it or otherwise, or if it be found that upon any facts subsequently occurring, the house of Allamand & Co. made this property their own, and had no legal right to compel the claimants to receive it, then, in law, the claimants could deal with them for a purchase on the same footing as with any other strangers,

and buying of them under such circumstances may be regarded an original purchase. In such case, the sum paid by the claimants would be the actual cost price; the sum so paid must be distinctly priced by the clerk. Numerous facts and circumstances resulting from the testimony at large have been adduced by the counsel for the respective parties, conducing to support the one or the other of these propositions of fact, all of which are entitled to the careful consideration of the jury. These goods are subject to forfeiture if the purchase from Launay & Co. was the true cost price, in respect to the claimants (although in the end they actually paid much less for them), and the invoice was made up at the lower price with a view to the rate of duties which goods should pay here. They are entitled to acquittal, if the transaction of September 6th with Allamand & Co. was the original purchase of the goods. Allamand & Co. selling as absolute owners, and the claimants buying, as having a free election to take the goods or not, without respect to their ability to fulfil any legal obligations subsisting between them and Allamand & Co. in regard to the goods.

Case No. 16,306.

UNITED STATES v. SIXTY-FOUR BARRELS DISTILLED SPIRITS.

[3 Cliff. 308.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1870.

FORFEITURES UNDER INTERNAL REVENUE LAWS—INNOCENT PURCHASERS — DISTILLED SPIRITS — DIVESTITURE OF TITLE—CONSTRUCTION OF STATUTES.

1. A purchaser of distilled spirits, ignorant at the time of the purchase that the spirits had been fraudulently removed from a bonded warehouse, or that the tax imposed thereon had not been paid, acquires his title only by such purchase, and if the property in the spirits claimed by the vendor had been absolutely forfeited to the United States before the sale, then the vendee can acquire no title; but where the verdict of the jury had established the fact of the innocence of the purchaser and claimant, the question is whether the goods had been forfeited to the United States before the contract of sale. The liability of the goods to forfeiture in such case must be deduced from the acts of the first owner and seller alone.

2. Forfeitures made absolute by statute relate back to the time of the commission of the wrongful acts prohibited by statute, and the title vests immediately in the government on the commission of the wrongful acts.

3. But where there is more than one remedy provided by statute, and the government has an election to proceed for the forfeiture or in some other way not involving a forfeiture, the title to the property does not vest in the United States prior to the seizure or performance of some act which amounts to such election.

4. Congress has the power to decide in what event a divestiture of title shall take place, and where the act declares without any election of remedies that forfeiture shall take place upon the commission of the wrongful act, the court must carry the provision into effect, even against innocent purchasers, where the title is consummated by seizure, suit, judgment, and condemnation.

5. Where the language is doubtful, resort must be had to the ordinary rules of construction, and the rules of the common law applicable to the subject of forfeiture.

6. The title of the wrong-doer remains unaffected by his wrongful acts until suit, seizure, and judgment or decree, but where the act of congress so provides, and there is no election of remedies, the judgment or decree divests his title from the date of the wrongful acts.

7. Section 45 of the act of July 13, 1866 [14 Stat. 163], provides that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may immediately upon discovery be seized, and after the assessment of the tax thereon be sold by the collector for the tax and expenses of seizure and sale." *Held*, that under this statute the judgment or decree only relates back to the date of the seizure, and does not overreach the title of an innocent purchaser acquired subsequent to the date of the wrongful acts and before the seizure.

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

Provision is made by section 45 of the act of July 13, 1866, that "all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may immediately upon discovery be seized, and after the assessment of the tax thereon be sold by the collector for the tax and expenses of seizure and sale." 14 Stat. 163. Pursuant to that enactment, the libellant alleged, in the first count of the information, that the internal-revenue collector for the third collection district in this state on April 26, 1867, did, at Boston, in this judicial district, seize on land, as forfeited to the United States, sixty-four barrels of distilled spirits found on the 28th of April in the same year in a certain store and building therein described. And the libellant further alleged that the goods so seized were distilled spirits; that they had been manufactured in the United States since January 1, 1865; that an internal-revenue tax was, and since the goods were so manufactured had been, by law imposed on the same; that the goods so seized in the store and building aforesaid were found elsewhere than in a bonded warehouse; that they had not been removed from any bonded warehouse according to law; and that the tax so imposed by law on the same had not been paid, nor any part of the same, when the goods were so found and seized.

Two other counts were also contained in the information, founded on another provision enacted by congress (14 Stat. 111; 13 Stat. 240). This provision reads as follows:

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

That goods on which taxes are imposed by law if "found in the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal-revenue laws, or with (the) design to avoid (the) payment of said taxes, may be seized by the collector, . . . and the same shall be forfeited to the United States." When the information was filed it contained four counts, but the fourth was discontinued, and a new one was filed in its place by leave of court, which was the fourth count in the series as at present numbered.

Omitting unimportant words, the last three counts alleged in substance and effect, that the goods in question were distilled spirits manufactured in the United States; that on the day and year aforesaid they were found by the said collector in the store and building aforesaid; that the goods were then and there within the control of the claimant [John E. Cassidy] for the purpose then and there entertained by him, of being sold and removed in fraud of the internal-revenue laws of the United States, and with the design of avoiding the payment of the taxes imposed on the same, which then and there remained due and wholly unpaid.

Monition was duly issued and served, and the claimant appeared, and alleged, in due form, that he, at the time of the seizure, was and still was the lawful and sole owner and proprietor of the goods seized, of which he offered due proof. Two pleas were subsequently pleaded by the claimant: (1) That the goods in question did not, nor did any part thereof, become forfeited to the United States in manner and form as in said information was alleged. (2) That the sixty-four barrels of distilled spirits did not become forfeited, as alleged, because the same after their manufacture had been in a bonded warehouse, and that the same had been removed from that depository in due form of law; that after the same were so removed from the bonded warehouse, they were rectified and inspected by a government inspector, and were duly marked as required by law; and that the same were subsequently offered for sale in open market; and that he, without any knowledge, information, or belief that the same were not properly and rightfully so offered for sale, or that there was any tax due and unpaid to the United States upon the same, bought the said sixty-four barrels of distilled spirits and paid for the same their full, just, and marketable value; all of which, as he alleged, he was ready to verify. Issue was joined upon the first plea, and to the second the libellant filed a general replication, affirming that all the allegations of the information were true, and tendering an issue which was duly joined by the claimant. Both pleas therefore terminated in issues of fact, and the jury under the instruction of the court returned a verdict for the claimant. [Case unreported.] Exceptions were tendered by the district attorney, and the same were duly allowed and sealed, and the questions examined and decided were those saved in the bill of exceptions, and brought into the court by the writ of error sued out by the United States.

Evidence was introduced tending to show that several hundred barrels of distilled spirits manufactured within the United States were deposited in certain bonded warehouses in the third internal-revenue collection district in this state; that a tax was imposed on the same under the internal-revenue laws of the United States which had not been paid; that the same were withdrawn from that depository upon application made in due form to the collector of that collection district, the applicants giving bonds in due form for the alleged purpose, in certain cases that the spirits were withdrawn for rectification, and in other cases that the spirits were withdrawn for the purpose of transportation to some port or place in another state, and for exportation from thence to some foreign country. None of the applications, however, were made by the claimant, nor did he execute any of the bonds or cause them to be executed, but the bonds were accepted by the collector, and he granted permits in due form, as in case of withdrawal for rectification or for transportation to another state. All of the bonds were false and fraudulent, and none of the spirits were ever returned as stipulated, nor were the same or any part thereof ever transported to another state or to any foreign country. On the contrary, the spirits were removed and sold for consumption within the United States, and barrels filled with water were attempted to be transported in their place, and all the spirits were consumed in this country without paying the taxes, in violation of the internal-revenue laws passed by congress. Such of the spirits as were in controversy in this case were found by the collector in the store and building described in the information. They were in the actual possession of other parties, but the bill of exceptions showed that they had been placed there by the direction of the claimant, were under his control, and were intended to be sold and removed, and that the building was neither a bonded warehouse nor a distillery. Some evidence was also introduced tending to show that the spirits in question were a portion of the spirits fraudulently withdrawn from the bonded warehouses as aforesaid, and that the claimant received the same from one of the persons who executed the false and fraudulent bonds, or procured them to be executed, and that the claimant not only knew that the spirits had been thus fraudulently removed from the public depositories, and that the taxes had not been paid thereon, but that he participated in the fraudulent acts by which the removal was effected, and also in the fraudulent attempt to transport water instead of the spirits to another state, and that

he held the spirits in possession for the purpose of removal and sale. All such participation and knowledge were denied by the claimant, and he introduced evidence tending to show that he purchased the spirits innocently, and for value and in good faith, at their full market value, that he had no knowledge that the spirits had been fraudulently withdrawn from the bonded warehouses, or that the taxes had not been paid. Rebutting evidence was introduced by the libellant as to the market value of the spirits, and the bill of exceptions shows that the claimant admited that the price paid, the spirits being greatly above proof, was less per gallon than the tax imposed and unpaid.

Two instructions were given by the court to the jury at the request of the claimant, to which the district attorney excepted:—That if the spirits were removed from a bonded warehouse upon bonds in the form prescribed by law, then the facts that such bonds were signed by irresponsible parties, and that the same was known by the party who withdrew the spirits and intended to commit the fraud, do not render the spirits liable to forfeiture in the hands of an innocent purchaser. That if the spirits were fraudulently withdrawn as aforesaid, but in the form prescribed by law, and the claimant was not a participant in the fraud, and purchased the spirits in good faith without knowledge of the fraud, then he acquired a good title, and the spirits cannot be forfeited. Prayers for instructions were also presented by the district attorney in substance and effect as follows: That if the spirits were found elsewhere than in a bonded warehouse, and not in a distillery, and had been removed from such a depository upon permits authorizing the removal for rectification or for transportation, issued upon the execution of false and fraudulent bonds, in form such as were required by law, and if the tax imposed on the spirits had not been paid, then the spirits are subject to forfeiture under the first count, even though the claimant may have purchased the same innocently and without any participation or guilty knowledge of the fraudulent removal or that the tax had not been paid. That the spirits having been found as shown in the evidence, the burden is upon the claimant to satisfy the jury that the tax imposed by law on the same had been paid, and that if he fails so to do, the verdict on the first count must be for the United States. That if the claimant purchased the spirits at a less price than the tax as imposed by law, and if the spirits had actually been fraudulently removed from a bonded warehouse as aforesaid, and if the tax imposed by law thereon had not been paid, then the said spirits were subject to forfeiture under the first count in the information. That if the claimant purchased the spirits at less price than the tax imposed by law thereon, the fact of such purchase under such circumstances "must be in law taken" as notice that the spirits had not been removed from a bonded warehouse according to law, and that the tax imposed thereon had not been paid, if in fact the spirits had been fraudulently removed from such a depository as aforesaid, and if in fact the tax imposed by law on said spirits had not been paid.

The court refused to give the instructions as requested, and instructed the jury, among other things, in substance and effect as follows: That if the spirits were fraudulently removed from the bonded warehouse, as aforesaid, for the alleged purposes aforesaid, but were really withdrawn for sale and consumption, and if the tax imposed by law on such spirits had not been paid, the spirits would be liable to forfeiture under the first count in the hands of the person who committed the fraud, or of any person who aided in committing it or connived at it, or of any purchaser who held the spirits for sale and consumption, and who bought the same with actual knowledge of the fraud. Just exception, it was conceded, could not be taken to that part of the charge, but the court in the same connection instructed the jury that the spirits under the circumstances therein assumed would not be liable to forfeiture if in the hands of an innocent purchaser for value without notice. Certain instructions were also given by the court as to the burden of proof, but as those rulings were not the subject of complaint, the instructions are omitted. That the purchase of the spirits at a less price per gallon than the amount of the tax was not in itself a ground of forfeiture, nor was it in law to be taken absolutely as notice to the purchaser that the spirits had been illegally removed, and that the tax on them had not been paid; that the purchase in that state of the case was a circumstance of suspicion, and that such a circumstance was to be considered by the jury in connection with the other evidence in determining whether or not the claimant, as such purchaser, had actual knowledge of the fraud at the time he bought the spirits. Reference need not be made to the single instruction reported as given, applicable to the other counts, as it was conceded by the district attorney that the point intended to be raised by the exception was not open, as the jury found that the claimant purchased the spirits without knowledge of the fraud or that the tax imposed thereon had not been paid.

W. A. Field, Asst. U. S. Dist. Atty.

J. W. Richardson and M. W. Paine, for claimant.

CLIFFORD, Circuit Justice. Viewed as an innocent purchaser for value without notice that the spirits had been fraudulently removed from the bonded warehouse, or that the tax imposed thereon had not been paid,

as the claimant must be in this investigation, the single question presented for examination and decision is, whether the spirits under the circumstances disclosed in the bill of exceptions were liable to forfeiture at the time the same were seized by the internal-revenue collector for the third collection district. Whatever title to the spirits in controversy the claimant had at the time the same were seized, he acquired by purchase, and if the property in the spirits claimed by his vendor was absolutely forfeited to the United States before he purchased the same, then he acquired nothing by his bargain; but if the title of his vendor was valid at the time of the sale, then the spirits were not liable to forfeiture at the time of the seizure, as the verdict of the jury establishes the fact that the claimant is an innocent purchaser for value, without notice that the spirits had been fraudulently removed from the bonded warehouse, or that the tax imposed thereon had not been paid, as alleged in the information.

Examined in that point of view, as the case must be, it is apparent that the liability of the spirits to forfeiture in this case must be deduced, if at all, from the acts of the former owner and not from the acts of the claimant, as every charge against him is negatived by the verdict of the jury. "Distilled spirits found elsewhere than in a bonded warehouse not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited." 14 Stat. 163. Had the provision stopped there, it is quite clear that the forfeiture would have been absolute, and that the spirits might be subsequently seized for that purpose, as well after the same had passed into the hands of an innocent purchaser as while the spirits remained in the hands of the perpetrator of the fraud. Forfeitures made absolute by statute relate back to the time of the commission of the wrongful acts which the statute prohibits. Where the forfeiture is absolute the title to the thing forfeited vests immediately in the government, but where more than one remedy is given, and the government has an election to proceed for the forfeiture or in some other way not involving a forfeiture, the title of the property does not vest in the United States prior to the seizure or the performance of some other equivalent act which amounts to such an election. U. S. v. Grundy, 3 Cranch [7 U. S.] 338; Roberts v. Wetherall, 1 Salk. 223; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246. Differences of opinion existed at one time among the justices of the supreme court, whether a forfeiture for the violation of the revenue laws ever gave such a title to the United States as to overreach a bona fide sale to an innocent purchaser when made before seizure and suit for condemnation, but the majority of the court adopted the affirmative of that proposition. U. S. v. Bags of Coffee, 8 Cranch [12 U. S.] 404; The Mars, Id. 417; Confiscation Cases, 7 Wall. [74 U. S.] 460. Congress possesses the power to decide in what event a divestiture of title in such a case shall take place, whether on the commission of the offence, the seizure, or the condemnation; and where the act of congress declares in terms without any qualification or election of remedies that that forfeiture shall take place upon the commission of the offence, it becomes the duty of the court to carry the provision into effect even as against innocent purchasers, in cases where the title is consummated by seizure, suit, and judgment, or decree of condemnation. Such is the settled rule of law where the forfeiture is made absolute upon the commission of the offence; but in all cases where the language employed by congress is doubtful, it is manifestly proper to resort to the ordinary rules of construction and to the rules of the common law applicable to the subject of forfeiture to assist the mind in coming to a conclusion. Forfeiture, it is said, in the former case, is absolute; but the remark should be received with some qualification, as the title only vests in the United States by relation back to the criminal offence in case where it is consummated by seizure, suit, and judgment or decree. Unless the matter is prosecuted and the title consummated, the act of congress becomes imperative, as the title of the wrong-doer remains unaffected by his wrongful acts until seizure, suit, and judgment or decree, but the effect of the judgment or decree is to divest his title from the date of the wrongful acts. U. S. v. Fifty-Six Barrels Whiskey [Case No. 15,095]; The Florenzo [Id. 4,886].

Grant all that as applied to the clause of the section declaring the forfeiture if it stood alone and without any qualification, but the same section contains an alternative clause, as appears by the next sentence, which provides as follows: "Or (such distilled spirits) may immediately upon discovery be seized, and after the assessment of the tax thereon may be sold by the collector for the tax and expenses of seizure and sale." Read together, as the two clauses must be, their true construction is as obvious as any enactment well can be which is expressed in clear and unambiguous language. Such spirits when found elsewhere than in a bonded warehouse, if the same have been illegally removed from such a public depository without the payment of the tax imposed by law on the same, may be seized as forfeited to the United States, or the proper officer of the revenue may seize the same under the immediately succeeding clause of the section, and in that event it becomes the duty of the assessor to assess the tax on the same imposed by law, and of the collector to sell the spirits for the tax and expenses of seizure and sale, as expressly provided by the closing paragraph of the sentence. Where the forfeiture is absolute, the entire title of the

wrong-doer, when the judgment or decree is rendered, vests in the United States from the date of the wrongful act; but if the forfeiture is made conditional, as, for example, if the United States may elect to proceed by information for a forfeiture or for some other redress not amounting to an absolute forfeiture of the spirits, then the judgment or decree only relates back to the date of the seizure, and does not overreach the title of an innocent purchaser acquired subsequent to the wrongful act of the seller and before the seizure of the spirits, if the purchase was bona fide for value and without notice of the wrongful acts of his vendor. Caldwell v. U. S., 8 How. [49 U. S.] 366; Confiscation Cases, 7 Wall. [74 U. S.] 460; U. S. v. Grundy, 3 Cranch [7 U. S.] 352; U. S. v. Morris, 10 Wheat. [23 U. S.] 290. Extended remarks to show that the United States in cases arising under the section on which the information in this case is founded, are quite unnecessary, as the express words of the second clause referred to are, that as an alternative remedy the spirits may immediately upon discovery be seized, and after assessment of the tax thereon may be sold, by the collector for the tax and the expenses of the seizure and sale.

Proceedings under that clause are instituted and prosecuted to enforce a lien created by an act of congress, and the very nature of the proceeding concedes that the title to the spirits seized is still in the wrong-doer, and it is as clear as anything well can be that he is entitled to what remains of the proceeds of the sale after deducting the tax, interest, and expenses, as there is no authority to sell the property for any other purpose. Evidently these considerations dispose of all the exceptions exhibited in the record except the one in the instruction given, which is applicable to the other counts, and in respect to that no further remarks are required, as it is conceded that the point is not open under the finding of the jury.

Judgment affirmed.

Case No. 16,307.

UNITED STATES v. SIXTY-NINE BARRELS OF RUM.

[2 Int. Rev. Rec. 45.]

District Court, S. D. New York. Aug. 1, 1865.

INTERNAL REVENUE—SEIZURES FOR FORFEITURE—RELEASE ON STIPULATION.

[The courts have no power, under the act of 1864 (13 Stat. 223), to release on bond or stipulation goods seized for forfeiture under sections 48 and 68. The power of granting relief in such cases is conferred by the act upon other officers than the judges of the courts.]

[This was an information of forfeiture against sixty-nine barrels of rum, and certain spirits, materials, and articles seized by the revenue officers.]

Proceedings having been instituted in May last, to forfeit the rum, etc., above mentioned, under sections 48 and 68 of the internal revenue act of 1864, the application referred to in the following decision was made, on the ground that the mode of bonding goods provided in section 88 of the collection act of 1799 [1 Stat. 695], as well as the other proceedings provided for in that section, was a part of the practice of this court in internal revenue cases.

THE COURT was moved on the part of the claimant by counsel on the 29th of July last, for an order that the claimant have restored to him the property above mentioned, seized and described in the information filed in this court in the above entitled cause, upon filing stipulations for the value of the same, with sufficient sureties, etc.

The United States attorney opposes the motion on the ground that the act of congress, approved June 30, 1864, "To provide internal revenue to support the government, to pay interest on the public debt, and for other purposes" (13 Stat. 240, § 48), has conferred upon other officers than the judges of the circuit and district courts of the United States jurisdiction over the relief applied for to this court by this motion.

That objection appears to THE COURT well founded. The present application must accordingly be denied, with costs.

F. Byrne, for the motion.
J. G. Courtney, U. S. Dist. Atty.

Case No. 16,308.

UNITED STATES v. SKAM.

[5 Cranch, C. C. 367.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

PENSIONS — RIGHTS OF ILLEGITIMATE CHILDREN — MARRIAGE OF PARENTS—PERJURY.

1. An adopted child is not entitled to a pension. But an illegitimate female child, if her parents afterwards intermarry, and the husband acknowledge the child, becomes legitimated by the law of Maryland of 1786 (chapter 45, § 7) and entitled to a pension under the laws of the United States, if her father dies in the naval marine service of the United States, and the mother marries again.

2. The intermarriage, and the acknowledgment of the child by the husband, are prima facie evidence that he was the actual father of the child; and if he begot the child, it was not perjury in the witness to swear that the child was the legitimate heir and only child left by the deceased husband.

Indictment for perjury. The perjury was assigned in a joint affidavit made by the defendant and one Jane Berkemer, who, in order to obtain from the United States a

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

pension for one Mary Ann Thomas, as the child of one Orral T. Thomas, (a marine who died in the service of the United States,) made oath before a justice of the peace in Washington that they are well acquainted with Mary Ann Thomas, and know her to be the legitimate heir and only child left by the said Thomas, whereas the defendant then and there knew and believed that the said Mary Ann Thomas was not the child of the said Orral T. Thomas.

By the Maryland law of 1786 (chapter 45, § 7), "if any man shall have one or more children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated, and capable in law to inherit and transmit inheritance, as if born in wedlock."

Evidence was produced by the defendant that the said Orral T. Thomas married the mother about a year after the birth of the child, and received and maintained the child, and called her his child, and suffered her to call him father, and to be called by his name, namely, Mary Ann Thomas.

THE COURT, upon the trial, (THRUSTON, Circuit Judge, absent,) at the motion of Mr. Key, the district attorney, instructed the jury: "That if they believe from the evidence, that Mary Ann Thomas, mentioned in the affidavit, was the child of Ann Alford, (the wife of the said Orral T. Thomas, and who after his death intermarried with one Alford); that said child was born about twelve months before her marriage with the said Orral T. Thomas; that the said Thomas was not the father of the said child; but that after the marriage he adopted the said child, and allowed it to take his name,—then such child, under the circumstances proved in this case, would not be entitled to claim a pension under the act of congress." Act March 4, 1814 (3 Stat. 103). But THE COURT also instructed the jury, "that the facts, that the said Orral T. Thomas married the mother of the said Mary Ann after her birth, and received and maintained the child as his own, and called her his child, and suffered her to call him father, and to be called by his name, if believed by the jury, were evidence, from which, if not contradicted by other evidence, the jury may infer that she was begotten by the said Orral T. Thomas."

Mr. Key then prayed the court to instruct the jury, "that if the prisoners" (both affiants being upon their trial) "knew, or believed that the said Mary Ann Thomas was not begotten by the said Orral T. Thomas, then their affidavit is false; and if they made the oath knowingly, and the affidavit was correctly read over to them, then such taking such oath is perjury."

But THE COURT refused to give the instruction.

Verdict, not guilty.

Case No. 16,309.

UNITED STATES v. SKINNER et al.

[1 Brunner, Col. Cas. 446;[1] 2 Wheeler, Cr. Cas. 232.]

Circuit Court, D. New York. 1818.

CRIMINAL PROSECUTIONS — AUTHORITY FOR COMMENCEMENT—INTERNATIONAL LAW—PRIVILEGES OF FOREIGN MINISTER—NEUTRALITY LAWS.

1. No instruction or official authorization is required for the institution of a criminal prosecution; any citizen may complain of an infraction of the law, and it is the duty of the judge to issue a warrant.

2. The privileges of a foreign minister are not extended to a person having a commission from a revolutionary government not acknowledged by the United States.

3. The fitting out or arming of a vessel with illegal intent, though that intent appear to have been defeated after the vessel sailed, will constitute a breach of the neutrality laws. It is not necessary that the vessel illegally fitted out should be armed, or in condition to commit hostilities on leaving the United States.

The facts of this case appeared as follows: Judge Livingston issued warrants against Captain Skinner, Don Manuel H. Aguirre, and Mr. Delano, for "knowingly being concerned in the furnishing, fitting out, or arming, in the port of New York, two ships, called the Curiazo and Horatio, with the intent that they should be employed in the service of some foreign prince or people, to cruise or commit hostilities against the subjects of some other foreign prince or state, with whom the United States are at peace." These warrants were issued under the third section of the act passed at the last session of congress, "for the punishment of certain crimes against the United States," and which is in the words following:—"Sec. 3. Be it further enacted, that if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property, of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and

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

equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States." 2 Bior. & D. Laws, 426 [1 Stat. 383].

The counsel for the defendants moved to have their clients discharged altogether; or, if held to bail, they insisted that they should, under all the circumstances of the case, be recognized to appear at the next term of the circuit court, in a very small sum. This motion was made on three grounds:—(1) That as the prosecution had been commenced without any directions on the part of the government, or application by the district attorney, it was irregular in its inception, and ought to be immediately discontinued. (2) That Mr. Aguirre (to whose case alone this ground applied) was a minister from the government of Buenos Ayres to that of the United States, and could not, therefore, be proceeded against in this way. (3) That to constitute an offense against the third section of this act, the vessels must not only have been fitted out with intent to be thus employed, but actually armed for that purpose; and many depositions were produced, proving that neither of the vessels were or ever had been armed.

Emmett, Wells & Soughton, for prosecution.

Mr. Hoffman, D. B. Ogden, Mr. Burr, and Mr. Palmer, for defendants.

After an argument of these points by the respective counsel, LIVINGSTON, Circuit Justice, decided:

First. That no instructions were necessary on the part of the president, or any other officer of government, to justify the issuing a warrant for the violation of this or any other law; nor had the president any right to interfere with the proceedings which had been commenced in this case, by giving any instructions to him on the subject. Nor was it necessary that the application for a warrant should be made by the district attorney, as any individual might complain of the infraction of a law, and he considered it his duty to award a warrant whenever complaint was made to him on oath of a crime's being committed, whether such warrant were applied for by the district attorney or any other person.

Second. As to any privilege which Mr. Aguirre's commission conferred on him, the judge was of opinion that this gentleman, not being accredited by the president, and the independence of Buenos Ayres not being acknowledged by the government of the United States, he was liable to be proceeded against for any offense which he might commit against our laws, in the same way as any other individual.

On the third point, the judge thought no offense could be committed against the third section of the act, unless the vessel was armed, as well as fitted out with intent to be employed, etc. That it does not appear by any part of the act that congress intended to prohibit the citizens of the United States from building vessels and selling them to either of the belligerents, so long as they were not armed. In the case of a principal, it was clearly necessary, by the very terms of the law, to render him criminal, that the vessel should be fitted out and armed. Those, therefore, who were knowingly concerned in the furnishing, fitting out, or arming of such ship or vessel, must also be considered as innocent, until an actual armament took place, or this absurdity would result, that one man might have a vessel built and fitted out for this purpose without being guilty of any offense, while the whole penalty of the law might be incurred by a person who should furnish her with a single suit of sails, or a cable. As it respected the evidence of an armament, the depositions on which the warrants had issued were not only either altogether silent, or quite insufficient to prove the fact; but those on the part of the defendants established, beyond controversy, that neither of the vessels, although no doubt built for warlike purpose, had ever been armed.

LIVINGSTON, Circuit Justice, was therefore of opinion, that neither of the parties arrested had committed any offense, and ordered them all to be discharged.

Case No. 16,310.

UNITED STATES v. The S. K. KIRBY.

[Cited in The Daniel Ball, Case No. 3,564. Nowhere reported; opinion not now accessible.]

Case No. 16,311.

UNITED STATES v. SLACUM.

[1 Cranch, C. C. 485.] [1]

Circuit Court, District of Columbia. July Term, 1808.

CRIMINAL LAW — STATUTE OF LIMITATIONS — ASSAULT AND BATTERY.

1. The act of congress of April 30, 1790, § 32 [1 Stat. 112], which limits the prosecution of offences not capital to two years, applies to cases of assault and battery at common law in the District of Columbia.

[Cited in U. S. v. Six Fermenting Tubs, Case No. 16,296.]

2. The finding of an informal presentment is not the finding or instituting of the indictment, so as to take the case out of the statute.

Indictment for assault and battery. The defendant pleaded the act of congress of April, 1790 (1 Stat. 112), by which prosecutions are limited to two years, after the offence committed. Replication that a presentment was found for the offence within the two years. General demurrer.

Mr. Swann, for defendant. The words of the act are: "Nor shall any person be prose-

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

cuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid." The supreme court of the United States, in the case of Adams v. Wood, 2 Cranch [6 U. S.] 336, decided that the statute was a bar to all kinds of prosecution and for offences created by acts of congress since 1790.

Mr. Jones, U. S. Atty. for the District of Columbia, contended that the act of congress applies only to offences created by acts of congress, not to cases of assault and battery at common law. At the time of passing the act of limitation, there were no crimes against the United States, but statutory crimes. "Instituting" an indictment, is as appropriate as "finding" an indictment. The presentment was the institution of the indictment. A presentment is tantamount to an indictment. An indictment is only a specification of a presentment. "Instituted" is a broader term than "found."

Mr. Swann, in reply. The general acts of congress apply to this district, unless repugnant to the adopted laws of Virginia. Assault and battery is included in the act of congress, and is within the reason of the cases mentioned in the act. If an informal presentment of a grand jury may be said to be the institution of an indictment, the act might be completely evaded.

THE COURT (DUCKETT, Circuit Judge, absent) was of opinion that the act of congress applied to cases of assault and battery; that the finding of a previous presentment was not the finding nor institution of the indictment; that the act of congress was a good bar to the prosecution; and that therefore the replication was bad.

Case No. 16,312.

UNITED STATES v. SLADE.

[2 Mason, 71.] [1]

Circuit Court, D. Massachusetts. May Term, 1820.

EXECUTION—EXTENT UNDER MASSACHUSETTS STATUTE—APPRAISEMENT—RETURN.

1. An extent under the statute of Massachusetts of 1784, upon real estate is not good, unless it appear by the return that all the appraisers are sworn—nor unless all the appraisers concur in the appraisement.

[Cited in Koning v. Bayard, Case No. 7,924.]

[Cited in Wilcox v. Emerson, 10 R. I. 276.]

2. But it is not necessary to the validity of the levy, as between the parties and their privies, that they should be recorded within the three months prescribed by the statute; nor that a certificate of the appraisement should be made and signed by the appraisers. It is sufficient that the officer's return contains all the facts necessary to make the levy valid.

[Cited in Howard v. North, 5 Tex. 290.]

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

Writ of entry counting on the seisin of the United States within twenty years, and a disseisin by the tenant [William Slade]. Plea, nul disseisin. At the trial, the title of the United States appeared to be under an execution dated the 10th of April, 1805, and issued on a judgment recovered by the United States against one John Bowers, the owner of the land, at the March term of the district court of Massachusetts district, A. D. 1805. The levy was made by the marshal of the district, on the 13th day of May, 1805, and was duly returned into the clerk's office, but was not recorded in Bristol county, where the land lies, until the 29th day of September, 1818. The marshal's return stated in substance that he had levied the execution on the land, the reversion of which was the property of Bowers, describing its boundaries; that he caused three discreet and disinterested men, freeholders of the said county, one chosen by the United States, (the creditor,) one chosen by Bowers, (the debtor,) and one by the marshal, to be sworn before one of the justices of the peace for the same county, faithfully and impartially to appraise such real estate as should be shewn to them, as by the justice's certificate on the same execution appeared; who appraised the land at $1582 45, to satisfy the execution and all fees; and that he delivered seisin and possession of said estate to H. B. in behalf of the United States. There was no certificate by the appraisers that they were freeholders, or of their appraisement, or of their doings on the premises. It was further proved that Bowers was entitled to the reversion in the land subject to an estate in dower, which had now expired.

William Sullivan, for the tenant, contended that the execution was not well levied on the demanded premises: (1) Because there was no return or certificate by the appraisers, the return of the officer not being sufficient for that purpose. (2) Because the execution was not recorded in the county where the land lies, within three months after the levy. But the court overruled both objections, reserving the points for further consideration, if the verdict should be against the tenant, and suffered the papers to go to the jury. The tenant then claimed title to the demanded premises on a judgment recovered by himself against Bowers, at the October term of the court of common pleas, of Bristol county, 1809, and a levy on the execution, issued thereon on the 9th of the ensuing November, which was duly recorded within three months. The return was signed by two of the appraisers only, and no reason was assigned on the return for this omission. But by a deposition of the third appraiser, offered in evidence by the tenant, it appeared that he refused to join in the appraisement, thinking it too low. It further appeared on the return, that but two of the appraisers were sworn, and the third was affirmed.

Mr. Blake, U. S. Dist. Atty., objected to the tenant's title for both reasons, viz.: (1) That

all the appraisers were not sworn. (2) That the return was not signed by all of them, or some reason assigned for the omission. The objections were sustained by the court; and a verdict was taken for the plaintiffs, subject to the opinion of the court upon the points made at the trial.

And now W. Sullivan, having previously moved for a new trial, and the case coming on for argument, admitted that upon examination of the authorities he could not sustain his objections to the plaintiffs' levy; but he endeavoured to maintain the sufficiency of the tenant's levy, supposing that a record within three months was indispensable to the title of the plaintiffs, as against other purchasers. He cited on the subject, Norcross v. Widgery, 2 Mass. 506; Pidge v. Tyler, 4 Mass. 541; Farnsworth v. Childs, Id. 637; Williams v. Amory, 14 Mass. 20.

Mr. Blake cited the following additional authorities: Eddy v. Knap, 2 Mass. 154; Ladd v. Blunt, 4 Mass. 402; Tate v. Anderson, 9 Mass. 92; Whitman v. Tyler, 8 Mass. 284; McLellan v. Whitney, 15 Mass. 137.

STORY, Circuit Justice. The statute of Massachusetts of the 17th of March, 1784, enacts, that when any judgment creditor shall think proper to levy his execution on his debtor's real estate, the officer to whom it is directed shall cause three disinterested and discreet freeholders in the county where the land lies, one to be chosen by the creditor, one by the debtor, and a third by the officer; and in case the debtor shall neglect or refuse to choose, the officer shall appoint one for the debtor, to be sworn before a justice of the peace for the county, faithfully and impartially to appraise such real estate as shall be shewn to them, to satisfy the execution, and shall set out such estate by metes and bounds, and the officer shall deliver seisin and possession to the creditor. And the statute then declares: "Which execution being returned with the doings thereon into the clerk's office, and before such return into the clerk's office or afterwards, and within three months, the same shall be recorded in the registry of deeds in the county where the land lies, shall make as good a title to such creditor or creditors, his or their heirs and assigns, as the debtor had therein."

In questions of local law, and in the interpretation of state statutes, it is a great relief to my mind, when I am able to resort to decisions already made by state tribunals, instead of being myself compelled to give a construction to them for the first time. The courts of the United States in cases of this sort, have invariably adhered to the state decisions, without entertaining any question as to their original propriety, whenever there has appeared a fixed and unequivocal rule for their guidance. And this has been done not only from a spirit of comity; but also from considerations of public policy, and public interest. If it be of importance that there should be an end of litigation, it is not of less importance, that the rules by which private rights are to be ascertained, should be uniform and consistent; and that our citizens should not be delivered over to endless doubts from conflicting jurisdictions.

When this case was first opened, impressed as I was with the uniformity of the practice in the county where I was bred, to include in the return of every levy of real estate, a certificate by the appraisers, of their doings, it struck me that there was a good deal of weight in the objection urged at the bar on this point against the title of the United States. It was then suggested, that the objection had been expressly overruled in the state courts. The case alluded to is Williams v. Amory, 14 Mass. 20, where the point was directly decided; and I am entirely satisfied with the reasons, upon which the decision is founded. The first objection, therefore, to the title of the United States, is untenable. And the second objection, that the levy was not recorded in the registry of deeds within the time prescribed by the statute, must in like manner be abandoned, for as between the parties to the execution it has been settled to be immaterial (McLellan v. Whitney, 15 Mass. 137; Ladd v. Blunt, 4 Mass. 402), and unless the tenant can shew a good title in himself, he cannot contest that of the United States.

We are driven therefore to consider the sufficiency of the title of the tenant as an execution creditor. And it appears to me, that both of the objections taken to that title by the counsel for the United States, are fatal. The general rule is, that where the party takes by a statute extent, or title on record, every thing essential to that title must be apparent upon the record. The statute expressly requires that the appraisers shall be sworn, and here one of them was merely affirmed. No such substitution is authorised by the terms of the act; and it is not for courts of justice to supply the defect.[2] In the next place, two only of the appraisers concurred in the appraisement, and no reason is assigned for the nonconcurrence of the third. The act requires the appraisement to be made by all the appraisers; and I am not aware that it has ever been held that an appraisement by two only, is under any circumstances valid. If the appraisement be made by all, though the certificate thereof be signed only by two, it may be good, if a good reason be stated for the omission, such as the death of the third appraiser. I mean to confine this language to cases where the certificate forms a part of the return, and may be referred to to correct any ambiguity in the return; for as it is now settled that

[2] The statute of February 28, 1811 (chapter 127), has authorized an affirmation instead of an oath to be made by Quakers, before they enter on the discharge of any office, place or business, or on any other lawful occasion, where an oath is required. The levy in this case was before that statute.

the certificate of the appraisers is unnecessary; if the return of the officer be otherwise sufficient, the terms and signing of the certificate become altogether immaterial. It is in this way that I understand the doctrine laid down in Whitman v. Tyler, 8 Mass. 284; otherwise it would be inconsistent with that held in Williams v. Amory, 14 Mass. 20. Parol proof cannot be admitted to show that the third appraiser did concur, for it must appear by the return of the officer. And if it could be admitted, his own deposition, now in court, would prove that he never did concur in the appraisement, (as indeed is necessarily to be inferred from the return itself) but dissented for a sufficient cause, viz. that the appraisement, was too low in value, a cause however which destroys the levy; for an appraisement by two appraisers only is, as I conceive, a mere nullity. For both causes, therefore, the extent of the tenant conveyed no title to him in the land in question, it being in substance defective.

Judgment for the United States.

Case No. 16,313.

UNITED STATES v. SLAYMAKER.

[4 Wash. C. C. 169.] [1]

Circuit Court, D. Pennsylvania. Oct., 1821.

EJECTMENT—WRIT OF POSSESSION—ALIAS WRIT—RESISTANCE TO EXECUTION.

1. The defendant cannot rule the marshal to return a habere facias possessionem, although the plaintiff may do so.

2. If after plaintiff is put into possession under a habere facias possessionem, he is turned out by the defendant, he may, upon suggesting vice comitatus non misit breve, obtain an attachment, or an alias habere facias. Aliter, if he is turned out by a stranger.

3. If the first writ be returned executed, plaintiff cannot issue out an alias. If the writ, though executed, has not been returned, and an alias issues on the suggestion of the plaintiff, resistance to such writ is an offence. Aliter, if the first writ had been returned.

4. The habere facias possessionem cannot be executed after the return day, and if it be attempted, resistance to it is no offence against the act of congress.

Indictment for resisting the execution of a habere facias possessionem issued from this court, returnable to the 11th of April, 1821. The writ is set out in the indictment in hæc verba. It appeared in evidence, that an alias habere facias possessionem issued on the 4th of May last, returnable to the first day of the present term, upon a suggestion of the plaintiff, "vice-comes non misit breve." The deputy marshal, to whom the writ was delivered to be executed, proved, that he was prevented by threats and demonstrations of violence from executing the writ; but he stated that the writ under which he acted was endorsed "alias;" nevertheless he believed that the writ, which was returnable to April court last, was, from its appearance, the one which he was directed to execute. He further stated, that, under the first writ, the possession had been taken peaceably by another of the deputy marshals, and delivered to the plaintiff in the ejectment, who placed a tenant upon the land, but that the possession was afterwards abandoned.

Upon this evidence, and before the case of the defendants was fully opened, the district attorney, with great candour, submitted to the court, whether the prosecution could be supported, expressing his unwillingness unnecessarily to consume the time of the court, if the opinion should be in the negative. He cited the following: Adams, Ej. 301, 360; [Wheaton v. Sexton] 4 Wheat. [17 U. S.] 505.

Peters & Chauncey, for defendants.

WASHINGTON, Circuit Justice. It was decided at the last session of this court, that the defendant could not rule the marshal to return the writ of habere facias possessionem, although the plaintiff may. The reason of the rule is, that it affords the plaintiff the best security for obtaining the full benefit of his judgment, by enabling him to renew the execution at his pleasure, until he has the full enjoyment of the possession. For if after he is put into possession, and the officer has departed, he is again turned out by the defendant, he may, upon a suggestion, "vice-comes non misit breve," obtain an attachment, or sue out a new habere facias possessionem, so as to regain the possession. If he is turned out by a stranger, the rule is otherwise, for he is then put to his ejectment, or to his writ of forcible entry and detainer; because, in this latter case, the title never was tried in respect to the stranger. But if the first writ be returned executed, the plaintiff can never obtain a new writ, although he should afterwards be turned out even by the defendant; because it then appears on record, that the plaintiff has had the full benefit of his suit, and the new execution would be superfluous.

It is no objection therefore to the new writ, that in point of fact, the first writ has been fully executed, if the evidence is merely in pais, and not of record; and resistance to such new writ by the defendant and his agents, would be as much an offence against the law, as if the resistance had been to the original writ. 2 Keb. 245; 1 Keb. 779, 785; Style, 318, 408; 6 Mod. 27; 2 Brownl. & G. 216, 253; Palm. 289; 1 Rolle, 353; Salk. 321. It is true that there is a late English case to be met with in 1 Taunt. 55, in which it is decided that if the habere facias possessionem be executed, it ought to be returned, and that if the plaintiff be turned out by the defendant, a new writ cannot issue. But considering the old cases as authority binding

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

upon us, which the case above referred to is not, and that the former are bottomed upon the soundest reason; we shall adhere to the rule which they have sanctioned.

In this case, we can feel no doubt but that the alias habere facias possessionem was in reality the writ which the deputy had to execute; and if so, the variance between the evidence and the indictment is fatal. If, on the other hand, there be no such variance, then the original writ could not be legally executed after the day to which it was returned. It was then functus officio. In this case the indictment cannot be supported. The district attorney entered a nolle prosequi.

Case No. 16,314.

UNITED STATES v. SMALL.

[2 Curt. 241.] [1]

Circuit Court, D. Massachusetts. May, 1855.

SEAMEN—STOWAWAY—ASSAULT WITH DANGEROUS WEAPON—PROVINCE OF JURY.

1. One who secretes himself on board a vessel before sailing and discovers himself after the vessel is at sea, is not one of the crew, though the master requires him to work, as a condition for his having food, and he does work.

2. Whether an assault was with a dangerous weapon, or not, may depend upon matter of fact, as upon the manner of the assault; and in such case, the court cannot declare, as matter of law, that the assault, if committed with a belaying pin, was with a dangerous weapon. The question must be left to the jury.

[Cited in U. S. v. Williams, 2 Fed. 64.]

[Cited in State v. Collyer (Nev.) 30 Pac. 896; State v. Lang, 65 N. H. 286, 23 Atl. 433. Cited in brief in U. S. v. Green, 6 Mackey, 566.]

3. The danger referred to is danger to life.

This was an indictment against [Sanford Small] the mate of the ship Tigress for beating and wounding James Sweeney, one of the crew. There was also a count for an assault with a dangerous weapon. It appeared that Sweeney went on board the Tigress while lying at New Orleans, without the knowledge of the master, or either of the officers; and there concealed himself until after the ship was at sea, bound for Boston. He then discovered himself, and the master ordered the mate to set him to work in tarring some of the rigging. While so employed, he neglected his work, and was insolent to the mate, who took up a belaying pin and struck at him and hit him on the arm. The blow did not appear to have been heavy, and no serious injury was inflicted.

Mr. Hallett, U. S. Dist. Atty.

J. H. Prince, for defendant.

CURTIS, Circuit Justice. To sustain the first count under the third section of the act of congress of March 3, 1835, (4 Stat. 776), it is necessary for the government to prove that Sweeney was one of the crew of the Tigris. Upon the facts, which are admitted, my opinion is, he was not one of the crew. He was not on board under any contract to serve as a seaman, nor was he in fact a seaman. His presence there was a fraud, and if the master, from motives of humanity, chose to feed him, and at the same time, as a condition for his having food, required him to do such work as he was capable of doing, and he chose to work in order to get food, this did not amount to a contract of hiring him as one of the crew. This count in the indictment, therefore, is not supported.

But whether one of the crew or not, if the mate assaulted him with a dangerous weapon, he is guilty of an offence under another act of congress of March 3, 1825, § 22 (4 Stat. 121). It is of the substance of this offence, that the assault be with a dangerous weapon. I am not aware that the words "dangerous weapon" in this act of congress, have received an interpretation. I think the damage referred to is danger to life. The offence intended to be described, appears from the punishment prescribed, to be a very serious one. The punishment is of the same duration, as for manslaughter. Act April 30, 1790, § 12 (1 Stat. 115). And the fact that the assault is with a dangerous weapon, is classed by the law, with an assault with an intent to kill; for an assault with a dangerous weapon, and an assault with an intent to kill, each amounts to the offence punished by this act. You will consider that, to support this count, the assault must be with a weapon dangerous to life. I think, also, that as actually used, the weapon must have been dangerous to life. Thus a small pistol, when loaded, is undoubtedly a dangerous weapon; and if pointed towards a person within striking distance, with a present intention of discharging it, an assault with a dangerous weapon is committed. But if not loaded, and used only to push, or strike with, a small pistol could not be considered a weapon dangerous to life. So the thing said to be used by the defendant may, in the hand of a strong man, be capable of endangering life by a blow on the head; but not dangerous to life, if the arm or leg be struck with it. And if it be so, then an assault on a person, by striking at, or attempting to strike at his head with this instrument, being within striking distance, would be an assault with a dangerous weapon; while an attempt to strike his arm with it, would not be such an assault. In many cases it is practicable for the court to declare, that a particular weapon was, or was not, a dangerous weapon, within the meaning of the law. And when it is practicable, it is matter of law, and the court must take the responsibility of so declaring.

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

U. S. v. Wilson [Case No. 16,730]. But where the question is whether an assault with a dangerous weapon has been proved, and the weapon might be dangerous to life, or not, according to the manner in which it was used, or according to the part of the body attempted to be struck, I think a more general direction must be given to the jury; and it must be left for them to decide whether the assault, if committed, was with a dangerous weapon. Rex v. Noakes, 5 Car. & P. 326. My instruction to you is this,—if the blow, as struck, or as intended to be struck by the defendant, with this weapon, could put the life of the prosecutor in danger, then it was an assault with a dangerous weapon. It was such an assault, if a blow with it on the head would be dangerous to life, and the prisoner being within striking distance attempted to, or did strike at the head of the prosecutor. But if a blow, with this weapon, upon the arm, could not endanger life, and the prisoner's only purpose and act was to strike the prosecutor's arm, then it was not an assault with a dangerous weapon.

Verdict, not guilty.

Case No. 61,315.

UNITED STATES ex rel. REED v. SMALLWOOD.

[1 Chi. Leg. News, 321; 2 Am. Law T. Rep. U. S. Cts. 109; 1 Leg. Gaz. 47.] [1]

District Court, D. Louisiana. July, 1869.

POST OFFICE—PUBLICATION OF LIST OF LETTERS—MANDAMUS—WHEN MAY ISSUE FROM UNITED STATES COURT—JURISDICTION.

1. The Times, being the newspaper of the largest circulation in New Orleans, has a right to the printing, under government contract, of the weekly list of letters uncalled for at the New Orleans post office, and that it was the duty of the acting postmaster to send such list to that paper for publication.

2. Outside of the District of Columbia, the circuit courts of the United States cannot issue a writ of mandamus in the exercise of original jurisdiction, and such writs can be issued only as necessary to the jurisdiction of the court, and to enforce a judgment rendered.

[Cited in U. S. v. Pearson, 32 Fed. 310.]

3. In this case the court had not jurisdiction in the first instance by mandamus to compel the postmaster to furnish the letter list to The Times newspaper.

A. Walker, for plaintiff.

Semmes & Mott, for defendant.

DURELL, District Judge. The 18th section of the act of March 3, 1845 (5 Stat. 738), provides: "That all advertisements made under the orders of the postmaster general, in a newspaper or newspapers, of letters uncalled for in any post office, shall be inserted in the paper or papers of the town or place where the office advertising may be situated having the largest circulation: provided, the editor or editors of such paper or papers shall agree to insert the same for a price not greater than that now fixed by law; and in case of question or dispute as to the amount of circulation of any papers, the editors of which may desire this advertising, it shall be the duty of the postmaster to receive evidence and decide upon the fact." Prior to this enactment the patronage of the government, as far as the advertising of uncalled-for letters was concerned, was given to party papers, in many instances to papers which had not a tenth of the circulation secured to other papers published in the same town or city. The postal provision of section 18 of the act of 1845 was made to take this matter wholly out of the influence of politics; it was made looking solely to the public good. The act of 1863, § 7 (12 Stat. 702), provides: "That the postmaster general is hereby authorized to regulate the periods during which undelivered letters shall remain in any post office, and the times such letters shall be returned to the dead-letter office, and to make regulations for their return to the writers from the dead-letter office when he is satisfied they cannot be delivered to the parties addressed. He is authorized, also, to order the publication of the list of non-delivered letters at any post office, in his discretion, by writing, posted in any public place or places, or in any daily or weekly newspaper regularly published within the post office delivery; such list may be published in any daily newspaper of an adjoining delivery having the largest circulation within the delivery of the post office publishing the list, but in no case shall compensation for such publication be allowed at a rate exceeding one cent for each letter so advertised; and no such publication shall be required when the postmaster general shall decide that the public interest requires it: provided, that letters addressed to parties foreign born may be published in a journal of the language most used by the parties addressed, if such be published in the same or an adjoining delivery."

It will be seen that this act authorizes the postmaster general to order the publication of the list of non-delivered letters by writing, posted in a public place, or by print in the columns of a regularly published newspaper—in his discretion. But when the discretion is exercised, it must be a wise discretion; and, if publication through the columns of a newspaper be selected, the act of 1863 reiterates the provisions of the act of 1845, and enjoins that the non-delivered letters be published in a newspaper having the largest circulation within the delivery of the post office publishing the list. Undoubtedly the newspaper represented by C. A. Weed, being the paper of the largest circulation in the city of New Orleans, has a right to the printing under government contract of the weekly list of letters uncalled for at the New Orleans post office,

[1] [1 Leg. Gaz. 47, contains only a partial report.]

and it is the duty of Mr. Smallwood, acting postmaster, to send said list to that paper for publication. Smallwood, it appears, very well knows his duty under the law, for it is in evidence that in January last, he, acting for the government, awarded to The Times newspaper the making of the publication under consideration, for and during the time of one year. This publication he now hinders by withholding the weekly list of letters uncalled for, and Weed, representing the Times, applies for a writ of mandamus commanding Smallwood to do that which the law requires of him as an officer of the government to do. Can this court issue the writ in the exercise of an original jurisdiction? This question has been much mooted, both before the supreme and the circuit courts of the United States, and the decisions given thereupon are by no means harmonious. But the authority of Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166, 1 L. T. Cts. Rep., where there was an application for the writ to the United States circuit court, sitting in Iowa, to compel certain county officers to levy a tax for the payment of the interest of certain railroad bonds issued by the county, is adverse to the exercise of any such power.

The decision given in the case of Riggs v. Johnson Co. [supra] is the last in point of time, rendered by the supreme court, touching the question under consideration, and with this court it is the law. The opinion was read by Mr. Justice Clifford as the organ of the court, and in the course of said opinion it is said: "The second proposition of the defendants is that the fourteenth section of the judiciary act [1 Stat. 81], does not confer the power upon the federal courts to issue the writ to a state officer in any case. They argue that it does not authorize those courts to issue it at all, as it is not one of the writs named in the section, and is specially provided for, as appears in the preceding section. Nothing, however, is better settled than the rule that the circuit courts in the several states may issue the writ in all cases where it may be necessary, agreeably to the principles and usages of law, to the exercise of their respective jurisdictions. Such was the construction given to the fourteenth section of the judiciary act at the same time that the last clause of the preceding section, except as applied to judiciary officers, was held to be unconstitutional and void, and that construction has been followed to the present time. The authority of the circuit courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law is beyond question, and the power so conferred cannot be controlled either by the process of the state courts or by any act of the state legislature. Such an attempt was made in the early history of federal jurisprudence, but it was wholly unsuccessful. Suit in that case was ejectment, and the verdict was for the plaintiff. Defeated in the circuit court, the defendant went into the state court and obtained an injunction staying all proceedings. Plaintiff applied for a writ of habere facias possessionem, but the judges of the circuit court being opposed in opinion whether the writ ought to issue, the point was certified to this court, and the decision was that the state court had no jurisdiction to enjoin a judgment of the circuit court, and the directions were that the writ of possession should issue. Prior decisions of the court had determined that a circuit court could not enjoin the proceedings in a state court, and any attempt of the kind is forbidden by an act of congress. The argument for the defendant is, that the rule established in those and kindred cases controls the present controversy, but the court is of a different opinion, for various reasons, in addition to those already mentioned. Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear that the proposition is wholly untenable. Theory of the plaintiff is that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction which has previously attached, and that, in such cases, it is a process auxiliary to the judgment, and is the proper substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract. Grant that such is the nature and character of the writ as applied in such a case, and it is clear that the proposition of the defendants must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a state court cannot enjoin the process or proceedings of a circuit court. Complete jurisdiction of the case, which resulted in the judgment, is conceded: and if it be true that the writ of mandamus is a remedy auxiliary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument. as it cannot be contended that a state court can enjoin any such process of a federal court. When issued by a federal court, the writ of mandamus is never a prerogative writ. Outside of this district no circuit court can issue it at all in the exercise of original jurisdiction. Power of the circuit courts in the several states to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Express determination of this court is, that it can only be issued by these courts in cases where the jurisdiction already exists, and not where it is to be acquired by means of the writ."

Thus it is decided by the supreme court that outside of the District of Columbia no circuit court can issue a writ of mandamus in the exercise of original jurisdiction. That such writs can be issued only as accessory to the jurisdiction of the court and to enforce a judgment rendered. Such being the law, and the writ demanded being, in fact, a

new suit, and not accessory to the jurisdiction of the court acquired in a previous suit, the motion is dismissed. The only remedy is an action at law for damages.

Case No. 16,316.

UNITED STATES v. SMALLWOOD.

[5 Cranch, C. C. 35.] [1]

Circuit Court, District of Columbia. Nov. Term, 1836.

COMPETENCY OF WITNESS.

[Upon an indictment of a husband for assault and battery upon his wife, the wife may testify for the government. Following U. S. v. Fitton, Case No. 15,106.]

Witness. Indictment [against Moses Smallwood] for assault and battery upon his wife. The wife was admitted to testify for the United States, on the authority of the case of U. S. v. Fitton [Case No. 15,106].

[Cited in U. S. v. Jones, 32 Fed. 570.]

Case No. 16,316a.

UNITED STATES v. SMIDTH.

[N. Y. Times, Feb. 26, 1855.]

Circuit Court, S. D. New York. 1855.

CRIMINAL LAW—NEW TRIAL—SURPRISE.

[Where a criminal trial is conducted on both sides upon the assumption that a certain material fact, though not admitted, is to be taken as true, but the court in its charge expressly leaves the question of the existence of that fact to the jury, this is sufficient ground for granting a new trial, where the attorney for the defence claims that the court's action was a surprise to him, and that he would have offered evidence on the point in question had he known that the matter was to be considered as open to the jury.]

Capt. Smidth was convicted at the last term of this court of being employed in the African slave trade, on board the slave brig Julia Moulton. Heard on motion for a new trial.

Before NELSON, Circuit Justice, and BETTS, District Judge.

NELSON, Circuit Justice. The prisoner is indicted under the act of congress passed May 15, 1820 [3 Stat. 600], upon a charge of having been engaged in the slave trade, in violation of the provisions of that act. By its provisions, any citizen of the United States, being of the crew, or ship's company of any foreign ship engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship, owned in whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, who shall be engaged in the slave trade in the manner and with the intent specified in the fourth and fifth sections of the act, shall be adjudged a pirate, and, on conviction of the offence, shall suffer death.

The indictment charged the offence under both branches of the act—(1) That the prisoner being one of the ship's company of the brig Julia Moulton, owned in whole or in part by a citizen or citizens of the United States, did piratically, etc., confine and detain 500 negroes on board said vessel, etc., with intent, etc., contrary to the statutes. (2) That the prisoner, being a citizen of the United States, and one of the ship's company of the brig Julia Moulton—the said brig being a foreign vessel engaged in the slave trade—did piratically, etc., detain, etc., 500 negroes on board said vessel, with intent, etc.

On the trial evidence was given on behalf of the government of the purchase of the brig Julia Moulton by the prisoner at Boston, from the American owners, previous to the equipment and fitting out at the port of New York for the voyage to the coast of Africa; also that the ship's papers were taken out at the custom-house at Boston, and afterwards at New York, by him, or at his instance, and in his own name. The evidence was not entirely clear that the purchase of vessel was made for himself, or that he had furnished the money that was paid for her. In the ship's papers, which had been produced by the government, the prisoner was described as a citizen of the United States, and he had taken the usual custom-house oath that he was such citizen. The evidence was full that the prisoner, as master of the vessel, sailed from the port of New York to the coast of Africa, took in a cargo of negroes, and from thence sailed to the Island of Cuba, where the cargo was landed, and the ship burned by his orders. Considerable evidence was given on the part of the prisoner tending to show that he was a subject of the kingdom of Hanover, in which he was born, and not a citizen of the United States.

In submitting the case to the jury the court stated that the government must prove either that the prisoner, at the time he was engaged in the illegal traffic, was a citizen of the United States, or that the vessel which he commanded was owned, in whole or in part, by a citizen or citizens of the United States, in order to justify them in finding him guilty. And these two questions were accordingly left to the jury, for their finding, after calling their attention to the evidence that had been given bearing upon them. The jury found a general verdict of guilty.

The prisoner's counsel now moves for a new trial, among others, upon the ground that he was taken by surprise in the direction given to the case by the charge of the court in submitting to the jury the question as to the national character of the vessel, or, to be more particular, the question wheth-

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

er the interest of the American owners in the vessel had passed to the prisoner by the purchase of her at Boston.

The argument of the counsel is, that the purchase of the vessel by the prisoner has been proved on behalf of the government; and assuming, therefore, that it was not to be made a matter of controversy in the progress of the trial, but not to be taken as an admitted fact, he had omitted to examine witnesses and to produce evidence, which, if his attention had been turned to the point, or he had deemed it material, would have placed the fact beyond all reasonable doubt; that having taken it for granted, from the course of the trial, that the purchase and transfer of the vessel from the American owners passed from them, and vested in the prisoner a complete title, the only question in controversy left in this part of the case, as the counsel supposed, was the question of citizenship.

We are satisfied, on a review of the case, that those considerations, suggested by the counsel for the prisoner, are entitled to weight, and that the course of the trial may very well have misled him in respect to the point mentioned, in conducting the defence.

The government having begun the trial by giving evidence tending to prove the purchase of the vessel by the prisoner from the American owners, and thus making that fact a part of its case, whether material or not, so far as the prosecution was concerned, it was natural for the counsel for the prisoner to infer that, unless he himself chose to controvert it, it would be regarded as admitted, or, at least, not a matter of controversy to the future progress of the trial. The somewhat imperfect state of the evidence in respect to this purchase, as given on the trial, led to the impression at the time, that whatever might be our opinion as to the fact, the question was one that belonged to the jury, and it was submitted accordingly. We are satisfied, from the view already presented, that in this respect we are mistaken; and that instead of submitting the fact to the jury, as the government had made it a part of its case, and the fact not being controverted by the prisoner, the court should have regarded it as undisputed, and confined the question at issue to the citizenship of the prisoner. The contrary view taken by the court was not only calculated to mislead the counsel for the defence, but, we think, from the course of the trial, and the evidence given on the part of the government, that there was error in submitting the question of the national character of the vessel to the jury at all, as open for their consideration.

The finding of guilty was general, and as the national character of the vessel was submitted to the jury, the verdict may have been influenced by the consideration of that question. There must, therefore, be a new trial.

Case No. 16,317.

UNITED STATES v. SMILEY et al.

[6 Sawy. 640.] [1]

Circuit Court, N. D. California. Sept. 5, 1864.

THEFT OF ABANDONED PROPERTY — EXTRATERRITORIAL CRIMINAL JURISDICTION—PROPERTY BURIED IN SEA.

1. The ninth section of the act of congress of March 3, 1825 [4 Stat. 116], against plundering or stealing money, goods, merchandise or other effects from or belonging to any ship or vessel, in distress or wrecked, lost or stranded, does not apply to property which has been abandoned by its owners. Property thus abandoned may be acquired by any one who has the energy and enterprise to seek its recovery, without violating the statute.

2. The criminal jurisdiction of the United States may, in some instances, extend to their citizens beyond their territory, as, for instance, for violation of treaty stipulations by them abroad; for offenses committed in foreign countries where jurisdiction is by treaty conceded for that purpose, as in some cases in China and the Barbary States; for offenses committed on deserted islands or uninhabited coasts, by officers and seamen of vessels sailing under their flag; and for derelictions of duty by their ministers, consuls and other representatives abroad. But except in cases like these (and their extraterritorial character is generally indicated in the law designating the act for which punishment is prescribed), the criminal jurisdiction of the United States is limited to their own territory, actual or constructive. Their actual territory is co-extensive with their possessions, including a marine league from their shores on the sea. Their constructive territory embraces vessels sailing under their flag. Wherever they go they carry the laws of their country, and for a violation of them their officers and seamen may be subjected to punishment.

[Cited in Com. v. Manchester, 152 Mass. 245, 25 N. E. 118; Manchester v. Massachusetts, 139 U. S. 262, 11 Sup. Ct. 564.]

3. In this case the vessel, which carried the money recovered by the accused, was at the time of its recovery broken up, without a vestige of it remaining. The money was buried in the sand several feet under the water of the sea and was within one hundred and fifty feet of the Mexican shore. *Held*, that there was no jurisdiction of the United States over the place or property; and that the jurisdiction of Mexico over all offenses committed within a marine league of its shores, not on a vessel of another nation, was complete and exclusive.

[This was an indictment against Thomas J. L. Smiley and others for plundering and stealing property from a wreck, under the act of congress of May 3, 1825. Heard on demurrer.]

The case was as follows: The steamer Golden Gate, belonging to the Pacific Mail Steamship Company, left San Francisco for Panama on the twenty-first of July, 1862, with two hundred and forty-two passengers and a crew of ninety-six persons. At about five o'clock on the afternoon of Sunday, July 27th, while running within three and a half miles of the Mexican coast, she was discovered to be on fire. An examination disclosed that the fire had originated between one of

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

the galleys and the smokestack, and it soon became apparent that it was impossible to save her. She was then immediately headed for the shore, and half an hour later struck on a shelving beach of sand about two hundred and fifty feet from the shore, at a point fifteen miles north of the port of Manzanillo. The surf, which was breaking heavily, soon swung her stern around so that she lay nearly parallel with the beach when she went to pieces. At eight o'clock of that evening all that remained visible were her engines, boilers, and wheel frames. Of the three hundred and thirty-eight souls on board, only one hundred and forty were saved. The treasure which she carried, amounting to one million four hundred and fifty thousand dollars, was sunk about forty feet inside of the wreck, where in a space of sixty feet square upwards of one million two hundred thousand dollars were subsequently recovered.

Soon after the loss of the steamer was known, a vessel was fitted out by the underwriters to proceed to the scene of disaster and recover whatever was possible of the treasure. The parties employed soon returned and abandoned the idea of finding it. Immediately another vessel, the Active, was sent by a party of capitalists on the same errand, but she returned likewise unsuccessful. In December, 1862, another party of capitalists started another vessel, the schooner William Ireland, fitted with pumps and wrecking appliances and accompanied by submarine divers, under the command of Ireland, one of the projectors of the enterprise. The men in this expedition succeeded in recovering eight hundred thousand dollars. In August, 1863, they again returned to the wreck and were successful in recovering seventy-six thousand dollars more, when it was believed that any further efforts to secure any additional amount would be unsuccessful. Afterwards, in September, 1863, Thomas J. L. Smiley and others fitted out another expedition with a party of divers and a more complete equipment of diving and wrecking apparatus, and returned in January following, having succeeded in recovering three hundred and three thousand dollars. On a second trip they found thirty-three thousand dollars more; and with that voyage all efforts in that direction were closed. The treasure recovered by Smiley and others was carried in wooden boxes, each containing from five hundred dollars to forty-four thousand dollars, and was stowed in a room near the stern of the ship. The locality where the greater part was found was about one hundred and fifty feet from the shore of Mexico, and in from six to nine feet of water. Beneath the water was an equal depth of sand, under which was a hard clay stratum. On this hardpan beneath the water and the sand, the treasure boxes lay.

Before commencing his operations, Smiley had obtained from the Mexican government a license to explore for the treasure lost. On his return to San Francisco, claim was made by shippers for the specie recovered, but it was not given up, as the parties could not agree as to the amount which the recovering party should retain as compensation for the recovery. The result was that a complaint was made against Smiley and others of his company, and in March, 1864, they were indicted in the circuit court of the United States for plundering and stealing the treasure from the Golden Gate, under the ninth section of the act of congress of March 3, 1825, which provides "that, if any person or persons shall plunder, steal, or destroy any money, goods, merchandise or other effects, from or belonging to any ship, or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States," he "shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment and confinement to hard labor not exceeding ten years, according to the aggravation of the offense." 4 Stat. 116.

To the indictment a demurrer was interposed on various technical grounds. As the expedition conducted by Smiley was an open one, after all other efforts for the recovery of the treasure had been abandoned, and Smiley was a man of previously good character and standing in the community, the indictment was generally regarded as persecution,—as an attempt to coerce the treasure from him without allowing proper compensation to him and his associates for its recovery. The counsel engaged in the case appeared to recognize this. It was therefore agreed that the facts stated above should be deemed admitted, and that upon them the following questions should be presented to the court for determination: First, whether the act of congress applied to a case where the taking of the property, of which larceny was alleged, was after the vessel had gone to pieces and disappeared; and, second, whether, if the act covered such a case, the circuit court had jurisdiction to try the offense charged, it having been committed within a marine league of the shores of Mexico; with a stipulation that if the court should be of opinion that the act did not apply to the case, or that it had not jurisdiction to try the offense charged, the demurrer should be sustained. Upon this stipulation the questions were argued.

William Barber, for the prosecution.

John B. Felton and Delos Lake, for defendants.

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

FIELD, Circuit Justice. We are not prepared to decide that the statute does not apply to a case where the vessel has gone to

pieces, to which the goods belonged, of which larceny is alleged. It would fail of one of its objects if it did not extend to goods which the officers and men of a stranded or wrecked vessel had succeeded in getting ashore, so long as a claim is made by them to the property, though before its removal the vessel may have been broken up. We are inclined to the conclusion that, until the goods are removed from the place where landed, or thrown ashore, from the stranded or wrecked vessel, or cease to be under the charge of the officers or other parties interested, the act would apply if a larceny of them were committed, even though the vessel may in the meantime have gone entirely to pieces and disappeared from the sea. But in this case the treasure taken had ceased to be under the charge of the officers of the Golden Gate, or of its underwriters, when the expedition of Smiley was fitted out, and all efforts to recover the property had been given up by them. The treasure was then in the situation of derelict or abandoned property, which could be acquired by any one who might have the energy and enterprise to seek its recovery. In our judgment the act was no more intended to reach cases where property thus abandoned is recovered, than to reach property voluntarily thrown into the sea, and afterwards fished from its depths.

But if the act covered a case where the property was recovered after its abandonment by the officers of the vessel and others interested in it, we are clear that the circuit court has not jurisdiction of the offense here charged. The treasure recovered was buried in the sand, several feet under the water, and was within one hundred and fifty feet from the shore of Mexico. The jurisdiction of that country over all offences committed within a marine league of its shore, not on a vessel of another nation, was complete and exclusive.

Wheaton, in his treatise on International Law, after observing that "the maritime territory of every state extends to the ports, harbors, bays, and mouths of rivers and adjacent parts of the sea inclosed by headlands, belonging to the same state," says: "The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." Part 2, c. 4, § 6.

The criminal jurisdiction of the government of the United States—that is, its jurisdiction to try parties for offenses committed against its laws—may in some instances extend to its citizens everywhere. Thus, it may punish for violation of treaty stipulations by its citizens abroad, for offenses committed in foreign countries where, by treaty, jurisdiction is conceded for that purpose, as in some cases in China and in the Barbary States; it may provide for offences committed on deserted islands, and on an uninhabited coast, by the officers and seamen of vessels sailing under its flag. It may also punish derelictions of duty by its ministers or consuls, and other representatives abroad. But in all such cases it will be found that the law of congress indicates clearly the extraterritorial character of the act at which punishment is aimed. Except in cases like these, the criminal jurisdiction of the United States is necessarily limited to their own territory, actual or constructive. Their actual territory is co-extensive with their possessions, including a marine league from their shores into the sea.

This limitation of a marine league was adopted because it was formerly supposed that a cannon-shot would only reach to that extent. It is essential that the absolute domain of a country should extend into the sea so far as necessary for the protection of its inhabitants against injury from combating belligerents while the country itself is neutral. Since the great improvement of modern times in ordnance, the distance of a marine league, which is a little short of three English miles, may, perhaps, have to be extended so as to equal the reach of the projecting power of modern artillery. The constructive territory of the United States embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment. But when a vessel is destroyed, and goes to the bottom, the jurisdiction of the country over it necessarily ends, as much so as it would over an island which should sink into the sea.

In this case it appears that the Golden Gate was broken up; not a vestige of the vessel remained. Whatever was afterwards done with reference to property once on board of her, which had disappeared under the sea, was done out of the jurisdiction of the United States, as completely as though the steamer had never existed.

We are of opinion, therefore, that the circuit court has no jurisdiction to try the offense charged, even if, under the facts admitted by the parties, any offense was committed. According to the stipulation, judgment sustaining the demurrer will be, therefore, entered, and the defendants discharged.

Case No. 16,318.

UNITED STATES v. SMITH.[1]

Circuit Court, E. D. Pennsylvania. Oct. 25, 1861.

INTERNATIONAL LAW—CIVIL WAR—RIGHTS OF INSURGENTS—PIRACY.

[1. A combination of citizens or subjects for the purpose of overturning a government does not become entitled to the privileges of national sovereignty until a revolution is actually accomplished.]

[1] [Not previously reported.]

[2. The fact that the number of insurgents in a state is so great that they carry on a civil war against its government does not entitle the government set up by such insurgents to the privileges of sovereignty.]

[3. The United States courts will treat as pirates all persons engaged in plundering vessels of United States citizens under authority of a government set up by insurgents against whom a civil war is being waged.]

[This was an indictment against William Smith for piracy.]

Geo. A. Coffey, U. S. Atty.

Furman Sheppard, for prisoner.

Before GRIER, Circuit Justice, and CADWALADER, District Judge.

GRIER, Circuit Justice (charging jury). The defendant, William Smith, whom you have in charge, is indicted for the crime of piracy. It is proper that the court should give you a definition of it, so that you may apply the testimony to the case. It is briefly defined as "robbery on the high seas." [U. S. v. Smith] 5 Wheat. [18 U. S.] 153, Append. As the sea belongs to no nation, but to all nations, and as the offense is usually committed without the particular municipal jurisdiction of any nation, it is an offense against the law of nations, and may be punished by any nation, whether committed by natives or foreigners. Pirates or robbers on the ocean are called "hostes humani generis." But every nation has the offense and punishment defined by its own municipal laws. Of the several acts of congress on this subject we need only refer to the third section of the act of 15th May, 1820 [3 Stat. 600], as the one which defines the offense as charged in the indictment. It is as follows: "Sec. 3. That, if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: Provided, that nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court."

First the offense is robbery, a crime defined by the common law as "the feloneous and violent taking of any money or goods from the person of another, putting him in fear." The epithet "feloneous" has reference to the intention, which must be "animo furandi" for the purpose of stealing or appropriating the thing taken. There need be no absolute personal violence used, if there be threats and the person robbed submits peaceably through fear of violence. When the robbery is committed by several acting together, all are equally guilty. Nor need the money or goods taken be on the person, provided they be in the possession of the owner, such as household goods, or cattle in the field, or, as in this case, "upon a vessel, and in lading" as defined in the act. Third. The robbery must be committed on the "high seas," &c.

If you believe the testimony (which I need not repeat to you), the charge thus defined appears to be fully established. In fact, if the case rested here, the learned counsel for the defendant seem to admit that they could not avoid a conviction. But it is contended that, though property may be taken "by violence on the high seas," yet if it be done by authority of a state in prosecution of a war against another state, the persons acting under such an authority are not guilty of piracy, and cannot be punished as such. Of this there is no doubt; for piracy has been defined as "depredation on or near the sea without authority from any prince or state." 6 Bac. Abr. 163. Those having such authority are treated as enemies, or as having the privileges of enemies in open war. Thus Turks and Algerines, though acting as free-booters on the ocean (according to Sir Lionel Jenkins), could not be treated as pirates, because they acted under a commission from states with whom the government had treaties, and had acknowledged to be states, in the great family of nations. But it does not follow that every band of conspirators who may combine together for the purpose of rebellion or revolution or overturning the government of which they are citizens or subjects, become ipso facto a separate and independent member of the great family of sovereign states. A successful rebellion may be termed a revolution; but until it becomes such it has no claim to be recognized as a member of the family, or exercise the rights or enjoy the privileges consequent on sovereignty. "When a civil war rages in a foreign nation, or in our own, and one part separates from the old established government, and erects itself into a distinct government, the courts of the United States must view such contested government as it is viewed by the legislative and executive departments of the government of the United States." Every government is bound, by the law of self-preservation, to suppress insur-

rections; and the fact that the number and power of the insurgents may be so great as to carry on a civil war against their legitimate sovereign will not entitle them to be considered a state. The fact that a civil war exists for the purpose of suppressing a rebellion is conclusive evidence that the government of the United States refuses to acknowledge their right to be considered as such. Consequently this court, sitting here to execute the laws of the United States, can view those in rebellion against them in no other light than as traitors to their country, and those who assume by their authority a right to plunder the property of our citizens on the high seas as pirates and robbers.

I do not think it necessary, on the present occasion, to follow the wide range of questions which have been drawn into discussion. Of the plea of duress I need only say that I am sorry indeed that there is not some evidence to support it. But the dispensation of mercy is not with us. Your duty is to render a true verdict, and that of the court to pronounce the sentence of law thereon. Whether, under all the circumstances of the case, a proper policy might not suspend its execution, is a question for the executive to decide.

Case No. 16,319.

UNITED STATES v. SMITH.

[2 Blatchf. 127.] [1]

Circuit Court, N. D. New York. Oct. 7, 1850.

CUSTOMS DUTIES — COLLECTION LAWS — NONDELIVERY OF MANIFEST—CONSTRUCTION OF STATUTES.

1. The 1st section of the act of March 2d, 1821 (3 Stat. 616), as re-enacted by the act of March 3d, 1823 (3 Stat. 781), which imposes a penalty for bringing into the United States from adjacent territory goods subject to duty, and not delivering a manifest thereof at the nearest collector's office, is not repealed by section 19 of the act of August 30th, 1842 (5 Stat. 565).

[Cited in U. S. v. Nolton, Case No. 15,897; U. S. v. The Cuba, Id. 14,898; The Coquitlam, 57 Fed. 718.]

2. The first two acts and the last act provide for a very different class of offences. The former attach the penalty to the mere neglect to deliver a manifest, no matter what the intent. In the latter, there must be an intent to defraud the revenue, and either smuggling or an attempt to pass a fraudulent invoice.

[Cited in U. S. v. Batchelder, Case No. 14,540.]

3. The act of 1821 does not require either a formal entry at the collector's office or an invoice, and the system established by it is a distinct one, applicable to the frontiers adjacent to foreign territories.

4. The act of 1842 is aimed at frauds on the revenue, in cases where an entry of goods and an invoice are required, as prescribed by the act of March 1st, 1823 (3 Stat. 729).

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

This was a writ of error to the district court [of the United States for the Northern district of New York].

The action was debt, brought by the United States against [Abel B.] Smith, to recover a penalty under the acts of congress passed March 2d, 1821, and March 3d, 1823 (3 Stat. 616, 781). The declaration set forth, in substance, that the defendant brought from Canada into the United States, in the collection district of Cape Vincent, certain goods and merchandise subject to duty, and neglected and refused to deliver a manifest thereof at the nearest collector's or deputy-collector's office, and passed by and avoided such office, contrary to the provisions of the acts of congress above referred to; and claimed the penalty of four times the value of said merchandize. The defendant pleaded nil debet. On the trial, the counsel for the defendant admitted that a cause of action had been made out, and that the United States were entitled to recover according to the case as presented by the declaration; but insisted that the penalty imposed under the acts of 1821 and 1823 had been abrogated by the 19th section of the act of congress of the 30th of August, 1842 (5 Stat. 565). The court so ruled, to which ruling the plaintiffs excepted, and, after verdict and judgment for the defendant [case unreported], they brought a writ of error.

James R. Lawrence, Dist. Atty., for plaintiffs in error.

Bernard Bagley, for defendant in error.

NELSON, Circuit Justice. By the 1st section of the act of March 2d, 1821, it is made the duty of the masters of vessels, except registered vessels, and of every person having charge of any boat, &c., and of the conductor or driver of any carriage or sleigh, and of every other person coming from any foreign territory adjacent to the United States, into the United States, with merchandize subject to duty, to deliver, immediately on his arrival within the United States, a manifest of the cargo or loading of such vessel, boat or carriage, or of the merchandize so brought from the foreign territory, at the office of any collector or deputy-collector which shall be nearest the boundary line, &c.; and every such manifest shall be verified by the oath of the person delivering the same, which shall state that such manifest contains a full, just and true account of the kinds, quantities and values of all the merchandise so brought from the foreign territory; and it is provided that, in case of neglect or refusal, or of passing by or avoiding the office, the said merchandise, together with the vessel, boat or carriage, shall be forfeited to the United States, and the person offending shall be subject to a penalty of $400.

The act of March 3d, 1823, substantially reenacts this provision, changing the penalty of $400 to a penalty of four times the value of the merchandise.

The 19th section of the act of August 30th, 1842, provides, that if any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise subject to duty, and which should have been invoiced, without paying or accounting for the duty, or shall make out, or pass or attempt to pass through the custom-house, any false, forged or fraudulent invoice, every such person, &c., shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not exceeding $5,000, or imprisoned for a term not exceeding two years, or both.

The question presented is, whether this section has the effect necessarily to repeal the aforesaid provisions of the acts of 1821 and 1823. If it has, it must be by implication, on account of the repugnancy and inconsistency of the two provisions, as there is no repeal in express terms; and, in order to ascertain this, it will be material to compare the two acts, and ascertain with care their import and effect.

The offence, in the acts of 1821 and 1823, consists in the neglect or refusal to deliver at the office of the collector, or of his deputy, nearest the boundary line, or nearest the road or waters by which the goods are brought, the manifest prescribed in the act, of merchandise subject to duty brought into the United States from an adjacent foreign territory; or, the passing by and avoiding such office. The simple neglect or refusal to deliver the manifest, under the circumstances stated, or the passing by and avoiding the office, constitutes the offence, and subjects the party to the penalty. The intent which accompanies the neglect or refusal, or the passing by and avoiding the office, is not made an element of the offence, or the subject of inquiry on the trial. If the fact of neglect or refusal appears, the penalty follows.

The offence, in the act of 1842, consists in knowingly and wilfully, and with an intent to defraud the revenue, smuggling or clandestinely introducing into the United States merchandize subject to duty, and which should have been invoiced, without paying or accounting for the duty; or, the making or passing, or attempting to pass, at the custom-house, a false, forged or fraudulent invoice. The act must be smuggling or clandestinely bringing into the United States merchandize subject to duty; and it must be done with a wilful intent to defraud the revenue. These are essential elements to constitute the offence, and must be established on the trial, to warrant a conviction.

Now, it seems to me that this analysis and comparison of the two acts show that they provide for an entirely distinct and different class of offences, depending upon a totally different state of facts and circumstances, and are to be regarded as separate and distinct parts of the system of the government to prevent evasion and fraud in collecting the revenue. Their only identity consists in their object and purpose, to wit, to guard the customs. But, in this there is no repugnancy; as penal acts for this purpose in the statute book are numerous and constantly enforced. The repeal of a statute by implication is not favored by the courts, and is never allowed unless the repugnancy is plain and unavoidable, so that the two acts are incapable of being reconciled. Wood v. U. S., 16 Pet. [41 U. S.] 342. Here, both statutes may well stand together, as the acts constituting the offence in the former are not covered by the latter. The former prescribes particular regulations to be observed on the frontiers by the importers of foreign merchandize, with a view to guard the revenue, annexing a penalty in case of a non-observance. The violation of these comes far short of making out the offence under the latter. Both are directed against the importation of foreign merchandise without payment of the duty, but under a different state of facts and circumstances, and prescribing a punishment according to the aggravation of each case respectively. Hence, where the act is done knowingly and wilfully, and with an intent to defraud, fine and imprisonment are annexed.

It is not necessary to say that the latter act is cumulative; indeed, it cannot be properly so regarded, because it is not for the same offence. Neither is it necessary to say that the party could be punished under each statute for the same importation of merchandise. That is a very different question from the one presented, and which I have been considering. The same act, committed under different circumstances, may be the subject of different degrees of punishment, as an assault, and an assault with intent to kill; but, it by no means follows that the party is punishable by the infliction of each penalty.

But, independently of the above views, there is also another upon which I am of opinion that the judgment below must be reversed.

By the 19th section of the act of 1842, the punishment is inflicted for smuggling goods subject to duty, and which should have been invoiced; and for making, or passing or attempting to pass at the custom-house, false, forged or fraudulent invoices.

The act of congress of the 1st of March, 1823 (3 Stat. 729), requires that an invoice shall be delivered to the collector when an entry of goods is made at the custom-house, giving to him, in certain cases, a limited discretion as to the time when it is to be produced; and it is against the smuggling of goods which, if regularly imported, should have been accompanied with this invoice, and against the fabrication of fraudulent invoices, that the 19th section of the act of 1842 is directed.

Now, the act of 1821 refers to a different class of importations. No formal entry by

the importer need be made at the office, nor need the goods be accompanied with an invoice. All that is necessary is the delivery of the manifest prescribed by the act, at the office of the collector, or of his deputy, nearest the boundary line, or nearest the road or waters by which the goods have been brought, together with the verification of the same. Upon this being done, the duties are paid or secured. The act dispenses with the invoice.

If, in view of the act of March 1st, 1823, which requires that an invoice should accompany the entry of goods at the custom-house, there could be any doubt that the construction I have put upon the act of 1821 is correct, all doubt is removed by the act of March 3d, 1823, which, though passed after the act of March 1st, 1823, yet substantially re-enacts the first section of the act of 1821, and changes the penalty, thereby re-affirming that act, which dispenses with the invoice.

It is apparent that an essential element to constitute the offence under the 19th section of the act of 1842 is wanting, in the importation of goods provided for in the act of 1821. There is nothing in the latter act requiring that they should be invoiced. The system is a distinct one, applicable to the frontiers adjacent to foreign territories. I am constrained, therefore, to differ from the court below, and to reverse the judgment there rendered. Judgment reversed, and venire de novo.

Case No. 16,320.

UNITED STATES v. SMITH.

[3 Blatchf. 255.] [1]

Circuit Court, S D. New York. Feb. 24, 1855.

CRIMINAL LAW—INSTRUCTIONS—NEW TRIAL—SLAVE TRADE.

Where, on the trial of an indictment, founded on the slave-trade act of May 15, 1820 (3 Stat. 600), which charged the prisoner with being one of the ship's company of a vessel owned in whole or in part by a citizen or citizens of the United States, and also with being a citizen of the United States and one of the ship's company of a foreign vessel, the government began the trial by giving evidence tending to prove the purchase of the vessel by the prisoner from American owners of her, and the prisoner did not controvert that fact, or put in any evidence on that subject, but confined himself to proving that he was not a citizen of the United States: *Held*, that it was error in the court to submit to the jury the question as to whether the interest of such American owners in the vessel had passed to the prisoner by such purchase, but that the only question submitted to them should have been as to the citizenship of the prisoner; and that, as they found a general verdict of guilty, there must be a new trial.

[Cited in Sparf v. U. S., 156 U. S. 175, 15 Sup. Ct. 321.]

This was an indictment against the defendant [James Smith], under the act of congress passed May 15, 1820 (3 Stat. 600), upon a charge of having been engaged in the slave trade, in violation of the provisions of that act. It provides, that any citizen of the United States, being of the crew or ship's company of any foreign ship engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship owned in whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, who shall be engaged in the slave trade, in the manner and with the intent specified in the fourth and fifth sections of the act, shall be adjudged a pirate, and, on conviction of the offence, shall suffer death. The indictment charged the offence under both branches of the act: (1) That the prisoner, being one of the ship's company of the brig Julia Moulton, owned in whole or in part by a citizen or citizens of the United States, did piratically, &c., confine and detain five hundred negroes on board said vessel, &c., with intent, &c., contrary to the statute. (2) That the prisoner, being a citizen of the United States, and one of the ship's company of the brig Julia Moulton, the said brig being a foreign vessel engaged in the slave trade, did piratically, &c., detain, &c., five hundred negroes on board said vessel, with intent, &c. After conviction, the defendant moved for a new trial.

John McKeon, U. S. Dist. Atty.
Charles O'Conor, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

NELSON, Circuit Justice. On the trial, evidence was given, on behalf of the government, of the purchase of the brig Julia Moulton by the prisoner, at Boston, from her American owners, previous to her equipment and fitting out at the port of New York for the voyage to the coast of Africa; also, that the ship's papers were taken out at the custom-house at Boston, and afterwards at New York, by him, or at his instance, and in his own name. The evidence was not entirely clear that the purchase of the vessel was made for himself, or that he had furnished the money that was paid for her. In the ship's papers, which were produced by the government, the prisoner was described as a citizen of the United States; and he took the usual custom-house oath that he was such citizen. The evidence was full, that the prisoner, as master of the vessel, sailed from the port of New York to the coast of Africa, took in a cargo of negroes, and thence sailed to the island of Cuba, where the cargo was landed and the ship burned by his orders. Considerable evidence was given on the part of the prisoner tending to show that he was a subject of the kingdom of Hanover, in which he was born, and not a citizen of the United States.

In submitting the case to the jury, the court stated, that the government must prove, ci-

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission.]

ther that the prisoner, at the time he was engaged in the illegal traffic, was a citizen of the United States, or that the vessel which he commanded was owned, in whole or in part, by a citizen or citizens of the United States, in order to justify them in finding him guilty. And these two questions were accordingly left to the jury for their finding, after their attention was called to the evidence that had been given bearing upon them. The jury found a general verdict of guilty.

The prisoner's counsel now moves for a new trial, upon the ground, among others, that he was taken by surprise in the direction given to the case by the charge of the court, in submitting to the jury the question as to the national character of the vessel; or, to be more particular, the question whether the interest of the American owners in the vessel had passed to the prisoner by the purchase of her at Boston.

The argument of the counsel is, that the purchase of the vessel by the prisoner had been proved on behalf of the government; that, assuming, therefore, that it was not to be made a matter of controversy in the progress of the trial, but was to be taken as an admitted fact, he had omitted to examine witnesses and to produce evidence, which, if his attention had been turned to the point, or he had deemed it material, would have placed the fact beyond all reasonable doubt; and that, having taken it for granted, from the course of the trial, that the purchase and transfer of the vessel from the American owners passed from them and vested in the prisoner a complete title to the vessel, the counsel supposed that the only question in controversy, left in this part of the case, was the question of citizenship.

We are satisfied, on a review of the case, that these considerations, suggested by the counsel for the prisoner, are entitled to weight, and that the course of the trial may very well have misled him in respect to the point mentioned, in conducting the defence. The government, having begun the trial by giving evidence tending to prove the purchase of the vessel by the prisoner from her American owners, and having thus made that fact, whether material or not, a part of its case, so far as the prosecution was concerned, it was natural for the counsel for the prisoner to infer, that unless he himself chose to controvert it, it would be regarded as admitted, or, at least, not be a matter of controversy in the future progress of the trial. The somewhat imperfect state of the evidence in respect to this purchase, as given on the trial, led to the impression, at the time, that whatever might be our opinion as to the fact, the question was one that belonged to the jury, and it was submitted accordingly. We are satisfied, from the view already presented, that in this respect we were mistaken; and that, instead of submitting the fact to the jury, as the government had made it a part of its case, and as the fact was not controverted by the prisoner, the court should have regarded it as undisputed, and have confined the question at issue to the citizenship of the prisoner. Not only was the view taken by the court calculated to mislead the counsel for the defence, but, we think, from the course of the trial, and from the evidence given on the part of the government, that there was error in submitting the question of the national character of the vessel to the jury at all, as a question open for their consideration.

The finding of guilty was general, and, as the national character of the vessel was submitted to the jury, their verdict may have been influenced by the consideration of that question. There must, therefore, be a new trial.

Case No. 16,321.

UNITED STATES v. SMITH.

[1 Bond, 68;[1] 5 Am. Law Reg. 268.]

District Court, S. D. Ohio. Oct. Term, 1856.

OFFICES OF UNITED STATES—COMPENSATION—SET-OFF—ACCOUNTING OFFICERS—DOUBLE SALARIES—TERRITORIAL SECRETARY—COMMISSIONS.

1. In a suit by the United States to recover a balance due on the books of the treasury department, the defendant can not give in evidence, as a set-off, a claim against the government, which has not previously been presented to, and disallowed by, the proper accounting officer, without proving that it was not before in his power to produce the voucher for such claim, and that he was prevented from exhibiting it, "by absence from the United States, or some unavoidable accident."

2. The rejection of an account or claim against the United States, by an accounting officer of the government, authorized by a special act of congress to adjust the same on equitable principles, does not preclude the defendant, when sued, from setting up such rejected claim or account as a set-off.

3. There is no authority, either in the executive or judicial department of the government, to allow a claim against the United States, which is prohibited by law.

4. The legislation of congress prohibits any extra compensation to an officer for services performed, properly pertaining by law to his office.

5. The defendant, as secretary of Minnesota territory, having a fixed salary as such, was not entitled to claim, in addition thereto, the salary of governor, during the absence of that officer; as the act organizing the territory made it the duty of the secretary, "in case of the death, removal, resignation, or necessary absence of the governor," to discharge the duties of that office, without any provision for an increase of compensation to the secretary.

6. The proviso in the second section of the act of September 30, 1850, expressly prohibits the allowance of double salaries in all cases.

7. The act organizing the territory of Minnesota, made the secretary the disbursing officer of the territorial government, and he can not claim a commission on such disbursements.

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

8. Where an officer, with a salary payable quarterly, is appointed for four years, "unless sooner removed by the president," and a removal is made during a current quarter, he is not entitled to his salary to the end of the quarter.

9. By the organic act of Minnesota territory, the general government became pledged to defray "the expenses of the legislative assembly, the printing of the laws, and other incidental expenses;" and the defendant is entitled to a credit for services rendered, or expenditures made, within the fair scope and meaning of these terms, so far as they did not pertain to the office of secretary of the territory; but the words "other incidental expenses" must be restricted to such expenses as were incidental to the legislative assembly and the printing of the laws.

10. The second section of the act of August 29, 1842 [5 Stat. 541], which applies to territories, then or afterward to be organized, provides that no act of the legislature of a territory shall be deemed of sufficient authority for a payment by the national treasury, and requires proper vouchers and proof of the same to be exhibited to the accounting officers of the proper department.

11. In a judicial case involving the accounts of a former secretary of a territory, in which credits are claimed which have been rejected by the treasury department, the fact that such credits have not been embraced in the estimate required by the organic act of the territory, to be previously made by the secretary of the treasury does not preclude their allowance by a jury, if not objectionable on other grounds.

D. O. Morton, U. S. Dist. Atty.

Corwin & Probasco, Judge Johnson, and Mr. Spooner, for defendant.

LEAVITT, District Judge (charging jury). This suit is brought on the official bond of the defendant [Charles K. Smith], as late secretary of the territory of Minnesota, dated March 31, 1849. A balance of $4,078.41 is claimed as due to the United States; and treasury statements are in evidence, showing such balance against the defendant. The defendant exhibits claims against the government exceeding the amount of such balance, and insists on a judgment in his favor for the sum alleged to be due him. The larger portions of the items of claims exhibited in the defendant's account have been passed upon and disallowed by the treasury department, under the provisions of a special act of congress authorizing their adjustment on equitable principles. The defendant also claims an allowance of about one thousand dollars, embracing items of charge against the United States, which have not been presented for payment or allowance at the treasury department, and, consequently, have not been rejected by it. This latter class of vouchers was permitted to go in evidence to the jury, upon a suggestion that the defendant would be able to show reasons for their non-presentation which would render them admissible, and with the understanding that otherwise they were to be withdrawn from the consideration of the jury. The fourth section of the act of congress of March 3, 1797 (1 Stat. 515), provides "that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination and by them disallowed, in whole or in part, unless it should be proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident." No proof has been exhibited by the defendant which brings the items referred to within either of the exceptions stated in the foregoing provision of the act of congress, and they must, therefore, be entirely excluded from the consideration of the jury. The law is imperative on this subject, and vests no discretion in the court. There may be cases in which its operation may savor of harshness, or even of injustice, but there can be no doubt that such a provision is necessary to prevent the presentation of fraudulent or fictitious claims upon the government.

The other items of charge in the defendant's account having been presented to, and disallowed by, the proper accounting officer, under an act of congress authorizing their settlement upon principles of equity, are properly in controversy in this suit. Such rejection of these items, by the treasury department, is not decisive of the rights of the claimant. The constitution of the United States vests all the judicial power of the government in the courts of the Union; and it is the unquestionable right of the citizen, in a suit brought by the United States for the recovery of a balance claimed, if his credits have been disallowed by the accounting officer, to present them for the decision of a court and jury. There is an obvious necessity that the government should hold its subordinate agents to great strictness, and the most rigid accountability in all transactions involving official liability; and in discharging this duty, the highest executive officers must be guided by law, and are not at liberty to adopt their own views of right and justice as the basis of their action. Even in cases of reference to them by act of congress, with a power to adjust and settle accounts on principles of equity, no authority is thereby implied to allow a claim against the government which is expressly, or by clear implication, prohibited by law. And the same principle of action applies to and must govern the court of the United States in adjudicating between the government and a citizen, as to matters of account. If the allowance of a claim is forbidden by law, a court and jury can not give it legal validity; but if not thus prohibited, and it is in its character just and equitable, though it may have been rejected by the proper officer, it may be allowed

in a judicial tribunal, if properly authenticated by evidence. When the government comes before such a tribunal as a litigant party, its position is that of equality with the citizen; and it is entitled to no special immunities, unless expressly conferred by law. If it shall happen that even the application of these liberal principles, in such a controversy, shall fail to secure to the individual citizen the full measure of justice, his only remedy is an application to the legislative department of the government; the powers of which are ample to administer aright on the most comprehensive principles of equity, with no limitations except those imposed by the constitution.

The items of the account exhibited by the defendant, and on which the jury are to pass, are numerous, and include claims for various services and expenditures, as secretary of the territory of Minnesota, embracing a period between March 31, 1849—the date of his appointment to office—and November 14, 1851, when he was superseded by the appointment of another person. I will not detain the jury by a special reference to all the credits claimed by the defendant in his account now exhibited, but having noticed a few of them, in respect to which the construction of the court has been called for, will state some general principles of law applicable to the whole account, which may afford a satisfactory guide to the jury, in their considerations as to its proper adjustment.

I may remark here, that it is insisted, by the counsel for the government, that all the items of charge in the defendant's account are liable to the objection, either that they involve claims for services rendered by him as secretary of the territory, legally pertaining to the office, and for which he is entitled to no compensation beyond the salary given him by law—or, if not included in this class, the services rendered and expenditures made were in virtue of laws or resolutions passed by the territorial legislature, for which there is no legal claim on the treasury of the United States. It may now be regarded as a principle which admits of no question, that no officer of the United States, having a fixed salary, is entitled to any extra compensation for the performance of services or duties which pertain to his office by law. It is wholly unnecessary to refer to the legislation of congress, or the decisions of the courts of the Union on this subject. The incumbent of an office is bound to perform all the duties belonging to it, without extra compensation. No man is under any necessity to accept an office, but having accepted it, the obligation rests upon him to discharge its duties for the remuneration which the law provides. He accepts it with a knowledge of the pay or salary attached to it, and, though its duties may be onerous, and the compensation inadequate, if he chooses to retain the office he must be content with what the law gives.

Some of the charges in the defendant's account are clearly within the objections just stated, and can not, therefore, be allowed by the jury. I will notice, very briefly, some of the principal items which, in the judgment of the court, must be rejected on this ground. The charge of $1,004 for salary as acting governor of the territory during the absence of the governor, is clearly within the prohibition adverted to. There are two distinct periods of service charged by the defendant, for which he claims the salary of the governor, in addition to that of secretary of the territory. The first is, from November 8, 1849, to February 12, 1850, amounting to $645—the second, from April 10, 1851, to the 2d of June following, amounting to $358.83. The charge for the latter period is within the operation of the proviso of the second section of the act of September 30, 1850, and its allowance is expressly forbidden by it. This proviso is in these words: "That hereafter the proper accounting officers of the treasury, or other pay officers of the United States, shall in no case allow any pay to one individual for the salaries of two different offices, on account of having performed the duties thereof, at the same time." But, without reference to this act of congress, the whole of this charge is liable to the objections, that the service was one which he was bound to perform as secretary of the territory, and for which no extra compensation can be allowed. The third section of the act for the organization of Minnesota territory authorizes and requires the secretary to discharge the duties of the executive, "in case of the death, removal, resignation, or necessary absence of the governor from the territory." The defendant took the office of secretary knowing that, in any of the emergencies specified, the duties of the governor would devolve on him. And the law made no provision for any additional compensation in that event. In assuming the office of secretary of the territory the defendant became bound to act as governor, if necessary under the law, as fully as he was obliged to discharge any other duty as secretary. It pertained to the office of secretary, though not strictly within the ligitimate range of its duties. The salary certainly was less than the labor and responsibility required, but this is an evil which this court and jury can not remedy without usurping legislative power.

There is another item, $557, charged in the defendant's account as a commission of one per cent. on funds disbursed by him as secretary. This is liable to the objection stated in the foregoing item. By the eleventh section of the organic act of the territory, the secretary is expressly made the disbursing officer of the territory, and is required to

account to the secretary of the treasury of the United States for the manner in which the funds have been expended. This was, therefore, one of the duties required of him by law, as secretary, for which he is not entitled to any extra allowance.

I will here notice briefly another charge in the defendant's account that must be rejected. I refer to his claim for salary as secretary for the whole of the quarter ending December 31, 1851. It seems he entered on his duties as secretary in March, 1849, was removed by the president the latter part of October, 1851, but continued in the actual performance of his duties till the 14th of November in the last-named year. The defendant has been allowed his salary by the treasury department to the date of his removal, but it has been rejected for the balance of the quarter. No doubt can exist to his right to it to the 14th of November, when he was in fact superseded by his successor. It is insisted, however, that he is entitled to pay for the whole quarter. The argument is, that, where an officer whose salary is payable quarterly is removed, by the act of the president, before the expiration of a current quarter, he is entitled to his pay to the end of it. This is believed to be in opposition to the uniform practice of the government in such cases I do not propose to discuss the constitutional question of the power of the president to remove from office, at his own will, without presenting to the senate the grounds of the removal and obtaining its approval of the act. The defendant, conformably to the act organizing Minnesota territory, was appointed to the office of secretary for four years, "unless sooner removed by the president of the United States." For many years past this has been the usual mode of commissioning executive and ministerial officers; and the power of removal, with or without cause, has been freely exercised by those who have held the presidential office for the last thirty years. True, there were those at an early period of our national government who contended that the spirit, if not the letter of the constitution, required the president to submit the causes of removal from office to the senate; and that, as it was only by and with the advice and consent of that body that an appointment could be made, the same formality was required in removing from office. Although there may be some, at this day, who maintain this view, the current of opinion seems to set strongly in the opposite direction. The practice of the government has been so long settled, and is so generally acquiesced in, that there is little probability of a change. And if conceded that the power of removal, without restriction or limitation, belongs to the president, the official duties of the incumbent, and with it, his right to salary or compensation cease when the successor assumes the office. The defendant's claim for salary, from the 14th of November to the 31st of December, will therefore be rejected by the jury.

Before passing to the consideration of the other part of the defendant's account, I will notice an item of $116, charged as the expenses of a visit to Washington, to procure the funds appropriated by congress for the support of the territorial government for the year 1850. From some cause, great delay had occurred in remitting the funds appropriated, to the seat of government of the territory. To hasten this remittance, the defendant made the journey to Washington. Its necessity is not very obvious, so far as there is any evidence on the subject. But if the jury believe the public interests of the territory required the journey, there is no reason why the defendant should not be reimbursed to the amount of his actual expenses.

It would detain the jury unreasonably, and, as I think, unnecessarily, to notice in detail the remaining items of charge in the defendant's account. In their retirement they will have the opportunity of giving to the account, and the vouchers which sustain it, a critical inspection. So far as any of these may be for services or duties performed, belonging to the office of the defendant, as secretary of the territory, they will be disallowed, on the grounds already fully stated. There are others, however, which stand on another basis, and which present a different question for the consideration of the court and jury. Their allowance or disallowance will depend mainly upon the provisions of the act of congress for the organization of the territory of Minnesota. To such of them as bear upon the items in controversy, I will now briefly ask the attention of the jury. This organic act was approved and took effect March 3, 1849. Section 4 vests the legislative power of the territory in the governor and a legislative assembly. Section 6 provides that the legislative power shall extend to all rightful subjects of legislation, consistent with the constitution of the United States, and the provisions of said act; and requires that all the acts of the governor and legislative council shall be submitted to the congress of the United States; and if disapproved, shall be null and void. By section 12, the laws in force in the territory of Wisconsin, at the date of her admission into the Union, are declared to be in force in Minnesota, so far as they were compatible with the act organizing the last named territory, subject to amendments and repeal by the legislature. By the same section, the laws of the United States were extended over, and declared to be in force in, Minnesota, so far as they were applicable. Among the provisions of section 11 is one declaring that there shall be an annual appropriation by congress of one thousand dollars, to be expended by the governor to de-

fray the contingent expenses of the territory, and also, annually, a sufficient sum "to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses." This appropriation is to be made upon the estimate of the secretary of the treasury, and to be expended by the secretary of the territory. Section 17 appropriates five thousand dollars for the purchase of a library for the benefit of the territory.

These are all the provisions of the organic act which it is material to notice. The act, as is obvious, is based on the admitted doctrine that a territory is, in some sense, a ward of the general government, and that while in its state of pupilage, the primary and paramount power of legislation over it is vested in congress. The act of congress, however, granted to the people of Minnesota territory the right to elect a local legislature, in which was vested the ordinary powers of legislation, subject to the restrictions and limitations specified. Among the powers thus conferred on the legislative body, was the power of taxation for legitimate territorial purposes. But the obligation was assumed by the general government to provide for the payment of the salaries and compensation of all the officers, whose appointments were authorized by the act. It was also pledged to defray the contingent expenses of the territory, to an amount not exceeding one thousand dollars, and also "the expenses of the legislative assembly, the printing of the laws, and other incidental expenses."

One of the important questions presented in this case is, whether the charges contained in the defendant's account, which have not before been brought specially to the notice of the jury, and upon which the views of the court have been stated, are fairly within the scope and range of the words just quoted from the organic act. The jury will observe, from an inspection of the vouchers for that part of the account referred to, that they embrace charges for services rendered, and expenditures made, by the defendant alleged to be necessarily connected with, or incidental to, the administration of the territorial government. Without referring specifically to these items, I may remark here that so far as these claims are for services outside of the defendant's official duties, and secretary, and may come within the designation of "expenses of the legislative assembly, the printing of the laws, or other incidental expenses," I see no objection to their allowance, if sustained by proof to the satisfaction of the jury. The act of congress sanctions the payment of expenses, which may be classified under these heads, from the national treasury; and within the limitations already indicated, they would seem to be proper items of charge against the United States. But it is clear congress did not intend to impose an obligation on the general government to meet every expenditure which might be authorized by the territorial legislature. That body was vested with a discretionary power of legislation, in regard to the local or internal interests of the territory; but any expenditure authorized for such purposes was to be paid out of the territorial treasury. And it is obvious, that an unlimited power, in the legislature of a territory to authorize expenditures, which were to be paid by the general government, would lead to great abuses, and impose a grievous burden on the national treasury. There is not only no such power in the territorial government, but congress has expressly provided, that in reference to the appropriation of money for expenditures in a territory, to be paid by the general government, the acts of a territorial legislature are not conclusive. By section 2 of the act of August 29, 2842 (5 Stat. 541), it is expressly required, as to all territories, then or afterward to be organized, that the accounts for such expenditures shall be settled and adjusted at the treasury department; and it is provided, "that no act, resolution, or order of the legislature of any territory, directing the expenditure of the sum, shall be deemed a sufficient authority for such disbursement, but sufficient vouchers and proof for the same shall be required by said accounting officers."

It shall be the duty of the jury, in reference to the class of charges now referred to, to determine from an examination of the vouchers, and other evidence adduced by the defendant, whether they are fairly comprehended under the heads of "expenses of the legislative assembly, the printing of the laws, and other incidental expenses." It is difficult, if not impossible, to define with certainty what may be rightfully included in these terms. I should not probably render the jury any essential aid, if I were to attempt to prescribe a rule for their action in this regard. I may remark, generally, that it is evidently within the spirit of the language used in the act of congress, that the expenses incurred under any of the heads stated, should be necessary and proper, and the sums reasonable. This would necessarily lead to the rejection of any vouchers for expenditures for purposes not required in the proper discharge of the duties of the legislature of the territory, and not in promotion of the public interests. So, in relation to the printing of the laws passed by the legislature. The expenses incurred must have reference and be limited to the object stated. The words, "other incidental expenses," are of comprehensive import, and were, without doubt, adopted by congress, to provide for any necessary expenses which could not be foreseen, and specifically pointed out. The fair construction of these words, in the connection in which they are used, would seem not to justify the conclusion

that they were intended to include all expenditures which might be deemed incidental to the administration of the government of the territory. They must be limited in their import to the necessary incidental expenses of the legislative assembly and the printing of the laws. Within the limits thus indicated, if the evidence of the expenditures and services is satisfactory to the jury, and the charges are not within any of the prohibitions previously stated, they would seem to have the sanction of law, and may properly be allowed as credits to the defendant.

It is proper that I should here briefly notice an objection urged to the defendant's account, by the counsel of the United States, founded on the position that they have not been included in any estimate made by the secretary of the treasury, and can not, therefore, be viewed as legal setoffs to the claim presented by the government. It is true the act organizing the territory of Minnesota requires the secretary of the treasury to make an estimate, in advance of the appropriation by congress, of the expenses of the territorial government. Without discussing this subject, it may be sufficient to state that the duty enjoined on the secretary of the treasury is directly to, and obligatory on him. But if he omits to make an estimate, or if that estimate proves insufficient to meet the just expenditures contemplated by the act of congress, it affords no reason why the claims of an individual, coming fairly within the scope and intention of the act, should not be allowed. The question now presented, arises in a judicial case, and the true inquiry is not whether there has been a previous estimate, embracing the charges claimed, but whether they are just, and not within any express prohibition of law.

I may also refer to the letters from the comptroller of the treasury, addressed to the defendant, while he held the office of secretary of the territory, which are in evidence. These, it is insisted, authorize a part of the expenditures charged in the defendant's account. I shall not notice, in detail, the contents of these letters. It will be proper for the jury to refer to them, in their retirement, as a part of the evidence in this case. Whatever may be their purport, it can not be claimed for them, that they invalidate the positive provisions of law. So far, however, as they may be viewed as authorizing any of the charges or expenditures of the defendant, they may properly be considered by the jury; and as to items concerning which they might otherwise be in doubt, may exercise an influence in their decision.

With these views, the case is submitted to the jury. They will apply the law, as I have attempted to state it, to the evidence before them, and decide what portion of the credits claimed by the defendant shall be allowed, and what shall be rejected.

The jury returned a verdict for the United States for $1,536.

Case No. 16,322.

UNITED STATES v. SMITH et al.

[2 Bond, 323.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1869.

CONSPIRACY TO DEFRAUD UNITED STATES—INDICTMENT—VARIANCE—INTERNAL REVENUE LAWS—BONDED WAREHOUSES—TESTIMONY OF ACCOMPLICES—EVIDENCE OF GOOD CHARACTER.

1. In an indictment for a conspiracy to defraud the United States under section 30 of the act of March 2, 1867 [14 Stat. 484], there must be satisfactory evidence, not only of the conspiracy charged, but of the overt act averred, to carry into effect the objects of the conspiracy.

2. A conspiracy is where two or more persons confederate or combine to do an unlawful act, and may be proved by direct and positive evidence, or by facts showing that there was concert of action and a unity of purpose in effecting an unlawful object.

3. In such an indictment, alleging the conspiracy to have been entered into in the county of Champaign, within the Southern district of Ohio, if the proof shows that if there was a conspiracy, it was entered into in the county of Montgomery, it is not a fatal variance between the allegation of the indictment and the proof, the act charged being averred to have been committed within the territorial limits of the Southern district of Ohio, and therefore within the jurisdiction of the court.

4. It was not necessary to set forth the county in which the alleged conspiracy was formed, and it may be rejected as surplusage.

5. A distiller's bonded warehouse, which the law requires him to provide, is a part of the distiller's premises; and proof of the unlawful removal of the spirits from such a warehouse sustains the averment of the indictment, that the removal was from the distillery with which it was connected.

6. The government, in an indictment under section 30 of the act of March 2, 1867, is not bound to strict proof of the ownership of the rectifying distillery to which it is alleged the spirits were unlawfully removed.

7. The evidence of an accomplice, in the crime charged, is to be received with great caution, and, as a general rule, will be rejected unless corroborated, as to the material facts stated by him, by credible witnesses.

8. Proof of the good character of the party charged with crime, if there is doubt of his guilt upon the evidence, may afford good ground for a presumption of innocence, but will not be available to overcome or set aside satisfactory proof of criminality.

[Cited in State v. Northrup, 48 Iowa, 585.]

[This was an indictment against George Smith and Edward Smith for conspiring to defraud the United States.]

Warner M. Bateman, Dist. Atty., and Henry Hooper, for the United States.

M. P. Nolan, H. L. Burnett, and Robert Christy, for defendants.

LEAVITT, District Judge (charging jury). This case, after a long and tedious investigation, is now to be committed to the jury for their action. It has been most strenuously contested by counsel, and you are entitled

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

to the thanks of the court for the patient attention you have given to it during its progress. It is the purpose of the court to state, as briefly as possible, the legal points arising in the case and the views of the court upon them, leaving it exclusively for the jury to pass upon the facts. The defendants are on trial for a criminal act, specially set forth in the indictment, in which there are three distinct counts. The first and third counts are substantially alike in their structure, and do not require a separate consideration. The first count alleges a conspiracy by the defendants, in concert with others, entered into in the county of Champaign, in the Southern district of Ohio, in November, 1867, to defraud the United States of the legal tax or duty imposed upon a large quantity of distilled spirits. The overt act of the conspiracy charged is the unlawful removal of fifty barrels of spirits from the distillery of one A. C. Campbell, where it was manufactured, to the rectifying establishment of the defendants, not being a bonded warehouse, with a criminal intent. The third count varies the charge by averring the unlawful conspiracy to have been entered into on March 15, 1868, in the county of Montgomery, in said district, and charges, as the overt act, the removal of the spirits to the rectifying establishment owned by the defendants and other persons. The second count alleges a conspiracy for the fraudulent removal of fifty barrels of distilled spirits from the distillery to the rectifier by night—that is, after sunset and before daylight—in violation of the statute and with a criminal intent. The indictment is framed under section 30 of the act of congress of March 2, 1867, which provides that if two or more persons shall conspire to commit any offense against the United States, or to defraud the United States in any manner whatever, and one or more of said parties to the conspiracy shall do any act to effect the offense, such person shall be deemed guilty, and shall be liable to punishment. The jury will observe that the statute is as broad and comprehensive as language can make it. It includes any conspiracy to violate a law of, or to defraud the United States, in any manner whatever. But to consummate the offense contemplated by the statute, there must be, what the law terms, an overt act done, to effect the object of the unlawful conspiracy. Such an overt act, namely, the unlawful removal of the spirits, is averred in all the counts in this indictment. To justify a verdict of guilty under this indictment, there must be proof satisfactory to the jury, first, that there was a conspiracy, to which the defendants were parties, substantially as alleged; and second, that the overt acts averred are proved by the evidence. And here it is proper to direct the minds of the jury to some legal propositions submitted by the counsel for the defendants, and state the views of the court upon them for the guidance of the jury in their action in the case. I regret that the infirm state of my health will not permit me to do this as fully, or perhaps as satisfactorily, as I could desire.

It is insisted, in the first place, that under the first count of the indictment, in which it is alleged, inadvertently no doubt, that the unlawful conspiracy was entered into in Champaign county, whereas the proof shows the entire transaction took place in Montgomery county, there can be no conviction. The claim is, that in this particular the evidence does not sustain the first count, and that the jury must return a verdict of not guilty on it. In other words, that there is a fatal variance between the first count and the evidence offered to sustain it. I have not had the opportunity of investigating this point as fully as I could have desired. From the reflection I have bestowed upon it, I can not concur with the counsel for the defense on the point. The discrepancy between the averment as to the county in which the conspiracy was formed and the evidence is not material. This court has jurisdiction in crimes throughout the territory and counties included in the Southern district of Ohio. And the general averment in the indictment, that the offense charged was committed within the district, without designating any particular county, would have been sufficient to sustain the jurisdiction of the court. And the United States, in this case, is not bound to prove that the offense was committed in the county alleged, and the allegation may be rejected as surplusage, as in that case the averment would be that the offense charged was committed within the judicial district, and within the jurisdiction of the court.

It is also strenuously urged by defendants' counsel, that there is a fatal variance between the averments in the several counts and the proof in this, that the removal of the spirits is alleged in the indictment to have been from the distillery of A. C. Campbell, whereas the proof shows the removal was from the bonded warehouse connected with the distillery. This objection is exceedingly technical in its character, and if sustained, the court would be compelled to withdraw the case from the consideration of the jury, and instruct them, without regard to the merits of the case, that they must return a verdict of not guilty. I am reluctant to do this in any case, unless the law requires it as an imperative duty. In a case like this, which has been so fully presented to the jury on the facts, and which has occupied so much time in its investigation, I prefer submitting it to them for their action. And, in my view, the point submitted does not require me to withdraw the case from the jury. While it is true, the removal of the spirits was directly from the bonded warehouse, and not from the part of the building used as the distillery, I am quite clear that the bonded warehouse may be legally held to be a part of the distillery premises; and that the

proof sustains substantially the averment that the removal was from the distillery. The law in force at the time made it the duty of every distiller to provide a bonded warehouse in immediate connection with the distillery, in which the spirits, when manufactured, were to be deposited, and which may be held to be a part of the distillery. In point of fact, if I rightly remember the evidence, this place of deposit was under the roof of, and a part of the building in which the distillation was carried on.

There is still another technical legal point urged as a ground for the acquittal of these defendants. It is insisted the evidence does not sustain the averment in the indictment as to the ownership of the rectifying distillery. The evidence as to the parties interested in the rectifying seems not to be satisfactory. I do not propose to refer specially to it, as it is doubtless in the memory of the jury. It may be well doubted whether this question of ownership is material in the case. The criminal overt act charged is the removal of the spirits to a place other than a bonded warehouse, and the proof of such removal constitutes the gist of the offense. It was not necessary to allege in the indictment the ownership of the rectifying establishment; and such averment may be stricken out as not a necessary element of the offense charged. But, if I am correct in my understanding of the averments of the indictment, the objection on the ground of variance in proof and the allegations as to ownership does not lie. In the first count, the ownership of the rectifier is stated to be in these defendants alone, and in the third count, to be in them and other persons. So that whether they were the sole owners, or whether there were other persons interested with them, the evidence sustains one or the other of these counts. And a verdict may be returned on either, according to the effect to be given to the evidence by the jury.

If it shall be necessary hereafter to consider these several legal points, and give to them a fuller examination, the opportunity will be afforded for that purpose. For the present the jury will receive the views stated by the court as the law upon these points. And in this aspect of the case, it will be the duty of the jury to consider it on its merits, with reference to the evidence before them. The first inquiry for the jury will be, whether the conspiracy charged in the indictment is proved to their satisfaction. A conspiracy within the meaning of the statute is, where two or more persons combine, confederate, or agree to do any unlawful act, or to commit a fraud against the United States. And the proof of such conspiracy may be, first, by direct proof by witnesses having positive knowledge of its existence; or, second, it may be legally presumed from facts and circumstances leading with reasonable certainty to that conclusion. It will be obvious to the jury that it will rarely happen that a conspiracy can be established by direct and positive proof. Persons acting together for an unlawful end pursue their plans in secrecy, studiously avoiding all means by which their guilty purpose may be known to others. In the present case, there is no direct evidence that these defendants entered into a deliberate agreement between themselves, or others, to defraud the United States of the tax imposed on the spirits in question; and the inquiry for the jury will be, whether from all the facts in evidence they can fairly infer there was such a conspiracy. In other words, are the jury satisfied that the defendants between themselves, or in combination with others, were actuated by a fixed purpose of committing a fraud upon the United States, and whether, in accomplishing that object, there was a oneness of purpose, and a unity of action, evidencing their guilty intent to effect their object. This is an inquiry exclusively for the jury, as it involves merely the force and effect to be given to the evidence. The claim of the counsel for the United States is, that the proof shows, not only that these defendants had knowledge of the fraud intended by the unlawful removal of the spirits specified in the indictment, but that they participated and aided in such removal. On the other hand, the defendants' counsel most strenuously contend there is nothing in the evidence which in any way implicates them in the charge of a conspiracy to defraud the government, or in any overt act to effect the unlawful purpose of such a conspiracy, if one existed, in law or in fact.

As remarked before, if the jury find the fact of the existence of the conspiracy charged, they will inquire whether these defendants were so connected with, or aiding and assisting in, the unlawful removal of the spirits, charged as the overt act of the conspiracy. There is certainly some conflict and contradiction in the testimony. But one fact is beyond controversy, and is not denied, namely, that frauds of the most deliberate and repulsive character were committed in numerous instances in reference to the spirits manufactured at the distillery of A. C. Campbell, now deceased. One of the methods by which these frauds were perpetrated was by the fraudulent removal of the spirits to the rectifying establishment of these defendants, situated near the distillery. Without payment of the tax, they passed through the process of rectification, and then were sent to market and sold as tax-paid spirits. And the fact in relation to these frauds, and which renders them all the more odious, is, that government officers, in gross violation of their oaths, were participants and aiders in their commission. It will be for the jury to say, whether from all the circumstances proved, these defendants are implicated in the frauds charged. And it may be proper to remark here, that though it is clearly proved that others were perhaps more flagrantly guilty of these frauds than these defendants, it is no justi-

fication for them if they too were guilty participants in them. The jury will doubtless have noticed that the government in this case has introduced a witness—Huffman—whose testimony, if credible, most clearly implicates these defendants in the frauds charged. This witness, it is not denied, was a prominent actor in the frauds. He does not deny his guilty agency in them. The defendants' counsel insist that his position before the jury as an accomplice in the crime charged renders his testimony utterly worthless, and that it should be wholly rejected by the jury. Without discussing the law as to the credit due to an accomplice, I may briefly state that, on the soundest principles of reason, it does affect the credibility of a witness occupying that position. And, as a general rule, his testimony must be received with great caution, and unless sustained and corroborated, in the material facts stated by him, by credible witnesses, his testimony should be wholly rejected. It is also insisted that the veracity of this witness is seriously impeached by other witnesses, who positively contradict him as to material parts of his testimony. And there seems to be no doubt as to the fact that these contradictions do appear. But, without further notice of this witness, I will remark that it is the exclusive province of the jury to pass on the question of the credit due to witnesses, and to them in this case it is referred.

In conclusion, I may report to the jury that they are to direct their inquiries (1) to the proof as to the existence of the conspiracy charged; and (2) to the question of the guilt of defendants in effecting the objects of the conspiracy, by the unlawful removal of the spirits charged as the overt act. As to the first of these inquiries—the existence of the conspiracy—the jury must be satisfied of the fact, having reference to the legal principles applicable to it, as before laid down by the court, to justify a verdict of guilty. And as to the other inquiry, the connection of the defendants with the overt acts, the jury must be satisfied that the averments of the indictment are substantially sustained by the evidence. As to dates and the quantity of spirits removed, the government is not bound to make the proof in exact correspondence with the statements in the indictment. The gist of the question is, whether spirits, in a larger or less quantity than is named in the indictment, were unlawfully removed, with the guilty participation and aid of the defendants in the act. And I may here remark, that whatever doubts the jury may entertain as to the criminal complicity of the defendants, they can have none as to other parties not now on trial. If they were before the jury to answer for the crime with which these defendants are charged, there could not be a shade of doubt as to the result.

In my remarks I have made no special reference to the second count, charging a violation of the statute in the removal of the spirits after sunset and before sunrise. I do not suppose it is necessary for the jury to consider this count. If the defendants, in the judgment of the jury, are guilty under the first and third counts, it is not material to inquire as to the second. And if the jury find they are not guilty under the first and third counts, they would probably not be prepared to return a verdict of guilty under the second. The mere fact of a removal of the spirits at a time forbidden by the statute, in the absence of a fraudulent or criminal intent, would not, in a criminal prosecution, be regarded as a sufficient basis for a verdict of guilty.

I am requested by counsel to remind the jury that the defendants have produced very satisfactory evidence of their previous good characters for integrity and good citizenship. Such proof they have undoubtedly given, and they are entitled to all the benefits the law secures to them from it. But, in its legal effect, it can not be held to negative or set aside clear proof of guilt. Its chief value is in cases where a well-founded doubt may exist in the minds of a jury, from the evidence adduced, of the guilt of a defendant charged with crime. In such a case, the law benignantly holds that good character may be taken into consideration by a jury as affording a presumption in favor of the innocence of the accused party.

The jury returned a verdict of guilty against the defendants. They were sentenced to a short period of imprisonment and a fine of $2,000.

Case No. 16,323.

UNITED STATES v. SMITH et al.

[Brunner, Col. Cas. 430;[1] 6 Dane, Abr. 718.]

Circuit Court, D. Massachusetts. 1792.

CRIMINAL CASES—COMMON-LAW JURISDICTION OF.

The federal courts have common-law jurisdiction of criminal cases, and may punish a crime though there be no express statute for that purpose.

In these cases there were four indictments at common law against the defendants, for counterfeiting bank bills of the Bank of the United States, passing them, and having tools to counterfeit, etc. Smith was found guilty of passing bank bills of the said bank, counterfeited.

Parsons moved in arrest of judgment because there was no federal statute on the subject; hence only an offense of common law; and the state courts exclusively have jurisdiction of these offenses.

THE COURT held the act incorporating the Bank of the United States was a constitutional act, and that by the constitution of the United States the federal courts had jurisdiction of all causes or cases in law or equity arising under the said constitution and

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

the laws of the United States; that this was a case arising under those laws, for those bills were made in virtue thereof, though there was no statute describing or punishing the offense of counterfeiting them; and therefore to counterfeit them was a contempt of and misdemeanor against the United States, and punishable by them as such; and that the same offense might be punished as a common-law cheat in the state court. Judgment was fine and imprisonment and pillory, the common-law punishment; but not to pay costs, paying costs being no part of the common-law punishment.

(See seventh amendment of the federal constitution as to common law.)

Case No. 16,324.

UNITED STATES v. SMITH.

SAME v. FAXON.

[1 Cranch, C. C. 127.] [1]

Circuit Court, District of Columbia. June, 1803.

JURORS—FINES FOR DELINQUENCY—EXCUSES.

If a juror be fined, and at the same term come in and offer a sufficient excuse, and the court thereupon order the fine to be struck out, but the clerk neglect to enter such order, the court will at the next term, on proper affidavits of the fact, order the fine to be struck out.

[Cited in Blagden v. Broadrup, Append. Fed. Cas.; U. S. v. Walsh, 22 Fed. 648.]

Smith had been summoned as a petit juror, at June term, 1802, and failing to attend, was fined eight dollars. At the same term he came in, and offering a sufficient excuse, his fine was ordered to be struck out; but the clerk omitted to enter it, by mistake.

These facts appearing now by affidavit, THE COURT at this term, June, 1803, ordered the fine to be struck out.

Same order in the case of Josiah Faxon.

MARSHALL, Circuit Judge, absent.

Case No. 16,325.

UNITED STATES v. SMITH.

[1 Cranch, C. C. 475.] [1]

Circuit Court, District of Columbia. Dec. Term, 1807.

LARCENY—LOGS IN FENCE.

Logs in a fence are not the subject of larceny, the fence being in law annexed to the freehold.

Indictment [against W. Smith] for stealing fence-logs, the property of John Orr, from a worm fence. The fence consisted of ten logs, two supporting a rider.

Mr. Morsell and Mr. Caldwell, for the defendant, contended that it was not larceny, but trespass. The fence is part of the freehold, and would have gone to the heir, and not to the executor. It could not be taken in execution. Orr was the tenant of W. Brent. Mr. Caldwell contended, the fence was the property of W. Brent (which Orr admitted in his testimony), and not of Orr.

THE COURT instructed the jury that it was a felony; but having doubts, said they would hear a motion for a new trial or in arrest of judgment, if a verdict of guilty should be found—which was found accordingly.

And on consideration, THE COURT (nem. con.) was of opinion that it was no felony; that the fence was to be considered as annexed to the freehold, and would descend with the land to the heir, and would not go to the executors.

Judgment arrested.

Case No. 16,326.

UNITED STATES v. SMITH.

[2 Cranch, C. C. 111.] [1]

Circuit Court, District of Columbia. June Term, 1815.

FORGERY OF PROMISSORY NOTE—DEFECTIVE INDICTMENT—ACQUITTAL AND SECOND TRIAL.

1. A note of an unincorporated bank, "payable out of the joint funds thereof and no other," is a promissory note within the meaning of the Maryland statute of 1799, c. 75, § 1.

2. The note must be precisely and accurately set forth in the indictment.

3. If the defendant be acquitted upon a flaw in the indictment, he will be remanded for trial at the next term.

Indictment [against Bennet Smith] for forging a promissory note of the Farmers' & Mechanics' Bank (not incorporated).

Mr. Lear and Mr. Law, for prisoner, objected to the admission of the note in evidence, because it was "payable out of the joint funds thereof, and no other," and therefore not such a promissory note as was intended by the act of Maryland of 1799, c. 75, § 1, upon which the indictment was founded; it not being, as they said, a negotiable promissory note; and they said it was not a bank-note within the meaning of the Maryland act of 1793, c. 35, § 2; and therefore could not be given in evidence to support the averment that it purported to be a promissory note of the Farmers' & Mechanics' Bank.

But THE COURT (MORSELL, Circuit Judge, not sitting) overruled the objection.

The prisoner's counsel then objected that in setting forth the note in the indictment, the signature was written "W. Marbury," but the signature to the note was "Wm. Marbury," and for that variance the court refused to suffer the note to be given in evidence.

Verdict, "Not guilty." Prisoner remanded to be tried at the next term on a new indictment.

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

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

Case No. 16,327.

UNITED STATES v. SMITH.

[3 Cranch, C. C. 66.] [1]

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

IMPRISONMENT FOR DEBT—DISCHARGE—PAYMENT OF POUNDAGE—AGREEMENT WITH MARSHAL.

A debtor of the United States had been discharged from custody by order of the president of the United States under the act of the 3d of March, 1817, and had entered into an agreement with the marshal for payment of his poundage fees by instalments, with a proviso that if any instalment should not be paid when due, the marshal should take out a new ca. sa. for his fees. *Held* that he could not be detained upon the new ca. sa.; and the court refused to order him to be committed.

The defendant [John K. Smith], upon being ordered by the president of the United States to be discharged from a ca. sa. issued for a debt due to the United States, and being still holden in custody by the marshal for his poundage fees, which amounted to more than $4000, agreed with the marshal to pay those fees by instalments, and that if he should make default, the marshal should obtain a new ca. sa. and arrest him again. He made default and the marshal took out a new ca. sa. in the name of the United States for his fees. Upon this new ca. sa. he was arrested and brought into court, and prayed to be committed.

Mr. Key, for defendant, objected, that the defendant having been discharged by order of the president of the United States under the act of March 3, 1817, 3 Stat. 399, entitled "An act supplementary to an act for the relief of persons imprisoned for debts due the United States," could not be arrested again for the same cause. The marshal having relinquished the hold he had upon the person of the defendant, could only resort to his action upon the new agreement. After the principal debt has been paid this court has decided, in the case of Causin v. Chubb [Case No. 2,527], at December term, 1805, that the marshal cannot detain the defendant for his poundage fees.

Mr. Lear, for the marshal, contended that that was the case of a ca. sa. under the Maryland law, entered "Not called by consent," in which case the plaintiff may always have a new ca. sa.

But THE COURT (nem. con.) refused to order the defendant to be committed.

Case No. 16,328.

UNITED STATES v. SMITH.

[4 Cranch, C. C. 629.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

GAMING—CONSTRUCTION OF STATUTES.

The first and twelfth sections of the penitentiary act of the District of Columbia, so far as they relate to the offence of keeping a faro-bank, or other common gaming-table, are to be construed together; and, when so construed, they contain a complete description of the offence and its punishment.

This was an indictment [against Henry Smith] under the act of congress of March 2, 1831 (4 Stat. 448), entitled, "An act for the punishment of crimes in the District of Columbia," commonly called the "Penitentiary Act." The offence charged was the keeping "a common gaming-table, called a 'sweat-cloth.'"

The defendant having been convicted, his counsel, Mr. Dandridge, moved, in arrest of judgment, contending that the term "gaming-table," in the twelfth section of the act, was too vague and indefinite to support an indictment, and must be confined to the single offence of keeping a "faro-bank;" as the English statute against stealing "sheep or other cattle," was confined to the stealing of sheep; and the statute against stealing horses did not include a man who stole only one horse. 1 Bl. Comm. 88; 6 Bac. Abr. tit. "Statute"; Plow. 465. It was also contended, that, in the twelfth section, the words "faro-bank or gaming-table," mean nothing more than faro-bank; the words "or gaming-table" being only expletive of the term "faro-bank."

Mr. Key and Mr. Carlisle, contrà, contended, that, in considering a statute, the intention of the legislature is the only sure guide to its construction, and that the first and the twelfth sections are to be construed together, so as to read, "a faro-bank or other common gaming-table."

THE COURT (THRUSTON, Circuit Judge, contrà) refused to arrest the judgment.

CRANCH, Chief Judge, delivered the opinion of the majority of the judges, as follows: This is an indictment for keeping "a certain common gaming-table, called a 'sweat-cloth,' against the form of the statute in such case provided, and against the peace and government of the United States."

The jury having found the defendant guilty, his counsel has moved, in arrest of judgment, and contends that this indictment is under the twelfth section of the penitentiary act of March 2, 1831, by which it is enacted "that every person duly convicted of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor for a period not less than one year, nor more than five years." That the words "gaming-table" are too general, and will not maintain an indictment; and that, if any offence can be punished under that branch of the statute, it is only the offence of keeping a faro-bank. That there is no punishment, provided by the statute, for the offence of keeping a common gaming-table; and that the words "or gaming-table" are intended to be used as synonymous with "faro-bank," and are merely expletive, not cumulative. That the statute ought to be construed strictly, like the statute against stealing "sheep or

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

other cattle," which, it was supposed, was, by construction, confined to the stealing of sheep; and the statute against stealing horses, which, it was supposed, had been construed not to extend to a person who stole one horse only. But this indictment was not framed upon the twelfth section alone. It is founded on the first and twelfth sections. By the first section it is enacted that every person who shall be convicted, in any court in the District of Columbia, of any of the offences therein enumerated, and among others, "of keeping a faro-bank or other common gaming-table," "shall be sentenced to suffer punishment by imprisonment and labor for the time and times hereinafter prescribed, in the penitentiary for the District of Columbia." And by the twelfth section it is enacted "that every person duly convicted" of "keeping a faro-bank or gaming-table," shall be sentenced to suffer imprisonment and labor, for a period not less than one year, nor more than five years. The first section is complete in itself in regard to the description of the offence, the place where committed, the court in which the conviction must be, the nature of the punishment, the place of imprisonment, and the tribunal to pass the sentence. It does not fix the term or period of the imprisonment and labor by express words; but it does so by reference to a subsequent part of the act, where the offence was to be again brought into view, and the period of imprisonment and labor limited. This is done in the twelfth section, where the sentence for keeping a faro-bank or gaming-table is to be for a period of not less than one nor more than five years. The first and twelfth sections, construed together, as they ought to be, complete the legislation upon that subject, and leave no doubt as to the designation of the offence, the tribunal and place in which the conviction is to be had, and the sentence passed, and the nature, extent, and place of punishment.

It has, however, been suggested that the twelfth section can derive no aid from the first; because the first is to be considered merely as a preamble enumerating the offences which the legislature intended to subject to penitentiary punishment; and that the twelfth section is a substantive and independent enactment, and the only one which subjects the offence of "keeping a faro-bank or gaming-table," to punishment in the penitentiary. But any one who reads the first section, must see at once, that it is not a mere preamble, but is as substantial an enacting clause as any other in the whole act. It is indeed the most substantial enacting clause in the act; for there is no other section of the act, except the fourteenth (and that applies only to capital cases other than murder, treason, and piracy), which informs us where the crime must be committed, or by what tribunal, or in what place the sentence is to be passed, or whether the imprisonment and labor are to be in the penitentiary of the District of Columbia, or in any other penitentiary.

Let us, for a moment, consider the twelfth section as standing alone, and deriving no aid in its construction from any other part of the act. The words are: "Sec. 12. And be it further enacted, that every person duly convicted of obtaining by false pretences any goods or chattels, money," &c., "or of keeping a faro-bank or gaming-table, shall be sentenced to suffer imprisonment and labor for a period not less than one year nor more than five years." (1) "That every person duly convicted"; where? In Maryland? or Virginia? or the District of Columbia? or before what tribunal? The section is silent on these points. (2) "Of keeping a faro-bank or gaming-table"; where? The section is silent. (3) "Shall be sentenced"; where, and by what tribunal? The section is silent. (4) "To suffer imprisonment and labor"; where? In the penitentiary of the District of Columbia? or in any other penitentiary? or in any common gaol? Upon all these questions the section is silent. It is an act of the congress of the United States, and there is nothing in the twelfth section to confine its operation to this district, or its tribunals; or to acts done within the district.

Now consider the first section. "Section 1. Be it enacted," &c., "that from and after the passage of this act, every person who shall be convicted in any court in the District of Columbia, of the following offences, namely, manslaughter," &c., enumerating several offences; and among the rest, "obtaining by false pretences any goods or chattels, money," &c., "or of keeping a faro-bank, or other common gaming-table," &c., "shall be sentenced to suffer punishment by imprisonment and labor, for the time and times hereinafter prescribed, in the penitentiary for the District of Columbia." (1) "Every person who shall be convicted in any court in the District of Columbia." This answers the first question which arose in considering the twelfth section; namely, where must the conviction be? The first section says in some court in the District of Columbia; and this answers also the second question which arose upon the twelfth section, namely, where must the offence be committed? For if the conviction is to be in a court in the district, the offence must have been committed in the district or the court could not have had jurisdiction, and the offender could not have been convicted. It also answers the third question raised upon the twelfth section, namely, where and by what tribunal must the sentence be passed? For if the conviction must be in a court in the district the sentence must be also; for one court cannot pass sentence upon an offender upon a conviction in another court. (2) Again, the first section says that the offender "shall be sentenced to suffer punishment by imprisonment and labor for the time and times hereinafter prescribed, in the penitentiary for the District of Columbia."

This answers the fourth and last question which arose upon considering the twelfth section, namely, where is the offender to suffer imprisonment and labor? So far, then, is the first section from being a mere preamble, that it is the only effectual enacting clause. Without it, the twelfth section, and all the other sections limiting the period of imprisonment and labor, would be of no avail. It is evident that their only purpose and office is to fix and limit the time of imprisonment, and apportion it to the respective offences enumerated in the first section; that they ought to be considered as having no other use; and that the first section ought to be construed as if the several limitations of the time of imprisonment and labor had been immediately applied to the respective offences as they were enumerated in that section. The first section, so far as it relates to this subject, would then read thus: Every person who shall be convicted in any court in the District of Columbia, of keeping a faro-bank, or other common gaming-table, shall be sentenced to suffer punishment by imprisonment and labor, for a period not less than one year nor more than five years, in the penitentiary for the District of Columbia. This we think is the true construction of the act.

But it has been said that the twelfth section does not fix or limit the degree of punishment for keeping a common gaming-table. The answer to this suggestion is that the twelfth section has fixed and limited the degree of punishment for keeping all sorts of gaming-tables, which, of course, includes common gaming-tables. But to this it is objected that the word "gaming-table," is too general and vague to be the subject of a penal enactment. That it cannot be supposed that congress meant to make it a penitentiary offence if a gentleman should play a game of whist with his guests in his own house; and that as they could not have meant that, they meant nothing; and that therefore the twelfth section is to be confined to the punishment of the faro-bank only. Here, then, we are obliged to resort to construction; for the plain words of the section are that "every person duly convicted of keeping a faro-bank, or gaming-table, shall be sentenced," &c. By these words, he, who keeps a gaming-table, is equally guilty with him who keeps a faro-bank; and therefore, in order to get rid of these words of the section we must resort to construction. But when we resort to construction we are bound by the rules which the law has laid down for the construction of statutes. The first and great rule of construction is to ascertain and carry into effect the will and intention of the legislators; and the second is that in order to learn that will and intention, not only every part of the statute, but every other statute in pari materiâ, and even the preambles of statutes, are to be considered. A third rule is that although penal statutes are to be construed strictly, yet even in these the intention of the legislature is to be regarded. Heydon's Case, 3 Coke, 7. By these rules of construction, then, in order to ascertain the extent of the term "gaming-table," as used in the twelfth section, we must compare that section with the first; and there we find that it was the intention of the legislature to punish the keeping of common gaming-tables only; and that for the degree of punishment they refer to a subsequent section; which, it is evident can only be the twelfth, because that is the only subsequent section in pari materiâ. The rule that penal statutes are to be construed strictly, then comes in and says that the general and comprehensive term, "gaming-table," must be limited to common gaming-tables. Thus the two sections will be perfectly reconciled, and the intention of the legislature carried into effect. To say that the word "gaming-table," in the twelfth section, has no meaning, or is to be disregarded because it is too general; or is merely a synonyme with the word "faro-bank," is to violate that rule which requires a statute to be so construed "that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Bac. Abr. tit. "Statute" 1, 2; Rex v. Berchet, 1 Show. 108. It would also leave the case, of keeping a common gaming-table, unpunished; contrary to the clearly-expressed intention of the legislature in the first section; unless, indeed, the common-law discretion of the court, in punishing misdemeanors by fine and imprisonment, should be considered as applicable to a misdemeanor which the legislature has enacted shall be punished by imprisonment and labor in the penitentiary without limiting the time of such imprisonment, considering labor and imprisonment as only a substitute for fine and imprisonment. But upon this it is unnecessary to express any opinion. A construction which would defeat the plain intention of the legislature, ought, if possible, to be avoided; and especially when a reasonable construction can be given which will carry that intention into effect. A majority of the judges are quite satisfied that the construction which we have before intimated is the true construction of the statute, and that the motion in arrest of judgment must be overruled.

THRUSTON, Circuit Judge. This is a prosecution, under the penitentiary law, for keeping a gaming-table, and the motion is in arrest of judgment. The matter of law for the consideration of the court, on this motion, is, whether an indictment, charging the keeping a (common) gaming-table called a "sweat-cloth," can be sustained under the said law. I should have not much doubt, from the liberal construction given to penal statutes in modern decisions of the courts, that if the description of the offence contained in the first section of the penitentiary act, had been followed out in the twelfth section which annexes the punishment, that the indictment might be sustained; but there is a material, and, in my view, fatal variance. The first section con-

templates the prohibition of, and the punishment for, keeping a faro-bank or other common gaming-table; and had any subsequent section pursued this description, and followed it with a specific punishment for the offence, the case might have been sufficiently clear, and the offence sufficiently set out to sustain the present indictment; but what is the offence set out in the twelfth section? It is the keeping a faro-bank, or gaming-table; now here is a material and most important distinction. If the words, "or gaming-table," can, by any reasonable interpretation and rules of construction, admit of an intention in congress to have made penal the keeping any kind of gaming-table, other than a faro-bank, which I cannot admit however; then we see an utter want of harmony between the offence set out in the twelfth section, and the one contemplated as a subject of subsequent specific legislation in the first section. They (congress) omitted, in the twelfth section to make provision for the offence as set out in the first section; it is a casus omissus, and must be supplied, if deemed proper or necessary, by future legislation. The act is carelessly drawn, which is manifest in another instance; the first section, in enumerating the offences to be provided for in the subsequent sections, mentions, among them, "petty larceny"; if this means any thing, it must mean petty larceny as a description of offence then well known and settled. Still you find nothing of petty larceny in the subsequent provisions; the law makes, or creates a new constructive petty larceny, extending the sum necessary to constitute it far above the amount necessary to constitute petty larceny at the time of the passage of the act; it is true they have fixed a sum, the stealing under or over which makes the punishment penitentiary confinement, or only fine and imprisonment in the common jail; here is another casus omissus, for the crime or offence called "petty larceny," although enumerated in the first section as one of the offences to be specifically punished, is not afterwards mentioned throughout the law.

But to return: for what offence of gaming is punishment actually (not contemplatively) provided for? Why the keeping a faro-bank or gaming-table; and what is the difference, it may be asked? I answer substantial, essential, and most important; that characteristic word "common" is wanted; a word which alone gives existence, I may say vitality to the offence; in which alone lurks the poison baneful to society, which is an essential and indispensable element of every nuisance; without which the same act is no nuisance. "Common," means, in the sense in which it is used in the first section, "public," and "common" sense too; and so it will be found in the best expounders of the meaning of words. There is another important word also, in setting out the offence intended, or rather contemplated to be specifically animadverted on, in the subsequent section; namely, the word "other." Now this word, "other," so separates and disunites the subsequent words, "common gaming-table," from the preceding words, "faro-bank," as to leave no doubt that other common gaming-tables than faro-banks, were in the contemplation of congress to be prohibited, and the keeping of them punished; but there is no punishment provided for them: had the twelfth section gone to the extent of the first, no doubt could exist, I should think, as at present advised, that they would have embraced sweat-cloths or tables, among the prohibited games. But I give no opinion as to this because there is enough to arrest the judgment without considering particularly the result of an accordance between the crimes contemplated to be punished and those actually punished.

Again, shall it be said (as I think I heard intimated) that the first and twelfth sections may be taken together, and the defects in the twelfth may be supplied, and the meaning and intention of the legislature gathered therefrom. How is this? because in the first section they denounce the keeping of a common gaming-table, and neglect afterwards to provide any punishment for it, shall we be bold enough to send any one to the penitentiary for keeping a common gaming-table? I have read of preambles affording a clue to unravel a doubtful meaning as to the sense of subsequent enactments in the same statute, by affording a view of the policy of the statute, and the public evil intended to be remedied by it; but I never heard of their being actual enactments, or as supplying the place of them. If a statute were to propose to punish any offence, and to denounce it with all the terms of reprobation which ingenuity could invent, or the enormity of the offence about to be punished could justify, still if the legislature omitted to carry its denunciations into effect, the law would be of no avail. But can you, from the preamble, supply, in the prohibitory and actual penal enactment, the very gist and essence of the crime? Can the words in the twelfth section "faro-bank or gaming-table," be made, with the help of the first section, to be equivalent with "faro-bank or other common gaming-table?" The first section declares that the keeper of a faro-bank or other common gaming-table, "shall be sentenced to suffer punishment by imprisonment and labor in the penitentiary," &c., "for the time and times hereinafter prescribed." Well, through the whole law you find this crime not noticed; but in the twelfth section it is true that there is a definition of crime something like it; something akin to it, but falling far short of it in essential characteristics, which is punished by confinement, &c., and these important characteristics may be supplied, we are told, from the first section. What! supply the only word which is essential? which is the soul of the crime; in which alone the public weal could be concerned, namely, "publicity"? Who will say, that when the law is advanced as far as the twelfth section, the

framers of it might not have changed their intention, and softened the severity of the contemplated provision in the first section? All that the first section shows is, that they did intend to punish a certain crime, but this intention is not carried into effect; but the only offence like this one actually provided for, is a different one in substance and essence. To say the best of it, perhaps, is to say that the legislature overlooked it; it is a casus omissus. Let us now come to the twelfth section as it stands in its crippled condition, not propped up by the first section. What do the words "keeping a faro-bank or gaming-table," mean. In my opinion they mean only a gaming-table called a "faro-bank," and no other kind of gaming-table. Now let it be considered that "faro-bank" is no term known to our laws; there is no certain, legal, or established technical meaning attached to the term. Had the words "faro-bank" stood alone as designating the offence, it might be very equivocal, whether some other bank than a gaming-bank might not be intended. When a new offence is about to be punished, circumlocution is used to describe it; and as the words "faro-bank" were used as descriptive of the offence, it was reasonable to make it more certain by adding the words, after the disjunctive "or," "gaming-table," to put it beyond all uncertainty, and that a gaming-table, vulgarly denominated a "faro-bank," was intended to be the subject of animadversion. Now as to the denomination, the act of Maryland of 1797 (chapter 110) uses the word "faro-table," and declares it to be one of the devices used for gaming; and this term, and not "faro-bank," was known to the law as a "gaming-table," and had it been used instead of "faro-bank," there might have been less necessity for those explanatory words, "or gaming-table." If arson, rape, robbery, or perjury are the subjects of legislative prohibition or punishment, they per se ex vi terminorum, are descriptive of the offence, and sufficiently certain. They carry with them and in them a full and perfect exposition or definition of the offence; no explanatory words or circumlocution are necessary; but where shall we look for the meaning and technical offence inherent in the words "faro-bank"? Suppose a prosecution commenced for keeping a faro-bank: would it not be a preliminary question, what is a "faro-bank"? Neither the law, nor any judicial precedents, furnish an adequate or settled meaning of the term; you have to resort to evidence to ascertain what a faro-bank is, in which case there may be great diversity of opinion among the learned in the gambling republic, and thus great uncertainty as to the offence the law meant to punish. Would it not be curious to have witnesses before a jury to tell us what murder, arson, rape, or robbery is? We hear facts, and the law defines crimes; if the evidence prove facts amounting to the established and settled characteristics of the crime, the court are judges of the sufficiency of the evidence, and adjudge the party guilty of the crime charged. We look not to evidence, not to the opinion of witnesses, for what constitutes offences known and settled in the law; so that the legal denomination in one word comprises all the constituents of the crime. Not so with the term "faro-bank;" it is unknown to the law, and is no technical description per se of any offence. Therefore, when the legislature mean to punish any act not known and established as a crime by some legal and technical and certain characteristics, it resorts to descriptions and specifications of the facts and circumstances which are to constitute the prohibited act; they would not be satisfied, nor would there be any certainty in it, to prohibit and punish the act, merely by its vulgar, and popular name; and, therefore, it was proper to superadd the words, or "gaming-table," to illustrate more specifically the meaning of the words "faro-bank." But with the explanation it is still very loose; but if deemed sufficiently explanatory of the meaning attached to the words "faro-bank," it has nothing to do with a sweat-cloth, or sweat-cloth table. A faro-bank or gaming-table, is only an alternative expression of the same thing. It would be a forced construction to say that when one offence was mentioned, that using another more generic or explicit term, separated from the first by the disjunctive, "or," that all kinds of offences which might fall within the scope of this generic term were intended to be embraced in it. It is most consistent with the rules of construction, to consider the latter words as merely an alternative description of the offence not so clearly expressed or defined in the first term. But suppose they were meant as distinct and independent offences, let us see how the matter would then stand. To say nothing of the absence of any legal, known, technical meaning of the words, "faro-bank," and the necessity of resorting to the uncertainty of human testimony to ascertain what a "faro-bank" is, I would ask if the words have a known and definite meaning? Is not betting at a faro-bank essential to constitute the keeping it an offence? Then take away the explanatory words, "or gaming-table," or consider them as independent of the words, "faro-bank," and creating a distinct offence; then the keeping a faro-bank without any betting, or gaming, would fully come within the prohibition, and might be accordingly punishable; can this be the meaning of the legislature? Then take the latter branch of the alternative prohibition, and say that the words, "or gaming-table," mean to prohibit all sorts of gaming-tables, then private gaming-tables are prohibited, and a person having a party of friends at his house, keeping a whist, or loo-table (and nothing is more common), he comes within the prohibition, and is liable to the penalty. Could

this have been the intention of the legislature? No. Gaming-tables must be common, or public, to make them nuisances, and, as such only, are punishable. Whatever rigid moralists may desire as to the correction of private as well as public morals, legislatures have never gone so far as to visit with vindictive penalties the pleasures or amusements of private families; these are left to the gradual influence of public opinion, or are proper subjects for the press, the pulpit, or writers and lecturers on moral duties.

The conclusions, therefore, to which the foregoing considerations lead my mind, are, that whatever the intention of the legislature might have been to provide, in the specific punishments for the crimes enumerated in the first section of the act, that if they have omitted to provide for any one of them, that one is not punishable. That there is no section of the law, subsequent to the first, that makes the keeping a faro-bank, or other common gaming-table, an offence, or provides any punishment for such offence, by such description of the offence, or other equivalent descriptive words. That the offence set out and punished in the twelfth section, is not the offence of keeping a faro-bank, or other common gaming-table, but only the keeping a faro-bank, or gaming-table; a distinct offence, and not identical in language, meaning, or substance, with those in the first section. That you cannot supply the defect of description, by any aid to be derived from the first section, because there is an important, substantial, and essential difference in the two descriptions of offences, to wit: the word "common" is wanting in the latter, which, being the very essence of the offence, can no more be intended, than you can intend, from the preamble of a statute, important words, essential to constitute the crime which the enacting clause professes to punish, because the offence is among those which the preamble contemplates to punish. For example: Suppose the penitentiary act, among the enumerated offences, contained that of murder, which it proposed to punish by penitentiary confinement, instead of capitally; when you come to the clause providing for the punishment of the offence, it is described thus: "Whoever shall kill another, shall be punished by confinement," so and so; could you, because the first section enumerated murder among the crimes to be punished, supply the material and characteristic words, "with malice prepense," from the preamble, or (what is tantamount to a preamble, or is, at least, in the same category) the first section of the act in question.

According to this view of the case, the description of the offence in the twelfth section must be taken alone, and independent of, and unaided by, the first section, whether they be taken together as descriptive of one offence, or separately, as descriptive of two offences. I have endeavored to show that the words are descriptive, and intend only one offence, and shall not repeat what I have said as to their being alternate descriptions of the same offence, but will only make one remark: Can I judicially know that a faro-bank is a gaming-table? In what book shall I look to know this? I do find a faro-table recognized in the Maryland act of 1797 (chapter 110), but no faro-bank. If, then, the expression, "keeping a faro-bank or gaming-table," means two distinct offences, then, by strong implication, a faro-bank is not a gaming-table, because a gaming-table, being a generic term, would necessarily include the species, faro-bank. But if you will place them in antithesis, and faro-bank is not a species of the genus gaming-table (and a very extensive genus it is), then faro-bank is a very innocent and harmless diversion, and never was intended to be, nor could be, without great absurdity being ascribed to the legislature, denounced as a crime. The only rational interpretation of the words describing the offence in the twelfth section, is, that the words, "or gaming-table," are but an alternate and more precise description of a faro-bank, and inform us that a faro-bank is a gaming-table, without which we could not judicially know it.

The result of the foregoing conclusions is, that a sweat-cloth, or rag-table, is not within the provisions or prohibitions of the twelfth section; and as, according to my view, it cannot be extended, even in these more philosophical days of liberal construction, by any aid or support drawn from the preamble, or first section, an indictment for such offence cannot be sustained.

I will add one more remark; all that I have said in the foregoing opinion is exclusively with reference to the case before us, namely, the keeping a sweat-table. It is probable, from what I have observed, that we may have motions in arrest of judgment for keeping faro-banks; therefore I do not mean that any thing in this opinion commits me, one way or the other, as to this latter offence; if a question on such indictment is made, I shall consider it with all the deliberation in my power. I believe, however, that this particular species of gaming was the one intended by the statute to be suppressed. There is another important word, used in the description of the offence, which deserves much consideration; and this is the word "keeping," both in the first and the twelfth sections. The meaning of this term, as I understand it, gives strength to the intimation, in the close of my argument, that no gaming-tables but faro were intended to be denounced and punished by the act; or, at most, none but such as were fixed, and permanently, or at least, for a considerable period, established; so as to be

places of known and common resort. What is the true import of the verb, "to keep?" Does it not import something more than setting up a table for a day, or during the races, if the proof had so established the fact, which, however, it did not, because the testimony in all the cases tried this term, went to the extent only of a single exhibition of a gaming-table on one day only; or proved only one act of playing, or gaming, by the setter up. Now, can the term "keeping" embrace such a case as this? If I understand the meaning of the term, it implies some duration or permanency; and that the opening, or instituting, or setting up a gaming-table for one day, or a few days during a public race, if the evidence even went so far, is not keeping a gaming-table within the meaning of the statute. Let us endeavor to ascertain the true import of the term, by illustrations drawn from common usage, as well as from the best dictionaries. That it is never employed to signify any temporary business or employment or engagement, is evident from innumerable instances where this verb is used, as in the following instances. This is a rule, as far as I know, without exception. If there be one, I have not discovered it. We say he keeps an hotel, a store, a billiard-table, a register's office, a broker's office, a coach, a horse, a gig, an omnibus, carts for hire, a livery-stable, a school, a mistress, &c. Now, does not every instance in the examples above quoted show, that the word is only employed in cases of expressing the idea of some permanent and established business? That congress meant only to strike at those known and established gaming-tables, such as faro, I have no doubt, for the reasons hereinbefore given, but because those dangerous resorts were best known, were prominent in importance and danger, and, therefore, were the particular and exclusive subjects of legislation. They never meant to invade the precincts of the race-field, that annual jubilee of immemorial usage, where the species of petty gambling during the jubilee has been coeval with the festival itself; and tolerated by all the legislatures of the states where this species of annual amusement has been in use. They hardly meant to visit, with the enormous penalty of penitentiary confinement, the poor negroes who kept their fippenny-bit sweat-cloths or ragtables, during this period, and on this theatre of almost universal relaxation of discipline during this festival. I have no dictionary at home except Ainsworth's. The Latin word which seems to me to express, most nearly, the English word to "keep," is "sustentare," and this word, in that language, implies to maintain, support, &c., extending its operation and effect beyond the ephemeral existence of a day. I am unable to give any etymological history of the word, for the want of the proper books, but collect its true import, not only from the corresponding word in another language, from which many of our words are derived (though the verb, "to keep," is not, but is most probably of Saxon or Teutonic origin), but from the sense in which it is, without exception, used in common parlance, and usus est jus et norma loquendi.

[Subsequently the counsel for the defendant moved for a new trial, which was granted by the court, MORSELL, J., dissenting. Case No. 16,329.]

Case No. 16,329.

UNITED STATES v. SMITH.

[4 Cranch, C. C. 659.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

GAMING—KEEPING COMMON GAMING TABLE.

Neither a single act of play at a gaming-table, called a sweat-cloth, at the races, nor even a single day's use of it on the race-field, is a keeping of a common gaming-table, within the penitentiary act for the District of Columbia [4 Stat. 448].

This was an indictment [against Henry Smith] for keeping a certain common gaming-table called a sweat-cloth, against the form of the penitentiary act for the District of Columbia, of the 2d of March, 1831, §§ 1, 12.

The motion in arrest of judgment having, on the 11th instant, been overruled [Case No. 16,328], the defendant's counsel moved for a new trial, on the ground that the exhibition and use of a gaming-table called a sweat-cloth, for a single day on the race-ground, during the races, was not such a keeping of a common gaming-table as was within the meaning of the penitentiary act; the word "keeping" not being satisfied by proof of a single act of play at the table, nor even by a single day's use of it.

After argument, THE COURT (MORSELL, Circuit Judge, contra) granted a new trial, on the ground suggested by the defendant's counsel.

CRANCH, Chief Judge. The defendant has been found guilty of keeping a certain common gaming-table, called a sweat-cloth. A motion for a new trial is made by the counsel of the defendant, because the witnesses only proved that it was exhibited and used one day during the races; which they contend does not amount to the offence of keeping a gaming-table within the meaning of the statute. The word "keeping," certainly, when applied to time, implies duration. Standing alone without limitation, either by express words, or by the nature of the act or thing which it governs, it implies indefinite duration; as when I say, take this book and keep it; keep at work; keep the mill going. But the duration may be limited to a single day, or

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

hour, or minute, and still it is "keeping." So it may be limited or extended by the nature of the subject to which it is applied. That subject may consist of a succession of acts. Thus we say, "he keeps a ferry;" but a single act of carrying a man across a river in a boat, is not keeping a ferry;—"keeps a tavern;" but a single act of lodging a traveller, is not keeping a tavern. So we say, "he keeps a disorderly house;" but a single instance of disorder in the house, is not the keeping of a disorderly house. Many other instances may be cited, in which the word keeping implies a repetition, or succession of similar acts. If the thing to be kept, is itself, temporary, the duration intended by the word "keeping," will be temporary, also. If, therefore, congress had prohibited the keeping of a sweat-cloth at the races, the word "keeping" might, perhaps, have been satisfied by one day's keeping. But if congress had been asked whether they intended to punish by imprisonment and labor in the penitentiary, any person who should exhibit and keep a sweat-cloth for a single day at the races, I think they would have said that they did not; that it was not the kind of keeping which they contemplated. I think, therefore, that a new trial should be granted.

THRUSTON, Circuit Judge. This is an indictment for keeping a common gaming-table called a sweat-cloth. A motion is made for a new trial, grounded on the legal sense of the participle keeping, as intended in the law; and on the construction of which the motion must be allowed or not. Admitting the verb keep, as used in the law, or rather the participle of that verb, namely, keeping, can be strained to the sense contended for; that it may imply a momentary, or a few minutes', or an hour's, keeping a sweat-cloth, (though the testimony, as far as I recollect it, only proved upon the traverser one single instance of his playing at such table,) yet surely it does not become the court, nor is it consistent with the established principle of construction, nor the avowed humanity of the law, to be astute in searching for a meaning of the word to suit the occasion, against the undoubted sense in which the word is used in common parlance, as I have endeavored to show by numerous instances cited by me in my former remarks, which might be swelled to an indefinite extent, without a single example that could be adduced to the contrary; take yet another instance or two. We say, "this is a good keeping apple;" "will this meat keep?" yet everybody knows that neither the meat nor the apple will keep but a limited time, although they will keep for a time implying duration beyond a day, or week, or two weeks; the apple will only last sound for a few months, and the meat, (if not in a vessel hermetically sealed,) but a few years; but in both cases, considerable duration is implied, ex vi termini; where shall we look for authorities to settle the meaning of this most significant term, upon the true construction of which depends the fate of several unhappy beings now in jail? Shall we seek them in common usage? That is in favor of the meaning I contend for. Shall we go to dictionaries, to the best expositions of the term keeping, by the best lexicographers? They support my definition. Shall we seek for illustrations from parallel and corresponding words in other languages? They sanction the definition as I have given it, namely: take the Latin language, the verb "sustentare" is the nearest, nay, the true corresponding word in that language to the verb "keep." This word is translated by Ainsworth, the highest authority, by the words "to sustain" or "maintain"; and what English scholar will give a meaning to those words implying only a moment's, or even an hour's duration? Take an equivalent and corresponding French word, namely, "entretenir"; will any French scholar pretend that this word has so limited a meaning?

Let us then look into the policy of the law, as far as we can gather it from known facts within the knowledge of everybody; and as the statute has no preamble, I know not where else we can search for the intention of the legislature, except from considering the circumstances which it is probable led to its enactment. Who believes that congress either knew or thought of those petty ephemeral tables on race-grounds, which, at most, could only last during the races, and for aught that appeared in evidence on the trial, did not, in the case before us, continue to be played at beyond a few minutes? Congress has tolerated the principal vice, horse-racing. It is hardly presumable they would have left this higher quarry, and struck at the humbler sweat-cloth, a mere incident to the principal, and as certain to follow it as any incident to follow its principal. Had they designed to strike at them, they would have designated them by a more special description, and more congenial terms; they saw, under their very noses, the established and permanent faro-banks in this city, continuing during the session, and some of them, as I have heard, and believed, for years; the fixed, well-known, and dangerous places of resort, kept as permanently and notoriously as Gadsby's Hotel; established places of seduction to the young and the unwary, and productive of every evil; of loss of fortune, of the earnings of tradesmen, shopkeepers, and, perhaps, laborers, and driving on desperation to seek the means of indulging the most absorbing of all passions, gambling; by fraud, larceny, or robbery, and terminating an unsuccessful career by suicide. These are the formidable results of those great establishments, of those hells, as they are justly called; and which congress, by fearful penalties endeavored, and I believe designed to put down.

No such consequences can result from sweat-cloths; they are among those mushroom extravagancies of the race-field, springing up with the races and ending with them, and no more heard of till the return of that annual

jubilee, which has been in use and practice, without let or molestation till now, for an indefinite period, so as to become almost sanctioned by immemorial usage, unnoticed by the laws of Maryland, whose numerous race-fields, dispersed through the country, with all their concomitants of sweat-cloths, and other similar irregularities, have been kept up, and annually, and even semiannually used and indulged in for a time, the commencement of which is at this day unknown,—beyond the memory of man. Do you believe that congress meant, under this short, but sure magic word "keeping," for magic it is indeed, if it has such wonderful efficacy to put down, so suddenly, this ancient usage, "more honored," it is true, "in the breach than the observance," this petty gambling, confined to the poor, the ignorant, during a few days, at most, of an annual celebration; when, from long habit, and the indulgence of the laws, until now, a general relaxation of manners have been permitted and tolerated during such celebrations; like the Saturnalia at Rome, where the laws were almost suspended, for, as well as I remember, three days in the year. To return to the word "keeping." If the word implies exclusively, when unattended with other restraining adjuncts or explanatory words, what I have stated above, if it was never known, in common use, to have any other meaning, nor, according to the expositions of the best dictionaries, illustrated by parallel and corresponding words in other languages, no other meaning can be ascribed to it, shall we strain and force it to a meaning thus denied it by common use, and such authorities, in order to convict the prisoner, and send him to the wretched confinement of the penitentiary, because, to our more cultivated minds and more improved moral sense, he has indulged in practices which shock our feelings? It is against every principle of construction to construe a criminal law not only liberally, but with unprecedented license against the accused; but, on the contrary, if the words, so far from having any force against him, are entirely in his favor, will even admit of a construction to save him, by any reasonable intendment, it is our duty, and comports with the known humanity of the law, to give them that construction. Shall we, I say, arbitrarily strain the word to a sense not justified by common use, nor the most authorized expositions of it by the best expounders, and illustrations drawn from other languages, in order to take in this case, because we think he deserves punishment? He is a profligate fellow, and therefore the word means so and so, and he deserves to be punished, although no instance of such meaning can be found, of the word, unless it be limited and restricted to such meaning, by other words or adjuncts, clearly abridging the known and acknowledged sense of it. For example, we say, "he kept his bed a whole day;" "will you keep my place for me until I return?" in the first case, limiting the duration of the keeping by express words, to a day; and in the latter, by like words or adjuncts, to the time of the return; but the law says, whoever shall "keep a faro-bank or gaming-table," without any words of limitation. Now why should we be thus astute in seeking to bring the traverser within the formidable penalty of the statute, by resorting to an unusual, forced, and unauthorized construction of a single term or expression, on the true import of which his fate hangs? Why should we do this thing? Is it because these poor creatures, born and raised in poverty, ignorance, and darkness, and without any chance or means of moral culture, have done what shocks our more cultivated minds, or our religious or moral sentiments? Are we reformers, or are we judges, to administer the law as it is, and not as we think it ought to be, to the poor and rich with equal hand, and leave reformation to be worked out where alone it can and ought to be, by the wisdom of the laws, or the spread of knowledge and diffusion of learning, or by the influence of moral and religious instruction, by the ministers of religion?

Case No. 16,330.

UNITED STATES v. SMITH.

[4 Cranch, C. C. 727.] [1]

Circuit Court, District of Columbia. March Term, 1836.

BAIL—DISCRETION OF MAGISTRATE.

1. If the indictment does not describe an indictable offence, the magistrate, who takes the bail in the case, has a discretion as to the amount of the bail, and no corrupt motive can be imputed to him on account of the smallness of the amount in which the bail is taken.

[Cited in U. S. v. Ringgold, Case No. 16,167.]

2. The act not being illegal, the court will not permit evidence to be given of a corrupt motive.

Indictment [against Fleet Smith] for taking insufficient bail upon a bench-warrant against Miller for "keeping a certain gaming-table called a faro-bank."

Mr. Brent and Mr. Bradley, for defendant, prayed the court to instruct the jury that the prosecution cannot be sustained, as this court has quashed the original indictment against Miller, on the ground that it did not describe an indictable offence. The bench-warrant which issued upon the presentment was "to answer to a certain misdemeanor, as it is presented," without further description of the offence; and upon reference to the presentment, it does not appear that any offence is charged.

Mr. Dunlop, for the United States, contrà, contended that the magistrate had no right to judge of the validity of the indictment, nor whether it was an indictable offence.

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

Mr. Bradley and Mr. Brent, in reply, cited Starkie, Ev. 168, and 2 Chit. Cr. Law, c. 8, pp. 144, 158.

THE COURT (MORSELL, Circuit Judge, absent) instructed the jury, that as the indictment did not describe an indictable offence, and the justice had discretion as to the amount, no corrupt motive can be imputed to him from the smallness of the bail taken. It was not an illegal act, and therefore the motive is immaterial.

And CRANCH, Chief Judge, added, that if any corrupt act was done to obstruct the due course of justice, it might be the ground of a separate count, or indictment; but upon this count the act of taking the bail in $20 only, not being illegal, the court will not admit evidence of a corrupt motive.

Case No. 16,331.

UNITED STATES v. SMITH.

[5 Cranch, C. C. 484.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

SPECIAL BAIL—EVIDENCE.

A certificate, in the usual form, by the officers of the treasury of the United States, that a certain balance is due by the defendant to the United States, is not sufficient cause for bail.

The United States had filed an account from the treasury, certified in the manner required by the statute, stating merely a balance of $11,000 due by the defendant [W. S. Smith].

W. L. Brent, for defendant, moved for leave to appear without special bail; and stated that this court had decided that a mere statement from the treasury, of a balance due, was not even prima facie evidence on the trial, and, therefore, is not sufficient to hold the defendant to bail.

THE COURT (CRANCH, Chief Judge, not sitting in the case) permitted the defendant to appear without special bail.

Case No. 16,332.

UNITED STATES v. SMITH.

[Brun. Col. Cas. 82; 4 Day, 121; N. C. Cas. 81.]

Circuit Court, D. Connecticut. 1809.

SLAVE TRADE — ACTION TO RECOVER PENALTY — ACCOMPLICE AS WITNESS—DEPOSITIONS —REDUCTION TO WRITING.

1. In an action of debt to recover the penalty given by the act of congress of May 10, 1800, for transporting slaves from one foreign port or place to another, a particeps criminis, after the expiration of two years from the commission of the offense, without any prosecution against him being commenced, may be compelled to testify against the defendant, though such witness has been out of the jurisdiction of the United States a considerable part of the two years. A fleeing from justice within the proviso to the United States statute of limitations for crimes does not necessarily import a fleeing from prosecution begun.

[Cited in brief in U. S. v. White, Case No. 16,677.]

2. The offense within the act of congress of May 10, 1800, consists in transporting persons from one foreign country to another, with a view to their being sold as slaves; and the offense is complete when the vessel arrives at the place of destination, whether the slaves are sold or not.

3. Where the certificate of a magistrate taking a deposition, stated it to have been written in his presence, without saying by whom, and it appeared also that the substance of it had been reduced to writing by the deponent ten days before at a different place when the magistrate was not present, it was *held* that such deposition was inadmissible in the United States courts.

[Cited in West v. Davis, Case No. 17,422.]

This was an action of debt to recover double the value of the interest which the defendant [John Smith] had in certain slaves, transported in the brig Heroine, whereof the defendant was sole owner and master, from Africa to Havanna, and there sold by the direction of the defendant, and for his benefit, contrary to the provisions of the act of congress of May 10, 1800 (5 Stat. 167, 170). The first section of that act is as follows: "That it shall be unlawful for any citizen of the United States, or other person residing within the United States, directly or indirectly, to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another, and any right or property belonging, as aforesaid, shall be forfeited, and may be libelled and condemned for the use of the person who shall sue for the same; and such person transgressing the prohibition aforesaid shall also forfeit and pay a sum of money equal to double the value of the right or property in such vessel, which he held as aforesaid; and shall also forfeit a sum of money equal to double the value of the interest which he may have had in the slaves, which at any time have been transported or carried in such vessel, after the passing of this act, and against the form thereof."

The action was commenced March 31, 1808. The transportation and sale of the slaves were thus alleged in the declaration: "That while said vessel remained on said coast of Africa, to wit, after the first day of December, 1805, and before the first day of April then next following, by direction of said John Smith, and for his use, the crew of said vessel did forcibly seize, carry on board said vessel, and there confine more than one hundred of the natives of Africa, a foreign country, with intent them to transport, and sell and dispose of as slaves in some foreign country. And afterwards said vessel, pursuant to the previous advice and direction of said John Smith, did sail from said coast of Africa, having on board more than one hundred of the said inhabitants and natives of

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

Africa, destined to the port of Havanna, a foreign port and place in the dominions of the king of Spain, at which port said vessel arrived before the 1st day of June, 1806. And the said United States further declare that after the 1st day of April, and before the 30th day of June in the year last mentioned, and within two years next before the date of this writ, by the previous advice and direction of said John Smith, and for his use and benefit, at Havanna aforesaid, one hundred of said inhabitants and natives of Africa, so as aforesaid, by said John Smith, caused to be taken and transported to the place last mentioned, were there sold and disposed of as slaves, and at a price not less than one hundred dollars for each of said Africans, amounting in the whole to ten thousand dollars, against the form, force, and effect of the several acts of the congress of the United States in such cases made, and then in force." The declaration then concluded thus: "By means whereof, and by force of the statutes aforesaid, the said John Smith hath forfeited and become liable to pay a sum of money equal to double the value of the interest which he then had in said slaves so transported in said brig Heroine, whereof said John Smith was sole owner, from Africa to Havanna aforesaid, and there sold as aforesaid, for the benefit of said John Smith, amounting to twenty thousand dollars." The defendant pleaded "Not guilty."

Mr. Huntington, Dist. Atty., and Mr. Peters, for the United States.

Goodrich, Daggett, Mosely & Dwight, for defendant.

On the trial the district attorney, Mr. Huntington, for the United States, offered William Mills, one of the crew of the brig Heroine, as a witness to prove that the defendant was owner of the slaves mentioned in the declaration.

Mr. Daggett, for defendant, objected to his being sworn, on the ground that his testimony would implicate himself, and subject him to fine and imprisonment. The second section of the act of May 10, 1800, declares "that it shall be unlawful for any citizen of the United States, or other person residing therein, to serve on board any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another"; and provides that "any such citizen or other person voluntarily serving as aforesaid, shall be liable to be indicted therefor, and on conviction thereof shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding two years." 1 Stat. 168. A prosecution has already been commenced against the witness for serving on board the defendant's vessel during the voyage in question. Any facts within the knowledge of this witness which will subject the defendant will also show that the witness is guilty.

The district attorney replied that he had entered a nolle prosequi on the prosecution against the witness, and the time for instituting a new prosecution has elapsed, the offense having been committed more than two years ago. Further, the only point to which we propose to direct the testimony of the witness is, that John Smith was owner of certain slaves. To establish that point will not implicate the witness. Nothing is more common in criminal trials than to call upon a particeps criminis to testify.

EDWARDS, District Judge. That is where the witness does not object. But here the witness does object.

The district attorney observed further that the witness came here voluntarily, and agreed to testify. He ought not now to surprise us by refusing to testify. It would be hard on the part of the United States if he were permitted to conduct in this manner.

EDWARDS, District Judge. That is of no consequence. The only question is whether he can be compelled to testify to what may implicate himself, because two years have elapsed since the transaction.

The district attorney then insisted that the lapse of two years after the offense was committed without any prosecution is unquestionably a complete bar, and cited Adams v. Wood, 2 Cranch [6 U. S.] 336. The witness is now as secure from the penalties of the statute as though he had never committed the offense.

Mr. Daggett, for defendant. The United States statute of limitations has a proviso expressly excepting persons fleeing from justice from its operation. The latter clause of the thirty-second section of the act of congress of April 30, 1790 (1 Stat. 119), is as follows: "Nor shall any person be prosecuted, tried, or punished for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture aforesaid." Then follows this proviso: "Provided that nothing herein contained shall extend to any person or persons fleeing from justice." It appears that this witness has been out of the United States a considerable part of the time since the transaction took place. (This had been previously stated, and admitted by the counsel for the United States.) Now, a fleeing from justice is nothing more than avoidance, a going out of the jurisdiction to avoid prosecution. So the construction has been as to fugitives from justice from one state into another. But at any rate the witness will be jeopardized by testifying, and this is sufficient to excuse him. If prosecuted for this offense he must plead the statute of limitations. The attorney for the United States may then reply over a fleeing from justice. This he will attempt to support by showing that the witness has actually been without the jurisdic-

tion of the United States. Will not this jeopardize him? The statute of limitations never purges the offense. Nothing but a pardon will afford the offender complete security. The case of Bollman, in Burr's Trial [Case No. 14,693], was referred to. The question there was whether Bollman was bound to accept the pardon. But without the pardon it was admitted that he could not be called upon to testify.

Mr. Peters, for the United States, contended that a fleeing from justice within the proviso of the statute must be a fleeing from a prosecution begun.

EDWARDS, District Judge. That point was decided otherwise by Ch. J. Ellsworth in the Case of Williams [Case No. 17,708]. He said it made no difference whether a prosecution was commenced or not.

Mr. Goodrich stated that in Williams' Case [supra] the offender had simply been in a foreign country, and it was considered as a fleeing from justice.

EDWARDS, District Judge. I am prepared to give my opinion on the point, but if the jury should find a verdict against the defendant I will give him an opportunity to move for a new trial, and have the opinion of Judge LIVINGSTON. It appears to me that the witness is prima facie protected from prosecution by the statute of limitations. The answer comes from him. He says he is not protected because he has fled from justice. But he ought not to make his fleeing from justice (his own crime) a ground for withholding his testimony. At the same time the court will take care that the witness be not entrapped. The attorney will not be allowed to say now that the prosecution is barred, and thus obtain his testimony, and afterwards bring forward a prosecution, and say that it is not barred, because the witness has fled from justice. The witness must testify.

In the course of the trial the district attorney offered the deposition of Thaddeus R. Austin. It appeared that the substance of this deposition had been copied by the deponent from another paper which he had written at Suffield about ten days before. The certificate of the magistrate who took the deposition was as follows: "Personally appeared the above-named Thaddeus R. Austin of Suffield, in the state of Connecticut, and being duly cautioned, made oath to the truth of the above deposition by him subscribed, and written in my presence," etc.

Mr. Daggett objected to the admission of this deposition on the ground that it was not taken as the act of congress requires. The 30th section of the judiciary act (volume 1, p. 69) provides, that every person deposing shall be carefully examined, and cautioned, and sworn, or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. This testimony was not reduced to writing by the magistrate taking the deposition, nor by the deponent in his presence.

Mr. Peters, contra.

EDWARDS, District Judge. The provisions of the act of congress relative to the taking of depositions are very important, and ought to be adhered to strictly. This deposition cannot be read. The question is not a new one. In England the lord chancellor has refused to admit depositions taken as this was. The transportation of the slaves from Africa to Havanna, as stated in the declaration, was clearly proved by the evidence adduced on the part of the United States. It appeared that the vessel arrived at Havanna more than two years before the commencement of the suit; but it did not appear that the slaves were actually sold until some time within the two years.

Messrs. Goodrich and Daggett contended that the offense charged in this declaration is complete when the vessel arrives; and her arrival takes place when she is moored. It is not necessary that the slaves should be landed or sold.

The district attorney and Mr. Peters, contra, insisted that in order to constitute the offense in question the persons transported must be sold as slaves; if they are transported for the purpose of colonization, or any other purpose than to be sold as slaves, it is no offense. But at any rate, they must be landed before the offense is complete. It does not appear that these slaves were landed more than two years before the commencement of the suit. If the defendant relies upon the statute of limitations for his protection it belongs to him to show this, which he has not done.

Mr. Goodrich, in reply, observed that it clearly belonged to the United States to prove the offense committed within two years from the commencement of the suit; otherwise there could be no recovery. There is a manifest distinction between this case and that where a debt is admitted by the defendant, and claimed to be barred by the statute of limitations.

EDWARDS, District Judge. That part of the case which rests upon the statute of limitations is extremely clear. My opinion is, and so I shall charge the jury, that the offense consists in transporting persons from one foreign country to another, with a view to their being sold as slaves; and as soon as the vessel arrives at the place of destination the offense is completed, whether the slaves are sold or not. It is incumbent on the attorney for the United States to show an offense committed within two years; and as this has not been done, there must be a verdict for the defendant.

The jury found accordingly.

NOTE. Party to Crime, When Compelled to Testify. When the prosecution is barred by the statute of limitations, a particeps criminis

may be compelled to testify; he is not privileged. Weldon v. Burch, 12 Ill. 376; U. S. v. White [Case No. 16,677], approving case in text.

Depositions under United States Laws. Depositions taken under United States statutes must be in strict conformity therewith. Shanwiker v. Reading [Case No. 12,704], citing case in text.

Case No. 16,333.

UNITED STATES v. SMITH.

[1 Dill. 212.] [1]

Circuit Court, E. D. Arkansas. 1870.

CONSPIRACY—RESISTING AN OFFICER—WHAT ESSENTIAL.

[Attorney and client conspiring to resist an officer, are equally guilty. It is not necessary to show actual violence. Threats and acts intended to terrify, or of a character to terrify, a prudent officer, are sufficient, even though he be not prevented thereby from executing his process.]

At law.

CALDWELL, District Judge. If a client and his attorney enter into a conspiracy to resist an officer in performing his duty, both are equally guilty; and in an indictment for this offence, it is not necessary to show actual violence; threats and acts intended to terrify, or calculated by their nature to terrify a prudent and reasonable officer, are sufficient, even though he be not prevented thereby from executing his process.

Case No. 16,334.

UNITED STATES v. SMITH et al.

[2 Hall, Law J. 456.]

District Court, D. New York. Aug., 1809.

EMBARGO ACT—BOND GIVEN BY VESSEL MASTER.

[The embargo act of December 22, 1807, required that no vessel should depart from one United States port to another unless the master gave bond "to the collector of the district" that the goods should be relanded "in some port of the United States." *Held*, that a bond given under the act was not invalid because made payable "to the United States," and not to the collector, and conditioned to reland the goods "at the said port of S., or at some other port of the United States."]

[This was an action by the United States against Hezekiah Smith, Stephen Griffith, and Nathaniel L. Griswold, upon a bond executed by the defendants. Heard on a demurrer.]

This action was upon a bond executed by the defendants to the United States and delivered to the collector of the port of New York, having annexed the following condition, viz. "Whereas the following goods, wares and merchandises, that is to say, 1,272 barrels flour, as per manifest now delivered to the collector of the customs of the port of New York and intended to be transported in the said vessel called the James Wells, burden 178 11-95 tons to the port of St. Mary's in the state of Georgia: Now, the condition of the above obligation is such that if the above-mentioned goods, wares and merchandises, shall be relanded in the United States, at the port aforesaid or at some other port of the United States the dangers of the sea excepted, the said obligation shall be void, otherwise, &c."

The bond was taken by the collector under authority of the second section of the embargo act of the 22d December, 1807, requiring that no vessel shall be allowed to depart from one port to another of the United States, unless the master, &c. shall first give bond with one or more sureties "to the collector of the district," that the goods, &c. shall be relanded "in some port of the United States."

It was argued, upon demurrer, by Riggs, Hoffman & Emmet for defendants, that a bond required and taken under colour of a statute is not valid unless the same is in strict conformity with the authority of the act; that the statute under colour of whose authority this bond is taken requires the security "to be given to the collector of the district," whereas it is made payable to the United States and is conditioned to reland the goods, &c. at the said port of St. Mary's or at some other port of the United States, which being a variance from the words and authority of the act the bond is against law, and void as well under the act as at common law.

Mr. Sandford for the United States.

TALLMADGE, District Judge, said that the authorities cited by the defendants' counsel were decisions upon the particular words of 23 Hen. VI., authorising and requiring bail bonds; which statute prescribes the form of the security and declares all others to be void, and hence it was very properly decided that the particular form marked out was alone decisive and all others void per force of the statute. That the purpose of that act was to correct abuses which had crept into a system of former practice. The purpose of the act in question is to create an entire new system. It prescribes no form of bond nor avoids any that shall be adopted. It merely authorizes the president to give such instructions as appear the best calculated to carry the act into effect. That he was satisfied, upon an attentive perusal of the act, it did not mean to confine the security to the person of the collector as the obligee, but merely through his agency to ensure by bond, a conformity to its restrictions, and that the bond as taken embraced the substance, and was within the spirit and authority of the act a voluntary bond and valid.

Judgment for the United States.

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

Case No. 16,335.

UNITED STATES v. SMITH.

TEN OTHER SIMILAR CASES.

[1 Hughes, 347.] [1]

Circuit Court, E. D. Virginia. Aug. 2, 1877.

CIVIL WAR — RIGHTS OF CONQUEST — DEBTS DUE INSURGENT STATE — JURISDICTION OF FEDERAL COURTS.

1. Where a person was indebted, for money had and received, to one of the insurgent state governments which were overthrown by the United States in 1865, and was sued by the United States, after the return of peace, in an action of assumpsit, on demurrer, *held*, that the original assumpsit of the defendant to the insurgent state government was a debt at common law and not jure belli; and that, the United States having succeeded by right of conquest to the debt, the law, after peace, implies an assumpsit by the defendant to pay the debt to the United States, and will treat the latter assumpsit as a common law obligation and not as arising jure belli.

2. A circuit court of the United States has jurisdiction of an action of assumpsit brought upon such a debt, whether arising at common law or otherwise

The government of Virginia under the Confederacy, having borrowed a large amount of specie from one of the banks in Richmond, the then governor (William Smith), and other officers, withdrew it on or about the 2d day of April, 1865, which was the day preceding the occupation of Richmond by the Union army. Of the specie there were received in distribution by several officers respectively, the following sums, to be accounted for as advances of salary for the fiscal year, commencing April 1st, 1865, viz.: by

William Smith	$5000
George W. Mumford	2000
John O. Chiles	1000
Edward H. Fitzhugh	1000
P. F. Howard	500

At a later date, to wit, in August, 1865, further sums of this specie were distributed to officers of the government then expired, to wit: to

Henry W. Thomas	$500
Shelton C. Davis	300
John L. Shackleford	100
Daniel Denoon	100
S. L. Moncure	100
A. A. Lorentz	100

During the first session of the legislature of the Alexandria government (that of 1865–66), the committee of courts of justice of the house of delegates was charged with an inquiry into this matter. On December 20th, 1865, that committee reported, through William T. Joynes, one of its members, that in respect to this money, the then state government of Virginia did not succeed to the rights of the state government which was overthrown in April, 1865, and could not claim this money; and, that whatever rights of conquest accrued by the overthow of the late government belonged to the United States.

There was no demand or suit by the subsequent state government for these sums of money. Latterly, the United States have brought actions of assumpsit against each of the persons named after personal demand made. The amount received by E. H. Fitzhugh was some time ago paid by him into the treasury of Virginia. As but one of the suits (that against William Smith) involved a sum large enough to authorize it to be carried to the supreme court, that has been heard first, and the others will be stayed to await the result, in order that the principle which may be settled in it may govern the other cases.

The case was heard in June on the demurrer to the declaration; and the decision of the court on the points raised by the demurrer was rendered on the 2d day of August, 1877.

L. L. Lewis, Dist. Atty., for plaintiffs.

R. T. Daniel, Atty. Gen., W. B. Taliaferro, Robert H. Stiles, Bradley T. Johnson, and William L. Royal, for defendants.

HUGHES, District Judge. This case is before me not upon issues of fact, but upon facts admitted by demurrer, and upon the law as arising upon the facts so admitted. The allegations of the declaration are these: (1) That the defendant was indebted to the insurgent government of Virginia in the sum of $5000 on the 2d day of April, 1865; (2) that he promised the said government to pay the said indebtedness; (3) that the said insurgent government was, on the 9th April, 1865, overthrown by the United States by force of arms, and the lawful authority of the United States re-established, in the state; and, (4) that the defendant, after the said 9th day of April, 1865, in consideration of the premises, undertook and promised to pay to the United States the said sum of $5000. The demurrer admits these allegations to be true; yet denies that they constitute a case of indebtedness by the defendant to the United States, and prays judgment, etc.

In technical strictness, by admitting the truth of these several allegations, the demurrer admits the case of the plaintiffs to be sufficient to warrant a judgment for him. But let it be assumed that the fourth allegation, being an inference of law, is not admitted by the demurrer. Then, the question for decision is, whether the United States acquired by conquest of, and succession to, the insurgent government of Virginia, on the 9th April, 1865, such a right to the money which was then due from the defendant to the insurgent state government as was valid and sufficient to raise the assumpsit set forth in the fourth clause of the declaration. Stating the case differently, the question before me is, whether the United States succeeded by conquest and succession to the rights of action, as well as the property, of the insurgent state government,

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.]

which was overthrown on the 9th April, 1865. If so, the law will adjudge that the defendant promised to pay to the United States the money which he thus owed to that government, and the court will render judgment against him accordingly. As a matter of history, it cannot be disputed that it was the power of the United States, and not of any state, or of what was called the Alexandria government of Virginia, which was brought to bear against the insurrectionary governments of the South; or, that the overthrow and conquest of the insurrectionary government of Virginia was in fact effected by the United States. Therefore, whatever rights of property or of action ordinarily result under the law of nations and of war from conquest, resulted to the United States, on the 9th April, 1865, and did not result to what was called the Alexandria government of Virginia. The very able committee of the general assembly of Virginia, Mr Marshall at its head, which had this matter in charge, in the winter of 1865, in the report submitted through one of its members, Judge Joynes, one of the ablest and most learned judges of the state, conceded this right to the United States in their report, in which they said: "It is very clear that the present government representing the state of Virginia cannot assert any claim to this money by right of conquest, for all the rights of conquest, whatever they be, belong to the United States."

And, therefore, the particular question for decision in this case is, whether the right of action, which the demurrer admits that the insurgent state government of Virginia had against the defendant on the 2d to the 8th April, 1865, for $5000, passed by conquest, and, after the peace following complete conquest, to the United States, on or after the 9th April, 1865. Does succession, after complete conquest and peace, give to the conquering power the right of enforcing, by civil action, the payment of debts due, at the date of conquest, to the conquered power? In this case it is to be observed that there was not merely a temporary conquest, and that condition of quasi belligerence attending such an event, but complete and final conquest producing absolute peace, and that undisputed succession of one power by the other resulting from such a conquest. It was a case of undisputed succession peacefully held after complete, final conquest. I will also premise that such suits as this can affect only such property or rights of action as belonged to the insurgent government of Virginia as such, and not property or rights which belonged or belong to the people of Virginia through their legal government. The former alone were the subjects of conquest; the latter were not. Speaking of what passes by conquest to the conquering power, the supreme court of the United States says, in U. S. v. Lyon, 16 Wall. [83 U. S.] 435, the conqueror's "rights are no longer limited to the mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of a conquered state, including even debts as well as personal and real property." Mr. Justice Clifford, in delivering this opinion of the court, and using the language thus quoted, simply gives expression to the settled principle of the law of nations. In the case of Advocate General of Bombay v. Amerchund, cited at length in Elphinstone v. Bedreechund, 1 Knapp, 329, it was held that money in bank belonging to a conquered prince may be recovered in a suit against the banker by the conquering nation. In the case of U. S. v. McRae, 8 Eq. Cas. 72, it was said by the vice chancellor: "I apprehend it to be clear, public, universal law, that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouse, fort, or arsenals, would, on the success of the new or restored power, vest ipso facto in such power, and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right, not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed and displaced, and was itself seeking to enforce it." All the authorities have held the same doctrine, and, indeed, it has never been disputed. These authorities close the question in favor of the right of the United States to the property of the overthrown government of Virginia, as the insurgent government, and to the debts due, whether from citizens or from foreigners, to that government, at the time of its overthrow.

The objection of defendant's counsel, that assumpsit will not lie for an obligation arising by implication from a debtor of a conquered state to the conquering government after conquest, because promises do not arise from acts of violence, is not tenable. It is not denied, it is admitted by demurrer, that the defendant by receiving from the state government before its overthrow, $5,000 not due to him, became indebted to that government. It is settled law, as already shown, that a conquering power after the conquest, succeeds to the debts which were due to the conquered

power. If, therefore, by the law of nations, which is part of the law of England and America, such a debt becomes due from a citizen to the conquering power, then the law of England and America, even the common law of the two countries, implies an assumpsit, a promise on the part of that citizen to pay the debt. The citizen owes the debt to some one. The money he owes does not belong to himself. He is bound in conscience to pay it to the rightful owner, who is entitled ex equo et bono to receive it. And the law of nations, as well as of England and America, declares that the conquering power is that rightful owner. There is no violence between the debtor, as such, and the conquering power. The violence was between the two governments. The debt, as a debt, becomes due to the conquering power, irrespective of the consideration whether the debtor was a combatant or a non-combatant. In his character of debtor, not in that of man or woman, combatant or non-combatant, native or foreigner, he became, qua debtor to the conquered power, the debtor of the conquering power. This is not a question between soldier and citizen, growing out of acts committed while war was flagrant, in the course of the soldier's service, as in Hughes v. Litsey, 5 Am. Law Reg. (N. S.) 148. Nor is it a question of prize or capture durante bello, concerning property taken or right acquired during the progress of war, as in Coolidge v. Guthrie [Case No. 3,185], and in Elphinstone v. Bedreechund, 1 Knapp, 316, where the court expressly says that the capture was made nondum cessante bello. The indebtedness of the defendant in this case to the insurgent government of Virginia, was not one arising jure belli between belligerents, but by contract between friends. It is true that the succession of the United States to the insurgent government was an event durante bello; but that event having been completed, the indebtedness of the defendant to the succeeding government arising after the close of the war, was not an indebtedness jure belli, but by contract. Being indebted, the implied assumpsit of the defendant to pay, his promise to pay, is a common law obligation. A debtor may be liable in assumpsit to a creditor, but if by violence the creditor is killed, the debtor then becomes liable in assumpsit to the creditor's administrator.

I do not think, therefore, with defendant's counsel, that this is a case of first impression. It is an action at common law, founded upon a contract arising of common law implication, and as such, is not new or unprecedented. Nor is the objection of defendant's counsel tenable, which they take on the score of the jurisdiction of the court. The circuit courts of the United States have original cognizance "of all suits at common law, etc., etc., where the United States is plaintiff" (see clause 3, § 629, Rev. St. U. S.), or in other words "of all suits of a civil nature at common law or in equity, etc., etc., in which the United States is plaintiff, etc., etc." Jurisdiction Act March 3, 1875, § 1 [18 Stat. 470]. These definitions of jurisdiction do not refer to the claim sued upon, its character or its origin, but only to the nature and form of the action which may be made the instrument for establishing the demand. A citizen of the United States, indebted to a citizen of France by a contract made in Paris, may be sued in the circuit court of the United States for the district in which he resides in this country. His demand is not a common law demand, but if sued upon it, in an action at law, the suit is in form and character a suit at common law. He may be sued in assumpsit, if the demand be such as to make that form of action proper. So a demand arising durante bello, and not arising at common law, may be sued upon in an action at common law in this country, either in a state or federal court. Under whatever law, whether of peace or war, of the domicile or foreign jurisdiction, the obligation of the defendant arises, the suit proper to enforce it according to the forms of action employed in England or this country, whether it be at common law or in equity, may be brought in the federal courts, if the courts have jurisdiction of the parties to the suit.

As to the proposition of defendant's counsel, that this money is a trust fund, and the execution or abuse of the trust must be examined into by Virginia alone,—that is a question not yet arising in the cause, and it does not appear how it will arise. The state has, by adopting the report of the committee of 1865, and by long inaction, declined to look into or after the trust, if such it be. The defendant has put in no plea in the cause claiming that he has discharged his fiduciary obligations in respect to the debt as a trust fund. And it is not until all action of the sort has seemed to have become wholly improbable, that the United States have now moved in the matter. As a preliminary step to devoting the fund to its trust purposes, it would seem incumbent that the person charged with the legal title in the trust should proceed to collect it in, and as the legal title, by the law of nations and of the land, is in the United States, we have a right to presume that, if the fund bears the character of a trust, the United States will, after collecting it, give to it the direction required by the trust.

As to the proposition of defendant's counsel, that the war of the United States was not against the insurgent government of Virginia, and that the overthrow of that government was not a conquest, but only the setting aside of one government and the assumption of its functions by another, it can hardly find acceptance in view of the facts of history. The event happened at the close of a frightful war, and was directly produced by arms, and by armies in the field. The power of the United States was directed against the in-

surgent state governments, even more than against their confederated authorities. The war was conducted for the overthrow of those governments. When they were crushed, the war ceased, and the historical fact of conquest cannot be changed or obliterated by the employment of theoretic paraphrases in speaking of it. As to the insurgent state governments, it was a conquest, and was followed by the legal results of conquest. This debt is due. It is due to some rightful claimant, and I think the law makes it sufficiently apparent who that claimant is.

The demurrer must be overruled.

Case No. 16,336.

UNITED STATES v. SMITH.

[19 Law Rep. 91.]

District Court, D. Massachusetts. March, 1856.

PERJURY—FISHING BOUNTY LAWS.

To constitute the offence of false swearing under the act of 1813 [3 Stat. 51]. for the payment of fishing bounty, there must be a wilful and corrupt intent to swear falsely.

[Cited in U. S. v. Moore, Case No. 15,803.]

This was an indictment [against David A. Smith] for perjury in making a false declaration to obtain the bounty on a fishing schooner, called the East Wind, of Provincetown. The act of 1813 allows a bounty to vessels that have been employed in the cod fishery not less than four months at sea, provided they shall have been employed under an agreement with the fishermen on shares. The act declares that "any person who shall make any false declaration in any oath, or affirmation required by this act, being duly convicted thereof, shall be deemed guilty of wilful and corrupt perjury, and be punished accordingly."

In order to procure the bounty, the law requires that the owner of the fishing vessel, his agent or representative, shall produce to the collector the original agreement with the fishermen employed during the fishing season, which shall provide that the fish or their proceeds shall be divided among the fishermen, in proportion to the fish they may respectively have caught, and to the truth of which he shall swear or affirm.

It was proved at the trial, that Paul Atkins, the managing owner of the East Wind, which had been employed four months in the cod fishery, gave powers of attorney to the defendant, D. A. Smith, to procure the fishing bounty of the collector, S. B. Phinney, at Barnstable. The defendant at the same time took the papers and powers of attorney for other vessels, about thirty in number, belonging to Provincetown, for which he engaged to collect the bounty, and for each of which he was to be paid fifty cents. He was a county commissioner at the time, and was going from Provincetown to Barnstable on business. Mr. Smith produced to Collector Phinney, the fishing agreement of the owners and skipper of the East Wind, which was in legal form, signed by the master and crew, and purporting to be on shares, according to law. To the truth of this agreement he took and subscribed the following oath before Collector Phinney: "I solemnly swear that the paper now produced by me to the collector, is the original agreement between the owners, master and fishermen, of the schooner East Wind, for, and during the last fishing season." The oath was administered December 31, 1855, and thereupon the collector paid the bounty to Mr. Smith. The government produced three of the fishermen engaged in the vessel, two of whom testified that they were hired by the thousand, that is, so much for every thousand fish they caught, and the other that he was hired by the season, for $125. The agreement was made with the master. They were to have no part of the bounty, five-eighths of which by law belong to the fishermen, and three eighths to the vessel. They all signed the regular shipping paper, which was printed, to go on shares, but the actual agreement was as above stated. There was no evidence to contradict this, and it was admitted that the oath taken by the defendant, was not true in point of fact. But the counsel for the defendant argued to the jury that the defendant took the oath innocently and in good faith; that he had no personal knowledge whether the paper he swore to was true or false; that it was customary for persons who had no personal knowledge of the facts, but who had received the papers as genuine, and found them correct in form, to take such oaths at the request of the owners who sent their papers by them to obtain the bounty, and that as there was no wilful and corrupt intent on the part of the defendant to swear falsely, he was not guilty of "wilful and corrupt perjury."

The United States attorney argued that the perjury consisted in the false declaration, that the paper produced was the true agreement, when it was not the agreement, and also in the defendant's positively swearing that it was the true agreement, when he knew that he had no knowledge whatever of the fact he swore to. That by such swearing he induced the collector to pay the bounty, who had testified that he could not have paid the bounty under his instructions from the treasury department, and should not have paid it, if he had known that the fishermen were not employed on shares, and that he relied on the oath of the defendant for the truth of the agreement, to which he there positively swore. The attorney requested the court to instruct the jury that if the defendant, Smith, when he positively swore that the paper produced by him was the original agreement, had no knowledge that it was the agreement, and knew that he had no knowledge of the fact to which he made oath, then he knowingly and wilfully swore to a false declaration. And to this

point, he cited 1 Hawk. P. C. c. 69, § 6; 2 Russ. Crimes; and 3 Greenl. Ev.—"that it is perjury if one wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavors to induce those before whom he swears, to proceed upon the credit of a deposition which any stranger might make as well as he."

B. F. Hallett, U. S. Dist. Atty.
T. K. Lothrop, for defendant.

SPRAGUE, District Judge, instructed the jury that the law did not allow the fishing bounty, unless by the agreement under which the voyage was performed, the fishermen were severally to share in the bounty and proceeds of the voyage. That engaging men for so much a thousand fish caught, or hiring them by the month or season, except the cook, was not a compliance with the requisitions of the law, and no vessel was entitled to bounty, where the fishermen did not have a share in the residue of the proceeds of the voyage, in proportion to the number of fish caught. The law made it necessary, in order to obtain the bounty, that, after certain deductions from the proceeds of the fish caught, the residue should be divided among the fishermen, according to the number of fish they caught, and that five-eighths of the bounty should be divided in the same proportion. And the owner, his agent, or representative, must swear that such was the agreement, in order to get the bounty. But in order to make the offence perjury, under the statute, the jury must be satisfied that the defendant swore to a declaration, which at the time he was aware was false. To constitute the offence, it must be proved, that, in taking the oath, the defendant knowingly swore to a declaration as a fact, which he was aware was untrue. And that might be either by swearing to a fact which he knew was not true, or by swearing to his knowledge of the fact, when he knew he had no such knowledge. Rash swearing was not necessarily perjury, and the jury would inquire whether it was honestly done, or to deceive the officer and get the bounty by making a false declaration. The jury would inquire what reason the defendant had for believing that the oath he took was true. He had no participation in the voyage, and no interest in swearing falsely to get the bounty. Was the paper put into his hands as an original document, and did he receive it as such? It is in the usual form, and purported to be a genuine document. It had the genuine signatures of the master and all the fishermen, and was countersigned by the owner of the vessel. It had also the certificate of the inspector, at Provincetown, who examined the vessel before she went on her voyage, and the oath of the master of the vessel before the deputy collector, on her return, that it was the actual agreement for the voyage. Taking the position in which the defendant stood, did he honestly and in good faith take the oath, or did he wilfully swear that he had knowledge of that which he was conscious at the time he had no knowledge of?

The jury retired, and after being out a few hours, came into court and requested instruction, whether the oath must be taken wilfully and with intent to defraud?

THE COURT said: "It is necessary for the jury to be satisfied beyond a reasonable doubt, that the oath was taken wilfully and intentionally to deceive, or mislead, and that the defendant stated as true, what he knew to be false. If he had no intentions of stating a falsehood to mislead, it is not the offence charged in the indictment, there being no collusion with any officer. That it was not necessary that the defendant should have intended to defraud the government, by obtaining the bounty for a vessel which he did not think had earned it. He might believe that the vessel had been employed the full time, with the requisite crew under the proper agreement, and so was entitled to the bounty, and yet he might, under the statute, be guilty of the offence charged by swearing falsely, to induce the collector to pay the bounty."

Under this instruction the jury retired, and returned a verdict of "not guilty."

Case No. 16,337.

UNITED STATES v. SMITH et al.

[1 Mason, 147.] [1]

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

REVOLT OF SEAMEN—"HIGH SEAS"—VOYAGE WHERE ENDED.

1. An endeavour to make a revolt within the act of 30th of April, 1790, c. 9, § 12 [1 Stat. 115], is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship.

[Cited in U. S. v. Smith, Case No. 16,345; U. S. v. Hemmer, Id. 15,345; U. S. v. Haines, Id. 15,275; U. S. v. Seagrist, Id. 16,245.]

2. A vessel lying on the sea, outside of the bar of a harbour of the United States, within three miles of the shore, is on the high seas.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; U. S. v. Plumer, Id. 16,056.]

3. A voyage in shipping articles from A to B, or some other port, for a cargo of salt, and return to the United States, is not ended on arrival at the first port of the United States, unless it be the port of discharge.

Indictment against the defendants [James Smith and others] for an endeavour to make a revolt in a ship on the high seas, contrary to the 12th section of the statute of 30th of April, 1790 (chapter 9).

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

George Blake, for the United States.
S. L. Knapp, for defendants.

STORY, Circuit Justice, after summing up the facts, delivered the opinion of the court as follows:—

The language of the statute is not of very easy interpretation; and the word "revolt" has not acquired so definite a meaning, as to be free from all doubt. After the best consideration, which we can give the subject, we are of opinion, that an endeavour to make a revolt in a ship is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers of the ship. A mere act of disobedience to a lawful command of the officers, is not, of itself, an endeavour to make a revolt. But to amount to the offence, it must be combined with an attempt to excite others of the crew to a general resistance or disobedience of orders, or a general neglect and refusal of duty. So if there be an endeavour to usurp the command and government of the ship, by combining the crew in hostility against the master and officers, this is properly an endeavour to make a revolt. We do not mean to assert, that the offence cannot be committed, unless by an attempt to stir up a general resistance or usurpation of the authority of the officers in all cases. If the crew were to combine together to resist a single lawful order of the master, or to compel him by force to yield up his authority in a single case, and were to proceed in the execution of their purpose, all their acts, done towards its accomplishment, might perhaps be properly deemed endeavours to make a revolt. What we mean to assert is, that the endeavour to make a revolt necessarily implies an attempt to stir up others of the crew to a resistance or rebellion against the lawful authority of the master and officers; and that the offence is not committed, if the party does not attempt or endeavour to combine, or excite others of the crew, to aid in his unlawful purposes.

Another question has arisen, whether the offence if committed at all, was in this case committed on the high seas. It appears, that the vessel at the time of the supposed offence was lying outside the bar of Newburyport harbour, but within three miles of the shore. Under these circumstances we are clearly of opinion that the place, where she then lay, was on the high seas; for it never has been doubted that the waters of the ocean, on the sea-coast, without low-water mark, are the high seas.[2]

Another question is, whether the voyage was ended at the time of the supposed offence, so as to discharge the mariners from their service. The voyage by the shipping articles is, "from Newburyport to the Cape de Verd Islands, or some other port, for a cargo of salt, and return to the United States." The vessel on her return voyage anchored in the outward harbour of Boston, and was immediately ordered round to Newburyport, (the port to which she belonged,) to discharge her cargo. Upon the construction of the shipping articles we are of opinion, that the voyage did not end at the arrival at the first port in the United States, nor until an arrival at the port of discharge in the United States.

Verdict against the defendants.

[2] Quære if it be necessary to allege this offence to be committed on the high seas, as the statute does not seem to make it local? Vide the 12th section of the act of 1790, c. 9.

Case No. 16,338.

UNITED STATES v. SMITH.

[2 Mason, 143.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1820.

SLAVE TRADE — INDICTMENT — SPECIFICATION OF TIME—SCIENTER—CONCLUSION.

1. In an indictment founded on the slave trade act of 20th of April, 1818, c. 86 [3 Story's Laws, 1698; 3 Stat. 451, c. 91] §§ 2, 3, for causing a vessel to sail from a port of the United States, to be employed in the trade, it is sufficient if the indictment alleges that the offence was committed after the passing of the act, at some time between certain specified days, though no day in certain, on which it was committed, is specified.

2. It is not necessary on an indictment on the same act to aver, that the defendant knowingly committed the offence.

[Cited in U. S v. Malone, 9 Fed. 900.]

3. A conclusion of an indictment founded on a statute "contrary to the true intent and meaning of the act of the congress of the United States, in such case made and provided," is good, and is equivalent to a conclusion "against the form of the statute in such case made and provided."

[Cited in U. S. v. Gooding, 12 Wheat. (25 U. S.) 478.]

[Cited in State v. Skolfield (Me.) 29 Atl. 923.]

Indictment [against Joseph F. Smith] on the second and third sections of the act of 20th April, 1818, c. 86, against the slave trade. This case was similar in most material respects to the preceding case of U. S. v. La Coste [Case No. 15,548].

A verdict of guilty was brought in by the jury, and motions for a new trial and in arrest of judgment on the same grounds as those in that case, were made by Hooper for the prisoner.

STORY, Circuit Justice. Many of the objections taken to this indictment, have been already considered in the case of U. S. v. La Coste [supra], and need not be here re-

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

examined. Those only will be taken notice of, which apply to the second count of the indictment, (which charges in substance, that the defendant on the high seas caused a certain vessel, &c. to sail from the port of Baltimore, &c. for the purpose of being engaged in the slave trade,) and which were not discussed in the other cause.

The first exception is to a supposed repugnancy in that part of the count, which avers, that before the vessel was caused to sail, she had been fitted out, &c. for the slave trade. It is a sufficient answer, that whatever may be the force of the argument on this point, the whole averment in this part of the count is mere surplusage and unnecessary to the constitution of the offence, and therefore may be rejected as immaterial. "Utile per inutile non vitiatur."

A second objection is, that no definite time is stated in the second count, when the offence was committed, which is a fatal defect. The averment is, "that heretofore and after the 20th day of April, A. D. 1818, that is to say, at some time between the day of the month and year last mentioned, and the 12th day of February now last past," the defendant committed the offence. That the averment of a particular day, on which the offence was committed, would in this case be altogether formal cannot be doubted. It would be unnecessary to prove, that the offence was committed on that particular day, and if proved to have been committed on any other day after the passing of the statute and before the caption of the indictment, it would have justified a conviction. It is not then a case in which time is material to the constitution of the offence.

I am myself no friend to over curious and nice exceptions in mere matters of form, either in civil or criminal proceedings. They were introduced into the law in an age of subtilties and scholastic refinements; and I agree with Lord Hale and Lord Ellenborough, that they are grown to be a blemish and inconvenience in the law and the administration thereof, and that more offenders escape "by the over easy ear given to exceptions in indictments, than by their own innocence;" and that these unseemly niceties are "a reproach to the law," and have become "the disease of the law." 2 Hale, P. C. 193; The King v. Stevens, 5 East, 244, 260. Still the defendant is entitled to the benefit of these niceties, wherever the law is settled in favour of them; and it is our duty to allow them as far as they have clearly gone. But for one, I am not willing to extend them beyond the limits already assigned to them. This objection, then, is to be decided, not by the reason of the thing, (for that is against it) but by authorities. If they settle the point, we are bound by them; if they are silent, or are divided, we are at liberty to follow the dictates of common sense, and general legal reasoning.

It is a general rule, that it is necessary to allege in every indictment some time, when each fact happened, that constitutes the offence, or is material to the guilt of the party; and if no time be alleged, the indictment is bad for uncertainty; and as the statutes of jeofails do not extend to indictments, the defect cannot be amended, and is fatal. 2 Hawk. P. C. c. 25, § 77; 1 Starkie, Cr. Pl. 50; 2 Hale, P. C. 177; The King v. Holland, 5 Term R. 607, 624. Hawkins says, that it is laid down as an undoubted principle in all the books, (and he refers principally to ancient authorities) that no indictment can be good without precisely shewing a certain year and day of the material facts. 2 Hawk. P. C. c. 25, § 77. Staundford says, that to make a good indictment, it is necessary to put in the year, day, and place, when and where the felony was committed, and it ought to be such a day, which is not uncertain nor ambiguous. Staund. P. C. 95. Lord Hale says, touching the time, viz. the year and day, wherein the fact was committed, this is necessary to be contained in the indictment. 2 Hale, P. C. 177. If, by these expressions, it be meant, that a particular day must in all cases be alleged with certainty, the present indictment cannot be sustained, for it lays the offence only on some day between certain times. It is easy to see, why a day certain should be alleged in all cases, where it constitutes a part of the crime, or where a forfeiture of goods and chattels or lands takes effect from the time of its commission; for in such cases it is material to the party. But where the offence may be committed at any time, or, if laid on a particular day, may be proved without any substantial variance to have happened on any other day or between any given limits, it is not so easy to see the reason of such a rule. That there are exceptions to the rule, as laid down in Hawkins, and the other authorities above referred to, is unquestionable. As for instance, a negative, or omission of duty, may be set forth without alleging any time. Rex v. Holland, 5 Term R. 607, 616; Hawk. P. C. bk. 2, c. 25, § 79. So upon informations and convictions before justices of the peace, and informations in the exchequer on penal statutes, it is held to be sufficient to allege the offence to be committed between such a day and such a day. Rex v. Chandler, 1 Ld. Raym. 581; Reg. v. Simpson, 10 Mod. 248; Hawk. P. C. c. 25, § 82. What substantial difference there can be between an information on a penal statute in the exchequer, and in any other court, I profess not to know. This is certain, that in an information for any offence at common law, or upon a statute, the same certainty and precision are required as in an indictment. Rex v. Wilkes, 4 Burrows, 2527, 2556; 1 Chit. Cr. Law, 846; 2 Hawk. P. C. bk. 2, c. 26, § 4. Mr. Starkie in his late valuable treatise on criminal pleadings asserts, that this mode of pleading has been long in use in informations upon penal statutes. And he adds, "there does not appear to be any reason, why the offence should not be so laid in indictments, where the day cannot in fact be

ascertained; but it is safer to aver some day, though it cannot be proved." From these remarks, it may be inferred, that the point is not considered now to be settled in England against the same practice in indictments. There is a case in 1 Show. 389, Rex v. Roberts, which is cited by Hawkins (2 Hawk. P. C. bk. 2, c. 25, § 82), where an information was for extortion by a ferry keeper, and the party was charged with having between a certain day and the day of exhibiting the information extorted of divers subjects divers sums of money exceeding the lawful rates. And it was held bad, because every several taking was a several offence; and the court said, suppose an indictment, that between such a day and such a day he beat divers of the king's subjects; this is not one complicated offence, consisting of several facts, but several offences jumbled together. Sir B. Shower, the reporter, argued the case for the defendant, and it does not appear from his report, that he took any exception to the manner of laying the time, but only to the joining of several offences in so uncertain a manner. The case is somewhat differently stated in 4 Mod. 101, for there an objection is made, that no time certain was laid, but nothing is said on it by the court. Carthew and Salkeld agree in substance with the report in Shower; and the former makes the court to say, "'tis true all informations in the exchequer are general, as this is; but the reason is, because they are for certain (meaning, I presume, several and distinct) penalties." This case, therefore, affords no authority against the sufficiency of an information laying a single offence between certain days. And if the case be supposed to decide any thing as to the allegation of time, it is directly contradictory to the authority of the case of Rex v. Lady Broughton, 2 Lev. 71, where laying the same crime at divers days and times, between such a day and such a day, was held upon motion in arrest of judgment to be sufficient. Lord Chief Baron Comyns (Com. Dig. "Indictment," G, 2) says, that on divers times between such a day and such a day is sufficient in an information, and cites this case in Levinz in proof; which shows, that he considered it good law.

The counsel for the defendant, in support of this objection as to time, cited 2 Co. Inst. 318, where it is said, that upon an appeal of murder the fact cannot be alleged to be done circa 10 diem Decembris, &c. or inter decimum et 11 diem Decembris, &c. But it is to be considered, that this doctrine is expressly applied to the case of an appeal, and upon the very terms and construction of the statute of Gloucester, which in appeals requires the day, the hour, the time of the king, and of the town, where the deed was done, to be set forth; and Lord Coke in his Commentary expressly admits, that there are diversities between appeals and indictments. See, also, 2 Hawk. P. C. bk. 2, c. 23, §§ 86–88. The authority, therefore, does not come up to the point.

The case, then, now before us, does not appear ever to have been in terms decided. It is not a case, where the offence is laid on a day, which from its description is uncertain, so that it may mean either of two days, or on a future impossible day; or where one and the same offence is laid on two different days, or on days repugnant to each other. In all these cases it has been adjudged, that the defect cannot be helped by a verdict. 2 Hawk. P. C. bk. 2, c. 25, § 77; 2 Hale, P. C. 178; 1 Starkie, Cr. Pl. 55, 56. Nor is it a case, where several offences have been generally laid at divers days and times, as to which there is a diversity in the authorities. The case now before us is, where a single offence is laid to have been committed between such a day and such a day, not alleging any day certain. Such an averment would be sufficiently certain in many criminal proceedings, on complaints and summary proceedings before justices, upon informations for penalties, and upon indictments for non-feasances. This is the case of a misdemeanor, as to which much less nicety in respect to time is required in the material allegations of fact, than in indictments for capital offences. 2 Hale, P. C. 178; 1 Chit. Cr. Law, 221; 1 Starkie, Cr. Pl. 54; Hawk. P. C. bk. 2, c. 25, § 77. It would seem strange, that the fact might not be laid, as it would be proved: that if the exact time were unknown, or could not be proved, it might not be so stated, or stated between such a day and such a day: that the day must be stated with certainty in the indictment, and yet a verdict finding it on another day would be good; or finding it on no day certain, as between two days, would be good. And this, though the time be admitted to be formal, and more certainty would not conduce to the relief of the defendant, or aid his defence, or narrow down the proof. In the Cases of Lowick (4 State Tr. 718) and Lord Wintoun (6 State Tr. 17, 53, 56, 57), where the subject was a good deal discussed, although the general doctrine as to certainty of time in all indictments was stated; yet the argument seemed mainly rested upon its materiality and importance in capital cases. If the present were a capital case, it would be our duty to adhere to the very letter of established doctrines in favorem vitæ. But in respect to misdemeanours, courts have relaxed much from their former strictness in construing indictments; and many exceptions, which were formerly holden fatal, would now be disregarded. 1 Starkie, Cr. Pl. 227, 228. There is no modern decision on this point. The case of Rex v. Broughton, already stated, (2 Lev. 71; Com. Dig. "Indictment," G, 2), which is recognized as law by Chief Baron Comyns, (and no better authority could be cited) has decided, that the offence of extortion laid on divers days and times between the 2d of May, 22 Car., and the exhibiting the information, was well laid, and the exception, though moved

in arrest of judgment, was overruled. That case approaches nearer to this than any other case; and if sufficient in an information in the king's bench, it would be sufficient in an indictment. And the language of Mr. Starkie, already referred to, seems to justify the notion, that this exception would not now be held fatal in England, when the allegation conformed to the fact.

Upon the whole, after much deliberation, being willing to give the defendant the benefit of every legal objection; but willing also to subserve the purposes of public justice, I confess myself not satisfied, that this objection to an unexpected and unnecessary irregularity, in pleading, ought to be held or would now be held in any court of criminal jurisprudence, fatal.

Another exception is, that it is not alleged, that the defendant knowingly committed the offence stated in the second count. This is not required by the statute, and need not be averred. If he caused the vessel to sail for the purpose of being engaged in the slave trade, he must have known the act and the intent. But it is sufficient to say, that no such averment is necessary.

The last exception, which will be taken notice of, is, that the second count does not conclude against the form of the statute. The objection supposes, that these words are necessary in every indictment founded on a statute. But we understand the rule to be not exactly so. In every indictment founded on a statute. it is necessary to conclude against the statute; but though the technical words, "against the form of the statute in such case made and provided," are constantly used in all indictments, which consult accuracy and precision; yet equipollent expressions are just as sufficient in point of law. All that is required is, that some phrase should be used, which shows that the offence charged is founded on some statute. This is the doctrine heretofore asserted in this court (Smith v. U. S. [Case No. 13,122]); and it is recognized in the decisions of the supreme court of the state. The count in this case concludes, "contrary to the true intent and meaning of the act of the congress of the United States in such case made and provided." It is therefore clear, that it purports to be founded on a statute. The words, "act of the congress," are as strong and unequivocal as "statute" of the congress; and against the "true intent and meaning" of a statute, is in reality more forcible, direct and intense, than against the "form" of a statute. And this very count finally concludes after an averment, which is merely surplusage, "contrary to the form of the act of the congress of the United States in such case made and provided;" which conclusion might be applied to the whole count, if necessary, which we are decidedly of opinion it is not

The motion for a new trial and in arrest of judgment is overruled.

Case No. 16,339.

UNITED STATES v. SMITH.

[13 N. B. R. 61.] [1]

District Court, N. D. New York. 1874.

BANKRUPTCY—FRAUDULENT DISPOSITION OF GOODS—CRIMINAL PROSECUTION—EVIDENCE.

1. It is not necessary that the goods which have been fraudulently disposed of shall have been obtained within three months prior to the commencement of the proceedings in bankruptcy, in order to convict a party of a fraudulent disposition thereof.

2. The intent of a party is ordinarily to be inferred from evidence which tends distinctly and directly to prove the intent.

3. In order to obtain a conviction for concealing assets from the assignee, it is not necessary to prove a demand on the part of the assignee.

During the months of September, October, and November, 1871, Jacob O. Smith, then doing business as a retail boot and shoe merchant at Rochester, New York, obtained upon credit about twenty-five thousand dollars worth of boots and shoes from various wholesale dealers in New York and the manufacturing towns of the East. The first notice that the creditors received of Smith's fraudulent operations was about the middle of December, 1871, when an attorney from Rochester came to New York City and endeavored to effect a compromise upon a low basis, making the usual plea of hard times and misfortune. Upon examination it was found from the books of the express and railroad companies that, during the months of October and November, Smith received a large quantity of boots and shoes from New York City and the East, and that during the time he was receiving these goods he was shipping large quantities of boots and shoes to the auction houses of George P. Gore & Co., of Chicago; Murdock & Dickson, of St. Louis; to his brother, F. H. Smith, at Chicago, to be sold at auction; to his father, I. Smith, at St. Louis, to be sold at auction; to J. O. Smith, at Lockport, N. Y., and to various auction houses in Louisville, Ky., and Cincinnati, O. It was further ascertained that the goods shipped to J. O. Smith, Lockport, were put into a store there, sold at retail for a few days, and the remainder, amounting in value to about eight thousand dollars, was sold by Smith to one A. W. Henderson on the 1st of December, 1871. For this sale Smith claimed he received from Henderson about two thousand dollars in money, and about six thousand dollars in Henderson's individual notes. It further appeared that on the 14th of December, 1871, one L. M. Farnham, of Chicago, filed a petition in bankruptcy against Smith. That Smith made the affidavit of bankruptcy admitting he was a bankrupt; and on the same day Smith's attorney consented to an immediate adjudication in bankruptcy. The proceedings in bankruptcy were probably collusive. The peti-

[1] [Reprinted by permission.]

tion was verified by the attorney instead of the creditor; and as such a petition had then been held effective, it was doubtless a part of the plan to defeat any civil or criminal proceeding by setting up the defect in the petition. When the creditors determined to prosecute the case, they caused a new petition to be filed on behalf of James Griffin, of New York, and then had Smith indicted for disposing of his goods with intent to defraud, and for concealing his assets. The defect in the petition was the main reliance of Smith's counsel upon the trial, but the court held that Smith's admissions in the affidavit of bankruptcy, and a recent decision of the circuit court, were conclusive against the defendant.

Richard Crowley and Charles M. Dickinson, for the United States.

George Gorham and Mr. Tourtelotte, for defendant.

HALL, District Judge. Whatever may be your final verdict in this case, I am sure you will agree with me in the feeling, that it is a case which deserves your most careful and serious consideration. The charge against the defendant is one of a serious character, and the punishment, if he is convicted, will be of sufficient magnitude to deter others, to some extent, from the commission of similar offenses. It is important to him, therefore, that he should not be pronounced guilty, and it is the duty of the jury not so to pronounce him guilty, unless the evidence in the case justifies that verdict; but, on the other hand, if he is guilty of the offense charged upon him, it is certainly the duty of the jury, as it is for the interest of the public, that they should not hesitate, if they are entirely convinced of his guilt, to pronounce him guilty. The bankruptcy act passed by congress, has for its object not only the discharge of the unfortunate, but honest debtor, from his liabilities, but it has also for its object the security of the creditor against the fraud and dishonesty of his debtor; and in pursuance of the desire and object of congress to provide securities against fraud on the part of debtors, a section was introduced into the bankruptcy act upon which the indictment in this case is found. The section contains several provisions, making several different acts criminal, and among them are two which form the basis of this indictment. There are three counts in the indictment; the first and the last count are founded upon a provision of the statute which declares that if any bankrupt shall, with intent to defraud his creditor, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions, in the ordinary course of his business, any of his goods or chattels, which have been obtained upon credit, and which remain unpaid for; he shall be guilty of a misdemeanor, and shall be punished as provided in this section.

You will see, gentlemen, the general object of this provision. Whenever a debtor, especially a trader, is clearly insolvent, it is the object of the bankrupt act to enable his creditors to take proceedings against him, and to secure a fair and equal division of his property among them, with such preference as the act itself provides for, with the exception of such property as the bankrupt is entitled to retain under the provisions of the act. The case proceeds upon the ground that each one of the creditors is entitled to share equally; and when it has been established that the act of bankruptcy has been committed, that the party is insolvent, and that he has done something which is in violation of the act, and in violation of the rights of the creditors, proceedings may be taken against him by his creditors, he may be forced into bankruptcy, and his property then be distributed under the provisions of this act. For the purpose of carrying out this object, securing this equality among creditors, securing the proper division of the property of the bankrupt, this section, as I have stated, provides that if he shall within three months next before the commencement of the proceedings in bankruptcy, dispose of his property except by bona fide transactions, that is, transactions in good faith, and in the ordinary way of his trade—that is, the ordinary, regular, and customary mode of proceedings in his trade or business, prior to the time when he became a bankrupt—now, if he shall do this, if he shall pawn, pledge, or dispose of, otherwise than in an honest manner, and in bona fide transactions, and in the ordinary ways of his trade, any goods or chattels which have been obtained on credit, and remain unpaid for, in this way, with intent to defraud his creditors, he is guilty under the provisions of this act. It is not necessary, as has been stated to you by the district attorney, that the goods which have been so disposed of shall have been obtained within the three months next prior to the time when the proceedings in bankruptcy shall have been filed against him. No matter when they were obtained, if they have been obtained upon credit, and have not been paid for, and have been so disposed of within the three months next prior to the petition in bankruptcy, with the intent to defraud, then the offense is completed, and the defendant must be found guilty of the offense charged against him.

Of course, gentlemen, in looking at this case, you will consider what is the ordinary way of trade with the defendant, and persons transacting business of a similar character, and you must determine from the evidence whether the transactions to which your attention has been called by the district attorney, were bona fide transactions, honest transactions, transactions made in good faith, without any intent to defraud his creditors, or whether they were of a different character, and made with intent to defraud.

You have heard, gentlemen, the evidence at length upon this question; you have heard very able and full arguments from the counsel of the accused, and from the public prosecutor, and I shall not attempt to give you any instructions in regard to the evidence which has been given here, and certainly not indicate to you any opinion in regard to your duty in respect to the question of fact which has been submitted to you. The intent of a party is ordinarily to be inferred from evidence which tends distinctly and directly to prove the intent, because it is impossible in ordinary cases to prove what the intent of a party is, except by what is called circumstantial evidence. Of course, jurors have no power to look into the mind of the party to determine precisely what his intent may be; but that intent is to be inferred from all the circumstances of the case, subject, however, to this theory and presumption of law, that a man intends when he commits an act, the ordinary and usual consequences of that act, or the inevitable consequences of that act. If a man commits an act, the natural consequences of which are to defraud his creditors, the law presumes that it is done with that intent, and that presumption must be acted upon, and must prevail, unless it is destroyed by the evidence produced upon the part of the party accused.

Now, in reference to the other count in the indictment; gentlemen, that count is founded upon a provision of this section, which also makes it a criminal offense for a bankrupt to conceal from his assignee, or omit from his schedule, any property or effects whatsoever. You are, probably, aware that it is the duty of the bankrupt, in every case, whether his condition is voluntary on his part, or whether he is declared a bankrupt upon the petition of his creditors, to make a schedule and inventory, in which this property is to be described. That inventory is to be verified by his oath, and this is the schedule which is referred to, undoubtedly, in this provision of the statute. In this particular case, although the order of adjudication, being in the form prescribed by statute, required the defendant to file such an inventory and schedule, the evidence in the case is, I believe, that no such inventory and schedule has been filed, and therefore the ground on which the defendant is to be convicted under the second count, if he is convicted at all, must be upon the ground that he fraudulently concealed from his assignee, or assignees, some property or effects which belonged to him, and which should have passed into the hands of his assignee. The evidence upon that question relates almost exclusively to money which he alleges he received from Henderson on the sale of the goods in the store in Lockport. It is insisted here, by the district attorney, that upon his testimony given before the register, he stated that he received two thousand dollars as a part of the consideration for the sale of goods in that store; and that this property, as is insisted here on the part of the public prosecutor, has been concealed from his assignees; has not been turned over to them, and has not been made available.

Something has been said here in reference to a demand being necessary in order to charge the defendant under the provision of this statute. Under the evidence in this case I am of the opinion that no demand is necessary as a matter of law, in reference to the questions arising under this count in the indictment. He was brought before the register, as appears by his own deposition, and examined in reference to his property; and upon that examination it was, undoubtedly, his duty, if he had property in his hands of this description and to this amount, to disclose that fact. It is evident from the examination which was made, that this examination was had for the purpose of discovering whatever should pass into the hands of the assignees for the benefit of his creditors; and if upon that examination he willfully omitted to account for that money, if he, in point of fact, received money to the extent of two thousand dollars, and withheld it from his creditors and from his assignee, then he is liable to be convicted under the second count of the indictment. If he paid it over to his creditors, to honest creditors, and stated the fact upon his examination, then he would not be liable, under this count in the indictment, for concealing from his assignee this amount of money. If he, having this money, thus concealed the knowledge of it from the assignee, he is liable to conviction, notwithstanding that there was no demand upon the part of the assignee or receiver, or any person authorized to receive it. These are, perhaps, gentlemen, all the remarks which it is necessary to submit to you in this case. You must examine it with care. Your verdict should be the result of your calm and deliberate judgment. You should be influenced by no passion or feeling, and by no sympathy. In a case of this character the interests of the public as well as the interests of the defendant require that your verdict should be the result of your deliberation and judgment, and in accordance with your sworn duty.

Case No. 16,339a.

UNITED STATES v. SMITH.

[19 Niles, Reg. 319.]

District Court, D. Georgia. Dec., 1820.

PIRACY — SEIZURES DURING WAR — CONTRABAND GOODS—COMMISSION FROM GOVERNOR OF ORIENTAL REPUBLIC.

[1. The seizure of a French vessel by an armed ship whose officers held commissions from the governor of the Oriental Republic *held* not an act of piracy on their part, where the vessel seized was carrying arms and munitions of war to a port of the enemy.]

[2. A subordinate officer of an armed ship, acting in good faith, under a commission from

the governor of the Oriental Republic, *held* not guilty of an alleged act of piracy against a ship belonging to a neutral, where he entered a formal protest against the act.]

[3. One making seizures of Spanish and Portuguese vessels while in command of an armed ship in the patriot service *held* not guilty of piracy where he acted, in good faith, within the limits of a commission from the governor of the Oriental Republic, even though it turned out that such commission was forged.]

[4. In determining whether a person was guilty of piracy in making certain seizures while serving under a commission from a foreign government, the fact that he was an American citizen, and, as such, forbidden by the laws of the United States to serve against nations with whom they were at peace, can have no weight. His violation of the laws in question would subject him to the penalties prescribed thereby, but would have no tendency to make him guilty of piracy.]

Three several indictments for piracy, under the act of congress of 1819 [3 Stat. 510] were preferred against the defendant, John Smith, and returned by the grand jury. The first indictment charges that the defendant, on the high seas, sailing in a certain vessel, called the Columbia, or Arragonta, with force and arms did piratically and feloniously break and enter a certain schooner, name unknown, property of subjects of the king of France; that the said defendant did make an assault upon the mariners of the said schooner, put them in bodily fear, and did violently, feloniously, and piratically steal, take, and carry away one four inch hawser, value twenty dollars; and one deck awning, of the value of five dollars, of the goods and chattels of persons unknown. The second indictment is the same as the first; but the piracy charged is the taking of the brig Antelope or General Ramirez, and the apparel and tackle of the value of $3,000, alleged to be the property of certain subjects of the king of Spain, to the jurors unknown. The third indictment: The piracy charged is the taking of the ship or vessel, name unknown, being the property of subjects of the king of Portugal, to the jurors unknown, and her apparel of the value of $1,000.

It appeared in evidence that the defendant acted as first officer of the patriot armed vessel, the Columbia, or Arragonta, Don Simeon Metcalf, commander, sailing under the flag of the Artigan government. That he had in his possession a commission under the hand and seal of Jose Artigas, governor of the Oriental Republic, as a captain in the naval service of the said government. That there was a commission signed by Artigas on board the Arragonta. That, after the detention of the French schooner, the Arragonta was carried into Sierra Leone by the British squadron, and there discharged. That, after the capture of the Antelope, the Columbia was wrecked on the coast of Brazil, and her commission and papers lost. It further appeared in evidence that it was the practice of Artigas to furnish his commanders with copies of commissions and general instructions to govern their conduct. That these copies were generally furnished to prize masters, endorsed by the commander. Such a copy was found in the possession of the defendant, accompanied by the usual instructions of the Artigan government. That the French schooner, which was detained one night, was bound to a port of an enemy of the government of Artigas, having on board munitions of war. That upon the detention of the said schooner, the defendant, Smith, made a formal protest against the act of the commandant, Metcalf.

The evidence also ascertained that the defendant always acted within the limits and authority of the personal commission, and the copy of the commission of the Arragonta, which were found in his possession when he was taken. It also appeared that Smith was born in the United States, but had been for three or four years past an officer in the patriot service, appointed to different vessels sailing under the flag of Artigas. The Antelope, under the command of the defendant, was afterwards taken off the Florida coast by the United States cutter Dallas, and brought into the port of Savannah. The case of the defendant was considered as if all the indictments were before the jury.

The counsel for the defendant classed the cases under two heads: 1st, the detention of the French schooner; 2d, the capture of the Spanish and Portuguese vessels. Under the first class, it was urged: 1st. That the detention of the French vessel was authorized by the commission, as the evidence ascertained that this vessel was bound to an enemy's port, having on board munitions of war. That for any excess of this authority, the defendant is answerable to his own government, criminaliter, and to persons aggrieved, civiliter, in damages. That this act, being done under a commission, cannot be piracy. 2d. That admitting the act to have been unlawful and piratical, the defendant having made a formal protest against it, and thus disclaimed the act, cannot be made answerable. Under the second class: 1st. That the defendant, Smith, is a regular commissioned officer of an independent government, at war with Spain and Portugal, and therefore authorized to make captives. 2d. That the fact of his nativity cannot alter the rights derived under that commission, so far as they are essential to the defendant on these indictments; for (1) that expatriation is a natural right, which society cannot justly restrain, and which is not impaired by the failure on the part of this government to prescribe the mode in which it shall be exercised; that, in the absence of such regulations, a compliance with the municipal regulations of a foreign country, and the acquirement of the rights of citizenship there, are an expatriation as to this country; and (2) that if the defendant is still to be considered as a citizen of the United States, and that it was therefore unlawful for him to take a

commission to war against a nation with whom the United States are at peace, still such an act does not amount to piracy, because the penalty of it is prescribed by the act which renders it unlawful. (3) That if all those points are against the defendant, still if he acted bona fide, that is, within the scope of his commission, the acts imputed to him cannot amount to piracy.

THE COURT, charging the jury, considered the several points argued by the defendant's counsel, and in relation to the first act, the detention of the French schooner, recognized the principle contended for, that this detention was authorized, as the vessel had on board munitions of war, and was bound to the port of an enemy. If the act were unlawful, THE COURT said, that the defendant, by his protest, had disclaimed that act, and relieved himself from any consequences which might ensue; that to every individual who was about to commit a crime there was a locus penitentiæ, and that when such a repentant disposition appeared, no punishment would be inflicted. In relation to the commission of the defendant, from the Artigan government, and the commission of the Columbia, or Arragonta, THE COURT said that so long as the defendant acted within the limits of these commissions, in good faith, even if the papers were not in fact genuine, he could not be found guilty of piracy. That the proof of their genuineness was, under the authority of adjudged cases, sufficient at least to repel the charges of felonious intent, which is indispensable to constitute piracy; that so long as the defendant kept these as the rule of his conduct, and did not transcend the authority given by them, he was not guilty of any piratical act. The fact of the nativity of the defendant does not alter the case, for if it be unlawful in a citizen of the United States to hold such a commission as that in the possession of the defendant, a commission to war against a nation at peace with the United States, the act which makes this unlawful, prescribes the particular penalty. It cannot be piracy.

The jury returned a verdict of not guilty.

Case No. 16,340.

UNITED STATES v. SMITH.

[1 Sawy. 192.] [1]

District Court, D. California. June 7, 1870.

INTERNAL REVENUE—PAWNBROKER'S TICKETS.

The ticket given by a pawnbroker under the statute of California is "an agreement or contract" within the meaning of section 170 of the internal revenue act of 1864 [13 Stat. 297].

At law.

L. D. Latimer, U. S. Dist. Atty.

Shafter, Southard & Seawell, for defendant.

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

HOFFMAN, District Judge. The demurrer in this case raises the question, whether the check or ticket given by a pawnbroker in accordance with the statute of this state is "an agreement or contract" as described in Schedule B, section 170, of the internal revenue act of 1864. The language of the schedule is, "Agreement or contract other than domestic and inland bills of lading, and those specified in this schedule, * * * five cents." The check delivered to the pawnor in this case is headed "Pawnbroker." Then follow the street and number of his shop, and the date of the loan. It then describes the property pledged, the sum loaned, with the name and residence of the pledgor. To this succeeds a memorandum as follows: "Loan for one month at ten per cent. in advance; over time, same terms. P. Smith." It will be perceived that this receipt or memorandum contains all the particulars of the contract between the parties. It is signed by the party to be charged, and distinctly sets forth the terms and conditions of the bailment. On its face it is as much a contract as a bill of lading or a warehouseman's receipt.

It is urged that inasmuch as the statute requires the pawnbroker to enter in a register book the various particulars of loans made by him, and pledges deposited with him, and to "deliver at the same time a memorandum signed by him containing a copy of the said entry; that the memorandum so delivered is not a contract or agreement, but merely a copy of an entry made in obedience to the law." The terms, "contract or agreement," as used in the internal revenue law, of course, refer not to the convention or agreement made by the parties, but to the evidence of it contained in a writing. In this sense the pawnbroker's receipt and memorandum of the date, amount and terms of the loan, and a description of the property pledged, is a contract or agreement between the parties as much as any other written memorandum which embodies and states in writing the terms of an agreement to which the parties have assented. The statute does not require merely that a copy of the entry shall be delivered to the pledgor, but that "a memorandum be delivered to him, signed by the pledgee, containing a copy of said entry." As the previous clause required that every particular necessary for the pledgor's protection should be entered in the register book, it was unnecessary to re-enumerate those particulars in the subsequent clause which describes the ticket to be delivered to the pledgor. It was, therefore, provided merely, that the memorandum should contain a copy of the entry on the register, and should in addition be signed by the pawnbroker. It cannot be presumed that by adopting this mode of specifying the contents of the ticket to be delivered to the pledgor, the legislature meant in any way to impair its availability to him, or its obligation on the pawnbroker, as a contract or agreement between the parties.

It is suggested that pawnbrokers' tickets, being in common use, would have been specifically mentioned if intended to be subjected to the 5 cent tax. There may be some force in this suggestion, but it may be that congress regarded these instruments as so clearly "contracts," as not to require specific mention; and as the amounts to which they related is usually small, a uniform tax was imposed under a general description. Whereas, in other instruments and receipts, the tax being proportionate to the sums to which they related, they were necessarily mentioned specifically.

A far stronger argument in favor of the construction adopted is furnished by the fact that the tax of five cents has been collected on pawnbrokers' checks, under instructions of the commissioner of inland revenue, since the passage of the act, and no case is reported where the collection of the tax has been disputed or resisted.

I am, therefore, of opinion that the pawnbroker's check mentioned in the declaration is a contract or agreement, and that a stamp of five cents should have been affixed to it, as required by law. The demurrer is therefore overruled.

Case No. 16,341.

UNITED STATES v. SMITH.

[1 Sawy. 277; [1] 12 Int. Rev. Rec. 135.]

District Court, D. Oregon. Aug. 22, 1870.

JURY—WAIVER OF CHALLENGES FOR CAUSE—NEW TRIAL—INCOME TAX—PROFITS ON STOCKS—EXCHANGE OF PROPERTY—PERJURY—PROVINCE OF COURT AND JURY.

1. Where a defendant is informed by the examination of a juror that he has had a conversation with a third person about the case, and makes no challenge on that ground, but accepts the juror, he cannot afterwards object to the verdict on that account.

2. Applications for new trials on the ground of newly-discovered evidence, are liable to great abuse, and are therefore regarded with jealousy and construed with great strictness.

3. To entitle a defendant to a new trial on the ground of newly-discovered evidence, it must appear (1) that the party has discovered the evidence, or that it has come to his knowledge since the last trial; and (2) that it is so material that it would probably produce a different verdict if the new trial were granted.

4. The successive acts of congress, from that of August 5, 1861 (12 Stat. 309), to that of March 2, 1867 (14 Stat. 479), upon the subject of taxing incomes, construed as being in pari materia, and requiring a return for taxation as income of all gains derived from the sale of corporation stocks in 1868, if purchased at any time after August 5, 1861.

5. A bona fide exchange of stocks for other property, however much to the apparent advantage of the owner of the stocks, is not a sale thereof, from which profits are derived liable to taxation as income.

6. A transfer of stocks for a promissory note, which is collectible, or an exchange thereof for land, followed by a sale of such land within the year, for collectible promissory notes, is to be considered a sale of such stock for so much cash.

7. Although the affidavit of a party to his income return be false, he cannot be convicted of perjury thereon, unless it was made with a corrupt intention, and therefore, if such party, as a matter of law or fact, honestly believed that he was not bound to return any profits from the sale of stocks, for taxation, then, although he was mistaken and his affidavit in this respect false, he cannot be convicted of perjury.

8. The tax upon incomes is both just and expedient, and the objection that it is inquisitorial applies with equal force to the state law which provides for imposing a direct tax upon all the articles of property of which a person is possessed.

9. Upon an indictment for perjury, whether the oath was knowingly and corruptly false, is a question for the jury, and the court will not set aside their verdict thereon, unless it is clearly against the weight of evidence.

10. Although the act imposing a tax upon incomes (14 Stat. 479) makes no provision for compelling a person to make oath to his return of income, yet it permits him to do so, and if he avails himself of the privilege, and intentionally swears falsely, he is guilty of perjury. 13 Stat. 239.

11. The profits made upon a sale of stocks in 1868 were taxable as income for that year, without reference to the year in which the increase in the value of the stocks occurred, so that it was subsequent to the act of August 5, 1861 (12 Stat. 309), imposing a tax on incomes.

12. Whether a false oath was taken under mistake as to the law or fact involved therein, is a question of fact for the jury.

13. A new trial will not be granted upon the ground that the evidence of a witness took the party by surprise, unless it appears that such surprise is in no degree attributable to the negligence of such party.

14. The circumstances under and for which perjury was committed, considered with reference to the punishment proper to impose upon a party convicted thereof.

On August 6, 1869, the defendant [William K. Smith] was indicted for the crime of perjury, in swearing to his income return. 4 Stat. 118; 12 Stat. 309. The indictment alleged in substance and effect that the defendant on March 22, 1869, made an affidavit before the assistant assessor of the Fourth division of the district aforesaid, that a certain statement then made by him contained a full, true, particular and correct account of defendant's income subject to income tax for the year 1868; and that he had not received, and was not entitled to receive from any and all sources of income together, any other sum for said year besides what was set forth in said statement in detail: whereas, in truth and in fact, said statement did not contain a full, true, particular and correct account of the defendant's income for 1868, subject to an income tax, and that defendant received and was entitled to receive from any and all sources together other sums and a greater sum for the year 1868, besides what was set forth in said statement in detail; and that the defendant at

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

the time of making said affidavit and statement well knew that the same was false.

Upon arraignment, the defendant pleaded not guilty, and on August 24, and three days thereafter, the cause was tried before a jury, who being unable to agree, were discharged without giving a verdict. Thereupon, on application of the defendant, the cause was continued until the term of March, 1870, when it was again continued by consent of parties until July 12. On the last mentioned date it was tried before a jury who, on July 14, found the defendant guilty as charged in the indictment, and recommended him to the mercy of the court. On July 19, a motion for new trial was filed, and on the application of the defendant the hearing was continued until August 5, when it was argued by counsel and submitted.

J. C. Cartwright, for the United States.

Wm. Strong and David Logan, for defendant.

DEADY, District Judge. The motion for a new trial is based on the following grounds: (1) Misconduct of James Winston, one of the trial jurors. (2) Newly-discovered evidence. (3) Insufficiency of the evidence to justify the verdict. (4) That the verdict is against law. (5) That the defendant was taken by surprise by the testimony of Mellen, the assistant assessor.

On the first trial, when the prosecution offered in evidence the defendant's statement of income for the year 1868, the defense objected to the proof because the assignment of perjury in the indictment was too general—merely negativing the words of the affidavit—while it should have been assigned specially upon some particular fact or matter sworn to by defendant. The court ruled that the objection should have been taken by motion or demurrer; and that after the plea of not guilty it came too late; but in order to apprise the defense of what particular fact or matter in the statement the prosecution relied upon to show the falsity of the affidavit, the court required the latter to elect and declare in what particular it expected to prove such statement false. The prosecution then elected to prove the statement false in subdivisions 5 and 13, relating respectively to income derived "from profits realized by sales of real estate purchased since December, 1868," and the "profits on the sales of gold or stocks, whenever purchased;" but in fact the evidence was confined to the matter of profits arising from the sale of stocks. On the second trial the same formal proceedings were not had upon this question, but the rule established on the first was followed without question, and the evidence of the prosecution upon this branch of the case was confined to the question of whether or not the defendant had made profits from the sale of stocks during 1868.

The statement of the defendant's income was in the usual form of blank 24, and purported to be a "detailed statement of the income, gains and profits of W. K. Smith, of Salem, Oregon, during the year 1868." The gross amount of income in currency contained in the statement was $7,617.14, which was stated in detail under the various subdivisions as follows: First—from profits in any trade, business or vocation, etc., $3,849. Third—from rents, $400. Eighth—from profits in corporation, not divided, $766.66. Tenth—from interest otherwise than on United States securities, $640. Eleventh—from salary other than as an officer of the United States, $1,861.48. The deductions amounted to $1,579.86, leaving the taxable income, returned by the defendant, to be $5,937.28. No income was returned by the defendant under the subdivisions 5 or 13.

As to the alleged misconduct of Winston, the facts appear to be as follows: Being returned on the venire to serve as a trial juror at the term at which the defendant was to be tried, he was drawn by the clerk in the formation of the jury in this case. Being sworn concerning his qualifications to sit on the jury, on examination by defendant's counsel, he stated that since he was summoned as a juror, and since his arrival in the city, he had a casual conversation with Dr. Cardwell about this case, but that he had no decided opinion as to the merits of it. The defense interposed no challenge, and after some deliberation, accepted the juror, and he was sworn. At the same time the court directed a rule to be entered and served upon the juror, requiring him to appear and show cause why he should not be punished as for contempt, on account of his engaging in conversation with third parties concerning cases pending in this court after he was summoned to serve therein as a juror. On July 16, two days after the jury had given their verdict, Winston showed cause, and answered that he had had a brief conversation with Dr. Cardwell concerning this case after he was summoned as a juror, which arose in this way: Winston stated to Cardwell that he was here as a juror and would consequently be in the city for some time, when Cardwell remarked that he supposed the Case of Smith would come up for trial. Winston replied, by asking what kind of a cause it was? Cardwell answered, that Smith was accused of making and swearing to two different income returns the same year. Winston replied that it must be some sharp practice to get rid of the income tax. Winston also stated that it was in nowise his intention to prejudice his mind in relation to this case or disqualify himself to sit therein as a juror. Upon reading the answer, the court discharged the rule on payment of the costs by Winston. If a challenge had been submitted to this juror for bias, it might have been

allowed, yet it is not beyond question that it should have been. The conversation was casual, and was not introduced by the juror. He appears to be a stranger to the defendant, and an intelligent, fair man; nor is there any suspicion or suggestion that Cardwell was in any way inimical to the defendant, or that he desired to prejudice the juror against him. The information communicated by Cardwell to the juror, and upon which the latter made the remark that he did, was a very general allusion to the case, and not by any means a correct statement of the crime with which the defendant was charged, nor of the facts which constitute it. Swearing to two different income returns for the same year is not in itself a crime, though the fact may tend to convict the party of the crime of perjury in swearing to one or the other of them, if they be different in the sense of contradictory as well as distinct; nor does the remark of the juror about "sharp practice" necessarily indicate that the information then received made an impression upon his mind that the defendant was guilty or any crime—let alone that of perjury. Indeed, by the expression "sharp practice" men commonly designate acts or conduct which, although contrary to good morals or the golden rule, are not punishable as crimes by the law of the land.

But the decisive answer to the motion on this ground is, that the defendant accepted this juror with a full knowledge of the fact that he had conversed with Cardwell about the case, and had gotten some impression about it from such conversation. A party who knows of a ground of challenge, and does not seasonably take it, must be deemed to have waived it. 2 Grah. & W. New Trials, 247; Davis v. Allen, 11 Pick. 467. If the defense supposed that this impression was in their favor, as it is quite likely they did, and accepted the juror on account of it, they took their chance so far for a favorable verdict, and must abide by the result. But counsel for the defense say now, that if they had known the nature of this conversation, they would not have accepted the juror. But counsel are aware that, according to the practice of this court, the defendant was not entitled to know the particulars of this conversation nor the nature of the impression produced by it, if any. It was sufficient, if the juror disclosed the fact that he had had a conversation upon the subject, and with whom, and whether he had formed an opinion as to the guilt of the defendant from such conversation. But if this were otherwise, the defendant cannot now complain of the want of this information, because the juror was not interrogated on this point. He was only sworn to answer questions touching his qualifications, and he was not bound to volunteer information beyond the scope of the inquiries propounded to him. If the defense accepted this juror in ignorance of the nature of this conversation and the impression produced by it, this is no ground for a new trial. They were either not entitled to such information, or otherwise they neglected to ask for it when they knew of its existence. The defense, as must be presumed, supposing that Winston, notwithstanding the conversation or on account of it, was comparatively a safe juror for them, accepted him, cannot now be heard to object to the verdict on that account. In the statement of this matter in the motion, it is said that Winston swore on his voir dire, that he was an "impartial juror." This is a manifest mistake. Whether the person drawn as a juror is impartial between the parties or not, is a question to be tried and decided by the court, and not the witness. The juror was examined at some length, and the substance of his testimony was, that he had had the conversation as above stated, but had formed no decided opinion as to the guilt or innocence of the defendant. He may have also stated that he thought he could try the case according to the evidence. Counsel sometimes ask such questions, and they are allowed to be answered because not objected to. In any event, I have no doubt that he told the truth, for he learned nothing in such conversation upon which to form any opinion as to whether the defendant was guilty of the crime of perjury. There is no reason to suspect that the juror acted from improper motives, or that any person ever sought to prejudice his mind against the defendant. It was admitted by counsel, on the argument, that the juror was otherwise an unobjectionable man, and I can see no reason to doubt that he formed and gave his verdict according to his oath, upon the testimony given him in court, and not otherwise.

Before considering specially the second and third grounds of the motion, it will be necessary to state the substance of the case as it appeared before the jury. During 1862 and 1865, and the years inclusive, the defendant became the owner of eleven shares of the Wallamet Woolen Manufacturing Company stock, at Salem, at a cost of $350 to $830 in coin per share, the aggregate cost being $7,480. Early in the year 1868, he disposed of this stock to Robert Kinney, for cash, notes and property, then valued by the parties to be worth in the aggregate $33,000 in coin; namely, cash $10,000; about ten acres of land, with grist-mill and four-mule team and wagon, at McMinville, valued at $10,500; 960 acres of land, with live stock, in Chehalem Valley, valued at $6,000; Kinney's notes, bearing interest and secured by a deposit of two shares of the stock, for $6,500. On July 10, 1868, the defendant sold and conveyed the McMinville property, except the mule team, to John Saxe for $9,500 in coin. Saxe paid $1,000 down and gave his three notes in equal sums for the remainder of the purchase money, payable in one, two and three years, with interest at one per centum per month, and secured by mortgage upon the premises. During the time the defendant owned these shares, the Wallamet Woolen Manufacturing Compa-

ny paid no dividends, and the profits accruing on the stock were estimated and returned for taxation as undivided profits, as follows: For 1864 and 1866, by the company, at $2,475 and $6,238 88 respectively; and for 1865 and 1867, by the defendant, at $4,271 96 and $2,024 66 respectively. These profits are stated in currency, and aggregate $14,985 50. The statement of income for 1868 was made in currency at seventy-five cents on the dollar. Converting the first cost of the stock into currency, at this rate, gives $9,973 33. Add to this the aggregate of undivided profits which had paid taxes, gives a sum total of $24,958 83. Converting the cash, notes and property received by defendant from Kinney, at their estimated value, into currency at the above rate, gives $44,000 received for the stock. The difference between this sum and the cost of the stock and the profits which had paid taxes, is $19,041 17. This latter sum, the prosecution maintained, represented the profits which the defendant had made in 1868 by the sale of the stocks, upon which no taxes had been paid, and which he ought to have included in his return for that year.

The foregoing statements were not questioned on the trial, and I have stated them as facts established in the case. The evidence in support of them was ample and uncontradicted. The calculations were made by the district attorney and read to the jury without question on the argument, and therefore I have adopted them without verifying them.

W. A. K. Mellen, the assistant assessor for the Fourth division, including Salem, testified that the defendant, then living at Salem, on March 22, 1869, in pursuance of a notice and blank from his office, appeared before him at Salem to make his statement of income for 1868. Mellen had heard of the sale of stocks to Kinney, but was not aware of the details of the transaction, nor had he any knowledge of what the stocks cost the defendant. After the defendant had made the statement of income as above set forth, Mellen called his attention to this transfer of stocks, and told him that the law required him to make out an exhibit of the facts. Defendant said that he had returned all the income that he was entitled to, and refused to make any statement of income under subdivision 13. In the course of the conversation upon this subject, which lasted about fifteen minutes, defendant admitted to Mellen that he got $10,000 cash from Kinney, but did not inform him further as to the nature of the consideration which he received, and claimed that the transaction was a swap, and therefore no profits had arisen from it to be returned. Mellen replied, that he ought to return the shares represented by the $10,000 cash. The defendant refused to do so, and swore to the statement as above stated, without inserting any sum as profits derived from the sale of stocks.

Afterwards, Mellen gave defendant notice to appear and show cause why his statement of income should not be increased $20,000, on account of this stock transaction. In pursuance of this notice, and between April 1 and 4, the defendant appeared before Mellen, at Salem. Mellen then told the defendant that he had increased his return so as to get from him a statement of this stock transaction, and that if defendant would give witness the figures of the purchase and sale, and that made the profits less than the increase, he would reduce it. Defendant then contended that the profits on the stock had already been returned and paid tax as undivided profits of Wallamet Woolen Manufacturing Company; and said that he could not give a statement of the facts as to the cost and sale of shares, because his memorandum book was in Portland. Mellen then told him that he could appear before Mr. Frazar, the assessor at the Portland office, and attend to the matter there.

Thomas Frazar, the assessor for the district of Oregon, testified, that prior to April 10, 1869, defendant came to his office and said that he and Mellen had disagreed about his income return, and Mellen had sent him to witness' office to arrange the matter, and he wanted to make his return here, as he was coming here to live. Witness asked if defendant had any statement to make up income from? Defendant said, none. Witness asked defendant for memorandum book containing cost of stock. Defendant said he had lost it. Witness said he could not make up a return without some statement, and have to estimate return and assess penalty. Defendant said he had not a scratch of pen to tell what he gave for the stock or what he sold it for. About April 12, defendant returned and handed witness a statement in pencil writing, which was produced by the witness and read to the jury. It set forth, that defendant "sold, traded and transferred, on October 9, 1868, nine shares of Wallamet Woolen Manufacturing Company stock, the proceeds of trade used, as I remember, in payment of my liabilities in taking up a note held by Ladd & Tilton for between $4,000 and $5,000, including interest, and in paying for sawmill, etc., altogether amounting to, I think, $10,000, and real estate in Yamhill county." Then follows, to the effect, that John F. Miller had offered to trade defendant Portland property for four of his shares, and the most he could get offered for the property was $4,000. That subsequently, Miller offered to sell defendant his shares for $2,250 per share, and defendant would have taken much less for his in cash, but could get no offer. That defendant could only approximate to cost of shares: "Eight or ten shares were offered to the company before I went to California, at $1,000 per share, I think in the spring of 1863, and subsequently were purchased; and I had to take them, or a large portion of them, paying large interest until they were paid for. On the early purchases of the stock the rate of interest was high; I remember paying high interest on a large

amount of money borrowed." After looking at this memorandum, witness asked defendant if he expected that witness could make up a return from that paper? Defendant said he had nothing else. Witness then told defendant that he would assist him, and asked him to state the facts from memory. Defendant then stated, that he and Miller and J. S. Smith had purchased stock whenever they could, to get control of the company, and paid from $500 to $1,250 per share. Defendant represented to witness, that while he had disposed of eleven shares to Kinney, that he considered he had only sold him nine shares, because he held the other two shares as collateral security for Kinney's note. He said these nine shares cost, in the aggregate, $8,010, or $890 apiece—and that he had borrowed money to purchase this stock and paid interest to the amount of $5,000. That he sold to Kinney, for $10,000 in cash, 960 acres of land in Yamhill county, and property in McMinnville; that the land was only worth $2.50 per acre, or $2,000 in round numbers; and the McMinnville property, $5,000—thus making the cost of the nine shares, including $5,000 interest, $13,010, and the proceeds of their sale $17,000—which left an apparent profit of $3,990 in coin. This being converted into currency at the above rate, gives $5,320. The witness made a memorandum of this statement at the time, which he produced in court and testified from. Witness testified, that at this time he was not aware that there was a mill upon the McMinnville property, but supposed, from defendant's conversation, that it was only ten acres of land; nor was he aware, nor did the defendant inform him, that it had been sold the July previous to Saxe for $9,500, as above stated. Witness then stated that he would take occasion to ascertain about the matter, and the defendant went away. Afterward, witness having ascertained that there was a mill on the McMinnville property, and also the sale of it to Saxe, and that defendant had received other property for his stocks which he had not mentioned to him, caused Assistant Mellen, on May 7, to issue and serve a notice on defendant, to appear at witness' office on May 24, and show cause why the penalties prescribed by law should not be assessed against him, for making a false and incorrect return of his gains and income for 1868.

On the same day the defendant came into the office and said: "What's the matter?" Witness said that defendant's statements were not satisfactory. Defendant said that he had made all the statements he could make. Witness then asked defendant if he was willing to make an amended return upon the basis of the statement and figures that he had given witness at last interview? Defendant said he was. Witness then took a blank and filled it up with the same sums as the first one made before Mellen, except that under subdivision 13 he inserted as profits on sales of stocks the sum of $5,320. The defendant then signed the return and swore to it; after which he said: "I suppose I may have my first return now." To which witness answered, "No—that's a record of the office." Witness then said to defendant: "What am I to think of a man who, while an officer was assisting him to make his return, would make such a false statement to him as defendant did to witness a few days before? That defendant had estimated the value of the McMinnville property to witness at $5,000, when he had sold it months before at $9,500." To this defendant made no particular reply, but left the office. Witness also stated, that in one of the conversations, and he thinks the first one, defendant claimed that the disposition of the stock was not a sale, but a trade. On the cross-examination, witness stated that he did not inform defendant at the last interview what he had learned of the sale of the McMinnville property; and that he did not do so, because he wanted to see if the defendant would swear to what he knew to be false; and also, that he had not said to Mellen that he would get defendant to sign the second return, and then prosecute him; but that he was very indignant at the time, and probably said defendant ought to be prosecuted.

Joseph S. Watt testified that he knew the 960-acre farm in Yamhill county, that defendant received from Kinney; that about two years ago, some time in 1868, the defendant wanted to sell it to him, and asked $10 per acre for it, and that at that time and since it was worth in cash $7 per acre.

William S. Ladd, called by the defendant, testified that on June 13, 1868, the defendant paid him a note of $4,000, with $104 interest upon it, and that the defendant did not pay him any other interest during that year.

John H. Hayden, called by the defendant, testified that on March 28, 1868, the defendant became an equal partner in a certain sawmill and business in the city with himself and Carter, and that the net profits of the mill for the year were $10,000 in coin, of which the defendant received about $2,500. This sum converted into currency at the above rate gives $3,333.

John F. Miller, called by the defendant, testified that in June, 1868, he offered seventeen shares of Wallamet Woolen Manufacturing Company stock to defendant for $2,250 in cash per share; that he was not able to state that there was any change in the value of shares between January and June, 1868, and that he thought the shares were worth more in 1867 than at any other time.

The newly-discovered evidence upon which the defendant asks for a new trial is set forth in the affidavit of the defendant, and the accompanying ones of S. A. Clarke, A. J. McEwan and J. S. Smith. By the affidavit of Clarke, it appears that on May 5, 1868, he was editor of the Daily Record, published in the town of Salem, and that

on that day he published a paragraph concerning this sale of stock, to the effect that he had learned that the defendant had sold to Kinney eleven shares of Wallamet Woolen Manufacturing Company stock, and also six other shares to other members of the company, and that he had not got the exact terms of sale, but learned from Kinney that he had paid a little less than $3,000 per share, and that he remembered it once sold at one tenth the price it now goes. Clarke adds, that when he asked defendant about terms of sale, he confirmed what Kinney had said, and assented to the publication of the particulars by not objecting when informed of his intention to do so. By the affidavit of A. J. McEwan, it appears that on March 4, 1869, he was clerk in the sawmill of Hayden, Smith & Co., at Portland, and that on that day he wrote to defendant at Salem as follows: "Sir—The net profits of sales made from October 1, 1868, to February 27, 1869, $2,149.79. Business improves rapidly since March 1." The letter accompanies the affidavit, and the affidavit states that "it was intended by me at the time to contain a true statement of the net profits of the business of the firm" for the time specified. The affidavit of the defendant states, that until after May 7, 1869, he believed that Saxe was not personally bound to pay the notes given by him for the McMinnville property, and that he could only look to the property for payment, and that he did not believe that the property "was available" for the security of more than $5,000 or $6,000, and that he knew no better until informed by J. S. Smith, after May 7, aforesaid, that Saxe was personally liable upon the notes. The affidavit of J. S. Smith states, that he is an attorney and brother of the defendant, and that shortly after his return from Washington, in July, 1869, defendant expressed great anxiety for fear he would have to take back the McMinnville property at a loss, and evidently labored under the impression that the only security he had for the payment of the purchase money was the property itself, and feared that Saxe, after keeping it a year or two, would return it in such a condition that he could not realize the purchase money from it. That affiant then assured defendant that Saxe was liable, as well as the property, for the money; and from the surprise and gratification then manifested by defendant, he is well satisfied that up to that time defendant had been laboring under the impression that the property was all the security he had, and that he could not realize the balance of the purchase money from it. Defendant, in his affidavit, states, that he was not aware of the materiality of any of these facts until since the trial, when he communicated them to his counsel for the first time.

To be entitled to a new trial on the ground of newly-discovered evidence, the party must satisfy the court that the evidence has come to his knowledge since the trial—that he has discovered it. Grah. & W. New Trials, 1021. Now, it is manifest and practically admitted that these facts were within the knowledge of the defendant before the first trial—in fact, ever since they occurred. It matters not that the defendant did not communicate them to his counsel, because they must have been discovered since the trial by the party, and not his counsel. Id. 1093. If this were otherwise, a party might always secure to himself a new trial by withholding from his counsel some material fact until after a verdict had gone against him. Applications for new trials upon the ground of newly-discovered evidence are liable to great abuse, and are therefore regarded with jealousy and construed with great strictness. Id. 1021. Indeed, I cannot but express my surprise that counsel could consent to maintain before a court that this was newly-discovered evidence.

Again, if the evidence were newly discovered, the court must be satisfied, before granting a new trial, that it is so material that it would probably produce a different verdict if the new trial were granted. Id. 1021. Now, none of this evidence bears directly upon the main question tried by the jury—the willful falsity of the oath of March 22—upon the point, whether the defendant made any profits, or not, in 1868, from the sales of stock, whenever purchased. The evidence of Clarke upon this question amounts to nothing. If anything, it proves, that on May 7, 1868, both the defendant and Kinney admitted that there was a sale of eleven shares of this stock for nearly $3,000 per share, although on the trial there was a weak attempt to prove that it was an exchange of stock and property at fictitious values. The paragraph from the Daily Record discloses no details of the stock transactions of the defendant except the sale of eleven shares at $3,000 per share. Now, Mellen testified on both trials, that he had heard of the sale. But when defendant said it was a "swap," he wanted to know the details as to what property he got for the stock, and more than all, what he gave for it. It cannot be pretended that there is any information in the paragraph upon these subjects, and these are the details that Mellen professed to be ignorant of, and tried in vain to get the defendant to inform him concerning. Indeed, on the principal point—the cost of the stock—the defendant professed to be ignorant himself. And again, if Mellen knew all about the purchase and sale of the stock, I am at a loss to conceive how that excuses or justifies the defendant for committing a mistake or falsehood in stating his income.

Before noticing specially the evidence of McEwan, it must be stated, that Mellen testified that defendant, after returning or stating the items of salary, rent and undivided profits, proposed to return a gross sum under subdivision 14, of either $1,700 or $1,170, and that he objected, and said it must be "itemized," whereupon defendant said it was for

interest received and the profits of a sawmill in Portland. Mellen then took a piece of paper down that had been sent him from the Portland office, showing the profits of that mill—the mill of Hayden, Smith & Co.—when defendant substituted that statement for his, and entered it in subdivision 1. It is probable that defendant had the letter from McEwan in his hand at the time. On the first trial, Mellen swore that defendant took a paper from his pocket on which he thought he had amount of profits of Portland mill. On the second trial, his attention was not called to it, and he omitted to mention it. The defense, with the consent of the prosecution, examined Hayden as above stated, to show the true profits of the mill, and that the defendant had returned more under that head than he was entitled to, and therefore it was not likely that he intended to defraud the government in the matter of the sale of the stock. But it appearing from the testimony of Mr. Hayden that the defendant's share of the profits of the mill was $3,333, in currency, a sum larger by nearly fifty per cent. than the largest sum which the defendant proposed to return as profits from mill and interest both—that is, $1,700 coin, or $2,226 currency, counsel for the prosecution argued to the jury, that upon the testimony introduced by the defendant, it appeared that he had attempted to return his mill profits much below the true figure, and therefore it was not unlikely that he would attempt to defraud the government out of the tax upon the profits on sale of stock. The evidence of McEwan is intended to show that the defendant, in offering to return $1,700 for mill profits, was acting upon information derived from the clerk, and therefore, that although the information proved incorrect, the defendant was not intending to make an incorrect return in this respect. This letter gives the profits of the mill for the last three months of the year for which defendant was making return, and the next two months of the following. The fact can hardly be overlooked by the court, on a motion for a new trial, that this is the season of the year when sales of lumber are smallest and monthly profits least. How did McEwan come to write this letter? At the request of the defendant most likely. Why did the defendant seek this partial and incomplete information, upon which to make his return of profits; or, if he came by it casually and for another purpose, why didn't he write to his clerk and get a complete statement of the profits for the nine months of the year during which he was a partner, and for which he was making a return? Men have no more right to guess under oath, when making a statement of income, than on the witness stand in court.

I see no reason to believe that if this letter had been before the jury, that it would have benefited the defendant. The facts contained in it, and the circumstances surrounding it, are ambiguous and as easily resolved against the defendant as for him. At that rate, his share of the profits for nine months was only $1,189.79, when in fact they were $2,500; and this fact had been ascertained and declared in the partnership, and Mr. Hayden had made his return for his portion accordingly to the Portland office. Is it likely that a jury would believe that a man of defendant's shrewdness and concern for his own affairs, was unaware of the real profits of the mill for 1868 at the time he made his return to Mellen? I think not. It must be admitted that the circumstances of the gross discrepancy between the sum proposed to be returned by defendant as mill profits and interest, and the true amount of mill profits, as shown by Mr. Hayden's testimony, may have had some weight with the jury, and helped their minds to the conclusion that the defendant was capable of deceit, and disposed to act disingenuously throughout the transaction. But it does not lie in the mouth of the defendant to complain of this result. The question at issue was the truth of the return as to the profits on the sale of stock, and not as to the mill profits. But the defendant thinking to get some advantage before the jury, offered the testimony of Mr. Hayden upon the latter point. The prosecution consented to its introduction, and if the result has been to the prejudice rather than the benefit of the defendant, he must submit to it.

As to the evidence of Mr. Smith; what the defendant said the McMinnville property was worth, was not the question before the jury, but what did he realize from it? Yet, the defendant having deliberately stated to Mr. Frazar in May, 1869, that it was only worth $5,000, and at the same time having sworn to a statement of income based upon the same value, when the fact was, he had sold the property, without the four-mule team, ten months before, for $9,500, the impression made upon the jury by these facts must have been against the defendant's veracity and the integrity of his intention. Would Mr. Smith's testimony probably change that impression upon another trial? He may be well satisfied, as he says, that his brother was honestly of the opinion that this property was not worth more than $5,000, and that he had no security for the remainder of the purchase money except the property, and therefore his notes were of no greater value than that sum. But to say the least of it, it is a very improbable story, and one that it cannot be presumed would outweigh in the minds of an intelligent jury the well established facts to the contrary.

It seems very strange that any man in this country, of common sense and the most limited experience and observation, should not have known that the maker of a promissory note is personally liable for its payment, although it may be also secured by mortgage; particularly, when it is remembered that the statute of the state expressly provides that the maker of such note shall be so liable in case the proceeds of the mortgaged property

is not sufficient to discharge the debt. Code Or. 251–253.

As to the value of the property, it is not pretended that any person can be found who will swear that it was worth materially less than the defendant sold it to Saxe for. Nothing of the kind was offered on the trial. The value of the property now and at the time the oath was taken is a subject upon which there is abundant testimony in the neighborhood of McMinnville. If the defendant had any good reason for believing or asserting that the property was only worth $5,000, other persons would have substantially coincided in that opinion and supported it by their testimony, if called upon. Mr. Saxe was upon the witness-stand and appeared to be a sensible, shrewd man. It is not likely that he would purchase a piece of property not worth more than $5,000 for $9,500, and pay $1,000 of that sum down. In corroboration of this opinion it may be observed he appears to have prospered by the purchase. He paid the first note when it became due on July 10, 1869, before the first trial, and probably before the conversation between Mr. Smith and defendant, in which the latter is alleged to have expressed his fears that the property was not sufficient security for the money due, and that he was afraid he would have to take it back. It is also fair to presume that the second note was paid before the second trial. Mr. Saxe did not so state, but he was not asked the question. The defendant knew whether he had or not, and if he had not, would have shown it. Indeed, taking everything into consideration, there is not a single reason to believe, or even suppose, that this property was not ample security for the sum of Saxe's notes—$8,500—when the defendant made this oath and since.

Although, as has been shown, the court is not authorized to grant a new trial on account of this evidence because it is not newly discovered, but was known to the party before the trial, yet if this were otherwise, this examination of it shows that it is not a sufficient ground for a new trial, because it does not appear to be so material that it would probably produce a different verdict if the new trial were granted. Indeed, I think that the impression of the defendant was almost, if not altogether, correct, that these matters were not material, and therefore he did not communicate them to his counsel before trial.

Before proceeding to consider whether the evidence is sufficient to justify the verdict, it will be proper to state the substance of the charge to the jury upon the questions of law involved in the verdict. The court instructed the jury in substance and effect:

I. That the acts and amendments thereto upon the subject of assessing and taxing incomes, namely, the act of August 5, 1861; July 1, 1862; June 30, 1864; March 3, 1865, and March 2, 1867, were acts in pari materia, or upon the same matter, and to be considered as one continuing and continuous act, and that therefore the defendant was bound to state and return for taxation as income all gains and profits derived from the sale of stocks in 1868, whenever purchased, so that they were purchased since August 5, 1861; and that by the terms of said acts and amendments thereto, a tax was imposed upon all gains, profits or income derived from any source whatever, unless specially excepted, and that therefore all gains and profits derived from the sale of stocks was taxable as income, whether such gains and profits were specially mentioned therein as being subject to taxation or not.

II. That the jury were first to inquire whether the affidavit of March 22, 1869, was false or not in the particular alleged; that is, had the defendant derived any gains or profits from the sale of stocks in 1868, which were taxable as income. That a mere exchange of property, as of the Wallamet Woolen Manufacturing Company stock for land or other property, was not a sale of stocks, from which profits were derived to be returned for taxation as income; because, although it might appear that one party or the other had gained by the exchange, that is, got property of greater value than what he gave cost him, yet this apparent gain might turn out otherwise, and is not realized until the property obtained is converted into cash or its equivalent. That these remarks must be understood as applying only to the case of an actual exchange of property in good faith. But where the parties to a transaction which is in fact a sale, attempt to clothe it with the forms and give it the appearance of an exchange, for the purpose of avoiding the payment of taxes on the profits derived therefrom by either party, the jury would be authorized to look through this disguise and deal with the matter according to the fact. That the estimated profits on the defendant's stocks for the years 1864–5–6–7, upon which the defendant, or the Wallamet Woolen Manufacturing Company for him, had paid income tax as undivided profits, was not liable to taxation again upon the sale of the stocks, and therefore the defendant was not bound to state the amount of such estimated profits in his return for 1868. But a transfer of stock, for which the seller takes a promissory note, is to be considered a sale for cash, provided the note is good and collectable, and an exchange of stocks for land, followed by a sale of the land within the year for cash or good and collectable notes, is to be considered as a sale of stocks for so much cash.

III. Apply these rules to this transaction. For instance, it appears that the defendant received from Kinney, for eleven shares of stock, property, notes and cash, valued by the parties at $33,000 in coin. Deduct from this, $6,000 for the 960-acre farm, which was only an exchange of property, and also $1,-

000 for the difference between the exchange price of the McMinville property and what it was sold for to Saxe, which will leave $26,000. This property being sold within the year for cash and notes, was a sale, so far as the cash is concerned, and the notes also, if you are satisfied, from the evidence, that they were good and collectable, and the defendant had good reason to believe so when he made his return. The same remark is applicable to the note of Kinney for $6,500. Assuming that these notes were good and collectable, the defendant received for his stock in cash $11,000 and its equivalent, in interest-bearing promissory notes, $15,000, in all $26,000. Convert this into currency at seventy-five cents on the dollar, gives $34,666. Deduct from this $24,958, the original cost of the stock and profits which have paid taxes as undivided profits, and the remainder, $9,708, is the least sum which the defendant was bound to have returned for taxation as profits derived from the sale of stocks within the year 1868, and not having returned any sum, his oath was false. On the other hand, if you should find that those notes were not good and collectable, or any portion of them equal to $9,708 in currency, then the defendant made no profits from the sale of stocks, and therefore his oath was not false.

IV. If you find that the oath of the defendant was false, the next and most serious question for you to determine is, whether it was knowingly, willfully and corruptly so. If the oath was intentionally taken by the defendant, knowing it to be false, or having no reason to believe it to be true, and for the purpose of gaining some advantage to himself, or defrauding or injuring any other, then he committed the crime of perjury. This is peculiarly a question for the jury to decide. In passing upon it, you should carefully consider the whole conduct of the defendant and the officers before whom the proceedings took place in which the oath was taken, and the attendant circumstances as they appear to you from the testimony. If the defendant, as a matter of law, honestly believed that he was not bound to return any profits from the sale of stocks for taxation, then, although he was mistaken and the oath be false, he did not commit the crime of perjury. In other words, a party cannot be convicted of perjury when the falsity of the oath is not attributable to a corrupt intention, but to an error of judgment or a mistake as to the law or facts. Therefore, if it appears probable from the testimony that the defendant took this oath, honestly believing that the law did not require him to return any profits on the transaction in question, you should find him not guilty. But if you should be satisfied that the defendant had no reason to believe that the law did not require him to return this sale of stocks for taxation, and that his refusal to do so for the reasons then given to the assessors was a mere quibble and pretense to avoid the payment of taxes which he justly owed the government under which he has lived and prospered, your conclusion should be otherwise.

Counsel for the defendant have taken occasion to speak before you of the law assessing and taxing incomes as an unjust, harsh and inquisitorial one. It is hardly necessary for me to remark that such assertions or considerations are not to influence your action one way or the other. Courts and juries are organized and maintained to administer and enforce laws, and not to question or pass upon the policy or propriety of them. The whole people of the United States, by their representatives in congress assembled, have determined that the law taxing incomes is needful and proper for the purpose of raising revenue. There being no question as to the constitutionality of the law, it must be enforced until the law-making power determines otherwise. Besides, in my judgment, there is no tax imposed in the United States which is generally more just and expedient than the one upon incomes. It is a tax not upon unproductive property or a venture or business which may yet prove profitless, but upon actual gains—upon prosperity—upon realized wealth. True, it is inquisitorial to some extent; but so are all laws providing for the collection of revenue. No tax can be fairly and intelligently imposed in any community without special inquiry in the affairs or condition of the party to be taxed. The state law imposing direct taxes requires the individual to make a sworn statement in writing of all the articles of property of which he is possessed, subject to taxation, including money, notes, etc. The law requiring deeds and mortgages to be registered exposes the private transactions of the parties thereto to the knowledge of the public; and upon its first introduction in England, was seriously objected to on that ground.

Again, if the incidental effect of the income act is, to give to each man some general knowledge of the pecuniary affairs of his neighbor, what harm is there in it? No honest man can be prejudiced in any community by a truthful statement of his income; and if dishonest ones or shams are thereby prevented from shirking their just share of the public burdens or imposing upon the community, so much the better. The only plausible objection that I ever heard to the law, is that it has not been generally enforced. That objection can be made to all laws imposing taxes; but if juries do their duty, this one will not be more liable to it than others.

Upon the first trial I was not satisfied whether an exchange of stocks for property should be held to be a sale or not, and therefore did not pass upon the question in my charge to the jury, but instructed them as upon the second trial, that however the law

should be construed upon that subject, if the defendant took the oath honestly believing that the law did not require him to return the sale, he could not be convicted of perjury on that account.

The sufficiency of the evidence to justify the verdict will next be considered. In the motion it is stated that the evidence is insufficient to justify the verdict because it "did not show that the oath was false; or if false, that it was knowingly or corruptly taken." The falsity of the oath is a plain question of fact. It seems to me that there can be no two opinions about it, and that it was false beyond a doubt or peradventure. Notwithstanding this, the defendant may have taken the oath innocently and without committing the crime of perjury. That depends upon whether it was knowingly and corruptly taken. This is a question of intention, and belongs almost exclusively to the jury to determine. Its determination involves the questions of what facts and circumstances were proven in the case, and what were left doubtful, the credibility of the witnesses and the weight to be given to their testimony and the inferences to be drawn from particular facts, acts and omissions. A court is not justified in setting aside any verdict unless it be clearly against the weight of evidence, and upon such a question as this, it must be manifest from all the evidence that the verdict is not right, before it ought to be set aside. Grah. & W. New Trials, 1239. It is not necessary in passing upon this motion to express an absolute opinion upon the question of the defendant's intention in this matter. Suffice it to say upon this point that in my judgment the weight of evidence is with the verdict.

The conduct of the defendant in the transaction, in most particulars of importance, was disingenuous and does not indicate integrity of purpose. For instance, if he had honestly thought for any reason that he was not bound to return this sale of stocks in his statement of income, how easy and natural it would have been for him, when asked about it by the assessor, to have candidly stated all the facts and given the reason for his opinion, and adhered to it until he learned better. Instead of this, he refused to disclose almost everything about the transaction. He asserted, and continued to assert, that he did not know what his stock cost—a matter which it was his business to know, and which the prosecution had no difficulty in proving; and finally, when he gave Mr. Frazar the cost, as the testimony shows, he stated it far above the fact. At first, he gave as a reason for not stating the matter in his income return, that it was a "swap" or trade. At the next interview with Mellen, nothing is said about its being a "swap," but he asserted that the gains, if any, had already paid tax as undivided profits—an assertion which, as the testimnoy shows, was materially untrue. When driven by the fear of penalties and increased income to submit to make a statement of the transaction to Mr. Frazar, he deliberately asserted that the 960-acre farm was only worth $2.50 per acre, when it was valued in his trade with Kinney at $6,000; and when he had asked Mr. Watt $10 per acre for it, and when it appears from the uncontradicted and every way credible testimony of Mr. Watt, that in 1868, and since, the property was worth at least $7.00 per acre, or $6,720; also that the McMinnville property was worth only $5,000, not disclosing the fact that there was a valuable grist-mill upon the land, situated in one of the best and most convenient wheat regions in the country, and directly concealing the fact that in his trade with Kinney it and the mule team were valued at $10,500, and that he had sold it without the team ten months before to Saxe for $9,500—$1,000 of which was paid down; and last, but not least, to save the payment of penalities, without any apparent change of opinion in the premises, he consented to, and did, make oath to the second return of May 7, which was not only itself false as to the profits on the sale of stocks, but in direct contradiction of the oath to his first return upon this point.

There is nothing of importance in the evidence to counteract the force of these and other like circumstances which tend to show that the defendant was not very scrupulous about the truth, and that he intended to obtain some advantage to himself by avoiding the payment of taxes due the government. The weight of the evidence is with the verdict, it was technically sufficient, and as the court cannot say that it was wrong, it must not be set aside upon this ground.

In support of the fourth ground for new trial, the motion states: (1) That the law did not require the defendant to take the alleged oath, and that it was extra-judicial. This point was not raised on the trial, nor argued on the hearing of the motion, and I suppose counsel do not rely upon it. The answer to it is apparent. It is true that the law did not compel the defendant to take this oath. He might have allowed the assessor to make up his income from other information; but it permits the defendant to take the oath and be a witness in his own favor in the matter of ascertaining the amount of his income; but if he voluntarily avails himself of this privilege, he is bound to tell the truth—and the law declares that if he knowingly and willfully swears falsely, he shall be deemed guilty of perjury. 13 Stat. 239. (2) That the law did not require the defendant to return any income on account of the alleged sale of stocks. The questions made under this head were not argued by counsel for the motion, and I suppose were passed upon by the court in the progress of the trial and the instructions to the jury. In the argument of the motion, I understood the learned counsel to say that he regarded the instructions to the jury as cor-

rect, kind and considerate. On the trial the court ruled, as in the charge to the jury, that the acts relating to income must be considered as one act, and also that the annual gains upon the sale of stocks meant all gains realized in a given year, although they have been accumulating by the increase in the value of the stocks for many years—at least since 1861, while counsel for defendant maintained that the annual gains meant only the appreciation or increase in value for the year in which the sale occurred, and for which the income was returned. These and the foregoing are the principal rulings and instructions which may be said to constitute the law of the verdict, and I have heard nothing to make me doubt their correctness. All those which might be said to affect what is sometimes called "the justice of the case" were in favor of the defendant. (3) That it appeared from the testimony that the alleged offense was a mere misconstruction of the law. Whether it was a mere mistake or misconstruction of the law is a question of fact, and not of law. The court submitted the question to the jury, and instructed them that if they found the oath was false, but that the falsity was attributable to a mistake of law or fact and not to a corrupt intention, they should acquit the defendant. The jury having found the defendant guilty, by their verdict, in effect say that the testimony satisfied them that the offense was willful and corrupt perjury, and not a mere misconstruction of the law.

The fifth and last ground of the motion is the allegation of being taken by surprise in the testimony of Mellen, that he did not on March 22, 1869, know the details of the transfer of stocks by defendant to Kinney. Courts interfere with verdicts upon this ground with great reluctance. If the surprise was owing to the least want of diligence, the applicant will be without sufficient excuse, and his motion will be denied; and it has been held that a party moving for a new trial on the ground of surprise, must show that the contrary would be proved on another trial. Grah. & W. New Trials, 876, 963, 969.

Now, nearly a year elapsed between the first and second trials of the defendant, and the testimony of Mellen upon this point was substantially the same each time, so there could have been no surprise on this head at the second trial; and if the defendant was able to prove the contrary, it was his own fault that he did not do so at that time. Besides, it is difficult to perceive how the proof of Mellen's knowledge of these details would aid the defense. It is the defendant who is supposed to have concealed the facts of the transaction, and not Mellen. Again, the details that Mellen said he was ignorant of, and which he tried to obtain from the defendant, were principally the cost of these shares and what property or consideration the defendant got for them from Kinney. Now, the affidavit of Clarke does not disclose that any of these details were ever published in the Record; besides, there is no evidence that Mellen ever saw the Record, or read the paragraph.

The motion must be denied. In coming to this conclusion, I have not overlooked the fact that the defendant is a man of means and position in this community, and that he has been able to bring to his aid to assist him in his defense all that these advantages will command, including able and experienced counsel; that nearly a year elapsed between the first and second trial, which enabled the defendant to know and prepare to meet not only the accusation against him, but the particular testimony in support of it. It is not likely that any new fact that is material would be established on a third trial, or that another jury would come to a different conclusion from the last one upon the same testimony.

The district attorney then moved for judgment. The court pronounced sentence upon the defendant as follows:

Sentence of the defendant: "William K. Smith: You have been accused by the grand jury of this district of the crime of perjury, and after a fair and impartial trial, in which you had every facility to prepare your defense, and every assistance that could be rendered you by learned and able counsel, you have been found guilty by the trial jury. The question of your intention in taking what appears to have been a false oath, belonged to them to determine. Their verdict against you, although it is possible it may be incorrect, establishes your guilt before the law, and makes it the duty of this court to ascertain and impose upon you the punishment which your crime deserves 'according to the aggravation of the offense.' The act of congress declares that upon conviction of perjury, the person convicted shall 'be punished by fine not exceeding $2,000, and by imprisonment and confinement at hard labor not exceeding five years, according to the aggravation of the offense.' It will be seen in the matter of punishment that much is left to the discretion of the court; and this is so, because of the great difference in the circumstances and ultimate end under and for which perjury is and may be committed. The person who as a witness maliciously swears falsely, with the intention of convicting another of a capital offense, is the worst and most dangerous species of a murderer. Between this and the case of one who swears falsely to save or gain a few dollars in a legal controversy, so far at least as the welfare of society is concerned, there is a wide difference. Yours is a case, where so far as the court can know, the motive was to avoid the payment of $400 or $500 taxes to the national government. The lax state of morals in this and other American communities, which excuses, if not encourages, persons to

avoid the payment of taxes justly due the national, state and municipal governments, by the use of means which would be considered dishonest between man and man, may have had much to do with the commission of this crime by you. For these reasons, and particularly on account of the recommendation of the jury, I shall make your punishment lighter than I otherwise would. I sentence you to pay a fine of $1,000, and to be imprisoned in the county jail of Multnomah county for the term of one day; and it is also ordered and adjudged that the United States have judgment for such fine, and costs taxed at $500, and that you stand committed to the jail aforesaid one day for every $2 of such fine and costs, or until the same are paid."

Case No. 16,341a.

UNITED STATES v. SMITH.

SAME v. OGDEN.

[3 Wheeler, Cr. Cas. 100.]

Circuit Court, D. New York. April, 1806.

INDICTMENT—PLEA IN ABATEMENT.

[It cannot be pleaded in abatement to an indictment that it was founded on illegal testimony introduced before the grand jury.]

At law.

[Pleas in abatement to indictments of defendants, under Act June 5, 1794, § 5 (1 Stat. 384), for misdemeanors in beginning, setting on foot, and providing the means for, a military expedition against dominions of a foreign power, with which the United States were at peace. Preliminary to the finding of the indictment, Ogden's sureties surrendered him in court, and were discharged from their recognizance, and defendant was committed to the custody of the marshal of the district. Defendant's counsel prayed the allowance of a habeas corpus, which was granted instanter, and moved that defendant be discharged from the custody of the marshal, which motion being denied after full argument, it was ordered that defendant stand committed, and recognizance was entered into for his appearance in the sum of $10,000. A motion by defendants' counsel that certain examinations and depositions of Ogden and Smith, taken before Judge Tallmadge, be suppressed, and not permitted to go to the grand jury or otherwise used, on the ground of their having been improperly and illegally taken, was denied. Thereafter, and on April 7, 1806, the grand jury presented separate indictments against Ogden and Smith, in several counts, which charged them on January 10, 1806, with beginning, setting on foot, and providing the means for, a military expedition against the territory of the king of Spain, with whom the United States were then at peace. Defendant Smith being called on to appear and answer, his counsel produced a certificate from the sheriff of the county, stating that he was in his actual custody at the suit of John Donaldson on a ca. sa. for a certain sum, and at the suit of John Livingston on a cap. ad resp. for a certain other sum, and was released on a prison's bound bond. The sureties on his recognizance being discharged, the district attorney moved that a bench warrant be issued to the marshal to bring in the body of defendant instanter. The marshal returned to such warrant the certificate of the sheriff of the county, that defendant was a prisoner in his actual custody by virtue of a cap. ad sat., issued out of the state supreme court, and he certified to the same fact himself. Such return was not considered sufficient, and the marshal was ordered to bring in the body of defendant, as directed. The allowance of a habeas corpus ad testificandum was prayed by the district attorney, and defendant Smith was brought into court by the sheriff upon such writ, and the marshal made return that defendant was in his actual custody, being taken into court. Thereupon the district attorney moved that defendant Smith be arraigned on his indictment. This motion was opposed by defendant's counsel, on the ground that, being brought into court upon such habeas corpus to testify in behalf of the United States on the indictment against Ogden, and said Ogden not having pleaded to said indictment, such habeas corpus was an abuse of the process of the court, and that the arrest of the defendant by the marshal in the circumstances was illegal, and that defendant ought to be discharged therefrom. The court held that said Smith could not be arraigned on his indictment until he was disposed of as a witness, for which he was brought into court. The district attorney thereupon stated that he did not want said Smith's testimony at such time, and prayed that he be ordered to plead to his indictment. Defendant, being ordered to plead to such indictment, filed a plea in abatement, verified by affidavit. Defendant Ogden also filed a similar plea in abatement, such pleas being substantially as follows:]

That the grand jury by whom the bill of indictment was found, previously to the finding thereof, had before them illegal testimony, and such as, by the laws of the land, ought not to have been before the said grand jury previously to their finding the said bill of indictment; and that the said defendant, on the first day of March last past, was arrested by virtue of a warrant issued by the Honorable Matthias B. Tallmadge, Esq., district judge of the United States for the district of New York, and thereupon carried before the said judge, and was then and there sworn and examined by the said judge touching the supposed offences charged in the said indictment, and was then and there illegally, and against his will, forced and compelled by the said judge to answer cer-

tain questions touching the said supposed offences, in the said indictment contained, which said examination and deposition of the said defendant were reduced to writing by the said judge, and the said defendant was then and there by the said judge illegally, and against the will of him, the said defendant, compelled to sign the same, and to swear to the same as the same were so reduced to writing and signed, and that the deposition in writing of one (the defendant in the other cause) taken before the said Honorable Matthias B. Tallmadge, Esq., in the absence of the said defendant, together with the aforementioned illegal deposition and examination of him the said defendant, were, before the said indictment was found, illegally laid before, and were before the grand jury, who found the said bill of indictment, and this he is ready to verify, &c.

After these pleas had been filed, the district attorney prayed time until the next day to consider what measures he should adopt, which was immediately granted by the court, without any opposition on the part of the defendants. On the next day, the district attorney filed his demurrers to those pleas; and the counsel for the defendants prayed time to join in demurrer till the next day, in order that they might be prepared for the argument.

The discussion relative to postponement of the argument on the demurrer was then renewed. Mr. Emmet stated, that from the nature of the facts set forth in the pleas, he had rather expected the district attorney would have taken issue on them, than admitted them by demurrer; that therefore the whole of his attention, and he believed also of that of his associate counsel, had hitherto been directed to the best manner of supporting the plea before a jury; that therefore the demurrer was a surprise upon him, and he was not prepared to argue it, except on the general principles which first suggested to the defendants' counsel the propriety of the plea. He observed further, that no objection had been made to indulging the district attorney with time for consideration yesterday, because the pleas were probably not expected by him; and there was no wish on the part of the defendants' counsel to obtain an advantage by surprise.

THE COURT then observed, that if the defendants' counsel were really unprepared, they should be indulged with time till the afternoon, but no longer; and at half past twelve adjourned till three o'clock.

The sitting of the court being resumed, the district attorney began by stating some formal objections to the plea, which it is unnecessary to mention here, as the judgment of the court was founded exclusively on the general objection on the merits, that no such plea would lie. On this general question, he argued, in support of the demurrer, that this plea was a perfectly novel experiment, for which no precedent or authority could be found. This very novelty was conclusive evidence that it would not lie; for otherwise it is inconceivable that it should not have been made use of before now. It manifestly appears, from the silence of all the elementary writers, that there can be no such plea in abatement. Lord Hale (2 Hale, P. C. c. 30, p. 236) details all those pleas, among which such as this is not to be found. They are, according to him: 1st, such defects as arise upon the indictment itself, and the insufficiency of it; 2d, such defects as are in matters of fact, as misnomer or false addition of the prisoner; and 3d, by matter of record. The acts of grand juries are not to be brought into court, and questioned in this way; they are independent and irresponsible; they judge for themselves of the testimony upon which they ought to find indictments, and no one has a right to inquire; nor has he, without a violation of the grand juror's oath, the means of knowing what evidence they may have had before them. No injury can result from this; for it is the duty of the grand jury to decide on ex parte evidence; and if they decide wrong, or prefer a false charge, the natural and the only remedy is, that the accused will be acquitted on his trial before the petty jury. The object of the grand jury is only to judge whether there is probable cause for putting a party to answer a charge. and therefore it should not be bound down to the same strictness of investigation as the tribunal which is ultimately to decide upon the charge. The counsel for the defendant have probably been led to adopt this step by Dr. Dodd's Case, 1 Leach, 155: but in truth it is an argument against them, for it is no precedent of a plea in abatement. If such a plea would have lain, why was it not adopted in that case? On the contrary, the matter there submitted to the court was laid before it on a summary application; which clearly shows that the prisoner's counsel had no idea it could be taken advantage of in any other way.

The defendant's counsel replied as follows: Among the authorities cited on the opposite side is the arrangement in 2 Hale, P. C. c. 30, p. 236, of pleas in abatement of the indictment; and from the circumstance that a plea similar to that now under discussion is not found there, it is inferred, that no such plea can exist. But it appears that Lord Hale's arrangement has not been very accurately examined. He classes those pleas as follows: 1st, on such defects as arise upon the indictment itself and the insufficiency of it; 2d, such defects as are in matters of fact, as misnomer or false addition of the prisoner; and, 3d, by matters of record. Now, we do not see why our plea does not come under the second of those heads; for it is a mistake to confine that head merely to misnomer or false addition of the prisoner. The arrangement comprehends pleas from such defects as are on the face of the indictment itself, which perhaps more properly ought to be call-

ed demurrers; 2d, such as arise from matters dehors the indictment in pais; and, 3d, from matters dehors the indictment of record—comprehending every possible matter that can arise. Is not the circumstance alleged in our plea, that illegal evidence has been offered to the grand jury, if it be true, matter of fact, and dehors the indictment? And does it not exactly class itself under the second head of Lord Hale's arrangement? If it does not, and that head must be considered as comprehending only the two cases that appear to be mentioned, merely for the purpose of illustration, then his classification is insufficient; and in proof of that assertion we specify a plea in abatement unquestionably good, which is equally excluded from his arrangement. This is to be found in Browne, Abr. tit. "Indictment," 2: "Note, that where a man is indicted of felony by those, of whom part are indicted or outlawed of felony, and others acquitted by pardon, so that they are not 'probi nec legales homines,' there it was agreed, that the indictments by them presented shall be void, and the parties who are indicted shall not be arraigned on this; and note, that this matter ought to be pleaded by him who is arraigned on this indictment, before he pleads to the felony." On this quotation let it be observed for the present, that it furnishes proof of a plea in abatement arising from matter of fact, dehors the indictment, and not from misnomer or false addition of the prisoner, but from matter relative to the grand jury; and it is therefore so far precisely parallel to that before the court. Having thus endeavored to set aside the respectable authority of Hale, if it could be considered as furnishing any argument against us, let us proceed to consider the general principles on which our plea can be supported. It is a fundamental doctrine in the law, that there is no wrong without a remedy, and no right without the means of enforcing it. Apply that to the present case. Is it not a wrong to be accused and subjected to prosecution on illegal evidence; to be injured in character, in peace of mind, and in the trouble and expense of defending one's self against an indictment which by the rules of evidence and law ought not to have been found? If so, what is the remedy? Is it not the right of every man that he shall not be put to answer to an indictment, unless it shall have been found according to the rules of law? And if so, what are the means of enforcing that right? A grand jury, it is true, ought to listen only to ex parte evidence; but that should be of such a nature as would be received to support the prosecution before a petty jury, and such as, if uncontradicted and unexplained, would induce a conviction The rules of evidence, are the result of accurate reasoning, and of a strict regard to the rights of those, whose persons or property are to be affected. That reasoning is equally accurate, and those rights ought to be equally sacred, whether the investigation be before a grand or petty jury. Those rules of evidence are not the result of any statutory regulations, but are adopted on account of their wisdom, justice, and universal applicability. What is there in the nature of grand juries, in the purposes for which they were instituted, or the objects they are to attain, that ought to enfranchise them from those rules of wisdom and of justice which are also of universal applicability?

But the attorney general insists, that grand juries are independent, and irresponsible; judging for themselves as to the grounds on which they will prefer an accusation, and that no one has a right to investigate or to know what evidence they have had before them. This doctrine is broadly denied; and we do so from regard to an institution, which we have been habituated to love, and do not wish at this day to learn to detest. Grand juries are the offspring of free government; they are a protection against ill-founded accusations, and the necessity of their originating bills of indictment is supposed to be infinitely more friendly to liberty than the mode of proceeding by information; but if their powers were of such a nature as we have heard described, we should advise the friends of freedom and security to seek for the abolition of such an odious institution, and to throw themselves at once upon the mercy of the public prosecutor. What frightful privileges is it alleged to possess? Hearing only ex parte evidence, secret in its deliberations, irresponsible for its decisions, and bound in its investigatons by no rules of law! Does this fall short of what we have heard or read respecting the most despotic tribunals in the most enslaved countries? The powers which it in fact possesses, of deciding only on the evidence for the prosecution, and of keeping its deliberations secret, are in themselves sufficiently serious; but they are controlled and prevented from becoming dangerous by this, that it is bound to investigate according to the rules of law. It is at liberty to range through the wide extent of the community in pursuit of crime; but it is confined to travel in its pursuit only by the established paths of evidence. From whence too does the attorney general infer, that grand juries are irresponsible? Is it from the power anciently claimed by judges of fining them for misconduct? We do not pretend to say that such a power ought to be revised, but the frequent exercise of it in former times shows that their acts have always from the earliest periods, been considered as subject to investigation and punishment; and at this day it will not surely be questioned, that if a grand jury grossly misconducted itself from corrupt motives, the members so offending might be prosecuted by information or indictment. as is specified in 2 Hale, P. C. 159, 160; where he also mentions the 3 Hen. VII. c. 1, empowering justices of peace, oyer and terminer, or gaol de-

livery, to impanel another inquest to inquire of the concealments of a former one, for the purpose of punishment. If they are not irresponsible, and that their acts may be inquired into, let us see whether there be any thing in the secrecy of the grand jury proceedings to prevent our being at liberty to allege that illegal evidence was offered to them. It might perhaps be advisable to ascertain with more precision than is already done in what the secrets should really consist; but without entering into any discussion of the kind, it may be sufficient to observe that although the sentiments expressed by jurors, and the facts disclosed by witnesses to them, are secrets, the names of those witnesses never can be. Those are facts which any man may learn, by placing himself at the door of the grand jury room, or by looking at the names indorsed on the bills after they are found. We may say, further, that no unlawful act done in the grand jury, is such a secret as jurors are bound by their oaths to keep. If a bill of indictment were found by less than twelve of the jury, surely no man is restrained from disclosing that. If a bill of indictment be found in another unlawful way, by the admission of illegal evidence, is that violation of law more protected by the obligation of secrecy? It would be competent to him against whom an indictment had been found by only eleven jurors, to avail himself of that fact, and to get rid of the accusation. Why is it not equally competent to the man, who is indicted on evidence which the grand jury ought not by law to have received, to insist for the same purpose on the illegality of this procedure?

We have established that grand juries are not independent of either the law or the court; let us now examine whether they are exclusively competent to judge for themselves as to the grounds on which they will prefer an accusation. To that doctrine may be opposed the well-known maxim "ad questiones legis respondeant judices, ad questiones facti, juratores." That maxim so accurately marks the distinct and constitutional provinces of judges and juries that we cannot hesitate to apply it equally to grand as to petty juries. They are each of them subordinate parts of the criminal system obviously instituted for the ascertainment of facts; and, as to matters of law, under the guidance and control of those with whom is deposited the interpretation of the law. If then it shall at any time in the course of the proceedings appear to the judges, that the grand jury are about to err, or have erred, in matter of law, in the first case the court will prevent their error, by giving them proper information; in the other case, where an error has been actually committed, the court will interfere, and prevent any injurious consequences from the mistake. Every day's experience shows us grand juries applying to the court for advice in matter of law, and the court directing them as of right, and as a part of its duty. There are two cases which immediately present themselves, and are illustrative of those two positions. In the one, the court prevented the error which the jury was about to commit; in the other, if the alleged error had been actually committed, the court manifestly would have interfered, and prevented any injurious consequences from the mistake. The first is Denby's Case, 2 Leach, 514; the other is Dr. Dodd's Case, 1 Leach, 155; and both prove that illegal evidence shall not be permitted to go before the grand jury. In Denby's Case, that body, suspecting Denby himself (who was examined as a witness before it against one Edwards) of prevaricating, applied to the court for his depositions taken before the magistrate, pursuant to the statutes of Philip and Mary. But the court refused, because while Denby could be had, they were only secondary evidence, and would be therefore illegal. The judges did not say to the jury, "You are independent and irresponsible, and you must decide for yourselves as to the grounds on which you will find indictments; therefore, as you ask for those depositions, take them, though they are not strictly legal evidence." No; their answer substantially establishes, that whatever is not legal evidence, shall not go before the grand jury, and that it is not that body, but the court, which is to decide on the legality of the evidence on which an indictment is to be found. In Dr. Dodd's Case, he stated to the court, when called upon to plead, that the indictment was found on the testimony of an incompetent witness. Did the court answer—"with that we have nothing to do; the grand jury only is competent to decide as to the evidence on which it will find indictments?" No; the judges instantly received the objection, and determined that if the grand jury had found a bill on illegal evidence, they would interfere and prevent any injurious consequences to the prisoner. The point was argued by some of the most able lawyers at the bar, and submitted to the twelve judges; and it was only because they decided that the witness was competent and the evidence legal, that the objection did not avail—from which it manifestly results, that where the evidence on which a bill of indictment has been found, is confessedly illegal, the court should interpose, and prevent the accused sustaining any injury from the error of the jury. But, says the attorney general, if a grand jury do wrong, and find an indictment on illegal evidence, the remedy and the only remedy is, that the accused will be acquitted on his trial, before the petty jury. That this is not the only remedy, is clearly established by the two cases last cited. Let us farther examine, whether it be any remedy for the wrong done to a citizen by being illegally indicted. Suppose a case of misery often witnessed; a wretch, after being indicted, unable to find bail—or a man indicted of a felony, in which bail would not be received; suppose farther, what not unfrequently happens, a

court limited like this as to the duration of its sittings, and so pressed with business, that part must be postponed—would it be any remedy to a man illegally indicted, and obliged to remain in prison until September next, that in September next he would be acquitted and discharged? Is such an acquittal a remedy for a moment's imprisonment, for anxiety of mind, derangement of affairs, suspension or loss of character? If not, we revert to the established maxim, "there is no wrong without a remedy," and ask, in this case, what is the remedy? or, at least, what is the remedy exclusive of that which we have adopted?

But great stress is laid on the novelty of this plea, and on its being entirely without precedent. Whether it be so entirely without precedent, shall be examined presently; but let us now take for granted that it is so. This certainly imposes on us some difficulty; but it only imposes one which has been gotten over in a case very nearly similar. It has been already shown from Brooke, Abr. tit. "Indictment," § 2, that where some of the grand jury were indicted or outlawed of felony, it might be pleaded in abatement of the indictment. As far as we can find, there is but one instance of such a plea, and that in the reign of Charles I. Sir William Withipole's Case, reported Cro. Car. 134. That this was the first instance of such a plea, is manifest from the reporter's expression, that "because this was the first plea that had been upon that statute, and would be a precedent in crown matters, the court would advise." Here then is a plea, the like of which had never been produced before the time of Charles I., and yet its entire disuse and novelty formed no ground for its rejection. Since the days of Charles I., there has been no precedent of any thing like it. If, then, that solitary case had not accidentally happened to occur, the same objection of novelty would as strongly apply to that plea, which is unquestionably good, as it can to that which we have offered to the court. But novelty only imposes on us the necessity of more accurately investigating the principles of law, on which we rely; if our deductions from them be well founded (and we trust they are) the objection of novelty vanishes.

Along with this objection of novelty may be classed another; namely, that supposing the court will interfere in a case like this, we have mistaken our application; and to that was pointed the attorney general's expression, that Dr. Dodd's Case is no precedent for a plea in abatement. To that we answer: 1st, that there may be more ways than one of applying to rectify the same error; and, 2d, that emphatically the most correct and proper way of applying to rectify this error, is by a plea in abatement. The first position may be illustrated thus: It is laid down in 2 Hawk. P. C. c. 25, § 16, that any one who is under a prosecution for any crime whatsoever, may, by the common law, before he is indicted, challenge any of the persons returned on the grand jury, as being outlawed for felony, &c., or villeins, or returned at the instance of a prosecutor, or not returned by the proper officer, &c. Here then is a summary mode given to the accused of objecting to grand jurors, either by challenging the array, or challenging the polls, as the case may require; but has he no other mode? Sir William Withipole's Case, Cro. Car. 134, and Brooke, in the paragraph already cited from him, tells us that these objections may be pleaded in abatement; and Lord Coke (3 Inst. 34) says, "The safest way for the party indicted, is to plead, upon his arraignment, the special matter given unto him by the statute of 11 Hen. IV. for the overthrow of the indictments, with such averments as are by law required (agreeable to the opinion of Lord Brooke, ubi supra), and to plead over to the felony, and to require counsel learned for the pleading thereof, which ought to be granted, and also to require a copy of so much of the indictment as shall be necessary for the framing of his plea, which ought also to be granted, and these laws made for indifferency of indictors, ought to be construed favorably; for that the indictment is commonly found in the absence of the party, and yet it is the foundation of all the rest of the proceedings." Here, then, is a case where an objection to the grand jury may be taken advantage of either by a challenge to the jury, or by a plea in abatement, at the option of the defendant. Farther, cases frequently occur, in which an indictment is quashed, on motion for error on the face of it, which might have been the subject of demurrer, or of arrest of judgment; but was it ever said in any of these cases, that because you have the first remedy, you cannot have the last? On the contrary, summary applications, on motion, particularly in criminal cases, are comparatively of modern invention; for the most part introduced for the ease of the defendant, and to save him from the technical nicety of formal pleading; but they were never intended to deprive him of the benefit of such pleading, should he judge fit to resort to it.

Dr. Dodd's Case, however, can be considered in no other light than as furnishing a plea in abatement, pleaded ore tenus; he averred, that the indictment was found on illegal evidence, which he set forth, and submitted that he ought not to be compelled to plead the general issue. Have not this allegation and prayer all the substantial requisites of such a plea? But the fact which he averred, being admitted, there was no necessity for putting it into form, and the law arising from them was argued as on a demurrer. Had the facts, however, been disputed, and the law indisputable, what should he have done? The answer to this question leads to the discussion of our second position—that emphatically the most correct and proper way of applying to rectify this error, is by a plea in abatement.

Had the facts been disputed, should they have been ascertained by a war of affidavits submitted to the judges, who are not the competent organs for ascertaining facts? No, "ad quæstiones facti respondeant juratores." If the facts alleged would afford sufficient ground for quashing an indictment, but their truth be controverted, a jury must decide on their truth; a jury cannot decide on their truth without an issue joined; an issue cannot be joined without a plea put in; and no plea can be put in but a plea in abatement. It follows, therefore, that wherever the facts are capable of being traversed, the only correct way of bringing them forward is in the form of a plea tendering an issue—the ancient and strict rules, of which the defendants have not lost the benefit, know of no other way of bringing before the court facts that ought to prevent an accused person answering an indictment than by pleading them; that if denied, their truth may be tried by those who are to try the truth of facts; and if admitted or proved, they may appear upon the record, and bring it to a legal termination. Any other way is an innovation—useful in many cases, frequently an advantage to the accused—but one which he may waive, if he prefer the mode of pleading.

As to the formal objections which were taken, the counsel for defendants replied to them; but stated, that the facts contained in their pleas had come to their knowledge so very short a time before the defendants were called upon to plead, that they had no time to reperuse them; and were obliged to file the original draughts, without even taking copies; that, therefore, if the court should think any of the formal objections valid, they would pray for liberty to amend; which they had no doubt it would be ready to grant, under the circumstances of these being criminal cases, in which the defendants should not be entangled by niceties, and of there being no precedent to which the counsel could have had recourse for their guidance.

Pierpont Edwards replied, but confined himself entirely to the formal objections, and did not enter into the general question whether such a plea would lie. After he had concluded, the court adjourned till the next day.

The pleas in abatement were, on the following day, over-ruled on the merits, and judgments were given against defendants upon the demurrers. Defendants' motion for permission to amend their pleas in abatement was denied. A motion was made to quash the indictment upon the evidence before the court, which being over-ruled, and defendants ordered to plead in chief, they severally pleaded not guilty. Thereupon the district attorney moved for leave to proceed to trial on the indictments.

Defendants' counsel filed the several depositions of defendants, stating: That James Madison, of the city of Washington, William Duncanson, of the same place, and Doctor Thornton, of the same place, Thomas Lewis, now master of the ship Leander, and Jonathan S. Smith, supercargo of the ship Leander, will be material witnesses for the said defendants in the trial of the said several indictments, as they are advised and believe to be true, and that they cannot safely proceed to the trial thereof, without the testimony of them the said James Madison, William M. Duncanson, and Dr. Thornton, Thomas Lewis and Jonathan S. Smith; and further stating, that the distance of the place of residence of the said James Madison, William M. Duncanson, and Dr. Thornton, is so great, that their attendance could not have been procured at this city since the said indictments were found, and that they expect to be able to procure the presence of the said James Madison, William M. Duncanson, and Dr. Thornton, or the benefit of their testimony, by the next sitting of the circuit court of the United States for the district of New York; and that they have every reason to think, and do verily believe, that the said Jonathan S. Smith and Thomas Lewis, will return to the United States by the ninth of September next, and the defendants will be able to procure their attendance, or the benefit of their testimony, at the next circuit court of the United States for the district of New York.

Upon such affidavits, defendants' counsel asked that the trial of the indictments be put off until the next stated term of the court, to be held on the first day of September next. Such motion was not opposed by the district attorney. It was ordered by THE COURT, that trial be put off until July 14th next, at which time it was ordered that a special session of the court should be held for the trial of criminal causes at the city of New York.

Nathan Sanford, Dist. Atty., and Pierpont Edwards, for the United States.

Cadwallader D. Colden, Josiah Ogden Hoffman, and Thomas Addis Emmet, for defendants.

[NOTE. At the special July term, the district attorney moved to bring on the trial of William S. Smith, and defendants' counsel moved for an attachment against absent witnesses, and for a continuance until such witnesses could be produced. Defendants' motion was denied and it was ordered that the case proceed to trial. Case No. 16,342. The trial of Smith resulted in a verdict of acquittal. Case No. 16,342a. A similar verdict was also rendered on the trial of Ogden. Case No. 16,342b.]

Case No. 16,342.

UNITED STATES v. SMITH.

[3 Wheeler, Cr. Cas. 100.]

Circuit Court, D. New York. July 15, 1806.

CRIMINAL LAW—TRIAL—ABSENT WITNESS—ATTACHMENT — WAR — POWER OF PRESIDENT TO DECLARE—INVASION OF FRIENDLY TERRITORY.

[1. A motion to bring on a criminal trial will take precedence of a motion for an attachment against absent witnesses.]

[2. The power to issue an attachment to punish a person for failure to obey a subpœna is incident to courts of justice.]

[3. Persons who are material as witnesses for a party in a federal court may be compelled to appear notwithstanding they are members of the cabinet of the president of the United States.]

[4. Where the acts for which defendant was indicted were committed in the city of New York, defendant will not be granted a continuance because of the failure of persons at that time resident in the city of Washington to attend pursuant to subpœna on a general affidavit, but he should particularly set forth in what matters their testimony is material.]

[5. The court will not postpone a criminal trial on the ground of the absence of witnesses unless the evidence to be given by such witnesses is pertinent to the issue, and the witnesses are material.]

[6. The power of making war is exclusively vested in congress; but the president has power to repel invasions by hostile forces, even when congress has not declared war.]

[7. The president of the United States has no authority to set on foot a military expedition against a nation with which the United States are at peace; and it is no justification to a private individual who sets on foot such an expedition in violation of Act June 5, 1794, § 5 (1 Stat. 384), that he acted with the knowledge and approbation of the president.]

[8. The trial of an indictment for setting on foot a military expedition against a nation with which the United States are at peace, in violation of Act June 5, 1794, § 5, will not be postponed to enable defendant to produce testimony of the executive officers of the government that the expedition was with the knowledge and approval of the president, as such evidence is not a justification or excuse for the offence, and is not material.]

[9. A criminal trial will not be postponed to enable defendant to obtain evidence which would have an influence upon the mind of the court in mitigation of punishment, but which is not legally admissible before a jury.]

[10. Defendant, indicted for a violation of Act June 5, 1794, § 5, in setting on foot, a military expedition against a nation with which the United States were at peace, caused certain United States cabinet officers to be served with subpœnas, and, on their refusal to appear, asked a continuance, and moved for an attachment for contempt. The court *held* that their testimony was not pertinent, and denied a continuance, but was divided on the question as to whether an attachment should issue.]

[Indictment for misdemeanor under Act June 5, 1794, § 5. Motion to bring on the trial, and for an attachment against absent witnesses.]

Nathan Sanford and Pierpont Edwards, for prosecution.

Washington Morton, Cadwallader D. Colden, Josiah Ogden Hoffman, Thomas Addis Emmet, and Richard Harrison, for defendant.

Colden read a subpœna, directed to James Madison, Esq., whereby he was commanded to appear at the present circuit court, to testify in behalf of the defendant; also, the copy of the subpœna ticket, and read an affidavit in the words following:

"City and County of New York, ss: Charles Lindsay, attorney at law, being duly sworn, saith that on the twenty-eighth day of May last he served on James Madison the writ of subpœna hereunto annexed, and also at the same time delivered to said James Madison a ticket of subpœna, a true and perfect copy whereof it is also hereunto annexed; and this deponent farther saith, that at the time of showing the said writ and of leaving the said ticket, he offered to pay to the said James his reasonable expenses, and tendered to him twenty dollars, which the said James would not accept, saying 'that he would not take them now, and that it was unnecessary to say anything about them;' and this deponent farther saith, that the said James made no objection to the quantity or quality of the money so tendered as aforesaid to the said James, and farther this deponent saith not. Dated the 16th day of June, 1806. Charles Lindsay.

"Sworn the 17th day of June, 1806. Matthias B. Tallmadge."

Colden stated that he had in his hand subpœnas for the other witnesses who did not attend, with like proof of service on them. That the present application to the court, however, would only relate to Mr. Madison, Mr. Smith, Mr. Wagner, and Mr. Thornton. As to the three last, the documents he had to offer were mutatis mutandis, the same as those he had read relative to Mr. Madison; it would therefore be unnecessary to trouble the court with reading them; he should put them on file, and the decision of the court on the documents that had been read he presumed would be allowed should govern in the other cases. He trusted that the court would not order the trial to proceed until the defendant has had the compulsory process of the court, to bring up the witnesses who have disobeyed the subpœna. And that compulsory process, he presumed, must be an attachment for which, in behalf of the defendant, he now applied. He did not move for this process merely as a means of bringing in the witnesses to answer for their contempt in disobedience of the ordinary summons of the court; but he applied for it, as for that compulsory process which, by the constitution of the United States, every person accused was entitled to in order to bring in his witness to testify on his trial. (Here he read the 8th article of the amendments of the constitution of the United States.) He also read the 6th section of the act of congress of the 2d of March, 1793 [1 Stat. 335], by which it

is provided, that "subpœnas for witnesses, who may be required to attend a circuit court of the United States, in any district hereof, may run into any other district."

Colden also read the 14th section, of the act of the 24th September, 1789 [1 Stat. 81], which enacts, "that the courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." This present application, said he, is sanctioned by the constitution, and the laws of our country. There can be no doubt of the power of the court to award the process for which we apply, nor can there be any question of the justice or propriety of granting it. I will not suppose that there is any thing in the station of the gentlemen who are the subject of the present application, which exempts them from proceedings to which any other citizen would be liable. The court cannot, and I trust will not, recognize them in their official situations; but hear of them only as of men, who have disobeyed the process of the court, and whose attendance the defendant requires as witnesses. I shall not say more on this subject, because I cannot but persuade myself that the process we pray for will be granted as of course. But we have, in the behalf of the defendant a further petition to the court; which is that the process be made returnable at a short day, and that the court adjourn de die in diem until it may be served and returned. The defendant cannot go to trial till his witnesses be brought in, and yet he is very unwilling that there should be any postponement. The court cannot be ignorant that the defendant, by being removed from an office which was a support of a numerous family, and for which he had sacrificed all other business, has suffered, while his guilt is not yet proved, a punishment greater than any it is in the power of the court to inflict. The court must also know that while this prosecution is pending against him, it would be in vain for him to seek any new employment or means of life. The court will readily perceive that humanity, as well as justice, requires that the defendant should have not only the benefit of the testimony of his witnesses, but that he should have that benefit speedily. It is, therefore, our humble petition to the court, in behalf of our client, that the process to bring in the witnesses may be made returnable at some short day, and that the court adjourn from time to time, till the return be made. We shall forbear at present to urge any farther arguments in support of the motion now before the court. When we have heard the counsel for the prosecution, we may have more to offer.

Sanford. The first question is, whether the application of the counsel for the defendant, for an attachment against the absent witnesses subpœnaed in this cause on behalf of their client, is at this time regular? I contend it is not. We are not bound at this time to discuss the question whether the attachments ought to issue or not. When the proper time for the argument of that question shall arrive, we shall be prepared to meet them on that, as on every other question which may occur in the progress of the prosecution. The court must have observed the public prosecutor has, in the first instance, moved to bring on the trial of W. S. Smith. While this motion is depending before the court, nothing can be in order but a motion to postpone the trial. That question must precede the application for an attachment, the object of which is to punish the absent witnesses for contempt. It may happen, that the parties are prepared to go to trial with the witnesses present; we are prepared on the part of the prosecution, and it does not follow that because persons who may have been regularly summoned as witnesses by the defendant are absent, the trial must be delayed even for a day, and still less until the return of the attachments shall be made. I forebear to say a word at present on the application for an attachment, a regular or legal mode of bringing in witnesses to testify. When that point shall come before the court, we shall be ready to meet and discuss it. We object to the motion for an attachment at present, simply on the ground that it is irregularly made at this time; and we shall not advance farther in the argument, until the court shall have decided this point. As, therefore, the application is altogether out of order, I trust the court will refuse it, and will order on the trial.

Colden. I do not see the difference in point of time as a matter of much importance. Whether the court decide on the one motion or the other first or last would be of little consequence. If the court order on the trial, then we shall renew our motion, and the court will certainly hear our application, and decide upon it before they allow the trial to proceed.

Pierpont Edwards wished to be admitted to say a word in explanation. This prosecution must be at some time brought to trial, and why not now, after the delay already granted by the court? Certainly the defendant's counsel will not press a further delay, unless they show some good reason and legal grounds for what they ask. They say, that the witnesses subpœnaed by the defendant do not appear. Well, is this a ground of delay? Will they be in a better condition if their witnesses are attached and brought here to answer for a contempt of the process of this court? No such a thing. The attachment they solicit does not go to them testificando to bring them in to give testimony, but merely to receive punishment for an alleged contempt. The only motion they can make is to put off the trial for some sufficient and legal cause; if they make that point, we are prepared to meet them; but surely the court will not put off the cause, in order to wait the return of an

attachment, to be issued against Mr. Madison and other gentlemen, who have been mentioned.

Hoffman. If the question is to take this shape, I am ready to meet it; but at present we hope the court will, at any rate, grant us a short delay for the absent witnesses to come in. It is the usual practice of the court, when the witnesses do not appear instanter, to postpone the trial for a day or more. This is what I should request, as it is probable that two of the witnesses may reach this city tomorrow. Far be it from me, to postpone this trial to a distant day: my only and sincere wish is, that it may come to issue before this court rises; but we anxiously hope that the court, from motives of justice and constitutional right, will grant us the compulsory process to bring in our witnesses, in the manner already requested. We do not dispute on matter of form. When our witnesses are here, the court will command their testimony, and it is with the court to enforce their attendance; but we shall certainly object to the trial proceeding at this moment.

Sanford. Do you mean to postpone the trial on account of the absence of the witnesses? If so, it might be cause of eternal delay.

Hoffman. Not so, I understand that two of the witnesses now absent will be here tomorrow, and mention it as a sufficient reason for a day's postponement. But I do not mean to commit myself on the question, whether we are bound to proceed to trial in the absence of our witnesses, when we can show we have used due diligence. When that question is raised, I shall be willing to meet it, and if the witness should now come into court, I would cheerfully and confidently go to trial.

Pierpont Edwards. The district attorney would repel with disdain the idea of sheltering himself under forms. No, please your honors, he has with great liberality met the opposite counsel, and I feel myself impressed with its propriety. The objection to the mode of proceeding, on the part of the defendant, is founded in great solidity; but it is not proper, at this stage of the business, to disclose to our antagonists the grounds of our opinions. When the proceedings take their proper shape, we shall have no objection to indulge them in any proper information; till then they will not be answered on irrelevant matter; at present they ought to confine themselves to a motion for postponement, if postponement is their object. When that is decided by the court, we will proceed with them to discuss the motion for an attachment against the secretary of state, and other officers of the executive government of the Union.

PATERSON, Circuit Justice, informed the bar, that the court had received a letter from Messrs. Madison, Dearborne and R. Smith, informing that they would not be able to attend. The letter was in these words: "To the Honorable the Judges of the Circuit Court of the District of New York: We have been summoned to appear, on the 14th day of this month, before a special circuit court of the United States for the district of New York, to testify on the part of William S. Smith and Samuel G. Ogden, severally, in certain issues of traverse between the United States and the said William S. Smith and Samuel G. Ogden. Sensible of all the attention due to the writs of subpœna issued in these cases, it is with regret we have to state to the court, that the president of the United States, taking into view the state of our public affairs, has specially signified to us that our official duties cannot, consistently therewith, be at this juncture dispensed with. The court, we trust, will be pleased to accept this as a satisfactory explanation of our failure to give the personal attendance required. And as it must be uncertain whether, at any subsequent period, the absence of heads of departments, at such a distance from the scene of their official duties, may not equally happen to interfere with them, we respectfully submit, whether the objects of the parties in this case may not be reconciled with public considerations by a commission issued, with the consent of their counsel and that of the district attorney of the United States, for the purpose of taking, in that mode, our respective testimonies. We have the honor to be, with the greatest respect, your most obedient servants. James Madison. H. Dearborne. R. Smith. City of Washington, 8th of July, 1806."

THE COURT also mentioned that they had also received a letter from Mr. Jacob Wagner, and one from Mr. William Thornton, which stated that they could not attend. That the letter from Mr. Wagner covered copies of a correspondence between him and Mr. Colden, by which it appeared that Mr. Wagner had offered to give his deposition in writing, if it could be taken by consent on interrogatories.

Colden acknowledged that he had received letters from the above mentioned gentleman; and said that these letters had been submitted to the counsel concerned for the defendant, who have agreed in opinion, that they could not, consistently with the interest of their client, dispense with the attendance of these witnesses, or consent to receive their testimony in the way it had been offered. Nor did he think it possible that the court would suffer either the letter which had been read from Mr. Madison and others, or those referred to by the court, to have any influence in the decision of the question then before them. The letter from the heads of departments, written by order of the president, was an attempt of the executive to interfere with the judiciary, which no doubt the court would indignantly repel.

PATERSON, Circuit Justice. The court mentioned these letters, to show that the gentlemen who had signed them would not be here upon the subpœnas, and were particularly called forth by what had fallen from one of the defendant's counsel, that two

of the witnesses would probably be here to-morrow.

TALLMADGE, District Judge. Those letters are not to determine how the court shall act; their decisions must be formed upon other ground. They were mentioned, as I conceive, with the view of convincing the counsel that none of the gentlemen who have signed them will be here tomorrow.

PATERSON, Circuit Justice, said that was the idea he meant to express.

Colden. Our application to the court for an attachment, the district attorney says, is superseded by his motion to bring on the trial. I do not mean to enter on an argument on this point; but let me inform him that he misconceives us in this particular. We apply for the attachments not merely to bring in the witnesses to answer for their contempt, but that they may be brought here to testify. We have no partiality for this or that process, nor care whether the process the court grants to us be called an attachment or any thing else, so that it be that compulsory process which the constitution and laws give us a right to demand.

Sanford. The court will please to dispose of the questions as to a day's delay for the witnesses, whose attendance is expected to-morrow; but, as to the question of attachment, it is altogether different. We have moved to bring on the trial; to defeat this motion, the defendant must show that the absent witnesses are material for his defence in the present cause; and I would ask how can he possibly show this when the gentlemen, whose testimony is required, were all at Washington when the military expedition was set on foot, and preparing at New York? What possible knowledge of their own could they have of those transactions at the distance of 250 miles? No affidavit in common form, stating the materiality of the witnesses, can be admitted; they must show the special grounds on which their testimony can operate for the defendant; and when this shall be done, the court will judge whether the special matter which may be disclosed constitutes a sufficient reason for postponing the trial.

Pierpont Edwards concurred in the position of the district attorney, and required of the defendant to show the special ground for the application, wherein the testimony of the absent gentleman was material to his defence.

Colden. That is not the law, as we have hitherto understood it. If we are obliged to offer an affidavit, we conceive it to be sufficient, in the first instance, to declare generally, that the witnesses are material, without specifying the particular points to which they are to testify, and that without them our client cannot safely proceed to trial.

PATERSON, Circuit Justice. You must offer an affidavit, and must show in what respect the witnesses are material. The facts charged in the indictment took place, and are laid, in New York; the witnesses are admitted to have been during that period at Washington. The presumption is, therefore, that they cannot be material, and this presumption must be removed by affidavit.

Colden, after a short silence, during which the counsel on both sides had conferred together, addressed the court. The counsel have agreed among themselves that the cause shall go off till to-morrow. To which the counsel for the prosecution having signified their assent, Colden then said, the trial being disposed of for the present, I now move on the documents which have been read, that an attachment be issued against Mr. Madison.

Sanford. We have by no means waived the priority of our motion that the trial may proceed, by consenting to postpone the cause till to-morrow. When the court shall have decided that, the motion for an attachment is in order, and we shall be ready to argue it; but the court will not permit our first question to be superseded by the deference we have paid to their request.

Washington Morton said the counsel for the defendant had no objection to this question also going off till to-morrow, and then arguing them together.

Colden: If the court would grant us the attachment to-day, it would be a gain of so much time, as the trial is postponed till to-morrow.

TALLMADGE, District Judge. The questions of bringing on the trial, and of the attachment, are certainly distinct, but setting the first aside for the moment does not authorize the other to assume its place. You cannot have your motion for the attachment argued before it is determined whether the trial shall now proceed.

Colden. It has been agreed to postpone the trial; the district attorney's motion then being disposed of, nothing now interferes with our motion for the attachment.

PATERSON, Circuit Justice. The conversation is extremely desultory, but go on in your own way.

Colden. I am now ready to open the argument at large, on the motion for an attachment, if the court will please to hear me. But if we now agree to postpone this argument till to-morrow, as we have the preference now, we trust the court will grant it to us then, and hear us before the motion to bring on the trial is renewed.

PATERSON, Circuit Justice. Certainly not.

Harrison. Then I presume we are to give up the idea of arguing the motion for the attachment at present, as the trial is postponed by accommodation.

TALLMADGE, District Judge. The accommodation has been granted, for the purpose of giving time for the arrival of some absent witnesses; this throws the trial off for a day, but it cannot give to the defend-

ant's counsel the privilege of having the second motion argued until the first is determined; the first question still retains its priority.

Pierpont Edwards. When the attachment is argued, we shall not take the ground of privilege for the executive officers of the government. I know the district attorney would disdain to rest himself on such a pretext. We shall require of the defendant to show that they are material witnesses, by affidavit and proof; if they cannot make out this point, their application fails. We have suffered the trial to go off for to-day; perhaps the other motion ought likewise to be suspended, especially if the defendant has not prepared his affidavit on which the motion must be bottomed.

Emmet. Have the court decided that the motion for the attachment should be heard in preference to the question which has been postponed till to-morrow? If they have not, I would ask permission to suggest one circumstance why it should have the precedence. The right of the defendant to compulsory process to bring in his witnesses, is not only guaranteed by the constitution and the laws, but springs from the necessity of the furtherance and due administration of justice in all well regulated governments, and if we can obtain the attachment to-day it will certainly expedite the trial.

Pierpont Edwards, interrupting, said, the court, he presumed, intended to accommodate the counsel on both sides, with the postponement of both questions till to-morrow.

Sanford understood that the court had already decided on that point, by declaring that the public prosecutor should not lose the precedence of his motion, to bring on the trial by the delay which has been accommodated, and he insisted upon the point of order.

Emmet did not imagine the court had decided against hearing the argument in favor of the motion for an attachment. He understood the trial was not to be brought on instanter, but certainly that was not to postpone the right of the defendant, to have his motion allowed.

(At this moment the grand jury came into court, and the foreman informing the court they had found no bills, and the district attorney declaring he had nothing to lay before them, they were discharged for the present.)

Emmet consented to the accommodation on the condition that it do not operate to the injury of his client, and proposed to offer an affidavit, proving the absent witnesses to be material on the trial. He hoped it would be understood that the trial was to be put off from day to day, until the witnesses came in.

PATERSON, Circuit Justice. The first motion will have the priority in the decision, but if the counsel agree they may argue the latter proposition first.

Sanford. We pray the decision of the court as to the mode of proceeding.

PATERSON, Circuit Justice. I am willing to hear the arguments on both points, and I do not care which is argued first, but I do not mean to decide either until both are gone through.

TALLMADGE, District Judge. The first motion will have the first decision.

PATERSON, Circuit Justice. You make all the difficulty out of a mere matter of form. If you argue the motion for an attachment to-day, no opinion will be given until the court have decided upon the motion for bringing on the trial. Let them go hand in hand, and the court will take care that neither party shall be caught or entangled in the net of form.

It was then agreed by the counsel on both sides, that the two questions should be argued together to-morrow.

Adjourned, till ten o'clock to-morrow.

Tuesday, July 15th, 1806.

Present PATERSON, Circuit Justice, and TALLMADGE, District Judge.

Colden made a brief recapitulation of the course of proceedings of yesterday, and then offered the following affidavit of Wm. S. Smith, viz.: "New York, ss.: William S. Smith, the defendant in the above cause, being duly sworn, says that James Madison, of the city of Washington, Robert Smith, of the same place, Jacob Wagner, of the same place, and William Thornton, of the same place, are material witnesses for him the deponent, on the trial of this indictment, as this deponent is advised by his counsel, and verily believes to be true, and that he cannot safely proceed to trial of the said indictment without the testimony of the said James Madison, Robert Smith, Jacob Wagner, and William Thornton, and that they have been regularly subpœnaed to attend at this court, on the fourteenth day of July instant, to testify in behalf of this deponent, on the said trial, and have not appeared in the said subpœnas, nor hath either of them appeared; and this deponent farther saith, that he hopes and expects to be able to prove by the testimony of the said witnesses that the expedition and enterprise to which the said indictment relates, was begun, prepared, and set on foot with the knowledge and approbation of the president of the United States, and with the knowledge and approbation of the secretary of state of the United States; and the deponent farther saith, that he hopes and expects to be able to prove by the testimony of the said witnesses, that if he had any concern in the said expedition and enterprise, it was with the approbation of the president of the United States, and the said secretary of state; and the deponent farther saith that he is informed and doth verily believe, and hopes, and expects to be able to prove by the testimony of the said witnesses, that

the prosecution against him for the said offences, charged in the said indictment, was commenced and prosecuted by order of the president of the United States; and the deponent farther saith, that he has been informed, and doth verily believe, that the said James Madison and Robert Smith are prevented from attending by the orders or interpositions of the president of the United States; and farther this deponent saith not. (Signed) W. S. Smith."

Colden proceeded: The present application is to put off the cause on account of the absence of witnesses whose testimony the defendant alleges is material for his defense, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed, by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify. If the court cannot or will not issue compulsory process to bring in the witnesses who are the objects of this application, then the cause will not be postponed. Or if it appears to the court that the matter disclosed by the affidavit might not be given in evidence if the witnesses were now here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to appear; and of whose voluntary attendance there is too much reason to despair; or on account of the absence of witnesses who, if they were before the court, could not be heard on the trial. It is therefore my business to show that the court can issue compulsory process against those persons who have disregarded the subpœnas. And secondly, that this process ought to issue, because their testimony, as it is disclosed by the affidavit, would be material. If the witnesses who have been summoned, stand on the same level with their fellow citizens; if there be not something in their high offices to raise them above those laws which are above the rest of the community; then there can be no doubt but that they are subject to that provision of the constitution, which in its terms seems to pay no respect to official dignity or station; but, as it appears to me, gives the accused a right to demand compulsory process against any man whose testimony he may deem necessary to make his innocence appear. I shall not, however, enlarge on the powers of the court in ordinary cases, to issue the process for which we now apply. I shall be content to repose on the articles of the constitution and the laws of the United States to which I referred yesterday. I proceed to inquire whether Mr. Madison and the other heads of departments have offered a sufficient excuse for their disobedience to the process of the court, by saying they are members of the executive government—whether these dignified sounds elevate them above the constitution and laws.

The general rule is that all persons are bound to give testimony. I have no book from which to read this rule; but I think it is written by the finger of God on the heart of every man. True it is that the necessities of society have introduced one exception, and but one: and that is where a person in the capacity of counsellor or attorney, represents another. This exception is most strictly confined to this relationship. No obligations of secrecy or confidence however sacred; no connections of blood or ties of friendship can interpose in the administration of justice. If they could, a Russel would not have perished by the hands of the executioner, or England have been indelibly stained with the blood of a Sidney. In the Case of the Duchess of Kingston, 11 State Tr. 246, for bigamy, Sir Cæsar Hawkins was called to prove that he had delivered the duchess of a child. He attempted to excuse himself from giving testimony on the ground of professional confidence; but the court wrung from him his secret. And in the same case Lord Barrington in vain implored to be excused from giving testimony against the accused, as all he knew had been imparted to him in the confidence of friendship. A Roman Catholic priest has been compelled to disclose the communications of his penitent in his religious capacity of confessor. 2 Atk. 524. I do not expect to hear the counsel for the prosecution contend, after this, that any obligations of confidence interpose to shield the defaulting witnesses from the process which in the name of the constitution we demand. Nor will I suppose that the learned counsel who are opposed to us mean to say that there is anything in the official dignity with which the witnesses are clothed which saves them from the operation of the laws. The peers of England have not thought that their titles or stations afforded them any such exemption. And even the king of that country, who claims his title by divine right, has yielded to the obvious moral obligation of giving his testimony when the administration of justice rendered it necessary. 1 Salk. 278; 2 Hawk. P. C. 152; Hob. 213. Indeed, if it were necessary to produce authorities on this point, we might go very far back, and show that the kings of Judea have witnessed and been witnessed against. Salk. (Wilk. Ed.) 1521, 1526.

But it may be said that there are certain political motives which should induce the court to excuse the secretary of state and other heads of departments from giving testimony. That were they to be examined as witnesses they might disclose state secrets! If I were to admit that there are certain secrets between the president and his secretaries which they would not wish to disclose, (and I have no doubt there are many such), or which ought not to be disclosed, still the

witnesses who have been duly summoned owe obedience to the process of the court; they must appear and be sworn, and when on their oaths, they may avail themselves of this excuse if questions are put to them which they ought not to answer. But the court must judge, and not the witnesses, whether they shall or shall not answer. Much less shall the witnesses be allowed to determine for themselves whether they will be obedient to a mandate of the judicial authority. Such was the determination of the supreme court of the United States in the case of Marbury v. Madison, 1 Cranch [5 U. S.] 137. But the dreadful inconvenience to the gentlemen themselves, and the injury to our national affairs, that may result from the court's exercising a power to call on our great men as witnesses, has been suggested. In the case I have mentioned of Marbury v. Madison, Mr. Lincoln took precisely these grounds. Yet in that case the court would not grant him a moment's time to consider whether he would or would not be sworn, although they had no objection that he should have time to consider what he would or ought to answer.

Before I quit this point, I will pray leave to refer the court to one other case which has occurred in our own courts. I mean the case of U. S. v. Cooper [Case No. 14,861]. And although I should be sorry to find that case received as law in all its points, because I think there are in it some determinations against the defendant too severe and rigorous, yet it will show that the question under consideration is not a novel one. Mr. Cooper calls as witnesses several members of the national legislature and officers of the executive government. Judge Chase permits subpœnas to issue against them. Judge Peters indeed objects to members of the legislature being subpœnaed, on account of a supposed privilege attached to them as members of the congress then in session, and therefore he thought the process could not be enforced, and that the court ought not to issue a process to which they could not compel obedience. But an objection on account of official station or dignity, or on account of executive confidence, is not even thought of. Such extraordinary objections are reserved for this very extraordinary prosecution. In the event, Mr. Cooper's witnesses appeared in court and offered to be examined.

If, however, the exemption in the present case should be supposed to extend to the heads of departments, I presume it will not be contended that it extends likewise to Messrs. Thornton and Wagner, who are admitted to be only clerks in the offices. If one clerk is entitled to this privilege, so is every other on the ground of being an executive agent. Suppose a case of treason or murder Would the court admit of such an apology for refusing to the person indicted compulsory process? It is monstrous to suppose that they would. Why, then, should it be refused to us in the present case; is the punishment to which the defendant is obnoxious of so trifling a nature, as to render his conviction or acquittal a matter of indifference? No, sir; the defendant is exposed to punishment extremely severe; he is subjected to a penalty of great amount, and to imprisonment in the common bridewell, among the vilest felons who are separated from the community. Shall he be exposed to all this, deprived of that shield which will cover him from this ungenerous attack? For the testimony we have sought, and which the court can furnish, will be to us that shield of defence. Will it be admitted as an excuse, that the gentlemen cannot attend at this time, because the affairs of the nation rest upon their shoulders? But it is intimated in their letter that their official employments will always interfere whenever the defendant may require them as witnesses. In that case we cannot issue an attachment either now or hereafter. Yet it is no uncommon thing to find these gentlemen absenting themselves from the seat of government for months at a time, for their own pleasure or business. It is hard indeed that they cannot devote a few days to the fate of a fellow citizen. I humbly hope that I have satisfied the court that they have power to issue the process we pray for, and that no sufficient excuse has been or can be offered for disobeying the subpœnas, and that therefore the attachment ought to be granted; if not for the purpose of bringing in the witnesses to testify, which is now our object, at least I think the court will be of opinion that they ought to compel the witnesses to appear and answer the contempt.

I now proceed to inquire whether the testimony which we expect to obtain from these witnesses may not be given in evidence, when the defendant is on his trial. And here we may say it may be given in evidence either in mitigation of the punishment, or as a justification. If not as a justification, certainly we shall be allowed to offer it in mitigation; and the proper time to offer it in mitigation is on the trial. There is no doubt but that circumstances in mitigation may be offered to the court after the verdict. If a defendent is so fortunate as to be able to obtain such testimony after he has been pronounced guilty by the jury, the court will undoubtedly listen to it. But the laws do not put it in the power of a defendant to compel a witness to appear and testify in his behalf, unless it be on the trial of the issue. It is as much the right of the accused to lay before the court testimony which may tend to lighten his punishment, as it is to offer testimony that will entirely exculpate him. Is it not as unjust and unreasonable that a defendant should be subject to three years' imprisonment when he can show that he ought not to suffer three days' confinement, as it is that he should be convicted when he is not guilty? If, there-

fore, there is no other mode of obtaining the mitigatory testimony but by the witness appearing upon the trial, the court will oblige him then to appear. Let us ask, has the law provided any means by which the defendant can compel a witness to give an extra judicial deposition in any criminal case; or is there any process by which the defendant can compel a witness to appear in court after the trial? We answer with confidence that there is none. Such a thing has never been heard of, and the counsel for the prosecution, we are certain, cannot point out to us any means by which we may oblige a witness to give the testimony we expect, if the court should say they would hear it after the trial. It is true, indeed, where witnesses have voluntarily made affidavits of this nature, the courts have received them after the issue has been decided. But can a matter of this importance to the accused depend on the mere will and pleasure of another? Every notion of justice is opposed to such an idea. And if there be no certain mode of obtaining this testimony but by examination of the witness on the trial, the court will oblige him to appear. We are, however, not without authority on this subject. In the Case of the Earl of Anglesea, indicted for a misdemeanor, reported in 9 State Tr. 305, it was expressly decided that circumstances in aggravation of the defendant's offence might be given in evidence on the trial. Now if circumstances in aggravation may be offered on the trial of the issue, a fortiori, it must be lawful to give in evidence circumstances of mitigation. For, as it is better that a guilty person should escape punishment rather than that an innocent one should suffer unmeritedly, so it is better that a guilty defendant should escape with too light a punishment rather than that he should suffer more than he deserves. This case of the Earl of Anglesea is a very strong one in our favor. The point now before the court was there debated, and received a decision which supports the principles for which we now contend. So in many instances have the courts allowed a defendant to give evidence of character, where the character of the defendant could have nothing to do with his guilt or innocence: McNal. Ev. 320, 323, etc. But we may appeal to universal practice on this subject. Is there a lawyer who hears me that will say he ever knew testimony of this kind refused by a court on a trial? And is it not admitted every day? I hope, therefore, the court will say that although we may only offer this testimony in mitigation, yet the witnesses must be compelled to come here, and give us the benefit of it.

We, however, go farther, and offer this testimony not merely as mitigatory, but as relevant to the issue, and as a complete justification of the acts with which the defendant is charged. We say by the affidavit that the witnesses will prove that what the defendant did he did with the knowledge, consent and approbation of the president of the United States; and if they do prove this, the defendant must be acquitted. Let us suppose that we could prove that the acts charged against the defendant were done by the express order of the president of the United States; would not such an order be a complete justification? That the president might have authority to give such an order cannot be questioned. Congress have the power of declaring war; and when that is done, the president is to act under it, and may authorize any military or hostile measure against the enemy. If it be said that there was no declaration by congress, it is sufficient for us to answer that there might have been. The constitution does not require that a declaration of war should be made public; it would be absurd to suppose that it did, and thereby the executive of this country was to be deprived of all chance of taking an enemy by surprise, or of the advantage of secret measures of defence or offence. It is well known, that at the time General Meranda's expedition was set on foot, congress was sitting with closed doors, and might have, nay, it was universally believed they had, declared war against Spain. If they had done so, the president would have had constitutional authority to sanction the acts for which the defendant is now to answer; and will it be said that the individual acting under the order or sanction of the chief magistrate of the country, who might have had authority to give that sanction, shall be answerable criminally for what he has done pursuant to that order? Must he inquire whether the chief magistrate was or was not authorized to give the order, and must the defendant be punished if it turns out that the president has acted illegally? No; it would be an oppressive and tyrannical doctrine to say the defendant may be charged with a crime under such circumstances. The defendant had only to inquire whether the president gave him an order which might be within the scope and limits of his constitutional functions, and if it was so, the defendant cannot be punished for his obedience. I will not take up the time of the court longer on this part of the subject, or detain it with any argument to show that when we have proved that the defendant acted with the knowledge, consent, and approbation of the president of the United States, it must be equivalent to proving that he acted under an express order.

But let us suppose that the testimony we offer would not make out a justification according to the strict legal acceptation of that term; still we say it would form such an excuse for the defendant as would entitle him to a verdict of acquittal. If the defendant can satisfy the jury by the testimony of the witnesses whom he now calls, that he had no intention to disobey the laws, but on the contrary that he thought, and had reason to think, that his conduct was sanctioned by

their authority; and that he would merit the approbation of his government, and the applause of his countrymen, he will not, he ought not, to be convicted. Where there is no intent to do wrong, there can be no crime. This is a principle not derived to us from tradition or record; it is in the heart of every man, is imbibed with our reason, and cannot be obliterated while a sense of justice, or knowledge of right and wrong is retained.

I expect to hear it said, that if this principle be applicable to all cases, then an ignorance of the law will always be an excuse for an offence. Sir, I say it will be so whenever a defendant may have it in his power clearly to demonstrate that he was ignorant. As if a law should this day be passed at Washington against the exportation of arms, and a person to-morrow, before he could possibly have knowledge of the existence of such a law, should make a shipment contrary to the prohibition. I say no jury on earth would convict a defendant under such circumstances. No court on earth would tell a jury, that in such a case, they ought to convict. But as it may, in many cases, be impossible to prove on a defendant a knowledge of the law, he is very wisely charged with it. In the first instance, it is always to be presumed that every citizen is acquainted with the laws of his country, and that presumption must stand against him till it is destroyed by decisive and irrefragable proofs. And so it is also with respect to the intent. If an offence is committed against the laws, it is to be presumed that there was an intent to offend until the contrary appear. But when that does appear, the presumption is destroyed, and the accused is exculpated. The testimony we would offer may then be heard if only for this purpose, if only to take away that presumption of criminal intent, which the law very wisely and necessarily raises against the defendant.

But whether this testimony may be a justification or excuse, it ought to be submitted to the jury. They are the judges of the law, and the fact. And all the facts ought to be brought before them, that they may apply the law. I do not mean by this that a party is to be at liberty to offer any sort of testimony that he may please, but he has an unquestionable right to submit to the jury every fact that has any relation to the crime with which he is charged.

There is another ground, also, on which the jury ought to be permitted to hear this testimony. It has become a practice for jurors to recommend a convict to the mercy of the court where they think he deserves it. This practice is sanctioned by so many instances, and by such a length of time, that it may now be considered as a right; and if it be so, then certainly the jury ought to have every circumstance before them, which will assist them to determine whether they will recommend or not. It may be proper, in order that the court may see the full applicability of the testimony we expect from the witnesses who have been subpœnaed, that I should mention the other testimony that we expect to offer in connection with it. We shall show from the journals of congress when their secret session began, and how long it continued. We shall prove that it was universally believed that congress had secretly passed an act for going to war with Spain. We shall read the president's message at the opening of the last congress, and a variety of documents communicated by him, on the sixth of December. And we shall then, from proving the notoriety of the preparation for General Meranda's expedition as well here as at Washington, and by a variety of other circumstantial testimony, bring home to the president the knowledge we impute to him.

Thus, may it please the court, I have endeavored to establish the power of the court to issue the process for which we ask, and to show that the gentlemen who have been subpœnaed, are not exempt from the process on account of their official dignity, or excused from obeying the subpœnas, on the ground of their being confidential executive agents. I have attempted to show that the testimony which these witnesses would afford us would be material either in mitigation or exculpation, and that in either case it must be given in evidence on the trial. I too plainly perceive how much I have left undone. But it is my province only to open this argument. I am happy that I am to be followed by counsel who will not fail to supply my omissions.

Hoffman. If I am not precluded by the intimation of the court yesterday, that it was necessary to disclose, by affidavit, the facts intended to be established by the absent witnesses, I solicit permission to submit some remarks, tending to show that the general affidavit ought to be received as sufficient for the postponement of the trial. With all possible respect, I suggest, that the defendant's counsel were not heard on this question, and I hope I may consider the intimation not as a fixed or deliberate opinion of the court.

PATERSON, Circuit Justice. You are too late, the question is already decided.

Hoffman. I proceed then to add to the opening argument, and shall limit my observations chiefly to the materiality of the testimony; for as it respects the right to an attachment, the principles on which we rely have been fully and ably stated. I, however, beg leave to read an additional authority, in support of the general scope of the argument used by my associate counsel. In 1 M'Nal. Ev. 255, it is decided, "that the claim of exemption from giving evidence, is scrutinized with a jealous eye, and the person relying on it, must establish his right by showing a positive law, or express authority." The master of the rolls, Sir Michael Smith adds: "It was the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call

upon a fellow subject to testify what he may know of the matters in issue." And every man is bound to make the discovery, unless specially exempted and protected by law. The general proposition, which I shall endeavor to maintain, is, that the testimony of Mr. Madison and the other witnesses named in the affidavit, is material to Col. Smith in his defence of the present prosecution. It is material, as matter of excuse or justification; but if not strictly as matter of justification, then as evidence to inform the judgment of the court, in the exercise of its discretion, in inflicting the punishment. Before I enlarge on these points, I remark, that it is sufficient for our purpose, to suppose a state of things between this country and Spain, where the assent and approbation of the executive of the United States, would justify the expedition charged in the indictment; for if there can be such a case, the advice of the counsel, as stated in the affidavit, must be presumed to apply thereto; unless, therefore, it shall appear negatively to the court, that the prosecution or defence can assume no shape, where the testimony required will be important, they will not refuse to postpone the trial. It certainly is not necessary for the defendant to disclose by affidavit, the precise use intended to be made of the evidence. We are not bound to unfold our entire defence to the public prosecutor; we are only bound to lay enough before the court, from which the importance of the testimony may be inferred.

The offence charged in the indictment, is for beginning and setting on foot, preparing and providing the means for a military expedition against a nation with whom the United States are at peace. And it may be asked, can the United States be in a state of war with a foreign nation, until congress shall have formally declared war? Congress have alone the constitutional right to elect to go to war; but in case of an actual war declared or waged by a foreign power, there is no option, war does already exist; a defensive war, without the agency of congress; a war de facto, and which would take the case out of the statute. Put the case of actual war commenced by Spain, against the United States, when war has not been declared by congress, would it not be permitted to the president, to call out the military forces of the Union, to repel the aggression? Certainly it would. An attack may be made here at the city of New York; may not the president commence and execute offensive operations, to draw off the enemy from this port, and put them on their defence in Florida, or any other part of the Spanish dominions? Offensive war once begun, the nation attacked succeeds to all the rights of legitimate warfare. It may merely resist its enemy, or it may repel its aggressions by a stroke at the head, the heart, or the extremities. All are equally justifiable. Suppose, in the progress of this cause, we should be able to verify the language of the president in his message on the subject of a war with Spain, when he speaks of force being to be met by force; and that we should show the conflict had already commenced, in which we were trying "who could do the other most harm"; would not this be actual war?

I ask, whether a war has not existed between this country and other nations, without a declaration of war by congress? Whether it did not exist against Tripoli and other African states, without such a declaration? Do I mistake the fact when I say, that an expedition was fitted out against Tripoli? And will it be denied, that we were then in a state of actual war? Yet congress had declared no war. Was the president of the United States justifiable for this act of hostility, commenced without the authority of congress? Certainly he was. It can never be denied to the executive to resist an attack. He is constitutionally bound to defend the United States against all foreign attacks, as well as domestic insurrections, and in the way best calculated in his judgment to insure success. A law was afterwards passed by congress [2 Stat. 129], providing the ways and means of carrying on the war, then existing, and so existing; and let it be remarked, continuing to exist, without any positive or formal declaration by congress. If war then can exist between the United States and a foreign nation without a declaration of war by congress, it belongs to the executive of the Union to ascertain the fact, and to declare the condition of the nation,—to say if actual war exists or not. The constitution delegates to the executive the power to protect and preserve the peace of the United States,—to communicate with foreign nations; and he is the constitutional organ through which the people derive their knowledge of our political relations with foreign powers.

Mr. Hoffman then urged, that the assent and approbation of the president of the United States to the expedition charged in the indictment was strong evidence that Spain was not at peace with the United States; as it was not to be presumed, that the president would have violated his trust by authorizing the expedition. At any rate, that he was in the execution of a right constitutionally vested in him,—that he alone was responsible; and the individual who acted in conformity to his permission, had committed no offence.

(These topics were again argued by Mr. H. in his address to the jury; the reporter, therefore, omits to insert them in this part of the trial.)

Mr. Hoffman then proceeded to the second branch of his argument.

Waiving all farther discussion on the first point, I shall endeavor to fortify the argument, that the defendant is entitled to have the witnesses examined, and to submit his whole case to the court and jury, for the pur-

pose of mitigating the punishment. The constitution of the United States secures to the accused the right to have compulsory process for his witnesses. This privilege is hardly worth the enjoyment, if it is to be confined to the case of a complete acquittal of the charges in an indictment. Col. Smith may be technically guilty, and yet his offence of so small a grade, as hardly to merit more than a nominal punishment. It is conceded, that after the trial, this court has no power to enforce the attendance of the witnesses, and the constitution does not extend its benevolent provisions to my client, unless he is permitted on the trial to prove the extent and nature of his offence. The correct principle is laid down in McNally's Evidence, already cited, "that wherever the punishment is discretionary, the testimony is to be received, although it only applies for the purposes of mitigation." I think I may, without fear of contradiction, assert that there is no authority to the contrary; and I speak with confidence that such has been the practice in the courts of this state. While I had the honor of holding the office of attorney-general, the objection was never made; and I understand, that the practice of my predecessors always corresponded with my own.

Let us examine the question upon the strength of authority. Besides the case already mentioned from McNally, there has been read to the court the Case of the Earl of Anglesea; to which, I presume, will be opposed the Case of the Chevalier D'Eon, in 3 Burrows, 1513. The case is shortly thus: An information was filed against the Chevalier D'Eon for a libel on the Count De Geurchy. M. D'Eon moved to postpone the trial on account of the absence of material witnesses. It appeared that the witnesses resided in France, and were there at the time of printing and publishing the libel, and that they were in the service of the crown of France; and that there was no probability of their being sent over, or even permitted to come over, to give evidence on behalf of D'Eon. It is to be observed, that their attendance could be never be enforced, nor could they be compelled to give evidence in any stage of the prosecution. Their attendance and their evidence would be altogether voluntary, and no possible injustice could be done to the defendant by refusing to postpone the trial; for it would be useless to delay it in expectation of obtaining the testimony. Lord Mansfield proceeds to say: "If their knowledge relates to any circumstance that may serve to mitigate the punishment, in case the defendant should be convicted, that sort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavits." Lord Mansfield by no means decides, that the evidence could not be received on the trial. He only says, it will not come too late after conviction. The Chevalier D'Eon was not deprived of any benefit by the course adopted by the court on that occasion, for as they could not aid him by any process that could be awarded, they leave him in the same situation as if the trial was not postponed,—to his ability to obtain voluntary affidavits. Not so here; this court can enforce the attendance of the witnesses at the trial, and at no other time. If the testimony is not then received, the defendant must forego it; for after trial no compulsory process can issue; and strange as it may seem, the defendant has a right secured to him by the constitution, which he cannot enjoy, if the court refuses to interpose its authority, and compel the attendance of the witnesses at the trial. The Case of D'Eon, therefore, fairly considered, is in principle with us.

The question appears to be reduced to the single point: The testimony we seek is material to the defendant in this cause. The court can now give him the benefit of it; if they do not, he may be presented for punishment as an offender whose guilt is of the deepest dye. And is it not material to the cause of the defendant, that the extent of his offence should be known? Is it not material to his personal liberty, to his interest and his character, that the punishment should bear a just proportion to the offence? The discretion granted to the court by the statute is useless, if the defendant is deprived of the means of showing circumstances evincive of his innocent intentions, and justly demanding the utmost lenity of the court. This subject is before the court in a way extremely inauspicious to the honor of the government of the United States; the president of the United States approving the act which he now seeks to punish. His approbation no doubt proceeded from honorable motives,—from enlarged views of the true policy and dignity of our country. It deserves praise. But if he did order this prosecution, it is not for me to justify or excuse the perfidy. Let it, too, be remembered, that in the Case of D'Eon, Lord Mansfield says: "If the witnesses had been sent away by the person on whose account the prosecution is carried on, that indeed would have been a sufficient ground for putting off the trial until they could be had. But here," says his lordship, "is no pretence for such an insinuation." Are we not expressly within this principle? The president of the United States ordering the prosecution, and the president of the United States restraining the witnesses from attending.

To conclude: The justice of our present application must be evident, and unless there exists some stubborn and unbending rule of law to the contrary, I indulge a strong hope, that the court will postpone the trial, compel obedience to its process, and thereby become possessed of the whole truth. If so, my client has no dread of punishment: It may be nominal; it cannot be severe.

PATERSON, Circuit Justice, expressed some regret that it was not in the power of the parties to carry the present motion up to the supreme court for its opinion, which could only be done in consequence of a difference in opinion between the two judges sitting in the circuit court as expressly declared by the law.

Mr. Sanford read an affidavit, as follows: "District of New York, to wit: Nathan Sanford, being duly sworn, deposes and says, that the offences laid in the indictments in these causes, took place in the city of New York between the twenty-fifth day of December last, and the first day of February last; that the facts which will be given in evidence on the part of the prosecution, upon the trial of the said indictments, took place in the state of New York, and principally in the city of New York, during that period; that during the whole of that period, James Madison, Robert Smith, Jacob Wagner, and William Thornton, were, as this deponent has been informed and really believes, at the city of Washington, and not in the state of New York; and that, as this deponent has been informed and really believes, the said James Madison, Robert Smith, Jacob Wagner, and William Thornton have not, nor has either of them, any personal knowledge of the offences charged in the said indictments, or of the facts which will be given in evidence upon the trial of the same on the part of the United States; and farther this deponent says not. Nathan Sanford." Mr. Sanford proceeded to say that the facts stated in this affidavit were not at variance with those stated in the affidavit offered by the defendant.

Sanford. If I understand the questions now before the court, they are these: First, whether the trial shall be postponed until the defendant's witnesses, who are now absent, shall come in; and second, whether attachments shall issue against the four witnesses who have not attended upon the subpœnas. It was decided by the court yesterday, that it was incumbent upon the defendant, in order to entitle himself to a postponement of the trial on account of the absence of these witnesses, to show in what respect they are material for his defence. It was the opinion of the court that the general affidavit in common form would not be sufficient for this purpose; but that the particular facts expected from the witnesses must be disclosed, in order that the court might, upon those facts, judge of the propriety of granting the postponement. In compliance with this decision the defendant has now made an affidavit, in which he has stated the particular facts which he expects to establish by those witnesses. The matters stated in this affidavit must at present be taken to be true, and for the purposes of this motion, it must be supposed that the witnesses are really able to prove the facts stated. The point of inquiry, therefore, is whether the matters stated in the affidavit of the defendant are material in point of law, to his defence, upon the trial of this indictment.

The principal allegation of the defendant in his affidavit is, that the military expedition against Carracas, and his agency in it, took place with the knowledge and approbation of the president and the secretary of state. It is said by his counsel, this amounts to a complete justification of the offence, or that, at least, it must operate in mitigation of punishment; and that in either view, they are entitled to the testimony. This we altogether deny It can neither operate in justification or in mitigation. The most superficial attention to our constitution and form of government will be sufficient to convince any one that this sort of defence is wholly inadmissible. It proceeds altogether upon the idea that the executive may dispense with the laws at pleasure; a supposition as false in theory as it would be dangerous and destructive to the constitution in practice. The defendant is indicted for a breach of a positive statute of the United States. Do his counsel seriously contend that the president dispensed with the law in this instance? Where will they find an authority of this nature vested in the president? For unless they show this, they gain nothing by their argument. Among the powers and duties of the president, declared by the constitution, he is expressly required "to take care that the laws be faithfully executed." They will not venture to contend that this clause gives the president the right of dispensing with the laws. Does the president derive such a power from his legislative character? Certainly not? He has a qualified veto, before the law passes. If he approves a bill, he shall sign it; but if not, he shall return it, with his objections, and the bill may be passed into a law, without his consent. When it has become a law, according to the forms of the constitution, it is his duty to take care that it be faithfully executed. He cannot suspend its operation, dispense with its application, or prevent its effect, otherwise than by the exercise of its constitutional power of pardoning, after conviction. If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government. To repeal a law, is an exercise of the same legislative power as to make a law; and the legislative power, for whatever purpose exerted, can only be exercised by the whole legislature. The president has no legislative power whatever, except in approving or disapproving bills, which have been adopted by a majority of both houses of congress. These principles result from the constitution, or rather, they are found in the constitution itself. The constitution of the United States is a delegation of limited powers. The powers delegated are not only defined

with accuracy, but are with equal caution allotted to different branches of the government. We observe throughout the separation of the legislative, executive, and judicial powers, a feature which renders it justly dear to the people. Hence it has become our boast that ours is a government of laws, and not of men. The judiciary surely will never give its sanction to so gross a violation of these principles, as would take place if the defence which is now attempted to be made were allowed to prevail. If, then, the president has no power to dispense with the law, it follows undeniably, that his knowledge and approbation of the offence, cannot be a justification to the offender. If the president has acted improperly, or failed in the execution of his duty, his conduct may be the subject of inquiry before another tribunal. If he has been guilty of crimes or misdemeanors, he is answerable upon an impeachment. The defendant is answerable for his conduct before this court, and a jury of his country.

It is said, however, by the adverse counsel, that if the defendant be not fully justified by the assent of the executive to his offence, yet that circumstance must operate materially to mitigate his punishment. If this idea be analyzed, it will appear to rest upon the fallacy, which, I trust, I have already sufficiently exposed. If the president has no power to dispense with the law, it must follow that an attempt to dispense with it would be altogether a void act, and could not afford any pretence of palliation or mitigation to the offender. But the counsel say that the defendant was, or might have been, ignorant of this, and might have supposed that the assent of the executive would shield him from the penalties of the law. This would be to allege ignorance of the law as a defence; and they might as well have urged that the defendant was ignorant of the statute prohibiting military expeditions, upon which he is indicted. Some of the counsel have indeed had the hardihood to assert in terms that ignorance of the law is an excuse. The maxim of law on this subject, undoubtedly is, that "ignorantia juris quod quisque tenetur scire neminem excusat." This rule must be as much applicable to matters which are urged for the purpose of palliation or extenuation as to those which are presented by way of justification or complete defence. Were it otherwise, the veriest villain in society might escape from justice, under the pretense that he was ignorant of the law, or that he thought the law was dispensed with in his favor, to enable him to perpetrate offences prohibited to every other person. Our law does not recognize such an absurdity. Every man is bound to know the public law of the land; and if he violates them, he does it at his peril. Upon these principles, how does the purposed vindication of the defendant appear? The counsel say that he had the countenance or the connivance of the executive in the unlawful expedition. What then? I answer he was bound to know, not only the public statute of the United States, but also that the president has no power to dispense with its provisions. The countenance, or connivance, or consent of the president, can, therefore, neither justify his conduct nor mitigate his punishment. An idea was thrown out by the last counsel, that we were in a state of war with Spain at the time the expedition was prepared, and that therefore the case does not come within the statute, which relates only to military expeditions set on foot against foreign states, with whom the United States are at peace. It would be a sufficient answer to this idea, at present, to say that this is not now a question before the court. The inquiry at present is simply whether the matters stated by Colonel Smith in his affidavit, as the testimony which the absent witnesses can give are material to his defence? It is upon this affidavit alone that the postponement is now asked for. Colonel Smith does not state that he expects to prove anything respecting the state of peace or war by the absent witnesses. On the contrary, he states that their testimony, will relate entirely to other objects. The affidavit states that the expedition was set on foot with the knowledge and approbation of the president; but contains not a word of a war with Spain. But this is not the only answer which may be given to this idea of war with Spain. It must appear affirmatively on our part at the trial, that the United States and Spain were at peace. How is this to appear? The constitution vests the power of declaring war in the legislature. It is a power given up by the states to the general government as an attribute of the national and supreme authority. It must, therefore, appear from the acts of the legislature, that the country is at war. But, the counsel say that an actual state of war may exist without the declaration of congress, and have attempted to cite instances of such wars. There is no instance in which the president has undertaken to make war, but in pursuance of the provisions of the constitution and laws passed under it. He certainly has power to repel invasions, and suppress insurrections; but even this is a power not vested in him by the constitution, but is expressly delegated to him by a statute. Act Feb. 28, 1795 [1 Stat. 424]. The counsel also speak of the late war with Tripoli. That war was also authorized by an act of the legislature.

PATERSON, Circuit Justice, desired Mr. Sanford to lay that law before the court; accordingly the law in volume 6, p. 8, was handed up.

Sanford. But the question of peace or war is to be determined by the court upon the laws themselves. The acts of the legislature when they make war, or cause it to be made

by others, are like all their other acts; public statutes or general laws which the courts must recognize. So treaties of peace made by the president, with the consent of two-thirds of the senate, are the supreme laws of the land. The judges are bound to know judicially, and to conform to these as to all other laws. It follows then, that the question of peace or war, is a question of law, to be determined by the statute book, and not a question of fact, to be determined by the testimony of any man. The treaty between Spain and the United States, made in 1795, is still in force, and must remain so until it be abrogated by an act of the legislature; and as such is the law of the land while it remains in force, there is no power in this country that can authorize an individual to set on foot a military expedition against Spain, or any of her territories.

In the year 1798, when congress thought proper to enter into a partial war with France, they began by rescinding the treaties and conventions which then existed between France and the United States. The court will not listen to what has been said respecting the president's message to congress at their last session, and the measures which may have been projected or proposed in that body, without having been finally adopted. It is absurd to contend that an individual may infringe the laws at pleasure, because the legislature in their secret deliberations, may have repealed the law or may have declared war. I do not mean to occupy the attention of the court in combatting arguments or assertions like these. I have attempted to show that the testimony of the absent witnesses is not material either for the purpose of justification or mitigation. The Case of D'Eon has been cited on the other side. If that case be examined, it will be seen to be a strong authority in our favor. In that case, the court held that they ought to be satisfied that the witnesses were material; that there had been no neglect in the party applying for delay, in endeavoring to procure their attendance; and that there was a reasonable expectation of his being able to procure their attendance at some future time. In that case, as in this, it appeared negatively that the witnesses were not material; for they were not present when the criminal transaction was charged to have taken place. It is added, if their knowledge relates to any circumstances that may serve to mitigate the punishment, in case he should be convicted, that sort of evidence will not come too late after the conviction of the offence, and may be laid before the court by affidavit. Upon the whole, they were clearly of opinion that the putting off the trial could not tend to advance justice, but, on the contrary, would delay it. This case then is a decisive authority to show that a trial is not to be postponed on account of the absence of witnesses, who, if present, could only give evidence in mitigation of the punishment; such evidence would not be proper on the trial of the issue, and could only be received by the court in its discretion after conviction. The counsel who opened this argument threw out an idea that because the jury were judges of the law as well as of the fact, they were therefore entitled to hear all the testimony which the party might offer. He attempted indeed to modify his position, but did not divest it of its absurdity. The court are judges of what is proper evidence to go to a jury; and unless the counsel intend to deny this, and insist that the jury are judges of the testimony which it is proper for them to receive,—a position which would be equally contrary to the law and practice,—I do not perceive the point of this argument. The court, in the first place, judge of the testimony which is to go to the jury, and the jury then judge of the fact and the law upon that testimony, which the court suffer them to receive.

Having thus reviewed the ideas of others, and stated my own upon the question for a postponement, I now pass on to consider the motion for attachment. The adverse counsel suppose they are entitled to the attachment, as of course, and have cited some authorities to prove this point. This we deny. The proceeding by attachment against absent witnesses is undoubtedly known to the law; but such an attachment never issues of course. It is a summary and extraordinary proceeding, which is used by the court in its discretion, to vindicate its justice and punish contempts against its authority. The only rule which can be laid down on the subject, therefore, is that the court may or may not issue the attachment in its discretion, according to all the circumstances of the case. The party injured by the absence of the witness has his remedy against him by action, without this extraordinary process of the court. When the attachment is issued, it is issued not for the purpose of bringing in the witness to testify, but in order to punish him for contempt.

The counsel opposed to us have argued as if we meant to insist that the absent witnesses are entitled to some peculiar privilege or special exemption from giving testimony. We do not contend for any such exemption; we oppose the application for attachments on other grounds.

If I have succeeded, in any degree, in the preceding part of my argument, I have shown that the testimony of the absent witnesses is altogether immaterial, and could not be received if they were now present. If this be so, it would seem to be a strange absurdity, that the court should be bound of course to issue attachments against persons who are absent, who could not testify if they were present. And unless I deceive myself, it is now presented to the court as a naked question, whether the court shall issue the attachments of course against absent witnesses who have been summoned, merely because they have been summoned, when it appears to the court, from the statement of the party who

calls for them, that they could not have testified in the cause if they had attended. If it be discretionary in the court, to grant or refuse the attachments, as we contend it is, this is surely a case in which they ought to be refused. It was an abuse of the process of the court, to summon persons who could not be witnesses. It would be intolerable to subject those persons to imprisonment, not for any purpose of justice, but merely because they were summoned by a process which issues of course at the pleasure of every party. I admit that the court have power to issue attachments, but they will undoubtedly exercise it in sound discretion, for fair purposes, and to promote justice. They will take care, on the other hand, to enforce obedience to their process, in all cases where the purposes of justice require it, and on the other, they will take equal care that this process shall never be turned to improper purposes, or employed to harass men who know nothing of the transaction about which they are summoned to testify. In addition to this, it appears that the absent witnesses have not failed to attend, from any contumacy or contemptuous disregard of the authority of the court. There are documents before the court, which exhibit the reasons of their absence, and show that they intended no contempt of the court, even if their testimony had been material.

Colden. If the letters in the possession of the court which have not been read are alluded to, and are to be made any use of in this argument, I shall pray that they may be read. There are some parts of them which we think material for us, particularly when one of the gentlemen who wrote these letters says he was present when the president of the United States ordered these prosecutions.

Sanford. I will read them.

PATERSON, Circuit Justice. It is unnecessary. We have the papers before us.

Sanford. If the court then are satisfied that no contempt was intended; and that the testimony they could give, were they here, would be immaterial and inadmissible, this surely is not a fit case for attachments. Another objection to the application for attachment arises from the affidavit of the service of the subpœnas. It is stated that the deponent tendered the sum of twenty dollars to each of the witnesses for his expenses. This sum is insufficient, and the service of the subpœnas being therefore defective, that circumstance alone would exempt the witnesses from being liable to attachment. A witness is not bound to attend, unless the full amount of his expenses is tendered to him at the time of serving the subpœna.

PATERSON, Circuit Justice. Is there any law of congress on that point?

Sanford. Yes, there is a law defining the amount of the witnesses' fees.

Colden. This does not apply to criminal prosecutions. We contend that it is not necessary to tender any thing to a witness in a criminal case.

PATERSON, Circuit Justice. What! by the common law?

Emmet. Neither by common law nor by statute. The statute of Elizabeth was the first law that gave a witness a right to demand his expenses.

Sanford. The whole doctrine is laid down at length in Sell. Prac. p. 454.

PATERSON, Circuit Justice. Is there any statute on this subject by the United States?

Sanford. The compensation allowed to witnesses by the law of the United States is ten cents per mile for going and returning. This, without any allowance for attendance, would amount to more than twenty dollars, in the case of the witnesses from Washington. In respect to the necessity of tendering the expenses at the time of serving the subpœnas, I conceive the law and practice of this state must govern. This must be a case in which the laws of the United States recognize the law of the state as a rule of decision. By the law and practice of this state it is unquestionably necessary to tender the expenses. Here I rest the argument in the hands of the able counsel who will succeed me.

Colden. The affidavit states more than the district attorney has attended to. The affidavit is that Mr. Madison found fault neither with the quantity nor quality of the money, adding it was unnecessary to say any thing more on the subject.

Edwards. The vast concourse of people who have constantly attended these trials in every stage of their progress must convince every intelligent observer that some motive other than their importance must have produced this effect. From the solicitude discoverable in their countenances, it is evident an importance has been attached to them which their intrinsic merits do not justify. But it is improper for me to be more explicit on this delicate point. The learned and independent court before whom I appear will not participate in that glowing sensibility which evidently warms this assembly; they are above the reach of party views, and will decide with wisdom and the purest integrity. On my part, it would be highly indecorous, as well as weak in the extreme, to attempt to influence its decisions on the points submitted, by calling to my aid any consideration which is not intimately connected with such a view of the subject, as must naturally lead to a result demanded by the strict principles of the laws of our country.

Had the present application been made simply for attachments against the non-attending witnesses, and exclusively for the purpose of punishing them for a contempt of the process of the court, the counsel for the United States would not, on this occasion, have troubled the court with any observation. In that case it would have been a matter between the United States and the witnesses. But the motion before the court has a double aspect: 1st. It is a motion for attachments, to the end, that the witnesses named may be brought into

court and punished for contempt. 2nd. To bring them into court to testify in these causes. And if the motion can be sustained for these two purposes, the effect will necessarily be, that the trials must be postponed. It will be recollected by the court, that I yesterday stated, that an attachment against a witness for non-attendance, after having been duly served, with a subpœna, is never granted for the purpose of bringing in a witness ad testificandum, but exclusively for the purpose of punishing him for a contempt. At that time some of the learned counsel for the defendant treated this proposition as one wholly untenable. This circumstance led me to hope, that I should, on a discussion of the question now before the court, have heard from them some remarks intended to render my position questionable. But no observations of the kind which I had anticipated, have been made. I shall, however, not dismiss that point, until I shall have again stated, and attempted to support by authorities, the position which I then with confidence submitted to the court. I repeat then, that in no case do the courts of common law grant an attachment against a non-attending witness, who has been regularly subpœnaed, for the purpose of bringing such witnesses into court ad testificandum; but in such case the attachment is issued exclusively for the purpose of bringing him into court to answer for the contempt offered to the court, by disobeying its process. In criminal causes, I readily admit, that the practice of granting an attachment against a non-attending witness, subpœnaed on the part of the crown, is very ancient; but my researches have not yet brought to my view a single case, in which an attachment has been granted against a witness, subpœnaed by the defendant in a criminal prosecution. In point of principle, however, I do not hesitate to say, that it is as competent for the court to grant an attachment in the latter as in the former case.

But the question still recurs, is an attachment, in either civil or criminal causes, ever granted for the purpose of bringing in a witness ad testificandum? In the case of Bowles v. Johnson, 1 W. Bl. 36, on motion for attachment against one Yerbury for not giving evidence at the assizes, Lee, C. J., says: "This is a new case. Attachments are a new practice. I remember the first motion for them." This was in Michaelmas term, 22 Geo. II. 1748. A recurrence to the English reporters will enable us not only to date the birth of this practice, but to fix upon the very time when the first travail throes took place that eventually brought it into existence. In the case of Hammond v. Stewart, 1 Strange, 510, determined Hil. term, 8 Geo. I., cited also in Wyat v. Wingford, 2 Ld. Raym. 1528; and in the case of Daleson v. Aland, determined in the exchequer, Mich., 10 Geo. I., a rule to show cause had been granted; but in each of those cases, the rule was discharged by the court. In Wakefield's Case, Cas. t. Hardw. 313, determined Trin., 10 Geo. II., in B. R., Lord Hardwicke says: "The way of proceeding by attachment is a new method." In the common pleas, Trin., 13 Geo. II., in the case of Huffe v. Fowke, and in the case of Stephenson v. Brookes, reported in Barnes, Notes Cas. 33, the court, in the first case, refused to grant a rule to show cause; and in the second, after having granted a rule to discharged the rule, refused to grant an attachment, saying that "the party may have his action upon the statute of 5 Eliz. c. 9." In the case of Chapman v. Pointon, Easter term, 14 Geo. II., in B. R., the court say, "that this way of punishing as for a contempt, was new and practiced only in the court; the common pleas not doing it to this day, but leaving the party to his remedy on 5 Eliz. c. 9." 2 Strange, 1150. From what is said in the case of Stretch v. Wheeler (Easter term, 27 Geo. II.) Barnes, Notes Cas. 497, it may fairly be inferred, that at that time the common pleas had not gone into the practice adopted in the king's bench, long before, of granting attachments for a contempt against non-attending witnesses, who had been regularly subpœnaed. In the case of Wyat v. Wingford, the court made the rule absolute for granting an attachment. This happened July 2, 1728.

The origin of the practice of granting attachments against witnesses in civil causes having been thus clearly exhibited, I proceed to establish the proposition, that attachments are never granted for any other purpose than that of punishing the witness for a contempt. Lord Raymond, in giving the opinion of the court in the case of Wyat v. Wingford, says: "But the court in this case thought it was a good foundation for an attachment; the disobedience to the subpœna being a contempt to the court." Not a word is said in this case by the court, or the counsel, that intimates an idea that the attachment was moved for in order to bring the witnesses into court to testify. But there is a circumstance in this case which puts it beyond a doubt, that that could not have been the purpose for which the motion for an attachment was made. One Rolf Baily had been subpœnaed to attend the assizes in a cause in which Wyatt was plaintiff, and Wingford defendant; and there had been a tender to Baily of his charges; Baily did not attend, whereby the plaintiff was nonsuited. This is the state of the case as reported in 2 Strange, 810, by the name of Wyatt v. Winkworth, but confessedly the same case as that reported in Lord Raymond, by the name of Wyat v. Wingford. Surely after the cause was out of court, the plaintiff having been nonsuited, it must have been idle indeed to have moved for an attachment, if the object aimed at had been to bring in Baily ad testificandum. In the cases in Stephenson v. Brookes, before cited, and the case of Brodie v. Tickell, Barnes, Notes Cas.

35, which latter case was in the common pleas, Hil., 24 Geo. II., were also cases in which a motion for an attachment was made after nonsuit. To the same purpose is the case of Rex v. Ring, 8 Term R. 585. In this case an attachment was moved for, and granted against Ring for not appearing at the assizes to testify before the grand jury against Everland and Davis, committed to Salisbury jail on a charge of felony. Ring not appearing, the grand jury threw out the bill. Jekyll, on the part of the prosecution, moved for an attachment, and it was granted. The courts of Westminster always consider the proceeding by way of attachment as for a contempt, as a criminal proceeding. In the case of Smalt v. Whitmill, 2 Strange, 1050, the reporter says: "But it appearing not to be a personal service (that is, of the subpœna), the court held it not sufficient to warrant a proceeding criminally against him (that is, the witness)." In this case an attachment was moved for against a witness for not attending, being subpœnaed and having a shilling left. In the case of Chapman v. Pointon, already cited for another purpose, the court say "that this way of punishing as for a contempt was new," &c. And so strictly is this proceeding by way of attachment against a witness as for a contempt holden to be a criminal proceeding, that the affidavits and all the other papers in the cause must be entitled, "The King v. the Persons to be Attached." To this purpose is the case of Rex v. Sheriff of Middlesex, 3 Term R. 133. It is there said: "But as the affidavits on both sides were entitled Robins v. Hall, and as the rule was drawn up on the civil side of the court, a doubt arose whether the proceedings were properly entitled, and the court held them to be irregular, and that a motion for an attachment in the course of a civil suit ought to go on the crown side of the court, and the affidavits entitled 'The King against the Person to be Attached,' because it was not a motion in the cause, but arising out of it." Farther. it is laid down in all our law books which speak on this subject, the granting an attachment is in the discretion of the court; but if granting an attachment for the non-attendance of a witness be ex debito justitiæ, the court can exercise no discretion; they have in that case only the power to inquire whether the witness had been duly subpœnaed, and whether the non-attendance was through obstinacy or not? Chapman v. Pointon, 2 Strange, 1150.

From this review of the history of attachments, as relative to witnesses, we are authorized to say: 1st. That it never was considered, in the origin or progress of this practice, either by counsel or by the court, that an attachment was granted for the purpose of bringing in the witness ad testificandum. 2d. But that an attachment, if granted, was always granted exclusively for the purpose of punishing the witness for a contempt.

But there is another ground on which this motion for attachments may be successfully resisted. The court will never grant an attachment in the first instance. The first motion must be for a rule to show cause. This was the course pursued in the cases of Hammond v. Stewart (8 Geo. I., B. R.) 1 Strange, 510; Daleson v. Aland (10 Geo. I., in the exchequer); Stephenson v. Brookes, 13 & 14 Geo. II.; Chapman v. Pointon; Wyat v. Wingford (2 Geo. II., B. R.); Stretch v. Wheeler, Barnes, Notes Cas. 497; 27 Geo. II. I mention only the earliest cases. The case of Chaunt v. Smart, 1 Bos. & P. 477, in the common pleas, sets this point at rest. Here the court say, "that in future the practice of this court should be conformable to that of the king's bench, and the rule should be to show cause why the attachment should not issue in all cases, except of non-payment of costs on the prothonotary's allocatur."

The motion for an attachment in the first instance, is certainly irregular, and therefore the defendant can take nothing by his present motion. But it has been contended by the counsel for the defendant, that this question, viz. "Shall an attachment be granted to bring in a witness ad testificandum?" rests in the courts of the United States on the basis of the constitution. For by the 6th article of the amendments of the constitution, it is among other things provided, "That in all criminal prosecutions the accused shall enjoy the right, &c., to have compulsory process for obtaining witnesses in his favor." That, therefore, it is the constitutional right of the defendant to have an attachment to bring in his witnesses, and that nothing short of an attachment will be compulsory process according to the true spirit and meaning of this constitutional provision. The words relied on by the counsel for the defendant are, "to have compulsory process for obtaining witnesses in his favor." If the meaning of the word "compulsory," here used, can be determined, we shall find no difficulty in ascertaining, with perfect precision, the degree of weight which ought to be attached to the argument urged by the defendant's counsel. Process to compel the attendance of witnesses in criminal and civil causes was a kind of process well known to the people of the United States, long before and at the time the articles of amendment to the constitution were adopted. They borrow their language, their laws, and of course their technical terms of them, from England.

The only process to compel (in the first instance) the attendance of witneses in criminal or civil causes known to the courts of common law in that country, and in this, is a subpœna. No other process is ever issued in England but a subpœna, even in criminal causes. When the parliament en-

acted the statute of 7 Wm. III. c. 3, pt. 7, the crown possessed no right to use any other process than a subpœna to compel the attendance of its witnesses. Until the making of that statute, the prisoner could by no process compel the attendance of his witnesses. By that statute it is enacted, "that every person who shall be indicted for high treason, whereby any corruption of blood may be made, shall have the like process of the court where he shall be tried to compel his witnesses to appear for him at such trial, as is usually granted to compel witnesses to appear against him." In England, then, a subpœna is compulsory process; it is the only compulsory process (unless entering into a recognizance to appear at the trial be called process) provided for the crown, or the prisoner, by the laws of that country. The article in the constitution of the United States, relied upon by the defendant's counsel, it is true, has no relative clause in it, as the statute of 7 Wm. III. has; for that says: "He shall have the like process of the court where he shall be tried to compel his witnesses to appear for him at such trial, as is usually granted to compel witnesses to attend against him." This, however, cannot help the argument of the defendant's counsel. The constitution has not told us what that process shall be, but has used the word "process" in reference to obtaining witnesses. The words "compulsory process" are used as being terms, the meaning of which was then well understood. It was to be process which would, according to the legal notions existing in the minds of the framers of the constitution, be adequate to compel the attendance of the witnesses of the accused. To the present moment the United States cannot use any other process to compel the attendance of witnesses on their behalf in criminal causes, than a subpœna; and no one has ever entertained an idea, but that a subpœna, when used in such cases, is compulsory process, or in other words, a process to compel the attendance of witnesses.

One of two things must have been in the intentions of the people of the United States when they adopted this amendment: First, that in all criminal prosecutions, the accused should have such compulsory process for obtaining witnesses in his favor as was then known to our laws, and used for such a purpose; or, secondly, that a new kind of compulsory process, not hitherto in use in our courts, or known to our laws, for the purpose of compelling the attendance of witnesses in behalf of the accused, should be provided. If the former was the intention, then clearly the motion for attachment must be denied, or an attachment in our laws is not known as compulsory process for obtaining witnesses, but the process of subpœna is the only process recognized by our law for obtaining witnesses. If the latter was the intention of the people of the United States, the amendment relied upon has only provided that the accused shall have a right to compulsory process, for obtaining witnesses in his favor of a new kind not hitherto known to our laws. The amendment not having prescribed what that process shall be; not having said that it shall be an attachment, a warrant, a capias, or pointed out any of its attributes other than that it is to be "compulsory," they have, therefore, left the kind of process to be designated and prescribed by a law of congress; for courts of law cannot make a new process wholly unknown to the common law, and unauthorized by act of congress, and not prescribed by the constitution. So in article 3, § 1, of the constitution of the United States, it is declared, that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may from time to time ordain or establish." But those courts must be created by act of congress before they can exercise any of the powers conferred on them by that article of the constitution. So in this case, if a process, not known to the existing laws, be directed in order to compel the attendance of the witnesses of the accused, that process must be provided and established by an act of congress. But the framers of the constitution never contemplated any other compulsory process than that already known to our laws, and constantly used, viz. a subpœna.

If by the expression in the amendment relied upon, "shall have a right to compulsory process for obtaining witnesses in his favor," the defendant has a right to an attachment, why was it not used in the first instance? Why was a subpœna the first process that he thought proper to use? There was no intimation in the article relied on, that the accused is first to use some other process than an attachment, but it is absolute, "a right to have compulsory process," and if it be the right of the accused to have any attachment at all for obtaining his witnesses, he has a right to have it in the onset. But if he had a right to have an attachment in the first instance, ex debito justitiæ, why did he not use it? He has been guilty of laches in not taking out an attachment instead of a subpœna. Had he taken his compulsory process in the first instance, he would on this day have had his witnesses in court. But he neglected to do this, and therefore he cannot now have the trial postponed for the purpose of taking out his attachment, that is, "compulsory process for obtaining witnesses in his favor;" which process, according to the construction of the constitution contended for by his counsel, he had an undoubted right to have taken out in the first instance.

But we resist this motion on another ground. The motion is in effect, to postpone the trial of the cause for the reason stated in the affidavit. Before it will be granted, the

defendant must satisfy the court that the gentlemen named in it are material witnesses; and that he has been guilty of no laches or neglect, in omitting to do all that he might have done to procure their attendance. These are principles laid down by the court in the case of Rex v. Le Chevalier D'Eon, 3 Burrows, 1513, and are founded in good sense.

The affidavit upon which the present motion is found appears to have been shaped with a view to these principles, for it states "that the defendant expects to be able to prove by Mr. Madison" and others "that the expedition and enterprise to which the said indictment relates was begun, prepared, and set on foot with the knowledge and approbation of the president of the United States;" and "that if he had any concern in the said expedition and enterprise, it was with the approbation of the president of the United States and the said James Madison;" and "that he expects to be able to prove by the said witnesses, that the prosecution against him for the said offence, charged in the said indictment, was so commenced and prosecuted by order of the president of the United States;" and "that he has been informed, and doth verily believe, that James Madison and Robert Smith are prevented from attending by the order or interposition of the president of the United States." Their testimony, it is urged, is material in two points of view: 1st. It will show that the United States were not, at the time when the enterprise is alleged to have been set on foot, "at peace with Spain." 2d. Should the court be of opinion that it is not material in that respect, it is material for the purpose of showing to the court the degree of criminality attached to the defendant by any agency which he may have had in beginning or "setting on foot the expedition" alleged, and thereby enabling the court to proportion the punishment of the defendant according to the degree of his guilt. That to enable the defendant to obtain the testimony of these witnesses for this purpose, it is necessary that he should now be furnished with compulsory process; for after a verdict of guilty, any testimony to this purpose must be laid before the court by affidavit, and the law knows of no process by which a witness can be compelled to make such an affidavit.

In support of the first proposition, it is urged, that the testimony expected from these witnesses, will establish this as a fact, and the United States were not, at the time when the alleged offence is supposed to have been committed at peace with Spain; for it will certainly evince that "the expedition and enterprise" referred to "were begun, prepared and set on foot with the knowledge and approbation of the president," and this "approbation" necessarily implies on the part of the president an acknowledgment that the United States were then at war with Spain; and, by the constitution of the United States, the president possesses the power of determining whether the United States were at war or not, in cases where any aggressions and acts of hostility have been committed by a foreign nation upon the territory, or citizens of the United States. If the constitutional principle which is assumed by the defendant's counsel cannot be maintained, the first ground, viz. the materiality of this testimony in point of justification, must be abandoned.

In support of this proposition, "that by the constitution of the United States, the president possesses the power contended for," much stress has been laid on the 3d section of the 2d article of the constitution. "He" (the president) "shall, from time to time give to the congress information of the state of the Union." These words, it has been insisted, give to the president the power of determining whether the United States are or are not in a state of war. This section, if susceptible of the construction contended for, must also, of necessity, give to the president the power of determining, after war shall have been declared by congress, that the United States are at peace; and, of course, of repealing the act of congress by which war may have been declared. The words are, "give to the congress information of the state of the Union." In the 8th section of the 1st article of the constitution, it is declared, "that the congress shall have power to declare war." Here this power is given in a most explicit manner. But, if the construction of the 3d section of the 2d article be as contended for, then the constitution, in point of effect, reads thus: "Congress shall have power to declare war, but the president shall have power to determine when the United States are at war, and when they are at peace," "notwithstanding congress shall have declared that the United States are at war." And I ask the learned counsel what will prevent the president from putting an end to a war declared by congress the very next moment after it shall have been declared by them, provided it be true that by stating to congress that the United States are not at war, he can change the state of the country from that of war to that of peace? Was it ever until the present pressing occasion imagined that by making it the duty of an agent to give information to his principal of his business, that thereby the agent was vested with the power of altering the condition of the principal?

It is undoubtedly made the duty of all the envoys of the United States in Europe, "from time to time, to give information of the state" of our affairs with the respective powers, at whose courts they represent the United States; but was it ever imagined that those envoys thereby became invested with a power to alter the state of our political relations? The president is obliged by the constitution to give to the congress

information of the state of the Union; a power to give to the congress information of the state of the Union, and a power to declare to congress, what are our political relations as to other nations in point of war or peace, are very distinct powers. The one regards the statement of facts, affecting the United States, which have occurred and come to the knowledge of the president; the other regards the power of determining what shall be the legal effect of those facts, as to the political state of the nation, and its relation to other nations.

The framers of the constitution of the United States appear to have perfectly well understood and duly appreciated the principles expressed by Vattel, in book 3, c. 1, § 4. "As nature has given to men the right of using force only when it becomes necessary for their defence and the preservation of their rights, the inference is manifest, that since the establishment of political societies, a right so dangerous in its exercise no longer remains with private persons, except in those kinds of rencounters where society cannot protect or defend them." For in the congress of the United States, solely and exclusively, did they place the power of making war. As it is the people who are to endure the fatigues and calamities, and sustain the waste of blood and treasure inseparable from war, they have confided the power of making it to their immediate representatives. They have, therefore, declared that "the congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." But the wise men who framed the constitution did not stop here; lest the right of making war should be claimed by the several states, they cautiously inserted in the constitution a prohibitory clause; they declared that "no state shall without the consent of congress lay any duty of tonnage, &c., or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." By the constitution, therefore, no state can engage in war, unless for the purpose of self-defence, and then only when actually invaded, or in such imminent danger as will not admit of delay." But if the proposition contended for by the defendant's counsel be correct, then it follows that although the people of the United States have conferred on congress the power of declaring war, and have denied the power of engaging in war in any event whatever, but those specified in the 8th section of the third article of the constitution, to every state in the Union, yet that they have by declaring that the president "shall, from time to time, give to the congress information of the state of the Union," by necessary implication, given to him also the power of declaring that the United States are in a state of war, or, in other words, of declaring war. That is to say, because it was the duty of the president to give information to the congress, that some Spanish troops had come into the territory of the United States, and in a hostile manner carried off the Kempers, and the president, in fulfillment of his duty, had given to congress information of those facts; therefore, the president did declare the United States to be at war with Spain. To give such a course of reasoning the semblance of solidity, the gentlemen, to be consistent with themselves, must go farther; for the words relied upon are imperative: "He shall," &c. If, then, by giving to the congress information that acts of hostility have been committed against the United States by Spain (and this it was his duty to do), he necessarily declared war, it follows, that the constitution has imposed upon the president the duty of declaring war in all cases, when acts of hostility have been committed upon the territory or citizens of the United States. If giving information of the state of the Union, means stating to congress what is the existing political state of the United States as to war, then it follows that he possesses the power of determining that our treaty with the sovereign of any nation with which we may be thus declared to be at war, is at an end; for if the United States are at war, such treaty is no longer obligatory. If, however, I should yield to the gentlemen this strange, and until this argument, unheard-of, interpretation of the constitution, will it profit the defendant? Has the president given to congress information of the United States being in a state of war with Spain? Has he announced that our relation to that country has become that of war? I ask, what has he done? Why, it is alleged that he has approved of this expedition, therefore, the United States are at war! To those who are capable of being misled by such reasoning, any observations within the compass of my abilities to urge, would be urged in vain.

But it has been asked, what if Spain should declare war against the United States, are not the United States de facto at war with Spain? Would the United States, in such an event, be at peace with Spain? I answer, whenever such a case shall happen, it may then be proper to consider whether the United States are de facto at war with Spain; it is sufficient for us at present to say that no such case had happened when the offence charged in the indictment was committed. But should it be granted, that in such a case the United States must be considered as being at war with Spain; that state of war would be produced by the declaration of war on the part of Spain, and not by the act of the president in giving information to congress of the existence of that fact. But the principle contended for is as novel as it is strange.

If we turn our attention to the practical interpretation of our constitution given by congress under the two former administrations, we shall find nothing to countenance the construction contended for, but much to convince us that it is wholly untenable. On the 27th of March, 1794, congress passed an act entitled "An act to provide a naval armament."

The preamble is in these words: "Whereas the depredations committed by the Algerine corsairs on the commerce of the United States, render it necessary that a naval force should be provided for its protection." 3 Folwell's Laws, 24 [1 Stat. 350].

It is here admitted by congress that such depredations had been committed by the Algerine corsairs as render it necessary that a naval force should be provided for the protection of its commerce. And in section 9 of the same act, it is enacted "that if peace shall take place between the United States and the regency of Algiers, that no farther proceedings be had under this act." President Washington had given to congress information of the state of the Union in relation to depredations committed by the Algerines, but it was not considered that his having given this information, de facto placed the United States in a state of war with those barbarians; but congress, this notwithstanding, not only declare that such have been the depredations committed by the Algerines, but, in the 9th section, declare that the United States are not at peace with the regency of Algiers.

On the first of July, 1797 [1 Stat. 523], a time when our affairs with France wore an aspect very much like war, her cruisers and national ships having committed most unjustifiable depredations on our commerce, congress passed another act, entitled an "Act to provide a naval armament," and by the 12th section authorized the president to increase the strength of the revenue cutters, and to cause them to be employed in defending the sea coast of the United States, and to repel any hostility to their vessels committed within their jurisdiction. It is in the recollection of the court that outrages on the part of France, unparalleled by anything yet done by them towards the United States, had been offered. These were stated by the president in the most explicit manner; a special congress convened for the purpose of taking these outrages into consideration. But this congress did not deem it their duty to declare that those outrages amounted to war. The president did not imagine that he possessed the power to produce that state of things called war; and congress did nothing more than to provide for the defence of the commerce of the United States, within its jurisdiction.

The discontents between this country and France still wearing the appearance of an approaching war, on the 28th May, 1798 [1 Stat. 558], it was enacted by congress "that the president of the United States be authorized, in the event of a declaration of war against the United States, or of actual invasion of their territory by a foreign power, or of imminent danger of such an invasion discovered in his opinion to exist, before the next session of congress," to cause to be enlisted, &c. From this it is manifest that even at this time congress does not admit that we were at war with any foreign power. On the same day [1 Stat. 561], congress passed an act entitled "An act more effectually to protect the commerce of the United States," the preamble to which is in the words following, viz.: "Whereas armed vessels sailing under authority, or pretence of authority, from the republic of France, have committed depredations on the commerce of the United States, and have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations, and treaties between the United States and the French nation, therefore," &c. Here is an admission by congress, that armed vessels sailing under authority, or pretence of authority, from the republic of France, had committed depredations on our commerce, and captured our vessels in or near our coast, in violation of the laws of nations and of treaties between the United States and the French nation. But what did they do? "Authorize the president to instruct and direct the commanders of the armed vessels belonging to the United States to take, seize, and bring into any port of the United States to be proceeded against according to the laws of nations, any such armed vessel which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing depredations on vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen of the United States which may have been captured by any such armed vessel." 4 Folwell's Laws, 120 [1 Stat. 561]. Defence only is what they authorized; but congress did not even then declare that we were in a state of war. Sixteen days after this, congress passed another act, entitled "An act to suspend the commercial intercourses between the United States and France, and the dependencies thereof." 4 Folwell's Laws, 129 [1 Stat. 565[. This act is what its title bespeaks it to be. By its 5th section it is provided "that if, before the next session of congress, the government of France, and all persons acting by or under their authority, shall clearly disavow, and shall be found to refrain from the aggressions, depredations, and hostilities, which have been, and are by them encouraged and maintained against the vessels and other property of the citizens of the United States and against their national rights and sovereignty, in violation of the faith of treaties and the laws of nations, and shall thereby," &c. Congress in this section have put it on record, that the government of France had been hostile, and at the time of making this act, were committing depredations upon the vessels and other property of the citizens of the United States and against their national rights and sovereignty, in violation of the faith of treaties and the laws of nations; but still congress does not declare war, nor admit that United States are in a state of war.

On the 22d of June, 1798 [1 Stat. 569], an act was passed authorizing the president to

increase the strength of the revenue cutters, "for the purpose of defence against hostilities near the sea coast;" and on the 25th of the same month, congress passed an act authorizing "the commanders and crews of any merchant vessel owned wholly by a citizen thereof, to oppose and defend against searches and restraints by the commanders and crews of any armed vessel sailing under French colors, and to repel force by force." 4 Folwell's Laws, 148 [1 Stat. 572]. Here, again, is a congressional declaration, that "lawless depredations and outrages," had been "hitherto encouraged and authorized by the government of France," that that government had not caused "the laws of nations to be observed by armed French vessels;" but no declaration of war, or admission of its existence.

On the 7th July, 1798, an act passed entitled "An act to declare the treaties heretofore concluded with France, no longer obligatory on the United States." On the 9th of that month, "An act farther to protect the commerce of the United States" was passed, giving to the president the power of "instructing the commanders of the public armed vessels employed in the service of the United States to subdue, seize, and take any armed French vessels," "and providing for their condemnation and other purposes." In addition to those, other acts were passed, to some of which I shall refer. 4 Folwell's Laws, 264, 271 [1 Stat. 578].

But I will now close my remarks upon acts of congress, by reading the first section of an act passed the 2d of March, 1799, entitled "An act giving eventual authority to the president of the United States to augment the army," &c. (4 Folwell's Laws, 489 [1 Stat. 725]), by which it is enacted "that it shall be lawful for the president of the United States in case war should break out between the United States and a foreign European power, or in case of imminent danger of invasion of their territory by any such power shall, in his opinion, be discovered to exist," &c. Here we have a declaration made by congress, and by the president of the United States, that notwithstanding all that had hitherto happened, no war had as yet "broken out between the United States and France."

What are the plain, obvious inferences which press themselves upon us from all these acts of congress? (1) That acts of hostility committed by a foreign power against the United States or their citizens do not necessarily place the country in a state of war. (2) That acts of hostility, though "outrageous, in violation of the laws of nations, and in contravention of existing treaties," had been committed upon the United States by a foreign nation, yet presidents Washington and Adams never entertained an opinion, that by declaring to congress the existence of these facts, they thereby placed this country in a state of war. (3) That congress have always considered the power of declaring war to be invested exclusively in them. (4) And that such has always been the understanding of the nation.

But a principle still more dangerous has been advocated. "That whether the United States be at war or at peace is a question of fact to be determined by the jury, from facts which may be proved to exist in pais independent of any act of congress." That is, that a jury of twelve men are the proper constitutional judges to decide whether our nation is at war or at peace, though congress shall not have declared war, though the president shall not have said that we are in a state of war, and though war may not have been declared against us. To all this, I answer, in a few words, that to very little purpose indeed have we cautiously and expressly confided by our constitution, to the representatives of the nation, the power of declaring war, if the peace of the nation may be compromitted by a jury, however honest and well intentioned. Wretched, supremely wretched, is the condition of the people of the United States if such a power be in the hands of every jury which may be impannelled to try a criminal. All other civilized nations have entrusted that power to the sovereign of the state; but here a jury of twelve men, whether congress has declared it or not, whether the president has announced it or not, is competent to place upon the records of our courts, that we are at war. To say to Spain, "the United States are at war with you." What will not Spain be justified in doing, if this be a constitutional mode of settling the question, and a jury by their verdict shall say that the United States are at war? May she not say and act accordingly: "Your nation is at war with ours; this has been declared, as appears by the records of your country, by its constituted authorities. We, therefore, will capture your vessels, enslave your citizens, bombard and sack your towns, and slaughter your inhabitants." Thus she will have a right to say to us, and thus may she lawfully treat us.

Nor can the admission of this testimony be sustained on the second ground. What have the jury to do with the question,—"What is the degree of the defendant's criminality?" They are to determine whether he is guilty of the crime charged, but they are not to decide whether there are any mitigating circumstances which ought to lessen the punishment. The court exclusively must settle this question. The authorities cited by the counsel for the defendant do not at all support the admission of the ground which is here contended. In the case of Rex v. Lord Anglesea, the court permitted the counsel for the crown to go into evidence calculated to show that Lord Anglesea sought after an opportunity, and persisted in the pursuit of the purpose eventually accomplished; and it certainly was very proper, when attempting

to show the nature of the crime charged upon the prisoner, to adopt such a course of proceeding, when the precise nature of the crime committed could not otherwise be ascertained to the jury. The cases from 1 McNul. Ev. 320, 321, 322, 323, by no means favored the gentleman opposed to me. They only establish this rational principle, that the prisoner may call witnesses to his good character, and that the witnesses so called, may, in such cases, relate particular facts within their knowledge, which have induced the good opinion entertained by them. Thus Lord Kenyon expressed himself in the case of Rex v. Thelwal, at a special commission of oyer and terminer, in 1793, at the Old Bailey, as follows: "An affectionate and warm evidence of the character, when collected together, should make a strong impression in favor of the prisoner, and when those who give such character in evidence are entitled to credit, their testimony should have great weight with the jury;" and such evidence is in the very nature of things relevant. If the character of the prisoner has always been fair, it is certainly less probable that he should have committed the crime charged, than if his character had been notoriously bad. As to the solitary remark of Judge Down, in the case of Rex v. Mockler, it stands alone, unsupported by any authority, or even the dictum of a single advocate or elementary writer. The testimony offered, then, if there be any weight in this reasoning, is wholly irrelevant. If Mr. Madison and the other witnesses were now here, and sworn in this cause, they would not be permitted to give in evidence, to the jury any of the facts alleged in Col. Smith's affidavit, because they would not tend to show that the defendant was not guilty. The president of the United States possesses no power to dispense with the laws, but, on the other hand, is bound by his official oath to preserve them inviolate, and to defend the constitution of the United States.

But it is incumbent on the defendant to show that he has been guilty of no laches or neglect in his endeavors to procure the attendance of the witnesses. Has the defendant done his duty in this particular? He has served subpœnas on his witnesses; he has tendered to them twenty dollars. The distance from the city of Washington to this place is 240 miles. By the 6th section of the act, passed 28 February, 1799 [1 Stat. 626], it is enacted "that the compensation to jurors and witnesses, in the courts of the United States, shall be as follows, to wit, to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for traveling expenses, at the rate of five cents per mile from their respective places of abode to the place where the court is holden, and the like allowance for returning." This compensation, we contend, the witnesses were entitled to receive before they started from Washington The law imposes no obligation upon a witness to give a credit to the defendant. A witness, by the subpœna, is called upon to leave his business, to travel to the place of holding the court, and to remain there until the cause is decided or he is dismissed. But is the witness compellable to do this until he receives his compensation? The words are "the compensation to witnesses in the courts of the United States shall be," &c. In England, since the statute of 5 Eliz. c. 9, no witness, until his reasonable expenses are tendered to him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid. 3 Bl. Comm. 369. Congress, however, has not left this question, "What are reasonable expenses?" open for discussion, but has declared that five cents a mile for going to, and the same for returning from, court, shall be the compensation to which he shall be entitled. But if the witnesses are holden by law to attend without this compensation being first paid, how are they ever to obtain it? How, but by suit? And if the witness, through poverty, is unable to attend, is he notwithstanding to be adjudged guilty of a contempt?

The question as to the construction of the statute of 5 Eliz. c. 9, in this regard, came before the court of common pleas, in the case of Fuller v. Prentice, 1 H. Bl. 49, on a motion for an attachment. But the court refused the attachment, saying "that it might afford a dangerous precedent, by which witnesses coming from their places of abode to attend at trials, might be deprived of the repayment of their necessary expenses; the whole of which, as well of their going to the place of trial, as of their return from it, and also during their necessary stay there, ought to be tendered to them at the time of serving the subpœna, otherwise an attachment would not lie." And yet in that case 2s. 6d. had been given to the witness, and a promise made to bear all her expenses, and a place was taken for her in the stage, and she had promised that she would go, but when the stage called, she refused to go, and confined herself in her house. The statute of Eliz. is substantially the same as the act of congress. By the former it is enacted "that if any person upon whom process shall be served to testify or depose, and having tendered to him such reasonable sum of money for his or their costs and charges." Suppose the words in the act had been "tendered and paid to him ten cents per mile for his costs and charges," &c.; would not that statute, if thus expressed, have, in effect, declared that ten cents per mile should be the compensation to the witnesses? What are the words of the act of congress? "The compensation to jurors and witnesses in the courts of the United States, shall be," &c. Compensation necessarily implies satisfaction or payment for something done, or to be done, by the

witnesses. Before the statute of Eliz., no law existed by which witnesses could insist on payment of their reasonable costs and charges. Congress, by this act, have provided that they shall be compensated for their costs and charges, and, to put to sleep all controversy about what should be considered as reasonable costs and charges, have said, it shall be ten cents per mile, &c. The right of a witness to compensation and the amount of compensation are both settled by the act of congress, and by necessary implication. The duty of the party who serves process on the witness is also settled, for the act says what the compensation shall be, but it is no compensation if it is not paid. Was it not, therefore, the duty of the person on whose behalf the witness was served with process, to have tendered or paid the ten cents per mile, if he intended, in case the witness did not appear, to proceed against him for a contempt? But the compensation has not been paid or tendered to the witnesses, nor does the affidavit of the person who served the subpœna help the gentleman over this difficulty. He says that he offered Mr. Madison more, but that he observed that it would be to no purpose. In the case of Fuller v. Prentice, 2s. 6d. was tendered to the witness, a promise was made to bear her expenses, a place was taken for her in the stage-coach, she promised to go, and more money was offered, and yet an attachment was refused. On no principle, therefore, can an attachment be issued against Mr. Madison.

An attachment for the purpose of bringing in a witness ad testificandum is never granted. The article of amendment to the constitution has instituted no new compulsory process. The testimony which the witnesses named could give, if present, as stated in the defendant's affidavit, is wholly irrelevant, and the motion for an attachment is premature.

Wednesday, July 16. 1806.

Some desultory conversation arose at the bar, when the argument proceeded:

Emmet. The counsel for the prosecution, who last addressed the court, adverted to the interest and anxiety which, from the number and respectability of the audience, it is manifest that this cause has excited in the public mind; and he was pleased to intimate that he had it in his power to assign a motive for this general solicitude, totally different from the actual importance of the prosecution. To me, I confess, it appears, that the novelty and nature of the questions heretofore agitated, and those likely hereafter to arise in the course of these trials, are fully sufficient to fix the public attention upon the proceedings of this court. You are making precedents in criminal jurisprudence, the influence of which may hereafter be very great and extensive; and you are doing so under the judiciary system of the United States, where precedents of that nature are by no means common. Besides, the enterprize with which the defendant is supposed to be connected is in itself calculated to awaken in his favor the most general sympathy and interest. It was therefore hardly worth the learned counsel's while to hint, with some appearance of severity and censure, at any extrinsic inducements for the portion of attention, that the public may bestow upon our proceedings. But if in doing so, and if by the motive which he did not think proper to assign or specify, he intended to allude to any thing in the conduct of the defendant's counsel, as one of them, standing in a very extraordinary and delicate situation, I entreat the indulgence of the court, while I say a few words about myself.

Attached as I am by the strongest connection to those principles, which placed the present administration in power; feeling for the members who compose it the sincerest esteem; and wishing to see them exalted on the highest pinnacle of respect, it will be with extreme reluctance and personal pain, that I shall, perhaps, in the course of these proceedings, press inferences of facts, somewhat derogatory to that dignified and honorable reputation, which they have most deservedly acquired. In the present cause, however, no sentiment of private respect or public feeling can be permitted to interfere with the discharge of my professional duty. Colonel Smith has done me the honor of thinking that my exertions may be useful to him in the conduct of his defence; and surely there is nothing in the character of that gentleman, nor even in the fact with which he is charged, that could justify my withholding those exertions; more especially, since (if those things which he has stated to me in private, and sworn to me in court, shall be proved on his trial) I cannot but consider him as "a man more sinned against than sinning." The learned counsel, however, may rest assured, that although I shall earnestly urge whatever I conceive pertinent and necessary to my client's defence, I shall not be induced by any wish of exalting my own character, or acquiring the favor of any party or description of men, to wound the feelings of those whom I respect, or to urge what may be unpleasant to them, farther than is indispensably necessary. I have no wish through this trial to excite unfavorable impression against any one; on the contrary, most gladly would I erase all memorials of it from the records of this court, and blot out from the public mind all remembrance of it, and of the transactions to which it has given rise. What irresistible motives caused it to be commenced, I cannot presume to divine; but it is the only error that I feel inclined to impute to the administration; for as to the part they took, according to my client's statement, in the enterprize, for assisting which he stands indicted, I trust, before I conclude, I shall evince myself to be not only the defender of Col. Smith, but of the

government itself. The court will pardon my having spoken thus much of myself; but I conceived this explanation due to the peculiarity of my situation, and to the extent of my obligations to those whose friendship has contributed to place me in a situation so peculiar. I shall now proceed to the matter before the court.

The affidavits on which these motions must be decided are, I apprehended, perfectly consistent with each other. Col. Smith considers the gentlemen at Washington as material witnesses for his defence, and assigns his reasons for that opinion, by specifying the facts which he expects to prove from their testimony. These reasons are not removed by Mr. Sanford's affidavit, which does not controvert or doubt any of the facts specified; but merely says, in general terms, that he does not conceive the witnesses to be material. I trust, I shall be able, when we shall have come to the discussion of that question, to convince the court of their materiality. I purpose, with its permission, to argue, first, the motion for the attachment, and, secondly, that for putting off the trial.

The counsel for the prosecution have displayed very considerable learning and research in tracing the history and progress of attachments against witnesses in England; but they will allow me to say, that their learning and research have no application to the law on that subject, as it exists in America. The counsel who spoke last, professed to detail what he called the "travail throes" of the measure; but as far as relates to the judiciary of the United States, it had, in this country, no travail throes; it is derived from the constitution, the head of our laws; and like the celebrated offspring of the head, it was consummate at its birth. We claim the process of attachment to compel the attendance of witnesses, as a matter of right, by virtue of the sixth article in addition to, and amendment of, the constitution (Graydon's Dig. 17, printed as article 8), which says, that in all criminal prosecutions, the accused shall have compulsory process for obtaining witnesses in his favor. By the fourteenth section of the general judiciary act, passed September 24th, 1789 (Graydon's Dig. 243 [1 Stat. 81]), which gives to the courts of the United States the power "to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" and lastly by the sixth section of the act of 2d March, 1793 (Graydon's Dig. p. 256 [1 Stat. 335]), which provides that subpœnas for witnesses who may be required to attend a court of the United States in any district thereof may run into any other district." These provisions form a striking difference between the English and American law. It may be, as the learned counsel contends, that in England the granting of an attachment is discretionary with the court, which may refuse it, or issue it for the purpose of vindicating its own dignity. In that country the party accused was for a long time wholly unprotected; he could not examine his witnesses on oath, and had no means for compelling their attendance. It was not before the 7 Wm. III. c. 3, that any compulsory process for witnesses was given to the accused; that act was expressly confined to cases where the judgment would work corruption of blood; and that is the only law, even to this day, which gives such process in any criminal case whatever. The 1 Anne, c. 9, enacts that witnesses for the prisoner shall be sworn, and under the equity of that statute, if I may say so, the courts have, in other criminal cases, awarded compulsory process; but they have considered themselves entitled to exercise their discretion as to granting attachments. I therefore broadly contend, that although in England the subject, when accused, may not have a right to compulsory process, yet in America the citizen has it secured to him by the highest authorities, the constitution and laws of congress: and I here claim the attachment as the right of my client.

The opposite counsel have endeavored to entangle us by raising a distinction that we are not entitled to an attachment on a general affidavit. In answer to that objection, it may be observed, that our affidavit is special, and states sufficient to show the importance of the testimony expected from those gentlemen. That topic I shall discuss at large, in arguing the motion for putting off the trial; but, postponing it until then, I shall here insist that we are entitled to have this motion granted, even on a general affidavit, and that it is not necessary to state any thing respecting the nature of the evidence they may give. An attachment is our right. The ordering of it must therefore be as much a matter of course as the issuing of a subpœna. Were I to apply to the officer of the court for a subpœna, should I be stopped by an inquiry on his part, how far the witness was material? Certainly not. When I come then into this court, and ask for what is equally my right, and ought to be as much a matter of course, shall I be stopped by interrogatories, which it could be necessary to answer, only if I were applying for a writ, that the court might, in its discretion, either grant or refuse? We have shown that the witnesses have disobeyed the process of the court by non-attendance. With regard to them, subpœna is not a compulsory process, and we therefore ask, under the sixth article of the amendment of the constitution, and the fourteenth section of the judiciary act [1 Stat. 81], for a process that will compel their attendance. This process, "agreeable to the principles and usages of law," is an attachment; and an affidavit of the service of the subpœna, with the absence of the witness,

without a sufficient excuse, is all that can be requisite for the success of our application.

The counsel on the other side have told us, that we are only entitled to a conditional rule in the first instance. If that should be the opinion of the court, it will only influence the manner of making out the order, and cause us to accept of a rule to show cause; it would make no difference to us, except so far, as it might delay our trial; but from the probability of that delay arises an irresistible objection to a conditional order, that it would prevent a speedy trial. By the sixth article of the amendments to the constitution already quoted, the accused shall enjoy the right to a speedy trial; for the purpose of which he shall have compulsory process to obtain the attendance of his witnesses. That process, then, ought to be modified, so as to be consistent with, and to procure a speedy trial. Here, also, the authorities from the English law books become inapplicable, if the counsel for the prosecution are right in the position for which they have principally contended; because the granting of the attachment in that country is, as they say, a matter of discretion; in America it is a matter of right; and surely those authorities that refer only to questions of discretion, can have no bearing on a question of constitutional right. If the process were only issued to vindicate the dignity of the court, it might proceed by slow degrees, and begin with a conditional rule; but there are not the same motives, nor is there the same power to interpose that delay between the right of the accused to a speedy trial, and his right to compel the attendance of his witnesses. That dilatory rule is only authorized, or required, where the matter to be ultimately decided upon rests in the discretion of the court.

But it is said that we did not tender to the witnesses the necessary expenses; that we were five dollars short of the precise sum. Is this Mr. Madison's objection, or will he feel grateful to those who urge it on his behalf? I presume not, for he has expressly disclaimed it. The tender was twenty dollars in the first instance, and a farther offer to pay all his expenses; and the affidavit of service states, that on this offer being made, he secretary of state replied, it was unnecessary saying anything more on that subject; thereby undoubtedly waiving the benefit of an insufficiency in the tender, if under any circumstances advantage could be taken of it. The truth, however, is that the objection would not avail them even in England. The cases cited by the opposite counsel are all in civil actions, and the necessity of tendering to witnesses their expenses, at the time of serving the subpœna, was created by 5 Eliz. c. 9, § 12, which relates only to such suits. In criminal cases no tender was ever held to be necessary.

PATERSON, Circuit Justice. Is there not good reason for that, when the defendant would not be entitled to any process at all?

Emmet. The observation is certainly correct. The statute was passed when persons accused were in no case entitled to such process; and it could not be within the purview of the law, to make them tender money on service of a process, to which they were in no respect entitled. In criminal cases it is perfectly settled that witnesses are bound to attend. Hawk. P. C. b. 2, c. 46, § 50, is explicit on this point. "It seems that in civil proceedings a witness is not obliged to attend, unless his expenses are tendered to him, pursuant to 5 Eliz. c. 9, and if after such tender he neglect to appear, he may be fined according to the directions of that statute, or punished by attachment for a contempt of the court, as the circumstances of the case shall appear to be. But in criminal proceedings, the demands of public justice supersede every consideration of private inconvenience; and witnesses are bound unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence."

PATERSON, Circuit Justice. You say that the defendant is entitled to compulsory process, as of right. Is there any statute of the United States which makes the tender of expenses to the witness on the service of the subpœna necessary?

Emmet. I apprehend not; and in that respect there is a very manifest difference between the English and the United States law. By the statute of Eliz. a tender is necessary from the express words of the act; and those words have regulated the decisions of the English courts. By the United States act of the 28th February, 1799, § 6 (Graydon's Dig. 260 [1 Stat. 626]), a compensation to witnesses is regulated at the rate of five cents a mile for traveling, and $1.25 for every day's attendance in court. It struck me on reading that law, that those sums of money were to be paid to witnesses, as to jurors, by the United States, and not by the defendants; and, on inquiring as to the practice, I find that the officers of the court are not agreed. On this point, therefore, the court must form its own conclusion. But from whatever quarter the compensation should come, jurors and witnesses are by the law put upon the same footing. Would a juror, when summoned, be permitted to say, "I will not obey the process of the court because I have no tender of my expenses"? Certainly not. By what construction of the act, then, can that objection lie in the mouth of a witness?

PATERSON, Circuit Justice. Has there been any decision under this statute on the ground of tender?

Emmet. I answer, perhaps without sufficient information, not; at least, not to my knowledge. But when I couple this law with the article of the amendment to the constitution which says a witness must at-

tend, I think he can claim no right to a previous tender of his expenses; but must perform the service of attending; and in case of nonpayment, he becomes entitled to his action for the compensation.

Another question has been raised. It has been insinuated rather than explicitly expressed, by one of the counsel for the prosecution, that those witnesses could not be coerced to appear. If hereby is meant to be asserted any peculiar privilege of office, certainly such claim cannot be made by Doctor Thornton or Mr. Wagner. Nor is there such a privilege attached to any of the offices held by the other witnesses. It is a strange doctrine in this free country, where the constitution and laws have accurately marked out the rights and privileges belonging to every office. Privileges of exemption from those duties to which every citizen is liable as such, must be clearly shown, and the law by which they are authorized must be produced.

PATERSON, Circuit Justice. You may save yourself the trouble of arguing that point; the witnesses may undoubtedly be compelled to appear.

Emmet. Another question has been stated: Can the witnesses be compelled, or would they be authorized to disclose the secrets of state? No law book that I have ever read or heard of mentions such a privilege as belonging to public officers, though it is uniformly allowed to lawyers and attorneys. But in this case another answer is also obvious. If the concurrence of the president in those matters with which Col. Smith stands charged be a secret of state, for the keeping of which there is a lawful privilege, it must be because such concurrence was within the legal sphere of the president's duties. If that be the case, let it be remembered, when I shall argue that the concurrence of the president would form a justification for my client; at present I shall urge it thus: If the concurrence of the president was within the legal sphere of his duties, the legality of his conduct will justify those who acted by his concurrence; of course, the court will help us to the utmost in availing ourselves of the legal and adequate defence; and will, at least, bring the witnesses into court, to try whether they will decline answering what, if they do answer, must acquit us. On the other hand, if such concurrence be not within the legal sphere of the president's duty, then, as to that, neither he nor the witnesses can have any legal privilege in right of his or their offices. Supposing the witnesses are not bound to divulge the secrets of government, let them, at least, declare whether there be any secrets of government connected with the measure for which Col. Smith stands indicted.

But it is also urged that the witnesses could not be forced to answer questions that might criminate themselves. No; but there is nothing in that argument that should prevent their being brought into court, to see whether they will make an objection which they certainly may waive. In truth, however, Col. Smith's affidavit does not lay us open to that argument; for it does not charge anyone with approving of that expedition, but the president and secretary of state. Now, Mr. Madison may be called to prove the conduct of the president, and the other witnesses to prove the conduct of Mr. Madison.

PATERSON, Circuit Justice. Would Mr. Madison be liable to a prosecution if he answered that the conduct of Col. Smith was with his knowledge, or knowledge and consent of the president?

Emmet. If the view I shall hereafter take of the statute be correct, he certainly would not.

Another circumstance has been mentioned; that those gentlemen have offered to be examined under a commission, and the court was pleased to express some surprise that such an arrangement had not been before thought of. With the utmost deference, I beg leave to answer, that the circumstance was adverted to; but neither the defendant nor his counsel are willing to accede to that arrangement. For my own part, I declare, that except upon some very extraordinary occasion, which I cannot now foresee, I never will consent to examine a witness under a commission in a criminal case, if his attendance on the trial can be forced. Even in civil causes, I have more than once had occasion to lament the inroads that are made upon oral testimony, by the increased use of written depositions; and I am convinced that the latter frequently prevent the discovery of truth. Every one knows that when a witness is examined in open court, the manner in which he answers, and the manner in which he declines to answer, are matters of public observation; and that cross-examination may draw out more than could be obtained by studied and written answers to written interrogatories. It is the wish of my client that this case shall be made as clear as possible; that the truth shall be eviscerated and brought into public view; that the allegations of the defendant and the testimony of the witnesses may be compared and judged of by the jury and the public. The advantages of oral testimony over written depositions are so strikingly set forth by Sir Matthew Hale in his History of the Common Law (volume 2, c. 12, p. 145), that I shall beg leave to read a short extract from it; as, perhaps, if the same reasons were assigned by myself, they might be supposed to have some personal allusions. "The excellency of this open course of evidence to the jury, in presence of the judge, jury, parties and counsel, and even of the adverse witnesses, appears in these particulars: 1st. That it is openly, and not in private, before a commissioner or two,

and a couple of clerks; where oftentimes witnesses will deliver that which they will be ashamed to testify publicly. 2dly. That it is ore tenus, personally, and not in writing; wherein oftentimes, yea too often, a crafty clerk, commissioner or examiner will make a witness speak what he truly never meant, by dressing of it up in his own terms, phrases and expressions. Whereas, on the other hand, many times the very manner of delivering testimony will give a probable indication whether the witness speaks truly or falsely. And by this means, also, he has an opportunity to correct, amend, or explain his testimony, upon further questioning with him; which he can never have after a deposition is set down in writing. 3dly. That by this course of personal and open examination, there is opportunity for all persons concerned, viz. the judge, or any of the jury or parties, or their counsel or attorneys, to propound occasional questions, which beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated. And on the other side, preparatory, limited, and formal interrogatories in writing, preclude this way of occasional interrogations; and the best method of searching and sifting out the truth is choaked and suppressed. 4thly. Also by this personal appearance and testimony of witnesses, there is opportunity of confronting the adverse witnesses; of observing the contradiction of witnesses, sometimes of the same side; and by this means great opportunities are gained for the true and clear discovery of the truth. 5thly. And farther, the very great quality, carriage, age, condition, and place of commorance of the witnesses, are, by this means, plainly and evidently set forth by the court and the jury; whereby the judge and jurors may have full information of them; and the jurors, as they see cause, may give the more or less credit to their testimony." There is another objection to taking the depositions of the witnesses, by commission in criminal cases, which I think irresistible; if the witnesses swear falsely, how are they to be indicted for perjury? In urging this argument, I can have no allusion to the witnesses who have offered to be thus examined; but this case is so conspicuous and important, that every part of its proceedings may hereafter become a precedent; and in this case the precedent might give rise to a very dangerous practice. I therefore feel that I should not only be doing injustice to my client, but also injury to the general administration of justice, if I consented to any other mode of taking the testimony of those gentlemen, than viva voce before the jury.

We come now to the most important question; the materiality of the testimony expected from those witnesses. So far as relates to the attachment, I trust I have already convinced the court that it ought to be laid out of consideration; that process being a matter of right. The witnesses are in contempt; when they come forward to purge themselves of that contempt, then, and not before, ought the nature of their evidence to be taken into consideration. I deem it, however, to be the most important of all questions raised in this cause; since the counsel for the prosecution resist our application to put off the trial, on their allegation that the testimony is immaterial. The remainder of my observations shall, therefore, be directed to the support of that application. The facts which we hope to prove by those witnesses are very material, either for a complete defence or for mitigation of punishment; and in either case we have a right to ask for compulsory process to bring them into court, and for the postponement of the trial till they do come. It cannot be expected of us that we should, in this stage of proceedings, disclose our defence, and give the opposite side advantage of a detailed argument upon the application of our evidence. We shall do enough if we show by a general view of the subject, that those facts may be applicable to our case either in justification or in mitigation of punishment.

First, as to justification: The purport of a constitution is to define the duties of the constituted authorities, to prevent their usurpations or collisions, and to limit the powers of public officers, in order to protect the people from their encroachments. It seems to me, therefore, that the fair construction of our constitution, as to the right of declaring war, is that the executive shall be controlled, and deprived of that baneful prerogative which is exercised by the chief magistrate of England. If the president undertake to declare war, he becomes undoubtedly and justly liable to impeachment; but it is too harsh a construction of the constitution to say that it has any reference to the conduct of an individual acting bona fide under the president, and by his authority, in times and circumstances such as those when General Miranda's expedition was set on foot. No subordinate officer or private person acting by the president's authority, falls within the purview of the constitution, or becomes criminal, unless by knowingly and intentionally assisting to violate its provisions, he should involve himself in the guilt of his principal. Where, therefore, the situation of the country affords a reasonable ground for supposing that a war with some foreign power, may speedily break out, I submit that the subordinate agent who, with the knowledge and under the direction of the president, provides or prepares the means for a military enterprise against that power, stands acquitted, and that if there has been any misconduct, it must be answered for by the superior officer alone. Who is to be the organ of congress if secret preparations for war shall have been decided upon? Undoubtedly, the executive. Suppose then the head of the war department, by the desire of the president, should write to any contractor or subordinate officer to pro-

vide a million of cannon balls, or any of the other things necessary for a military expedition, while congress were sitting with closed doors, deliberating upon an avowedly hostile message sent them by the president; would the contractor come under the penalties of the law, if he accepted and executed the contract, and thereby provided and prepared the means for a military expedition? Or should he say, I will not execute the contract, or the inferior officer, I will not obey your orders; for I do not know that you have the sanction of congress, as they are still sitting in secret deliberation? I venture to assert that a more unwise or injudicious construction could not be given to the constitution, than to say that it prohibits a subordinate officer from paying obedience to the orders of his superior, or that the commands of the president would not be to him a sufficient justification of his conduct under all the circumstances of the case.

Spain had committed depredations on our territory; the message of the president details the particulars, and recommends a hostile attitude; congress sit with closed doors to discuss the question. To whom, then, should the people at large look for information or guidance, but to the president? Is it not competent to congress to decide secretly on the propriety of anticipating an enemy before he has matured his strength? If they should so determine to declare war, would they not naturally authorize the president to take all necessary steps for attack or defence, unknown to Spain? A citizen residing distant from the seat of government can only know such facts as are public; he is not likely to have direct communications as to the secret objects of the cabinet or congress. But when he sees that Spain has commenced hostilities against us, and finds that the president has recommended war, on which the two houses are deliberating in secret; when at the same time he receives satisfactory assurances that he has the approbation of the executive, shall he be culpable if he acts on those views and on that authority?

Here I am met by an objection, that Col. Smith does not lay any foundation for supposing this to be the state of the country; nor does he swear that he expects to prove those facts by these witnesses. To that I answer, that perhaps we may question them as to those facts; but we do not complain of want of testimony on that subject; we may prove it by other means; I see a very venerable[1] witness in court, by whom we can certainly prove the state of the country. It is not necessary to specify in the affidavit more than we expect and want from those witnesses; it never yet was required of an accused that he should disclose, on a motion of this kind, all the particulars of his defence, and how each fact is to be proved. In this state of the cause, we may well assume circumstances of public notoriety, and couple them with those we wish to prove by the witnesses, in order to see whether the whole together will not make a justification.

The argument which I have hitherto urged from the state of the country acquires infinitely more force when you consider the precise charge in the indictment, which is framed pursuant to the statute for setting on foot, providing and preparing the means for a military expedition or enterprize.

PATERSON, Circuit Justice. What are the words of the statute?

Emmet read from Graydon's Dig. p. 70, the fifth section of the act of 5th June, 1794 [1 Stat. 384]: "If any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprize to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace, every such person so offending shall," &c. It appears then, that the indictment and statute are only pointed against preparatory acts for carrying on an enterprize against a power at peace. Will the counsel for the prosecution offer evidence of the sailing of the Leander, or of any act of hostility? If they do, it must be in order to lay matter of aggravation before the jury, and let them consider how far that is consistent with their denial of our right to prove matter of mitigation in the same way. But as to the acts charged in the indictment, they are only preparatory, and independent of any actual hostility. As to them, the state of the country forms an irresistible justification both of Colonel Smith and of the president. The constitution indeed does not allow the latter to declare war, but does it forbid his providing and preparing the means of carrying it on, while congress are in actual and secret deliberation whether they shall declare war against a nation that is committing and provoking hostilities? Spain, indeed, was technically at peace by the treaty of San Lorenzo, but she was actually at war by the law of nations; she had broken that treaty, plundered our ships, invaded our territories, and carried our citizens from thence as prisoners by military force. Such a nation is not entitled, if I may say so, to the benefits of this act, the object of which is, that so long as any prince or potentate shall act towards us with perfect amity, and not by equivocal or unfriendly conduct, render preparatory measures for war advisable, so long as it shall be forbidden under the penalties of this law, to any individuals to break that amity, and by unauthorized acts to endanger the peace of the two countries. But if the foreign power shall itself have broken that amity, and shall have given just grounds of war, no government ought to omit "providing and preparing the means" for military enterprizes; nor could any law have intended to prevent the preparatory efforts of individuals for subduing the public enemy. The memorable congress that commenced your revolu-

[1] The vice-president.

tion, did not hesitate to provide and prepare the means of meeting the English before the actual war was declared; nor did it censure or discountenance those patriots, who, unauthorized by any orders, and before the formal declarations of war, possessed themselves of Ticonderoga and Crown Point.

The circumstances of the times, we have shown, justified the president in giving his approbation, and my client, under that approbation, in providing and preparing the means of a military enterprize against Spain. And surely no enterprize could be more useful or effectual for drawing the enemy from our southern and western frontiers; none more worthy of the exalted and philosophic mind of our chief magistrate; none more consonant to the enlightened and philosophic views of society and politics, which he has exhibited to the world, than an expedition to liberate South America; to destroy at once Spanish tyranny and power on our own continent; to enfranchise, by one effort, millions of our fellow creatures from the most frightful bondage; and to lay the foundations, in so large a portion of the globe, for the freedom and the happiness of man!

PATERSON, Circuit Justice. You state in the affidavit that it was done with the knowledge and approbation of the president, but is it stated in the affidavit that he authorized the fitting out of the expedition?

Emmet. I conceive it was not necessary; for though I have argued upon the effects of an authorization, it was only to show that the argument of the adverse counsel went much too far, when they contended that the president could not authorize any such measure. For our defence, it will be only necessary to show that the president was, under the circumstances of the times, warranted to provide and prepare the means for a military expedition; and that, in what he might do, we acted with his knowledge and approbation. "Qui prohibere potest et non prohibet, jubet." The knowledge and approbation of the chief magistrate and heads of departments, if we shall prove them to have been sufficiently express and positive, will amount to justification; but even if we shall fail in establishing them to that extent, they will still afford very powerful inducements for mitigating the punishment. This is denied on the other side; but I would ask, if it could be proved that this enterprize was carried on against the president's express order, would not that be matter of aggravation? If it would, surely the reverse must be matter of mitigation. The mistake into which a defendant may have been led by the approbation of the government, and the innocence of his motives, must surely mitigate a discretionary punishment. In this case we do not rely upon a mere general and vague approbation of the measure; we will show that approbation was given to this very defendant's being concerned in it.

We are told, however, that no evidence which only goes in mitigation of punishment should be laid before a jury; but that it is only cognizable by the judge who is to apportion the punishment, and that, therefore, the want of it forms no ground for putting off the trial. This doctrine, permit me to say, is contrary to every day's experience; for who that has attended the commonest trials for assault and battery does not know that all matters connected with the crime, though not making any part of the issue, whether they preceded, accompanied or followed the fact charged, are given in evidence on the trial; and that the judge, after hearing those matters, varies his sentence according to the case, from perhaps one cent to a very exemplary fine and imprisonment? But what reporters can we quote on this subject? I verily believe that no lawyer who ever undertook to report a case thought this a matter of sufficient difficulty or importance to be worth noting. It happens, however, that we can cite a printed case in which the point has been decided, and that only, because the trial having been taken verbatim, the most insignificant circumstances attending it have been preserved. The case I allude to is that of the Earl of Anglesea, in 9 State Tr. p. 335. There, although it was resisted by the defendant's counsel, the counsel for the prosecution stated and proved matter of aggravation, entirely distinct from the assault on which the indictment was framed; and the court considered his right of doing so as unquestionable. It has been asserted, on the other side, that the facts stated, accompanied the assault, and therefore were necessarily admitted; but if so, how came the defendant's counsel to resist their introduction? On looking into the case, the court will find those facts which were introduced for the purpose of aggravation happened the two days preceding the assault. A distinction is also taken, that what was there stated, was in aggravation, and that what we wish to introduce before the jury, is in mitigation of punishment. What principle of law sanctions this distinction? Those who have a right to hear the one surely have right to hear the other. Unfortunately, also, it seems contrary to the case of Rex v. Mockler, 1 McNal. Ev. p. 320, where Downes, justice, admitted evidence of character on the trial for uttering counterfeit coin; as the punishment was not certain, but discretionary in the court.

But the counsel on the other side maintained that such evidence must have been received to meet the issue of not guilty; it being very unlikely that a person of good character would be guilty of such a crime. To this surmise, the answer is obvious; that was not the reason assigned by the court. It happens, also, that I was concerned in that cause for the defendant, and have such a recollection of it as enables me to show the learned counsel's supposition to be groundless. The fact was clearly proved, and in-

deed admitted; but the defence was, that the defendant was a silver-smith, and made out of pure metal shillings which were rather more valuable than the current coin, which, by being worn down, was not worth more than nine pence, and of which there was an actual scarcity. This certainly formed no legal defence; but, on its being proved that the counterfeit was as good as the current coin, the judge admitted evidence of character, not to controvert the guilt, which was unquestionable; but that it might be considered in mitigation of punishment.

The Chevalier D'Eon's Case, 3 Burrows, 1513, is very much relied on by the opposite side, as proving that evidence in mitigation should not be received on the trial; but that it should be laid before the judge after verdict, by affidavit; and that the want of it forms no ground for putting off the trial. Let us, therefore, shortly examine that case. The first position is supported, as the counsel think, by this expression of Lord Mansfield: "If their knowledge relates to any circumstances that may serve to mitigate the punishment, in case he should be convicted, that sort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavits." True, it will not come too late after conviction; but has his lordship said that it would come too soon before verdict? True, it may be laid before the court by affidavits; but has his lordship said that it ought not to be laid before the court viva voce, on the trial? That sentence, however, has been misconceived by the learned counsel; it only refers to the peculiar circumstances of D'Eon's Case, and does not purport to lay down any general principle whatsoever. This will instantly appear by comparing the report of the same case, in 1 W. Bl., 510, with that in Burrows. The motion was made in Trinity term; the trial could not take place till after that term; and, as it was an information, judgment could not be given till the November or Michaelmas term; and Mr. Morton and Mr. Ashhurst argued, I confess, I think unanswerably, for puttting off the trial, that it could not, at the utmost, cause above eight day's delay, as to the sentence, if the defendant should be ultimately convicted. Lord Mansfield, however, said, in substance: Your witnesses are out of our jurisdiction in France; and it is not either in your power or ours to compel their attendance; but you expect them here, you say, next term; they will therefore come, if at all, before sentence; and as they can be only in mitigation (this being an information for a libel, which admits of no justification) you can still have the benefit of their testimony; though they should not be present on the trial their evidence will not come too late next term (when you expect them) after your conviction, and you can lay it before the court by affidavit. This is the true explanation of that sentence on which the opposite counsel so much rely; and permit me to observe upon that case, even were it more favorable for them than in reality it is, that, since truth is settled to be an inadmissible justification on an indictment for a libel, it is manifest the exclusion of those witnesses on the trial of the issue worked an injustice to the defendant. Indeed, any one who now examines that decision with impartiality, will, I think, be convinced that the defendant was very hardly dealt with; and, what surely will not recommend the precedent to this court, it appears from 1 W. Bl., 517, as if this hard treatment sprung from a spirit of complaisance to certain foreign ministers.

This case, however, affords no ground for arguing that matter in mitigation of punishment should not be given in evidence on the trial—and every day's experience shows that it may. Even for the information of the judge, if he alone is to take cognizance of the testimony, it is advisable that he should be informed by viva voce examination, which is superior to written affidavits, and which affords the advantage of sifting out the truth by pointed and cross-examination. Besides, if we are not allowed compulsory process for enforcing the attendance of those witnesses before the jury, and a postponement of the trial till they can be brought into court; by what process or authority of law are we to obtain their affidavits in mitigation of punishment? I know of no process by which you can compel any man to swear an affidavit: and here let me observe, that in the Chevalier D'Eon's Case, his witnesses he admitted were friendly, and were willing to be examined—there was therefore no danger but that he could procure their affidavits after conviction. Col. Smith does not pretend that his witnesses are friendly, or willing to be examined. How then, I again ask, if this trial should not be postponed until the attendance of the witnesses can be enforced and their evidence obtained under a compulsory process, is the defendant to procure those affidavits, which might be laid before the court, and ought to diminish the punishment? Besides, it is the right of the jury to recommend to mercy; and how can they do so, if no extenuating circumstances are permitted to reach their ears? The president's approbation and knowledge are facts, which, like most other facts, may be contested, and upon which, therefore, the court entertain some doubts. Would not the recommendation of the jury, finding those facts and grounded on their declared belief of them, have infinite weight in removing the doubts of the court and influencing its conduct? Indeed, from every view I can take of the subject, I am convinced that the original and correct mode of receiving any testimony, whether to the issue, or in aggravation or mitigation of punishment, was viva voce on the trial; and that the introduction of affidavits after conviction is a modern

and irregular invention, tolerated for the convenience of the defendant, to whose benefit it has hitherto been most frequently applied: but I confess I am surprised to hear it argued, that the innovation should totally supersede the ancient, and I think the wisest practice.

Another reason for putting off the trial presents itself from an examination of D'Eon's Case coupled with Col. Smith's affidavit. In that case, the defendant gave some reason to believe that the witnesses were prevented from attending by the interference of the prosecutor; and Mr. Justice Wilmot declared (1 W. Bl. 516) that if that were clearly established, he should be for putting off the trial for ever. In this case, Col. Smith swears that he believes those witnesses are prevented from attending by the interference of the president, who has directed this prosecution. The fact is not denied, and what might be a justification of the fact is not sworn to. Upon that ground, which is admitted to exist with us, and which Lord Mansfield said in D'Eon's Case, 3 Burrows, 1515, would be sufficient for putting off the trial, till the witnesses could be had, we ask, even if you should be against us on the other points, that the trial may be postponed.

I have trespassed so long on the time of the court, and on the debilitated health of one of its members, that I know not what apology to offer. I shall not increase my offence by any longer intrusion, except to return my thanks for your very patient and favorable attention.

Harison. I am now to close the argument on the part of the defendant, and to offer my sentiments upon a subject that is nearly exhausted. A sense of the duty I owe to my client, and a regard to public justice, are the motives by which I am influenced, and which I hope will apologize for observations that may appear to be superfluous, and perhaps have been already offered.

Before, however, I proceed to the main questions that have arisen, I beg leave to advert to an observation which fell from the counsel for the prosecution. He indeed declared our form of government to be the best in the universe; in the preservation of which every citizen was of course deeply interested. And yet, he expressed great surprise that a prosecution such as this, which he considered as of a very ordinary nature, should bring together so numerous an assembly, and excite such universal interest and attention. Perhaps this observation might have been spared; for without adverting to the previous proceedings in this case, the nature of the prosecution, and the high authority by which it was instituted, would sufficiently account for the effects it has produced. For my own part, believing the criminal system of the United States to be the most pure and chaste and mild and perfect that the world ever beheld; in fact, I consider it as a most valuable inheritance belonging to the citizen. It has, therefore, called forth the public attention; and the numerous audience that is assembled upon this occasion, must be considered as an expression of its sentiment. The remarks which I have made upon the criminal institutions of the United States, and to which I shall hereafter allude, will, I trust, be found not wholly inapplicable to the cause before the court. I proceed to discuss the questions in the order that they have been stated. The first is, whether an attachment should issue for the non-attendance of the witnesses. Here I observe that according to the mild system of our laws, the innocence of the defendant is always to be presumed until the contrary appears. The public has an interest in guarding the innocent, at least equal to that of punishing the guilty. It is, indeed, our first duty to protect innocence; and hence, the very constitution of this country has provided that the accused shall have the necessary means of defence; among which compulsory process for his witnesses is expressly included. This is a provision of great importance, and distinguishes our criminal code from that of other nations. In the origin of the English law, no witness was to be examined for the prisoner, at least not upon oath; though, by a modern statute, a different regulation has been introduced; and by a favorable construction of that statute, the prisoner has been held entitled to process against his witnesses. In our country, however, this matter has not been left to construction; nor does it depend upon legislative pleasure. It is a fundamental article of the constitution, which imparts a right to the accused, that he cannot be deprived of, and which courts of justice are bound to protect.

It is not pretended that the peculiar character and situation of the witnesses exempt them in this case from the duty of attendance. Public officers, however dignified, are not excused from appearing to vindicate innocence. Our law contains no dispensation from this duty. The defendant has a right to the benefit of their evidence; and the court is bound to secure a right so essential to the complete protection of life, liberty and property. If, therefore, this right exists in the defendant to prove his innocence, there must exist a power to compel the attendance of reluctant witnesses; otherwise, the right would be nugatory, and it would be in the option of the witnesses to defeat the provisions of the constitution.

It is always to be remembered that at the last term affidavits were produced to show that the witnesses were necessary to our defence. The court then directed subpœnas to be issued, and the trial to be deferred. The due service of the subpœnas has been fully proved, and the defendant has complied with everything that was requisite on his part. Why then shall the attendance of the witnesses not be procured? It is said that

they have written a letter to the court, stating their excuse. But I may ask whether such a letter can be considered as a legal apology? If the witnesses had any excuse to offer, it should have been presented in another shape. The court certainly can pay no attention to this document; for though in one instance the rescript or letter of a British king was received as evidence, yet this was always considered as an improper proceeding, and not as a legal precedent. Even in England, therefore, a mere letter would not be thought worthy of notice; and in this country neither the president nor any other officer can be heard in a court of justice to exculpate himself from a contempt, unless upon oath.

I go on to remark that whatever might be the practice of English courts as to enforcing the attendance of witnesses, the power and the duty of the American courts would not be affected by it. I might therefore be silent as to this head of the argument; but lest the court should think it of importance, I shall bestow some few minutes to its consideration. The counsel for the prosecution have supposed that attachments against witnesses for contempt in non-attendance, owed their origin to the statute of Elizabeth, and that they did not exist at common law. On the contrary, the passage from Blackstone which has been quoted shows that, from the earliest ages of the law, the superior courts of justice have used the method of punishing contempts by attachment. Contempts committed by witnesses "by making default when summoned, refusing to be sworn, or examined, or prevaricating in their evidence when sworn," have, according to the learned commentator, always been punished in this manner. Attachments in such cases are therefore as ancient as the laws themselves; and did not, as the counsel for the prosecution contend, grow out of the statute of Elizabeth. If so, all the fabric which those gentlemen have endeavored to raise upon this foundation, must inevitably fall to the ground. It is true, as they have stated, that Lord Chief Justice Lee is made in one case to say that "attachments are a new practice; that he remembered the first motion for them." But there must be some mistake in this reporter; for it is laid down in a case mentioned in Lil. Reg., that an attachment may be granted against witnesses for their non-attendance, and this is said in a case which took place long before the period to which the memory of Lord Chief Justice Lee could have extended.[2] Besides, the authority of Lord Mansfield, in the case cited from Douglas, is at variance with the assertions of the learned counsel. His lordship says: "The courts of Westminster Hall most clearly now (and they also did so before the statute) proceed against witnesses who wilfully absent themselves, as for a contempt." Thus, therefore, Lord Mansfield, according to Douglas, one of the most eminent reporters of the English bar, is at variance with the counsel for the prosecution. The court must determine as to which it is probable should be mistaken.

But the gentlemen for the prosecution say, that if we are entitled to any thing, it would be only to a rule against the witnesses to show cause; and if this was all the dispute between us, it would be of little consequence whether in the first instance the attachment should be granted, or a rule to show cause why it should not be issued. The cases, however, which they have quoted respecting this matter are, except one, in civil causes. The only one of a criminal kind, in which the question arose, and which is in 7 Term R., is a case where the court doubted their authority to have originally issued the subpœna. They therefore granted a rule to show cause in the first instance, that the parties might argue that point if they thought proper; and being satisfied upon it, the attachment was finally issued, the rule being made absolute, and Lord Kenyon saying that the application was warranted by precedent. It will be seen, too, that in the cause cited in the notes to that case, the court of king's bench had, without any question, issued an attachment in a criminal case in the first instance. So that from authority, and from reason, upon the principles of the common law, and on precedents from time immemorial, it appears that courts possess a right to enforce obedience to their precepts by process of attachment.

Here PATERSON, Circuit Justice, asked whether this power of punishing contempts was not incident to courts of justice? And upon the counsel's replying that it certainly was, according to the scope of his argument, the judge observed that he had always considered it so.

Mr. Harison then proceeded in the following manner:

Taking it then for granted (which perhaps no man of legal information could have doubted) that the power to punish contempts is, by the principles of the common law, inherent in every superior court, and that process of attachment is to be resorted to for that purpose, it will follow that unless the witnesses are entitled to exemption from the general rule on account of their official characters, attachments ought to be granted. But any objection on that ground is disclaimed, and would not be tenable.

It is, nevertheless, objected that the attendance of these witnesses ought not to be enforced, because the nature of the evidence ex-

[2] [The case in 1 Lil. Reg. 162, is said to have taken place in 1655. The dictum of Lord Chief Justice Lee was in 1748; but perhaps he spoke of an attachment in civil causes. It is most probable they had in such cases fallen into disuse after the statute, when the remedy by action may have been preferred, at least for some time.]

pected from them is such as would criminate themselves. I shall certainly not attempt to invalidate the maxim, "that no one is bound to inculpate himself." It is too well established, and too sacred in its nature, to admit of a dispute. The court will, in every instance, secure to the witnesses the benefit of the rule; and for that purpose will examine the interrogatories that may be put to them, and even have the questions reduced to writing for the sake of precision. But then the court will never prejudge the question in this state of the business, when it cannot appear that the testimony of the witnesses will of necessity inculpate themselves. For, granting that the participation of the president and great officers of state in Miranda's enterprise is to be established by the evidence, still no man need be called upon as a witness to accuse himself. Mr. Madison might speak only as to what relates to the president, and other members of the administration; and they again might be examined with the like qualification of not being called upon to accuse themselves. At present, the court cannot determine for the witnesses, whether they will or will not insist upon the privilege of not answering to those things which would involve their own crimination. It is a privilege which the law has conferred for their benefit; and which, in the course of examination, they might think proper to renounce; since, according to the legal maxim, "Quisquis renuntiare potest juri pro se introducto." At any rate, they are not for themselves to judge that they can give no evidence which the court would receive or compel; but they must come in person, and submit themselves to the judgment of the court upon the questions as they arise.

One other objection has been taken to the issuing of an attachment in this case, flowing from the supposed deficiency of the tender made to Mr. Madison for his expences. But it is obvious that he had waived the objection, and he would, probably, have disdained as a subterfuge, what the legal ingenuity of learned counsel has pleaded in his excuse. Indeed, the constitution has directed that the accused shall in all cases have compulsory process for his witnesses, and it is silent with regard to defraying their expences. If this should be deemed necessary to secure their attendance, the poor (though innocent) might lose the benefit of this provision. Such a construction of the constitution certainly will not be adopted; and, if I am not misinformed, a contrary doctrine has received the sanction of the judges in one of the courts of the United States. It should also be considered that in civil cases a party injured by the nonattendance of witnesses may have some reparation from the recovery of damages. But in criminal cases such remedy would be wholly inadequate, even if it could be obtained by any legal proceeding. We trust, therefore, that the court will grant our motion for an attachment.

I now proceed to the second, and perhaps more important, question, whether the trial should be deferred until the attendance of the witnesses can be enforced. If the principles which I have alluded to, as to the rights of the accused, are correct, and that the most dignified characters in the Union are obliged to attend for the protection of innocence, then even the president himself, who sustains the most exalted character upon earth, that of the chief magistrate of a free people, clothed as he is with great constitutional privileges, and bound to the most important duties, vested with the whole executive power, and considered as the common parent of the American people, might probably be required to attend the trial, if his evidence was requisite for our defence. But it is not necessary for us at present to insist upon this position; we ask only for the attendance of his ministers; and though perhaps it may not be reasonable that they should be dragged from one end of the continent to another upon light and trivial occasions, yet, if affairs of state and their important avocations are at all times to shield them from attendance, our best and dearest interests may be put in jeopardy, and the means of protecting innocence totally fail. In all these cases, I take it, the court will inquire into the nature of the evidence, and see whether it is relevant to the cause to be tried. We contend that the evidence is relevant, whether it goes in justification of the defendant, or in mitigation of the crime. If in justification of the defendant, then it is admitted that it would be proper to defer the trial. This, therefore, is the first subject for our consideration; and it will depend upon the question whether the defendant will be justified in a participation in Miranda's enterprize, by the president and chief officers of the administration having known and approved of the plan.

The gentlemen concerned for the prosecution tell us that the constitution has invested congress alone with the power of declaring war; and that even the positive orders of the president (much less his knowledge or approbation) would be no justification for the defendant. We admit, indeed, this constitutional provision; but on our part, we contend that actual war may exist without any declaration. The necessity of a declaration to the existence of a public war has, indeed, sometimes been insisted upon; but is contrary to the doctrine of Grotius, Bynkershoek, and other approved writers. Hostilities committed by the public authority of one government against another must certainly create a state of war, independent of any declaration; and a state of actual war subsisting between Spain and the United States would be a justification to the defendant upon this indictment. Besides, by the constitution of the United States, the supreme executive power is vested in the president; and it is the presumption of law that this high and responsible officer will perform his duty. The citizen, therefore, when he acts with the knowledge and approbation

of the president, must stand justified, unless the case is such as could not, upon any construction, fall within his legal powers. Confidence is to be reposed in the magistrate at the head of public affairs, and though the president might be punishable by impeachment or otherwise, for his misconduct, the private citizen should be safe when acting under the authority of the executive. If actual war, therefore, may exist without a declaration, and without the concurrence of congress, then I would ask whether the supreme executive power would not be justified in directing hostilities against the enemy? Suppose, for instance, that the British government should commence an actual warfare against us, and meditate aggressions from the province of Lower Canada, would not the president be justified in making an immediate diversion in another quarter, though no actual invasion had taken place, if he could thus defeat the design of the enemy? Or would it in such case be necessary for him to convene congress and obtain a declaration of war, when in the interim our territories might be invaded, and irreparable mischief done to our citizens and their possessions? Suppose, again, that a military expedition against the more distant territories of Spain should be found necessary, to prevent an attack by them upon our south-western frontier, would it not be competent for the president to direct such an expedition in a case that would not admit of delay? The authority of the president in such circumstances may not, indeed, be given by the express terms of the constitution; but it is virtually implied and contained in the supreme executive power with which he is invested,—a power which, in all governments of every form, must sometimes act upon its responsibility for the protection of the public, even where no express power is delegated. When it neglects this high duty, it becomes an object of scorn; and for the performance of it, if the president should even exceed the bounds of express constitutional power, he would rise to a fault which his country would applaud, and which the rest of the world could not censure.

If there are cases, then, in which actual war may exist without a declaration of it by congress, (and unless I have been misinformed, the case of Tripoli was originally such,) then there may be cases in which the president may lawfully order or approve of military enterprizes without the sanction of congress. Now, if such cases can exist, the present is, perhaps, a case containing all the circumstances which would justify the president in the exertion of extraordinary powers. The situation of the two countries was in reality a state of war, as we expect to show from the message of the president and the proceedings of congress. It was right in the president to attack the enemy in his most vulnerable part; and the fitting out of the expedition under Miranda, if done with the knowledge and approbation of the president, was highly meritorious. For as the indictment charges the defendant with preparing the means for a military expedition, and as the military enterprizes are within the proper province of the president's authority, if he approved of the expedition, (as we say he did,) then the defendant stands justified. A private citizen, acting with the approbation of the executive, in a military expedition against the enemy, wants no other justification. He is not presumed to know the secrets of state, which belong to the president and his ministers. When they approve of the expedition, as Col. Smith says they did in this instance, it must be presumed legal; and all military enterprizes would be delayed and rendered precarious, if the officer was to wait for legal explanations, or acts of congress, before he complied with the wishes of the executive power. I have already said that the president is to be considered as the parent of the American family. As such, he was bound to warn them against the commission of any criminal proceedings that came to his knowledge, and he could not neglect to do so without a violation of his duty. Even if this was doubtful upon general principles, the act of congress, upon which the indictment is framed, enjoins him to prevent the commission of the offences therein mentioned. Consequently, the presumption of the legality of those expeditions which he approved would be strengthened by the consideration that it was expressly made his duty to prevent them, when they came to his knowledge, unless they were against an enemy. The private citizen, therefore, must be justified under the circumstances stated, when he undertakes to forward an expedition which has been approved by the president.

I proceed now to the next branch of the argument. If the evidence required will not justify the defendant, does it go in mitigation of his offence, and ought the trial to be deferred upon this account? Here, if we suppose that every citizen undertakes a military expedition upon his own risk, and that he cannot be justified by the mere approbation which the president may have bestowed upon the enterprize, still, as the punishment is discretionary, the motives of the defendant should be inquired into, and all the circumstances which tend to show that he acted from no improper or wicked design should be admitted to alleviate the offence. One of the greatest orators and lawyers of the present age, when speaking of the English criminal law, says that it is "the purest, the noblest, the chastest system of distributive justice, that was ever venerated by the wise, or perverted by the foolish, or that the children of men in any age or clime of the world ever yet beheld." This is, indeed, a very great and striking eulogium; but, perhaps, more applicable to our criminal system, than to that of England. We have moderated the unreasonable severity of their

code, and made the protection of the accused more peculiarly our care, at the same time that we have preserved everything that was good and valuable in their system. Thinking, therefore, as I do, of the criminal system of this country, and supposing it entitled to all the praise which Mr. Curran has given to that of England, I cannot believe that it can be so defective as to trust a discretionary punishment of offences to the court, according to the circumstances of the case; and yet not supply the means to the accused of manifesting those circumstances upon the trial. If our system is perfect, it must proportion punishments to the offences, and will not consider the stain to be equal when the whole body is clothed with corruption, and when the spot is so small that the microscopic eye can scarcely discover it. The differences of offence must necessarily imply a difference of punishment, and this again implies an examination of all circumstances, which must be had according to the language of the poet. "Ne scutica dignum, horribili sectere flagello." But this examination can never take place if the evidence which goes in mitigation, the evidence which shows the real motives of the defendant, and the circumstances of the case, is excluded from the trial. The defendant, if he has a right to justice, has a right to acquittal if innocent, and if guilty, to show what the precise extent of his offence, that he may be punished accordingly. It is in vain to say that evidence in mitigation may be received by affidavit after the trial. For this is a novel practice permitted by the indulgence of the courts, where the regular time for offering the evidence has elapsed. There is no compulsory method to oblige witnesses to make these affidavits. If they are so disposed, they may indeed do it; but they may also refuse if they think proper; and thus, if the doctrine contended for on the part of the prosecution is to prevail, there will arise this legal solecism, that the defendant shall have a right to be judged according to the degree of his guilt, and yet shall possess no legal means to ascertain that degree, by an explanation of his motives or other circumstances, which, though not amounting to a justification, may fix the relative malignity of the crime.

It is said, indeed, that this kind of evidence can only serve to mislead the jury; but I ask, by what kind of logic is it permitted to the public accuser to produce all the evidence that will go in aggravation of the crime, (whatever may be its effect upon the mind of the jury,) and to exclude all that would tend to mitigate the offence, even where there is no other certain way of bringing it before the court, except upon the trial? If this is really to be considered as the law of our country, then is our boasted system of criminal law miserably defective in a most important point. We have shown to the court by the Case of Lord Anglesea, 9 State Tr. 335, that the public prosecutor was suffered to give evidence in aggravation, because "the fine which the court was to impose was discretionary, and would be greater or less in proportion to the nature of the offence; and, therefore, everything was proper to be laid before the court that might be an ingredient in their consideration for the imposing that fine." And, surely, if this was a reason for giving evidence in aggravation, the same reason would legalize evidence in mitigation of the offence.

The counsel for the prosecution, upon this part of the argument, seem to rely upon the Case of the Chevalier D'Eon as reported by Burrows (volume 3, p. 1513),—first, to show that evidence in mitigation comes properly after the trial; and, secondly, that the want of it is no reason for postponement. On our part it is admitted that the case in Burrows is law, and whenever a case similar to it shall arise, it ought to govern. But it was a case the circumstances of which were extraordinary, and from which no conclusion can be drawn to affect the present. In the first place, no process whatever could there reach the witnesses, and if they gave evidence at all, it must be because they were well affected towards the defendant, and willing to testify on his behalf. If, therefore, they were expected to come voluntarily as witnesses to the trial, they would also voluntarily make affidavits in mitigation of the offence, if they could do so with propriety. In both cases they could not be affected by the process of the court; and their conduct depended upon their volition. So that the defendant lost nothing by their non-attendance upon the trial. Again, it is observable, that Lord Mansfield says their evidence, if in mitigation, may be received after the trial. But his lordship does not say that evidence in mitigation could not be received upon the trial. And if it could not why enter into all the other reasoning, when this at once would have been a conclusive argument?

Granting, therefore, that where the witnesses are beyond the reach of process from the court, where their evidence will be merely in mitigation; and where, if they attend at all, it must proceed from their own good will, that the trial ought not to be deferred for their nonattendance, (which is all that the case from Burrows establishes,) we cannot draw the consequence either that evidence in mitigation could not be heard upon the trial, or that, if the witnesses were under the control of the court, and ill affected towards the defendant, the court would not defer the trial to procure their testimony. On our part, besides the Case of Lord Anglesea from the State Trials, we have also upon this subject produced to the court the cases from McNally's Evidence to show that where the punishment is discretionary, evidence of character may be produced upon the trial, to inform the mind of the court as to the fine to be imposed. One of the counsel associated with me appears to have been concerned in one of those cases, and has stated the circumstances of it to the court. The counsel for the prosecution contend, that

these cases only show that character may be given in evidence upon a criminal prosecution; and they contend that the only reason why such evidence is ever admitted, is because it demonstrates the improbability that a man of such a character would be guilty of such a crime. We admit that this kind of proof may, in some cases, be properly given for the purpose stated by our opponents; for the evidence may be so equally poised, that even the circumstance of character may turn the balance. But the cases in McNally's Evidence do not go upon this principle. They admit the offences to have been fully proved, and state the evidence of character to have been received merely to guide the discretion of the court as to the extent of the punishment. Either, therefore, these cases must not be law, or they show that evidence in mitigation, where the punishment is discretionary, is proper upon the trial.

I have now gone through the argument which I proposed to lay before the court. If we are right, then the beauty or harmony of our criminal system is preserved throughout all its parts; the right of the accused to have compulsory process for his witnesses is maintained; and he is enabled, not only to manifest his innocence, if the evidence will support it, but, if he is not perfectly innocent, to show the shade and color of his offence, that the punishment may, by the court, be proportioned to it.

I conclude with observing, that the interest which the public has taken in this cause has perhaps been sufficiently accounted for. It is a state prosecution, instituted by the president's orders, for acts done with the president's knowledge and approbation. It is, therefore, highly important; and the sense of its importance may perhaps have been heightened in the public mind, by seeing the learned judge of another district called upon to assist the public prosecution, and to lend his exertions and talents in support of the prosecution.

Thursday, July 17th, 1806.

PATERSON, Circuit Justice. It appears to the court, that James Madison, secretary of state, Robert Smith, secretary of the navy, and Jacob Wagner and William Thornton, who are officers under the department of the secretary of state, have been duly served with subpœnas to attend as witnesses on the part of the defendant, and that they do not attend pursuant to the process of the court. As the facts charged in this indictment, if committed at all, were committed at the city of New York, the court could not perceive how the above-named persons, who reside at the city of Washington, and were there during the transaction, could be material witnesses on the trial of the indictment; and were of opinion that, under such circumstances. an affidavit in common form was not sufficient to put off the trial. The consequence is, that the court would inquire into the grounds of the general allegation set forth in the common affidavit, and insist upon the defendant's stating the point of materiality, which he expected to prove by these witnesses. Perhaps the defendant, by stating particulars in his affidavit, and the material facts which he intended to prove by their testimony, might remove this doubt, and induce the court to grant his application. This was the substance of the opinion delivered by the court on Monday, and which, on a review, are considered to be correct, and perfectly consistent with the principles and usages of law. The result of this opinion has been, that the defendant has come forward with an affidavit stating the material facts, which he conceives he will be able to prove by the evidence of Mr. Madison, Mr. Smith, Mr. Wagner and Mr. Thornton. This part of the affidavit runs in the following words: "And this deponent farther saith, that he hopes and expects to be able to prove by the testimony of the said witnesses, that the expedition and enterprise, to which the said indictment relates, was begun, prepared and set on foot with the knowledge and approbation of the president of the United States, and with the knowledge and approbation of the secretary of state of the United States. And the deponent farther saith, that he hopes and expects to be able to prove, by the testimony of the said witnesses, that if he had any concern in the said expedition and enterprise, it was with the approbation of the president of the United States, and the said secretary of state. And the deponent farther saith, that he is informed, and doth verily believe, and hopes and expects to be able to prove, by the testimony of the said witnesses, that the prosecution against him for the said offence charged in the said indictment is commenced and prosecuted by order of the president of the United States. And the deponent farther saith, that he has been informed and doth verily believe, that the said James Madison and Robert Smith are prevented from attending by order or interposition of the president of the United States."

In consequence of the foregoing statement, the defendant has moved the court (1) to postpone the trial; (2) for an attachment against those absent witnesses. These questions have been ably and elaborately argued by the counsel on both sides. They are important both as to their general nature and as to their immediate pressure and bearing on the cause now at issue; and I have given them all the consideration that my feeble habit of body would permit.

The first question is, whether the facts stated in the defendant's affidavit be material, or ought to be given in evidence, if the witnesses were now in court, and ready to testify to their truth? Does the affidavit disclose sufficient matter to induce the court to put off the trial? As judges, it is our duty to administer justice according to law. We

ought to have no will, no mind, but a legal will and mind. The law, like the beneficent author of our existence, is no respecter of persons; it is inflexible and even-handed, and should not be subservient to any improper considerations or views. This ought to be the case particularly in the United States, which we have been always led to consider as a government not of men, but of laws, of which the constitution is the basis.

The evidence which is offered to a court must be pertinent to the issue, or in some proper manner connected with it. It must relate and be applied to the particular fact or charge in controversy, so as to constitute a legal ground to support, or a legal ground to resist the prosecution. For it would be an endless task, and create inextricable confusion, if parties were suffered to give in evidence to the jury whatever self-love, or prejudice, or whim, or a wild imagination might suggest. This is an idea too extravagant to be entertained by reflecting and candid men; as it would, if carried into practice, quickly prostrate property, civil liberty, and good government. Law would become a labyrinth—a bottomless pit; and courts would be perverted from their original design, and turned into instruments of injustice and oppression. A line must be drawn—a line has been drawn—on such occasions, which it becomes the duty of judges to pursue. If there be no line, anything and everything may be given in evidence. Where shall we stop? What is the rule which we find to be laid down for our guidance? The evidence must be pertinent to the issue. The witnesses must be material. If the evidence be not pertinent, nor the witnesses material, the court ought not to receive either. Let us test the affidavit of the defendant by this principle or rule. The defendant is indicted for providing the means, to wit, men and money, for a military enterprise against the dominions of the king of Spain, with whom the United States are at peace, against the form of a statute in such case made and provided. He has pleaded not guilty; and to evince his innocence, to justify his infraction of the act of congress, or to purge his guilt, he offers evidence to prove, that this military enterprise was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government. Sitting here in our judicial capacities, we should listen with caution to a suggestion of this kind, because the president of the United States is bound by the constitution to "take care that the laws be faithfully executed." These are the words of the instrument; and, therefore, it is to be presumed that he would not countenance the violation of any statute, and particularly if such violation consisted in expeditions of a warlike nature against friendly powers. The law, indeed, presumes, that every officer faithfully executes his duties, until the contrary be proved. And, besides the constitutional provision just mentioned, the seventh section of the act under consideration expressly declares, that it shall be lawful for the president of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary for the purpose of preventing the carrying on of any such expedition or enterprise from the territories of the United States against the territories or dominions of a foreign prince or state with whom the United States are at peace. 3 Swift's Laws, 91, 92 [1 Stat. 384].

The facts, however, which are disclosed in the defendant's affidavit, we must, in the discussion of the present question, take to be true in the manner therein set forth; and the objection goes to the invalidity, the inoperative virtue, and the unavailing nature of the facts themselves. Are the contents of the affidavit pertinent—are they material—are they relevant? The fifth section of the statute, on which the indictment is founded, is expressed in general, unqualified terms; it contains no condition, no exception; it invests no dispensing power in any officer or person whatever. Thus it reads: "And be it further enacted and declared, that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court, in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars, nor the term of imprisonment be more than three years." The section which I have read is declaratory of the law of nations; and, besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact, and the very nature, scope, and end of civil government. The statute, which is the basis of the present indictment, was passed the 5th of June, 1794, and was temporary; but congress found it expedient, and, perhaps, necessary, to continue it in force, without limitation of time, which was done on the 24th of April, 1800 [2 Stat. 54]. This fifth section, which prohibits military enterprises against nations with which the United States are at peace, imparts no dispensing power to the president. Does the constitution give it? Far from it, for it explicitly directs that he shall "take care that the laws be faithfully executed." This instrument, which measures out the powers and defines the duties of the president, does not vest in him any authority to set on foot

a military expedition against a nation with which the United States are at peace. And if a private individual, even with the knowledge and approbation of this high and pre-eminent officer of our government, should set on foot such a military expedition, how can he expect to be exonerated from the obligation of the law? Who holds the power of dispensation? True, a nolle prosequi may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to judicial investigation and punishment, which are very different from a power to dispense with the law.

Supposing then that every syllable of the affidavit is true, of what avail can it be on the present occasion? Of what use or benefit can it be to the defendant in a court of law? Does it speak by way of justification? The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitation in our republic. Will it be pretended that the president could rightfully grant a dispensation and license to any of our citizens to carry on a war against a nation with whom the United States are at peace? Ingenious and learned counsel may imagine, and put a number of cases in the wide field of conjecture; but we are to take facts as we find them, and to argue from the existing state of things at the time. If we were at war with Spain, there is an end to the indictment; but, if at peace, what individual could lawfully make war or carry on a military expedition against the dominions of his Catholic majesty? The indictment is founded on a state of peace, and such state is presumed to continue until the contrary appears. A state of war is not set up in the affidavit. If, then, the president knew and approved of the military expedition set forth in the indictment against a prince with whom we are at peace, it would not justify the defendant in a court of law, nor discharge him from the binding force of the act of congress; because the president does not possess a dispensing power. Does he possess the power of making war? That power is exclusively vested in congress; for, by the eighth section of the 1st article of the constitution, it is ordained, that congress shall have power to declare war, grant letters of marque and reprisal, raise and support armies, provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. And we accordingly find, that congress have been so circumspect and provident in regard to the last three particulars, that they have from time to time vested the president of the United States with ample powers.

Thus, by the act of the 28th of February, 1795 (3 Swift's Laws, 188 [1 Stat. 424]), it is made lawful for the president to call forth the militia to repel invasions, suppress insurrections, and execute the laws of the Union. Abstractedly from this constitutional and legal provision, the right to repel invasions arises from self-preservation and defence, which is a primary law of nature, and constitutes part of the law of nations. It therefore becomes the duty of a people, and particularly of the executive magistrate, who is at their head, and commander-in-chief of the forces by sea and land, to repel an invading foe. But to repel aggressions and invasions is one thing, and to commit them against a friendly power is another. It is obvious, that if the United States were at war with Spain at the time that the defendant is charged with the offence in the indictment, then he does not come within the purview of the statute, which makes the basis of the offence to consist in beginning or preparing the means to carry on a military expedition or enterprise against a nation with which the United States are at peace. If, indeed, a foreign nation should invade the territories of the United States, it would I apprehend, be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy's own country; and for this plain reason, that a state of complete and absolute war actually exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other. What! in the storm of battle, and, perhaps, in the full tide of victory, must we stop short at the boundary between the two nations, and give over the conflict and pursuit? Will it be an offence to pass the line of partition, and smite the invading foe on his own ground? No; surely no. To do so would be a duty, and cannot be perverted into a crime. There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war. A nation, however, may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negotiations for redress, than to make an immediate appeal to arms. Various considerations may induce to a measure of this kind; such as motives of policy, calculations of interest, the nature of the injury and provocation, the relative resources, means and strength of the two nations, &c. and, therefore, the organ intrusted with the power to declare war, should first decide whether it is expedient to go to war, or to continue in

peace; and until such a decision be made, no individual ought to assume an hostile attitude; and to pronounce, contrary to the constitutional will, that the nation is at war, and that he will shape his conduct and act according to such a state of things. This conduct is clearly indefensible, and may involve the nation, of which he is a member, in all the calamities of a long and expensive war. It is a matter worthy of notice on the present occasion, that when the offence laid in the indictment is stated to have been committed, congress were in session; and if, in their estimation, war measures were prudent or necessary to be adopted, they would, no doubt, have expressed their sentiments on the subject, either by a public declaration of their will, or by authorizing the executive authority to proceed hostilely against the king of Spain. But nothing of this kind has been done, or at least appears to have been done. Congress does not choose to go to war; and where is the individual among us who could legally do so without their permission? Whoever violates the law becomes liable to its penalties; nor can the observance of the law be dispensed with, unless it contains a clause authorizing certain persons to dispense with it under specified circumstances, or whenever they may think it expedient. In the present case, if war had occurred between the United States and Spain at the time the facts stated in the indictment were committed, they would not amount to an offence within the statute, which relates to a time of tranquillity and peace. The defendant in his case would have been out of the statute. War is not pretended; and the law under consideration is absolute, requires universal obedience, and does not vest any officer with a dispensing power, or the extraordinary privilege of authorizing a person to do what it expressly prohibits. It appearing, then, that the testimony of Mr. Madison, Mr. Smith, Mr. Wagner, and Mr. Thornton, as stated in the defendant's affidavit, is not pertinent to the issue, nor material by way of justification or defence against the facts charged in the indictment, their absence cannot operate as a legal excuse to put off the trial.

But it has been contended, that if the testimony offered should not amount to a justification, it will to a mitigation of the punishment, and ought to pass to the jury for the sake of reaching the ears of the judges. I take this to be incorrect in principle, so far as it regards criminal prosecutions. Why suffer evidence to go to the jury, that is not pertinent to the issue; that will not justify the defendant, nor prove his innocence, nor purge his guilt? Is it that the court may instruct the jury that they must not regard such evidence, because it is irrelevant? This would be a work of supererogation and inutility. Nor is this all; the evidence may warp their opinion, may mislead their judgment, and induce them to find an erroneous verdict. If they acquit in consequence of this improper testimony, would a new trial be granted? Evidence, which operates merely in mitigation of the punishment, is fit for the court only. If the defendant be convicted, then the question of mitigation arises, and will come properly before the judges. I have always taken the distinction to be between criminal and civil cases. On an indictment for a misdemeanor, where the punishment is discretionary, the jury are to determine whether the defendant be guilty or not of the charge exhibited against him; and it is the peculiar and exclusive province of the court to ascertain the punishment. The jury have no voice in fixing the punishment; and why should they hear evidence respecting it? In civil prosecutions, instituted to recover damages, as in an action for assault and battery, false imprisonment, evidence in mitigation should be addressed to the jury, because they are the legally constituted assessors of the quantum of damages. It is of the utmost importance to the due administration of justice, that the boundary between the province of the judges and the province of the jury, which is accurately marked by the law, should be inviolably preserved; it ought not to be broken in upon, as it would lead to confusion, and render our civil rights precarious.

The Case of Anglesea, 9 State Tr. 335, has been cited to prove, that the vindictive temper and conduct of Anglesea a day or two preceding the assault were given in evidence, though strongly resisted by his counsel. This may have been proper in two points of view: (1) Because, according to the practice of Westminster Hall, matter in aggravation, previously to the commission of the offence and conviction of the offender, are not usually laid before the court after conviction, in order to increase the punishment. This is a humane practice, and in favor of the offender. I say usually, because there may be some exceptions, or some anomalous cases to the contrary. (2) Because the previous conduct, and malicious spirit of Anglesea naturally led to the assault, were connected with it, and constituted one offence. It is usual to relate the circumstances attending the fact, which form no inconsiderable ingredient in the transaction, and are perfectly consistent with the nature of the case, and the issue.—What is it, but to set forth the special manner of the fact or offence? In the case cited, it was the same person, it was the same offence. This case, therefore, is not applicable to the present, and cannot be assimilated to it.

Several passages were read in McNal. Ev., which went to show in what case the character of the prisoner may be given in evidence on his trial. Great relaxation of the old rule has of late years obtained, at least in the Irish courts of judicature; for in a certain class of cases, the character of the

defendant, when it bears on the issue, and goes to show the improbability of his having committed the fact laid in the indictment, is permitted to be given in evidence; as on indictment for seditious libels, for riots and assaults, for forgeries, &c. Let us hear the opinions of Lord Carlton, Lord Kilwarden, Baron Smith, and Lord Kenyon, 1 McNal. Ev. 321–323.

In Rex v. Brown, commission of oyer and terminer, Dublin, Dec., 1798, before Lords Kilwarden and Carlton, Chief Justices, the prisoner was indicted, at common law, for uttering a forged instrument, purporting to be a promissory note for money of Sir Thomas Lighton & Co. The prisoner offered evidence of character; which was objected to on the old rule, that evidence of character was only admissible in favorem vitæ, on capital charges, but the indictment here was not capital, but merely a misdemeanor. Lord Carlton, C. J. Com. Pl., said, he had conversed with many of the judges on the subject now before the court, who thought, as he did, that in cases where character was put in issue, evidence of such a nature might be very material: for example, suppose a man of very great property was indicted for perjury, when the object to be obtained by the perjury was a mere trifle, for instance a shilling; or suppose a man to be charged with a riot or assault, who was known to be of a peaceable and quiet disposition; evidence of character in such cases, directly encountering the nature of the charge in the indictment, must be of the last importance. His lordship then cited Rex v. Carr, Guildhall, London, 32 Car. 2, on an information for a libel against the government. Sir William Scroggs, who was the judge, and who was not likely to grant a prisoner, in such a case, any privilege that he was not entitled to, admitted the defendant to give evidence of his character and deportment. Lord Chief Justice Holt, his lordship observed, also admitted this species of evidence; and all the judges in Ireland, upon the late circuits, uniformly received the evidence of loyalty in cases where the charge was of a seditious nature, though amounting only in point of law to a misdemeanor. Lord Kilwarden, C. J. Ban. Reg., agreed with Lord Carlton, and observed, that the reason generally assigned for the admission of such evidence in capital cases, and in capital cases only, was altogether unsatisfactory to his mind. It was said to be in favorem vitæ; but he had no conception, according to the principle of sound sense and right reason, that character could be evidence in a case affecting the life of a man, and yet not evidence in a case affecting his freedom, his property, and his reputation. In Rex v. Crawley, commission of oyer and terminer, Dublin, February, 1802, W. Smith, B., in his charge to the jury, adverted to the evidence of good character, which had been given for the prisoner. Character, he said, is of great weight in every case, and requires particular attention when the charge is grounded on circumstantial evidence; for it then creates a greater degree of doubt than where the prosecution is supported by direct evidence. In the former case, evidence of character ought to be particularly attended to, because the jury is more or less embarrassed, and called upon to weigh the case with more scruple and doubt, from the very nature of the testimony. Lord Kenyon's sentiment, though promulgated in a capital charge of the first magnitude, may be well applied to all cases, where the character of the defendant comes in issue. An affectionate and warm evidence of character, when collected together, should make a strong impression in favor of the prisoner, and when those who give such character in evidence are entitled to credit, their testimony should have great weight with the jury. The reason assigned by the Irish judges, in favor of giving character in evidence on indictments for misdemeanors, when it bears on the issue, possesses great weight, and perhaps, irrefragable. I feel no disposition to controvert them, nor is it necessary to do so on the present occasion. Character had, in the cases cited, an immediate and powerful bearing on the facts in issue, and did not go merely in mitigation of the punishment. Downe, J. (1 McNal. Ev. 320), admitted the prisoner to give evidence of character, as a fraud was charged, and the punishment was not certain, but discretionary. The first reason given by Judge Downe is solid, because character bears on the point of fraud; but the second reason I do not consider in the same light, for it appears to me to be unsound and incompatible with legal principles.

The suggestion, that the evidence should be permitted to pass to the jury, that they may determine whether the offender ought to be recommended for mercy, is utterly destitute of foundation. It does not merit a serious thought. The jurors are to hear such evidence as the court think pertinent and material, and nothing more. But if matters, which may induce the jury to recommend the offender to the pardoning power, should be received in evidence, I do not know where we are to stop, or how to draw a line between the admission and the non-admission of testimony. We should be without landmarks; and afloat on the ocean without any compass to direct our course.

2. The Attachment. On this subject the judges disagree, or, as the statute expresses it, their opinions are opposed. When this happens, the judges do not assign any reason in favor of their respective opinions, but merely state the point of disagreement, that either party may carry it to the supreme court for ultimate decision, according to the 6th section of the act to amend the judicial system of the United States, passed the 29th of April, 1802 [2 Stat. 159]. One of the judges is of the opinion, that the absent witnesses should be laid under a rule to

show cause why an attachment should not be issued against them. The other judge is of the opinion, that neither an attachment in the first instance, nor a rule to show cause, ought to be granted.

Immediately after the opinion of the court had been given, Sanford moved to bring on the trial.

Hoffman requested permission for the counsel of the defendant to confer a few minutes together.

Morton requested a few days' delay, or to the next term; he did it with great deference to the court, and should submit with silent respect to their decision. The ground on which this question had been argued by the gentlemen with whom he was joined had great force on his mind, and he hoped the court would admit of a short delay. He farther requested that Mr. Smith's affidavit might be filed

PATERSON, Circuit Justice. The court have considered this point also, and determined that the trial should proceed. His own infirm state of health had for a moment inclined him to agree to a few days' delay, with the hope that he might then be able to sit on the trial; but he was convinced that he should not in that time be sufficiently recovered. He therefore relinquishes the idea of delay on his own account; and he did not perceive any benefit which could result to the defendant by granting the application.[3]

PATERSON, Circuit Justice, then left the bench.

The district attorney renewed his motion to bring on the trial. But the counsel for the defendant expressing a wish that it might be postponed till to-morrow morning, the court, with the assent of the counsel for the prosecution, granted the postponement, on condition that the defendant's counsel would make no other attempt to create delay. And the defendant's counsel having assented to this, the court adjourned till to-morrow morning.

[3] The offence of conspiracy is more difficult to be ascertained precisely than any other for which an indictment lies. It is, indeed, rather to be considered as governed by positive decision than by any consistent and intelligible principles of law. It consists, according to all the authorities, not in the accomplishment of any unlawful or injurious purpose, nor in any one act moving to that purpose; but in the actual concert and agreement of two or more persons to effect something, which being so concerted and agreed, the law regards as the object of an indictable conspiracy. There are two classes of cases in which the criminality of such agreement is perfectly intelligible and obvious: (1) where the object proposed would, if accomplished, be a criminal offence in the parties acting in it; (2) where though the ultimate object may be lawful, the means by which the parties conspirators propose to effect that purpose necessarily involve in them indictable offence. The gist of conspiracy is the unlawful confederation to do an unlawful act.

Case No. 16,342a.

UNITED STATES v. SMITH.

[MS.]

Circuit Court, D. New York. July, 1806.

CRIMINAL LAW—ACT JUNE 5, 1794—MILITARY EXPEDITION AGAINST NATION AT PEACE—EVIDENCE—CONFESSIONS.

[1. On the trial of an indictment for a misdemeanor in beginning, setting on foot, and providing the means for a military expedition against a nation with which the United States are at peace, the president's message to congress, and other documents transmitted therewith, are inadmissible to show the existence of a war at the time the acts were charged to have been committed.]

[2. An expedition, to be within the act, need not have been consummated without deviation of course. It is sufficient if it was begun, and the means prepared to be carried on from the United States, though the vessel at the identical time of sailing was not in complete readiness for hostile engagements.]

[3. Confessions of defendant, whether in crimination or justification, are to be taken together.]

[Trial of William S. Smith, indicted under the act of congress of June 5, 1794, § 5 [1 Stat. 384], for a misdemeanor in beginning, setting on foot, and providing the means for a military expedition to be carried on from the city of New York against the dominions of Spain in South America, the United States and Spain being at peace. Proceedings on the plea in abatement to the indictment are reported in Case No. 16,341a. Proceedings on a motion for an attachment against absent witnesses and for a continuance will be found reported in Case No. 16,342.

[After the close of the evidence for the prosecution, Mr. Colden, of counsel for defendant, asked permission to read to the jury the message of the president of the United States to congress at the opening of the last session, with a variety of other documents which were transmitted by him to congress at the time, to show that the United States were then at war with Spain.]

Mr. Sanford. We object to their being read, if the court please. The message of the president might be evidence to congress of the situation of our country, but it is not addressed to a court and jury. Every question of this kind should receive the decision of its proper tribunal; the questions involved in the president's message have received such a decision, and therefore must be at rest. We found ourselves in this objection upon the decision of the court, before whom it was fully discussed. But the counsel has not told us how he means to apply the message and documents. Is it for the purpose of setting up a justification? The court has determined that they are inapplicable for that purpose; therefore they cannot go as evidence to the jury. They first attempted to maintain that the government sanctioned this expedition; that not being permitted,

they now mean to show that they had a right to decide upon the president's message, whether we were at peace or at war; a question which is the exclusive province of congress to determine.

Mr. Colden. There is nothing in the decision which the court has made which precludes the testimony we offer. If there be, I have totally misunderstood the honourable judge who delivered the opinion of the court. We offered as a justification or excuse, to prove by the testimony of the witnesses whom we have subpœnaed, that the president of the United States sanctioned and approved the acts for which the defendant is now to answer. The court decided, as I understood, that although the witness should be able to make this proof, yet, as the sanction or approbation of the president would be no justification or excuse, the court refused to grant compulsory process to bring up witnesses, whose testimony, in the opinion of the court, would be irrelevant. But the question now before the court, is totally distinct from any that has been agitated, and has received no decision. We acknowledge, that the purpose for which we would introduce these documents, is to show, that at the time the expedition mentioned in the indictment was set on foot, this country was not at peace with Spain, or, which is the same thing, that Spain was not at peace with us. The court observed that we had not stated in our affidavit that we expected to prove by the witnesses we have subpœnaed that we were at war with Spain; and therefore, the court thought we could not say that their attendance was material on that ground. But, if I am not mistaken, it was to be inferred from the argument of the judge, who delivered the opinion of the court, that if we had stated in the affidavit that we expected to prove this fact, viz. that there was war with Spain, by the witnesses we have summoned, then their testimony would have appeared material, and the compulsory process we applied for would have been granted. It is true, it was the opinion of the court, that the power of declaring war vested entirely with congress. And that the president's declaration could not place us in a state of war. But this is very far short of saying, that we may not show, by any competent testimony, that there was an actual state of hostility between this country and Spain, or rather that Spain had committed aggressions and hostilities against our territory, commerce and citizens, which amounted to actual hostilities, or a state of war on her side at least.

TALLMADGE, District Judge. The court made observations but on the materiality of the witnesses; they did not go to this point, but that you were not entitled to parol evidence to prove that the country was at war.

Mr. Colden. I understand the decision of the court as I have stated it. And cannot presume that we shall not be allowed to show, that the United States were not at peace with Spain. And if we can prove that at the time that this expedition was fitted out, Spain was in open and violent hostility against this country, whatever may have been the disposition of this country to remain at peace, however reluctant she may have been to make a declaration of war, however patiently we may have been inclined to bear the wrongs and violence that were offered to us; yet without our will, and against our consent, there was an end to our peace with Spain. For we could not have been at peace with Spain, when Spain chose to be at war with us. We shall read these documents, then, to show what was the actual state of things between this country and Spain; and shall rely on these official communications of the executive, as the highest evidence of the facts which they state. For as they are made to congress by the president, in obedience to that part of the constitution which directs, that he shall, from time to time, give to the congress information of the state of the Union. There can be no higher evidence. Nor can there be an objection to our reading these documents from the newspaper which we have in court; which must derive some authenticity from its being the newspaper of the government, so far, at least, as being selected for the publication of its laws. In England the Gazette is received as evidence of the public acts of the government. Rex v. Holt, 5 Term R. 442. In the Case of Thomas Cooper, in the Pennsylvania circuit court, this kind of testimony was allowed; and in 8 State Trials, 212, the Case of John Quelch, paragraphs from the London Gazette were read, to show that there was peace between Portugal and England. Though I do not much rely on this last authority, because, although the Gazette was read, yet when an objection was afterwards raised to the testimony, the court seem to have thought it unnecessary to decide whether it was proper or not. As we offer this testimony merely to show acts of hostility against this country, on the part of Spain, it will be obvious that it does not raise the question, whether the president can put the country in a state of war, without the assent of congress. We mean to prove, that without the will, or approbation, or act of the president, or of congress, there was a war de facto with Spain. And if so, then the defendant was not guilty of fitting out an expedition against a power, with which the United States were at peace.

Mr. Hoffman. I did not expect any objections would be made to the proof now offered. I understood the opinion of the court on the motion to postpone the trial, as effectually deciding on the competency of the proposed testimony. The judge, who delivered that opinion, stated, as a reason why

the trial should not be put off, that the affidavit did not allege that the witnesses could prove the existence of war between Spain and the United States. The statement of this fact was unimportant, if war could only have existed by an act of congress; for, in that case the court must have taken judicial notice of such act. The remark, therefore, could only have applied to a war, whose existence was to be proved by circumstances and facts, independent of any legislative act; by circumstances and facts, proper for the consideration of a jury, and which, like all other matters in pais, should be submitted to them, under the charge of the court. It certainly was said by the judge, and in express terms, "that Spain could not be at war with the United States, and they at peace with Spain." But, notwithstanding the reasoning adopted on that occasion, and the conclusive opinion of the judge, which I have just mentioned, it seems we are again to discuss the question, whether the United States can be at war, without a declaration of war by congress. The objection now made, goes to exclude all testimony of the fact, excepting such a declaration. It must be granted, that Spain would not be prevented by our constitution from committing aggressions; nor would her monarch trouble himself even to read that instrument when inclined to commence hostilities with the United States; and, profoundly as I respect the talents and ingenuity of our learned opponents, I apprehend it would be difficult even for them, to persuade any person of common understanding, that Spain would wait for an act of congress to authorize her to make war on the United States. We have only then to alter the manner of stating the question, and all difficulties vanish—Could Spain be at war with us, and we at peace with Spain? The answer is self-evident, and testimony ascertaining that Spain was at war with the United States, is all that is necessary to establish the fact of absolute warfare between both nations, and ought unquestionably to be received. The message of the president, with the documents officially submitted by him, tend directly to establish, that Spain had commenced hostilities against the United States; not merely acts of violence and predatory aggressions by her subjects, but open and avowed warfare, permitted and authorised by her government. In that message and its accompanying documents, therefore, we offer the best and highest proof of the fact. By the third section of the second article of the constitution, it is made the duty of the president, "from time to time, to give congress information of the state of the Union." This provision embraces equally the external and internal situation of our country: the president therefore discharges an official duty in communicating to congress our relative situation with foreign powers; and his communications form the highest evidence of facts, of a public or political nature. They must be received as such, when necessary for the purposes of defence in a criminal prosecution. Unfortunate indeed, would otherwise be the situation of an accused individual, who, having acted under their authority, is refused their production, as exculpating testimony, and is punished for a laudable confidence in the declarations of the first magistrate of the Union. Again. The constitution declares that "the executive power shall be vested in a president of the United States of America." Is it not a branch of the executive power to declare the condition of the nation, particularly as it regards foreign governments? If not, to which department of our government is this power intrusted? Not to the legislative department, for it holds no intercourse with foreign nations, the president being the sole organ of such intercourse—to him, likewise, belongs the right of interpreting all treaties between foreign governments and our own —of deciding upon the relative duties of one to another—and of enforcing their performance. The executive department alone, therefore, can declare, in the first instance, the political state of our nation; whether it be hostile or pacific. Such was likewise the opinion of our Washington, and he acted upon this principle in his proclamation of neutrality, issued during the early stages of the French revolution; wherein he declared the condition of the nation, as it regarded France. By some it was pretended, that he had exercised an unconstitutional power; but the measure received the applause of every true friend of his country, and the approbation of its constituted authorities. But, it is said, that the duties of the executive are distinctly marked out in the constitution, and that no powers devolve on him, but those specifically enumerated, in the second and third sections of the second article. If so, I ask, from whence does the president derive his right to remove from office? A right of late not unfrequently exercised. The counsel for the prosecution, I am confident, are not disposed to question the exercise of this very important function; but, I will thank them to show, where it is included under any presidential powers, which are specially defined in the constitution. They cannot. It is a right springing only from the general grant of executive power —a power, which remains in all other cases equally unimpaired; unless when controuled in its exercise, by the qualifications contained in the second and third sections. This is not a novel doctrine. It was the doctrine of the first congress, as the debates of that day will manifest; and, I am greatly misinformed, if the present secretary of state, one of the most distinguished members of that honourable body, did not take a decided part in advocating the same princi-

ples of construction, which I support at present. Sure I am, they are the only rational and sound ones, that can be used, in giving a just interpretation to the constitution. The constitution provides, "that congress shall have the power to declare war," and until they do declare it, cry our opponents, the nation is at peace! I shall offer at present, a very few remarks, in reply to this assertion War is either offensive or defensive. This distinction is used, only for the purpose of distinguishing the nation, which offends, or which commences the war, from that which defends itself against the attack. The war is offensive by the party which commences it; on the opposite side, it is defensive. The rights of both nations, as to the extent and nature of hostilities are equal. The defending nation is not confined in her resistance, to the mere point of attack. She can at once remove the seat of war, from her own territories, to the dominions of her enemy, and in prosecuting her defence, injure the aggressive power by direct and absolute attacks. May not therefore a defensive war exist, and all its rights attach, without a formal declaration by congress? If not, a singular paradox has grown out of the constitution. Between two nations, there may exist a state of complete war on the one side, and of peace, or at least, a species of qualified war, on the other. Our constitution, which it has been said, and with justice, was the work of the wisest men, and most enlightened patriots of the nation, cannot be charged with a doctrine so inimical to our safety and our honour. It is a doctrine originating in this prosecution, and as novel as many others by which it is distinguished. The plain and obvious meaning of the constitution, is, that it is the province of congress, when the nation is at peace, to translate it into a state of war. When an option exists, the choice is with them. But, when a foreign power attacks and makes war on the United States, they are then, by the very fact, already at war, and any declaration by congress, would be idle and nugatory.

I conclude by insisting, that a congressional declaration of war is not the sole evidence of war, actually existing between Spain and the United States. The official communications of the president, made to congress, ought to be received, as evidence of the facts, which they contain, and from them the jury have a right to decide, whether Spain and the United States were at peace at the time of the offence charged in the indictment.

Mr. Emmet. I did not intend to trouble the court on this question; but to reserve my exertions, and whatever talents and arguments I may possess, until I have the honour of addressing the jury on all the matters connected with my client's defence. I am induced, however, by the solicitations of my friends near me to alter a resolution, which was not suggested by indolence, but by attentive observation of the whole course of this prosecution; and not to abandon the last effort, which it will probably be necessary to make, exclusively with the court, for bringing forward the defendant's case to the best advantage. Our object is to give evidence as to the state of the country, with respect to its relation with Spain; for that purpose we offer the president's message to congress, and the other documents to which it refers, and with which it was originally accompanied. It is the president's duty, under the third section of the second article of the constitution, to lay before the congress information of the state of the Union, and of course, of our relations with foreign powers. This message was delivered in performance of that duty; and is therefore, at least, prima facie evidence of the facts which it contains. If it and the other accompanying public documents shall be rejected as inadmissible evidence, I confess I do not know where the defendant is to look for any better testimony as to this part of his defence. But it is stated that the decision of the court, on the motion for putting off the trial, has precluded us from giving evidence as to this point. If so, I think, with the utmost deference, that the court travelled out of the subject-matter before it. I pay profound and willing respect to its decisions, when they relate to the matters submitted to it by the parties; but when they pronounce without necessity upon irrelevant topics, they become extrajudicial, and cannot lay claim to the same authority. Did the court say we were precluded from examining the question whether this country and Spain were at peace? That was never presented to it as the question for its consideration. Our application for putting off the trial was grounded on the absence of witnesses, who could prove, not the state of peace or war, but the president's knowledge and approbation of the defendant's conduct. Why should we be precluded from examining the question whether this country and Spain are at peace? In the indictment it is averred that Spain was at peace with the United States. It is therefore a fact comprehended in the general issue joined in this prosecution; and we are surely entitled, under all the rules of law, to show that it is false. I request the attention of the court to this point. The adverse counsel admit they are bound to prove the fact; but they refuse to us the privilege of disproving it, of counteracting their proofs, and of showing that they are mistaken. Was there, or not, war de facto, is emphatically a question of fact, and as such ought to be submitted to the jury: if they should be of opinion that there was such war, the whole of the indictment is not proved. It seems, however, to be argued, that a war de facto is not sufficient to disprove the indictment, because it is founded on a statute which is declaratory of the law of nations; and that the words of the statute are to be construed with reference to that law.

It would be a sufficient answer to that argument to say, that a war de facto is recognised by the law of nations; but further, I beg leave to dissent from the opinion that this statute is declaratory of that law, although the assertion has proceeded from an authority which I highly respect. By looking at the statute, it will be found to have been originally enacted for only two years; the limitation of its duration shows that it was not intended to be declaratory of the law of nations; for that law is perpetual, and does not require to have its meaning declared every second year. The object of the act is not declaratory, but to create and describe a crime and to annex a penalty to its commission. The argument drawn from that assertion, I think, therefore, fails on every ground, and that we ought to be permitted to give the president's message in evidence of outrages committed by Spain on our frontiers, and her depredations on our commerce; whether they amount to war de facto will be matter of consideration for the jury; but we have a right to show, if we can, that the relation of peace was broken by Spain; that she carried on hostilities, violated our territories, and waged war upon our trade. Permit this to be shown, and she will not appear to be a nation at peace with us; nor will the absurdity be maintained, that we were at peace with her, when she was at war with us.

Mr. Harison. I presume that if there is any principle in our law, certain and incontrovertible, it is that in all criminal cases the jury are the judges of the law, as well as of the fact. And from this principle it follows, that no question purely of law can arise, connected with the guilt or innocence of the defendant, which is to be considered as exclusively belonging to the court, and not within the cognizance of the jury. For if, as to certain propositions so connected, the court can pronounce that by law either the affirmative or the negative is to be considered as existing, and exclude the evidence relative to that proposition, it will result, as an inevitable consequence, that they can limit and confine the province of the jury within such bounds as they themselves shall deem proper. They can assume the several propositions and controul the verdict according to their pleasure. In the determination of this cause, the question of peace or war is of primary importance; because, to establish the guilt of the defendant, it must appear that the expedition was against a nation with whom the United States was at peace. Such is the express declaration of the statute. It is therefore "a turning point," to be determined by the jury whether we were at peace with Spain when the offence is supposed to have been committed; and if the jury are to determine it, they must have every species of evidence that is fit to demonstrate the actual situation of affairs between the two countries. In opening this cause to the jury, the district attorney seems to have been fully convinced of the doctrine for which I am now contending. He then informed the jury, that the fourth point which he should establish would be that this country was at peace with Spain, when the offence was committed, which is charged in the indictment. At this time, however, he insists that this is a mere point of law, about which the court only is to judge; without reflecting that the great maxim I have already noticed would be violated by his doctrine; and without considering, that in relation to this point, legal inferences can only be deduced from facts antecedently appearing. In criminal cases, it cannot be proper for the court to assume the fact, and determine the law. They cannot tell the jury, this country was at peace. Such is the law; and you are to determine the guilt or innocence of the defendant upon that supposition. If the court could do this, the power of the jury in criminal cases would indeed be feeble, and very different from what we have supposed. But, admitting that the question of peace or war may be proper for a jury, we are told that no war can exist without a declaration by congress. Consequently, that no evidence but the act of congress can be received, to demonstrate the existence of a war between this and any other country. The federal constitution has, indeed, provided that "the congress shall have power to declare war;" and thence it is inferred that war cannot exist without such declaration. But surely, this provision of the constitution can only relate to cases where there is an option to embrace the alternative of peace or war; and it by no means implies that a formal declaration is essential to the existence of actual warfare. If the enemy commences the attack, we may appeal to arms immediately, and without any ceremony. The state of peace is no longer in being; and from the very instant that the aggression takes place, the two contending powers, by the law of nations, which is founded upon the law of nature, are to be considered as enemies. Even allowing then, that as to offensive war on the part of this country, the doctrine of our opponents would be correct; yet it should be remembered that there is a defensive, as well as an offensive war; and that the state of peace or war between two countries implies reciprocity. Both must be at peace, or both will be at war. So that, if a foreign country should declare war against the United States, or attack their territories, or commit acts of open hostility and aggression, this country would be in a state of actual warfare, without a declaration of congress upon the subject. If any doubt could be entertained whether to constitute a war in such cases, it is necessary that there should be a precedent declaration, I could refer the court to the most approved writers upon the law of nations; to Grotius, Puffendorf, Barbeyrac, Vattel, and others; all of whom (whatever may be the discordance of their opinions as to the necessity of declaring war when it is in its nature offensive) agree in the sentiment that under such circumstances as I have already stated, no rule of the law of nations

would be violated, if war should be carried on without being declared.[1] I might add that the constitution itself has contemplated a case in which war may exist without any declaration of congress; where a state may engage in it, though not invaded, if in such imminent danger as will not admit of delay. The question, then, as to the state of our peace, must depend upon a variety of circumstances, and may be made evident to the jury by a variety of proofs. In the case of offensive war, the declaration of congress could be resorted to; and where the war commenced by the acts of aggression of the enemy, the acts might be proved in the same manner as every other fact of great notoriety. If then this country might have been actually at war with Spain, without any declaration of congress, it will only remain to show that the president's message is proper evidence to establish the fact. Here I must observe to the court that, by a particular provision of the constitution of the United States, it is made the duty of the president, to give congress information, "from time to time, of the state of the Union." Hence, his official communications to the legislature, must be considered as stamped with the character of truth, and carrying in themselves the most irrefragable evidence of those facts which they relate. The state of the Union depends, not only upon its internal circumstances but also upon its situation with respect to foreign powers; and when the chief magistrate of the Union exhibits to the congress a state of facts, there can be no higher evidence to establish their existence, and the consequences that result from them.

The court will no doubt recognize the presumption of law that all magistrates execute their duty with fidelity; and this presumption shall prevail until the contrary is shown. But if such a presumption exists as to the ministers of justice and subordinate magistrates of the country, it must apply, with much more force, to him who is invested with the highest dignity, and most important trust. It would be indelicate to suppose that he had deviated from the truth, and it would require the most convincing proofs to establish the fact. We hope, therefore, that the president's message will be admitted in evidence for the consideration of the jury; and we trust it will convince them that the United States were not at peace with Spain, as is alleged in the indictment.

One objection, however, still remains to be noticed. It is said the present questions have been determined by the decision of the court, upon our application to compel the attendance of witnesses. But I do not think this is the case. If I am not mistaken, the court mentioned that if the United States were not at peace with Spain, the defendant could not be guilty; and that the affidavits produced by the defendant, did neither allege the existence of a war on the part of the United States, or that the witnesses could prove it. As far as the language of the court then went, according to this statement, it seems to imply that the question of peace or war was open for discussion; but as we did not allege the materiality of the witnesses to prove the state of warfare, the court could not defer the trial on account of their absence. We were certainly under no necessity at that period of the cause to allege the state of warfare, for any other purpose but to obtain the attendance of those witnesses. If we did not judge it proper to make the allegation for that purpose, still we have a right upon the trial, to avail ourselves of the defence, and if permitted to do so, it will be a complete justification.

Mr. Sanford. I shall be extremely brief in reply to the arguments of the gentlemen who have dilated so much upon the point now before the court. The authority cited to show that the gazette is proper evidence to go to a jury, is inapplicable until a previous question shall have been decided. The question immediately before the court, and which I apprehend must be first decided, is whether the defendant can be allowed to offer any evidence whatever to the jury, to show that the United States were at war with Spain. If it shall be decided, that the defendant is entitled to give evidence to the jury, to show a state of actual war, an ulterior question may then arise, whether the gazette, or whatever else may be offered is proper evidence for that purpose. I shall, therefore, entirely abstain from a discussion of the latter question, and shall return to our former proposition on this subject, which is, that the question of peace or war under this statute, is a question of law to be decided by the court, and not a question of fact to be decided by the jury. If then, this be the point which is now presented to the court, I conceive that it has already been very fully discussed, and has already received the decision of this court. The adverse counsel are pleased to say, that they did not understand that this point was before decided. They surely have not so soon forgotten that this very argument was discussed upon the argument of the motion for a postponement, and for attachments. Did they not there urge, that the testimony of their absent witnesses was wanted for the purpose of establishing a state of actual war? And was not their whole train of reasoning upon this subject the same that has now been urged? The opinion of the two judges, as I understood it, was, if not in terms, at least by necessary consequence, that the question of war or peace under this statute, is a question of law exclusively for the decision of the court. (Here he recited

[1] Vide Bynk. Quest. Publ. Jur. lib. 1. c. 2; Vatt. Law Nat. lib. 3. c. 6. § 57; Grot. de Jur. B. et P. lib. 3. § 6; Puff. de Jur. Nat. & Gent. lib. 8. c. 6, and the notes of Barbeyrac; "Heineccius Systema Juris," bk. 2. c. 9, § 197; Hen. Cocceii et Sam. L. B. Cocceii, Com. ad Grotium; vide etiam Nolfii Jus Gentium, c. 6, § 713.

some parts of the opinion, for which vide ante pages.) This opinion, however, is not now before the court, and I can only cite it from memory. I will, therefore, rapidly recapitulate the reasons upon which we contend that the question of war or peace is in this case exclusively a question of law. The high power of making war, is vested by the constitution, in the legislature alone. This provision of our constitution, is evidently the result of that jealous spirit of liberty, which pervades the people of this country. The power of making war, so important to their interests, and if abused, so dangerous to their liberties, could not, consistently with that spirit, be vested elsewhere than in the whole legislature. It follows, that under our constitution, the only evidence of a state of war which can be recognized by the courts, is the act of the legislature declaring it; for until the legislature has declared war, the nation is constitutionally and legally at peace. This consequence seems plain and undeniable. But the adverse counsel say, that war may exist in fact, though not declared by congress; that war may exist by the actual commission of hostilities, or may take place by the actual invasion of our country. They then ask, is not this war? And may not individuals, in such a state of things, undertake military enterprises against the offending nation without incurring the penalties of this statute? I answer, certainly not. I concede that the state of things which exists when the country is invaded, or actual hostilities take place, may in a certain sense of the term, be denominated war, and the counsel opposed to us, concede that war may exist by the declaration of congress, though no invasion or hostilities should have taken place. We find then, that we are here using the words "war" and "peace" in different senses. Our opponents talk of actual war, and we speak of war declared by congress. The question between us then, comes to this inquiry; in which of these senses have the legislature used the word "war," or its correlative "peace" in this statute? Without urging other topics in support of our construction, a very slight attention to the consequences of the opposite doctrine, will be sufficient to show that the word "peace" is used to indicate that state of things which exists when the nation has not declared war. Actual hostilities may take place by the irregularities or violence of individuals, or if the counsel please, the United States may be invaded, and yet the legislature may suppose that the best interests of the country require it not to declare war, but to attempt to obtain redress by negotiation. It cannot be denied that they are the constitutional judges of this question. If they have the constitutional right of deciding whether the nation shall make war or not, it follows that all the individuals of the community must submit to their decision. But the doctrine set up on the other side, is the very reverse of this. It is now contended, that if actual hostilities have happened in any extent whatever, all the people of the community are absolved from their obligation to remain at peace, and may set on foot military expeditions, and make any sort of offensive war, though the government of the country should not have declared war, and should wish to remain at peace. According to this doctrine, any individual may, at any time, declare, that in his judgment, war has taken place, because some act of irregularity or violence has happened, and may take steps, the certain tendency of which, will be to precipitate the nation into a serious conflict. When Great Britain shall capture our vessels, or impress our seamen, or commit any other act of violence, which by itself may be denominated "war," it is then the right of every citizen, according to this doctrine, to fit out an armament to invade the territories of Great Britain, and make war upon her subjects.—When disputes are subsisting between the United States and Spain respecting territorial bounds and Spanish troops occupy a part of the disputed territory, claiming it as their own, this is called an invasion of our territory, and is denominated "war"; and Colonel Smith, and every other citizen of the United States, is therefore at liberty to undertake hostile enterprises against the dominions and people of Spain, though the government of the country, with a full knowledge of all the circumstances, has decided that it will still remain at peace.

These are the consequences of the doctrine now urged on the other side, and however absurd are not exaggerated. It never can be seriously imagined, that the legislature used words in a sense which must lead to such absurd consequences. The plain and obvious meaning of this statute is, that while the government of the country are at peace, all the citizens should be bound to observe the duties of that situation, and the very object of the statute is to prevent individuals from plunging the nation into war, by their own unauthorised acts of violence. The peace, mentioned in the fifth section, is described to be peace between the United States, and the foreign prince or state, thereby indicating that state of things which exists while the nations, and their governments are at peace. Any other construction would lead to the solecism, so well described by the presiding judge of this court, who is now absent, in his late charge to the grand jury, of a nation at peace, and its citizens at war.

But the adverse counsel still ask, have not our citizens a right to defend themselves when the country is invaded? Certainly they may, but this does not in any degree prove, that they have a right, in such circumstances, to invade a foreign country in turn. Defensive war is a branch of the natural right of self defence, which is enjoyed by

communities and individuals in all circumstances whatever. The right of making offensive war, belongs solely to the sovereign power of the community, and can only be lawfully exercised by its authority. The rights of defensive warfare are not in question in this case, but the inquiry is, in what circumstances the citizens of this country, may invade the territories of another. Our position is, that according to the constitution of the United States, and the true meaning of this statute, no citizen can set on foot military expeditions, or make war against the dominions of a foreign state, until the relations of peace shall have been dissolved by an act of congress. In this case, no law has passed declaring war, or authorising hostilities against Spain. Our treaty with Spain is still in force, and is therefore the supreme law of the land. It results that in these circumstances, the court is judicially bound to consider the two nations at peace, and that the proposed inquiry is improper.

Mr. Hoffman. The counsel for the prosecution have the right of closing this argument; but, as the decision of the present question involves very important principles; and is intimately connected with the defence of my client, I ask permission to follow my learned opponent (Mr. Edwards) who has just spoken. I am greatly mistaken if I shall not refute his reasoning, and establish our own arguments, by the very authorities which he has produced. It has been asked, with a degree of triumph, if a private citizen can capture the property of an enemy, or commit depredations on his commerce, without regular commission or authority. Now it so happens, that we have never contended for a principle so illegal, nor evinced such ignorance of the law of nations. The question and answer were equally the offspring of the counsel's own fertile imagination; and could only have been introduced to divert the attention of the court from the true point in discussion, or to afford himself an opportunity of displaying his ingenuity in refuting arguments which we should have been ashamed to advance. We fully admit, that an individual acting offensively against a common enemy, must be regularly authorised by his own government, otherwise his aggressions might be deemed piratical, and himself rendered liable to punishment, as well by the foreign nation as by our own tribunals. The court surely understands that Col. Smith is not charged with an offence of this nature; that the indictment is founded on a particular statute; and that to bring him within its penalty, Spain must have been at peace with the United States. But we offer to prove her at war, and the sole question is on the admissibility of the evidence, necessary to establish that fact. Our opponents contend, that a declaration of war by congress is the only legal evidence of the fact. This we deny. And it must be granted, if we are right, that the evidence we offer is of the highest nature, and must be received. I certainly feel much indebted to the learned counsel for his research into the laws of the United States; and thank him for their production, which occurs so opportunely for the support of my argument. They were not within my recollection, or I should have read them, as furnishing a practical construction of the constitution. They have been rightly considered as a legislative interpretation of that instrument. Before I advert to these acts, I will notice the 12th article of the amendments to the constitution, which says: "The powers not delegated to the United States, by the constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people." This amendment was pressed into the argument with all the zeal of sincerity; yet I am at a loss to comprehend its connexion with the present discussion. We are agitating, whether the United States were at war, or in peace? The right to determine on the one or preserve the other, is expressly delegated to the United States: neither the states respectively, nor the people at large, can exercise any constitutional power over this question; its decision exclusively belongs to the general government; and the present inquiry is, to which department thereof does it belong? Further—The object of this amendment, was to prevent the United States (not particular departments of its government) from assuming the exercise of powers by implication; tending to infringe the sovereignty of the states, or to violate the rights of the people. The nature of our federal government, excited a vigilant and cautious jealousy on this subject; and the amendment was made to insure the jurisdiction, and local sovereignty of the states over all matters, not peculiarly of national interest or concern. A chapter of the alcoran would have elucidated the gentleman's argument as clearly as the amendment.

Let us see whether he has been more fortunate in his reliance on acts of congress. The first quoted is the act of the 27th of March, 1794, entitled "An act to provide a naval armament." [1 Stat. 350.] It recites that "the depredations which had been committed by the Algerine corsairs on the commerce of the United States, rendered it necessary that a naval force should be provided for its protection;" and it authorises "the president to provide six frigates," and makes the necessary provision for officering and manning them. This act provides the ways and means for a naval force, but contains no direction for its employment or destination. The framers of the law knew the full extent of their constitutional powers. They knew, that it was the duty of congress to provide the ways and means for carrying on war, but that it belonged to the executive of the union to direct the public force.—The last section, is important, as it plainly indicates, we were then at war with Algiers: "If a peace shall take place between the

United States and the regency of Algiers, no farther proceedings are to be had under the act." What! were we then at war with Algiers, and without any declaration of war by congress? Yes; and congress, without whose declaration, the gentleman would have us believe, that the United States must always enjoy the tranquillity of peace, do not, by this or any prior act, declare war against Algiers; they find it already commenced without their concurrence. The choice of decreeing the fact is superseded by the fact itself. They increase our naval forces, and forbid their reduction "until peace shall take place." Again—I ask how congress became informed, that Algiers was at war with us? They are not charged by the constitution with the intercourse between us and foreign powers, for that is an executive function. I apprehend a little more research would have produced a message from the president, wherein he judges of the fact himself, and recommends a more effective force to be provided. What is this, but his declaring the situation or state of the nation, as it respects Algiers? To comment on each of the laws cited by the counsel, would be an unpardonable waste of time; I shall only notice some of them, and that in a very cursory manner. The next in order is an act passed April 20, 1796 [1 Stat. 453], and being merely supplementary to the law first read, cannot invite a single additional observation. We have next "an act for providing a naval armament," passed July 1, 1797, which makes provision for the officering and manning of two frigates. I remark, that the act of March, 1794, was no longer in force, peace having taken place with Algiers; and the statute of 1796, provided for the building of frigates, but not for their equipment, or the subsistence of their officers and crew. It would lengthen out my reply unprofitably to mention, even by name, the numerous statutes which have been read. They are generally of the same import—one authorises the president to build or purchase twelve ships—another adds some revenue cutters—a third allows our merchantmen to protect themselves, and, by a fourth our intercourse with France is prohibited. Why they have indiscriminately been forced into this day's service, I am at a loss to comprehend; nor have I been able to learn, from the arguments of the counsel, the application of any, excepting the first and the last, to the present question. These I gladly present to the consideration of the court; they bear strongly on the present question; and, in my judgment, place our doctrine beyond a doubt. Before I consider them, I repeat one general observation, "that war can exist between the United States and a foreign power, without a declaration of war by congress."

Now for the acts: The first is the act of May 28, 1798, entitled "An act authorising the president to raise a provisional army." [1 Stat. 558.] This act called forth many strong remarks from the gentleman; and from his language, I am to conclude that he spoke the genuine convictions of his judgment; his inferences and my own, from the same source, are very different, and the court will decide between us. This law declares, "that the president of the United States be, and he hereby is authorised, in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power; or of imminent danger of such invasion, discovered in his opinion to exist; before the next session of congress, to cause to be enlisted and to call into actual service a number of troops," &c. Do not congress here, by express terms, contemplate the fact of the United States being at war, by the sole act of a foreign power? An army is to be raised and to be called into actual service, not in consequence of a declaration of war by congress, but in the event of war declared against the United States. And let it always be remembered, that the nature and the place of this actual service are left to the judgment of him, in whom the constitution has wisely confided the direction of the national forces. It must be admitted, that this act is no declaration of war; it is prescriptive, and it supposes a war may prevail between the United States and a foreign power, before the next session of congress.—Prevail—how? The reply is obvious; congress would be out of session. The war could not proceed from their act; yet it might take place by a declaration of war against the United States, and in that case, congress considers us, in every sense of the term, a nation at war. Our nation would be stamped with the character of belligerent, and its warlike operations would assume an offensive or defensive course, as circumstances might demand. This act is wholly inconsistent with the assertion, that the nation must always be at peace, until congress shall declare it at war. I come now to the last act, passed March 2, 1799 [1 Stat. 725], entitled "An act giving eventual authority to the president to augment the army." This act differs from the preceding one, as far as I can at this moment discover, only in its phraseology. Instead of providing for a case where war shall be declared against the United States, congress, knowing that a foreign nation might make war, without any formal declaration to that effect, vary the terms before used, and provide "in case war shall break out between the United States and a foreign European power" for the augmentation of the army. The inference is too plain and too strong to be resisted. Can the court believe, that congress ever indulged so illusive an opinion, as that war or peace depended on their will or pleasure? "If war breaks out," (says the act) not by the choice of the United States, for then we admit that congress alone has the election, but, breaks out, by the acts of a foreign power, over whose decision and conduct congress could have no controul. The case here contemplated is altogether anal-

ogous with that, which we hope to prove existed at the time of the offence, charged in the indictment; for we offer expressly to show, that war had broken out between Spain and the United States; by Spain having, without any formal declaration, actually made war on the United States. If our testimony does not establish this fact, it cannot serve us.

Unfortunately for the gentleman, his inferences from the last statute, and the principle, for which he has so warmly contended, are directly at variance. "Congress alone," says he, have the only "power of declaring the nation at war." If this power is conferred exclusively on them, they cannot delegate it to any other branch of the government; for each department must execute its prescribed constitutional trust. We might as well say congress could devolve the whole duty of legislation on the president. I demand then, who was to judge the fact, whether or no, in the language of the last statute, "war breaks out?" The president. And his opinion would fix our nation exactly in that condition, where it is pretended congress alone could place it. What is this, but admitting the right of the president to pronounce, in the given case, the condition of the nation, by declaring that war did exist. Our reasoning is perfectly consistent; there is no incongruity in the exercise of the power, which we ascribe to the executive, and of the right vested in congress. When the United States are at peace, congress alone can elect to go to war; they cannot commit this choice to the president; but when war shall break out, or in other words, when a foreign power shall declare or make war against the United States, it is with the president to declare the fact, and with congress to provide the ways and means for defence.

I have thus endeavoured to confine my remarks strictly within the limits of reply. This argument was unexpected; but, feeble as it has been on my part, I cannot but hope it will prove satisfactory. I repeat my sense of obligations to the counsel, for the strength his better acquaintance with our statute laws, has afforded to our general proposition; for, if legislative sense and practice on an article of the constitution, can be deduced in aid of its true interpretation, we feel, that we stand upon sure and strong grounds.

I conclude with entreating the court always to distinguish, that we are not indicted for any offence against the law of nations; but charged with infracting a particular statute, of which there could be no breach, if Spain was at war with us. The public prosecutor has so shaped his indictment, and by it he must abide.

The argument on this point being closed, the judge, in a few words, decided that neither the president's message, or any of the documents that were offered, should be read.

Mr. Colden. We now offer testimony to show that the government had knowledge of the whole transaction.

TALLMADGE, District Judge. That has been decided as not being material to the issue. That question was deliberately settled in a full bench. I cannot attempt to alter it myself.

Mr. Colden. We do not ask to prove it by the gentlemen who are at Washington. We offer Mr. King as a witness, who is now here, to prove that the expedition was made with the knowledge and approbation of government.

TALLMADGE, District Judge. It cannot be received, as it is wholly immaterial.

TALLMADGE, District Judge (charging jury). Gentlemen, the trial upon this indictment has already occupied several days of your time. It is now drawing to a close. You have listened to the testimony of the witnesses and have attended to the argument of counsel. If in some instances the latter has been more at length than clear and illustrative, in others it has been ingenious and eloquent. This is a cause of considerable expectation and importance, both as it regards the individual accused, and as it relates to that system of neutral policy which hitherto our government have invariably pursued, and from which the United States, in a great measure derived, and are to expect, prosperity and happiness.—Conviction may not only subject the defendant to fine, but the loss of personal liberty; and should our government permit offences of this nature by passing them over with impunity, war and a participation in the quarrels and bloodshed of Europe must necessarily ensue. Need I say that such consequences ought especially to induce a jury to the most careful and dispassionate consideration of the evidence, and bear them superior to any prejudice which idle report, or out-door observation, may have excited. You will now give your attention to a review of this subject. It shall be my endeavour to present it in its native state stripped of embellishment. It is my duty to state to you the law, the substance of the accusation, and the defence.

You have heard much said upon the right of a jury to judge of the law as well as the fact. Be assured, that on this occasion there is not the least desire to abridge those rights. I am an advocate for the independence of the jury. It is the basis of civil liberty, and in this country I trust will ever be a sacred bulwark against oppression and encroachment upon political freedom. The law is now settled that this right appertains to a jury in all criminal cases. They unquestionably may determine upon all the circumstances if they will take the responsibility and hazard of judging incorrectly upon questions of mere law. But the jury is not therefore above the law. In exercising this right they attach to themselves the character of judges, and as such are as much bound by the rules of legal decision as those who preside upon the bench. It was delivered as the opinion of this court by the judge who presided at the commencement of the term, and it is still my opinion that the United

States were at peace with Spain at the time the defendant is charged with the offence in the indictment. It was also the opinion of the court, and no subsequent argument has changed my view of the subject, that the previous knowledge or approbation of the president to the illegal acts of a citizen can afford him no justification for the breach of a constitutional law.—The president's duty is faithfully to execute the laws, and he has no such dispensing power. These points have received the decision of the court seriatim, and I trust a jury will not set up a contrary opinion but with great circumspection and deference to the learned judge who delivered them, the necessity of whose absence is a subject of regret, and whose opportunity for correct legal decision is obviously so far superior to what falls to the common lot of jurors.—Should you however choose not to confide in the correctness of the court in this respect, the data exhibited, and which will lead to your determination of these points, are a view of the constitution and laws of congress giving and defining the power of making war; the powers and duty of the executive branch of the government—the statute upon which the indictment is preferred, and the treaty of San Lorenzo, 1795, which stipulates "that there shall be a firm and inviolate peace and sincere friendship between his Catholic Majesty and the United States." You have no document, nor any proof before you, establishing a state of things contrary to the stipulations of the treaty I have now read.—Certain papers have been offered in evidence, which, it is said, acknowledge aggressions by Spanish subjects, and evince a state of war in fact between the United States and the king of Spain.—By authority of the former decisions, those were decided irrelevant and rejected as improper evidence. The United States cannot be constitutionally at war, but when war is authorised by congress, or is rendered an act of necessity by the invasion of a foreign enemy. Principles of self defence in such case point it out as the duty of the chief magistrate of the nation in the interim of congress to repel force by force. The greatest scope of the jury is to determine upon points arising upon the pleadings and such evidence as is permitted to come before them. It is the exclusive province of the court to determine upon the admissibility of evidence. That which their judgment rejects as improper, the jury have no right to presume. The contents of those papers is unknown, and conjecture can never afford safe ground for the decision of a jury, sworn to determine truly. Our living at peace is what constitutes the offence. For although the defendant was concerned in setting on foot, or preparing the means for a military expedition against the Spanish dominions, if the United States were at that time at war with Spain, he would be innocent, and should you so determine, you will acquit the defendant upon his indictment.

The indictment against William S. Smith, contains counts, charging him with offences prohibited by an act of congress of June, 1794. The fifth section of that act reads as follows: "That if any person shall, within the territory or jurisprudence of the United States, begin or set on foot, or provide, or prepare the means of any military expedition or enterprise, to be carried on from thence, against the territory or dominion of any foreign prince or state, with whom the United States are at peace, every such person, so offending, shall, upon conviction, be adjudged of a high misdemeanour," &c. It is the peculiar province of the jury to inquire, whether the evidence adduced maintains the charges in the indictment. If it fully supports any one of them, it will be your duty to find him guilty. The proofs in relation to the matters of fact, charged in the indictment, have very properly been divided, into that which regards the setting on foot, providing or preparing the means within the United States. for an expedition or enterprise to be carried on from thence—that which regards the object, and that which manifests the defendant's participation and agency in setting on foot and preparing the means for such expedition or enterprise.

A summary of the testimony of the many witnesses who have been examined to prove the first point is, that the Leander, a merchant vessel, owned by Samuel G. Ogden of this city, and for some time previously used in the St. Domingo trade, had just returned from a voyage from that island, when she was chartered to take out Gen. Miranda and such persons as should choose to go along with him. The vessel immediately underwent repair and alteration suitable to the particular purpose; having a new lower deck built in her hold. She cleared out at the custom-house on the 23d January, and sailed from this port on the 2d February last—had a very crowded cargo, and was laden almost entirely with articles of warlike preparation. From 180 to 200 men were here engaged in the enterprise, several of them immediately after took military title and rank, and all were submitting to subordination and discipline. Eleven or twelve hundred suits of soldiers' uniform—about 600 swords and cutlasses, and a great number of belts, pouches and cartridge boxes—about 4,500 pikes—a number of muskets, horsemen's pistols and blunderbusses, all of which were principally in boxes or casks. Exclusive of her complement of 17 guns, the Leander had on board about 34 cannon, with several field carriages—150 casks of gun powder, and a quantity of ball suited to cannon and muskets of different caliber. These articles were chiefly purchased by the captain of the vessel, Armstrong, upon the credit of Mr. Ogden, and sent on board with a view to the enterprise. The object was either military or commercial. Miranda was

at the head of the expedition, who for 20 years has made no secret that his wishes and intentions were inimical to the duration of the Spanish government in South America. His declarations to Mr. Ripley, to Col. Platt and Swartwout, avow his design of returning to his native country, the province of Caraccas; to revolutionize it, and to free his countrymen from what he terms the yoke of Spanish oppression. Allurements, military honours and rapid fortune, were held in view to induce men to enter upon an enterprise, secret and unexplained, while written assurances were given that the service should neither be against the French nor English. The testimony of Mr. Rose, who went out in the Leander from this city, and remained on board until the capture of the two schooners, and Miranda's return with the Leander to Barbadoes, will more clearly than that of any of the other witnesses, enable you to determine whether the original intention of the preparation and outfit of the Leander was for a military expedition, or mere commercial enterprise. The witness swears that soon after the vessel left the Hook, he with several others were industriously employed in making handles to the pikes, and putting the arms on board into complete readiness for actual service. That the vessel first touched at Jacquemel, but did not there unload any of her cargo, or transact business of a commercial nature, and only remained to recruit a few men and equip the two schooners, to accompany and support the Leander in the enterprise, out of the supplies she brought from New-York. While at Jacquemel Miranda issued commissions to those who took military rank and office, before the Leander left this city. From St. Domingo this squadron proceeded to Aruba on the road to the Caraccas, when the men were all landed and underwent military parade and inspection, and here first were made acquainted with the particular destination. The hostile landing of a military force, and the distribution upon the main, of proclamations in the Spanish language, headed by Miranda's name, as general and commander in chief, next are attempted off Porto Cabello by the very men who were engaged in this city, armed and equipped with the very preparations provided and carried from here. These attempts are opposed by Spanish government vessels; an engagement ensues; the invaders are beaten off, with the loss of the two schooners and many of the men.—The Leander returns alone, taking the course to Trinidad, but falling in with an English sloop of war the Lilly, with her went into Barbadoes. The counsel for the defendant urge this to be a mere commercial enterprise, from the facts, that the vessel had been previously occupied in the West-India trade; that the articles composing her cargo, were those of ordinary commerce, the open manner they were purchased and put on board, and that the Leander was not in complete condition and readiness to carry on a military enterprise at any time, while she remained within the United States. I think there is some reason to doubt the correctness of this position, and to suspect that the 1,200 suits of soldiers' uniform, the regimental coats, the cannon drills, the chest of armourer's tools, and the case of surgeon's instruments, not to be paid for unless the expedition should be successful, were not intended as articles of commerce.

It is not necessary that the expedition should be consummated without deviation of course. Was it begun, and were the means prepared to be carried on from the United States? The words of the statute are, "If any person within the territory or jurisdiction of the United States, shall provide or prepare the means of a military expedition, to be carried on from thence;" therefore, it matters not whether or no, the vessel, at the identical time of sailing, is in complete readiness for hostile engagement. You are not to inquire of her capacity to achieve the object. If, in fact, the Leander sailed with the intent, and means to carry on such an enterprise, I conceive the transaction comes within the prohibition of the act. But the facts in evidence is the proper business for your determination. In the case I mentioned yesterday, under this very act, for a similar offence, tried April, 1795, Paterson, Justice, charged the jury, "that converting a merchantship into a vessel of war, must be deemed an original outfit;" for the act would otherwise become nugatory and inoperative.—It is the conversion from the peaceable use to a warlike purpose, that constitutes the offence. The vessel in question, arrived in this port with a cargo of coffee and sugar from the West-Indies, and appears to have been employed by her owner with a view to merchandize, and not with a view to war. The inquiry is, therefore, united to this consideration, whether, after her arrival, she was fitted out in order to cruise against a foreign nation, being at peace with the United States. It is true, she left the wharf with only four guns, but it is equally true, that when she dropped to some distance below, she took on board three or four guns more, a number of muskets, water-casks, &c. and it is manifest other guns were ready to be sent to her by the pilot-boat. These circumstances clearly prove a conversion from the original commercial design of the vessel, to a design of cruising against the enemies of France, and of course against a nation at peace with the United States, since the United States are at peace with all the world. Nor can it be reasonably contended, that the articles thus put on board were articles of merchandize, for if that had been the case, they would have been mentioned in the manifest, on clearing out of the port, whereas it is expressly stated that she sailed in ballast.

If they were not to be used for merchandize, the inference is inevitable, that they were to be used for war. No man would proclaim on the house top that he intended to fit a privateer.—The intention must be collected from all the circumstances of the transaction.

It now only remains to consider how far the defendant was concerned in beginning, providing and preparing the means of the expedition. Col. Smith mentioned to Doctor Douglass, before Miranda arrived in the United States from England, that he had expected that a grand expedition was on foot and that his son was going. After Miranda did arrive the defendant introduced him, first to Mr. Lewis, one of Ogden's captains, then to Mr. Ogden, as persons likely to aid him with a vessel proper for his purpose. He employed the witness, Fink, to engage a sergeant, corporal, and twelve men for military service. The testimony of Mr. Fink appears to be candid and I think entitled to belief; but he is an old inhabitant of the city and you know his character. He swears he saw Col. Smith write the papers which contain the terms of the enlistment and promise of bounty lands. The defendant paid a month's wages to the witness to be advanced to each of the men so engaged, tied up and marked with the name of each man; and although there appears to have been among them some hesitancy about the propriety of their engagement, the men afterwards all declared themselves satisfied, and finally went upon this very advance of bounty. The verbal declarations and assurances of the defendant to the witness may be considered delusory and purposely intended to misguide and cover from the men the real object of their engagement, yet those clearly manifest the agency and participation of the defendant in providing the means for the enterprise. That these means were so provided and prepared by the knowledge and approbation of the president and secretary, you have already the opinion of the court, can afford the defendant no justification in the breach of positive law, however far the fact, if so, may operate to produce a pardon from the executive. But the testimony relied upon as establishing this fact is by no means positive or entitled to implicit confidence. It is the declaration of Miranda alone which charges the administration with previous information of the expedition; whose scanty means afforded him abundant reason to mask his real feebleness with any pretensions, the best calculated to facilitate the accomplishment of his views. The deliberate declarations of a party are indeed the strongest evidence against him. In the present instance these may induce a belief that the defendant was deceived in this respect by the equivocal or false representations of Miranda, but never can justify him in the illegal act charged in the indictment.

This is the state of the case before you. It is not a question of party politics. The people of the United States of all denominations are equally interested; and I have too much respect for the character of an American jury to anticipate a determination upon such grounds. The undertaking may of itself be a great and glorious one, worthy the breast of a good man, glowing with desire for the universal emancipation of those oppressed by the weight of monarchical power; nevertheless, an upright and dignified course of conduct, a harmonious intercourse with foreign nations is worthy the attention, is the duty of our government to cultivate and maintain. The laws must be observed and enforced. Sympathy ought not to cloud the conception nor warp the judgment of a jury whose duty simply is to pronounce truly upon the facts in evidence. The attribute of mercy is in other hands, and no doubt will be discreetly exercised.

Mr. Harison: I wish to correct a mistake which I think the court have fallen into, who has said to the jury that the confessions of the party are not to go in justification. His confessions, whether in crimination or justification, are to be taken together. The law is laid down in Trials per Pais, 298.

TALLMADGE, District Judge. I mean to be understood that the confessions of the party must be viewed entire, not in detached parts; the purport and meaning of the declaration must be collected from a view of the whole conversation at the time. You will not convict the defendant but upon clear and satisfactory evidence of his guilt, nor acquit him against evidence, because he has declared himself innocent.

Mr. Colden. I humbly conceive that the confessions of a party, made at one and the same time, are not to be taken, stronger as they are against him, than as they are for him. The counsel for the prosecution having thought proper to examine as to the confessions of the defendant, they must take them as they are given. They cannot reject a part and use the residue.

The jury retired, and after an absence of two hours, they returned a verdict of not guilty. Whereupon W. S. Smith is discharged from his recognisance, and his securities exonerated.

Case No. 16,342b.

UNITED STATES v. SMITH.

UNITED STATES v. OGDEN.

[MS.]

Circuit Court, D. New York. July, 1806.

CRIMINAL LAW—ACT JUNE 5, 1794—MILITARY EXPEDITION AGAINST NATION AT PEACE—JURY.

[1. Following U. S. v. Smith, Case No. 16,342a.]

[2. A juror who has sat on the trial of a person indicted for the same offence as defendant is not competent.]

[Trial of Samuel G. Ogden on indictment for a misdemeanor in beginning, setting on foot, and providing the means for a military expedition in the city of New York, to be carried on from thence against the territory of Spain in South America, at a time when the United States and Spain were at peace. A plea to the indictment on the ground that it was founded on illegal evidence was overruled (see Case No. 16,341a), and a motion for attachments against absent witnesses and for a continuance was also denied (see Case No. 16,342). On the drawing of the jury, one juror asked to be excused, on the ground that he had been a juror on the trial of William S. Smith, indicted for the same offence, whereupon the court excused him as not being a competent juror, notwithstanding the objections of defendant's counsel. Substantially the same evidence was introduced and offered in this case as in the case of U. S. v. Smith, Case No. 16,342a.]

Nathan Sandford, Dist. Atty., and Pierpont Edwards, for the United States.

Washington Morton, Cadwallader D. Colden, Josiah Ogden Hoffman, Thomas Addis Emmett, and Richard Harison, for defendant.

TALLMADGE, District Judge, proceeded to charge the jury. The points of law that arose in the progress of this trial, being precisely the same as those raised and determined on the trial of Col. Smith (Case No. 16,342a), the judge's charge was the same in substance, as reported in that trial; and after a careful collation of the testimony, which his honour told the jury was, in his mind, clear and decisive against Mr. Ogden, as having provided and prepared the means within the United States of a military expedition, to be carried on from thence against the dominions of some foreign power, he closed his charge by observing, that the defendant's agency in preparing the means, the nature of the expedition, and its destiny, were facts of which the jury were the proper and only judges. That whether the United States, at the time the offence is charged, were at peace or in war, is matter of law, and as such ought to be decided by the court. The jury might conscientiously rely upon its correctness, and were under no necessity to assume a responsibility beyond a determination of matters properly within their decision.

The jury retired, and, after a short absence, returned a verdict of not guilty.

Case No. 16,343.

UNITED STATES v. SMITH.

[2 Wash. C. C. 310.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

SMUGGLING—EVIDENCE.

1. The defendant was indicted for unlading from a vessel in the port of Philadelphia, three bags of coffee, without authority from the proper officer of the customs. The coffee was taken at night in a boat from the vessel, and part put on the wharf, the rest being in the boat; but on discovery, it was returned to the vessel. The court decided that this was not a landing within the act of congress, of March 2, 1799 [1 Stat. 627].

[Cited in U. S. v. The Express, Case No. 15,066.]

2. The twenty-seventh section of the act applies only to the captain or mate of the vessel.

The defendant was indicted for unlading from a vessel, which had arrived at the port of Philadelphia, three bags of coffee, without being duly authorized by the proper officer of customs to unlade the same, &c. It was proved, that the defendant was seen to bring from the vessel in a boat, in the night time, three bags of coffee, which he had got only in part on the wharf, the other half of the bags lying on the gunwales of the boat, when the witness discovered himself. The defendant then took back the bags, and returned them to the vessel.

THE COURT informed Mr. Dallas, that this was not a landing of the coffee, so as to constitute an offense under the fiftieth section of the law; nor is the defendant charged with landing it. The twenty-seventh section, which makes the unlading an offence, applies only to the captain and mate.

THE COURT directed the jury to acquit the defendant, which they accordingly did.

Case No. 16,344.

UNITED STATES v. SMITH et al.

[3 Wash. C. C. 78.] [1]

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

SEAMEN—ENDEAVOR TO MAKE REVOLT—CONFINEMENT OF MASTER—ADMIRALTY JURISDICTION.

1. Indictment against the defendants, part of the crew of the vessel. First count, for confining the master; and the second count, for endeavouring to make a revolt in the ship; both charged to have been committed on the high seas.

2. It seems, that to constitute the offence of endeavouring to make a revolt, the attack on

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

the master should be accompanied by some evidence, indicating, on the part of the assailants, an intention to take possession of the vessel.

3. Any confinement of the master, whether by depriving him of the use of his limbs, or by shutting him in the cabin, or, by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law.

[Cited in U. S. v. Smith, Case No. 16,345; U. S. v. Peterson, Id. 16,037; U. S. v. Huff, 13 Fed. 640.]

4. The offences charged against the defendants, were committed whilst the vessel was lying in the river, about one and a half miles below St. Ubes, and within the bar, the river being about one mile and a half wide at the mouth; and the court were of opinion, that they had jurisdiction of the case.

[See note at end of case.]

The indictment is founded on the 12th section of the act of congress, for the punishment of certain crimes, passed April 30, 1790 [1 Stat. 112], and contains two counts; the first for confining the master, and the second for endeavouring to make a revolt in the ship; both of which are charged to have been committed on the high seas. The evidence in support of the indictment, was, that whilst this vessel was lying in the river, about one and a half miles below St. Ubes, and within the bar, the river being about a mile and a half wide at the mouth, the defendant, Smith, who in the course of the day had been struck by the captain, laid hold of him, and cursing him, observed, "Now we are ready for you." The captain pushed him away, and ordered him forward; upon which Smith struck the captain, and they immediately closed with each other, when Smith cried out to the hands who were below to come up, for that now was their time. Upon which, the other two defendants ran forward to his assistance, one of them armed with an iron shovel, and the other with a piece of wood, and the one with the shovel struck the captain; after struggling for some time, the captain got clear from them, and got on the other side of the cabin, and ordered the men to go on the quarter deck, which they did, but still continued to abuse him, and threatened, if he came on the main deck, they would massacre him. After keeping the quarter deck for some time, and fearing to risk himself on the main deck in order to get into the boat, he got over the railing of the quarter deck, jumped into the boat, in which he went on shore, and having got a guard of soldiers, he returned to the vessel, where the defendants were armed and prepared to receive them; having during his absence declared, that they would resist the captain if he brought other masters of vessels to assist him, but that they would yield to soldiers, should they come with him; and that should he bring sailors with him, they expected that they would join them. They were, however, quelled and disarmed by the soldiers.

The counsel for the defendants, requested that the point, whether this indictment could be supported, the offence having been committed in a river, and not on the high seas, might be reserved. THE COURT directed the jury, if they should think the defendants guilty, to find them so, subject to the opinion of the court on a point reserved.

The evidence on the part of the defendants, was, to a great degree, contradictory to that given in support of the indictment, giving it rather the appearance of a battery by Smith alone, in return for a stroke first given by the captain. As to the threat to the captain, if he came on the main deck, the testimony was equally at variance with that given against the defendants.

WASHINGTON, Circuit Justice (charging jury). As to the second count, for endeavouring to make a revolt, the court feels some difficulty; but are inclined to think, that the attack upon the master, should be accompanied by some evidence, indicating, on the part of the assailants, an intention to take possession of the vessel. There is less doubt as to the law upon the first count. Any confinement, whether by depriving the master of the use of his limbs, or by shutting him up in the cabin, or by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law. In this case, the master, as he states, was prevented, by an apprehension that the defendants would execute their threats, in case he went on the main deck, from getting into the boat from thence, and thought it necessary for his personal safety, to endeavour to get away from the vessel; and in order to do so, was compelled to get over the railing of the quarter deck, and thence into the boat. If this evidence is believed by the jury, the defendants are clearly guilty under the first count. If the evidence on the other side is believed, they cannot be convicted upon either count of this indictment.

The jury found the defendants guilty—subject to the opinion of the court, on the point reserved.

NOTE. Upon the point reserved, the court was of opinion, that the case is within the jurisdiction of the court. For, if rivers, havens, &c., be not parts of the high seas, still, the 12th section, where it speaks of the high sea, is confined to manslaughter, and does not extend to this offence. Sentence passed on the defendants.

Case No. 16,345.

UNITED STATES v. SMITH et al.

[3 Wash. C. C. 525.] [1]

Circuit Court, E. D. Pennsylvania. Oct Term, 1819.

SEAMEN—CORRECTION BY MASTER—RIGHT OF RESISTANCE—CONFINEMENT OF MASTER—REVOLT.

1. The master of a vessel has an absolute authority on board the vessel under his command,

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

and his lawful orders must be obeyed. He may inflict moderate correction for disobedience, and impertinent language or behaviour. The seaman may endeavour to escape from it; and if he is pursued, and is otherwise exposed to a repetition of such treatment, he may resist for the mere purpose of protecting himself from injury.

[Cited in Fuller v. Colby, Case No. 5,149.]

[Cited in Buddington v. Smith, 13 Conn. 336; Thompson v. Hermann, 47 Wis. 607, 3 N. W. 579.]

2. If the master use an unlawful weapon, or the seaman is exposed to danger of his life, or limbs, he may resort to any necessary species of defence to avoid this danger.

[Cited in Fuller v. Colby, Case No. 5,149.]

3. If the master strikes the seaman, and is seized by him, and is so firmly held, as that he cannot extricate himself, the seaman is guilty of confining the captain.

4. Quere, what is making a revolt on board a ship?

Indictment [against Smith and Coombs]. The first count was for confining the captain. 2. For endeavouring to make a revolt.

WASHINGTON, Circuit Justice (charging jury). As something has been said, by the counsel on each side, respecting the authority of the master of a vessel to correct his seamen, and the duty of submission by the latter, it may not, perhaps, be time misemployed, to make some observations upon these subjects, although not necessarily involved in the questions which arise under the present prosecution. The master has an absolute authority on board of his ship; and his orders, if not unlawful, are, and must be, imperative. Submission is amongst the first duties of the seamen; and their deportment to the master ought to be respectful. He is justified in inflicting moderate correction on the mariners, for disobedience of orders, and for impertinent language and behaviour. Although it would be, in general, more dignified and more prudent, to avoid inflicting personal chastisement on a seaman for offensive language, yet the law does not condemn him for doing so; it is an indulgence to human infirmity, rather than a justification. The seaman, in such a predicament, may endeavour to escape from it; and if pursued, or if he is otherwise exposed to a repetition of such treatment, he may lawfully resist, in such manner as to protect himself against injury. If the master make use of an unlawful weapon, or the seaman is otherwise exposed to apparent danger of life or limb, he may lawfully resort to any species of defence necessary to avert the danger. In the case of U. S. v. Sharp [Case No. 16,264], this doctrine was fully explained.

Having made these general observations, we proceed to the consideration of the first count in the indictment; which is, for confining the master. The evidence on the part of the prosecution is, that after the master had struck at Smith, with a rope of dangerous size, which Smith laid hold of in order to escape the blow, the master struck him with his fist, which Smith returned; and having seized each other, they fell on the deck; and the master, having the ascendency, placed his knee on the breast of Smith; and, in that situation, mutual blows were exchanged, (Smith having hold of the master's collar,) until Boyd, another of the seamen, desired the master not to strike Smith again; upon which he quitted Smith, and ordered all the seamen, who, to the number of eight or ten, had come aft on the quarter deck, to go forward. The witnesses further prove, that, whilst Smith was down, he called to his comrades more than once, and asked if they would see him so treated; that they were ordered by the master to go forward, which they refused to do, until the master had called for his cutlass, and was in a situation to enforce his order. The defendants' witnesses deny that Smith struck the master, or laid hold of him, so as to confine him; some of them deny, also, that Smith called for the aid of his comrades, or that they were ordered by the master to go forward, until he had risen from the deck and called for his cutlass; when they obeyed.

Upon this evidence, it is for you to say, whether the captain was at any time confined by Smith. That Smith, after he was seized by the master, and until he was released, was himself confined, is certain. Nevertheless, if the captain's situation was forced upon him by Smith, if he was so firmly held by Smith that he could not extricate himself, then the defendant is guilty under this count; because, it has repeatedly been decided in this court, that if the master be placed under restraint by his seamen, or by any one of them, for any space of time, however short, whether it be by manual force, or by menace and intimidation, this is, in construction of law, a confinement. U. S. v. Sharp [supra]; U. S. v. Bladen [Case No. 14,606]; U. S. v. Smith [Id. 16,337]. If, on the other hand, the master was not so restrained, the insolence of Smith, his return of the captain's blows, however culpable such conduct would render him, and his resistance of the blows he received, would not amount to this offence. One of the witnesses stated, that he and the captain thought it prudent, for some nights after this affray, to keep watch in the cabin, and to be armed. If this was so, and you should be of opinion, that the conduct of the defendants and their associates rendered that measure prudent; and if also, the captain, in consequence of any threatened danger from the seamen, was prevented from the free exercise of all his privileges in every part of the ship, then these circumstances would amount to a constructive confinement; otherwise not. But unless this, in your opinion, was the fact, there is no evidence whatever to convict Coombs upon this count, as he had no personal conflict with the master, which can be construed into a confinement of him.

As to the other count, for endeavouring to make a revolt: What constitutes a revolt, has never been decided by this court. On the contrary, we have always recommended it to

the jury, to acquit the accused on counts for making, or endeavouring to make, a revolt. But a most respectable and learned judge of the supreme court (U. S. v. Smith [supra]) has defined it to be an endeavour to excite the crew to overthrow the lawful authority of the master and officers of the ship. Wishing to have this point decided by the supreme court, we shall request the jury, in case they should be of opinion that the defendants are guilty of endeavouring to make a revolt, according to this definition, to find them guilty, subject to the opinion of the court upon the facts of the case.

The jury found the defendants not guilty.

Case No. 16,346.

UNITED STATES v. SMITH et al.

[1 Woodb. & M. 184.] [1]

Circuit Court, D. Maine. May Term, 1846.

MARSHAL'S ACCOUNTS—CERTIFICATE OF JUDGE—AUTHORITY OF ACCOUNTING OFFICERS—MARSHAL'S FEES AND COMMISSIONS—INTEREST.

1. A certificate of a judge, allowing an account of a marshal is prima facie evidence of its legality and proper amount.

2. But when the treasury department entertain doubts on those points—it can require farther evidence and reasons in favor of the account, or reject it, if believed improper, till sustained by the opinion of some judicial tribunal.

3. If the items to which a judge certifies have been settled judicially in an action or bill of cost—heard and decided between proper parties—the items ought usually to be passed at the treasury department, if appropriations exist which embrace them.

4. A charge by a marshal for distributing venires to town clerks at two dollars each is legal—but not for travel as if serving venires himself—when they are in fact served by a constable.

[Cited in Re Sheazle, Case No. 12,734; U. S. v. Richardson, 28 Fed. 73; Harmon v. U. S., 43 Fed. 565.]

5. Nor is a marshal the keeper or inspector of the state jails, or to be allowed for services in either of those capacities, unless in a case where he is specially directed by the court to examine some of them to see if they are suitable for the keeping and security of prisoners of the United States.

6. Where a marshal extends an execution on real estate for the government, he is entitled to his fees from the latter, though the land be not yet sold or redeemed or in any way converted into money.

7. A marshal is not entitled to commissions on money paid to his deputies for taking the census, it being a part of his official duty, and not a separate and independent service performed for the United States.

8. He is entitled to interest on sums due to him and not paid after demand, but on the same principle must pay interest on what is due from himself after demand.

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

This was a writ of error, sued out September 10, 1844, on a judgment rendered the 3d of that month, in the district court on the following case. [Case unreported.] An action of debt was brought in that court by the United States, against the defendants [Albert Smith and others] on an official bond, and the case was as the counsel agreed in the statement annexed:

Agreed statement: The writ is dated June 5, 1841. The pleadings were (1) The general issue of non est factum. (2) Omnia performavit, by way of brief statement. The plaintiff claims to recover $1,312.20, the balance alleged to have been collected by the said Albert Smith, as late marshal of said district, for the plaintiffs, on their execution against Ezekiel Foster, and which it is alleged he has never paid over to the plaintiffs. They also claim interest on that sum. See specification of claim filed. Upon the trial of the case at this term, it is agreed that the facts appear as follows: (1) The said Albert Smith (with the other defendants as his sureties), duly executed the bond declared on, dated May 1, 1834, it being an official bond, in the common form, for the faithful performance of his duties as late marshal of Maine. (2) That said Smith, in his said capacity, collected the money, mentioned in the plaintiff's specification of claim, one execution in favor of the plaintiffs and against Ezekiel Foster, and that he has retained that amount, and declined paying it over, upon the ground that he had legal and equitable claims against the plaintiffs for more than that amount, which he claimed to have allowed him in set-off to the plaintiffs' demand. In defence, the facts proved were as follows: (1) That the claims of the said Smith, as specified in his account filed in set-off No. 1, were all duly substantiated by competent testimony, and that they were presented to, and rejected by, the proper officers of the treasury department. The items for services of venires from the district and circuit courts, as specified in vouchers A and B, and those items for levy of an execution in behalf of the plaintiffs as specified in voucher C, had been presented to, and allowed and certified by, the courts aforesaid. (2) That the items of claim in the supplemental account of the said Smith, filed in set-off No. 2, were reasonable, provided they were by law admissible.

Upon request of the defendants' counsel, the district judge ruled pro forma, and instructed the jury, that if proved to their satisfaction, the defendants were entitled by law to the allowance in set-off in the plaintiff's claim, of the following claims: (1) Of the said Smith's claim for the services of venires from the district and circuit courts. (2) The claim for levying an execution on property of Joseph F. Wingate as charged. (3) The claim for commissions as charged on $9,287.53, paid out in taking the census of 1830; and the judge further ruled that interest ought to be allowed on each of these sums. (4) The claim for superintending and

[1] [Reported by Charles L. Woodbury, Esq., and George Mirot, Esq.]

visiting the several persons in said district from April, 1829, to April, 1838, as specified in the supplemental account, No. 2. And the judge further instructed the jury, that the item of $26.50, as specified in the plaintiff's account in set-off No. 1, for serving a subpœna returnable to the circuit court of the Southern district of New York, was not admissible, and could not be allowed. Whereupon the jury returned a verdict for the defendants.

Howard & Shepley, for defendant.
Gorham Parks, U. S. Atty.

Judgment was rendered upon that verdict, and a writ of error was brought on it, which was argued at this term by Mr. Haynes, U. S. Dist. Atty., and by Mr. Howard, for defendant.

WOODBURY, Circuit Justice. Letters have been read in this case from my distinguished predecessor, stating as his opinion, and that of the other justices of the supreme court, that the certificates of the district or circuit judges in favor of a marshal's account is conclusive on the treasury department, and is not open to re-examination or disallowance. His letter is dated November 5, 1837, and is in reply to one from Mr. Sibley, marshal of Massachusetts. The provision of law on this subject is in the 4th section of the act of congress, passed May 8, 1792 (chapter 36), and is in these words. After reciting several fees and items, which shall be included in the "account of the marshal," it proceeds to say: "And the same having been examined and certified by the court or one of the judges of it, in which the service shall have been rendered, shall be passed in the usual manner at, and the amount paid out of, the treasury of the United States to the marshal, and by him shall be paid over to the persons entitled to the same," &c. 1 Stat. 277. It is manifest, that if the true construction of this clause is, as contended by the defendants, the re-examination and rejection of any of the items by the treasury department, which has been certified by a judge, was unwarranted, and that it is also my duty to decide in favor of them all, without re-examination. For if such a certificate is conclusive upon the treasury, no question can be agitated here on its propriety, any more than by the accounting officers, and it should be sent back there for the account to be registered up without inquiry. But notwithstanding the high respect which is due to the opinion of Judge Story, and to his statement of the opinions of his brethren, it is to be recollected, that his views on this matter were not given, nor theirs, in a judicial case, but ex parte, or extra judicially. Nor are the reasons in their favor stated. It is to be remembered, also, that the usages of the treasury department have been different for half a century, as well as those of the circuit and supreme courts. Judge Story himself, as well as other judges, when these questions as to disallowances by the accounting officers have come before the courts in actions at law, have uniformly considered them as open to examination, and have never felt bound conclusively by the certificate of a judge on them in favor of the marshal's account. See U. S. v. Cogswell [Case No. 14,825], and the other reports on like cases elsewhere. Nor does the language or reason of the act seem to require a different construction. It does not say the certificate of a judge shall be final or conclusive; but that, after it, the account shall be passed "in the usual manner," which manner is, to have the vouchers accompany it, and be examined so far as is deemed necessary to satisfy the accounting officer of the legality and propriety of the various items. The marshal himself being a responsible officer under oath, and the judge, and likewise the district attorney, whose opinion is usually taken (and often his certificate to allowances is asked by the judge, when they are new or unusual), it is certainly to be presumed, that the claims are legal. And a prima facie case in their favor is thus made out, which is all, probably, that Judge Story, or the other judges, under such circumstances, could have intended to mean. These may, properly, be enough to ensure the passage and payment of the account, unless something novel or extraordinary appears in respect to parts of it which may seem to require fuller explanation. In such last case, it has always been the practice of the treasury department to ask for such explanation, and if not receiving it, and the item appears not to be warranted by law or sound reason and analogy, they do and they ought to suspend or reject it.

The department has a duty to perform under oath of office. I have ever considered that oath required them to conduct in that way, if serious doubts remained as to the legality or proper amount of the claim, and not to yield those doubts till a court, having jurisdiction of the subject, or the attorney-general of the United States, on a suitable application to him, gave an official opinion in favor of the claim, or congress by a special law authorized its payment. My own opinion corresponds with this practice; under a different station at the head of the treasury department, it had my sanction and concurrence for several years. The decision of a court where proper parties, as now, are before it, and contest an item of charge, is a different matter. It is then a judgment, which, in the views of most persons, is entitled to the respect and assent of the departments so far as to pay the item thus allowed, if any suitable appropriation exist therefor. But a certificate of a judge, ex parte, in the hurry at the conclusion of a term, to an item, that has never been litigated nor argued by any opposing counsel, surely can make claim to no such binding and decisive weight. If the item, however,

is one on which judgment has been formally passed in an action only as a portion of a bill of cost, and it has become a part of that judgment, it would be a new and different question to be settled when it arises, whether the accounting officers could go back or behind such a judgment, if the United States was one of the parties. And if Judge Story meant any thing more than to give a prima facie force to the certificates in favor of marshals' accounts by one of the court, he probably intended to confine it, or was considering, at the time, only such items as had thus been passed upon in formal judgments as to bills of cost in actions where the United States was one of the parties. See The Apollon, 9 Wheat. [22 U. S.] 362. In such a case, I might feel justified in thinking with him, that the accounting officers ought to conform to the certificate. But that is not this case, nor resting on a like principle. Because there, if judgment could be properly rendered against the United States as against an individual for costs, when the failing party in an action, it would be. Yet as that is not done by the courts of the United States, the certificate of the judge is only the evidence that the costs are due rather than the judgment.

Entering then into the inquiry as to the lawfulness of the several claims here offered in set-off by the marshal, and not feeling bound by the certificate of the district judge ex parte in their favor, though, like all his opinions, entitled to much respect, I will first consider the claim for services of the venires. The provision of law on this claim is to be found in the 1st section of the act of February 28, 1799, c. 19 (1 Stat. 624). That allows to the marshal "for summoning each grand and other jury, four dollars, provided that in no case shall the fees for summoning jurors to any one court exceed fifty dollars; and in those states where jurors, by the laws of the state, are drawn by constables, or other officers of corporate towns or places by lots, the marshal shall receive for the use of the officers employed in summoning the jurors and returning the venire, the sum of two dollars; and for his own trouble in distributing the venire, the sum of two dollars." In Maine, the marshals do not summon the juries, but distribute venires to the town-clerks, and the summoning is done by them or constables. It has already been decided by this court, that the marshal is entitled to two dollars for distributing each venire, as they are distributed in the state of Maine, though formerly the usual charges of allowance were, like the words of the act, singular, and only two dollars for distributing the whole; treating it as the service of only one venire, called the "grand venire," and which is directed to him. U. S. v. Cogswell [Case No. 14,825]. If he summoned a jury, as is the practice in some states, he received four dollars for each jury or panel, but not to exceed fifty dollars, however many panels were summoned at any one term. But if he did not summon the jury, and constables did it, on such venires issued to them, he holding and executing only the grand venire, the fees were divided, assigning two dollars to him and two to the constable. It is now argued, that the marshal should be allowed not only two dollars for distributing each sub-venire, but travel; because, by the same section, he is allowed, beside two dollars "for the service of any writ, warrant, attachment or process," five cents per mile "for his travel out in serving each writ, warrant, attachment or process aforesaid." But it is to be remembered, that this last provision precedes that for summoning jurors, and hence does not relate to them under the general expression of serving "process" or travel to serve process. Otherwise, no special provision for summoning jurors would have been necessary, being embraced already in the former one for serving a process. Again, it is not usual nor necessary for marshals to incur any travel in distributing venires, but it has in most cases been done through the postoffice, and two dollars for merely thus distributing each, is a liberal compensation. Nor does the limit of all the fees for summoning juries to any one court, to fifty dollars, imply that travel is to be allowed; because, if allowed, it would usually increase the aggregate to more than fifty dollars. For with a grand jury of twenty-three, and two petit juries of twenty-four, or only one of twelve, the aggregate for service alone would, by this construction, often exceed fifty dollars a term. In fine, distributing the venires is contemplated by the act to be a different duty from serving them, as the former is called by a different name, and done by a different officer, in cases like this, that is, by the marshal; while the service is usually by a constable. Only two dollars, then, can be allowed to the marshal in this case for distributing each venire; and where the aggregate exceeds fifty dollars at any one term of the court, it is to be reduced and limited to that amount.

2. The claim for serving an execution on the property of Wingate, is usual in amount, and the only objection to its payment, the service having been performed by the United States, is, that the property has not yet been redeemed by the debtor, or sold by the United States, so as to realize or collect the costs. But that seems a poor apology on the part of a creditor for not paying others, who have performed useful services for hire, and where, as in this case, perhaps, certainly in one of a like kind in this state, the government is occupying the property extended on for a custom-house, and does not contemplate selling it at all. In some cases, also, the government does not sell the property during a third of a century, and one is fresh in my recollection of an extent on lands of Edward Randolph, attorney-general under

Washington, which never were redeemed or sold till the speculating era of 1834 and 1835, when the expectation of gold mines upon them, induced some one to buy at a high price. Could it be reasonable, or just, or legal, for the marshal or his heirs to wait so long for his fees in serving that extent? The whole difficulty on this point has arisen from an old form in the treasury, not crediting the debtor himself in cases of extents on land until it was sold by the government, and thus continuing him on the books nominally a debtor or defaulter for years after the whole claim has been thus satisfied. But the practice has been altered, or was directed to be; and there is no more excuse for the government not paying the fees after it has received them in land, than after they are received in money, provided an appropriation exists applicable to it. Let this item, then, be allowed.

3. The charge for superintending prisons in Maine is not taxable. There is no act authorizing it, and no order of the court shown, requiring such an examination by the marshal. Again, there is little foundation for any claim on this account in the general relation and duties of the marshal as to the jails of the states. He is not the keeper of them. He has no control over them. He neither repairs the jails, nor feeds the prisoners, nor regulates their police. Congress, September 23, 1789 (1 Stat. 96), recommended to the several states to pass laws to receive prisoners for the United States, for a reasonable compensation. And in 1791 and 1821, congress authorized the marshal to keep his prisoners elsewhere in safety, if the states withheld the use of their prisons. 1 Stat. 225; 3 Stat. 646. So as to the state prisons; we can use them for punishment, paying the expense, and letting our prisoners be employed and treated as the state convicts are. In point of fact, also, it is stated there is no evidence of actual examination having been made in that instance, justifying in any view so extraordinary and large a claim. This was properly rejected by the district court, and also the amount claimed for service of a writ from New York, and which is now abandoned by the defendants.

4. The only remaining claim is for commissions on fees, paid to the deputy marshals or assistants in taking the census. It is not pretended that there is any clause in the act for taking the census, which expressly authorizes this claim, but it rests on the hypothesis of being an act, not enjoined by law, and for doing which when requested, the marshal should be paid a reasonable commission. The commissions of the marshal, by the act of 1792, on payments over to others there designated, is two and a half per cent., and that rate has frequently been deemed proper in cases where any commissions for like services are allowable. But, in my view, these payments to the assistants were made by him officially and as a service properly belonging to his official station. He selected them—he employed and regulated them—he received, therefore, the money for them, and had general compensation for his duties in respect to the census, fully sufficient to indemnify him for such an incidental labor. It has been adjudicated in various cases, such as U. S. v. Wilkins, 6 Wheat. [19 U. S.] 135; U. S. v. McDaniel, 7 Pet. [32 U. S.] 1; U. S. v. Ripley, Id. 18; U. S. v. Fillebrown, Id. 28; U. S. v. Mann [Case No. 15,716]; Gratiot v. U. S., 15 Pet. [40 U. S.] 336; and in U. S. v. Gratiot, 4 How. [45 U. S.] 80,—that a reasonable compensation is proper to be made to officers for services clearly unofficial, clearly disconnected and exterior to their duties under their commissioners as officers. And though, in my view, some of these cases have gone too far on the facts, holding services to be unofficial which seem to me not entirely dehors from their duties as officers, yet I do not feel justified in departing from the decisions of the supreme court on this subject, till altered by that tribunal itself, or till new legislation occurs by congress applicable to new cases.

I do not rest this conclusion on the argument in this case by the United States, that the $200 salary given to marshals, "as a full compensation for all extra services," should be construed to embrace all labor and services of all kinds not specified nor specifically paid. On the contrary, I think that relates to extra services or duties, which are by law devolved on him as marshal. And I decide this point exclusively on the ground, that the paying over this money to his assistants was an incident to his official station and duties, and not a service entirely foreign or disconnected with it; and consequently, that commissions for doing it, not being given by any law, are not allowable. Gratiot v. U. S., 15 Pet. [40 U. S.] 336, 4 How. [45 U. S.] 80.

There is, likewise, a claim of interest set up by the defendants. I am willing to allow it on the item improperly rejected at the treasury department, beginning at the date of the rejection, and I do it on the precedent of the case of U. S. v. Cogswell [supra]. But if allowed to the defendants on the principles that they have been kept out of the money illegally since that rejection, the same principle renders it proper to allow interest to the United States, since the demand of the balance due them, and of which they have since been illegally deprived by the defendants. Making the computations, then, between the parties, on the principles I have explained, the United States is entitled to judgment for the balance.

Under these views, the judgment below, being in some respects erroneous, must be reversed, and the verdict be set aside, and a venire de novo ordered.

UNITED STATES (SMITH v.). See Case No. 13,122.

Case No. 16,347.

UNITED STATES v. SMITHERS.

[2 Cranch, C. C. 38.] [1]

Circuit Court, District of Columbia. Dec. Term, 1811.

PEREMPTORY CHALLENGE.

Indictment under the statute of Maryland of 1795, c. 75, for forging orders on Joseph Wheaton. By the statute the punishment is not death. He was not allowed a peremptory challenge, was found guilty, and punished by whipping, twenty-five stripes. See the act of Maryland.

Case No. 16,348.

UNITED STATES v. SMOCK.

[4 Int. Rev. Rec. 202.]

District Court, D. Kentucky. Oct., 1866.

INTERNAL REVENUE ACT—NON-PAYMENT OF DUTIES—PENALTY.

[The internal revenue act of 1864, § 48, provided that one having in his custody goods, merchandise, or articles for the purpose of sale, with the design of avoiding the payment of duties, should be "liable to a penalty of $500, or not less than double the amount of duties fraudulently attempted to be evaded." *Held*, that the penalty imposed must at least equal double the amount of duties sought to be evaded, and that it could in no case be less than $500.]

A clear case of fraud was proved against the defendant in this case, and judgment was duly rendered, but it is only recently that a written opinion was filed by the honorable judge. Obligation is due to Assessor Needham of Louisville, for transmitting copy for publication after revision by Judge BALLARD. [Thomas] Smock is stated to be still in jail, unwilling or unable to pay the fine. The case involved the construction of the 48th section of the excise act of June 30, 1864 [13 Stat. 241].

BALLARD, District Judge. The defendant having been tried and found guilty of the offence denounced by the 48th section of the internal revenue act of 1864, the question arises: what is the proper judgment to be rendered against him?

The provision of the section, under which the conviction has been had, is as follows: "Any person who shall have in his custody or possession, * * * goods, wares, merchandise, articles or objects subject to duty * * * for the purpose of selling the same with the design of avoiding the payment of the duties thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of duties fraudulently attempted to be evaded," &c.

It appeared on the trial, that the goods which the defendant had in his possession for the alleged unlawful purpose, consisted of about two thousand nine hundred and four gallons of spirits on all of which the duty was two dollars per gallon. On behalf of the convict it is contended that the court may, in its discretion, render judgment for either five hundred dollars or for a sum not less than double the amount of duties fraudulently attempted to be evaded, and that, under the circumstances of this case, the lesser penalty should be inflicted. The language of the statute is not well chosen. Its meaning is certainly not so obvious that it may not be misapprehended. Doubtless, the construction which suggests itself to many, perhaps to most persons of the first reading, is that adopted by the learned counsel of the convict, but, I am persuaded, that few if any will adhere to this conclusion after having bestowed on the provisions of the section and of the statute an ordinary amount of study. Having given the statute and the arguments of counsel the fullest consideration, I am satisfied that, although the language of section 48, above quoted apparently confers a discretion on the court to adjudge one penalty or another, it does not really do so. I think the court has no discretion whatever, and that it must always impose on the convict, under this section, a penalty at least equal to double the amount of duties fraudulently attempted to be evaded. The penalty, in my opinion, can in no case be less than five hundred dollars; but it may and must exceed this sum when double the amount of duties fraudulently attempted to be evaded exceeds it. Any other construction of the statute leads to unreasonable if not absurd consequences. If the court has the discretion claimed, then, in this case, judgment may be rendered for five hundred dollars, or for eleven thousand six hundred and sixteen dollars, or for any sum still larger, but not for any sum between five hundred and eleven thousand six hundred and sixteen dollars. Such a discretion is, I think, wholly without a parallel—nay, more, it is unreasonable. It assumes—first, that the court may render judgment for any amount no matter how large provided it be not less than eleven thousand six hundred and sixteen dollars, and it assumes—secondly, that, whilst by one alternative the judgment cannot be for less than eleven thousand six hundred and sixteen dollars, it may, by the other alternative, be actually for a less sum, provided it be for the precise sum of five hundred dollars. Upon the first assumption a power is confided to the court such as is without precedent in the legislation of congress, and such as is hardly within constitutional limits. The constitution declares that excessive fines shall not be imposed. It may be that this injunction is addressed to the judicial as well as to the legislative department of the government, and it may be, therefore, that no court can impose an excessive fine, even when authorized to do so by the terms of an act of congress; but surely no court will assume that it was the intention of congress

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

to confer such a power unless it were expressed in such clear language as not to admit of doubt. By the second assumption a discretion is confined to the court which is manifestly contradictory, and which, therefore, destroys itself.

Usually, if not invariably, where discretion is given in a matter of this nature, it is to inflict one kind of punishment or another—as death or imprisonment, fine or imprisonment, or to limit the imprisonment between certain periods, or the fine between certain amounts, according to the nature and aggravation of the offense. But the discretion here claimed is not of the nature of any of these. True, it assumes different degrees of guilt in offenders, but it does not allow a gradation of punishment according to the degree of guilt, for it imperatively requires that if one fine be not imposed another shall be, and thus excludes all authority to impose a fine for any intermediate sum. I can conceive of no reason for giving a discretion and limiting it in this manner. If I may impose on the defendant a fine of five hundred dollars, or of eleven thousand six hundred and sixteen dollars, why deny me the right to impose a fine for some intermediate sum? If congress supposed that some persons, convicted of fraudulently attempting to evade the payment of duties, might not deserve to be fined double the amount of duties so attempted to be evaded, how could they suppose that all such persons alike would deserve to be fined only five hundred dollars? There is manifest propriety in punishing one who has attempted fraudulently to evade the payment of duties by a fine which, in amount, has due relation to the amount of duties so attempted to be evaded. One who has attempted to cheat the government out of five dollars deserves punishment, and, indeed, severe punishment, because his offense is grave; but he hardly merits as severe punishment as he whose cheat extends to thousands. Such is the moral turpitude involved in every cheat that he who is guilty of one, no matter how small, well merits a fine of five hundred dollars; and no matter how large, he is not punished excessively if he is fined an amount only double the amount of the fraud. This would be a gradation of punishment with proper respect to the degree of guilt, and, it seems to me, that this is the only gradation contemplated by the statute we have been considering. That this is the meaning of the statute would be still more obvious, if the disjunctive "but" had been used instead of the disjunctive "or." And, it is quite the practice of the courts to change the phraseology of statutes to a greater extent than this; and even to impart into them words to express more clearly the apparent or assumed intention of the legislature. I confess I do not approve of this practice. If it is ever allowable it is only when the intention is plain without the change, and then resorted to only to express clearly what was before expressed obscurely. Obviously, courts have no authority to alter or add words with the view of expressing an intention which the legislature has not. If they have, nothing would be easier than to make a statute express anything. But if it is only when the meaning of a statute is already plain that its words can be changed or added to, of what use is any change or addition at all? The longer I sit here the more I feel the importance of seeking the meaning of a statute by a fair interpretation of its words and resting upon that. I think that when a judge is considering a statute, an agreement, or other written instrument with a view to its interpretation, what he is to seek is the thought it expresses. To ascertain this his first resort, in all cases, is to the natural signification of the words employed, taking them in the very order and grammatical arrangement in which the framers of the instrument placed them, nothing adding thereto, nothing diminishing. It is only when the words thus regarded fail to express any idea clearly, or involve an absurdity, or a contradiction to some other part of the same instrument, that there is any room for construction. As the legislature cannot intend an absurdity, or to require two contradictory things, such construction is not to be adopted as would suppose either the one or the other. And when, taking the words just as they are written, doubt remains respecting their meaning, that meaning must be adopted which the words most obviously express and best comports with the nature of the subject and right reason.

Now let us examine more closely the words of the statute exactly as they are therein written and arranged. "Any person whose * * * * shall be liable to a fine of five hundred dollars, or not less than double the amount of duties fraudulently attempted to be evaded." I observe first: That no one thought is so clearly expressed as to exclude all supposition that some other thought may have been intended. Second. That "five hundred dollars" must be either the lowest or the highest penalty which can be inflicted in any case. No other conceivable motive for the introduction of these words seems assignable. Third. If "five hundred dollars" is the highest penalty, then there is not full scope for the operation of the other penalty plainly denounced, to wit: of "not less than double the amount of duties fraudulently attempted to be evaded;" for undoubtedly, double the amount of duties attempted to be evaded may, and actually does, in this case, exceed five hundred dollars, and if the court may impose a fine of only five hundred dollars, it will adjudge actually less than double the amount of duties. But to assume that the court is required to impose a fine of not less than a given sum, and that it may at the same time, impose a fine less than the given sum, is to assume that the court has an authority or discretion which is,

in a certain sense contradictory. Fourth. The words seem to require that the penalty denounced by them shall contain two elements: 1st, that it be "five hundred dollars;" 2d, that it be "not less than double," &c. It would seem therefore, that the penalty can in no case be less than "five hundred dollars," for it would in that case lack one of the elements required. The only method of satisfying both apparent requisitions is to impose the penalty of "five hundred dollars" when double the amount of duties is less or is just equal to that sum, and when the amount of duties is greater than to adjudge the penalty for such amount of duties, that is, "not less" than that amount, and it will always be for five hundred dollars, that is, not less than that sum. Fifth. The words "not less" it seems to me, are not used to authorize the court to impose a higher penalty than double the amount of duties, but to prevent any penalty less than this from being inflicted.

I have thus endeavored to set forth my reasons for that construction of the statute which is here adopted. I am conscious that the task has been performed very imperfectly. Possibly the argument might be strengthened by a reference to the sixty-eighth and other sections of the statute, which peremptorily require the infliction of penalties, certainly not less than five hundred dollars for offenses involving far less moral guilt and far less danger of loss to the United States than the crime denounced by the forty-eighth section. And, possibly a reference to the forty-first section, which gives to the informer one-half of every penalty recovered, would not be unavailing, for it would seem that, if the informer is to get one-half, it is not only proper that the penalty should in all cases equal at least double the amount of duties attempted to be evaded, but that in this way only can the government escape loss, when the evasion has succeeded. But I do not care to pursue the discussion further. No amount of reasoning, I am conscious, can possibly make that plain which is intrinsically obscure. I do not say that the construction which I have adopted is the true one beyond all question; I only say it is the construction which seems to me to comport best with the language of the statute, and the only one which involves no apparent absurdity or contradiction. I drop the discussion all the more willingly, because, if it be admitted that I have all the discretion claimed by the counsel of the accused, I see no apology for the exercise of it, in this case, to his advantage. The accusee seems to be a man of at least ordinary intelligence. He certainly well understood the law which he violated. He laid and executed his plans with much deliberation and some cunning. All the barrels which contained the spirits found in his possession were marked with a false and counterfeit brand of a United States inspector, and not an inconsiderable number of them was, for a time, concealed in the forest, remote from any habitation, and from any road or highway. I am satisfied he was engaged in the business of cheating and defrauding the government by concealing and selling spirits, marked with a counterfeit brand, and on which no duty had been paid; and the evidence leaves hardly room to doubt that he was confederated, in his fraudulent scheme, with distillers residing in his neighborhood whose names have not been disclosed, and that the whiskey, which it was proven on the trial he had in possession, for the alleged fraudulent purpose, is only a portion of what he so had. I repeat, then, that I see nothing in the circumstances of the case which should induce me, had I a discretion, to inflict on the accused a small penalty. On the contrary, I see much which impels me to impose the highest penalty the law will allow. If the highest penalty is not to be inflicted in such a case, it would be impossible to say in what case it should be imposed. Let judgment be rendered against the defendant for eleven thousand six hundred and sixteen dollars and the costs of this prosecution.

Case No. 16,349.

UNITED STATES v. SNOW.

[1 Cranch, C. C. 123.] [1]

Circuit Court, District of Columbia. June Term, 1803.

PERJURY—SENTENCE.

Upon a conviction of perjury, the court may inflict the punishment of fine, imprisonment, and pillory.

Indictment [against James Snow] for perjury on the trial of Gallowy. Verdict, "Guilty." Sentenced to pay a fine of $100, to be imprisoned six months, and to stand one hour in the pillory.

Case No. 16,350.

UNITED STATES v. SNOW.

[2 Flip. 1; 23 Int. Rev. Rec. 78; 15 Alb. Law J. 219; 2 Cin. Law Bul. 47.] [2]

Circuit Court, E. D. Tennessee. March 26, 1877.

FEES IN PENSION CASES.

To an indictment for retaining a greater sum than the statutory allowance for collecting a widow's pension, it is a good plea that the husband of the applicant, for whose services the pension was sought, was charged on the rolls of the war department as a deserter, and that it was agreed between defendant and the applicant that he should receive one-half of the first payment on account of the pension, less costs and expenses, for his services in causing such charge to be removed.

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

[2] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 15 Alb. Law J. 219, contains only a partial report.]

To an indictment for a violation of Rev. St. § 5485, in retaining a greater compensation than allowed by law for prosecuting a claim for a widow's pension, defendant [Alexander L. Snow] pleaded that the husband of the applicant for whose service the pension was sought, was charged on the rolls of the war department as a deserter; that no pension could be allowed till such charge was removed; that it was accordingly agreed between him and the widow that he should receive one-half of the first payment on account of the pension; (such payment being about $1,200,) less his costs and expenses, for services in causing such charge to be removed, and the further sum of $10 for prosecuting her claim for the pension, all of which was done, etc.

To this plea the district attorney demurred.

George Andrews, Dist. Atty., for the United States.

W. O. Henderson, for defendant.

BROWN, District Judge. By Rev. St. § 5485, it is provided that "any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand or receive, or retain a greater compensation for his services" than is elsewhere provided, "shall be deemed guilty of a high misdemeanor."

This compensation is "such as the commissioner of pensions shall direct to be paid to him, not exceeding $25." Section 4785. And in case no agreement is made with the applicant, and filed with, and approved by, the commissioner, the fee shall be $10, and no more. Section 4786.

The section first above quoted being not only penal in its character, but in derogation of the common law right of every person to make his own bargain, should receive a strict construction. The design of the act was to prevent exorbitant charges being extorted by pension solicitors from a class of persons who are usually illy able to pay them, or to assert their rights against parties who hold the money in their hands. It was intended to fix a fair compensation for the labor usually and ordinarily necessary in obtaining a pension, but not for extraordinary services performed in a different department for a different purpose, although the ultimate object of those services may be the obtaining of a pension. The labor involved in procuring a widow's pension is ordinarily very slight, consisting merely in filling out a blank petition and affidavits showing the enlistment and death of the soldier, his marriage to the petitioner, and the number and ages of her minor children. The records of the war department are then referred to to confirm the fact of enlistment and death. For these services $10 was regarded as a fair compensation, although the parties may contract for the payment of $25, provided a prior agreement be made to that effect, and filed with, and approved by the commissioner. Clearly the statute covers only services, and the attorney would still be entitled to charge for expenses incurred in procuring testimony.

But in the case under consideration, defendant was called upon to perform a service entirely distinct from that usually required in such cases. The soldier was registered as a deserter on the rolls of the war department, and until that charge was disproved his widow could not recover her pension. Sections 2438, 4749.

Although in the particular case the service was performed in aid of the pension, it was essentially a distinct service and might have been required for another and different purpose. A deserter loses his right of citizenship. Section 1996. He cannot enlist in the army or navy of the United States. Sections 1118, 1420. And an officer mustering him in would be subject to punishment. Section 1342, art. 3. The records of the war department will only be corrected by plenary proof of mistake, and when a claim for a pension has once been advanced it must be prosecuted to completion in five years. Section 4717. It will be readily perceived that it may become an object of the utmost importance, to have a charge of desertion stricken out for other purposes than obtaining a pension. The difficulty of securing the requisite evidence is frequently very great, and in this case, it was admitted that an expense of over $300 had been incurred by the defendant for that purpose. To limit his compensation in such a case to $10 would be an adherence to the letter of the statute which congress could not have contemplated.

It is believed no authority can be found exactly in point; but a class of cases arising under the usury laws announce the principle here involved, viz.: that when a lender has made unusual effort or incurred extraordinary expense in connection with the loan, an agreement to repay his charges for services and disbursements, if made in good faith and not merely as an evasion, will not be deemed usurious. In the early case of Auriol v. Thomas, 2 Term R. 52, it was held that where a bill endorsed over is not duly paid, the indorsee may charge the indorser with exchange, and other incidental expenses beyond the amount of legal interest, if such charges be reasonably warranted by custom and not made a color for usury. This authority was followed in Palmer v. Baker, 1 Maule & S. 56; and in Baynes v. Fry, 15 Ves. 120. In Harger v. McCullough, 2 Denio, 119, it was held that where a creditor at the request of the debtor, and upon his express promise to pay the expenses, took a journey to the residence of the latter with a view to settling the demand, and afterwards included such expenses in a security taken for the debt; the security was not usurious. This case was

approved in Thurston v. Cornell, 38 N. Y. 281, in which it was held that where a party solicited to make a loan, and to procure the means of doing so, must spend time, and incur trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious. Whether the payment upon a loan of more than the legal rate of interest is usurious, depends upon the particular facts of the case and the intention of the parties, and these are questions for the jury. If paid for the loan or forbearance of money it is usury, but if the excess is for other good and valuable considerations, not interposed as a device to cover usury, the transaction is not usurious. The same principle was stated in Eaton v. Alger, 2 Keys [*41 N. Y.] 41, in which the court observe: "Even where the lender, without any special agreement with the borrower, in addition to lawful interest, takes a commission, by way of compensation for trouble and expense necessarily incurred in and about the business of the loan, the transaction would be supported, provided such commission was not intended as a device to cover a usurious loan."

See, also, to the same effect, Eldridge v. Reed, 2 Sweeny, 155; Beadle v. Munson, 30 Conn. 175; Gambril v. Doe, 8 Blackf. 140; Smith v. Silvers, 32 Ind. 321; Smith v. Muncie Nat. Bank, 29 Ind. 158; Tyler, Usury, 130.

In the case under consideration, if the agreement set up in the plea were made in good faith, for services actually performed as therein stated, and not as a mere pretext for charging more than the statute allowed for obtaining a pension, the defendant is entitled to an acquittal.

I am not called upon to determine whether his charge be reasonable or not; that must be litigated in another forum; the question of good faith only is here involved and that must be submitted to a jury.

An order will be entered overruling the demurrer.

Case No. 16,351.

UNITED STATES v. SNYDER.

[4 Wash. C. C. 559.] [1]

Circuit Court, E. D. Pennsylvania. Oct., 1825.

INTERNAL REVENUE COLLECTORS—OFFICIAL BONDS.

How far a collector of internal taxes and duties is liable upon his official bond, for bonds for internal duties not collected; and how far he is bound by the treasury statement which charges him with those bonds.

[Cited in Lee v. Fontaine, 10 Ala. 755; Hancock v. Hazzard, 66 Mass. (12 Cush.) 113.]

[Appeal from the district court of the United States for the Eastern district of Pennsylvania.]

This was an action of debt brought in the district court, upon the official bond given by the defendant, conditioned for the faithful discharge of the duties of his office, as collector of the internal taxes and duties, in the Twelfth district of Pennsylvania, and for collecting and paying over the said taxes and duties. The demand was founded on a statement from the treasury department, of certain uncollected bonds and duties due within this district. These bonds, or most of them, had been placed in the hands of an attorney for collection and suit, by a preceding collector, with the approbation of the commissioner of the revenue, by whom his compensation was fixed. Whether the collection of any of the uncollected bonds and duties, and if any, to what amount, was entrusted to that attorney by the defendant, does not distinctly appear. By the instructions of the commissioner of the revenue to the different collectors, bearing date the —— day of June, 1814, they are directed to commence prosecutions in the state courts, where the district court of the United States is beyond a certain distance, and if the attorney of the district be too remote, and has appointed no deputy to act for him, then, and then only, the collectors are authorised to employ any other respectable attorney, who is to receive a reasonable compensation for his professional services. It is then added, "It may be advisable to employ an attorney, with the understanding that he shall have all the business of the collector." The subsequent instructions of the 8th of April, 1815, after referring to the act of congress of the 3d of March, 1815 [3 Stat. 231], say, that this act will, after the district attorney has appointed his deputies, supersede the employment of other counsel, except where they may be specially employed by the treasury department. "In pending suits," they add, "it will be proper not to disturb the course that may have been pursued."

C. J. Ingersoll, U. S. Dist. Atty.

Mr. Kittera, for defendant.

BY THE COURT. The judge of the district court, in his charge to the jury, stated, that the collector, by his bond, and the duties it guarantied, was not charged with the uncollected bonds and duties as a debtor, but merely with the collection of them, upon the same principles as other agents, acting with ordinary care and diligence. That the collecting officers were put under the superintendence of the commissioners of the revenue, who had power to make suitable regulations; as they did make. That the defendant, when he went into office, found that his predecessor had employed an attorney to sue the uncollected bonds, and this by the direction of the commissioner of the revenue. He then concludes by saying, that if the jury

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

were satisfied of the facts, and that a special agent or attorney was employed by direction of the treasury officer, the defendant was not responsible for more than ordinary care and diligence in superintending the collection of the debts, and urging on such attorney; and that under any circumstances, he was not to be debited with the debts at all events, except such as were received by him; and that upon the facts above stated, if found by the jury, the verdict ought to be for the defendant.

The first point of law decided in this charge was, that the bonds debited by the treasury department to the defendant, did not thereby constitute the latter a debtor, at all events, to the United States to their amount, but that he was placed thereby, and by his own bond, and the duties of his office in the predicament of an agent, who is bound to use ordinary care and diligence in collecting their amount, and, when collected, to pay them over. In this decision, I entirely concur. The practice of charging the collectors of these taxes and duties, with the whole amount due by their respective districts, is, I presume, a mere treasury arrangement, as I understand the twenty-seventh section of the act of the 22d of July, 1813 [3 Stat. 33], to be confined to the internal taxes; and I can find no similar provision in any other act of congress, in relation to the collectors of the internal duties. or to those officers generally. If that section applied to the collection of the tax on stills, the subject of the present controversy, it would support the principle of law laid down by the district judge, but then the relief provided by it for the collector, could only be afforded by the comptroller. The principle then, being a reasonable and just one, and consistent with the general rules of law in relation to agents, and the above section not applying to the internal duties, I can perceive no objection to this part of the opinion of the district court.

But be this as it may, the material part of the charge was, that, if the jury were satisfied, that when the defendant went into office, he found that a certain attorney had been employed by his predecessor, to put in suit these bonds, (meaning the bonds for the amount of which the suit was brought) by direction of the commissioner of revenue; then the defendant was not responsible for more than ordinary care and diligence, in superintending the collection; and I think it must be agreed by all, that to make the collector responsible, in such a case, for the amount of those bonds, would be to outrage every principle of justice, which no court could sanction, unless compelled to do so by some positive statute. By the act of July, 1813, it is declared that there shall be an officer in the treasury department, to be denominated "commissioner of the revenue," for superintending the collection of the direct tax and internal duties, who shall be charged, under the direction of the head of that department, with certain specific duties, and amongst them, with that of superintending generally all the officers employed in assessing and collecting the said taxes and duties. In the execution of the powers thus conferred on that officer, he issued to all the collectors under his control the instructions, which have before been adverted to; whereby they were authorised, in case the district attorney resided too remotely from their respective collection districts, and had appointed no deputy to act for him, to employ any other attorney to sue for the taxes and duties which have become due; and to do this, with an understanding, that he should have all the business of such collector. It is admitted, in this case, that the district attorney lived too remote from the Twelfth collection district to attend to the business of the collection of it, and that he had appointed no deputy to represent him. In consequence of these circumstances, the predecessor of the present collector employed an attorney to sue the bonds which had been taken, which attorney was approved of, and his compensation fixed upon, by the commissoner of the revenue. That this officer had a power to give these instructions and to authorise the acts done by the collector alluded to, is unquestionable; and if this be so, upon what principle is it that the present collector can be made responsible for the amount of the bonds which, with the approbation of an authorised officer of the government, had been placed in the hands of an attorney for suit and collection, previous to his coming into the office. He could not withdraw the bonds from the hands of the attorney without a violation of the engagement made with him, "that he should have all the business of the collector." And, if they were in suit, which is highly probable, he would by doing so, have acted in opposition to that part of the instructions of the 8th of April, 1815, which states, that "in pending suits, it will be proper, not to disturb the course that may have been pursued." The creation of a commissioner of the revenue, for the purpose of superintending the collection of those portions of the public revenue, and of the officers employed in their collection, was no doubt done for wise and useful purposes; and in obeying his instructions, the collectors acted as duty required, and can upon no just or legal principle, be responsible for the consequences of those acts.

The judgment must be affirmed.

Case No. 16,352.

UNITED STATES v. SONACHALL.

[4 Biss. 425.] [1]

District Court, N. D. Illinois. Dec. 1864.

PERJURY — AFFIDAVITS OF DRAFTED SOLDIERS — NOTARY PUBLIC.

1. Under the act of March 3, 1863 [12 Stat. 73], the secretary of war has authority to prescribe what facts shall be stated in affidavits by drafted men claiming exemption from military service; and false swearing in reference to facts so required is perjury.

2. A notary public is an officer authorized to administer oaths in such cases.

[This was an indictment against Joseph Sonachall upon the charge of perjury. Motion to quash the indictment.]

DRUMMOND, District Judge. I am inclined to think this indictment can be sustained, though the question is not free from difficulty, but as after trial the defendant can move in arrest of judgment, I am disposed to overrule the motion to quash. It is an indictment against the defendant for having stated as a fact that which was untrue, in an affidavit made by him and presented to the board of enrollment for the Fifth enrollment district, in pursuance, as is alleged, of the order of the board, under the regulations of the war department. He asserted in an affidavit made before a notary public, with a view of obtaining an exemption from the military service of the United States, that he had never voted at any election in the United States.

I concede that under the law of March 3d, 1863 (12 Stat. 73), the fact that he had voted at an election did not estop him from claiming exemption from the performance of military duty; in other words, if he were a foreigner, and had never declared on oath his intention to become a citizen in pursuance of the laws of the United States, he was exempt from military service, whether he had ever voted or not; but still the board of enrollment had a right to know, in pursuing the inquiry, whether he was a citizen or had ever made an oath of his intention to apply for citizenship, whether he had voted or not. The act already referred to in the 5th section provided for the appointment of a provost marshal. The 6th section declared that it should be the duty of the provost marshal general, with the approval of the secretary of war, to make rules and regulations for the government of his subordinates. The 8th section provided that there should be in each district a board of enrollment, composed of a provost marshal as president, and two other persons to be appointed by the president of the United States. The 14th section provided that drafted persons should be carefully inspected by the surgeon of the board, who should truly report to the board the physical condition of all persons. The section proceeds to state: "Persons drafted and claiming exemption from military duty on account of disability or any other cause shall present their claims to be exempted to the board, whose decision shall be final."

The averment in the indictment is that this defendant, in order to comply with the requisition of the board, in pursuance of instructions from the war department, and with a view of claiming his exemption from military service, made an affidavit before a notary public that he was a foreigner by birth and that he had never voted at any election, which last statement the indictment alleges to be untrue.

The 13th section of the act of March 3d, 1825 (4 Stat. 118), declares that if any person in any case, matter, hearing or other proceeding where an oath or affirmation shall be required to be taken or administered under or by any law of the United States, shall upon the taking of such oath or affirmation knowingly and willfully swear or affirm falsely, every person so found shall be deemed guilty of perjury, etc.

The first question to be determined is whether this was an oath under a law of the United States. I think this point is decided by the case of U. S. v. Bailey, 9 Pet. [34 U. S.] 238. That case decides in effect that where the secretary of the treasury had authority to liquidate and pay certain claims to be presented to the government, he had a right to prescribe that an affidavit should be made of the claims, and that where one was made in pursuance of the instructions thus given and there was an untrue statement in the affidavit, that the party might be indicted, although there was no statute of the United States which expressly authorized the officer before whom the affidavit was made to administer the oath in support of the claim, and although there was no law of the United States which expressly authorized the secretary of the treasury to prescribe the particular regulation referred to. It seems that the rule laid down by the supreme court in the case of U. S. v. Bailey [supra] substantially controls this case.

The act of 1863 authorized the secretary of war to make these rules and regulations for the subordinates. The provost marshals and boards of enrollment were the subordinates. The indictment avers that he required affidavit to be made in relation to the particular fact, to wit: when a party claimed exemption on the ground that he was a foreigner, whether he had ever voted or not at an election. There can be no doubt under this act, if this case in 9 Pet. [34 U. S.] 238, is law, that the secretary of war had the right to prescribe this form to the board, and that it was a material fact which he had a right to know. The subject of investigation before the board was to be whether the party was entitled to exemption. If he was a foreigner, it was a pertinent inquiry whether he had ever voted at any election.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

It may be true that the fact that he had voted did not estop him from claiming the exemption; still, it was a proper inquiry before the board, and it had a right to know whether he had voted or not. I think the illustration given by the district attorney was an appropriate one. If a party went before the board, claiming that he was exempt on the ground that he was a foreigner, they had a right to know where he was born. The secretary had a right to prescribe that he should state under oath where he was born. If he knowingly stated a falsehood in relation to that, it was a matter material to the inquiry, although the fact that he was born in Great Britain, France, Greece, or elsewhere, would not be material as affecting his right to exemption. That is to say, he would be exempt whether he was born in one country or the other and had never made an oath of his intention to claim citizenship; but still the board had a right to know what the fact was, so far as it was within his knowledge. So in relation to many other facts which might be deemed pertinent to the question, Is this man exempt from military duty?

It will be observed that the act of 1825 does not in terms repeat the ordinary definition of perjury at common law, that it must be material to the point in issue, but the language of the act is, that if he shall "knowingly and willingly swear or affirm falsely" "in any case, matter, hearing or other proceeding when an oath or affirmation shall be required to be taken or administered," "he shall be deemed guilty of perjury."

The case referred to, decided by Judge Sprague, in one form went up to the supreme court of the United States; that is to say, after the party had been indicted in the district court he was indicted in the circuit court, and the case is reported in 17 How. [58 U. S.] 204 [U. S. v. Nickerson]. The principle decided by Judge Sprague was, that when the act of congress declared that a certain form should be complied with, in order that the party should be entitled to the payment of money, that the secretary of the treasury had no right to enlarge that form, and go beyond its terms, and I have no disposition to object to his ruling upon that point. I am inclined to think that if a law of congress does prescribe the form and manner in which a thing is to be done in order to accomplish a particular object, that neither president nor secretary has any right to go beyond that form or manner. And if the act of 1863 had prescribed what facts should be stated to the board of enrollment by the party in order to exempt him from military duty, the secretary of war would have had no right to enlarge that statement or go beyond it. It will be seen, therefore, that I hold that there was an affidavit made in pursuance of law, as it was made by the authority of the secretary of war touching a question that was to come before the board of enrollment, in relation to which he was authorized to act, and that in prescribing that a foreigner, when he came before the board and claimed exemption from the performance of military service, should state whether or not he had voted at any election in the United States, was a pertinent subject of inquiry, and, having sworn untruly upon that point, it was a false statement within the language of the act of 1825, and that an indictment will lie.

As to the other point, whether the officer had authority to administer the oath, I have no doubt whatever. This Case of Bailey, already referred to, expressly decides that point in all substantial respects. There, there was no law of the United States, as the court has already stated, which authorized the oath to be taken before a justice of the peace—he was a state officer; but the oath having been taken before him, in pursuance of the regulations adopted by the treasury department, the court held that it was an oath under the law, and that an indictment could be founded upon it if the statement were false. Here the indictment alleges it to have been an oath taken before a notary public. He is a state officer. By the laws of the state and of the United States he has a right to administer an oath. The indictment alleges that he had authority to administer the oath, under the act of 1790 [1 Stat. 112]. This is all that is required. For these reasons I think the indictment must be sustained.

Case No. 16,353.

UNITED STATES v. SOPER et al.

[4 Cranch, C. C. 623.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

INDICTMENT—CONSPIRACY.

The time and place of conspiracy must be alleged in the indictment.

This was an indictment for conspiracy to extort money from one William Hickey, by seizing two of his slaves, and confining them in Maryland, as runaways, so that the defendants [Soper and Webster] might claim the reward allowed by the laws of Maryland for taking up runaway slaves.

After a verdict for the United States, THE COURT, upon motion of the defendants' counsel, arrested the judgment, because there was no time nor place of conspiracy alleged in the indictment.

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

Case No. 16,354.

UNITED STATES v. SOTO.

[1 Cal. Law J. 328.]

District Court, N. D. California. 1863.

MEXICAN LAND GRANTS — LOCATION OF BOUNDARIES.

[A junior grantee has no right to insist that his land shall be surveyed so as to overlap an older grant for which a patent has been issued by the United States where the land patented lies within the exterior boundaries of the senior grant as shown by the diseño thereof; and especially where the junior grantee, without such overlapping, will obtain the full quantity granted by the former government.]

[Claim of Barbara Soto for the Rancho San Lorenzo, in Alameda county. The decision of the board of land commissioners confirming the claim was affirmed at the December term, 1856. See Case No. 16,357. The cause is now heard on objections to the survey.]

OPINION OF THE COURT. The principal objections now made by the United States to the official survey were urged on a former occasion to this court, when the cause was before it on appeal from the board of land commissioners. They were then elaborately argued and fully considered, and a decree was entered declaring the boundaries of the tract confirmed, as seemed to the court to be just. The exceptions filed by the United States seek to reopen the controversy thus settled and determined. It is enough to say that, independently of the fact that the matter may well be deemed "res adjudicata," I have seen no reason to doubt the entire correctness of the opinion heretofore delivered by this court. The location of the eastern line of the official survey is also objected to; but the location of this line was in like manner discussed in the opinion heretofore delivered, and fixed by the decree. Even if the question were still open, I confess myself unable to discover even plausibility in the objection taken by the United States. The grant and diseño of Soto appear to have embraced a tract extending from the San Lorenzo to the Alto creeks, and from the beach to the cuchilla, or crest of the hills, "excepting the number of varas granted to Castro in said lands." The grant to Castro for his rancho of six leagues was subsequently issued. His land is described as bounded "by the rancho of Soto on the side next the main road from the Arroyo del Alto to that of San Lorenzo, the said Soto having been considered the owner of that part next the beach." The main road referred to runs from one brook to the other across the plain from north to south, and at no great distance from the base of the hills. From the language of Castro's grant he might well have contended that his western line was to run along the road, and that Soto's land was to lie to the west, and between the road and the beach. But Soto's grant, which was prior in date, embraced the land from the beach to the cuchilla, or crest of the hills, excepting a few hundred varas already granted to Castro. A dispute, therefore, naturally arose, which, on the complaint of Soto that Castro was encroaching on the plain, was settled by the parties in the presence of and with the sanction of the governor. The boundary thus settled is thus described: "Commencing at the sanjon, or rivulet, where it is parallel with the southern side of Castro's house, measuring 600 varas towards the main road and from their point of termination, taking a straight line to the Arroyo de San Lorenzo, and recognizing, for the boundaries on the other side of the rivulet, the margin, or base, (orilla) of the hills; measuring ten varas up on the hills." The rivulet referred to is a small stream from the hills and flowing in a westerly direction into the plain. On its northerly side is the house of Castro, and on the southerly that of Soto. These houses are nearly in the same straight line. The rivulet is about midway between the Alto and the San Lorenzo. As a line run along the base of the hills would barely include Soto's house within his grant, and barely exclude that of Castro, it seems to have been agreed that from the rivulet, where it is parallel with the southern side of Castro's house, a line 600 varas long, towards the west, or in the direction of the road, should be run, and thence to the San Lorenzo. The house of Castro would thus be left more than 600 varas within, or to the east of, his boundary. The remaining or southern portion of the line, namely, that "on the other side of the rivulet," was to be run near the base of the hills, but 10 varas up on their side, in order that the house of Soto might be at least that distance within his boundary.

Such seems to me the clear and unmistakable meaning of the agreement made by the parties; and on no other supposition could it have effected its object, viz. the adjustment of a dispute between the parties as to the line constituting the eastern boundary of one and the western boundary of the other. The testimony of the neighbors, particularly that of Guillermo Castro, "shows," as observed in the former opinion of this court, "that the location as determined from the description in this agreement in no respect differs from the line as understood and recognized by the parties themselves and their neighbors." The official survey has followed this line, and, in my opinion, should not be disturbed. It is objected on the part of the claimant that the southern line, as surveyed, does not conform to the line passing from the Alto through the rodeo to the beach, as described in the grant and decree. The line of the official survey has followed the boundary of the rancho of Vallejo, the claimant's colindante on the south, as established by an official survey which has been finally approved, and which has been embodied in

a patent. The grant to Vallejo is the elder. His northern line as laid down on the diseño is indicated by an inscription on it of its magnetic course. This line has been followed in the survey, and patent issued to him. It is unnecessary to consider how far the patent thus issued to his neighbor would be conclusive on the claimant, if the grant to the latter were the elder of the two, and if the location of Vallejo were evidently beyond the limits of his grant. For in this case the grant to Vallejo is the elder, and the land patented to him is evidently within his exterior boundaries, as shown by his diseño.

I think, therefore, that the younger grantee has no right to insist that his land shall be surveyed so as to overlap his neighbor, and that the location of the dividing line between by the proper authorities of the United States is final and conclusive on both parties; more especially as there is already included in the lands surveyed to Soto the full quantity of one league and a half, granted to him by the former government. By a stipulation filed in this case, and signed by the claimants and intervenors herein, and by Guillermo Castro, it is agreed that a slight modification of the dividing line between the ranchos, as established by the official survey, shall be made. The United States have no interest in the question. A decree will therefore be entered, approving the official survey, with the modification thus assented to by the parties.

Case No. 16,355.

UNITED STATES v. SOTO.

[1 Hoff. Land Cas. 8.] [1]

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

MEXICAN LAND GRANTS—CONFIRMATION—BREACH OF CONDITION.

[Where all the papers necessary to a perfect title are found complete in the archives, and the genuineness of the signatures is proved, the mere fact that a condition in the grant requiring a house to be built on the land within one year, was not strictly complied with, in regard to time, will not prevent confirmation, where the grant was not denounced by the former government, but was confirmed by the departmental assembly, notwithstanding the omission. Fremont v. U. S., 17 How. (58 U. S.) 542, followed.]

[Claim by Josefa Soto for the Rancho Capay, comprising ten leagues of land in Colusa county; confirmed by the board, and appealed by the United States.]

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

William H. McKee, for appellee.

HOFFMAN, District Judge. This cause has been submitted without argument, and no reason for reversing the decision of the board has been suggested to us. The expediente, containing the petition, the order of the governor thereon, the grant, and the subsequent approval of the departmental assembly, is found among the archives of the former government, and the genuineness of the signatures to the title issued to the party and the record of the proceedings of the assembly is also established. The authenticity of these documents is not questioned in this court, nor does it seem to have been in any way impugned before the board of commissioners. The grant bears date the twenty-first of May, 1844. The approval of the assembly is dated the twenty-second of April, 1846. The condition of the grant, requiring the grantee to build a house within a year from its date, does not appear to have been strictly complied with. But there was no denouncement of the land under the former government, and the grant was confirmed by the assembly, notwithstanding the omission to comply with the condition. A house seems to have been built, and the land stocked with cattle, horses, etc., in the year 1846, or perhaps in the beginning of 1847, and from that time to the present the land has been in the peaceable possession of the appellee and those claiming under him. In accordance with the principles laid down by the supreme court, and applied by us in recent cases, we think this claim should be confirmed.

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

Case No. 16,356.

UNITED STATES v. SOTO.

[Hoff. Land Cas. 77.] [1]

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

MEXICAN LAND GRANT—EVIDENCE OF ISSUE.

[May 8, 1842, on a petition by the claimant for certain land, the governor ordered a provisional grant to issue to her, "while she presents a plat of the lands petitioned for, subject to the usual reports." This land had then been occupied by her husband for two years, and by her for four years. In 1844 the prefect was ordered by the governor to report whether the land was vacant, and he reported that she was occupying it, and the governor, according to his own testimony, issued a grant for the land, and three persons, of whom two were interested as purchasers from the claimant of parts of the land, testified as to having seen the grant, and as to its loss. The expediente contained the order of concession on which a grant would issue as of course. The claimant continued to remain in possession of the land from the time of the alleged grant, and to claim the same, making considerable improvements thereon. *Held*, that a confirmation of the claim was justified.]

[Claim of Teodora Soto for the Rancho Cañada del Hambre, comprising three leagues of land in Contra Costa county; confirmed by the board, and appealed by the United States.]

William Blanding, U. S. Atty.

Crockett & Page, for appellee.

HOFFMAN, District Judge. The documentary evidence produced from the archives in

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

this case shows that in May, 1842, Teodora Soto petitioned the governor for a place called "La Cañada del Hambre." She represented that her deceased husband, Francisco Barcenas, had obtained a provisional grant of the land and had occupied it with his cattle. That shortly afterwards he was obliged to leave it in consequence of a fire which destroyed the pasture, and had since accidentally been killed. She therefore solicited the governor to grant her the land, though only provisionally, and until she could present a new sketch, and reminded him of the services of her late husband in the army for more than ten years, and that on his discharge more than half his pay was due him. The prefect Guillermo Castro, to whom the governor referred for information, reported that Barcenas had occupied the land provisionally until he should obtain the grant; that he built a corral, but that it was burnt, and Barcenas was obliged to withdraw from the premises, and soon after met his death. It appears, also, from the report of Estrada, that the expediente of the grant obtained by Barcenas could not be found in the archives; but José Castro certified that Barcenas, in 1839, had solicited the land, and it was granted to him provisionally. On the eighth of May, 1842, the governor ordered a provisional grant to be issued to Teodora Soto "while she presents a plat of the land petitioned for, subject to the usual reports." By the depositions taken in the case it appears that Barcenas moved to the Rancho of Cañada del Hambre in the year 1836; that he built a house and corral upon it, and cultivated a part of it in corn and vegetables. He remained there about two years, and after his removal and subsequent death his widow returned to it, built a large house, inclosed and cultivated a portion of the land, and has continued to live upon it ever since. She has, however, been driven from her house, and now resides in a small hut built of hides and tule and poles, which she has constructed for a shelter. The fact of her occupation of the land is also proved by Castro, who testifies that, in 1843 or 1844, he was ordered by the governor to report whether the land was vacant, and that he cited Teodora Soto to appear. She claimed to own the land, but did not produce her papers. She was, however, in the actual occupation of it, and Castro so reported to the governor. The grant alleged to have been issued by the governor in pursuance of the order above recited is not produced. Governor Alvarado testifies that a grant was issued in 1841 or 1842, in pursuance of the decree of concession contained in the expediente. Francisco Pereyra testifies that he saw in the possession of the claimant, in 1849, documents relative to the title of the Cañada del Hambre; that he read them several times; that he saw a document issued to Teodora Soto by Alvarado, and that he was present in March or April of 1850 when these documents were delivered by Teodora Soto to General Vallejo, and that she said at the time that they were the title to the rancho. On cross examination the witness stated that the document stated the name of Teodora's husband; that the grant was made in consideration of his having been a soldier; that he did not remember whether it required any conditions, nor whether it was in the usual form; that Teodora Soto had sold a piece of the land to Vallejo in 1849, and that he received the title papers about eight months after the sale—at the time they were delivered to Vallejo he was called upon by Teodora to witness the fact. M. G. Vallejo testified that he had the title papers in his possession some years, but that about 1850, when he and his son-in-law Frisbie came to look for them, they could not be found. In 1850, however, when Major Cooper wished to secure a preëmption in the vicinity of this land, he requested the witness to have the grant translated, and that he accordingly procured a translation to be made by Frederick Rejedor, then public translator, but since deceased. The witness then identified the translation as a correct translation of the original grant which he had seen and knew to be genuine. The original, he says, he delivered to Capt. Frisbie to be placed in his safe, and he has never since been able to find it. Capt. Frisbie testifies that he had the original grant in his possession in 1849 or 1850; that he sent it to Sonoma, and it was returned to him, as he thinks, with the translation on file in the case. The paper when returned to him, if returned at all, was tied up in a handkerchief and thrown into an iron safe either by him or some of his clerks; that some time after the claimant applied to him for her papers, to be used in a law suit—on opening the handkerchief he found the translation, but not the original document; that he searched for it diligently, and wrote to General Vallejo at Sonoma for it, but could not find it. General Vallejo, he says, insisted that he had sent it back in the handkerchief, but the witness could never ascertain what had become of it. The witness further states that he read the translation soon after having the original in his possession; that he then thought and now thinks the translation was correct. He identifies the handwriting of the translation as that of Rejedor, a teacher in Sonoma and a public translator in that district.

The grant, as appears by the translation, is of three sitios "of that which shall remain over from the ranchos of the Pinole and Mr. Welsh, after they shall have been duly measured." By evidence taken in this court on appeal it appears that both Vallejo and Frisbie were, at the time of giving their testimony, interested in maintaining the grant—having purchased a portion of the land from the claimant. The objection was not, however taken at the time their testimony was given, nor has any motion been made to suppress their depositions. It however affects

their credibility, and if the proof of the existence of the original grant rested on their testimony alone, it might well be regarded as unsatisfactory. But Alvarado, the governor, and Francisco Pereyra both swear, the one that he issued the grant, the other that he saw it in the possession of the claimant. The expediente contains the order of concession upon which a grant would issue as of course; and Castro testifies that in 1842 or 1843 the claimant was in actual occupation of the land, claiming it as her own. The date of the grant in the translation is 1841; while the order of concession is 1842. This discrepancy was noticed by the board; but though calculated to excite suspicion, it was considered that it might with greater probability be attributed to a mistake of the translator than received as evidence that no such grant was ever issued. The United States have also produced in evidence a communication of José R. Estrada to the justice of the peace of Contra Costa. In this communication Estrada states that he was directed by the governor to inform the judge that there had been dispatched to Don Ignacio Martinez the title of the tract called the "Pinole"; and that Doña Teodora Soto should be informed that the pretension she has to occupy the tract called the Cañada del Hambre has no foundation, for that it belongs to the mentioned tract of El Pinole. This communication is dated June 2d, 1842. The order of concession in the expediente bears date May 8th, of the same year. Alvarado, though he recognizes the handwriting of Estrada, is unable to remember that he directed the communication to be made; and all that can be inferred from the document, assuming that it was written in pursuance of the orders of the governor, is, that the claim of Teodora Soto to any part of the Pinole rancho was disallowed by the government. But this would rather seem to confirm and strengthen the evidence in favor of the grant; for in that instrument the land granted is expressly limited to "three sitios of that which shall be left over from the ranchos of the Pinole and Mr. Welsh." If, then, after the issuing of this grant the Pinole rancho had been found to embrace any portion of the land claimed by Teodora Soto to have been granted to her, the communication of Estrada would naturally have been made, and would have been entirely consistent with the rights really acquired by Teodora Soto.

Obliged as we are in these cases to found our judgment upon testimony not in all respects reliable, it is impossible to affirm with certainty that the grant issued. I think, however, that the proofs preponderate in favor of that supposition. There seems no good reason to suppose that the governor withheld the grant which he himself ordered to be issued. The destitute condition of the applicant, and the services and misfortunes of her husband, must have commended her application to his favor; and we find her occupying and claiming the land from about the date of the alleged grant to the present time. The nature and extent of the improvements made by her would seem to indicate that she then considered herself as owning the land, and even the fact that in 1849 Vallejo purchased a portion of it from her might, perhaps, be considered a corroborating circumstance, for it implies a recognition on his part of her rights at an early day, and before the rise in value of the land presented temptations to manufacture spurious titles. The board, notwithstanding some suspicions which attend the case, confirmed the claim, and we have not discovered sufficient reasons for reversing their decision. The claim, however, must be strictly limited to the land granted; and it can only embrace such portion of the Cañada del Hambre, not exceeding three leagues, as is not included within the limits of the ranchos of El Pinole and Mr. Welsh, when the same shall have been duly ascertained.

Case No. 16,357.

UNITED STATES v. SOTO et al.

[1 Hoff. Land Cas. 182.] [1]

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

MEXICAN LAND GRANT — LOCATION OF BOUNDARY — EQUITABLE RIGHTS.

[1. The description in a grant called for "a straight line drawn to the beach, and from that point" another line. *Held*, that the word "point" did not mean a mathematical point, but that, in view of the character and circumstances of the grant, it must refer to the beach as being one of the boundaries.]

[2. Where it appears that the governor intended to accede to the petition, and the land has been long occupied and enjoyed under the grant or promise to grant, and by everybody recognized as belonging to the grantee, the latter has an equitable title which the United States should respect.]

Claim [of Barbara Soto] for one league and a half of land [constituting the Rancho San Lorenzo] in Contra Costa (now Alameda) county, confirmed by the board, and appealed by the United States.

William Blanding, U. S. Atty.
Thornton & Williams, for appellees.

HOFFMAN, District Judge. The claim in this case is founded on two grants,—one by Alvarado dated October 10, 1842, and the other by Micheltorena dated January 20, 1844, for the sobrante of half a league contained within the boundaries of the first. The land was described in the first grant as follows: "One league, a little more or less, in the tract called 'San Lorenzo,' the limits of which are from the creek of that name to that called 'El Alto,' pertaining to Don Jesus Vallejo, and from this creek, drawing a right

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

line to pass by the rodeo, to the beach, and from this point to the first ridge which the hills form, excepting the number of varas which have been conceded in said tract to Don Guillermo Castro, which shall be determined at the time of the possession."

At the time the grant issued, Castro was owner of a tract of six hundred varas square, upon which he resided. He, in October, 1843, obtained a concession of a larger tract, which was described as bounded by the rancho of [Barbara] Soto on the side next the main road, it being considered that there has already been made a concession to the said Soto on the side towards the beach. The main road alluded to crosses the tract from creek to creek, and it was contended by Castro that the main road was the western boundary of his land, and that the grant to him was a virtual settlement of the line between him and Soto, which in the grant to the latter had been left for subsequent adjustment. Proceedings were instituted to settle this dispute, and it was finally determined by a compromise made with the approval of the governor. The line as thus settled was described in a document drawn up for the purpose, which appears in the archives, and a copy of which is endorsed on both expedientes. The boundary of Castro as thus settled is as follows: "Commencing on the sanjon (or ditch) where it is parallel with the southern side of Castro's house, and down the sanjon towards the main road six hundred varas, from which point, where they conclude, by a straight line to the San Lorenzo creek. The boundary on the other side of the sanjon is the margin (orilla) of the hills towards the plain, measuring ten varas up on the hills."

These proceedings must be taken as a final and definite settlement of the eastern line of Soto's ranch, and as such it was acquiesced in and recognized by the parties. The line thus designated can, as appears from the proofs, be readily located, and the testimony of the neighbors, particularly that of Guillermo Castro, shows that the location as determined from the description in the agreement in no respect differs from the line as understood and recognized by the parties themselves and neighboring rancheros. On the 20th of January, 1844, Soto addressed a petition to the governor, setting forth that the concession of the tract which he occupies, called "San Lorenzo," expresses to have an extension of one sitio (square league) a little more or less; that the overplus which it may have towards the beach may be half a sitio, which he begs may be conceded to him, as united with the other it would be of much benefit to him. On this petition the secretary reports that there is no objection to granting it, but that the petitioner must subject himself to the limits which his first title calls for, and to the agreement celebrated with Don Carlos Castro. On receiving this report the governor acceded to the petition in the following words: "In conformity with the foregoing, Micheltorena."

It is objected that this was not a valid grant of the sobrante or overplus. But in the first place, it appears from the archives that the same formalities were rarely if ever observed in relinquishing a sobrante to the grantee, within the general limits of whose grant it was found, as were deemed necessary in making an original concession, or a grant of a sobrante to a stranger. The grant of the sobrante to him within whose limits it was found, was little more than a waiver or release of the condition of the original grant, which restricted him to a specific quantity, and the original grant (that condition being struck out) would by its terms convey the whole land within the limits designated. At all events, there can be no doubt in this case that the governor intended to accede to the petition, and the land having under this grant, or promise to grant, been long occupied and enjoyed, and on all hands recognized as belonging to the grantee, the latter has in any view an equitable right which the United States are bound to respect.

The important question, however, in the case, is as to the location of the southern boundary. The tract included within the original limits is claimed by the appellees to be in the form of a square or parallelogram, and bounded on the east by the line between Castro and Soto as it was fixed by the agreement heretofore alluded to, on the south by the Alto and a line through the rodeo to the beach, on the west by the beach, and on the north by the San Lorenzo. It is contended on the part of the United States, that neither the San Lorenzo nor the beach is a boundary of the tract, but that the southern line must be run from the point where the rodeo line or northern boundary strikes the beach, to the first ridge which the hills form. If such a line be drawn, it would form a diagonal to the square claimed by the appellees, and the tract would have a triangular shape, with the agreed line between Soto and Castro as its base on the east, and with its apex touching the beach at a mathematical point.

The language of the grant has already been quoted. The words which it is contended call for this location, are as follows: "And from this creek (El Alto) drawing a right line to pass by the rodeo to the beach, and from this point to the first ridge which the hills form, excepting," etc. It is claimed, and with much apparent reason, that the last line must be drawn from the "point" where the rodeo here strikes the beach to the first cuchilla or ridge. If the word "punta" had precisely the signification of the English word "point," as used in surveying, or if the grant had specified the "point" where the rodeo line strikes the beach as the point from which a straight line was to be drawn to the cuchilla for the southern boundary, the construction contended for

would be unavoidable. But the language is "a straight line drawn to the beach, and from that point," etc. It does not in terms say "and from the point where said line strikes the beach;" it merely says "from that point," namely, from the beach. A reference to the beach generally by the term "punta," is certainly not in accordance with our use of language; but so far as I have been able to discover, such a construction of the term is not inadmissible in Spanish. If, however, there were no other guide to the intentions of the grantor, this construction might probably be deemed forced and unnatural. There are other considerations, however, which I think remove any reasonable doubt as to its propriety.

In fixing the limits of land to be granted, both the law and usage of the Californians require them to adopt as nearly as possible a rectangular or square figure. This was not in all cases practicable, but in a country used almost exclusively for grazing, and where no fences were built, it became necessary to designate great natural objects as the boundaries of the tracts conceded. It seems therefore extremely improbable that in this instance the natural and obvious boundary afforded by the shore of a great estuary should be wholly neglected, and the land should assume the form of a triangle, having only a mathematical point at its apex resting on the beach, while one of the sides should diagonally cross the center of a large plain with no visible object throughout its length, except at its extremities, to determine its location. This is the more improbable as the whole of the neighboring land had been before, or was subsequently, granted, and the piece of land excluded by the diagonal line alluded to, if not embraced within the grant to Soto, has remained from some unexplained reason the only piece of ungranted land in the vicinity. The original grant to Soto was for one league within the limits specified. He subsequently, as we have seen, obtained the sobrante of about half a league more. This was after the boundary between him and Castro had been fixed.

Taking, then, that boundary as determined, there is found within the limits as claimed by him about one square league and a half, precisely the quantity granted to him in the two grants. But if the diagonal line be drawn as proposed, he would have but about two-thirds of a league in all, leaving his sobrante grant wholly inoperative, for even his first grant of one league could not be satisfied out of the tract so limited. It is to be borne in mind that Soto did not petition for an augmentation or extension, but for a sobrante or overplus—the excess within the original boundaries over and above the quantity to which he was restricted. This excess he states to be about half a league, while he also mentions that his first grant was for one league. If then the limits of the land as designated in his grant, after the Castro line was fixed, included less than a league as is now contended, the petition for a sobrante of half a league more within those limits was absurd. Had he or the governor supposed that the quantity already granted could not be found within the limits of the tract, it is not to be supposed that one would have asked for and the other conceded half a league more within those limits. In such case he would have asked for, not a sobrante, but an augmentation, and would have obtained his additional quantity outside of and beyond his original boundaries. The fact that the land, according to the boundaries he contends for, is nearly exactly the quantity (one league and a half) granted to him, seems to me almost conclusive as to what he intended to ask for and the governor to give.

The value of land to the former inhabitants of this country in a great degree depended upon the existence of abundant supplies of fresh water, or "agua dolce," for cattle. The line proposed would not only form an acute angle at the beach, but would touch the San Lorenzo creek only at a single mathematical point, thus cutting off all access to that stream, and either depriving the rancho altogether of fresh water, or else affording it at the El Alto alone for a short distance. The adjoining rancho at the south is bounded by the San Lorenzo, and it is improbable that in fixing the limits of a cattle rancho access to that stream should have been denied to Soto, when the land between his rancho and it was unoccupied and ungranted, and the governor was willing on his mere suggestion to increase the quantity given him by an additional half league. If with these considerations in our mind we recur to the grant, its intention seems obvious. It does not profess to give the boundary lines except on one side of the tract, but "its limits." Its longitudinal limits are declared to be from the San Lorenzo to the Alto, and the rodeo line to the beach. Having thus determined its length, the grantor indicates its breadth, viz. from the beach to the first crest of the hills.

He does not mention any point in the crest of the hills, which would have been natural if he had intended to fix as a southern boundary an imaginary straight line drawn from the point where the rodeo line struck the beach to the crest; and the indefiniteness of this description, referring as it does to a line on the summit of a range of hills, rather than to a point on those hills, seems to show that the intention of the grantor was merely to fix the latitudinal limits of the tract, viz: the beach and the crest; rather than to describe a line as a precise boundary. But all doubt on this subject is removed, if the diseño produced be received as the original on which the grant was made. It is shown beyond any reasonable doubt, that it was with the other title papers placed in the hands of eminent counsel in this city, in whose custody it has ever since remained.

By some oversight it was not put in evidence before the board, but A. M. Pico, Francisco Arce and G. Castro testify that it is either the identical map, or one exactly resembling that, which was handed to Pico when about to give judicial possession to Soto. This map is unusually rude, but the form of the tract is sufficiently indicated to show it to be a square or parallelogram, with the beach as its western boundary.

A further confirmation of these views is found in the report of Jimeno at the time of the dispute between the governor and Castro. "It appears to him," he says "convenient to measure to Soto the league, more or less, which has been granted him from the beach to the 'lomas,' or hills, but always on the side of the Arroyo del Alto, because those are the limits which have been marked out, and from these limits he should follow those of Don G. Castro." He was thus, according to Jimeno, to have a league on the side of the Alto, from the beach to the hill and from the Alto to the San Lorenzo, following Castro's boundary. The sobrante, after measuring the league, would have lain between the beach and the San Lorenzo, and would have been, as the testimony shows, about half a league in extent if measured after the Castro line was determined, and it was precisely this sobrante of half a league which Soto asked for and obtained.

If to all this be added the fact that Soto himself always claimed, and was regarded by his neighbors as owning, the whole tract between the beach and the Castro line, and between the Alto and rodeo line and the San Lorenzo, the conclusion is irresistible that such are the true boundaries of the grant. The board confirmed the claim to the land within these boundaries, and I see no reason to reverse their decree.

[This case was afterwards heard on objections to the survey. See Case No. 16, 354.]

UNITED STATES v. SOTO. See Case No. 16,156.

Case No. 16,358.

UNITED STATES v. SOUDERS.

[2 Abb. U. S. 456.] [1]

District Court, D. New Jersey. April Term, 1871.

ELECTIONS—PREVENTING VOTING—CONSTITUTIONAL LAW—ELECTION RETURNS, HOW CERTIFIED.

1. On indictment, under section 19 of the act to enforce the right of citizens to vote, &c., approved May 31, 1870 (16 Stat. 144), for "unlawfully preventing certain qualified voters from freely exercising the right of suffrage;" where the proof was, that the defendant, with others, attacked a number of voters, waiting in line for their turn to cast their ballots, and expelled them from the room; and that said voters afterwards returned and voted: *Held*, that the defendant committed the offense which congress meant to define and punish in the clause of the section under which the indictment was drawn.

2. The prevention took place, and the offense was complete, by the expulsion of the voters from the polls, although the prosecutors afterwards voted.

3. The words "exercising the right of suffrage" in section 19 of the act of May 31, 1870, may be held to mean "voting," without bringing that section in conflict with the provisions of section 4 of the act,—provided that the penalties prescribed in section 19 be understood to apply to offenses committed at elections for members of congress, and those in section 4 to state, county, and municipal elections.

4. Query, whether under the fifteenth amendment to the constitution of the United States, congress has power to pass any law to operate upon private individuals?

5. A copy of a return of an election in a township, filed with the clerk of the county, accompanied by the certificate of the clerk of the county, that it was a full and correct return of such election, as filed in his office,—sent to the office of the secretary of state, is not made and certified in the manner, and does not come from the source required by the election law of New Jersey, to constitute it an official paper.

Motion for new trial, after conviction on an indictment.

A. Browning and B. Williamson, for the motion.

A. Q. Keasbey, Dist. Atty., in opposition.

NIXON, District Judge. The defendant in this case has been indicted, and upon trial convicted, of "unlawfully preventing certain legal voters from freely exercising the right of suffrage" at an election for a member of congress, held on the eighth day of November last, in the township of Newton and county of Camden. [Case unreported.] The indictment was framed under section 19 of the act, entitled "An act to enforce the right of citizens of the United States to vote in the several states and for other purposes," approved May 31, 1870.

It may be assumed, in view of the verdict of the jury, that the government proved, at the trial, that on that day,—fixed by law for the election of a representative in congress, and the several state and county officers,—the polls were regularly opened at seven o'clock, a. m.; that the election was conducted by certain officers, claiming to act under the authority of the township; that during the progress of the election, at about half-past ten o'clock in the morning, whilst the room in which the election was held was well filled with colored voters, waiting for the opportunity of casting their ballots, a violent attack was made upon them by a company of white men, driving them forcibly from the room into the street, and closing, or attempting to close the door against them; that amongst the legal voters thus rejected, were John Ray, Henry W. Sizer, Lorenzo Wilson, Wm. H. Newsome, and Moses Wilcox; that these men, with others driven out, almost immediately rallied, and with the aid of their friends, regained admittance to the room, and, in turn,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

drove out the white men; and that all of them subsequently voted. The jury has also found, as a question of fact, that the defendant, Francis Souders, was engaged in this outrage of expelling the colored voters from the room, and thus preventing them from freely exercising the right of suffrage.

It further appears, that after the morning disturbance was quelled, the voting was resumed and continued without any serious interruption, until about six o'clock in the afternoon; that eight hundred and sixteen ballots were deposited; and that then another crowd of white men took possession of the polls, seized the ballot box, broke it in pieces, and scattered the ballots upon the floor and in the street.

Upon submitting this case to the jury, at the trial, I reserved two legal questions for consideration afterwards,—more in deference to the strongly expressed convictions of the able counsel for the defense, than because I entertained any serious doubt as to their correct import and meaning. Since then I have examined the briefs submitted by the counsel for the government and of the defendant, elaborately discussing these questions, and have given to them that careful attention which their importance, as bearing upon the conviction of the defendant, seemed to require.

The first question involves the true construction of the clause of section 19 of the act entitled "An act to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes," under which the indictment against this defendant was drawn; and the second, the legal effect upon this case of the certificate of election, filed in the office of the secretary of state, by certain persons, claiming to make the return of the election in the township of Newton, in the county of Camden, on November 8, 1870.

I. The charge against the defendant in substance is, that at an election for a representative in the congress of the United States, held as aforesaid, he unlawfully prevented certain qualified voters from freely exercising the right of suffrage, by force, threats, menaces, and intimidation. The proof is, that at said election, the defendant, in company with others, in the room where the polls were opened, made an attack upon a line of voters, waiting for the opportunity of casting their ballots for a member of congress, and drove them from the room with violence, under the pretext that certain other voters not in the line were excluded from the polls, and attempted to fasten the doors against their re-admission.

It is insisted, on the part of the defendant, that this is not the offense which congress meant to define in the clause of section 19, under which the indictment was framed; that preventing a voter from freely exercising the right of suffrage is not preventing him from voting; that the one is a mental restraint, and the other a direct physical interference; and that the design of congress, in using these words in this section, was to protect men in voting as they wished to vote, rather than to secure to them the opportunity of voting. It is further maintained, that, even if it be conceded that one of the meanings of the expression, "preventing a voter from freely exercising the right of suffrage," is "preventing him from voting;" yet the facts of the case do not prove a prevention, but a hindrance; that to prevent, is altogether to deprive him of the opportunity to vote, while to hinder is only to delay him temporarily in the exercise of the privilege; and that, as all the prosecutors afterwards voted, the offense defined in section 19 of the statute was not committed.

The argument is, that in the first place, the proper definition of the words used will not admit of the construction claimed by the government; and that, in the next place, all the sections of the statute must be so construed, as to render them operative, consistent, and harmonious with each other; that the construction given to section 19 by the government brings it in direct conflict with the provisions of section 4 of the act; that one penalty is described in section 4 for "preventing, hindering, or obstructing a qualified voter in voting;" and that a different and more severe penalty is affixed in section 19, for "unlawfully preventing him from freely exercising the right of suffrage;" and hence, that it is necessary to assume, in order to harmonize the provisions of these two sections, that different offenses were in the mind of congress when the law, as a whole, was enacted.

1. Our first inquiry will be, whether a proper definition of the words used in the section fairly admits of the meaning insisted upon by the counsel for the government?

There are well settled rules in the construction of statutes. The object of all inquiry is to get at the intention of the legislature in passing the law; and the sole duty of the court is to grant to that intention, when ascertained, its full force and effect. We first consider the language employed, giving to words and sentences their obvious import and signification; having regard more to their general and popular use than to etymological or grammatical refinements. If any doubt remains, we then look at the context; at the subject matter; look to the effects and consequences of this or that interpretation; to the reason and spirit of the law itself; expounding it in the light of the mischief of the old law, or want of law; and the remedy which the legislature has attempted to provide.

Where the statute is penal it must have a strict construction; for the law is tender as to the rights of individuals, and courts wisely shrink from the exercise of the power of punishment, except upon conviction in those cases where the legislature has clearly defined the offense and imposed the duty. But we must not err in a too liberal application of the rule. As was well said by Chief Jus-

tice Marshall, in U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 95: "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

Holding these familiar principles in mind, let us consider the clause of the section the meaning of which we are trying to ascertain. The words are, "that if at any election for representative, &c., any person shall by force, threat, menace, intimidation, or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," &c.

What do these words mean? It would seem that there ought not to be any difficulty in arriving at their signification, if we give to them their obvious and usual import. When a man is spoken of as exercising a right, it is commonly understood that he is doing something. When a voter casts his ballot into the box, do we not say that he is exercising the right of suffrage? Can any words be used that better define the act of voting? And when he exercises this right freely, does he not do it according to his pleasure, without any constraint either upon his mind or his body? His will must be uncontrolled, and his physical opportunity for doing the act must not be interfered with. Any control over the one, or interference with the other, encroaches upon his freedom of action, and produces the mischief which the words of the statute were designed to guard against and cure. And what is it to prevent a voter from exercising this right?

It is to put such a restraint upon his volition, or his body, that he cannot perform the act; producing, by threats or otherwise, such apprehension of personal loss or injury, as to induce him not to vote, or to vote contrary to his wishes, being a restraint upon his will; and intervening between him and the ballot box, so as to render it physically impossible for him to cast his vote, being the restraint upon his body. If this was what the statute forbid, the words used might afford some color for the construction asked for by the counsel for the defendant. But it forbids more than this. It prescribes penalties against those who unlawfully prevent voters from freely exercising the right of suffrage. It not only guards the voter against being stopped in the act, but it shields him against all sorts of duress, mental or bodily, while in the performance of the act. Even if it be true that a man is only prevented from voting when he is hindered altogether from exercising the right of suffrage, it is also true that he is prevented from freely exercising such right, when, in its exercise, any kind of constraint is placed upon him by force, threat, intimidation, or otherwise.

I am of opinion, therefore, that, looking at the words of the section in their obvious usual signification, and without any reference to the influence and control which other sections of the statute ought to have in the consideration of its construction, the indictment properly describes the offense which congress meant to define and punish, and the proof of the facts in the case sustains all the material allegations of the first and third counts of the indictment.

2. But it is insisted that such a construction of section 19 will bring it in conflict with section 4; that if we hold that the identical offense is described in these two sections, we subject congress to the imputation of passing an act prescribing different penalties in different sections, for the same misdemeanor; and that it is the duty of the court, under such circumstances, to find some other interpretation of the clause in section 9, which will bring the two into harmony, and cause them both to stand.

The court recognizes this authority and duty when the occasion arises for its exercise, but finds no occasion here. To create this antagonism it is necessary to assume that the phraseology of section 4 is broad enough to include congressional elections as well as state, county, and municipal. It does not do so in terms; and I am not willing to assert that if that section stood alone, the language used is not capable of such construction. But it does not stand alone, and it must be construed in connection with other sections of the act; and if the absurd consequences suggested by the counsel for the defendant are to follow the assumption that section 4, as well as section 19, was designed to apply to federal elections, is it not more consonant to reason and the principles of right interpretation, that we should limit the provisions of the one to state, county, and municipal elections, and of the other to the election of members of congress, than to wrest the words from their natural and obvious meaning, in order to create different and distinct offenses?

And this brings us to the inquiry, what offenses did congress mean to guard against and punish in these two sections of the act? I must acknowledge that the question is not free from embarrassment, if we consider the words only which they have used to express their object. The whole law indicates a want of precision and harmony in the use of terms that suggests either haste, or the

work of more than one mind, in its preparation.

In construing a statute, it is one of the fundamental rules to ascertain the intention of the law maker. Where the words used do not clearly disclose this intention, it is proper to consider what was said or done by the law-making power, while the subject matter was under discussion, in order to arrive at their meaning. Looking carefully into the mischief avowedly intended to be remedied by law, and into the history of the legislation preceding and accompanying its enactment, can there be any doubt but that its different sections were the work of many minds; that the law gradually grew from a single proposition, including only one object, into a complex one, embracing several; that the first thirteen sections were prepared to enforce the fifteenth amendment; that the next five sections were inserted to more effectually provide for carrying out the fourteenth amendment, and that the nineteenth and subsequent sections were afterwards added to accomplish another object, to wit: to preserve the purity and freedom of elections for members of congress?

Bills were pending and under discussion at the same time in the senate and house of representatives, with different provisions, but relating to the same subject matter, and having the same end in view. The title of these bills and the provisions of the several sections show that the primary design in each case was simply to provide the appropriate legislation deemed necessary to enforce the fifteenth amendment. The house bill, as passed on May 16 and sent to the senate on the 17th, was confined to this object. When it reached that body the senate bill No. 810, entitled "An act to enforce the fifteenth amendment of the constitution" was under discussion. This, substantially, consisted of the first thirteen sections of the law, as subsequently passed, and a motion had just been made to enlarge the purposes of the bill by adding to it two other bills, then pending in the senate, to enforce the fourteenth amendment, and which embraced the sections from the fourteenth to the eighteenth inclusive of the present law. The senate amended the house bill by striking out all after the enacting clause, and substituting their original bill with the proposed amendments; and after a few days' discussion the object and scope of the act were still further enlarged by annexing the 19th and 20th sections, for the expressed purpose of punishing frauds committed in the election of members of congress. These subsequent sections had been embodied in house bill No. 477, entitled "An act to prevent and punish election frauds," and which had been reported to the house from the committee on elections, and was then pending before that body as an entirely distinct measure. The bill thus amended passed the senate, and the remaining sections were added to it by the committee of conference on the disagreeing votes of the two houses.

Not much homogeneousness of language or expression should be looked for in an act thus made up, and little force can be given to the argument, that because different words and forms of expression have been used in different sections, it should be assumed that there was a design in the mind of the law-making power to express and define different offenses.

This reference to the origin of the law reveals the fact that the manifest object, in section 14, was to enforce the provisions of article 15 of the amendment to the constitution, and in section 19 to conserve the freedom and purity of elections for members of the house of representatives.

In legislating to enforce the provisions of the fifteenth amendment, it was conceded that congress might prescribe penalties against national or state officers, for interfering with the free exercise of the right of suffrage, and against all persons claiming to act under color of some state law or constitution; and the question at once arose, whether the constitutional power existed in congress to pass any law which acted upon private individuals. That amendment, it was alleged, related only to acts done by the United States or any state, to abridge or deny the right to vote on account of race, color, or previous condition of servitude. It had no reference to individuals acting as such, except so far as they pretended to be acting under the authority of existing law, state or national. It is not necessary for me to express any opinion upon that question here and now; but I allude to it in order to say that, in the debate upon section 4, it seemed to be admitted, both by the friends and opponents of the measure, that no indictment could be sustained under that section, against any one, unless the prevention of voting, or the denial of the right to vote, was done under the color or pretense of some state law or regulation. The act was amended by adding sections 19 and 20, expressly to cover the case of private individuals, who were corrupting the fountain of political life and social order by fraud, bribery, intimidation, force, or other unlawful means, and, anticipating the objection raised by others against the powers of congress to legislate in the matter of state elections, these sections were limited to offenses committed at an election for members of congress.

I am, therefore, of opinion that the words "unlawfully preventing a voter from freely exercising the right of suffrage," may be construed to mean "to unlawfully prevent him from voting," without bringing section 19 in conflict with section 4, and that it is not necessary to find some other interpretation to harmonize the provisions of these sections of the act.

It is further insisted, that to constitute the offense created by the clause of section 19 under consideration, the voter must be altogether frustrated in his efforts to cast his ballot; that the whole day is covered, so far as the meaning of the word prevention is concerned; and that, as these prosecutors found the opportunity to vote after their ejection, although for a time hindered, the offense was not committed.

It seems to me, as I have already intimated, that such a construction of the statute is too narrow, and that it defeats the purpose which congress had in view in enacting it. This purpose was to protect men in the discharge of their most sacred political privilege. That would be a slight protection, indeed, which allows bullies and rowdies to surround the ballot box from the opening to the close of the polls, keeping off all legal voters by threats, intimidation, or force; and then to hold that the offense is not committed, if by chance the hindered voters should avail themselves of a casual opportunity to slip in their ballots when the backs of these vigilant sentinels were turned. And yet this result follows the interpretation asked for.

But the argument here, of the counsel of the defendant, loses all its force when we call to mind that "exercising the right of suffrage," in the statute, is qualified by the word "freely," which, in his reasoning, he seems to have overlooked.

The proposition is, that we shall not prevent a voter from freely exercising the right of suffrage.

It may be admitted that prevention, in its strict signification, includes more than hindrance, and that it involves the idea of total exclusion from the right of voting. But is no force to be given to the word "freely?"

In view of the fact that these five men afterward voted, the counsel for the defendant asked whether they could truthfully answer "yes" to the inquiry, "Were you prevented from voting on the 8th of November last?" and insisted that their correct response would be, "No; we were hindered—not prevented."

But suppose the inquiry had been, "Were you prevented from freely exercising the right of suffrage?" they would answer, "Yes, we were hindered from voting by being knocked down, shot, forced out of doors, and having the doors closed against us. We were prevented from voting freely. We voted under great difficulties."

It is hardly necessary to multiply words upon this point. It is in proof that these five men stood waiting in line before the ballot box with ballots in their hands, intending to vote for certain individuals upon a certain ticket, which they wished to deposit; that while thus standing prepared to exercise and intent upon exercising their right of suffrage, Francis Souder, with others, drove them from the room and shut the doors against them. How can it be said that they were not prevented from exercising their right freely?

II. The only remaining question which we have to consider, is the legal effect upon this case of a paper produced by the government from the office of the secretary of state, and purporting to be a certificate of election filed by certain persons claiming to make the return of the election held in the township of Newton on November 8, last.

The reasoning of the counsel for the defendant upon this point, as it appears to the court, is founded upon a misapprehension of the allegations of the indictment.

The argument is, that the indictment charges that the offense was committed at an election held in the township of Newton, on November 8 last, by Alexander B. Mahan, Samuel P. Atkinson, and Herman Klusterman, judges; that the statute requires the judges holding the election to file a certificate of the results, in the office of the secretary of state, certifying the number of votes polled and received by each candidate, and the names of the persons voted for, and that such paper shall be an official paper; that to sustain the allegation in the indictment, the prosecution produced this certificate, which is in fact signed by other parties, and therefore does not prove, but directly contradicts the allegation.

The reply we have to make to the argument is, that there is no such allegation in the indictment, nor was any such material or proper.

The charge was, that a stated election for a representative in the congress of the United States, and for certain state officers, was duly held on that day at the township of Newton, in the county of Camden.

The facts, therefore, to be proved were, not that Alexander B. Mahan, Samuel P. Atkinson, and Herman Klusterman, were the judges who conducted the election,—but that a stated election was then and there held; that it was conducted by persons claiming to act under the authority of public law, and that it was held for the purpose of electing a member of congress.

And were not these facts proven? A large number of witnesses testified to them. No one raised a doubt by questioning them. The defense fully showed them by producing the poll book required to be kept by section 40 of the state election law (Nix. Dig. 263), having the proper heading, and containing a record of the names of the persons whose votes were received, and the order of their reception, and offering the clerk and two of the judges of election as witnesses, by whom the facts of election and the correctness of the poll book were established.

But it seems to be admitted that these material facts were proved. It is insisted, however, that a copy of a certificate was produced from the office of the secretary of state, which is invested by the statute with

the character of an official paper, and which contradicted, and therefore invalidated or nullified the verbal proof.

There are short and conclusive answers to this:

1. The paper thus produced was not made or certified in the manner, and did not come from the source required by the statute to constitute it an official paper. It appears, upon inspection, to have been the copy of a return filed with the clerk of the county of Camden, with the certificate of that clerk appended that it was a full and correct return of the election in the township of Newton, as filed in his office. It did not come to the secretary of state, either from the board of election of the township, or from the board of county canvassers.

2. But admit that it has the prerequisites necessary to make it an official paper. Then it is a record, or it is not. If a record, and incapable of contradiction by verbal evidence, as claimed by defendant's counsel, all the facts which it contains must be accepted as true. It shows that there was an election in the township of Newton, in the county of Camden, on November 8 last, and that such election was for a representative in the congress of the United States, which are the material facts to be established; and all the verbal testimony in the cause, to the effect that some other judges held the election, must be regarded as untrue; exhibiting the depravity of the character of the witnesses, or the fallibility of their memory. But if it is not a record, and may be contradicted by other proof, then the verbal evidence offered is abundant to prove these necessary facts in the case, and the verdict was right.

Thus, after a careful survey of the law and the evidence, the court finds no sufficient reason to be dissatisfied with the result at which a patient and intelligent jury arrived, and the motion for a new trial is denied.

Motion denied.

Case No. 16,359.

UNITED STATES v. SOUTH BRANCH DISTILLING CO. et al.

[8 Biss. 162.] [1]

Circuit Court, N. D. Illinois. Feb., 1878.

INTERNAL REVENUE—DISTILLER'S WAREHOUSE BOND.

1. The fact that distilled spirits are seized, condemned and sold for violation of the internal revenue law [14 Stat. 98], while bonded, does not release the obligors on the warehouse bond.

2. The fact that the purchaser at the sale paid the tax is immaterial.

Debt on bond, dated November, 1875, in penal sum of $7,000, given by South Branch Distilling Company, as principal, and H. J. Pahlman and Joseph Haas as sureties, conditioned that, if the said principal should well and truly pay, or cause to be paid, to the collector of internal revenue for the First district of Illinois the amount of taxes due and owing on a certain eighty-seven barrels of distilled spirits, particularly described in said bond, which were entered for deposit in the distillery warehouse, No. 1, of the said South Branch Distilling Company, in said district, during the month of October, 1875, before such spirits shall be removed from such warehouse, and within one year from the date of said bond, then said obligation should be void, otherwise to remain in full force.

Defendants, the South Branch Distilling Company and Joseph Haas, interpose as defense a special plea that, after said bond was given, to wit, on the 29th day of December, 1875, the United States, by its duly authorized collector of internal revenue for said district, seized the spirits in said bond mentioned, as forfeited to the United States for alleged violation of internal revenue law, heretofore committed by the said distilling company. That an information was duly filed on behalf of the United States in the United States district court of this district, praying for a condemnation of said spirits; and that on the 5th of April, 1876, such proceedings were had on said information, that by the judgment and order of said court said distilled spirits were declared condemned and forfeited to the United States, and ordered to be sold; and that afterwards, and before this suit, in pursuance of said judgment, said spirits were duly sold by the marshal of said district, in the manner prescribed by law, to one Isaac Waixel, who duly paid to the collector of internal revenue for said district the taxes due and owing on said spirits.

To this plea the plaintiff demurred generally.

Mark Bangs, U. S. Dist. Atty.

Stanford & Kohlsatt, for defendants.

BLODGETT, District Judge. It is claimed on the part of defendants that as this bond is conditioned for the payment of the tax on the spirits in question within one year, or when removed from the warehouse, and as the plea shows that the tax was paid by the purchaser at the condemnation sale under a seizure made by the government, therefore, the condition has been substantially performed; that is, the government has received the tax due on the spirits, while it is insisted on the part of the government that this plea is no answer to the bond.

Section 3271, Rev. St., requires "every distiller to provide, at his own expense, a warehouse, to be situated on and constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid."

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

Section 3293, Rev. St., requires the distiller, on the first of each month, or within five days thereafter, to give bond conditioned for the payment of all taxes on all spirits deposited in said distillery warehouse during the preceding month; said bond to be signed by one or more sureties, and conditioned for the payment of the tax on such spirits before removal from such warehouse, and within one year from the date of such bond.

By section 3334, Rev. St., it is provided that: "All distilled spirits forfeited to the United States, sold by order of court, or under process of distraint, shall be sold subject to tax; and the purchaser shall immediately, and before he takes possession of said spirits, pay the tax thereon. And any distilled spirits heretofore condemned, and now in the possession of the United States, shall be sold as herein provided. If any tax-paid stamps are affixed to any cask or package so condemned, such stamps shall be obliterated and destroyed by the collector and marshal after forfeiture, and before such sale."

Now, does the fact that spirits are seized, condemned and sold for violation of the internal revenue law while so bonded release the obligors on the warehouse bond from their undertaking?

The contract is, in effect, that the distiller will pay the tax on the removal of the spirits from the warehouse, and within one year; and can the distiller and his sureties be heard to allege his own violations of the law as a reason for failing to keep their bond?

It seems to me the undertaking is absolute that the distiller will within one year from the date of the bond pay the tax; that the bond is taken for the express purpose of securing the payment of the "tax due and owing" on the spirits as a guaranty and security to the government against any fraudulent or unlawful acts of the distiller. The bond is, so to speak, for the distiller's good behavior—at least in respect to the spirits so bonded. And it is no answer to the bond to say that by reason of the misconduct of the principal, the spirits have been forfeited and sold subject to tax, and that another person has paid the tax. The condition of the bond is, that the distiller, his heirs, executors or administrators shall pay the tax, and if he or they fail to pay, the condition is broken.

Section 3334 requires all forfeited and condemned spirits to be sold subject to tax; and when the taxes have actually been paid, the collector is required to destroy the stamps on the packages. The manifest intention of congress was, that all forfeited spirits should be sold subject to tax, and that the purchaser should pay the tax before he was allowed to remove them. And if such is the rule in regard to tax-paid spirits, it would seem to me to apply with equal force to bonded spirits.

As soon as distilled spirits are produced, the tax is payable, and the distiller may properly be said to owe the government the tax imposed by the law. The warehouse bond only gives him time on his liability, but does not in any degree release him from it.

No authorities bearing directly upon the question raised by these pleadings have been cited, and I am compelled to give my own construction to the contract and the law governing it. I may be wrong, but if I am the amount involved is sufficient to test the question in the supreme court.

Demurrer sustained.

Case No. 16,360.

UNITED STATES v. The SOUTH CAROLINA.

[Fish. Pr. Cas. 63.]

District Court, D. Pennsylvania. Feb. 26, 1813.

CONDEMNATION OF PRIZE—LICENSE FROM ENEMY.

[1. Where no prevarication or other improper conduct on the part of the captured vessel is shown, the question of condemnation of the vessel is to be determined from the papers found on board.]

[2. A United States vessel is not subject to condemnation because it carries a special pass or license from the enemy or the enemy's agent.]

In admiralty.

PETERS, District Judge. This vessel is, indisputably, an American ship, belonging, bona fide to a native citizen of the United States, John C. Stocker, Jr., who has interposed his claim. There is not among the papers found on board, nor according to the deposition of the master, Gaul, on his examination in preparatorio, was there at any time, any paper or document, evidencing any cause of suspicion that this vessel had been, or at the time of her capture, on the 9th November last, was, in the prosecution of any unlawful trade. The master, Gaul, swears that all the papers were delivered up, none having been burnt, destroyed, or concealed. The claimant, in his affidavit annexed to his claim, swears that the vessel was chartered to Willing & Francis, known to be native citizens of the United States, for a voyage from Philadelphia to Lisbon, where she arrived with a cargo of flour, corn, &c. wholly the property of American citizens, or of Portuguese subjects, as he believed, at the time of its shipment, and still doth believe. He states that he had no participation in any application for a passport or license from the British government; but believes there was put on board by the shippers, a letter of request, given by Mr. Foster, the late British minister, that she might be permitted to pass unmolested, but which he, the claimaint, never saw. He swears that no enemies of the United States, their agents, &c. ever had, nor have now, any right, or property, in the vessel; and adds his belief, that the cargo was the property of Willing & Francis, or of Portuguese subjects.

The outward cargo was, as the master swears, delivered at Lisbon to a Mr. Sampayo, a Portuguese subject. The vessel was on her return from Lisbon to Philadelphia, in ballast, when captured.

Among the papers found on board, and delivered into the custody of the clerk of this court, by the captor, was a pass, commonly called a "Foster," in the following words, &c.: "126. By Augustus John Foster, Esq. his Britannic majesty's envoy extraordinary, and minister plenipotentiary to the United States of America. These are to request and require all whom it may concern, to allow the brig South Carolina, of register $193^{30}/_{95}$ tons burthen, or thereabouts, laden with flour and corn, commanded by Richard Gaul, and bound to Lisbon from Philadelphia, and to return ballasted with sand, or salt, into a port of the United States—to pass unmolested. Given at New York, under my hand and seal this eighth day of July, in the year of our Lord one thousand eight hundred and twelve. (Signed) Aug. J. Foster. (Seal.)"

There does not appear to me, on account of this pass, or on any other consideration, any cause for the capture of this vessel. Farther proof is not necessary; as the whole case, on the face of it, is fair, and bona fide. If there were grounds of suspicion, of any decided nature as to the cause on the outward voyage, because it appears by the examination of Captain Gaul, that it was consigned to a house in Lisbon, or person of a name, said to be connected with the enemy; nothing appeared at the time of capture, or doth now appear, to warrant the court in the exercise of its discretion in requiring farther proof. The owner of the vessel had no knowledge of or concern with, the character of the consignee, nor any interest in the cargo. Nor am I to presume any fraudulent transaction, even if it were proved that the consignee was, in other matters, connected in dealings in enemy supplies. The cargo in this case, is alleged (and nothing appears to the contrary) to have been the property of citizens of the United States, or of Portuguese subjects, in amity; and its destination fair and lawful. It is only from the papers found on board, where no prevarication, or other improper conduct, on the part of the captured, is evidenced, that I am to form an opinion. No false or colourable papers, nor any misconduct in the officers or crew of the South Carolina, at the time of capture or since, are shown. A captor is not justifiable in sending in the vessel of a fellow-citizen, or a friend, under bare suspicions, whereof no proofs appear at the time. Nor is he entitled to farther or any proof, when all the papers, and the whole conduct of the captured are fair; and give no ground for warrantable suspicion of fraud. It cannot therefore, be on account of the circumstances mentioned, that this vessel is brought under the cognizance of the court.

It is entirely unnecessary for me to repeat my opinion as to Mr. Foster's pass; or, as it is called, "letter of request." On the policy of permitting, or forbidding, such, or any other passes, or licenses of any kind (other than such inhibited by our laws) I have no judicial opinion to give. The state of the world has rendered them common and familiar. Whatsoever articles, the indispensable demands of nations, though enemies, as the greatest number now are, require, they will obtain from each other in some way. If special passes or licenses are frowned on, they may promulgate general permissions to trade to places accessible to them, in designated articles necessary to them, free of capture from their cruisers. But these are considerations most proper for other departments of the government. I have only to decide on the lawfulness of their use by our ships. I have given, on former occasions, and repeat in this, my opinion, that our vessels are not subject to capture and confiscation by us, on account of the pass in question, or others similar thereto. Such passes are granted, it is true, for causes indirectly serviceable to the enemy, but under them, our ships may proceed innocently, as they do safely, to and from ports or places lawful to us.

It must have been generally known, and could not have been concealed from our cruisers, that enemy passes, to protect from capture our vessels sailing on lawful voyages, with cargoes belonging to our citizens, or neutrals, were allowed by the laws of nations, and are not contrary to our own municipal laws. It is alleged to have been an opinion entertained by the commanders of our cruisers, both public and private, that all licenses or passes, from the enemy or its agents, were unlawful; and on this account this vessel was sent in for adjudication. The worthy and respectable officer, who sent this vessel in, most undoubtedly pursued a conduct the least embarrassing and vexatious, when he ordered her into the port of her destination. It is therefore difficult for me to prevail on myself to give damages; as in cases in which they are not only retributive, but exemplary. Still however, the duty of courts is rigid and imperative. If the owner has suffered by the mistaken opinion of the captor, he ought to be retributed; at least so far, as to replace, or compensate any damage or loss, his vessel has sustained, by the capture and detention. Whether farther retribution shall be made, I shall leave to the judgment of the superior court; as I am given to understand an appeal will be entered; it having been, with no small reason, surmised, that I should decree restitution.

I decree restitution of the vessel, her tackle, apparel and furniture, with damages, to the extent I have stated, and costs. I cannot allow the captor his expenses, consistently with my view of the justice of the court.

Case No. 16,361.

UNITED STATES v. SOUTHMAYD.

[6 Biss. 321; 1 N. Y. Wkly. Dig. 155; 8 Chi. Leg. News, 1; 21 Int. Rev. Rec. 164; 22 Pittsb. Leg. J. 150; 7 Leg. Gaz. 316.] [1]

Circuit Court, E. D. Wisconsin. March 18, 1875.

CRIMINAL LAW—LIST OF WITNESSES FOR ACCUSED—MINUTES OF GRAND JURY.

1. In all criminal cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury, to be furnished to the accused.

[Cited in Parks v. State, 20 Neb. 515, 31 N. W. 5.]

2. He is not, however, entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him.

The defendant [Ld. Southmayd] was indicted for the alleged forgery of a postal money order, and for passing such order. There was no preliminary examination previous to the finding of the indictment. The defendant's counsel moves for an order requiring the district attorney to furnish him with a list of the witnesses sworn before the grand jury and with the minutes of their testimony, basing his application upon the fact that there was no preliminary examination, and claiming that he is entitled to know who the witnesses were who appeared before the grand jury and what their testimony was, in order to prepare for trial. The application, so far as it relates to the production of a list of the witnesses, is not resisted, but opposition was made to disclosure of their testimony.

Levi Hubbell, U. S. Dist. Atty.
J. G. Jenkins, for defendant.

DYER, District Judge. There are cases reported in the books in which the courts, in the exercise of a proper discretion, have ordered a list of the witnesses to be furnished to the accused where he has had no preliminary examination before a magistrate. The statutes of the United States provide that when any person is indicted of treason, or of any other capital offense, he shall be furnished with a copy of the indictment and a list of the witnesses to be produced at the trial. Rev. St. U. S. 1874, tit. 13, c. 18, § 1033. I find no similar provision in relation to other offenses. I have no doubt, however, that in all cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury to be furnished to the accused. People v. Naughton, 7 Abb. Prac. (N. S.) 421, is relied upon by counsel for defendant as an authority in support of his motion, not only as to furnishing a list of witnesses, but as bearing upon his right to the minutes of their testimony. In that case the defendants were indicted for alleged frauds in the conduct of certain elections. The motion papers set forth that the accused were indicted without preliminary examination; that they had no means of knowing the particular time, place or circumstances relied on by the people; that, at different times during the day on which the charges were laid, a large number of persons were present at the voting place, and, unless the accused could ascertain the precise time at which they were charged to have committed the offenses, it was impossible for them to determine what witnesses to summon, or in any manner to prepare for trial; and that important irregularities occurred in the proceedings of the grand jury, fatal to the validity of the indictment, which the minutes of testimony would disclose. Most of the discussion, in the opinion of the court in that case, is addressed to the question of the right of the accused to a list of the witnesses. The case discloses that it had been customary in many of the counties of the state of New York, before the passage of any statute on the subject, for the district attorney to indorse the names of witnesses on an indictment, and then send the same to the grand jury to be investigated. The names of the witnesses came, therefore, to be regarded as much an indorsement as the words, "True bill," and, consequently, the statute subsequently passed provided that the accused should be entitled "to a copy of the indictment and of all indorsements thereon." We have the same provision in the statutes of this state. Upon the practice as it had grown up in New York, and upon the statutes, there can be no doubt of the correctness of the decision of the court in People v. Naughton, supra, requiring a list of witnesses to be furnished.

The case of Com. v. Knapp, 9 Pick. 496, so far as it is applicable here, presented only the question of the right of the accused in a capital case to a list of the witnesses for the state. Although it was urged that this was not a matter of right, except under the statute of treason, Wilde, J., says, "a list of the witnesses has never been refused, in a case of this kind."

If the determination of the question, now presented, depended upon authority, I do not regard the case of People v. Naughton, supra, as settling the point. It is not asserted here that any irregularities occurred in the proceedings before the grand jury, involving the validity of the indictment. In that case, the application for the minutes of testimony was based principally upon such alleged irregularities, claimed to be fatal to the indictment, and which the minutes would disclose, and this branch of the motion was denied, for the reasons that the motion papers did not

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 155, contains only a partial report.]

state wherein the proceedings of the grand jury were irregular, or wherein an inspection was essential to protect the rights of the defendant, or that he could not more properly derive the information sought from other sources. The strictness of the rule on the subject was rigidly enforced, and the court say (page 432), that "it is only within certain restrictions that any inspection of the minutes can be allowed."

In Earl of Strafford's Case, 3 Howell, State Tr. 1382, the court, on application, ordered the witnesses before the grand jury examined in open court. But that was a case where an attempt was made to procure an indictment for high treason against the earl.

It is the general rule that the proceedings before a grand jury are privileged from disclosure. The cases are exceptional in which the rule is not adhered to. In an action for maliciously indicting the plaintiff, Lord Kenyon allowed a grand juryman to be asked whether the defendant was the prosecutor of the indictment; and thought the disclosure did not infringe upon the juryman's oath. Rosc. Cr. Ev. 150. In that case the alleged cause of action itself sprung from the act of the party in procuring the indictment.

Following the general rule, it is held that the clerk of the grand jury cannot be compelled to disclose the proceedings before them, nor can the county attorney. McLellan v. Richardson, 13 Me. 82. In Massachusetts it has been held, that the attorney for the commonwealth cannot be called to disclose what passed in the grand jury room. Com. v. Tilden, 2 Starkie, Ev. 324, note.

In the absence of strong reasons to the contrary, the rule ought not to be departed from. I think it should be adhered to in this case, to the extent of denying the application for the minutes of testimony. A list of the witnesses sworn before the grand jury should be furnished to the defendant.

Case No. 16,362.

UNITED STATES v. SOWERS et al.

[See Case No. 16,363.]

Case No. 16,363.

UNITED STATES v. SOWERS et al.

[36 Leg. Int. 488;[1] 14 Phila. 525; 25 Int. Rev. Rec. 405.]

District Court, E. D. Pennsylvania. Dec. 8, 1879.

CUSTOMS DUTIES — RATE OF DUTY — COLLECTOR'S DECISION—APPEAL TO SECRETARY.

1. Section 2931, Rev. St., makes the decision of the collector of the port respecting "the rate and amount of duties" on merchandise final and conclusive unless the owner shall within ten days after the ascertainment and liquidation appeal therefrom to the secretary of the treasury.

2. The entire question of rate and amount, and as to whether or not it was legally assessed and found, must be submitted to and passed on by the secretary of the treasury in the first instance.

3. This appeal cannot be neglected and the courts applied to for relief. In its absence the decision of the collector is final.

[This was an action against William H. Sowers and others, executors of the will of William Chamberlain, deceased, to recover duties claimed to be due the United States.]

John K. Valentine, Dist. Atty.

W. Wynne Wister, Jr., for defendants.

BUTLER, District Judge. On the 5th of January, 1870, William H. Sowers (principal in the bond sued upon) entered at the port of Philadelphia certain merchandise, imported from Liverpool. On the same day the collector of the port estimated the duties chargeable thereon at $901.74, and designated packages to be opened. The estimated duties were paid, and the merchandise (other than that set aside for examination) withdrawn. An appraisement was subsequently made, exceeding the invoiced value, and the duties liquidated at $1402.93. On the 25th of October, 1873, fourteen days subsequent to the liquidation, notice was given Mr. Sowers of the amount remaining due, and payment demanded. No response being made, suit was brought against the defendant (surety in the bond).

On the trial defendant's counsel requested the court to charge: 1st. That no notice having been given Mr. Sowers of the advance made by the appraisers, as is required by the treasury regulations on the subject, the plaintiff cannot recover. 2d. That no demand having been made on the principal, or notice given, such as is required by the condition of the bond, the plaintiff cannot recover. These points were reserved by the court; and a verdict was rendered by the jury in favor of the plaintiff for $591.19.

A rule being taken to show cause why judgment should not be entered for the defendant, notwithstanding the verdict, the points must now be answered. In the judgment of the court, neither of them is well founded. As respects the first: The statute does not provide for notice, either of the appraisement, or the liquidation. Congress contemplated that the importer should take notice of these steps in levying the duty. Westray v. U. S., 18 Wall. [85 U. S.] 322. The secretary of the treasury, however (recognizing the justice of notifying the importer of the appraisement), in pursuance of the 251st section of the Revised Statutes, has provided (by rule 324 of the department) that the collector shall give notice to the importer of any addition made by the apprais-

[1] [Reprinted from 36 Leg. Int. 488, by permission.]

ers to the estimated value of his goods. Whether this rule has the force of law, and, therefore, entitles the importer to such notice as a legal right, need not be decided here. If it has, the further question is involved, whether the government is affected by a failure to give the notice. That it is not affected by the laches of its agents, generally, is well settled, as appears by the following cases: Postmaster General v. Reeder [Case No. 11,311]; U. S. v. Vanzandt, 11 Wheat. [24 U. S.] 184; Dox v. Postmaster General, 1 Pet. [26 U. S.] 318. But whether such a failure as is here contemplated, falls within the rule, may be doubted. As before suggested, however, these questions need not be considered; for the 2931st section of the Revised Statutes makes the decision of the collector, respecting "the rate and amount of duties on * * merchandise * * final and conclusive * * unless the owner shall, within ten days after the ascertainment and liquidation * * appeal therefrom to the secretary of the treasury." This language is unambiguous, and conclusive as respects the case before the court. If any omissions or irregularities occur in the proceeding to levy the duty, the owner must make his appeal to the secretary for redress; or thereafter be silent respecting them. The suggestion of the defendant's counsel that such appeal will not reach the appraisement, finds no support, either in the terms or the spirit of the statute. It is the "amount of duty * * to be paid on the merchandise" that the statute submits to the collector's decision; and it is this the appeal involves. If the appraisement is not made in pursuance of law, it is, in effect, no appraisement; if the duty is not "ascertained and liquidated," in pursuance of law, the merchandise is not subject to its payment. These questions, (and the latter involves the entire proceeding—every material step in it,) necessarily, arise on the appeal. By his bond the defendant bound himself for the payment of "whatever excess of duties or charges may be assessed or ascertained and found to be due upon the final liquidation." The amount claimed was so assessed and found to be due. The defendant, however, asserts that it was not legally assessed and found. As before stated, the statute has referred this question to the secretary of the treasury, by whom it must be passed upon before it can reach the court. The entire subject is submitted to him, in the first instance. This appeal cannot be neglected, and the courts applied to for relief. In its absence, as we have seen, the decision of the collector is final. Rankin v. Hog, 4 How. [45 U. S.] 335; Tappan v. U. S. [Case No. 13,749]; Bartell v. Kane, 16 How. [57 U. S.] 273,—and other cases cited by the defendant's counsel, are not applicable to the facts here involved. The second point was not understood to be pressed on the argument. The notice proved was all that the condition of the bond required. The rule for judgment in favor of the defendant, as also that for new trial, must be dismissed.

Case No. 16,364.

UNITED STATES v. SPALDING et al.

[4 Cranch, C. C. 616.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

CONSPIRACY—SELLING FREE NEGRO.

The court will not quash an indictment for a conspiracy to cheat by selling a free negro as a slave.

Indictment for a conspiracy to cheat one Washington Roby by selling him a free negro as a slave for life. The first count charged that the defendants [Richard Spalding and Ellen Dwyer] conspired to cheat him by selling to him a certain negro boy as a slave for life, (and as the property of the said Ellen,) whom they then and there offered to sell to the said Roby, and who was then and there a free boy; and who was not their property; they, the said Richard and Ellen, then and there well knowing that the said boy was free, and was not their property; and that in pursuance of and according to their said confederacy, they fraudulently attempted and offered to sell, to the said Roby, the said boy, as a slave for life, and as the property of the said Ellen, well knowing that the said boy was not a slave, and was not their property, to the great damage of the said Roby, and against the form of the statute, &c. The second count charged that the defendants conspired "to sell a free boy" under the false and fraudulent pretence that he was the slave of the said Ellen, and thereby falsely and dishonestly to obtain money by cheating and defrauding the person or persons to whom they might so sell the said boy; and in pursuance of the said conspiracy "did attempt and offer to sell the said boy as a slave and as the property of the said Ellen to divers persons, namely, to W. R., G. G., and J. D.; the said defendants well knowing that the said boy was not a slave and was not the property of the said Ellen, to the great damage, &c. and against the form of the statute, &c.

W. L. Brent, for defendants, moved the court to quash the indictment because the conspiracy charged was not to do an act indictable at common law; cheating by a simple false assertion not being indictable. He cited 2 Russ. Crimes, 293, 297, 697; 4 Starkie, 403; and Chitty, 904.

But THE COURT (THRUSTON, Circuit Judge, doubting,) refused to quash the indictment.

The cause was afterwards tried, and the defendants were acquitted.

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

Case No. 16,365.

UNITED STATES v. SPALDING.

[2 Mason, 478.] [1]

Circuit Court, D. Rhode Island. June Term, 1822.

ACTION ON BOND — PLEADING — PROFERT — JURISDICTION AT LAW.

1. If an obligee tear off the seal, or cancel a bond in consequence of fraud and imposition practiced by the obligor, he may declare on such mutilated bond as the deed of the party, and set forth the special facts in the profert.

[Cited in Cutts v. U. S., Case No. 3,522; U. S. v. Williams, Id. 16,724; Smith v. U. S., 2 Wall. (69 U. S.) 232; Girard Ins. Co. v. Guerard, Case No. 5,461.]

[Cited in brief in Draper v. Wood, 112 Mass. 318; Bird v. Bird, 40 Me. 401; Brown v. Cousins, 51 Me. 302. Cited in Medlin v. Platte Co., 8 Mo. 239. Cited (Per Long, C. J.) in Ruby v. Talbott (N. M.) 21 Pac. 77.]

2. A court of law has concurrent jurisdiction with a court of equity, to sustain a suit to enforce such a bond.

3. Where a profert is made of a bond, and the declaration goes on to state the condition, and to assign a breach, it is not necessary to make a separate profert of the condition, for the whole bond is already before the court.

4. The condition of a bond among other things, was, that the party should produce the certificates and other proofs required by law, of the landing of the merchandise at some foreign port, &c., within two years, &c.; *held*, that a breach, negativing in the terms of the condition the production of such certificates and other proofs, was good.

Debt on five obligations, executed by Joseph Hubbard as principal, and the defendant [Edward Spalding] as surety, for certain sums of money, set forth in the declaration. The first count alleged that the defendant "on the 7th of August, 1819, at Bristol, by his certain writing obligatory, sealed with his seal, and which said writing obligatory the plaintiffs produce to the court here, in a mutilated state, and cannot otherwise produce the same, by reason that a part of the condition there underwritten, and the signature and seal of the said Spalding, have been torn from the same and destroyed by the collector of the port of said Bristol, occasioned by the production to him of a false and fraudulent certificate, then supposed by him to be true, purporting that the merchandise specified in the said condition had been delivered at a port or place without the limits of the United States at the island of St. Thomas, acknowledging himself to be held and firmly bound to the United States, in the sum of $207.18, to be paid to the said United States on demand; which said writing obligatory is subject to a certain condition, there underwritten, whereby, after reciting to the effect following, to wit, that whereas the following merchandise had been duly imported into the United States, by S. Cabot and J. & T. H. Perkins, in the ship Essex Junior, Hinman, master, from Calcutta, into the district of New York, the 3d of July, 1819, two bales of India cotton, which said merchandise had been reshipped by Joseph Hubbard, in order to export the same in the schooner Cintra, of Porto Praya, Juan Dupony, master, then in the port of Bristol, and bound for Cape de Verds, the condition of the said obligation, therefore, was such, that if the aforesaid recited merchandise, or any part thereof, should not be relanded in any port or place within the limits of the United States; and if the certificates and other proofs required by law of the delivery of the same at the aforesaid Cape de Verds, or at any other port or place without the limits of the United States, should be produced at the office of the collector of the said port of Bristol within two years from the date thereof, then the said obligation shall be null and void, but otherwise to remain in full force and virtue. And the said United States in fact say, that the certificates and other proofs required by law of the delivery of said merchandise at the aforesaid Cape de Verds, or at any other port or place without the limits of the United States, as aforesaid, have not been produced at the office of the collector of the said port of Bristol, within two years from the date of the said writing obligatory, to wit, at said Bristol; whereby an action hath accrued," &c. &c. in common form. There were four other counts on other bonds, to the same purport, and with the same averments; and a sixth count for $1500, money had and received to the use of the United States.

To this declaration, after oyer of the bonds, there was a demurrer assigning as special causes. 1. That the pretended writings obligatory given on oyer had no seals affixed. 2. That the plaintiffs had set forth a pretended condition to each of the writings obligatory, without making any profert of such conditions. 3. That the plaintiffs have not set forth by whom such certificate was signed, nor in what particular the same was false and fraudulent. 4. That the declaration contains allegations improper and impertinent, and too defective and imperfect to enable the defendant to traverse or take issue thereon. 5. That the declaration is defective and insufficient, and wants form and substance. The plaintiffs joined in demurrer.

Mr. Pitman, U. S. Dist. Atty.
Mr. Searle, for defendant.

STORY, Circuit Justice. It has been intimated at the bar, that the demurrer by mistake extends to the sixth count, and therefore I pass over all observations as to that count, for it is clear that so far the demurrer cannot be sustained. And before proceeding to the principal point in controversy, it may be well to dispose of some other objections spread upon the record, as causes of special demurrer. One of these is, that there is no profert of the condition of the writing obligatory, although it is set forth in the declaration. To this it is a sufficient answer, that when a

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

profert is made of any such instrument, the whole is before the court, and it is unnecessary to make a separate profert of the condition. If the defendant wishes oyer of the whole instrument, he may pray it; but oyer of the obligatory part is not oyer of the condition; each must be prayed for, if each is wanted. Another objection is to the want of particularity in the statement of the certificate, and in what respects it is false and fraudulent. It appears to me, that it would have been more correct to have stated, generally, that the mutilation of the instrument was occasioned by fraud and imposition practised upon the collector of Bristol, leaving the special facts to be made out in evidence. And it may be, that the averment is not sufficiently pointed and exact in its present terms, at least in not stating the party, by whom the false certificate was produced. But this is the less necessary to be considered, because, if upon the merits of the more general question, the United States are entitled to relief, the court would not find any difficulty in granting leave to amend. The question therefore, to which the opinion of the court will address itself, is, whether any suit can be maintained at law upon an instrument mutilated like the present, where that mutilation has been produced by fraud and imposition, practised upon a public officer in the discharge of a public duty by a party bound by the instrument.

The bonds given in the present case are the customary bonds required by law (Act March 2, 1799, c. 128, § 75 [1 Story's Laws, 636; 1 Stat. 680, c. 22], et seq., and particularly section 81) to be given upon the exportation of merchandise, entitled to drawback, in order to enable the party to obtain the common debenture. Certain proofs are required to be produced to the collector of the port of the fact of relanding the merchandise in a foreign country, upon the production of which the bonds may be cancelled. The law, of course, supposes the certificates and proofs to be genuine, and not fraudulent, and upon this presumption, and this only, authorises a cancellation of the bonds. If the cancellation be by mistake or fraud, the collector is acting beyond the authority confided to him by law, and his act cannot bind the government. But I should be sorry, that it should be supposed, that there is any principle applicable to this case, which would not equally apply to suits between private citizens. Nothing is more clear than that deeds procured by fraud are void, and may be set aside on non est factum pleaded, upon due proof of the fraud (Thompson v. Rock, 4 Maule & S. 338; Skip v. Huey, 3 Atk. 91, 93; Com. Dig. "Fait," B, 2; Shep. Touch. 60); and grants of the government are not, in this respect, distinguishable from those of individuals (Com. Dig. "Grant," G, 8, 9). It would seem to follow as a natural conclusion from this doctrine, that deeds cancelled by fraud and imposition are to be considered as still existing and in full force. If a deed be avoided by fraud in its concoction, it would seem almost absurd to say, that after its legal execution it should be destroyed by fraud practised upon the obligee.

The old cases proceeded upon a very narrow ground. It seems to have been held, that a material alteration of a deed by a stranger, without the privity of either obligor or obligee, avoided the deed; and by parity of reasoning the destruction or tearing off the seal either by a stranger or by accident. Pigot's Case, 11 Coke, 27; 1 Rolle, 39; 1 Rolle, Abr. "Fait," X, 1–3; Perk. §§ 135, 136; and cases cited in Cutts v. U. S. [Case No. 3,522]; Com. Dig. "Fait," F, 2; Mathewson's Case, 5 Coke, 23; Dyer, 59, and note 12; Shep. Touch. 67. A doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority, before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble. It appears to me to be shaken to its very foundation in modern times; and every case, which upholds a remedy at law, where the deed is lost by time and accident is decisive against it. The case of Read v. Brookman, 3 Term R. 151 (and see Bolton v. Bishop of Carlisle, 2 H. Bl. 259), is directly in point, and is reasoned out by Lord Kenyon with vast force and ability, upon principles of eternal justice. Mr. Justice Buller, in Master v. Miller, 4 Term R. 320, 339 (and see Waugh v. Bussell, 5 Taunt. 707; Totty v. Nesbitt; and Matison v. Atkinson, cited in 3 Term R. 153, note c; Henfree v. Bromley, 6 East, 309), said, and he is a great authority, "It is not universally true, that a deed is destroyed by an alteration, or by the tearing off the seal. In Palmer, 403, a deed which had erasures in it, and from which the seal was torn, was held good, it appearing, that the seal was torn off by a little boy. So in any case, where the seal is torn off by accident, after plea pleaded, as appears by the cases quoted by the plaintiff's counsel. And in these days I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt upon that point by stating the truth of the case. The difficulty, which arose in the old cases, depended very much on the technical forms of pleading, applicable to deeds alone. The plaintiff made a profert of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it. When that is done, the deed or the profert must agree with that stated in the declaration, or the plaintiff fails. But the profert of a deed without a seal will not support an allegation of a deed with a seal." There is so much sound sense and legal propriety in this doctrine, that one is persuasively urged

to adopt it, and it stands supported by the authority of other cases. But however this may be, it is clear that a divulsion of the seal by the obligor himself, or by his connivance, without the assent of the obligee, does not avoid the deed. Totty v. Nesbitt, 3 Term R. 153, note c; Shep. Touch. 67. And it has been so decided by this court. Cutts v. U. S. [supra]. And I have no hesitation in declaring, that if the seal is torn off with the assent of the obligee, either by mistake, or by fraud and imposition practised by the obligor, it may still be declared on as a deed, making the proper averment of the facts upon the profert, and the party will be entitled to a recovery. The case of Matison v. Atkinson, cited in a note in 3 Term R. 153, fully supports this doctrine; and if it were of the first impression, I should not hesitate to adopt it. Dealing with this case, therefore, as I am bound to do according to the admitted facts, I must take it to be a case, where the obligors to the bonds have procured the destruction of the seals by the obligee, not merely by a mistake of the facts, but by gross fraud and imposition. See, also, Perrott v. Perrott, 14 East, 423. We may readily see, how this doctrine stands in equity, from what fell from Lord Hardwicke in Skip v. Huey, 3 Atk. 91, 93, whose language meets the present case in its material features. "There are many cases," says his lordship, "where equity will set up debts extinguished at law against a surety, as well as against a principal; as where a bond is burnt or cancelled by accident or mistake, and much stronger, if a principal procure the bond to be delivered up by fraud, in such a case the court would certainly set it up, because he shall not avail himself of the fraud of any of the debtors." Now it appears to me clear, that the doctrine is the same at law as in equity in this respect, whenever, from the nature of its proceedings, a court of law can administer relief.

And this leads me, to what has been the principal objection urged at the bar, viz. that the proper remedy in this case is in equity, and not at law. That effectual relief might be administered, in a case like the present, in equity cannot be doubted (1 Ves. 387, 392, 393. See Atkins v. Farr, 2 Eq. Cas. Abr. 247, 1 Atk. 287, pl. 155; Anon., 2 Atk. 61; Ex parte Greenway, 6 Ves. 812); and it is as certain, that until a comparatively recent period it was supposed that the remedy was exclusively in equity. Such was certainly the supposition of Lord Hardwicke, as appears in Whitfield v. Fausset, 1 Madd. Ch. Prac. 22, 23 [1 Ves. Sr. 387]; East India Co. v. Donald, 9 Ves. 275; and something of the same lurking doubt of the jurisdiction at law yet lingers in the court of chancery. Ex parte Greenway, 6 Ves. 812; East India Co. v. Boddam, 9 Ves. 464. But whatever difficulties there may have been in the original question, it is now so firmly established, that a remedy exists at law on a bond lost by time and accident, and by parity of reasoning, on a bond destroyed or cancelled by fraud, that it is too late to disturb it. It must be admitted, that the jurisdiction in equity is in general more salutary and less liable to abuse; but the reasoning, that endeavours to establish a concurrent jurisdiction at law, is extremely cogent, and impressive. Read v. Brookman, 3 Term R. 151. I content myself therefore with holding the law on this subject, as I find it, not meaning to doubt, that it would have been equally competent for this court to have sustained a suit for relief on the equity side of its jurisdiction.

A suggestion has been thown out at the bar of the insufficiency of the breach assigned in the declaration. But it appears to me, that this objection is unfounded, for the breach is a direct negative in the very words of the condition. It is certainly good, according to the current of authorities. Heyford v. Reve, Yel. 40; Com. Dig. "Pleader," C, 45; Procter v. Burdet, 3 Lev. 170; Lee v. Johnson, 1 Lutw. p. 115, pl. 326–329. Leave is given to the plaintiff to amend, and to the defendant to withdraw his demurrer, as it is now too broad.

Case No. 16,365a.

UNITED STATES v. The SPEDDEN.

[See Case No. 2,394.]

Case No. 16,366.

UNITED STATES v. SPEEDEN.

[1 Cranch, C. C. 535.] [1]

Circuit Court, District of Columbia. June Term, 1809.

GAMING.

The game called "Equality," is a "device" prohibited by Act Md. 1797, c. 110. The words "or other device," are not so loose and vague as to be rejected.

Indictment [against Robert Speeden] for keeping a gambling-device called "Equality," under the Maryland law of 1797, c. 110.

Mr. Law, for defendant, prayed the court to instruct the jury, that the defendant was not liable for the penalty under the act. The words "or other device," being too loose and vague, are to be rejected.

But THE COURT refused; it not being a capital case, and the intention of the law being very clear and plain.

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

Case No. 16,367.

UNITED STATES v. SPENCER et al.

[2 McLean, 265.] [1]

Circuit Court, D. Indiana. Nov., 1840.

OFFICIAL BONDS—RECEIVER OF PUBLIC MONEY—LIABILITY OF SURETIES.

[The sureties on the bond of a receiver of public moneys are only liable for money which came into his hands during his term of office, and a declaration for money received on the day after the expiration of his term is bad on demurrer.]

At law.

Mr. Pettit, U. S. Dist. Atty.

Messrs. Cooper, Butler, and O. H. Smith, for defendants.

HOLMAN, District Judge. Declaration, on a receivers' bond, against the principal and his sureties. Breach assigned: That Spencer was appointed receiver of public moneys, for the term of four years, commencing on the 1st of January, 1835, and ending the 31st of December, 1839; and that divers large sums of money, arising from the sale of lands, came into, and were in, his possession, during his continuance in office—to wit: on the first day of January, 1840—which he failed and refused to pay, &c. General demurrer, by the sureties. The breach is insufficient, as respects the sureties. They are bound for the payment of all sums of money that come into the receiver's hands during his term of office, and no longer; and, as his office expired on the 31st of December, 1839, they are not bound for moneys that came into his hands on the 1st day of January, 1840, the day after his term of office expired. If the day alledged is material, and I am inclined to think it is, it can not be rejected as surplusage, and, therefore, the declaration is insufficient.

Plaintiff had leave to amend, and the cause was continued. [See Case No. 16,368.]

Case No. 16,368.

UNITED STATES v. SPENCER et al.

[2 McLean, 405.] [1]

Circuit Court, D. Indiana. May Term, 1841.

ACTIONS ON BONDS — PLEADING AND PRACTICE — RECEIVER'S BOND—LIABILITY OF SURETIES.

1. Nil debet, when pleaded to a declaration on a penal bond, where breaches are assigned, will not be set aside, on motion, but must be demurred to.

2. Where a plea sets up no new matter of defence it may be set aside on motion.

3. The sureties, in a receiver's bond, can only be made liable for moneys received by the receiver subsequently to the date of the bond. And if the bond bears date some months after the official term of the receiver commenced, the declaration is defective, if it do not show the receipt of the money after the date of the bond, and before the expiration of the official term of the receiver.

4. A demurrer, filed by the plaintiff, to a plea of defendant, will test the goodness of the declaration.

[For a decision on demurrer to the declaration, see Case No. 16,367.]

Mr. Petitt, U. S. Dist. Atty.

Fletcher & Butler, for defendants.

OPINION OF THE COURT. This action is brought on a bond, in the penalty of $200,000, given by Spencer as receiver of public moneys, and his sureties. The declaration states that Spencer was appointed receiver of public moneys the 1st January, 1835, for the term of four years, ending the 31st December, 1839; and that divers large sums of money, arising from the sale of lands, came into and were in his possession during his term in office, &c., which he failed to pay over, &c. In the first count the defalcation is alleged to be the sum of thirty three thousand three hundred thirty nine dollars and sixty eight cents; and in the second, forty thousand dollars. The bond bears date some three or four months subsequently to the date of the appointment, and the condition is that the said Spencer shall faithfully execute and discharge the duties of his office, then the obligation to be void, &c. The time of appointment is stated in the bond.

The defendant filed the following pleas: (1) The plea of nil debet. (2) That Spencer has well and truly discharged the duties of receiver. (3) That he has paid over the sum of $33,339.65, the defalcation alleged in the first count of the declaration. (4) That defendants have paid over to the government $40,000, the defalcation alleged in the second count. (5) That defendants have paid over to the government the debt in the declaration mentioned, to wit, $200,000.

The district attorney moved the court to set aside the first, second and fifth pleas. The plea of nil debet has been abolished in England (Reg. Gen. Hil. Term, 4 Wm. IV.), but it remains in this country subject to the same rules by which it was formerly regulated in England. And Mr. Chitty says, in his Pleading (volume 1 [Ed. 1837] 552), "that where the plea, though informal, goes to the substance of the action, on nil debet to debt on bond, the plaintiff should demur and not sign judgment; and, in general, where the defendants file an improper plea, the safer course is to demur or move the court to set it aside." And again, in page 518, "when the deed is the foundation of the action, although extrinsic facts are mixed with it, the defendant, if he deny his execution of the deed set forth in the declaration, should plead non est factum, and nil debet is not a sufficient plea. 1 Saund. 38, note 3; Id. 187a, note 2. But in debt for a penalty on articles of agreement, or on a bail bond, or on a bond setting out the condition and breach, if nil debet be pleaded the plaintiff ought to demur." The motion to set aside

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

this plea is, therefore, overruled. If the plaintiff wish to raise the question whether it is a proper plea in this case he must raise it by demurrer.

The court, also, overrule the motion as to the second plea but they sustain is as to the fifth. The fifth plea sets up that the defendants have paid the debt in the declaration named, to wit, the sum of two hundred thousand dollars. Now the third and fourth pleas allege the payment of the defalcations averred in the first and second counts, and either of these pleas, especially the latter, if sustained, is a full discharge from the bond. Why then can it be necessary, or even proper, to add the fifth plea, as to the payment of the penalty? The breaches are specially assigned in the declaration, and the plaintiffs, in the recovery of damages, are limited to the breaches assigned. They cannot go beyond them. If the action were brought for the penalty, the fifth plea would undoubtedly be proper, as it contains a full answer to such a demand. But the plaintiffs go for the amount of the defalcations and nothing more; and as the third and fourth pleas contain full answers to these, and no other or different effect can be given to the defence set up in the fifth plea, we think it may be set aside. It sets up no new matter of defence, and it unnecessarily, therefore, encumbers the record.

The plaintiffs having filed a demurrer to the first plea, the defendants' counsel ask the attention of the court to the form and substance of the declaration. The breaches are the nonpayment, by Spencer, of certain sums of money received by him during his official term, and it appears the bond was not executed until some months after the commencement of his official term. And it is insisted that the sureties are not responsible for any moneys received by Spencer before the date of the bond. That the sureties are only liable for moneys received by the receiver subsequently to the date of the bond, and before the expiration of his term, is clear; and it is equally clear that this liability must be shown, by proper averments, in the declaration. In this respect, the declaration is fatally defective. It does not show that the sureties are bound to pay any part of the defalcations charged. U. S. v. Boyd, 15 Pet. [40 U. S.] 206.

On motion leave is given to amend the declaration. The demurrer is sustained to the plea of nil debet.

Case No. 16,369.

UNITED STATES v. SPERRY et al.

[10 Int. Rev. Rec. 205.]

District Court, E. D. Missouri. 1869.

VIOLATION OF INTERNAL REVENUE LAWS—REMOVING WHISKEY WITHOUT PAYMENT OF TAX — JURISDICTION OF COURT.

[Upon an indictment for removing whiskey from a distillery in Pekin, Illinois, and sending it to St. Louis, under a false inspector's brand, and without paying the tax, defendant contended that the whiskey was taken from Illinois to St. Louis by government officials after seizing it, and that the district court for the Eastern district of Missouri therefore had no jurisdiction of the offence. *Held*, that if the whiskey was not taken from the possession of the railroad company by which it was shipped, before it arrived in St. Louis, the court had jurisdiction.]

H. T. Sperry was a distiller, and B. S. Prettyman a dealer in whiskey, and an attorney at Pekin, Ill. The government charged that the two defendants conspired together; that Prettyman furnished the money to run the distillery; that they manufactured 3 times as much as they reported and sent barrels with duplicate serial numbers, to Chicago and St. Louis. On the 19th of October, 1867, a lot of 150 barrels were seized at the depot of the Chicago R. R. Company, St. Louis, and a suit for their forfeiture was commenced on the ground that they had false inspector's brands upon them, and that they had been removed without the tax having been paid. The jury before which the suit was tried found that 102 of the barrels were fraudulent. Afterwards this criminal action was commenced against Sperry and Prettyman.

One of the principal points in the present case was in relation to the jurisdiction of the court, the defence contending that they did not bring the whiskey into this state, and that it was brought from Illinois to Missouri by the government, and that therefore this court had no jurisdiction.

On the opening of the court General Noble, U. S. Dist. Atty., proceeded to address the jury on behalf of the government. In the course of his address he said it was a remarkable fact that the defendants commenced business at the same time, and when no one could go into the business, pay taxes and make money, because the markets were flooded with whiskey, which was being sold below the tax. He reviewed at length the evidence which had been adduced and stated that the defendants manufactured two hundred barrels of whiskey, upon which the tax was paid. He charged that Prettyman entered in his book another lot with duplicate numbers as if bought of "John Jones," and that this whiskey was sent to Chicago. Another lot, fraudulent, was sent to St. Louis and found at McCartney's, Derby & Day's, and Hoffheimer's, and another lot was the one of 150 barrels seized by the government on the 19th of October, 1867. Prettyman's book showed that he purchased of Sperry 8,565 57-100 gallons of whiskey while there was another entry of a purchase from "John Jones" of exactly the same quantity. This was the total of the last three lots bought of the former. Duplicates of 50 of the 150 barrels seized at St. Louis were found at Chicago on the 18th of September, 1867, and he ridiculed what the defence had undertaken to show—that they had brought these from Chicago to St. Louis, because at that time they were shipping 1,500 barrels to that market.

He said that Prettyman sent to Chicago in three months whiskey which, if the tax had been paid, would have amounted to $140,000. The defence contended that because they did not come across the river with the whiskey they were not guilty in this district, but Hunicke & West, their commission merchants, paid the cost of its being brought over. The prosecution had been conducted in the fairest manner, and the government had been stabbed in the back at every step. Barrel heads used in the last trial had been stolen from his office, the brands on the barrels in court altered. Prettyman's book which had been used for three days in the trial, had disappeared, and the court deciding that it was in the custody of the court, Prettyman pulled it out of his pocket and it was thrown on the table. Was there nothing clandestine in that? After presenting the facts brought out by the prosecution in an able and lucid manner, the district attorney closed by making an earnest appeal for the vindication of law.

Col. Broadhead, for defendants, asked the court to give the following instructions to the jury: (1) That to complete the offence charged in any one count of the indictment, it must appear from the evidence, to the satisfaction of the jury, that the spirits manufactured by Sperry, or some portion of it, was brought into the state of Missouri by one or the other of the defendants, or by some one under their direction or authority. (2) No facts communicated to the jury in reference to the case on trial, otherwise than by the sworn testimony of witnesses, or by exhibits or papers produced before the jury under the direction and in the presence of the court, can be permitted to influence the minds of the jury in making up their verdict. (3) To constitute a conspiracy it must appear that there was some agreement or understanding between the parties to commit the offence charged in the indictment. But this agreement or understanding must be proved either by direct evidence, or circumstances tending to show that such agreement or understanding existed. The offence, however, under the first count of the indictment, is not complete without the proof of the overt act, and that either the conspiracy was formed, or the first overt act charged must appear to have been committed, in Missouri.

TREAT, District Judge, gave his instructions to the jury. With reference to the question of jurisdiction, he said that if the whiskey was not taken from the possession of the railroad company before it was brought into this city, the court had jurisdiction of the offence. He stated the matters the jury had to inquire into, and instructed them on the several counts of the indictment, making no comments on the testimony.

The jury retired, and, after deliberating about three hours, brought in a verdict of guilty against Prettyman on the second count, removing whiskey into this district without the tax on the same having been paid, and not guilty on the first and third counts of the indictment. They found Sperry not guilty on all the counts, and he was acquitted.

Case No. 16,370.

UNITED STATES v. SQUAUGH.

[1 Cranch, C. C. 174.] [1]

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

INTOXICATING LIQUORS—ILLEGAL SALES.

Selling less than a pint, under a license to sell not less than a pint, is selling without license.

Indictment [against William Squaugh] for selling less than a pint of whiskey.

The defendant produced a license to retail not less than a pint.

Not permitted to be given in evidence. Fined $16 under the act of 1784, c. 37, § 4, and not 600 pounds tobacco under the act of 1780, c. 24, § 11—it being a retailing without a license.

Case No. 16,371.

UNITED STATES v. The STADACONA.

[28 Leg. Int. 333; [1] 14 Int. Rev. Rec. 147; 4 Am. Law T. Rep. U. S. Cts. 213; 1 Leg. Gaz. Rep. 282; 8 Phila. 155; 3 Leg. Gaz. 317; 6 Am. Law Rev. 386.]

Circuit Court, E. D. Pennsylvania. Oct. 2, 1871.

SHIPPING—CONCEALMENT OF GOODS—ACT OF MARCH 2, 1799.

Goods were brought on board a foreign vessel and concealed by the steward. *Held*, that the master was not liable under the act of March 2, 1799, for not entering them on the manifest.

[Appeal from the district court of the United States for the Eastern district of Pennsylvania.]

In admiralty.

Aubrey H. Smith, for United States.

Henry R. Edmunds and Henry Flanders, for respondents.

McKENNAN, Circuit Judge. By the twenty-third section of the act of congress of March 2, 1799 (1 Stat. 644), all masters of vessels, owned in whole or in part in the United States, carrying goods from a foreign port into the United States, are required to have a manifest or manifests of their cargo; and, by the twenty-fourth section of the same act, a forfeiture equal to the value of the goods not included in the manifests, is imposed, "and all such merchandise, not included in the manifest, belonging or con-

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

[1] [Reprinted from 28 Leg. Int. 333, by permission.]

signed to the master, mate, officers or crew of such ship or vessel, shall be forfeited." These provisions are applied also to foreign vessels by the twenty-fifth section of the act of July 18, 1866 [14 Stat. 184], and, by the eighth section, the vessel may be holden for the penalty thus imposed.

The object of these laws is to protect the public revenue. Hence it is required of the chief officer of the vessel, that he shall keep a manifest of his whole cargo in the form prescribed, to facilitate and assure the collection of the duties imposed upon it; and the observance of this requirement is enforced by a penalty. It is the act or neglect of the master for which the penalty is imposed; for while the goods not on the manifest, belonging or consigned to any of the officers or crew, are forfeited, the master alone is condemned to the payment of a sum in money equal to the value of such goods. The personal forfeiture is the prescribed punishment of his personal delinquency. The unexplained finding of goods on board, not embraced in the manifest, is sufficient primary evidence of his liability to the penalty, but, by the express enactment of the proviso to the twenty-fourth section above referred to, this may be averted by proof, that no part of the cargo had been unshipped, except as reported by the master, and that the manifest had been lost or mislaid, without fraud or collusion, or that they were defaced by accident or incorrect by mistake.

The motive of the omission is thus made the ultimate test of culpability. It is, therefore, a superficial, as well as harsh, interpretation, which applies to the proofs of the master's faultlessness a standard of literal conformity to the mode of exculpation, which the act indicates, but does not prescribe exclusively, as effectual. If the apparent offence is expurgated, the spirit and object of the law are effectually subserved. An omission then to perform the duty imposed upon the master, which proof of an honest mistake or an unavoidable accident will excuse, will be condemned also by proof, which, in like manner, relieves him from all suspicion of corrupt or conscious wrong.

The respondent here is the master of the ship Stadacona, of Londonderry, Ireland. The night before she sailed from her home port, while the officers of the vessel were on shore, the steward carried on board nineteen bundles of silk, and concealed them in a space between the bread locker and the stairs leading from the cabin to the upper deck. This space was boarded up and covered with tin. In reference to it, the master, in his deposition, says: "This place had never been opened to my knowledge. I never imagined it could be opened, and never paid any attention to it." When the vessel was searched by the custom house officers at Philadelphia, this place was discovered and broken open, and the silks were found secreted therein.

There is no contention as to this state of facts, or as to the fair inference from them, that the shipment and concealment of the goods were the act of the steward alone, without the participation or knowledge of the master. It is not to be gainsayed, under such circumstances, that the master could not make an entry of the concealed goods on the manifest, and that his inability to make it did not result from any fault of his. No personal delinquency is imputable to him. While the smuggled goods then were properly condemned and forfeited, they are not to be treated as any part of the cargo, within the meaning of the act of congress, for the non-entry of which upon the manifest a penalty is imposed upon the master. He cannot be subjected to a personal forfeiture, when he has not done, or omitted to do, anything inconsistent with an honest purpose to discharge his duty. The district court rightly so adjudged, and its decree is affirmed.

Case No. 16,372.

UNITED STATES v. STAFFORD et al.

[2 Paine, 525.] [1]

Circuit Court, N. D. New York.[2]

ACTION ON BOND—PLEADING—VARIANCE.

Where, in an action of debt on a bond, the defendant was described in the bond and declaration, as "principal paymaster of the militia of the state of New York, which have been, or may be ordered into the service of the state of New York," and the evidence was an account against him as paymaster-general of the New York militia; it was held, that the court could not, as matter of law, decide that these different descriptions applied to the same officer, and that, therefore, the variance was fatal.

Error to the district court of the United States for the Northern district of New York.

This was an action on a bond. The bond was dated 1st September, 1813. The declaration was in debt, with the condition of the bond set out, which recited that by general orders of the commander-in-chief of the state of New York, certain militia of the state of New York had been organized and ordered into the service of the United States; and that Samuel Edmonds had been duly assigned and appointed principal paymaster of all the militia of said state which had been or might be ordered into the service of the United States, and with a condition that if the said Edmonds shall keep and render just and true accounts and vouchers of all his receipts and expenditures in said office, and account for, and deliver and pay over to some proper officer or department of the United States, all moneys and public property of the United States which may be in his custody, possession or control; and shall, in all things, honestly, faithfully and truly

[1] [Reported by Elijah Paine, Jr., Esq.]

[2] [No date given. 2 Paine includes cases decided between 1827 and 1840.]

demean himself in the said office of principal paymaster, then the obligation to be void. The breaches were, substantially, that after the date of the said bond, the said Edmonds, as principal paymaster as aforesaid, received of the United States divers large sums of money, viz., $50,000, which he, as such paymaster, was bound to pay over to the militia of the state of New York which had been ordered into the service of the United States, which he neglected and refused to do. The seventh and last breach set out a final settlement of the accounts of Edmonds as such paymaster, and a balance of $20,000 found due from him as such paymaster, which he was required to account for, and also to account for the whole $50,000 advanced to him; and that he neglected and refused so to do.

To this declaration the defendant pleaded: (1) That the bond was not the deed of him, Stafford, and issue. (2) That it was not the deed of Edmonds & Worth, and issue. (3) That the state of New York was a member of the United States, and that by the constitution of the state of New York, a council of appointment was constituted, and all military officers required to be appointed by such council; and that Edmonds was not so appointed—nor was he commissioned by the governor—nor did he hold any such office; and concluded with a verification. (4) That at the time of executing said bond, there was not according to the constitution and laws of the United States, or of the state of New York, any such office as in the condition of the bond was expressed or meant and intended, and prayed judgment if plaintiff ought to have and maintain their action. (5) That at the time of executing such bond, there was not any person authorized or empowered, under the constitution of the United States, to accept the delivery of said bond. And so the said Stafford says that the said bond is not his deed; and puts himself on the country. (6) That at the time of executing said bond, there was not any authority of law, either of the United States or of the state of New York, under and according to which the said bond could be taken; and concluding with a verification. (7) That at the time the bond was executed, there was not any authority of law, either of the United States or of the state of New York, under or according to which the said bond was or could be taken. And so the said Stafford says the bond is not his deed; and puts himself on the country. To the third plea the plaintiffs reply, that the said Edmonds did, at the date of the bond, hold such office as in the said bond and condition is meant and intended; and issue to the country. As to the fourth plea, the United States say, that at the time of executing said bond there was such an office as in and by the condition of said bond is expressed or meant and intended; and issue to the country. As to the fifth plea, the United States say, that at the time of executing said bond there was authority of law under and according to which the aforesaid bond was taken; and issue to the country. As to the sixth plea, the United States say, that at the time of executing said bond there was a person authorized and empowered by, and under the laws and constitution of the United States, to accept the delivery of the aforesaid bond on account of the United States; and issue to the country. As to the seventh plea, the United States say, that at the time of the sealing and delivery of said bond there was authority of law under and according to which the aforesaid bond was taken and made; and issue to the country. Thereupon, the third plea tendered three distinct matters of fact: (1) That Edmonds was not appointed by the council of appointment of the state of New York. (2) That he was not commissioned by the governor of the state as principal paymaster. (3) That he did not hold any such office as by the said bond or the condition was meant and intended. The replication only took issue on the third fact alleged in the plea, viz.: that at the time of executing said bond the said Edmonds did hold such office as in the said bond and condition was meant and intended. Under the fourth plea issue was taken, as a matter of fact, whether under the laws of the United States, or of the state of New York, there was any such office as in the condition of the bond is expressed or meant and intended. This was clearly a question of law, whether there was any such office. It would be matter of fact whether such office was filled by any person. Under the fifth plea issue was taken, as matter of fact, whether there was authority of law under and according to which the bond was taken. Here was, also, an issue joined upon a question of law, and to be tried as matter of fact. Under the sixth plea the issue was, whether at the time the bond was executed, there was any person authorized under the laws and constitution of the United States, to accept the delivery of the said bond on account of the United States. This was a question of law, but issue was taken upon it as matter of fact. The seventh plea alleged that there was no authority of law, either of the United States or state of New York, under which the bond was or could be taken. The replication to this plea took issue upon the allegation, whether there was authority of law to take such bond.

Upon the trial, the plaintiffs offered in evidence a transcript from the treasury department, which was objected to on two grounds: (1) That it purported to be a statement of an account between the United States and Samuel Edmonds, paymaster general and not principal paymaster, as described in the bond. (2) Because it did not contain the items of the account.

The defendants' counsel, under the shape of a motion for a nonsuit, made the following objections: (1) That the evidence produced did not support the breaches. (2) That it did not correspond with the bill of particulars delivered in the cause. (3) That the sureties were only liable for money received by Edmonds by virtue of the office of principal paymaster; and that there was no such office created or known in the law, and that the sureties, therefore, incurred no liability. These objections were overruled. A bill of particulars was introduced on the part of the defendant, which purported to be a statement of moneys received by Samuel Edmonds, as principal paymaster, and stating from whom received, and when received. The defendants then called Archibald Campbell, deputy secretary of state, and who swore that he had examined the minutes of the council of appointment, and found no entry of the appointment of Samuel Edmonds to the office of principal paymaster or paymaster-general. The counsel for the defendant then offered, in evidence, a letter from Peter Wagner, purporting to be an official letter, dated 26th April, 1825, addressed to Jacob Lansing, Esq., relative to the settlement of this account, and stating certain sums of money advanced to Edmonds by Charles B. Tallmadge, late assistant district paymaster, after 31st December, 1816. This was objected to and rejected by the court The counsel for the defendant prayed the court to allow and admit the matter so produced and given in evidence, on his part, to be conclusive, and to entitle him to a verdict; and that he should so instruct the jury, as to all or any one of the issues, as the proof would warrant.

The judge charged the jury, that the bond had been duly proved; that the transcripts from the treasury were admissible in evidence, although open to objections as to their sufficiency; that the bond admitted the appointment of Edmonds to the office or employment therein described; that the transcripts were not inadmissible, because they described Edmonds as paymaster-general, and stated balances only, and submitted it to the jury to decide whether the descriptions paymaster-general and principal paymaster were to be understood as meaning the same thing; that the variance between the bill of particulars and the accounts was not to be regarded by the jury; that, as to the issues joined on the special pleas, the questions involved in them were partly questions of law, and partly questions of fact; that, as to the questions of law, he had expressed his opinion in favor of the plaintiffs, and, so far as they involved questions of fact, the jury would be warranted, by the recitals in the bond, in finding against the defendant.

The jury found for the plaintiffs, and assessed the damages at $3,821.94.

THOMPSON, Circuit Justice. This case comes before the court on a writ of error to the Northern district of this state. A bill of exceptions was taken at the trial, and the argument here has been brought under considerations growing out of the pleadings, as well as the exceptions at the trial. The pleadings are extremely loose and inaccurate, and seem to have been more calculated to entangle the case in the net of form, than to have it tried upon its merits; and it would have been a discreet exercise of the powers of the court below to have corrected this by ordering a repleader. That, however, is beyond the reach of this court in the present stage of the cause; and I shall only notice the objections arising upon the bill of exceptions. The action is in debt on a bond, bearing date the 1st September, 1813, in the penalty of $20,000, with a condition reciting, that by general orders of the commander-in-chief of the state of New York, certain militia of the state of New York had been organized and ordered into the service of the United States; and that Samuel Edmonds had been duly assigned and appointed principal paymaster of all the militia of said state which had been or might be ordered into the service of the United States, conditioned that if the said Edmonds shall keep and render just and true accounts and vouchers of all his receipts and expenditures in said office, and account for, and deliver and pay over to some proper officer or department of the United States, all moneys and public property of the United States which may be in his custody, possession or control, and shall in all things honestly, faithfully and truly demean himself in the said office of principal paymaster, then the obligation to be void. Upon the trial, the plaintiffs produce in evidence a transcript from the treasury department, duly authenticated, stating the balance only of account between the United States and Samuel Edmonds, late paymaster-general of the New York militia.

Two objections were taken to the admission of this evidence: (1) That it did not purport to be an account against Samuel Edmonds, in his character or capacity as charged in the bond, and alleged in the declaration. (2) That it stated only the balance, and did not state the items. Although the exception, with respect to the form in which the account was presented, may be a mistake as to the capacity in which Edmonds stands charged at the treasury, and which probably might be explained, under proper averments in the declaration; yet, as the case stood upon the pleadings and evidence before the court, the transcripts did not correspond with the allegations in the declaration. In the bond and declaration, Edmonds is described as principal paymaster of the militia of the state of New York, which have been or may be ordered into the service of the state of New York; and the evidence was an account against him as paymaster-general of the New York

militia. The court could not, as matter of law, decide that these different descriptions applied to the same officer. In the account, he is not only described as paymaster-general, instead of principal paymaster, but he is called paymaster-general of the New York militia, which may include all the militia of New York; whereas, the bond is as principal paymaster of the militia of New York, which has been or may be ordered into the service of the United States. The latter capacity is more limited than the former; and it is in the more limited capacity that the sureties have bound themselves; and they have a right to confine their responsibility to their undertaking by their bond. Both Edmonds and his sureties may be estopped, by their bond, from denying that he acted in the character of principal paymaster of the militia of the state of New York, ordered into the service of the United States, and might be held accountable for money paid over to him, and to be disbursed in that character; but it must be shown that money was advanced to him in that character, in order to make his sureties responsible. The suggestion that there may be some mistake in the statement of the account from the treasury, is founded upon the circumstance that in the bill of particulars furnished under the order of the district judge, it purports to be a statement of moneys received by Samuel Edmonds, principal paymaster, corresponding with his character, as described in the bond; but the court cannot judicially know that Edmonds did not undertake to discharge duties also, under the character of paymaster-general of the militia of New York, and moneys received by him as such would not be covered by the bond. This supersedes the necessity of examining the other objections arising upon the bill of exceptions.

The judgment must be reversed without costs, and a venire de novo awarded, returnable in this court.

NOTE. In an action on a bond for the payment of a sum of money by instalments, it is not necessary to assign breaches in the declaration according to the requirement of the statute. Spaulding v. Millard, 17 Wend. 331. In declaring on a justice's judgment, rendered in this state, it is sufficient, besides stating the amount of the judgment, the time and place of its rendition, and the name of the magistrate, to allege that the judgment was rendered in a justice's court in a county of this state, in an action of which justices of the peace have civil jurisdiction. Stiles v. Stewart, 12 Wend. 473. In declaring on a justice's judgment of a sister state, the statute giving jurisdiction to the justice must be pleaded. Sheldon v. Hopkins, 7 Wend. 435. In a suit on a bond given by a deputy sheriff for the faithful performance of the duties of his office, the plaintiff must assign breaches, and cannot, without such assignment, take a verdict for even nominal damages. Barnard v. Darling, 11 Wend. 30. Where, in an action of debt, two several sums are demanded as due and owing in two separate counts, the declaration should, in the commencement, demand the aggregate amount, the first count should describe the sum demanded in it as parcel, &c., and the second count the sum demanded in it as the residue, &c. People v. Van Eps, 4 Wend. 387. The assignee of a lease, who enters upon and occupies the demised premises, is liable for the rent in like manner with the assignor. In declaring against him, he may be described as assignee in general terms; and the manner in which the assignment was made need not be set forth. But the assignee cannot be made answerable, by the action of debt, for the rent of any part of the premises demised, except that which has been possessed and enjoyed by himself; and the rent in such cases may be apportioned, the action being founded on the privity of estate merely, and not on the privity of contract. Norton v. Vultee, 1 Hall, 384. The plaintiffs demised certain premises, for a term of years, to one F. L. Vultee. The lessee, a short time before the expiration of the term, died, and the defendant (his widow) took out letters of administration upon his estate, and continued in possession of a part of the premises until the lease expired. An action of debt being brought against her for all the rent which was in arrear at the time of the expiration of the lease, it was held, that she was only liable in this action for the rent of such parts of the premises as had been occupied by her after her husband's death. Id. By the second section of the act (1 Rev. Laws, 222), any person, losing at any game any sum above twenty-five dollars, and paying the same, may, at any time within three months, recover it back of the winner by an action of debt, founded on the act. As the remedy afforded to the loser is provided by statute, in pursuing that remedy the forms and limitations prescribed must be observed; and a general action of assumpsit will not lie. Id. Though the legal effects of altering, by consent of parties, the time limited to do an act, e. g. to make an award, in the condition of a bond, leaving the original date to stand, is to destroy the bond as a pre-existing one, and to give it effect only from the time of the alteration; yet the bond may be declared on as bearing its original date, with or without an averment that it was delivered afterwards. Tompkins v. Corwin, 9 Cow. 255. A bond for performing an award was dated the 19th of September, 1825, and conditioned that the award should be made, &c., on or before the 31st of December then next; and afterward the parties extended the time for the award twice by erasure and interlineations: and the last time to the 19th of January, 1826. Held, that the plaintiff might either declare on the bond simply, as both dated and made on the 19th of September, or as dated that day and made afterward. Id. Where the merits of the case are affected by the time when a deed becomes valid, the time of delivery should be stated and shown; for the delivery gives it effect as a deed; otherwise, where time is immaterial. Id. A contract may be set forth in pleading according to its legal effect, though this vary from the precise words. Id. A deed executed on a particular day may, in general, be pleaded as made on any other day. Id. The supreme court have often held that, in pleading time, the words "next," or "then next," may be considered as referring to the day of the month, and not to the month itself. Id. Precedent of a declaration in debt on a judgment in a justice's court. Smith v. Mumford, 9 Cow. 26. It is sufficient to say the party recovered so much (a sum within the justice's jurisdiction) for such a cause, (being a matter within his jurisdiction,) without setting forth any of the previous proceedings. Id. The declaration on a justice's judgment averred a recovery for a debt, and also ninety-three cents for the party's damages, as well by reason of detaining the debts as for his costs, &c. Proof of $50 debt, and ninety-three cents costs. Held, no variance. Id. The term used in the declaration imported costs only. Id. Form of declaration in debt against the sheriff for suffering an escape from execution, on a surrogate's decree for distribution. Dakin v. Hudson, 6 Cow. 221. Such a declaration must aver that the surrogate's court, which made the decree, granted the administration. Id. For, otherwise it

has no jurisdiction to decree distribution. Id. In a declaration against the sheriff, for suffering an escape from execution, it is not good cause of demurrer that the judgment appears to be against A. and his wife, and the execution against A. only; nor that the execution appears to have been endorsed with a direction to receive interest, when no interest runs on the judgment; nor that the judgment and execution appear to be in favor of D. and others, without saying what others. Id. Any or all of these defects in the proceedings are no excuse to the sheriff who suffers the escape. Id. Such a declaration must describe the record and proceedings correctly; and if, when produced on the trial, they do not correspond, the objection may then be made on the ground of variance. Id. Such a declaration set out, in the first count, a surrogate's decree, execution to the sheriff, and a voluntary escape. The second count set out a similar decree, execution, &c., and an involuntary escape. In setting out the decree, this second count said a certain other judgment or decree, but then dropped the word "other," and referred to the judgment, &c., by the word "said." It set forth the execution as issued on the last-mentioned judgment, &c., but afterward referred to this execution by the word "said." On general demurrer to the whole declaration, held well, and that there was no repugnancy between the two counts. Id. In declaring on a bond, conditioned to pay a judgment in three months, or surrender the body of the defendant in execution, at the suit of the plaintiff, in thirty days thereafter, the taking out execution by the plaintiff within the thirty days is a condition precedent, and must be shown in the declaration. Whitney v. Spencer, 4 Cow. 39. In a declaration upon a bond, conditioned to pay the taxable costs of a suit, licet sæpius requisitus is good on general demurrer. Bacon v. Wilber, 1 Cow. 117. It is not necessary for the plaintiff, in declaring the debt on a recognizance of bail, to allege that a fi. fa. had been issued against the principal previous to the return of the ca. sa. Gillespie v. White, 16 Johns. 117. A declaration on a bond conditioned for the performance of covenants, commencing in debt, after setting forth the condition, and assigning breaches, and concluding in covenant, and demanding damages, is good, it seems, on special demurrer. Gale v. O'Brian, 13 Johns. 189. It is certainly good on general demurrer. Id. Same case, 12 Johns. 216. A breach of the condition of a bond "to free the land from all legal incumbrances, either by deed or mortgage, now in existence, and binding on the premises by the 20th of February," is not well assigned by following and negativing the words of the condition, as such assignment does not necessarily amount to a breach, and the plaintiff ought to have shown some existing incumbrance on the 20th of February, or at the commencement of the suit. Julliand v. Burgott, 11 Johns. 6. If, in a declaration on a bond conditioned to pay several sums of money, at several days, the plaintiff assigns two several breaches for the non-payment of two several sums, it will be bad on special demurrer, for duplicity. Taft v. Brewster, 9 Johns. 334.

Case No. 16,373.

UNITED STATES v. STAHL.

[1 Woolw. 192;[1] McCahon, 206; 1 Kan. 606.]

Circuit Court, D. Kansas. May Term, 1868.

FEDERAL JURISDICTION IN KANSAS — ESTABLISHMENT OF FORT ON GOVERNMENT LAND—WITHDRAWAL OF JURISDICTION FROM STATE.

1. The United States, when it admitted Kansas into the Union, although retaining the title to the land which it then owned within the state, parted with the jurisdiction over it, so far as the general purposes of government are concerned, with certain reservations and exceptions.

[Cited in Marion v. State, 16 Neb. 358, 20 N. W. 293; County of Cherry v. Thacher, 32 Neb. 353, 49 N. W. 352; State v. Doxtater, 47 Wis. 294, 2 N. W. 449.]

2. These reservations and exceptions were (1) Lands of Indian tribes having treaties with the United States, which exempt them from state jurisdiction. (2) The right to tax lands of the United States, and of Indians.

3. Forts of the United States might have been, but were not excepted.

4. In respect of jurisdiction within forts, Kansas is on the same footing as the original states. Her consent is necessary to the exercise by the United States of jurisdiction within them.

[Cited in Ex parte Hebard, Case No. 6,312; Langford v. Monteith, 102 U. S. 146.]

[Cited in State v. McKenney, 18 Nev. 182, 2 Pac. 172.]

5. Whether the constitution requires the consent of the state in which it is located, as a condition precedent to the establishment and use as a fort of a place already belonging to the United States, may be doubted.

6. In order to withdraw from a state a jurisdiction which it has once exercised, and confer it on the general government, the consent of the former is a pre-requisite. This is the material point aimed at in the constitution.

[Cited in U. S. v. Sa-coo-da-cot, Case No. 16,212.]

7. Fort Harker was, in 1863, established as a military post on government land in Kansas, and the United States has always retained the fee. In 1861, Kansas was admitted into the Union on an equal footing with the original states, with boundaries which included the lands on which the fort was established. *Held*, that the fort is not within the jurisdiction of the federal courts, to punish the crime of murder committed therein.

[Cited in Nebraska v. Pollock, Case No. 10,077.]

[Cited in Burgess v. Territory, 8 Mont. 57, 19 Pac. 562.]

This was a demurrer to a plea to the jurisdiction of the court.

MILLER, Circuit Justice. In this case the defendant is indicted for murder, alleged in the bill to have been committed in the district of Kansas, at a place under the sole and exclusive jurisdiction of the United States of America; to wit. at Fort Harker, on land occupied by the United States for a military post, and purposes connected therewith. To this indictment, the defendant pleads to the jurisdiction of the court, alleging that Fort Harker was first established as a military post in the year 1863, under the authority of the war department; that no purchase of the land on which it was established had ever been made by the government of the United States with the assent of the state of Kansas; and that the consent of that state had never been given in any other mode to the exercise by the federal government of an exclusive jurisdiction over the land included within the post. To this plea there is a demurrer, which we are now to decide.

The state of Kansas was admitted into the

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

Union by an act of congress, approved January 29, 1861 (12 Stat. 126), which declared that she was thereby placed on an "equal footing with the original states in all respects." This act, after describing the boundaries of the new state, excepts from its jurisdiction any territory which, by treaty with Indian tribes, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory, and declares that it shall not be included within said state. In the case of U. S. v. Ward [Case No. 16,639], decided at the May term, A. D. 1863, this court held that the jurisdiction of the state over the crime of murder was exclusive of that of the federal government, although the offence was committed on soil to which the Indian title had not been extinguished, unless it was soil occupied by one of the tribes which had treaties with the United States of the character above described. We held that the state had no jurisdiction in such territory, because it was no part of the state. It is not claimed that Fort Harker is included within territory of the character last mentioned. Here it is insisted that because the fee of the soil was in the United States when the fort was established, and because the federal government continued in the use and occupation of such soil as a fort, therefore the right to exercise jurisdiction in case of murder committed there vests in the United States.

It needs no argument to show that the jurisdiction of the crime of murder, or of any other offence, committed within the limits of her territory, must belong to the state of Kansas, except in some special cases, which, by a positive rule of law, are constituted exceptions to the general principle. In this case the exception is claimed to rest on that provision of the federal constitution which empowers congress "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by session of particular states and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

It is very obvious that the situs of Fort Harker does not come within the literal sense of this provision; for it was not purchased by the United States at all, and no consent was ever given by the state legislature to its use as a fort. As the United States was already the owner of the land before the establishment of the fort upon it, and before Kansas was organized into a territory or admitted as a state, it was impossible to comply with these literal terms of the constitution, so far as the purchase was concerned. But as no purchase could be made, so none was necessary. The only object of a purchase, namely, the acquisition of a title, was already accomplished. The government of the United States, when it admitted Kansas into the Union upon the same footing as the original states, retained the legal title to all the lands which it then owned in the state of Kansas. So far as general purposes of government were concerned, however, with certain reservations and exceptions, it parted with jurisdiction over it.

The first exception reserved the lands of Indian tribes which had treaties exempting them from state jurisdiction; the second, the power to tax the lands of the United States and of the Indians. It was competent to the federal government, and it would have been appropriate at that time, to have also excepted out of this grant of jurisdiction, places for forts, arsenals, &c., if such had been the policy of congress. But it was not done. So far as the consent of Kansas to the exercise of this exclusive jurisdiction by congress is concerned, that state stands on the same footing as the original thirteen.

The question then is, when congress purchases the fee simple of a portion of territory included within one of the original states, for the purpose of erecting a fort thereon, what kind of consent is necessary to be obtained from the state legislature in order to vest jurisdiction in the federal government? It is not material now to inquire whether the United States could erect and occupy a fort without the consent of the legislature. The language is, that congress shall exercise exclusive legislation over all places purchased with that consent. But whether the constitution requires that consent as a condition precedent to the establishment and use of the place as a fort, may well be doubted. It does not seem probable that the framers of the constitution, who conferred on congress full powers of making war, raising armies, and suppressing insurrections, and also declared that the federal government was established for the express purpose of providing for the common defence, would have left its power of erecting forts, so important to the execution of that purpose, subject to the volition of state legislatures. However this may be, it is clear that in order to withdraw from a state a jurisdiction which it had possessed and exercised, and confer it on the general government, the consent of the former was made a prerequisite. This is the material point aimed at by the provision of the constitution.

All the important uses of a fort, arsenal, or magazine could be secured without the exercise of exclusive legislation within their walls; and there was manifest propriety in requiring the assent of the state to the exercise of this important and delicate power, which of right belonged to the local authority, and which could be needed by or useful to the general government only in special cases. This jurisdiction having been vested in the state of Kansas by the act admitting her into the Union, and never divested, it cannot now belong to the United States. The power provid-

ed for in the constitution is one of exclusive legislation. The act under which the defendant is indicted applies, in exact terms, to places only in which the United States is empowered with exclusive legislation. Moreover, the indictment describes the place as being within the exclusive jurisdiction of the federal government. The question of concurrent jurisdiction, therefore, does not, and cannot arise in this case.

[These views find support in the following adjudged cases: People v. Godfrey, 17 Johns. 225; Com. v. Clary, 8 Mass. 75; U. S. v. Bereau, 3 Wheat. [16 U. S.] 388; Clay v. State, 4 Kan. 49; Dunn v. Games [Case No. 4,176]; Story, Const. §§ 1224–1227; 1 Kent, Comm. 482.] [2]

The demurrer to the defendant's plea to jurisdiction is overruled.

Case No. 16,374.

UNITED STATES v. STALY et al.

[1 Woodb. & M. 338.] [1]

Circuit Court, D. Rhode Island. June Term, 1846.

SEAMEN—SHIPPING ARTICLES—REFUSAL TO SERVE—REVOLT—UNSEAWORTHINESS OF VESSEL—AUTHORITY OF MASTER.

1. Shipping articles, signed by seamen, to a port A. and a market, are definite enough to be binding.

2. If the vessel has not cleared, but is lying at anchor in a navigable stream, where the tide ebbs and flows, the seamen on board are bound to obedience: and this court, probably, has jurisdiction over a revolt there, and will exercise it, if no evidence be offered as to the limits of the jurisdiction of the state, and any exception on this account is apparently waived. Whether the vessel be seaworthy or not, is a fact to be settled by the jury. But if she was not in truth seaworthy, and the seamen, on going on board and examining her, objected to serving on that account, it must be considered a refusal to enter upon the discharge of their contract, and not a violation of duty after their service has commenced under it.

3. In such case the remedy against them, if any, is a civil one for not beginning to serve under the articles, and not a criminal one for breaches of duty, after having entered upon duty.

4. If subsequent to the shipment and commencement of service, the vessel is believed not to be seaworthy, the seamen cannot refuse obedience, but may ask a survey if in port, and if not, but within sight of land, request the master to return and have the survey.

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

5. Should he then conduct himself unreasonably, or in any way treat them with unnecessary severity, their remedy is at law after their return, and not a resort to violence, unless in danger of the actual loss of life, and then at their peril as the result may turn out.

This was an indictment in several counts, [against Ephraim Staly and others,] for a revolt on board the barque John Brown, in Providence river, on the 23d of May, 1846. The respondents pleaded not guilty. It appeared in evidence, that the defendants and four others shipped on a voyage to Apalachicola, or elsewhere, for a market, and were taken on board the barque the evening previous to the transaction complained of. The vessel lay at anchor in the stream, and in the morning, on unfurling the sails, the mainsail was asserted by the men to be in such a dilapidated condition, and some of the rigging so much out of order, that they objected to going to sea in the vessel, as not seaworthy, and made offers to rescind their contract, and pay back the advance which they had received in money. The officers denied that she was unseaworthy, and undertook to enforce duties under the contract, which led to the collision and resistance complained of. Some objections were made to the form of the contract, and it was further insisted in their behalf, if the vessel was in fact not in a suitable condition for the voyage contemplated, the men were not bound to serve in her at all.

W. Burgess, U. S. Dist. Atty.
Mr. Rivers, for defendants.

WOODBURY, Circuit Justice, charged the jury, that the contract, though in form to a port designated, or elsewhere for a market, was definite enough and binding. If as certain as a policy of insurance, which was sometimes in such a form, it was as certain as was necessary in respect to the service, wages and obedience of seamen. The vessel had not yet cleared, and it is objected, that evidence of her clearance should be adduced from the collector's office, before the indictment can be sustained. But it strikes me, that being in a navigable stream, where the tide ebbs and flows, and nothing proved or shown as to the jurisdiction of the state over the place where she was at anchor, the indictment can be sustained, under the act of congress, as to offences of this kind in vessels, whether she had cleared or not. But I give only my first impressions, and shall see, if necessary hereafter, that the defendants have the benefit of any exceptions to this ruling, if erroneous. If obedience can be required in a vessel on the high seas, at a distance from the river, it should be in the river, or at anchor and before the clearance is obtained as well as after, or all order will be frustrated, and the due navigation and safety of the vessel rendered impossible. U. S. v. Hamilton [Case No. 15,291]; U. S. v. Stevens [Id. 16,394]. If there be any thing in the objection, it applies to the jurisdiction of this court to try the offence, when committed within the stream and port, and not on the high seas, rather than to the offence itself not having being committed at all. Under the act of congress of 1835 [4 Stat. 775], if the place where a revolt happened was clearly within the jurisdiction of a state, it might be doubtful whether this act reaches it, though that of A. D. 1790 [1 Stat. 112] has been con-

[2] [From 1 Kan. 606.]

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

strued to do it, some different terms being used there. Undoubtedly congress can, if it pleases, punish such offence in vessels, under its power to regulate commerce, though in places not on the high seas, or not within mere admiralty jurisdiction. But as the facts here are not sufficiently full to raise the question under the present act of congress, I shall, for the present, give no opinion on it, but consider it for the present waived, and the power to try this offence conceded to this court. See U. S. v. New Bedford Bridge [Case No. 15,867].

In respect to the question of the vessel being seaworthy or not, that is one of fact, to be settled by the jury. But I give it to them in charge, that if the seamen, as soon as they could examine the vessel and her sails after coming on board, and decide on her seaworthiness, did so, and then reasonably objected to enter on their contract, they were not punishable as criminals for refusing merely to begin to serve at all under their contract. Because it was the duty of the owners to have the ship seaworthy, and if she was not, they could not legally exact the proceeding to a fulfilment of the shipping articles by the men. It would then become a mere controversy as to the obligation to begin their service, and not to complete it faithfully after begun, with full knowledge of the real condition of the vessel. It would be a case for civil redress for damages for not entering on the contract, if the vessel was seaworthy. On the contrary, if the seamen had enjoyed full opportunities to examine the condition of the vessel, and had then begun their service, under their contract, they were bound to go on and yield obedience to all lawful commands; and if they became satisfied afterwards, that the vessel was not seaworthy, they should ask a survey, if in port, and if out of it, but not out of sight of land, should ask the mates to unite with them in obtaining it, under the provisions of the act of congress. They would still be bound to obey orders, and would not be justified for conduct otherwise mutinous, unless perhaps in immediate peril of life, and so found as a fact by a jury, after the crew come on shore, and are arraigned for disobedience. The duty of the seamen, after they have once entered fully on their service under their contract, is obedience; that of the officers is protection, and lenity, and kindness, so far as consistent with the preservation of order, and the safety of property and life. Officers are presumed to have superior intelligence and skill, and must be held answerable for the use of them; and in case of unseaworthiness, their lives are at risk as much as those of the seamen, and in real doubt they are as likely to wish a survey. Seamen are presumed to have bodily vigor, a knowledge of duty, and a willingness to obey orders. Let both classes conform to these presumptions, and the law will equally protect both. But let wanton cruelty appear in the officers, or a reckless disregard of the rights of the seamen, and they are to be punished no less severely than the latter, when instead of patience and obedience, and a reliance on the laws of their country for redress, they take the sword of justice into their own hands, and act as executioners of their own wills, as well as judges and parties.

The jury not agreeing, the respondents were discharged on their own recognizances.

Case No. 16,375.

UNITED STATES v. STANGE.

[6 Int. Rev. Rec. 5.]

Circuit Court, E. D. New York. 1867.

VIOLATION OF INTERNAL REVENUE LAWS—LOTTERY TICKET DEALERS—SPECIAL TAX.

[Defendant gave to customers, on payment of a small sum, combinations of numbers, specifying them as being in the Delaware or Kentucky lotteries. He then entered the numbers in his policy book, and, if they came out in the drawings, paid to the customer the required amount of money. He gave no certificate or ticket to the customer, and the latter kept the numbers in any way he chose. *Held*, that defendant was a policy dealer, within the meaning of the statute, and was subject to indictment for not paying the special tax.]

The defendant in this case was indicted for carrying on the business of dealing in lottery tickets without paying the special tax provided by law.

There was no question that he had not paid the special tax required by the internal revenue law [14 Stat. 116]. The question was whether he was a lottery ticket dealer within the words of that section of the law which provides that "every person, association, firm, or corporation who shall make, sell, or offer to sell lottery tickets, or fractional parts thereof, or any token, certificate, or device, representing or intending to represent a lottery ticket or any fractional part thereof, or any policy of numbers in any lottery * * * shall be deemed a lottery ticket dealer."

It appeared that the defendant kept a tobacco store on Pacific street, and that he also "sold policies," as it is called. A customer would come to him, and, paying him a small sum, would give him a combination of numbers specifying them as being in the Delaware or Kentucky lotteries. The defendant would enter them in his policy book, and, if they came out in the drawing of the lottery, he would pay various sums, according to the way they came out; but he gave the customer no certificate or ticket of any kind. He kept the numbers in his policy book and the customer kept them as he pleased. The question was whether this was making or selling any "policy of numbers."

The judge charged the jury that, for the purposes of this trial, he should hold that it was, that if they had found that he had so sold policies of numbers, they must find him guilty.

The jury accordingly found him guilty.

His counsel made a motion for a new trial, on which the question of this construction of the law is to be more fully discussed.

Mr. Tracy, U. S. Dist. Atty.

Mr. Whiting, for defendant.

Case No. 16,376.

UNITED STATES v. STANLEY.

[6 McLean, 409.] [1]

Circuit Court, D. Indiana. May Term, 1855.

PERJURY—PRE-EMPTION OF PUBLIC LANDS—CONFLICTING CLAIMS.

1. A false swearing to obtain a pre-emption right, is made perjury by statute.

2. The person commencing an improvement has a right to continue, and any one who intervenes may be considered a trespasser.

[Approved in Atherton v. Fowler, 96 U. S. 519.]

3. But if a first occupant give way to a second, and the right of pre-emption is granted to the second, it is good against all the world except the first occupant.

4. And if he abandon his right, the right cannot be questioned.

5. Where perjury is charged on a written affidavit, and it appears clearly from several witnesses that the affiant stated the facts truly, and was advised that they were substantially the same as stated in the writing, by a lawyer in whom the affiant confided, and he yielded to such an influence in taking the oath, it is not perjury, the guilty motive being wanting.

[Cited in U. S. v. Edwards, 43 Fed. 67.]

[Cited in Lambert v. People, 76 N. Y. 226; Barnett v. State (Ala.) 7 South. 416.]

[This was an indictment against Solomon Stanley for perjury.]

The U. S. Dist. Atty., for plaintiff.

Messrs. Walpole, for defendant.

THE COURT (charging jury). This is an indictment for perjury, under the 13th section of the act of congress of the 4th September, 1841 [5 Stat. 453], for swearing falsely to establish a pre-emption right, which, by that act, is made perjury. The act of the 3d of August, 1846 [9 Stat. 50], provides "that every actual settler, being the head of a family, or widow, or single man over the age of twenty-one years, who is now in possession, by actual residence as a housekeeper, of any tract of public land within the limits of the several cessions by the Miami Indians, in Indiana, which have not yet been proclaimed for sale by the president, or any such person who shall hereafter erect a dwelling house and become a housekeeper upon any such tract of land, shall be entitled to the same benefits and privileges with respect to said land, as were granted to settlers on other lands by the act approved 22d June, 1838 [5 Stat. 251], entitled 'An act to grant pre-emption rights,' and the several amendatory provisions of said act," &c. And in the 2d section of said act, it was provided "that in every case, the affidavit of the claimant under that act should be like unto that prescribed by the act of the 22d June, 1838, and the same shall be filed, and proof and payment made for the land claimed, at any time before the day fixed by the president's proclamation for the public sale of said land." The written affidavit was read on which the perjury was assigned, and which was made and filed by the defendant, at the time of application to the register of the land office for the pre-emption. A pre-emptive right to a quarter section was claimed on the ground that John Stanley had built a dwelling house on the same, which he with his family occupied, within the above cession of the Miami Indians. This affidavit was made the 23d March, 1854.

It appears from the testimony that a man by the name of Majors, and hands employed by him, entered upon the land in controversy, on the 13th March, 1854, cut logs for a cabin, and the next day it was built up to the roof. Finding the building in this condition, John Stanley, the brother of defendant, came to the cabin with his loaded wagon and entered into it, by cutting a door, and had it covered with materials which had been prepared by Majors. When Majors returned to finish the house, he found the defendant in possession of it, who said that his brother had gone to the land office to enter the land, and he remained to protect the possession. Majors entered into the house and his trunk was handed in. His entry was resisted by defendant, and finding that he could not stay there, Majors took possession of another quarter section. The affidavit of defendant stated that "he knows from personal observation, that the said John Stanley did, on the 14th day of March, 1854, enter into a dwelling house with his family, consisting of himself and wife and two children, which the said John Stanley previously caused to be erected on the above described quarter section of land, and that he, the said Stanley, continues to make said house his only home." After the affidavit was drawn up, the defendant stated that he did not feel free to swear to it. And he then observed that when he first saw the house, it was a pen, there being no roof on it; that his brother cut out the door and covered the house on the 14th, but he did not say who built the pen. After the statement of the above facts, the defendant was induced to make the affidavit on the advice of a connection of his who was present, and who was a lawyer, believing that it contained the facts substantially as stated by him. Some nine or ten persons proved the good character of the defendant, and that his standing was as fair and unexceptionable, as any other person of his age in that part of the county where he lived.

THE COURT, in their charge to the jury, said there could be no doubt that John Stanley was guilty of a trespass in entering

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

into the partly built cabin, and that he could not have procured the pre-emptive right to the quarter section, had Majors claimed it, and had all the facts been represented to the register and receiver of the land office. Majors was entitled to the possession of the improvement, so far as it was made by him. But he relinquished his right, as appears from the testimony, and settled upon another quarter in the neighborhood. This abandonment left John Stanley in possession of the improvement, and he made the house habitable by cutting out the door and putting a roof on it.

But the inquiry for the jury is not as to this particular matter, but whether the defendant was guilty of wilful and corrupt perjury. It does not appear that he had any knowledge who had constructed the pen of the cabin, but he knew that his brother had cut out the door and put on the roof. And he objected to swearing to the written affidavit, it appears, until his friends, and especially the lawyer, who was a connection of his, advised him to swear to it, as it embraced only the facts substantially as stated by him. If you believe, gentlemen, that he yielded to this influence in swearing to the paper, and that in his repeated relations he gave a true statement of the facts as they transpired, according to his knowledge of them, he is not guilty of perjury. To constitute perjury there must be a wilful and corrupt statement of a falsehood, material to the matter in hand. You are to determine the facts in the case, and judge of the guilt of the defendant. He has shown an excellent character, and this, under the circumstances, and indeed under all circumstances where the evidence of guilt is not clear, will receive due consideration by a jury.

Verdict of not guilty.

Case No. 16,377.

UNITED STATES v. STANWOOD.

[See Case No. 15,130.]

Case No. 16,378.

UNITED STATES v. STARK et al.

[15 Int. Rev. Rec. 48; 11 Am. Law Reg. (N. S.) 37; 6 Am. Law Rev. 573.]

District Court, D. Georgia. Nov. 27, 1871.

CUSTOMS DUTIES — IMPORTATIONS AT PORTS CONTROLLED BY INSURGENTS—LIABILITY TO DUTIES.

[1. Neither the fact that a port of the United States is under the control of an insurgent body, such as the co-called Confederate States, nor the fact that the government of the United States had conceded belligerent rights to the insurgents, will operate to suspend the revenue laws so as to relieve goods there imported from the payment of duties to the United States. Distinguishing U. S. v. Hayward, Case No. 15,336, and U. S. v. Rice, 4 Wheat. (17 U. S.) 247.]

[2. Nor was any such effect produced by the president's proclamation of April 19, 1861 (12 Stat. 1258), declaring a blockade of certain ports in the rebellious states; and any cargoes which managed to evade the blockade were still subject to the duties prescribed by law.]

This action was brought to recover of defendants [William H. Stark and others] the sum of $959.04, the duties on two hundred and sixty-six hogsheads and forty-one barrels of molasses, valued at $3,996, imported by the defendants into the port of Savannah on the 7th day of May, 1861. The defendants pleaded the general issue, and payment of the duties. The case was submitted to the jury on the following agreed facts: The goods were imported into the port of Savannah by the defendants at the time named in the declaration, and the amount of duties was as stated in the declaration, and they had never been paid to the United States. John Boston, United States collector of customs at the port of Savannah, resigned his said office on the 31st day of January, 1861, and he was collector of customs for the Confederate States at the port of Savannah at the time of the importation of the goods mentioned in the declaration. At that time the port of Savannah was in the paramount forcible military possession of the Confederate authorities, and by such paramount military authority the United States government, both civil and military, was excluded. The duties on said goods were paid to the collector of customs of the Confederate government.

John D. Pope, U. S. Dist. Atty.

Law, Lovell & Falligant, for defendants.

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

WOODS, Circuit Judge (charging jury). The facts in this case are all agreed upon, so that there is nothing for you to do but to return a verdict as instructed by the court. By the act of congress of July 30, 1846 (9 Stat. 42), § 1, it is provided that there shall be levied, collected, and paid on goods, wares, and merchandise imported into the United States from a foreign country, the duties prescribed by the act. The United States is therefore entitled to recover in this action, unless the defendants present some valid reason why they should be relieved from the payment of the duties on the goods imported by them.

Defendants insist that the agreed facts and public history, of which the court takes judicial notice, shows such a state of affairs, that at the time of the importation they were under no obligation to pay duties to the United States. They say that the Confederate States, being a belligerent power at war with the United States, and holding by military force territory captured from the United States, acquired a sovereignty

over such territory and during such occupancy. Allegiance within such territory was due to the Confederate States, and they only were entitled to receive duties on imports, and that in effect the port of Savannah was not a port of the United States but was a port of the Confederate States. In support of this view the cases of U. S. v. Hayward [Case No. 15,336], and U. S. v. Rice, 4 Wheat. [17 U. S.] 247, are cited. Both these cases were actions for the recovery of duties on goods imported into Castine, during the war of 1812, with Great Britain, and after that place had been captured by and surrendered to the British forces. The circuit court of the United States in the first case, and the supreme court of the United States in the other held that the goods imported were not liable to pay duties to the United States. The ground upon which these decisions were based is stated by the court in the case of U. S. v. Hayward in these words: "By the conquest and occupation of Castine, that territory passed under the allegiance and sovereignty of the enemy. The sovereignty of the United States over the territory was of course suspended, and the laws of the United States could no longer be rightfully enforced or be obligatory upon the inhabitants who remained and submitted to the conquerors. Castine, therefore, could not strictly be deemed a port of the United States, for its sovereignty no longer extended over the place." So in U. S. v. Rice [supra], the supreme court of the United States says: "Under the circumstances we are all of opinion that the claim for duties cannot be sustained. By the conquest and military occupation, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period so far as respected our revenue laws to be deemed a foreign port." It is clear from the extract just quoted that the decision in those cases was placed on the ground that Great Britain had acquired the sovereignty of Castine, and that the inhabitants owed the British government allegiance. If the Confederate States was a sovereignty, and was entitled as against the United States to the allegiance of the people living within the territory held by them, then these cases are directly in point as supporting the defendant's views. But the Confederate States as a sovereign power never had an existence. It was never recognized as such by any department of the government of the United States, or by any other nation on the globe. There was never a moment when any human being owed it allegiance; on the contrary, allegiance was due the United States and to their laws from all the inhabitants of the territory held by the military power of the Confederate States, and any violation of the laws of the United States was punishable by the authority of the United States. The government of the United States might prosecute for violation of its laws during the Rebellion. It has assumed to pardon those guilty of offences against its statutes, and a large number of prominent citizens of the late insurgent states now hold the pardon of the president for offences against the laws of the country, committed during the Rebellion, within the territory held by the military power of the Confederate States. Can we say then that a rebellion which never had a government which was recognized as such, was a sovereign, that it acquired sovereignty over territory held by force of its arms, and that the people of the territory controlled by it owed allegiance to a government which never had an existence? Clearly not.

That these views are the views of the supreme court of the United States will appear from the adjudicated cases. In Hickman v. Jones, 9 Wall. [76 U. S.] 200, Mr. Justice Swayne, speaking for the court, says: "The rebellion out of which the war grew was without any legal sanction. In the eye of the law it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the state to which it belonged. The proportions and duration of the struggle did not affect its character, nor was there a rebel government de facto in such a sense as to give any legal efficacy to its acts. It was not recognized by the national or any foreign government. It did not for a moment displace the rightful government. That government was always in existence in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary states. The union of the states for all the purposes of the constitution is as perfect and indissoluble as the union of the integral parts of the states themselves." Again, in the case of U. S. v. Keehler, 9 Wall. [76 U. S.] 86, Mr. Justice Miller, as the organ of the court, says: "It certainly cannot be admitted for a moment that a statute of the Confederate States or the order of its postmaster-general could have any legal effect in making the payment to Clements valid. The whole Confederate

power must be regarded as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an act of its congress or an order of one of its departments, any right of property of the United States." In Shortridge v. Macon [Case No. 12,812], tried by Mr. Chief Justice Chase in the circuit court of the district of North Carolina, he says: "War levied against the United States by citizens of the republic under the pretended authority of the new state government of North Carolina or the new central government which assumed the title of Confederate States, was treason against the United States. * * * On no occasion and by no act have the United States ever renounced their constitutional jurisdiction over the whole territory or over all the citizens of the republic, or conceded to citizens in arms against their country the character of alien enemies, or to their pretended country the character generally of a de facto government. There is nothing in the Prize Cases which gives countenance to the doctrine which counsel endeavors to deduce from it, that the insurgent states, by the act of rebellion, and by levying war against the nation, became foreign states, and their inhabitants alien enemies."

These cases show how broadly the case at bar differs from the case of U. S. v. Hayward, and U. S. v. Rice, relied on by counsel for defendants. Those cases were placed on the ground that the inhabitants of Castine owed allegiance to the sovereignty of Great Britain and obedience to her laws. The Confederate States were not a sovereignty; its inhabitants did not owe it allegiance, were not bound by its laws. On the contrary, the authority of the United States extended over them at all times. Their duty of allegiance and obedience to its laws was continuous and unbroken. All the laws of the United States, the act levying duties on imports included, were in force at all times and in all places within the territory of the United States, as much in Savannah as in New York; and all the citizens of the United States, whether within or without the insurrectionary districts, owed them obedience. If, as held by Mr. Chief Justice Chase, the laws of the United States against treason were in force over the inhabitants of the insurgent states, clearly the revenue laws were also in force.

But it is claimed for defendants that the Confederate States were belligerents, and that belligerent occupation gave them the right to revenues of the port or country occupied. We cannot concur in this view. It is difficult to conceive of a more dangerous and pernicious doctrine. It would place in the hands of insurgents, to whom, out of humane motives belligerent rights had been conceded, those rights which are only accorded to a sovereign power, and hold out the hope of plunder as a motive and incentive to rebellion. The concession of belligerent rights to insurgents does not render them any less insurgents. It clothes them with no attributes of sovereignty, among the highest of which is the right to levy taxes and impost. It gave the insurgents no more right to collect duties than the granting of belligerent rights to the insurgent inhabitants of a county in the state of Georgia would confer upon them the right to enforce the collection of the taxes due the state. This precise point was decided by Mr. Chief Justice Chase in Shortridge v. Macon, already cited. He says: "There is nothing in that opinion (the Prize Cases) which gives countenance to the doctrine that the insurgent states, by the act of rebellion, and by levying war against the nation, became foreign states, and their inhabitants alien enemies. This proposition being denied, it must result that in compelling debtors to pay receivers for the support of the Rebellion debts due to any city of the United States, the insurgent authorities committed illegal violence by which no obligation of debtors to creditors could be conceded or in any way respect affected."

We cannot admit for a moment the claim which appears to be set up by counsel for defendants, that by the concession of belligerent rights to the insurgents the United States agreed to remit the duties on goods imported into the insurgent territory, because such goods were necessary for the support of the insurgents. In other words, the right to import goods free of duty is not a belligerent right. It is also claimed for defendants that a blockade of the ports of the insurgent districts having been declared by the president of the United States in his proclamation of April 19, 1861, the laws for collection of duties were suspended by the law of the blockade. We do not understand that the president has authority to suspend the laws of the United States, nor can we suppose that this was the purpose of the proclamation of the blockade. The preamble recites as one of the reasons for the blockade the fact that by reason of the insurrection the laws of the United States for the collection of the revenue could not be effectually executed in the states named conformably to that provision of the constitution which requires duties to be uniform throughout the United States. One purpose of the blockade was, therefore, to secure the uniform collection of duties. The way not to accomplish this would be to allow all vessels which might succeed in eluding the blockade to discharge their cargoes duty free. If we adopt the view of defendants, one great purpose for which the blockade was established would be defeated. The laws of the United States required all goods imported from a foreign country to pay duties. The president's proclamation closed certain ports. Can it be claimed, with any fair show of reason, that because a vessel

had defied the proclamation and entered a blockaded port, that that fact relieves her cargo from the payment of duties?

Our view, then, of this case is this: The law of congress gives the national government a right to collect duties on all foreign goods imported into any port of the United States. Notwithstanding the Rebellion, the authority and laws of the United States extend over the insurgent territory. The port of Savannah was at all times a port of the United States. The Confederate States was not a sovereignty. The laws of its congress were absolute nullities. They had no right to collect duties, to levy taxes, or in any way to exercise the functions of a government. The people of the insurgent states were not bound to obey their laws, so far as they attempted to interfere with the rights of the United States, but, on the contrary, owed allegiance to the United States and obedience to their laws. And it follows that the United States are entitled to the duties on goods imported into the insurgent districts during the Rebellion. Your duty will therefore be discharged by returning a verdict for the plaintiff for the sum of $959.04 in gold, with interest from the 7th day of May, 1861.

Case No. 16,379.

UNITED STATES v. STARR.

[Hempst. 469.] [1]

Circuit Court, D. Arkansas. July, 1846.

OFFENCES COMMITTED IN INDIAN COUNTRY—JURISDICTION OF FEDERAL COURTS — CONSTRUCTION OF CRIMINAL LAWS.

1. Until the act of 17th of June, 1844 (4 Stat. 733), was passed by congress, the courts of the United States had no jurisdiction to hear, try, and punish offences committed in the Indian country west of Arkansas.

[Followed in U. S. v. Ivy, Case No. 15,451. Cited in Ex parte Kang-gi-shun-ca, 3 Sup. Ct. 396, 109 U. S. 560.]

2. That act was prospective, and did not operate on the past.

3. Laws are generally made to operate upon the future, not the past, transactions of men, and courts will not give them a retroactive effect unless that intention is clearly expressed.

[Cited in Brooke v. McCraken, Case No. 1,932; Tinker v. Van Dyke, Id. 14,058.]

4. Penal laws must be construed strictly.

5. If there is no tribunal competent at the time to punish an offence, the jurisdiction cannot afterwards be conferred.

[This was a writ of habeas corpus to procure the discharge of Ellis Starr from imprisonment.]

S. H. Hempstead, U. S. Dist. Atty.

E. H. English, for the prisoner.

JOHNSON, District Judge. By act of congress, passed the 30th of June, 1834, so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, are declared to be in force in the Indian country west of Arkansas; but not to extend to crimes committed by one Indian against the person or property of another Indian. And for the sole purpose of giving jurisdiction to the territorial court, that part of the Indian country was annexed to the territory of Arkansas. 4 Stat. 729; 4 Story's Laws U. S. 2399; 9 Story's Laws U. S. 128. On the 15th of June, 1836, the territory of Arkansas became one of the United States, by the name of the state of Arkansas, (5 Stat. 50), and on the 3d of March, 1837, this court was created, and invested with like jurisdiction as other circuit courts of the United States (5 Stat. 176.)

At a previous term, in the case of U. S. v. Alberty [Case No. 14,426], we held that this court possessed no jurisdiction beyond the limits of the state of Arkansas, and, consequently, had no power or authority to hear, try, and punish offences committed in the Indian country. Subsequent to that decision, and to remedy that defect, congress, on the 17th of June, 1844, passed the act entitled "An act supplementary to the act entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,'" passed 30th of June, 1834, and thereby provided "that the courts of the United States in and for the district of Arkansas be and they hereby are vested with the same power and jurisdiction to hear, try, determine, and punish all crimes committed within that Indian country designated in the twenty-fourth section of the act to which this is a supplement, and therein and thereby annexed to the territory of Arkansas as were vested in the courts of the United States for said territory before the same became a state. And for the sole purpose of carrying this act into effect, all that Indian country heretofore annexed by the twenty-fourth section of the act aforesaid to the territory of Arkansas, be and the same hereby is annexed to the state of Arkansas." 5 Stat. 680. It will be seen by this act that anterior to the 17th of June, 1844, this court had no jurisdiction of crimes committed in the Indian country, and on that day acquired such jurisdiction.

In the case now before the court, it is agreed and admitted by the parties to this proceeding, and is evident from the proof, that Ellis Starr is charged with the commission of the crime of murder in the Indian country annexed to the state of Arkansas by the act of 1844, on a day anterior to its annexation, that is to say, before the 17th of June, 1844, and the question made and argued by the counsel is, whether this court has jurisdiction of the crime. It seems to me plain that at the time the offence charged was committed, neither this court, nor any other court of the United States, had power

[1] [Reported by Samuel H. Hempstead, Esq.]

and jurisdiction to hear, try, and punish it. Indeed, it is manifest that from the time this court was created, on the 3d of March, 1837, up to the 17th of June, 1844, there existed no judicial tribunal of the United States competent to try and punish offences committed in this Indian country, and so this court decided in the case cited when its presiding judge (Hon. Peter V. Daniel) was present. And to give that jurisdiction was the sole object of the act of the 17th of June, 1844.

It is, however, insisted that this act confers upon this court jurisdiction to punish all offences against the laws of the United States committed in the Indian country,—those before as well as those after its enactment. The argument is that the crime was committed against an existing law, and within the jurisdictional limits of the United States, although this court could not then, yet may now punish it; and in carrying out this idea, it is said by the district attorney to get clear of a difficulty which lies in his path, that it is not a case where there was no law anterior to the 17th of June, 1844, creating the offence, and then doing it for the first time, for that, he concedes, would be an ex post facto law within the rule laid down in Calder v. Bull, 3 Dall. [3 U. S.] 386; but he insists that without creating any new offence, the law merely designates a tribunal to punish one already committed against an existing law of the United States forbidding it. If this be a sound position, then it is manifest that the act must have a retrospective operation; because, otherwise, it could not affect transactions which took place before its passage. The crime charged against the prisoner, as stated, was committed when neither this nor any other court of the United States was clothed with jurisdiction and power to try and punish it, and to proceed to do so now would be to give the act in question a retroactive effect.

Now in the construction of a statute it is a cardinal and well established principle, that the court will never give to it a retrospective operation, unless it clearly appears from the language used, that its makers intended it to have that effect; because laws are generally made to operate upon the future, not the past, transactions of men. 9 Bac. Abr. tit. "Statute," C. Legislatures seldom, if ever, especially in the enactment of criminal laws, intend them to have a retroactive effect, and certainly courts will never give them that operation, even if it can be done at all, unless the intention is clearly expressed. Prince v. U. S. [Case No. 11,425]. Penal laws must be construed strictly.

The inquiry then is, has congress, by the terms used in the act of the 17th of June, 1844, giving this court jurisdiction, clearly expressed the intention, that it shall take cognizance of past as well as future crimes? Let us examine the words of the statute itself. It provides that the court shall have the same power and jurisdiction of these offences that were vested in the courts of the United States for the territory of Arkansas before the same became a state. And for the sole purpose of carrying the act into effect, all that Indian country heretofore annexed to the territory of Arkansas is thereby annexed to the state of Arkansas. By this act nothing beyond jurisdiction of crimes committed in the Indian country is conferred on this court, and in order to make the grant effectual, the Indian country is attached to this judicial district and constitutes a part of it. This is all. There is nothing from which an inference can be drawn that it was intended by its makers to have a retrospective operation. They have neither said so expressly nor have they intimated that it shall have that effect. In the absence of any express intention to the contrary, the court is bound to presume that the makers of the law intended it to operate upon the future and not upon the past. If congress had made it retrospective, a nice question would then have been presented, upon which I give no positive opinion, although my mind inclines to the belief, for reasons that need not now be stated, that if there is no tribunal competent at the time to punish an offence, the jurisdiction cannot be afterwards conferred. For these reasons the prisoner must be discharged.

Discharged accordingly.

Case No. 16,380.

UNITED STATES v. STATE NAT. BANK OF MINNEAPOLIS.

[2 Cent. Law J. 107.] [1]

Circuit Court, D. Minnesota. Dec. Term, 1874.

FEDERAL TAXATION — ACTION AGAINST BANK FOR PENALTY—NECESSARY ALLEGATIONS.

1. In an action by the United States against a bank, for the penalty of one thousand dollars, for failing to make return of its net earnings, income, or gains, as required by the 120th section of the internal revenue act of June 30, 1864 [13 Stat. 223], as amended by the act of July 13, 1866 [14 Stat. 98], which was re-enacted July 14, 1870 [16 Stat. 274], the complaint must allege that the sum therein mentioned as net earnings, income, and gains, was dividends, or excess of profits over such dividends, added during the year to its surplus or contingent fund. The complaint should specifically state the character of the earnings, income, and gains which were liable to the tax, and that a list and return thereof has not been made as required in this section.

2. If the penalty is claimed under the 120th section of the act of 1864 the complaint should charge that the defendant has neglected or omitted to make dividends or additions to its surplus or contingent fund, within the period of time mentioned therein, and that it had failed to make the return required by that section.

The United States bring this suit to recover a penalty of one thousand dollars against the defendant, for not making or rendering a list or return to the assessor, of its net earnings,

[1] [Reprinted by permission.]

income or gains for the period of time embraced between January 1, 1870, and June 30, 1870. A demurrer is interposed by the defendant. The penalty is claimed by virtue of the act of congress, entitled "An act to reduce internal revenue taxes and for other purposes." Approved July 30, 1870 (16 Stat. 261). The 17th section of this act enacts: "That sections 120, 121, etc., * * * of the act of June 30th, 1864, * * * as amended by the act of July 13th, 1866, * * * shall be construed to impose the taxes therein mentioned, to the first day of August, 1870, but after that date no further taxes shall be levied or assessed under said sections, and all acts or parts of acts relating to the taxes herein repealed, and all the provisions of said acts shall continue in full force * * * for maintaining and continuing * * * penalties incurred under and by virtue thereof, etc." The ninth section of the internal revenue act of July 16, 1866 (14 Stat. 138), amended the 120th section of the act of June 30, 1864, by striking out all after the enacting clause and inserting the following: "That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable to stockholders, policyholders or depositors or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, saving institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States, or territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds, and said banks, trust companies, saving institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said tax of five per centum, and a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of the taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form or manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution or insurance company making such default, shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or returns, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal; provided, that the tax upon the dividends of life insurance companies shall not be deemed due until dividends are payable; nor shall the portions of premiums returned by mutual life insurance companies to their policy-holders, nor the annual or semi-annual interest, allowed or paid to the depositors in savings institutions, be considered as dividends." The 121st section of the act of June 30th, 1864, referred to in the 17th section of the act of July 11, 1870 (13 Stat. 284), enacts: "That any bank legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a list or return in duplicate, under oath or affirmation of the president or cashier, to the assessor or assistant assessor of the district in which it is located, on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued or been earned or received by said bank, during the six months next preceding said first days of January and July, and shall present one of said lists or returns, and pay the collector of said district a duty of five per centum on such profits; and in case of default to make such list or return and payment within the thirty days as aforesaid, shall be subject to the provisions of the foregoing section of this act. Provided, that when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

Lochren, McNair & Gilfillan, for defendant.
W. W. Billson, U. S. Atty.

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

NELSON, District Judge. The demurrer must be sustained. If the penalty is claimed for a failure to make a return in accordance with the 120th section of the internal revenue act of June 30th, 1864 (as amended by the act of July 13th, 1866), which was re-enacted July 14th, 1870, the complaint should have alleged that the sum therein mentioned as net earnings, income and gains was dividends declared or excess of profits over such dividends added during the year to their surplus or contingent fund. This is manifest, for the section imposes a tax upon two subjects: First, dividends due and payable; second, undistributed sums or excess over dividends which had been carried to a surplus fund. See Sav-

ings Bank v. U. S., 19 Wall. [86 U. S.] 235. The complaint should, therefore, specifically state the character of the earnings, income and gains which were liable to a tax, and that a list and return thereof had not been made as provided in this section. If the penalty is claimed under the 121st section of the act, the complaint should have charged that the defendant had neglected or omitted to make dividends or additions to its surplus or contingent fund within the period of time therein mentioned, and had failed to make the return required by this section. Only the earnings, income and profits of the defendant, not thus disposed of, were subject to a tax, and the penalty could only be maintained in case of a default of the president or cashier of the bank to make a list or return of such profits and payment of the tax imposed, on the first day of July, or within thirty days thereafter. The act of congress of July 14, 1870, not only imposed the tax mentioned in the 120th and 121st sections above referred to, but also continued in force all the provisions of said acts for maintaining and continuing the penalties incurred under and by virtue thereof. This act virtually re-enacted the 120th and 121st sections, and the right of congress to pass such a statute, retroactive in its effect, was declared by the supreme court, in the case of Stockdale v. Insurance Co. [20 Wall. (87 U. S.) 323]. An order will be entered sustaining the demurrer, with leave to the plaintiff to amend the complaint within twenty days after service of the same upon the district attorney.

[See Case No. 16,381.]

Case No. 16,381.

UNITED STATES v. STATE NAT. BANK OF MINNEAPOLIS.

[1 McCrary, 183.] [1]

Circuit Court, D. Minnesota. 1874.

INTERNAL REVENUE TAX ON BANK DIVIDENDS—ACT OF CONGRESS CONSTRUED.

1. Under the legislation of congress (16 Stat. 260), national banks are liable to a penalty for failing to make a return of dividends declared, etc., during the period between July 1 and December 30, 1870.

2. Said dividends, etc., are subject to a tax of two and one-half per centum during said period.

This suit is brought against the defendant to enforce a penalty of one thousand dollars, for failure to make a return of the dividends declared, additions to its surplus fund, and profit and loss accounts. The dividends and additions to the several funds are alleged to be from earnings, income, and gains, made during the period of time between July 1, 1870, and December 30, 1870. Repeated demands by the assessor for a list and return thereof, and refusal by the president and cashier of the bank, are alleged. The defendant interposes a demurrer. The penalty is claimed under the sixteenth section of the act of congress of July 14, 1870, entitled "An act to reduce internal revenue taxes, and for other purposes" (16 Stat. 260, 261), for a failure to make the return of earnings, income and gains, and payment of the taxes imposed thereon by the fifteenth section of the same act. Section 15 enacts: "That there shall be levied and collected for and during the year eighteen hundred and seventy-one, a tax of two and one-half per centum upon the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date, by any of the corporations in this section hereinafter enumerated, and on the amount of all dividends of earnings, income or gains hereafter declared, by any bank, trust company, savings institution, insurance company, railroad company, canal company, turnpike company, canal navigation company, and stock-water company, whenever and wherever the same shall be payable, and to whatsoever person the same may be due, including nonresidents, whether citizens or aliens, and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other funds; and every such corporation having paid the tax as aforesaid, is hereby authorized to deduct and withhold from any payment on account of interest, coupons and dividends, an amount equal to the tax of two and one-half per centum on the same; and the payment to the United States, as provided by law, of the amount of tax so deducted from the interest, coupons and dividends aforesaid, shall discharge the corporation from any liability for that amount of said interest, coupons or dividends, claimed as due to any person, except in cases where said corporations have provided otherwise by an express contract: provided that the tax upon dividends of insurance companies shall not be deemed due until such dividends are payable either in money or otherwise; and that the money returned by mutual insurance companies to their policy holders, and the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, shall not be considered as dividends; and that when any dividend is made, or interest as aforesaid is paid, which includes any part of the surplus or contingent fund of any corporation which has been assessed and the tax paid thereon, or which includes any part of the dividends, interest or coupons received from other corporations whose officers are authorized by law to withhold a per centum on the same, the amount of tax so paid on that portion of the surplus or contingent fund, and the amount of tax which has been withheld and paid on dividends, interest, or coupons, so received, may be deducted from the tax on such dividend or interest." Section 16 enacts: "That every per-

[1] [Reported by Hon. Geo. W. McCrary, Circuit Judge, and here reprinted by permission.]

son having the care or management of any corporation liable to be taxed under the last preceding section, shall make and render to the assessor or assistant assessor of the district in which such person has his office for conducting the business of such corporation, on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid, a true and complete return, in such form as the commissioner of internal revenue may prescribe, of the amount of income and profits and of taxes aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the corporation, under oath, that the same contains a true and complete account of the income and profits and of the taxes as aforesaid. And for any default in the making or rendering of such return, with such declaration annexed, the corporation so in default shall forfeit, as a penalty, the sum of $1,000; and in case of any default in making or rendering said return, or of any default in the payment of the tax as required, or of any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal."

W. W. Billson, U. S. Dist. Atty.

Lochran, McNair & Gilfillan, for defendant.

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

NELSON, District Judge. The seventeenth section of the act of July 14, 1870 (16 Stat. 261), provided for the tax upon the earnings, income and profits of the defendant during the month of July, 1870, at the rate of five per centum; and the fifteenth section of the same act reduced this tax to two and one-half per centum, and limited its continuance during the remaining portion of the year 1870 and the year 1871. There can be no doubt in our opinion in regard to the effect of the fifteenth section. The language is plain and unmistakable. The defendant's counsel admit that this section imposed the tax at two and one-half per centum for the year 1871, but deny that the language used imposing the tax "on the amount of all dividends of earnings, income, or gains hereafter declared by any bank," etc., has the effect of imposing this two and one-half per centum tax upon the dividends declared, or undivided profits added to any funds, after August 1, 1870, and before the expiration of the year. In our opinion this view is not correct. The word "hereafter" refers to a time after the passage of the act; any other limitation or qualification would render this word, according to the context, meaningless.

The defendant's counsel urge that, inasmuch as the first clause of the section enacts "that there shall be levied and collected for the year 1871, a tax," etc., it excludes the idea that any tax could be levied and collected in the year 1870. Admit that such is the case, and still there is no inconsistency in the subsequent phraseology of the section. A tax could certainly be levied and collected in 1871, upon the earnings, income, etc., of 1870. This section fixed the period when the tax ceased, and imposed it upon the earnings, income and profits of certain institutions during the years 1870 and 1871.

In the language of Mr. Justice Miller in Stockdale v. Insurance Co. [20 Wall. (87 U. S.) 323], when considering the act of 1870: "It repealed several sections of the internal revenue law absolutely. It fixed a period in the future for the cessation of others, and it reduced the income tax in a certain class of cases from five to two and one-half per centum, and provided for its continuance through the years 1870 and 1871, at the end of which all income tax was to cease." If there was any ambiguity of language used in this section, and we should examine it in the light of all the surrounding legislation upon the subject of taxation of the earnings, income and gains of banks, and other institutions therein named, there could be no satisfactory reason assigned, or explanation given, why congress, having imposed the taxes up to August 1, 1870, should rescind them for the remaining portion of the year 1870, and renew them during the year 1871. The complaint states facts sufficient to show a failure to make a list or return, which, if true, would entitle the government to recover the penalty denounced by the act.

The demurrer is overruled with leave to answer in twenty days after notice of this decision or judgment. Ordered accordingly.

[See Case No. 16,380.]

Case No. 16,382.

UNITED STATES v. STATON.

[2 Flip. 319; 25 Int. Rev. Rec. 10; 11 Chi. Leg. News, 191; 3 Cin. Law Bul. 1126.] [1]

Circuit Court, W. D. Tennessee. Dec. 23, 1878.

CRIMINAL LAW — DISTILLING — ATTEMPT TO DEFRAUD—INDICTMENT—CONSTITUTIONAL LAW.

1. An indictment under section 3257 of the Revised Statutes of the United States does not in itself so describe the offense charged, as to give a defendant notice of the nature and cause of the accusation, while, under section 3281, to charge the violation of the law in the language of the statute is sufficient, because it describes the offense as an intent to defraud the United States of the tax on spirits distilled, by the act of engaging in and carrying on the business of a distiller.

2. If the statute itself so defines the act or acts constituting an offense as to give to the offender information of the nature and cause

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 3 Cin. Law Bul. 1126, contains only a partial report.]

of the accusation, the indictment need go no further than the statute; but if it does not, of itself, do this, averments looking to the security of the constitutional right to such information, must be added. The constitution, in all criminal prosecutions, secures to the defendant the right of being informed of the nature and cause of the accusation.

John B. Clough, Asst. U. S. Dist. Atty.

[2] [The indictment contains two counts. The first count, drawn under section 3257 of the Revised Statutes charges, that defendant, being a distiller, did, at a certain time and place, defraud and attempt to defraud the United States of the tax on the spirits distilled by him The second count, drawn under section 3281 of the Revised Statutes, charges that the defendant at a certain time and place was engaged in the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him as such distiller. The offences charged in both counts are misdemeanors simply, and not felonies. The indictment in both its counts describes the offence in the words of the statutes under which they are respectively drawn. It is, in general, sufficient to describe a statutory offence in an indictment in the words of the statute itself without further particularity. U. S. v. Mills, 7 Pet. [32 U. S.] 138; U. S. v. Gooding, 12 Wheat. [25 U. S.] 460; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Lancaster [Case No. 15,556]; People v. Stockham, 1 Park. Cr. R. 424; 1 Bish. Cr. Prec. (2d Ed.) § 611, and cases cited; 1 Whart. Cr. Law (5th Ed.) 364, and cases cited; State v. Ladd, 2 Swan, 226; Harrison v. State, 2 Cald. 232; U. S. v. Bachelder [Case No. 14,490]; U. S. v. Simmons, 96 U. S. 360. But few exceptions to this rule are recognized, and if, in any case, the defendant insists upon greater particularity, it is for him to show that from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to the general rule. 1 Whart. Cr. Law (5th Ed.) § 611, and cases; U. S. v. Pond [Case No. 16,067]; U. S. v. Henry [Id. 15,350]. The case at bar is not, however, we submit, an exception to the general rule, as recognized by the federal courts in the following decisions rendered upon the identical question: U. S. v. La Coste [Id. 15,548]; U. S. v. Gooding, supra; U. S. v. Mills, supra; U. S. v. Lancaster [supra]; U. S. v. Martin [Case No. 15,731]. The following federal decisions have been rendered on this point also, each of which sustaining and in support of the general doctrine, is especially applied to criminal cases arising under the revenue laws of the United States: U. S. v. Ballard [Id. 14,506]; U. S. v. Page [Id. 15,988]; U. S. v. Howard [Id. 15,402]; U. S. v. Fox [Id. 15,156]; U. S. v. Henry, supra; U. S. v. Simmons, supra.] [2]

W. M. McCall, for defendant.

[2] [From 25 Int. Rev. Rec. 10.]

HAMMOND, Judge. This is a motion for a new trial and in arrest of judgment. The defendant stands convicted upon two counts of an indictment which are as follows: 1. "The grand jurors represent, that William Staton, etc., on, to-wit, the first day of March, 1877, * * * in the district aforesaid, was a distiller, and was then and there engaged in carrying on the business of a distiller, by then and there producing distilled spirits, and by then and there brewing, and by then and there making mash, wort and wash fit for a distillation and for the production of spirits, and by then and there making and keeping mash, wort and wash, having also then and there in his possession and use a still; and, that being so then and there engaged in carrying on the business of a distiller as aforesaid, he, the said William Staton, did then and there unlawfully, with force and arms, defraud and attempt to defraud the United States of the tax on the spirits so then and there distilled by him, the said William Staton, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

2. "The grand jurors aforesaid, etc., do further present, that said William Staton, etc., on, to-wit, the day and year aforesaid, in the district aforesaid, etc., unlawfully, with force and arms, was carrying on the business of a distiller by then and there producing distilled spirits, and by then and there brewing, and by then and there making mash, wort and wash fit for distillation and for the production of spirits, and by then and there making and keeping mash, wort and wash, and having also then and there in his possession and use a still, then and there with intent of him, the said William Staton, to defraud the United States of the tax on spirits, so then and there distilled by him, the said William Staton, as such distiller, as aforesaid, contrary to the form," etc.

The proof shows that the defendant gave bond and otherwise complied with the law regulating distillation of brandy made exclusively from apples, peaches, or grapes, known as a fruit distillery, then being in possession of about two hundred and seventy gallons of spirits distilled by him; the casks containing it were gauged by the proper officer, and the spirits were subsequently sold by the defendant without paying the tax upon them required by law.

A new trial is asked on the ground that the defendant objects to and moved to exclude all testimony showing more than one sale, and because the government was not confined in its proof to the first unlawful transaction it undertook to prove. This objection proceeds on the idea that each separate sale was a separate offense and that the government must elect on which one it will try the defendant. The defendant was not indicted for unlawfully selling the spirits without paying a

special tax therefor, but under one count for defrauding the government of the tax on spirits distilled by him, and under the other count for engaging in the business of a distiller with the unlawful intent to defraud the government of the tax on such spirits. Any acts, no matter how numerous, which would show, either that he defrauded the government of the tax, or carried on the business with that intent, were admissible. These were the circumstances which evinced the design with which the act was done and demonstrated the intent, and were the acts by which the fraud on the revenue was committed. The motion for a new trial should therefore be overruled.

The motion in arrest of judgment is based on the alleged insufficiency of the indictment, in not describing the offense charged so as to give the defendant notice of the violations of the law he is required to meet and defend.

The first count is drawn under section 3257, and the second under section 3281 of the Revised Statutes of the United States. Section 3257 enacts that, "whenever any person engaged in carrying on the business of a distiller, defrauds, or attempts to defraud, the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery, etc., and shall be fined not less than five hundred dollars, nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

This section does not in itself so describe the offense as to give the defendant notice of the nature and cause of the accusation. It was held in the case of U. S. v. Simmons, 96 U. S. 360, that it is sufficient, under section 3281 of the Revised Statutes, to charge the violation of the law in the very language of the statute, because it describes the offense as an intent to defraud the United States of the tax on spirits distilled, by the act of engaging in and carrying on the business of a distiller. This accusation in itself apprises the accused of the act for which he is arraigned, namely, carrying on the business of a distiller with the unlawful intent. The facts and circumstances by which the intent is demonstrated need not be alleged in the indictment and are only matters of proof. But suppose that, disconnected with this act of carrying on the business of a distiller, it were simply charged that the defendant had defrauded, or attempted to defraud, the United States of the tax on certain spirits; is it not plain that the defendant would have no notice of the act for which he is called to account? Now, this is the distinction between the two sections 3257 and 3281: The first makes all acts of a distiller, whereby he defrauds, or attempts to defraud, the United States of the tax on spirits distilled by him, offenses, but does not attempt to designate any of them, while the second describes and defines one particular act as an offense, namely, engaging in the business of a distiller with a particularly described intent.

And I think, after a careful consideration of the cases on the subject, that this will be found to be the true test between those where it is sufficient to allege the offense in the language of the statute, and those where it is not. If the statute itself so defines the act or acts constituting the offense as to give to the offender information of the nature and cause of the accusation, the indictment need go no further than the statute; but if it does not of itself do this, the averments necessary to secure the constitutional right to such information must be added. It makes no difference whether the crime be a felony or a misdemeanor, the constitution secures to the defendant, "in all criminal prosecutions," the right "to be informed of the nature and cause of the accusation." Const. U. S. Amend. 6; U. S. v. Cruikshank, 92 U. S. 542, 557, 558; U. S. v. Simmons, 96 U. S. 360; State v. Kilgore, 6 Humph. 44; State v. McElroy, 3 Heisk. 69.

In all the cases cited by the learned counsel for the government it will be found either that the statute gave sufficient information, or that the averments themselves did so. In U. S. v. Henry [Case No. 15,350], the fraudulent bond was pointed out. In U. S. v. Ballard [Id. 14,506], the particular entry of "one brown horse" was designated. In U. S. v. Fox [Id. 15,156], as under section 3281, in U. S. v. Simmons, 96 U. S. 360, the statute described the act denounced as that of carrying on the business of a distiller without having paid the special tax therefor, and it was held that by analogy to common law indictments for being a common barrator, scold, etc., it was sufficient to allege a general carrying on of a certain trade, where that was the crime charged. But even in that case, the allegation was, that the business was carried on between two designated dates, which was held sufficiently to describe the act to give the defendant notice. In U. S. v. Gooding, 12 Wheat. [25 U. S.] 460, the particular ship and time and place were given, so that the defendant knew what he was called to answer.

In the case now under consideration, by the first count of the indictment, the defendant is left without any circumstance of time, place, or occasion, to indicate to him the act he is called to defend. The particular spirits or packages are not described, the place where found, or where distilled by him; and no clue is given to the particular act of his which is alleged to have been either a fraud or an attempt at a fraud upon the revenue. He cannot read this count of the indictment and say from it what act of his is called in question. It is clearly too indefinite and vague to apprise him of the cause of the accusation. The judgment upon this count will be arrested.

The second count, for reasons already stated, is sufficient, and the case of U. S. v. Simmons, supra, directly sustains it. The motion in arrest as to that count is, therefore, denied.

UNITED STATES (STEARNS v.). See Case No. 13,341.

Case No. 16,383.

UNITED STATES v. STEEN & CWERGIUS' FACTORY.

[6 Ben. 172.] [1]

District Court, E. D. New York. July, 1872.

FORFEITURE—DISTILLING SPIRITS—VINEGAR FACTORY.

Under the forty-fourth section of the internal revenue act of July 20, 1868 (15 Stat. 142), and the joint resolution of the same date, if a person, having a wash and also a still on his premises, capable of distilling, does there distill fermented liquors, his premises not being an authorized distillery, all the personal property found in the premises is forfeited, notwithstanding that the product of the establishment be not distilled spirits, but vinegar.

[This was an information of forfeiture against Steen & Cwergius' Factory for keeping an unauthorized distillery.]

BENEDICT, District Judge. By section 44 of the internal revenue act of July 20, 1868, any person (described by section 59) who produces distilled spirits, or who brews or makes mash, wort, or wash fit for distillation or for the production of spirits, or who, by any process of vaporization, separates alcoholic spirits from any fermented substance, or who makes or keeps mash, wort, or wash, and has in his possession a still, not having paid special tax, or given bond, forfeits all the personal property found in the distillery. The joint resolution of July 20, 1868, has no effect to authorize the distillation, by any person, of fermented liquor, except in an authorized distillery. And as the uncontradicted evidence showed that the claimant did have a wash and also a still, on his premises, capable of distilling, and did there distill fermented liquors, the same not being an authorized distillery, the property proceeded against became forfeited, notwithstanding the fact that the product of his establishment was not distilled spirits, but only vinegar.

There must, therefore, be judgment on the verdict.

Case No. 16,384.

UNITED STATES v. STEFFENS.

[24 Int. Rev. Rec. 14.]

District Court, N. D. New York. Dec. 14, 1877.

TRADE-MARK—WHAT MAY BE REGISTERED—NATIONAL EMBLEM—COUNTERFEITING TRADE-MARKS—EVIDENCE—COMMITTING MAGISTRATES.

[1. The fact that the eagle is the national emblem of the United States does not prevent its appropriation by private parties for use as a trade-mark, especially when there is but slight resemblance in the figure of the eagle so used to that of the national emblem.]

[2. Trade-marks consisting of the representation (1) of an eagle with head erect and wings extended, perched upon the representation of a branch in leaf, the whole being surrounded with the name of the makers of the article; and (2) of the words and letters "G. H. Mumm & Co., Rheims," accompanied by the same circular design,—*held* to possess all the requisites of lawful trade-marks, and to have been properly registered under the act of August 14, 1876 (19 Stat. 141).]

[3. The certificate of the commissioner of patents, under seal, stating that certain trade-marks were deposited for registration, that with each mark was deposited a statement (annexed to the certificate), that declarations under oath were filed by a member of the firm filing the trade-mark, and that the statements contained in these declarations were almost word for word in the language of the statutes, is not admissible under Rev. St. § 882, as an authenticated copy, but is made admissible by section 4940, as evidence of all statements of fact therein contained. When so admitted, the certificate must be considered as prima facie evidence of the proper registration of the trade-mark.]

[4. In order to justify a committing magistrate in holding the accused for trial, it is only necessary that the evidence should show probable cause to believe that the prisoner committed the offence charged.]

[Preliminary examination of Emil Steffens on a charge of dealing in counterfeit trade-marks with intent to defraud.]

Rowland Cox, for the United States.
Hall & Blandy, for defendant.

Mr. Commissioner DEUEL'S opinion:

This is an arrest under the 5th section of the act of congress, approved August 14th, 1876, entitled "An act to punish the counterfeiting of trade-mark goods, and the sale or dealing in of counterfeit trade-mark goods." The defendant is charged with having on or about the 15th day of August, 1877, at the Southern district of New York, dealt in and sold certain counterfeits of the trade-mark of G. H. Mumm and Co., with intent to defraud. To support the complaint, the prosecution offered three certificates of the commissioner of patents, under the seal of the patent office, to show that the trade-mark had been registered pursuant to law, and three witnesses were sworn—two to sustain the accusation, and one the agent of complainants, touching their mode of doing business. At the close of the case of the prosecution, the defendant's counsel moved for dismissal on the following grounds: I. That the devices of complainants are not the proper subjects for trade-marks. II. That there is no evidence of proper registration. III. That there is no evidence to warrant holding the defendant.

The first proposition, as stated by counsel in his oral argument, is that, even if the complainants had complied with all the requirements of the statute respecting the registration of the marks in question, their devices were not such as could lawfully become trade-marks, and therefore the protection intended by the statute in question could not in their case be invoked. The trade-marks in question, as shown in the certificates of the commissioner of patents and the fac simile annexed thereto, are substantially as follows: The representation of an eagle, with head

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

erect and wings extended, having as a perch the representation of a branch in leaf; the whole encircled by the words and letters, "G. H. Mumm and Co.," "G. De Bary." Another consists of the words and letters, "G. H. Mumm and Co., Rheims," accompanied by the circular design above described. If neither of these can lawfully become a trade-mark, the position of the counsel is well taken, and the prisoner must be discharged. The counterfeit in question embracing all of the above devices, if either one of them is sustained the motion falls. The act concerning trade-marks says: "The commissioner of patents shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm, or corporation, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons." Rev. St. U. S. § 4939. It is clearly apparent from this enactment that congress intended that the name of a person, or firm, or corporation, when accompanied by a mark sufficient to distinguish the name from that of any other person, firm, or corporation entitled to use such name, could become a lawful trade-mark. The device which accompanies the name of "G. H. Mumm and Co., Rheims," is clear, distinct, and well defined. It could not mislead any one. It is a distinguishing mark clearly within the provisions of the statute, and as such must be sustained.

The oral argument of the counsel, that the eagle, being the national emblem of the United States, cannot be appropriated by private parties as a mark for trade, is unsupported by the citation of any adjudicated cases that shed any light upon the subject. Counsel makes the statement, and then leaves it. If there is any thing at all in the position, it might have been strengthened by the further statement that it was adopted as one of the emblems, and was borne on the legionary standard of ancient Rome; that in one form or another, single or double headed, it has figured as the national emblem of other governments, such as Russia, Prussia, and Austria. There is, however, but slight resemblance between the national emblem and the eagle constituting a part of the trade-mark in question. It has been decided in the courts of France that national arms can concur with other distinctive signs—for example, the name of the merchant—to constitute an industrial mark. Browne, Trade-Marks, p. 181, § 261, and the case there cited. If national arms can thus be appropriated, it seems to me that there can be no question as to the right of complainants to appropriate a portion of the national emblem. I am clearly of the opinion that the commissioner of patents was right in registering the mark; that it possesses all the requisites of a lawful trade-mark, and, therefore, the first motion must be denied.

The certificates of the commissioner of patents, under seal, presented in evidence, show the 2d day of September, 1876, the trade-marks in question were deposited in the patent office, for registration, by G. H. Mumm and Co., of Rheims, France; that with each mark they deposited a statement, a copy thereof being annexed to each certificate; said certificates further state that "a declaration under the oath of Peter Hermann Mumm, a member of said firm," was also deposited; it is further certified that the statements under oath contained certain declarations which are almost word for word the language of the statutes. It is, however, contended by counsel that these certificates are not sufficient proofs of the proper registration; that they cannot become evidence of the filing of the statement under oath required by the statute. These certificates are clearly not admissible under section 882 of the Revised Statutes, because they are not copies authenticated by the seal of the department. They are not certified copies, but certify that a certain paper had been deposited containing certain declarations.

In the case of Smith v. Reynolds [Case No. 13,097] the judge, commenting on a similar question, used this language: "A certified copy of the trade-mark, of the date of its receipt, and of the statements filed therewith, that is, a copy of everything filed and recorded, and of the memorandum of the date of the receipt thereof is made evidence. But such copy is made evidence only that what is shown by it to have been filed was filed." From this language it would be inferred that such certificate was evidence of all it contained, except, perhaps, conclusions of law. It would be evidence of all questions of fact. The case of Smith v. Reynolds differed from the present case. In that case the certificate did not set forth the filing of the statement under oath, and its contents. In the present case it does. In the absence of this certification, and in the absence of proof of the filing of the required statement under oath, the judge refused to grant an injunction. Congress gave to this certificate the character of evidence in section 4940, Rev. St.; when admitted it is evidence of all statements of fact in it contained. When the facts thus certified show a full compliance with all the requirements of the statutes, it must at least be considered prima facie evidence of the proper registration of complainant's trade-mark. In the absence of all evidence to the contrary it must be deemed conclusive. Since writing the above I have found a case sustaining the position herein taken. Vide Walker v. Reid [Case No. 17,084].

Having disposed of these objections, I now turn to the last question, viz.: Does the evidence warrant holding the accused for trial? A committing magistrate acts in a twofold capacity,—as a court in deciding questions of law and of evidence; as a jury in finding questions of fact. But the scope of investiga-

tion before the magistrate falls far short of a trial of a prisoner before the court and a jury. It is not required before the magistrate as it is before the jury, that all reasonable doubt of the prisoner's guilt must be removed; it is only required that the evidence be sufficient to establish probable cause that the prisoner committed the offence charged. In the present case probable cause of two facts must be created.

I. That the prisoner committed the offence. The evidence of Chapman and Benedict is conclusive on this point.

II. Did he do it with intent to defraud? It is contended by counsel, both in their oral and written argument, that it must be presumed that the labels sold by defendant were for a legitimate purpose, and that in dealing with Chapman and Benedict the presumption is they had authority to act as agents of complainants, and therefore defendant was dealing with complainants, and they could not be defrauded by the transaction. The evidence before me, in substance, is that Chapman, a man unknown to the prisoner, and who assumed the name of Benedict, applied to the accused for labels of complainant's trade-mark; the accused promised to furnish them, and did so on the following day, delivering them after dark in a lager beer saloon on South Washington Square. That when he entered this saloon Mr. Benedict was behind the bar. He asked for Benedict, and when Mr. Benedict said he was the man, he hesitated to transact the business with him, and did not until Mr. Chapman, who had given the order, presented himself. The counterfeit labels were delivered, the price paid, and the prisoner, though solicited, refused to give a receipt. The Monday following, Mr. Chapman swears, he again saw the accused, and in connection with the transaction, he—the accused—stated that if it were known what he had done, he would be sent to the state's prison. It was further testified by Mr. De Bary, as general agent of G. H. Mumm and Co., that all the wine of that firm shipped to the United States came to his firm, and that G. H. Mumm and Co. never sold labels to their trade-mark except as attached to packages containing their goods. No evidence on the part of the accused was offered.

From this evidence I can see no escape from the conclusion that the offence was committed with intent to defraud. There can be no other reasonable deduction from the evidence. No fraud was committed because the immediate purchaser, and the complainants who furnished the money, knew what was being bought. The prisoner, however, had no knowledge of the person with whom he was dealing; if he had, evidence of such knowledge would have been proper to destroy the presumption of intent. The immediate consequence of such transaction is a double fraud,—first, destroying the business of a firm which has taken years to build, by diverting the profits of their trade, and by destroying confidence in their product of manufacture by palming off a spurious article as genuine. And, second, by inducing the public to purchase an article other than that for which they supposed they were paying. It is a fraud on the complainants, and a fraud on the public, and the evidence, to my mind, is sufficient for finding that there was probable cause to believe that such a fraud was intended by the accused. The motions to dismiss are therefore denied, and in the absence of further evidence, the prisoner must be held to await the action of the grand jury.

It seemed to me, when the questions of law herein discussed were raised, that they were ones calling for a decision of the courts empowered to construe and interpret statutes. That they were not properly cognizable by a committing magistrate, whose duty, as I understand it, is to uphold and enforce the statutes as he finds them. Acting on this view, I declined to hear argument on the motion to dismiss the proceedings on the ground of the unconstitutionality of the act in question. The questions, however, being raised and argued, and this being the first arrest under the act of 1876, I felt it my duty to give them as full and as just consideration as I was able. I, however, disclaim any ambition to assume functions or duties not properly within the scope of a committing magistrate. And, as an excuse for giving expression to my views in this unusual form, I state that the questions presented in a proceeding of this nature are entirely new, and that in this form it may be convenient in the event of similar prosecutions before me.

UNITED STATES (STEINHAM v.). See Case No. 13,355.

Case No. 16,385.

UNITED STATES v. The STEPHEN HART.

[Cited in The Springbok, 5 Wall. (72 U. S.) 20. See The Stephen Hart, Case No. 13,364. Affirmed by supreme court 3 Wall. (70 U. S.) 559.]

Case No. 16,386.

UNITED STATES v. STEPHENSON'S EX'RS et al.

[1 McLean, 462.] [1]

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

SEALED INSTRUMENTS — SCRAWL SEALS — BONDS TAKEN UNDER FEDERAL STATUTES.

1. To constitute a sealed instrument at common law, it must be sealed with wax or some tenacious substance.

2. In this country a scrawl has been generally substituted for a seal, by the legislation of the different states.

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

3. A bond taken under an act of congress is not governed by the local law of the state where it may be executed.

4. The bond, in contemplation of law, is given at the seat of the federal government; as at that place the officer must account, for the performance of his duties.

5. A bond with a scrawl seal, given under an act of congress, is good.

6. A bond required to be given by congress, must be presumed to be such an instrument as by general usage, is denominated a bond.

7. A scrawl is substituted for a seal, by general usage, both in a popular and legal sense.

[Cited in Tolman v. Spaulding, 3 Scam. 13.]

At law.

Mr. Baker, late U. S. Dist. Atty.

Breese & Davis, for defendants.

OPINION OF THE COURT. This action is brought for a bond given by Stephenson, in his life time, as a receiver of public moneys; and the plaintiffs seek to recover of his representatives and his sureties a balance of moneys received by him but not paid over to the government. The defence set up is, that the act of congress requires a bond to be given, and that the instrument declared on is not a bond, at common law, it not having been sealed. This question is raised by special demurrer. The acts of congress establishing the several land offices, require the "receivers of public moneys, for lands, to give bonds with approved securities." The bond in question has scrawl seals, but there is no act of congress declaring that a scrawl may be substituted for a seal, and it is contended that the common law rule applies. And there is no question that at common law, a bond is a sealed instrument, and that the seal must be formed of wax or some tenacious substance that will receive and retain an impression. 2 Leigh, N. P. 730.

The supreme court of New York have decided (5 Johns. 244) that an instrument executed in Virginia with a scrawl seal which, by the statute of that state was a seal, but which instrument was to be carried into effect, in the state of New York, could not be considered a sealed instrument. The common law rule, on this subject, prevails in New York. Seals were invented and were in common use, long before the art of writing was in general use. The seal was known by the impress it bore, and the act of sealing was a deliberate and solemn act, which gave greater dignity to sealed than unsealed instruments. This distinction which originated in a rude and barbarous age, has become one of the axioms of the law, and is still rigidly adhered to. The reason on which this distinction was founded is far less forcible now, than it formerly was; but it is still regarded as a settled principle. With few exceptions the legislatures of the different states have, by special acts, provided that a scrawl should constitute a seal. This has been done in Illinois where the bond was executed, and it is insisted that the local law must govern the instrument in this case. The bond was executed with the condition that the receiver should faithfully discharge his duties, and account and pay over to the government, all monies received by him. He is to account to the proper department at Washington City, and pay the money to the treasurer of the United States at that place, or at such other place as should be directed. In contemplation of law the bond was executed at the seat of government, as that is the place where the chief officers of the executive reside, and to whom the receiver was amenable for the faithful discharge of his duties. The local law, therefore, does not govern the bond either as to its character or effect. It is an instrument given under an act of congress, and must be construed with regard to such act, and the general principles of law which are applicable. [Cox v. U. S.] 6 Pet. [31 U. S.] 173, 203; [Duncan v. U. S.] 7 Pet. [32 U. S.] 435.

The argument is not without force that where a term is used in legislation, which has a technical and well defined meaning at common law, the term is supposed to be used with reference to such meaning. And it is contended that the word "bond" is well understood at common law, and that this rule must govern the instrument under the act. This inference may be admitted, where there are no counteracting circumstances. The case in 1 Bos. & P. 360, was where a bond with a scrawl seal had been given in Jamaica, where the scrawl was recognized as a seal, and a suit was brought on it in England. The pleadings raised the question whether such an instrument could be declared on as a bond; and the court inclined to think it could not be, there being no proof of the usage in Jamaica. The case, however, was compromised, on the debt being paid by the defendant, and the plaintiff paid the costs.

From the reference to the usage in this case by the court, it would seem, that such usage if proved, would be recognized as the law of the contract. But, however this may be, the question for the court to determine is, whether in the act of congress the word bond must be defined by a reference to the common law, or to the usage, founded on local legislation, which obtains generally in the different states. The fact that the states have legislated on this subject, proves the inveteracy of the common law rule; but this does not operate against the inference we are about to draw. There is no common law as exclusively applicable to the federal authority. In the exercise of its judicial functions, it adopts the common law of the state, within which the case arises. But there is no general principle that pervades the Union, as a rule of right or of action, which is independent of the common law recognized in the states respectively. This,

however, is not a question of local law, either statutory or common, but of construction and definition. What did the legislature mean by the word "bond" as used? That they intended to include an instrument, which at common law was denominated a "bond," is admitted, but did they intend to include under the designation of "bond," an instrument having a scrawl seal? This can best be determined by the general use and application of the term in this country.

It would be a dangerous precedent to go out of the country for the meaning of terms used in a statute, which, by common usage, have a definite meaning. The policy of a law is influenced not more by local considerations, than are the words used in the enactment of it. And words thus adopted are not to receive a technical and strained meaning against the popular sense. The principle may be fully and forcibly illustrated in the case under consideration. Congress is composed of representatives from the different states, and in those states with the exception of some two or three, an instrument sealed with a scrawl is as much a bond in its character and effect, as if it were sealed by wax or wafer, or any other tenacious substance. By a law of congress, certain officers are required to give bond; now, must this bond be sealed with wax, &c. or will a scrawl seal be sufficient? A scrawl equally with wax, by general usage, constitutes a seal. Is this general usage to be rejected, and the common law definition of a bond, only to be adhered to? On the contrary, is it not manifest that the legislature constituted as has been stated, legislate under the influence of general usage and popular definition? When the term "bond" is used, may it not, and indeed must it not, be presumed to be used in reference to the generally understood signification, as well in legal proceedings as in popular language? There is no rule of construction which is believed to conflict with this. It affords the only safe standard by which to judge of the language of a popular and representative body. To reject this safe and reasonable rule, for one however venerable for its antiquity, which has been exploded by almost all the states, would be to reject the lights of experience and modern advancement for the maxim of a barbarous and unenlightened age. The general legislation and usage of the states on this subject, may be said to give, in this case, the common law to the federal government. At least that it affords the only safe rule by which the terms used by congress are to be defined and understood. Where a state has adopted the common law, as in New York, and has not legislated on the subject, it is admitted that the common law definition of a bond would, in such state be the correct rule. The parties to the bond under consideration, as appears from its language, have treated the scrawls as seals, and have acknowledged them to be their seals. And shall that which a party calls a seal, and has acknowledged to be his seal, be rejected as such, under a general usage which makes it a seal? We think not. On the contrary, we think in reason and on established principles of construction, the instrument under consideration must be considered a bond within the requirement of the act of congress, and as such, binding on those who signed it. Judgment for the plaintiffs with costs.

Case No. 16,387.

UNITED STATES v. STERLAND.

[3 Quart. Law J. 244; 6 Pittsb. Leg. J. 50.]

District Court, W. D. Virginia. July, 1858.

EVIDENCE—DECEASED WITNESS.

1. In a prosecution against a postmaster, evidence having been given that the office was suspected on account of the disappearance of mail matter which led to investigation, and ultimately to the prosecution, it is competent for the defendant to repel the presumption arising from this testimony, by showing that miscarriages of the mails, sent through the same office continued after his removal from the office.

2. The rule that the testimony of a deceased witness may be given in evidence on a second trial between the same parties does not apply to a criminal cause. Such evidence is inadmissible to support either the prosecution or defence.

At October term, 1856, James Sterland was indicted for stealing a letter and its contents from the post office at Wytheville, Va., he being a clerk employed in said office. He was put upon trial at that term, but the jury failed to agree. He was again tried, with the like result, at May term, 1857; and now was put upon trial before a third jury, at this term.

It was proved that the prisoner was a clerk in the post office at Wytheville, and entrusted with the management of the mails at that place. A mail agent who was the principal witness for the prosecution, testified that in 1856 the post office at Wytheville had fallen under suspicion owing to irregularities, and disappearances of mail matter, which seemed to be attributable to that office. He had therefore investigated the matter and his investigation had resulted in this prosecution.

After the case for the United States was closed, the prisoner called a witness, James H. Myers, and stated that his purpose was to prove by this and other witnesses that after the 29th day of October, 1856, (when the prisoner was arrested and imprisoned,) divers letters containing money and valuables, which had been mailed at Wytheville, had never reached their destination; and that he was in jail from October, 1856, till the latter part of May, 1857, when he was admitted to bail. Objection was made to the admission of this testimony, and counsel were heard on the question.

F. B. Miller, U. S. Atty.

Floyd, Wysor & Cook, for prisoner.

BROCKENBROUGH, District Judge. Evidence has been given that prior to the commencement of this prosecution this post office had fallen under the suspicions of the department in consequence of delinquencies in the transmission of the mails, for which this office was believed to be responsible; and that these suspicions were the motives leading to the action and investigation which terminated in this prosecution; and it is also shown that the defendant was a clerk in this office, and of course exposed to these suspicions. This testimony was not necessary to support the prosecution. The facts might have been detailed without any statement of the suspicions which put the agents of government in motion. But that evidence is before the jury and the prisoner is exposed to its influence against him. Whatever may be the weight of the testimony —be its effect much or little—he must suffer something from its operation. It therefore seems pertinent to rebut the effect of this evidence. To do this the prisoner offers to show that after he was arrested and imprisoned, and therefore relieved from all suspicion on account of subsequent delinquencies, there were still irregularities and miscarriages in this office. I think this is relevant and proper testimony. He is to be affected by evidence of delinquencies occurring while he was in the office. I think he ought to be allowed to show that after his connection with the office had terminated and he was in such a situation as to render it impossible to suspect him, the delinquencies continued to occur. I must admit the evidence for what it is worth.

In the further progress of the case the prisoner proved that Eli Rider was examined as a witness in his behalf on the trial at May term, 1857, and that Rider had since died. He then called a witness who said that he heard Rider's evidence and could detail it; and the prisoner then proposed to offer Rider's statements in evidence. This was objected to on the ground that in a criminal trial, proof of the testimony given by a deceased witness on a former trial is not admissible. For the general rule on the subject the prisoner's counsel referred to 1 Greenl. Ev. §§ 163–166, and to Strutt v. Bovingdon, 5 Esp. 56. On the other side, Finn v. Com., 5 Rand. [Va.] 701, was relied on.

BROCKENBROUGH, District Judge. There is no question as to the rule that in a civil action either party may give in evidence the facts deposed to by a deceased person who has testified upon a former trial. But I do not find that this course has ever been allowed in a criminal trial. On the other hand, Finn's Case is a direct authority against the admission of such evidence. It is true that in that case the testimony was offered against the prisoner, and the court held that it was the right of the accused to be confronted with his accuser and the witnesses. But if such evidence cannot be used against him, is it not a corollary from the decision that it may not be used in his favor? To me it seems that it is. But the defendant's counsel contend that Finn's Case is not binding upon this question, because upon the point now in dispute that decision was a mere obiter dictum. It is true that in Finn's Case the witness whose former testimony was offered against the prisoner was not dead; but he had left the commonwealth—was beyond the jurisdiction of the court, and for all the practical purposes of the prosecution was in the same condition as if dead. If it had been a civil action, proof of his statements on the former trial would have been admissible. The question therefore in that case was not precisely identical with the one at the bar; but the court considered the subject in both aspects, and decided that the absent witness could only be regarded as a dead man; or rather they decided that, even if he were dead, his statements would not be heard, and still less could they be admitted on the ground of his absence from the jurisdiction. I cannot say that I approve the rule as it is established. I can easily preceive the great oppression and hardship under which a man might suffer by reason of the death of his witness. It does seem that it is casting upon him an injury resulting from the act of God; and the remarks of Lord Ellenborough, in Strutt v. Bovingdon, are very apposite, that this is not the loose asseveration of an irresponsible person, but his statement under the sanction of an oath, and it comes in that sacramental form in which alone is evidence to be heard. But I have no alternative, and am constrained to hold that this evidence is not admissible.

The prisoner was found guilty and sentenced to ten years' imprisonment in the penitentiary of the United States.

Case No. 16,388.

UNITED STATES ex rel. VAN NORTHWICK v. STERLING.

[2 Biss. 408; [1] 3 Chi. Leg. News, 187; 13 Int. Rev. Rec. 100.]

Circuit Court, N. D. Illinois. Jan., 1871.

MUNICIPAL BONDS—DUTY OF CITY AUTHORITIES—POWER TO COLLECT TAX.

1. The fact that the total revenue of a city is used in defraying its current expenses, does not constitute a legal or sufficient excuse for not paying its maturing indebtedness.

2. They have no right to spend their income in this way, leaving their bonds and other debts unpaid; but are bound to provide for and pay the latter, and on failure or refusal, this court will, by mandamus, compel them so to do.

3. A city, which by its charter has certain general powers of taxation, and by consent of a majority of its legal voters at a proper election, can levy and collect a further tax, cannot plead that they have not sufficient power to collect an adequate tax to pay their debts. Under such a charter the authorities should, from

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

their ordinary revenue, discharge their legal indebtedness, and provide for their ordinary expenses by a further tax, according to their charter.

This was a demurrer to the return to an alternative writ of mandamus.

The substantial allegations in the application for this writ are that on the 20th of October, 1870, said relator [John Van Northwick], by the consideration and judgment of this court, recovered against said respondent, a municipal corporation of this state, with power to borrow money and issue bonds, a judgment for the sum of $5,069.57, which said judgment was for the amount then due and unpaid on certain bonds and coupons theretofore issued by said city to the relator; that due notice of said judgment had been given the respondent, and its officers requested to pay the same; but they failed and neglected to take any steps toward providing for such payment; and praying a writ of mandamus to compel the levy and collection of a sufficient tax to pay and satisfy said judgment.

To this writ the respondent filed an answer, admitting the recovery of said judgment and its non-payment, and also admitting the corporate existence of the respondent under the laws of this state, but insisting that by its act of incorporation said city authorities were only authorized to levy taxes at the rate of one per cent. per annum on the valuation of the taxable property of said city; that the expenses of said city government amount to about six thousand dollars per annum, and that the total receipts from taxes, licenses and fines, which were all the sources of revenue the respondent had, were only about six thousand dollars per annum. It further appeared from the return that said city charter contains in addition to the clause conferring power to assess and collect a tax of one per cent. on the valuation of the property of the city, this further clause: "The said city council may, however, levy and collect a tax for city purposes greater than one per cent., provided the same be done with the consent of a majority of the legal voters of said city voting at a general or special election ordered for such purpose." It further appeared that said city was in debt upon bonds bearing interest at the rate of ten per cent. per annum, exclusive of said judgment, to the amount of $6,424.70, and a floating indebtedness of about $2,100. In other words, the substance of the return was that all the revenue derived from taxation at the rate of one per cent. and from licenses and fines was used in the payment of the current expenses of the city government, leaving nothing with which to liquidate said judgment and the other maturing indebtedness.

To this return the relator demurred, as being an insufficient answer to the writ.

Jewett & Jackson, for relator.

F. Sacket and M. S. Henry, for respondent.

BLODGETT, District Judge. The question raised by the demurrer is, does the return show a legal and sufficient excuse for the failure or refusal to pay the judgment referred to. There is no dispute as to the existence of the indebtedness, nor as to the power of the respondent to incur the same, so that the only question is as to the power and duty of the court, upon the admitted facts, to enforce its payment by the process of mandamus. The only excuse or reason urged against the application being the want of power in the corporate authorities to levy the tax requisite for the purpose.

Questions kindred to this have of late attracted much attention, and have been the subject of much discussion, both in this court and elsewhere, and the uniform tenor of the decisions has been such as to leave no doubt as to the general power of courts to enforce by mandamus the levy and collection of taxes by municipal corporations, for the purpose of paying the debts and obligations of such corporations. But it is insisted by the respondent that none of the cases have gone to the extent of compelling such levy and collection of taxes unless the same came within the delegated powers of the corporation.

For the purposes of this case I do not deem it necessary to discuss the abstract question as to what courts shall do in cases where there is a want of adequate power of taxation to pay a legally contracted indebtedness, as it seems to me the respondent has ample corporate power to meet this emergency. It has power to levy a tax of one per cent. on the assessed value of all real and personal property within its limits. And with the consent of its legal voters, expressed at any general or special election, it has an unlimited power of taxation. It seems then clear to me that if the tax of one per cent. was not sufficient to raise the amount needed to meet this liability, it was the duty of the city authorities to call an election and require its voters to vote a sufficient tax for the purpose. The duty of paying municipal debts is as obligatory upon the citizens as upon the officers of the city. Indeed, the city authorities are only the agents of the citizens. Besides, what right had the city officers to expend the entire income of the city from the one per cent. tax in payment of current expenses, and leave this indebtedness unprovided for? Why did they not, from the proceeds of this one per cent. tax, pay the bonds and coupons on which this judgment was rendered, and take a vote as to the expediency of raising a further tax to defray current expenses? The proceeds of this one per cent. tax are not specially set apart and dedicated to the payment of current expenses.

The bonds for which this judgment was rendered had been legally issued, and the city authorities and voters were all chargeable with notice that they were due and

ought to be paid. They should then have levied and collected an adequate tax in apt time to have the money ready when their obligations matured, and, having failed to do so, are guilty of a breach of duty which the writ of mandamus will compel them to perform.

In the case of City of Galena v. Amy, 5 Wall. [72 U. S.] 705, the city authorities of Galena had power, if they thought the public good required it, to levy a tax, etc. There the power was discretionary in the city authorities, and yet the court held that they were bound to exercise this discretion, and compelled them by mandamus to do so.

The same doctrine is enunciated with equal emphasis in Supervisors v. U. S., 4 Wall. [71 U. S.] 435; Von Hoffman v. City of Quincy, Id. 535; People v. City of Cairo, 50 Ill. 154; Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166. The aspect then of the case is this: The respondents owe the debt, and acknowledge their legal and moral obligation to pay it, but have failed to take the necessary steps to raise the funds wherewith to do so. They have the power to levy and collect an adequate tax, and their duty is co-extensive with that power. For these reasons the mandamus must be made peremptory.

NOTE. The United States circuit court has power to issue a mandamus requiring state or municipal officers to levy and collect a tax. U. S. v. Treasurer of Muscatine Co. (Lansing v. County Treasurer) [Case No. 16,538]; U. S. v. Lee Co. [Id. 15,589], and cases there cited. The municipality having issued the bonds may be compelled to pay the interest. Flagg v. Mayor, etc., of Palmyra, 33 Mo. 440; St. Joseph & D. C. R. Co. v. Buchanan Co. Ct., 39 Mo. 485. Consult, also, U. S. v. Mayor, etc., of Burlington [Case No. 14,687].

Case No. 16,389.

UNITED STATES v. STERN.

[5 Blatchf. 512; [1] 6 Int. Rev. Rec. 169.]

Circuit Court, S. D. New York. Nov. 13, 1867.

BRIBERY—INTERNAL REVENUE LAWS.

The words, "and shall be thereof convicted," in the 62d section of the internal revenue act of July 13th, 1866 (14 Stat. 168), which makes it an indictable offence to bribe an officer of the United States, are to be treated as surplusage.

[Cited in Edwards v. Denver & R. G. R. Co. (Colo. Sup.) 21 Pac. 1012; Gould v. Wise (Nev.) 3 Pac. 33; Henderson v. Wabash, St. L. & P. Ry. Co., 81 Mo. 608.]

This was a motion in arrest of judgment. The defendant [David Stern] was indicted, under the 62d section of the internal revenue act of July 13th, 1866 (14 Stat. 168), for an attempt to bribe an officer of the United States, and was found guilty by the jury. The motion was founded on the ground that, under the section, as it was drawn, no conviction could be had.

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

Benjamin K. Phelps, Asst. U. S. Dist. Atty.

Abraham J. Dittenhoefer, for defendant.

BENEDICT, District Judge. The phraseology of the section in question is certainly extraordinary. It is as follows: "And be it further enacted, that, if any person or persons shall, directly or indirectly, promise, offer or give, or cause or procure to be promised, offered or given, any money, goods, right in action, bribe, present or reward, * * * * to any officer of the United States, * * * * with intent to influence any such officer or person to commit, or aid and abet in committing, any fraud on the revenue of the United States, or to connive at, or collude in or to allow or permit, or make opportunity for, the commission of any such fraud, and shall be thereof convicted, such person or persons so offering * * * * shall be liable to indictment in any court of the United States having jurisdiction, and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, * * * * and imprisoned not exceeding three years." Such being the act, the point taken is, that it must be held to be inoperative and impossible to be executed, as, by express words, a previous conviction is made necessary before an indictment can be found. Such, indeed, must be the result, if any effect is to be given to the words, "and shall be thereof convicted." It is not a case of the mere transposition of a word or a sentence; nor can any signification be given to the words referred to, which will render them consistent with the rest of the provision. To give them any meaning at all, as they stand, is to render the whole act meaningless; and the question is, whether these words, standing as they do, shall be treated as surplusage and of no effect, or whether, by giving them effect, the whole act shall be rendered void. Without these words, the act is complete; for, it defines an offence, declares it to be the subject of indictment, and provides a punishment on conviction. It is an act which was loudly called for, to prevent, if possible, a crime justly supposed to be of great and alarming frequency. To suppose that congress, while pretending to remedy such an evil, intended to pass an act which, by its own express words, was to be rendered wholly ineffective, under any possible circumstances, is to suppose congress to be capable of deliberate folly, if not of fraud upon the public. I entertain no doubt, that it is the duty of a court to prevent such a result, and, by treating the words in question as surplusage, to carry out the intention of congress, as manifested by the passage of an act on the subject in question, and by the various provisions which are incorporated in the act.

The section must, therefore, be read as

if the words, "and shall be thereof convicted," which are without meaning, as they are used, were not present. This disposes of the question raised on behalf of the prisoner, and judgment must, accordingly, be entered on the verdict.

Case No. 16,390.

UNITED STATES v. STETSON.

[3 Woodb. & M. 164.] [1]

Circuit Court, D. Massachusetts. May Term, 1847.

INDICTMENT — DIFFERENT OFFENCES — JUDGMENT — WAIVER OF OBJECTIONS — LARCENY.

1. When an indictment describes in different counts different offences, and of different grades and punishments, implied from the same transaction, and the verdict is guilty of the last count only, judgment may properly be rendered on the verdict.

[Cited in brief in State v. Watson, 63 Me. 134.]

2. If articles stolen are alleged to belong to owners "unknown," the indictment is good on its face; and if the owners were, in fact, known, the objection should have been taken to the evidence at the trial for a variance or by special plea.

The respondent [Matthew Stetson] had been indicted and tried at the first session of this term, for a charge of piracy, in one count, for running away, piratically, in July, 1845, with a cargo of whale oil, at Sidney, in New South Wales, in the barque La Grange, a vessel belonging to citizens of the United States, of which he was commander, and which had sailed from New Bedford. In another count he was charged with larceny of the same oil. In both, the owners were described as unknown. At the trial he was found guilty of the second count.

His counsel, at the adjourned session of the court in September, A. D. 1847, filed a motion in arrest of judgment, a copy of which is annexed: "And now, after verdict and before judgment, the said Matthew, by his counsel assigned to him by the court, move the court in arrest of judgment, that the prisoner be discharged, for the causes following, viz.: 1st. Because the indictment avers the property to be of certain persons whose names are to the jurors aforesaid, unknown; and Atkins Adams, a witness on the trial, testified that he was one of the owners of said property; and that he appeared as a witness before the grand jury, who found the bill of indictment in this case; so that by inquiry, the grand jury might have ascertained the names of the owners, and ought to have averred them in the indictment. 2d. Because the first count is for felony, and the second for a misdemeanor, which two counts cannot be properly and legally joined in one indictment."

J. Wingate Thornton, for the prisoner.

Ch. Levi Woodbury, for the United States.

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

WOODBURY, Circuit Justice. The first ground assigned for the motion in arrest of judgment has been fully considered by this court, in U. S. v. Peterson [Case No. 16,037]. There it was held that if two counts were united in one indictment for the same offence, describing it in the two as of different degrees of turpitude, so as to regard different kinds of punishment of like character, the judgment would not be arrested. And the impression conveyed is, that if the punishments were of a character clearly different, the motion would prevail; and the more especially so, if the crimes were connected with two different transactions. The reason for it then would be, that the court had no means of knowing of which grade of crime, under a general verdict, a jury had supposed the defendant to be guilty, if it was but one transaction; or of which of the two, if there were two transactions. But on the contrary, the inference might, perhaps, as well be in both cases, that the jury found the prisoner guilty under both counts, and both being good in form, the court might at least sentence him for either. In this case, however, there is no difficulty in rendering judgment on the last count alone, as the jury have found the prisoner guilty of that count alone. The transaction was also one and the same which was referred to in both counts. There is no danger to the prisoner in this course, and we are not aware of any precedents against it, when the verdict, as here, was not general on the whole indictment, but limited, ipsissimis verbis, to the last count. The cases cited for the prisoner on this point from 1 Chit. Cr. Law, 254; Archb. Cr. Pl. 60; and 3 Term R. 100, were, with many others, considered and explained in the Case of Peterson, before referred to.

In respect to the second objection, it resolves itself, when analyzed, into a question rather of fact than law. It is, in substance, that the indictment describes the owners of the oil stolen as "unknown," when in truth they were known,—one of the witnesses being the owner. But a motion in arrest cannot be maintained for an error in fact committed by the grand jury and existing in the indictment. It must rest on exceptions in law to what is alleged as a fact, and in law a description of the owners of the property as "unknown," is very common and is legal. See forms passim, 1 Chit. Cr. Law, 212; Hawk. P. C. bk. 2, c. 25, § 71; 2 Hale, P. C. 181; Cro. Car. 36; Plowd. 85b; 2 Chit. Cr. Law, 499. At the same time it may be in some views important to the prisoner to have the ownership stated truly; and the question is put by his counsel, how can he avail himself of a mistake in the indictment in this respect, unless by a motion in arrest? No difficulty is seen in objecting to the evidence at the trial, if it states the owners to be known, when in the indictment they are described as unknown. If the difference be material it would be considered

a fatal variance in the proof or in the probata from the allegata. 1 Chit. Cr. Law, 175, 213; 2 East, P. C. 651, 781; 3 Camp. 265, note; 2 Leach, 578. Again, perhaps, it might if material, be pleaded specially on leave at the time of filing the general issue. But in the present case the counsel for the prisoner is probably under a mistake in supposing all the owners of the oil were known at the trial. One of the owners of the ship was present at the trial; but he was only a part owner of either the ship or the cargo. And after the lapse of many years since the transaction, and the owners being numerous, there was an inherent difficulty in describing each of them, which probably led the grand jury and justified them to state that the owners were not known. Motion overruled.

UNITED STATES (STETTINIUS v.). See Case No. 13,387.

Case No. 16,391.

UNITED STATES v. STEVENS.

[4 Cranch, C. C. 341.] [1]

Circuit Court, District of Columbia. Nov. Term, 1833.

KEEPING DISORDERLY HOUSE—EVIDENCE OF REPUTATION.

Upon a count for keeping a disorderly house, charging that the defendant suffered persons of ill fame to come together, &c., evidence may be given of the general reputation of such persons. And the same evidence is admissible upon a count for keeping a bawdy-house.

[Cited in Henson v. State, 62 Md. 235; State v. Towler, 13 R. I. 66.]

The indictment [against Jemima Stevens] had two counts: 1. For keeping a bawdy-house. 2. For keeping a disorderly house.

THE COURT permitted evidence to be given of the general reputation of the persons who visited the house, in support of the averment in the second count, that the defendant suffered persons of ill fame to come together, &c.; and also of the averment in the first count, that the defendant suffered evil-disposed persons, &c., to commit fornication, &c.

The following cases and authorities were cited: 2 Russ. 682, 683; Com. v. Stewart, 1 Serg. & R. 342; Archb. Cr. Law, 362; 2 Ld. Raym. 1197; 2 Chit. 39, note; 2 Burrows, 1293; 3 Chit. 674; 2 Atk. 339, &c.

Case No. 16,392.

UNITED STATES v. STEVENS et al.

[2 Hask. 164.] [2]

Circuit Court, D. Maine. Nov., 1877.

CRIMINAL LAW—REASONABLE DOUBT—CREDIBILITY OF WITNESSES—CONSPIRACY—EVIDENCE OF ACCOMPLICES — MASTER AND SERVANT — QUITTING EMPLOYMENT.

1. A reasonable doubt is more than a captious doubt. It is a doubt for which a reason may be assigned, not necessarily sufficient to convince another, but such as may properly influence a juror honestly endeavoring to perform his duty.

2. Jurors should not disbelieve a witness, unless for good reason and they must determine the facts regardless of statements either of counsel or court.

3. A conspiracy to obstruct the mail in violation of Rev. St. § 3995, is a violation of section 5440, as a conspiracy to commit an offense against the United States.

4. An intention to obstruct the mail flows from an unlawful act that so operates, although its primary object was to accomplish another purpose.

5. Upon prima facie proof of a conspiracy the acts and declarations of each conspirator are competent evidence to go to the jury upon the trial of any one of them.

6. The jury must be first satisfied of a common design, confederation and purpose, before the acts and declarations of one participating are competent evidence against a confederate to prove the scope and purpose of the conspiracy.

7. It is lawful for employés, without any illegal purpose, to quietly and peaceably leave the service of their employer by concerted action at a given time so long as they do not violate any contract to remain longer.

8. It is unlawful for employés, whose employment is at an end, to combine to induce others to quit the same service at the same time, but before their employment has expired.

9. One, employed to work a day, cannot lawfully quit work before the day is done.

10. An engine driver employed by the day, to daily make a particular run, cannot lawfully quit before the run is made.

Indictment for conspiring to obstruct the United States mail. The defendants [George W. Stevens, George W. Kent, Warren H. Walker, Charles Stevens, Taylor L. Dodge, and Henry G. Mills] were members of the Brotherhood of Locomotive Engineers, and with their fellows, engine drivers on the Boston & Maine Railroad, sixty-seven in all, struck, and by concert of action, quit work at four o'clock in the afternoon. One of these engineers, not a defendant, at work by the day, whose accustomed run was from Exeter, N. H., to Portland, Me., and back, having partly completed his return run in charge of an engine hauling a mail train, at four o'clock stopped the train away from a station in an out of the way place east of Kennebunk in Maine, detached his engine and kept control of it until six o'clock by running it back and forth on the road, then extinguished the fire, drew the water from the boiler and abandoned it, the mails being thereby delayed. The first four defendants were members of a committee of the striking engineers directing or advising their conduct, and all the defendants were convicted.

The cause was heard upon a motion for a new trial for misdirection, and because the verdict was against law and evidence. After elaborate argument, it was considered by the court that no error existed in the charge presented below, and that the verdict was neither against law nor evidence, and judgment

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

[2] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

was ordered on the verdict without any formulated opinion.

Nathan Webb, U. S. Dist. Atty.
Almon A. Strout, for G. W. and C. Stevens, Kent and Walker.
Charles P. Mattocks, for Dodge and Mills.

Before SHEPLEY, Circuit Judge, and FOX, District Judge.

FOX, District Judge (charging jury). The counsel on both sides of this cause have dwelt with some force upon its great importance, and I feel that it is not inappropriate for me to reaffirm that proposition. I apprehend that however many causes you may any of you have been engaged in as jurors, there never has been one in which there was really a greater interest and greater questions involved than in the present cause. I know that during the experience that I have had in this place, I have had none come before me in which I felt there were more important matters involved than I feel that there are in the present cause which is now to be determined by you. It is of vital importance to these defendants, because it involves punishment both of fine and imprisonment in case they are found guilty. Therefore, gentlemen, in their behalf I invoke of you a most careful and candid consideration of the testimony, that no wrong be done to them by you in your deliberations. It is also of the greatest importance to the government and to the public at large.

You are well aware that the constitution of the United States has delegated to the United States government the control and direction of the mails. When the government was formed, it was deemed of so great importance, the management of this great department, that it was decided that it should not be committed to the various states, but that the general government for the general public welfare should control and regulate the management of the mails. And probably each one of you, on reflection, will come to the conclusion that there is no department of the government in which the public at large have so great an interest and derive so much benefit from as they do from the post office. Think one moment what the consequences would be if the mails should be destroyed for a single day that are passing merely in this state of Maine—how many sufferers there would be.

The government of the United States, therefore, having had committed to it by the constitution the control of the mails, has seen fit to legislate upon the subject, and has done so fully for its protection. It has declared that it shall be an offense to knowingly and wilfully obstruct the mails. It has also declared that there shall be such an offense as amounts to conspiracy, by the combination of two or more persons to violate the law of the United States, and, having thus combined, by doing some act in perfecting the violation. It has been stated to you what the punishment is in the one case, and what the punishment is in the other, and it is a fact that the law provides a more severe punishment, decidedly more severe, for a conspiracy to violate this provision of the law by knowingly and wilfully obstructing the mails than it does for the mere simple act of one person committing the crime.

You may ask yourselves why the government has seen fit, why congress has seen proper to impose a heavier punishment for the conspiracy than for the crime itself; probably a moment's reflection will satisfy you that it is quite right that there should be this distinction. The crime can be committed by a single person; generally speaking conspiracies are much more substantial than that. The moment there is this combination of purpose to violate the law, there is that element of force brought to bear upon the law which is much more difficult to contend with than the act of a single individual. Here is this combination of men in one case, while in the other there is the single individual. You can all, in a moment, see that where large masses of people are concerned in resisting the law, the law itself has much more to contend with than it would if each one of them stood alone without any combination; that it is much more difficult to resist a mob and escape danger that the law may be put down and the courts be overcome, than in the case of the single individual, where there is not this concert of action. Therefore, it seems to me, it was wise that congress should declare that, while we punish the one man merely for the commission of the offense, if a body of men get together and say we will stand against the law and we will resist and break the law, we will punish these men because they come with more force to resist the law and with more power to overcome the court; that it is right and just and proper that there should be this difference made in punishment.

Now, therefore, gentlemen, if these men have violated the law, let them take the consequences of it; if they have not violated the law, it is your duty and no doubt it will be your pleasure to say that they are not guilty. You will remember, that the presumption of innocence is a presumption which the law makes in all cases, even when a party has been indicted by the grand jury of the country. The indictment is simply to put the party upon trial, to subject him to inquiry. You are not, from the mere fact of the indictment having been found, to find that he is guilty of the offense with which he is charged. This presumption remains till you are satisfied of his guilt, and you must be satisfied of his guilt beyond a reasonable doubt. What is meant by a reasonable doubt? I refer you to the language of the Chief Justice of the United States in one of the Ku Klux Cases, where he was called upon to

explain the meaning of reasonable doubt. He says:

"The burden of proof, gentlemen, is upon the government. It is a wise maxim of the law in favor of life and liberty, that every man is presumed to be innocent until he is proven guilty, and this presumption is to continue with you, sitting as jurors, until it has been overcome by the testimony beyond a reasonable doubt. But a reasonable doubt is something more than a captious doubt, a mere vague notion that possibly the accused may be innocent. It must be a doubt for which a reason may be assigned. It need not be a reason sufficient to convince another, but it must be such as may properly influence the mind of one who is honestly endeavoring to perform his solemn duty as a juror." U. S. v. Butler [Case No. 14,700].

That is the language of the chief justice of the United States of America, which I am bound to receive as law, and so declare to you. You are bound, both in civil and criminal cases, to receive as the law whatever the court may declare it to you to be. There must be some tribunal which shall determine what the law is; the law must be fixed and stable and permanent and not dependent on the notions of men who are called occasionally to examine it; and therefore, it has been wisely determined that the court shall declare the law and that the jury shall determine the facts. It is therefore your province to determine all the facts, to believe such witnesses as you see fit; you have no right to disbelieve a witness upon mere prejudiced assumptions without there is something in the appearance of the witness or in his testimony in conflict with other testimony. You should deal fairly and justly with witnesses, and, unless there is some good reason for you to disbelieve them, you should believe their testimony. But the whole is for you; you are to draw your own inferences and pass upon the whole case and determine what is proved to your own satisfaction; you will not be governed in regard to that matter either by the statements of court or counsel. The counsel in the ardor of conflict may miss-recollect or misstate testimony; the court may misapprehend the testimony. So that, after all, if from any source whatever there is a statement made in regard to testimony, which according to your recollection is incorrect, you must be governed by your own recollection and not by such statement, no matter whence it came.

The act of congress (Rev. St. § 3995) declares that "any person who shall knowingly and wilfully obstruct or retard the passage of the mail, or any horse, carriage, driver or carrier, carrying the same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars."

Now, the meaning of this section has been declared by the supreme court of the United States, which in this case I am bound to receive as the law of the land and so declare it to you. The supreme court of the United States in 1868, being called upon to interpret that section, declared: "The statute of congress by its terms applies only to persons who 'knowingly and wilfully' obstruct or retard the passage of the mail, or of its carrier; that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. That statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows." U. S. v. Kirby, 7 Wall. [74 U. S.] 485.

That portion to which I especially call your attention as applicable to the charge here as to what constitutes an unlawful and wilful obstruction of the mail is: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object." That construction has been carried out repeatedly of late years.

Now that being the crime which these parties are charged with having conspired to commit, and such being the definition of it, what do we find in regard to a conspiracy? There is no general statute touching the subject except section 5440, and that reads as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." That is to say, there must be a combination, an agreement; that agreement may be inferred from the proceedings of the parties; but there must be an understanding with two or more persons to commit an offense against the United States.

Some questions were raised in the outset in regard to this indictment, and whether the allegations which are here found in the indictment constitute an offense. For the purposes of this trial I instruct you, that a conspiracy to commit an offense described in section 3995 is within section 5440, and is an offense under the latter section; that the indictment in the present case is in due form, and with the requisite averments charges these defendants with the commission of an offense under section 5440. If I am wrong in this, and it should be necessary, those who are over me will come in and aid us in the investigation. It seems to me there can be no doubt in regard to it. You will take that

as the law, that this indictment does charge these men with the commission of an offense within these two sections.

Now, gentlemen, in regard to the evidence which has been offered here; some tribunal must determine as to the admissibility of testimony; and the law has declared that the court shall, in the first place, say whether the testimony is or is not admissible as tending to prove the guilt or innocence of the party. The duty, therefore, devolved upon me, sitting here alone, to determine what testimony should be admitted in this cause. The trial has been somewhat more complex than most causes, involving matters which do not often arise, and the court had to thread its way, the best it could, when there was an attempt to offer evidence bearing upon the defendants in the cause, that another party, whom the law may deem the agent of the defendants, had been concerned in performing an act which would be evidence against them.

A good deal of time you will notice was occupied, and properly, in the discussion of the admissibility of testimony; and you must have noticed that the court, whether correctly or not, ruled out a very large portion of the testimony which the government undertook to offer in this cause, and that I have limited the testimony to the acts of the defendants themselves and of those who may be called the "striking engineers." I had doubts whether I was not restricting the government within somewhat narrow limits; I have more doubts now, but, under the circumstances of the case, I gave, in every instance, the defendants the benefit of the doubt. I rejected all testimony to the admissibility of which I entertained any serious doubts, for I did not want to subject them to the consequences of any illegal testimony, because if I did, I should have done them a very great wrong. I, therefore gentlemen, as I think, have admitted not a particle of testimony here which was not clearly admissible against these defendants.

The law is peculiar in regard to conspiracies, and in regard to the evidence of parties who may be said to be co-conspirators. Mr. Greenleaf, the learned author of a book on Evidence, which we all receive in almost every instance as the most correct exposition of the law, says: "A foundation must first be laid by proof, sufficient in the opinion of the judge to establish prima facie the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one, who does enter into a common purpose or design, is" generally deemed "in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such common design. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the case. But this rests in the discretion of the judge, and is not permitted, except under particular and urgent circumstances, lest the jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers." 1 Greenl. Ev. § 111.

And in another volume he again calls our attention to this same subject, and declares: "The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of its concoction; for every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design. The principle, on which the acts and declarations of other conspirators and acts done at different times are admitted in evidence against the persons prosecuted, is that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one in furtherance of that design a part of the res gestæ, and therefore the act of all. It is the same principle of identity with each other that governs in regard to the acts and admissions of agents when offered in evidence against their principals, and of partners as against the partnership." 3 Greenl. Ev. §§ 93, 94.

In this same Ku Klux Case, the chief justice of the United States had occasion to consider this branch of the law, and he there declared more concisely, but substantially as Mr. Greenleaf has declared: "Each member of a conspiracy is responsible personally for the acts of every member thereof, done in furtherance of its illegal purpose, whether

he be himself present or not. It follows that the acts and declarations of one of the conspirators, while actually engaged in giving effect to the common purpose, may be given in evidence against his co-conspirators. Having a common purpose, the acts and declarations of one, while carrying that purpose into effect, are the acts and declarations of all. But isolated acts of violence by individuals who may have been engaged in the conspiracy cannot be used against the others, unless it appears that they were done in furtherance of the common purpose. All are bound by them if they resulted from the original unlawful agreement between the parties to accomplish by their concerted action the proposed result."

You thus have the law clearly declared by the chief justice of the United States of America, that parties may be affected by the acts of others when there is a conspiracy to commit a common crime, when they are all actuated by a common purpose to effect a common result. The acts of one affect the others exactly as the acts of your agent would affect you, Mr. Foreman, in case you employed an agent to transact any business for you.

But, gentlemen, although in the outset the admission of this testimony was a matter for the opinion of the court, exercising its best judgment, after all, it comes back to you for your consideration under the following instruction: I say to you that in the opinion of the court there was prima facie evidence that these defendants with the other engineers, who on February 12th quit the employment of the Boston & Maine Railroad, were jointly acting in combination and concert, and aiding and assisting each other in carrying out the common purpose of a violation of section 3995, in obstructing the mails, so as to make the acts and declarations of such engineers done and made in the furtherance of, and during the pendency of the unlawful purpose, competent evidence to go to the jury against these defendants, but that it still remains a matter for the determination of the jury, whether those engineers were so acting in concert and co-operating with each other and these defendants in the common design of wilfully obstructing the mails. If so acting in concert and co-operating, in the opinion of the jury, then their acts and declarations, if done and made in pursuance of, and while engaged in carrying out the common design and object, and before it had been completed and determined, were competent evidence to be weighed by the jury against these defendants; but if not so co-operating, then such acts and declarations are not to be considered by the jury, but are to be rejected from the case, in pursuance of the general principle, that the acts and declarations of one person are not evidence against another.

So that it comes back to you to consider whether there was this concert and combination among all these persons—among the whole sixty-seven engineers. If so, then whatever any one of them thus did or said in furtherance of the common object is competent evidence to weigh against the rest. But, if there was no combination, the defendants are not to be affected by the acts of a stranger for whose acts they are in no way responsible.

We now come to the charge which is made and the evidence introduced by the government to sustain that charge. There are upon trial six men; two by the name of Stevens, one by the name of Kent, and one by the name of Walker, have been known throughout this trial as a committee of somebody or some party; there are two others upon trial, who were not members of the committee, Mills and Dodge; there are two other persons named in the indictment, Whitten, about whom you have heard a good deal, but who is not now upon trial, and Merrill, whom we have heard but little of, and who, I understand, was not originally one of the men who struck, but was one of the new men engaged, but whom it was claimed did not perform his contract. Your attention is to be directed to the four men of the committee and two other men, Dodge and Mills.

The government charges that the defendants conspired together to wilfully and knowingly obstruct the mails running on the Boston & Maine Railroad from Portland to Boston. The charge is that this was done on the twelfth of February. I have to say to you that the government is not confined to that day; it may prove the act at any time and on more than one day at or about that time; and if it does prove the offense to have thus been committed by these defendants, it is sufficient, although the averment is that it was on the twelfth of February.

The government has offered before you certain documentary testimony, which I do not understand is denied to be connected, so far as it is of any avail, with these first four defendants, the two Stevens', Kent and Walker. There are these papers which purport to be signed by them. Whether they were signed by them or not, you will probably think is of very little consequence, because there is no question made but that these papers are their acts, as I understand. You will have these papers before you, and in connection with them the letter of Arthur, who was the head man of the Brotherhood of Locomotive Engineers. Examine them carefully, and see what they say and what they propose to do. In the first place you will ask yourselves the question, for whom did these men act? Were they acting for themselves, or were they acting for the whole Brotherhood of Engineers? And, if you take these communications together, all which eventually came to Mr. White, president of the Boston & Maine, you will

judge for yourselves whether there can be any doubt that these men did not merely act for themselves, but that they claimed to act in behalf of, and as representing the whole body of the engineers of the Boston & Maine. It is important that you should take this matter into consideration in an ulterior view of the case. If they were acting for all the engineers, then you will enquire whether they had authority to act for all the engineers. It is for you to determine, from all the testimony, whether or not these men assumed to act merely for themselves as a committee, without being delegated by the engineers as a body, or whether the whole body of engineers got together and appointed these men their committee to carry out their purposes. I think, gentlemen, but of that you will judge, that the evidence shows that this committee did not undertake to act for themselves alone, but undertook to represent the whole body of engineers.

What do they say they will do? In those letters they make various demands, claiming to act, and saying they are acting in behalf of the engineers of the railroad; they finally come to the conclusion that on the twelfth day of February, at four o'clock, they will quit work if their demands are not complied with. The defendants say that is all they undertook to do, that is the whole extent of all these men had any purpose or design to accomplish; merely to quit work. I have a few words to say to you in regard to the rights of men to quit their work under such circumstances. We all understand that in this country no man can be made to make any particular contract with another person or company as to his work. Each man is at liberty to make just such a contract as he pleases. On the other side, the corporation is at liberty to employ him, and has a right to say just what the terms of their contract shall be, what shall be the extent of the labor, and how long it shall continue, and when it shall determine; and no man can step in between them and say, "You have no legal right to do anything of this kind."

So that, gentlemen, each one of these engineers had a right to make his own bargain with this company to be employed at just such wages as the company would agree to give him, and if he did not choose to employ with them, he could go on his way and leave the company to procure other men as it could. They had a right to elect that the term of service should be a week, or two weeks, or a year, or a day; whatever the term of service was, the parties were obliged to carry out, or else they would be guilty of violating their contract.

Now, I say to you this: Where there was no term of service agreed upon, or if the term of service which was agreed upon had expired, then the man had a right to leave the service, and nobody had a right to compel him to remain in the service. In this case I go farther than that, and say that these engineers had a right, if they saw fit, peaceably and quietly and without having any illegal purpose or object in view, to agree among themselves to quit work at any hour after reasonable notice, at an hour when they were not under a contract to work beyond that hour; but, if they were under contract to work beyond that hour, then for any combination or concert of men whose time was up, and so declared, to induce the others, whose time was not up, to violate their contract, to break off and leave their work, was an illegal act which the law would not justify them in doing.

Now, gentlemen, it may be important for you to determine, when you come to what was done on the twelfth of February by these different engineers, whether there was any concert of action to cause persons, who were under obligation to work beyond four o'clock of that day, to violate that contract to quit their work when they were bound by their contract to continue their work. That is a matter for you to determine. The evidence, as I understand it, is, but as I have before said, when I state testimony, it is always subject to your recollection, that there was no obligation for any man to work for any length of time beyond the day on which he was employed; they were hired by the day and were paid by the day, and when the day's work was ended, under that contract, they were at liberty to quit. But, gentlemen, if a man was employed to do a day's work, if that was the contract under which he was employed, he had no right to quit at four o'clock and say, I will not work beyond this time, for he would thereby violate his contract just as much as though he had been hired by the year, and had quit after working but six months, and said the balance he would not work. The duration of the contract is of no consequence, provided there was a conspiracy to induce the men to break their contract, to give up their work during the time the contract was in force, which it required them to go on and complete.

This point is important as bearing upon the conduct of Whitten and of Cook, who, I think, were on the noon trains between Boston and Portland. I inquired particularly of Mr. Furber, but you will recollect what the obligation was, what those men were expected to do under their contract with him, for how long they were hired and what was the route which they were engaged for, and he went on and stated that they were hired by the day, that the route which they were employed for was between Exeter and Portland, back and forth. Now, gentlemen, if that was the contract, and those two men were employed on the twelfth of February to run from Exeter to Portland and back again, they had no business, when they were in the course of performing that contract, to quit their

engine, and the other men had no business to induce them to do it; and if there was a conspiracy, therefore, on the part of those men whose time was up, and who were under no obligation to work during the rest of the day, if those men conspired to induce and did induce these two men to quit their work for one hour during that day, when by the terms of the contract they were obliged to work the day out, it was an illegal arrangement, an illegal act which the law will not justify.

It is for you to determine from all the testimony what this contract was, how Cook and Whitten were employed, and whether their contract was of that character that they had a right to quit any moment and leave their train where it might be, in the woods, and take the engine and go off and leave the passengers there; or whether the contract was that they should take that train through to Portland or to Exeter, deliver it up there, and thus do the work they agreed to do. If the contract was, as last stated they were guilty of a breach of contract in not doing it. It is for you to determine whether there was in this respect a conspiracy to do an illegal act.

I repeat, that no man who was under any obligation to work after four o'clock had a right to agree with his fellows that he wouldn't work after that time. If they were under no obligation to work after four o'clock, they had a right to enter into an agreement to leave at that time, but they had no right to undertake to induce parties, who were obliged by contract to work beyond four o'clock, to break that contract and leave their work. Therefore, you will determine this question in the first place, what the contract of these men was, the one who left the Portland train going out and the one who left the Boston train coming down, and the other man on the Newburyport train, and whether or not they were justified, under the terms of the contracts they had entered into, in leaving the trains as they did. There may be no positive direct testimony before you as to what these contracts were. Perhaps there is no direct testimony before you that Whitten agreed to run his train from Portland to Exeter and from Exeter to Portland. It is for you to say what was a fair understanding of that contract and whether these men had a right to leave their engines and thus abandon the road, abandon the train and abandon the mail for two hours at least as was done by Whitten. Therefore you will examine that question for yourselves, determine what these contracts were, whether there was any breach of them, and whether these defendants conspired with them to break their contracts.

Now, gentlemen, what was done on the twelfth of February? I propose to read some of the testimony upon this point to you, not trusting to my own recollection in regard to it; I do not even ask you to trust to my minutes, but, refreshing your recollection, you will determine whether I am correct or not. We will, in the first place, take the afternoon train which left Portland, and I will call your attention to Weymouth's testimony. He says:

"I was conductor of passenger train on Boston & Maine mail train February 12th; I. was to leave Portland at three o'clock for Boston, started on time. Benjamin Whitten had charge of engine, Murray fireman, six cars all told. We got within about three miles of Kennebunk depot, train was stopped, unusual place. I looked out and found engine had left the train and was some distance off, moving. I left the train in charge of baggage master and brakeman; called on Howard and a fireman with Smith to go up the track with me. Howard was a spare engineer in the car. We went up the road; locomotive stopped near a mile from train. When we were within a short distance, engine started again, went half a mile and stopped. We got within a short distance; engine moved and then stopped; it pretty soon came back twenty miles an hour, passed us. Whitten was on, managing the engine; I signalled to him; he made signs he would receive me; he stopped a short distance below us, he said 'keep them men back and you may come up.' Some passengers were following us. I stopped the men, went to the engine; old fireman was on; I got on engine, on foot board. Whitten said he was willing for me to get on, but 'them men' should not on any condition, nor no one else with the intention of taking the engine from him. I asked Whitten, if he struck at four, by whose authority he was keeping the engine. He said he was ordered by the committee to keep the engine till six unless a compromise was made with company, in which case, they would be notified by telegraph; if they received notice to keep on working, he would back up and couple on train by my notifying him from the office, and that if he did not get any order from Boston, at six he should leave engine without any water in tank or boiler, or a fire, with pump let down so she should not be hurt if she stood there all night. I told him I would go to the depot and if any order came I would notify him. He said orders were to come from committee; I was not able to regain engine before six."

There you have the statement of what was done by Whitten with that engine, and that testimony is corroborated to some extent by Howard. You have also the testimony in regard to the other engine which was the other side of Kennebunk. That engine, if I recollect right, had Cook on as engineer, and when they got down in the vicinity of Wells, according to the testimony, he signalled and the brakes were put on. He disconnected his en-

gine and kept possession of it until about six o'clock when it was given up without any damage being done to it of any kind, excepting the fire was out, the hose was disconnected and the water was out of the boiler. You have also the testimony in regard to the train on the Newburyport branch.

Here are three engines connected with mail trains. You will ask yourselves in the first place, were those mails obstructed on that day? Were they wilfully and knowingly obstructed? That is to say, did those who had charge of the engines purposely and designedly separate the engines from the cars and prevent the trains from going on and prevent the mails from being carried? Because if the train could not go on, the mails which are a part of it could not, and a detention of the train would be a detention of the mails. You will ask yourselves whether there is or not any question that on that day, the two mails between Boston and Portland, one up and the other down, were obstructed and were obstructed for some little time? And that, I understand the testimony shows, was done by Whitten and Cook. Were Whitten and Cook, in what they did, carrying out the common design with these defendants of obstructing and detaining the mails? And was their object to obstruct and hinder the train from going forward at that time? If you find that was the common purpose and object, and it necessarily resulted from it that the mail was detained, then you will be justified in finding that they conspired together to wilfully and knowingly obstruct the mail.

Now the defendants say that they had no such purpose as that: "Our object was to quit work; these men have done what they did beyond and outside of what we contemplated; we supposed and knew that the company were advised of what we were about; they had made arrangements to take the trains out of our hands at four o'clock, and we supposed it would be done, the old men stepping out and the new men stepping in." If that was their purpose, simply to quit work themselves, and they conspired simply to quit work, those who had a right to, whose time was up, it was all right. If their time was not up, they were guilty of a breach of contract and were acting illegally.

The government says that the testimony shows very conclusively that the object was far deeper and beyond any thing of that kind; that there was a purpose, a design to obstruct and retard the trains, to interrupt all the business of the road, and that that purpose, at four o'clock, in the vicinity of Boston, was carried out; that the cars were disconnected from the engines, and that they retained possession of the engines for two hours after four o'clock, hoping that some arrangement might be made.

If these men agreed together to interrupt all the business of the road, to detain all the trains wherever they might be, if that was their object, and if it necessarily followed from a detention of the trains that the mails were obstructed, and they did this knowingly and wilfully, you will be justified in finding these defendants guilty of conspiring to knowingly and wilfully obstruct the mails.

These men say they were acting as "committee of all the engineers." What are the acts of three of their principals, three of the men, for whom these four men say they were a committee, whom they undertook to represent? What do we find their principals doing? We find them separating their locomotives from the trains, running away from them in the way that has been stated before you, and not on four o'clock quitting work and leaving the engines as they then were, for men, it is argued, were known by the defendants to be ready to take their places when it was necessary. The government goes farther and says that there are other facts in connection with this which show it was not their mere purpose to quit work then, but that it was to interrupt the business of the road, and especially to delay all its trains; and those facts are that there were a number of locomotives in the yard in Boston, and when Furber and Smith called for those locomotives and let the engineers know that they would take them into their possession, and then went to get men to take their places, returning in less than five minutes, they found the fires dumped, the hose disconnected and water out of the boilers. If it was their purpose simply to leave work, the government asks you why did those men, when they could have quit their engines in a moment, instead of doing that, do what they could to render them for the time being unfit for use?

It was said long ago, "By their fruits ye shall know them." And by the acts of these men you must judge what their purpose and design was. If it was simply to leave their work, would they not have done it without detaining these trains, or dumping the fires, or drawing off the water, or disconnecting the hose? Would they not at once have given up the trains to the various men who were there to take them? Was their purpose to retain the possession of the train, which was delayed, when coming to Portland, two hours, in order that some arrangement should be made? Or was it simply that they did this of their own will and pleasure without in any way acting in concert with those in Boston.

Then, there is another fact which it is my duty to call your attention to, and that is the condition of trains up and down the road. You have the testimony of Beal, that after four o'clock, according to his recollection, there was not a single live engine on that road. Hamilton, who was on the road with him, thinks there was one which was running from Lawrence into Boston. Beal says that, all the way up and down that road, the engines were set one side with fires out, water drawn off, and were left in that condition.

The government asks you whether or not these are the acts of men who merely meant

to quit work, or the acts of men who meant to put this road in such a position that its trains for the time being should be interrupted. The matter is for you to decide, and not for me, drawing your own inferences, applying your reason to it, judging these men by their acts and the consequences of their acts, whether they did intend that which the government says they did.

Now, stepping beyond the twelfth of February, what do you find? You find that there was a train which should have left Portland the next morning, but which did not leave till about noon. You find that one engineer was bought off, and that, when they undertook to put another engineer on, stories were circulated in regard to the engine being unsafe, and that he did not go, and when a third was procured, the old man, the witness Bonney tells you what took place in regard to him. You have testimony that Whitcomb, one of the striking engineers, came to the Preble House with two or three men, merely bowed to Beal, and then left the two or three men who accompanied him there in conversation with Beal; that these men there drew out the sum of $1500 and actually offered it to him on condition that he would abandon his train and not run it to Boston the next day, and that Whitcomb, afterwards, in conversation inquired whether they had made a trade with him or not, and blamed him for not being willing to carry out the arrangement. That evidence is for you to consider as bearing upon the question as to what these parties contemplated. What did the striking engineers, as a body, contemplate? Did they contemplate leaving their employment and going about their own business? Or did they contemplate so dealing with the road and the new men employed as to compel the road to take old men back into their employ and forgive what had taken place.

There is also the testimony of Averill, the new engineer, who run down here to Portland. He says that Mills met him the next morning, and that an arrangement was made by which they were to pay him the sum of $100, $20 down, and then to employ him for a certain length of time. You will recollect the conversation which took place. He states that: "Mills told me he would write a letter to Arthur to show the agreement I had made. I told him to write to Geo. W. Stevens and he would show it to Arthur. He said he would do it." Mills does not appear to have written that letter, but somebody wrote a letter and handed it to Averill and he says "I took it up and showed it to Stevens. Presented the letter to Stevens at room forty-seven, the headquarters of the Brotherhood. Stevens opened the letter and said it was all right; he spoke of Arthur's seeing the letter. Arthur saw it, said it was all right and they would do as they agreed. I was in their office every few days. I had some conversation with three of these men, Chas. Stevens, Kent and Walker, at the Brotherhood in regard to their paying me. I had conversation with Mills and Whitcomb. They said that they were sure of carrying the day, going to beat the B. & M. in a few days. They said a good many men had been bought off and that they had money enough."

It is for you to say whether or not Averill's testimony should be believed. One of the learned counsel says he does not believe his story. The reason why he would not believe him is not before you. It may be that his being counsel in the case may make some difference in that respect. The question is whether you believe him, whether you have any right to disbelieve what he has said. If there is anything inconsistent in his story, if his appearance is that of an untruthful witness, you should make such deductions as you think proper. What is his testimony? He testifies expressly that four of these men, Geo. W. Stevens, Chas. Stevens, Kent and Walker all spoke about paying him and carrying out a contract which he had made with Mills in regard to his employment if he would leave the road. Is that or not evidence bearing upon this question. And is it or not important, as bearing upon this question, whether there was an agreement with these four men simply to quit work, or whether they still continued on that day carrying out the purpose and object of preventing the running of the road, of obstructing the trains, of hindering everybody, whether connected with the mails, or the running of the road, or passengers from passing over that road? Does it or not show that after this twelfth of February they were doing all they could to hinder and obstruct the business of that road? If that was so, and they were endeavoring to carry out that purpose and design, you may well find that they were guilty of conspiracy to knowingly and wilfully obstruct the mails.

You have the testimony of Hilton and the paper produced by him dated February twentieth, by which it was agreed that Hilton should receive three dollars and a half per day during the strike, and sixty dollars per month for three months after, and that he should be admitted to the Brotherhood. That is signed by Arthur, Sanborn, Webster, and also by Chas. Stevens and G. W. Stevens, who are two of the defendants and who were two of the committee. The government claims that this testimony corroborates that of Averill, and shows that these men meant something more than to quit work; that they meant to impede and obstruct the operation of that road; that they were doing what they could to prevent Hilton from further running on that road.

Gentlemen, you are obliged, having taken the oath you have, to decide this cause according to the evidence; to look the matter fairly and squarely in the face, and let your honest judgments, your conscientious

convictions decide this matter. Let your common sense determine what these parties meant by all they did and said, and how far their purpose was to obstruct and hinder the business of that road. If you find that there was a common purpose and object to hinder the road and prevent its running, hoping thereby to be reinstated, and that it was a necessary consequence of such hindrance that the mails were retarded, and that they wilfully and knowingly hindered and retarded the mails, it is your duty to find these men guilty so far as they are connected with it. What I have said has been mostly in regard to the four committee men. You have the testimony in regard to Mills. You will judge whether if the others are guilty there is any doubt as to his guilt.

Then comes the testimony in regard to Dodge. The government says he ran his engine on to the wharf in Portland, but so long as there was anything for him to do, he staid by and did his duty faithfully; but they say he was one of the conspirators originally, and that before six o'clock he had made up his mind to quit work, and had left his engine down there where he had no right to. If you find the others guilty, and you think you are justified in making any exception in his case, you will acquit him, if not, convict him. You are at liberty to convict one or more, or all, or acquit all.

Now take this case and apply your honest judgment to it, and render such a verdict as the law and the evidence warrant. If in any way you allow yourselves to be governed by fear or prejudice, there will be no satisfaction, after you have returned to your homes, in the retrospect of your labors here.

Several requested instructions have been passed to me.

1. "The means of carrying out the alleged conspiracy when made unlawful by statute, should be fully set out, and must be proved as alleged." I have given you that instruction and repeat it.

2. "An association of workmen formed for the purpose of raising their wages is not unlawful." If that is the mere object, to raise their pay, and they do not undertake to do anything illegal, it is not unlawful.

3. "The presumption that a man shall presume the natural and necessary consequences of his voluntary acts does not apply in a criminal case where the act done or contemplated (in case of a conspiracy) was lawful and the means lawful." If they undertook to do a lawful act, there is no presumption that they intended to do any unlawful act.

4. "Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoners' guilt, but inconsistent with any other rational conclusion." So far as the proof depends upon circumstantial evidence, that is a rule of law which you are bound to apply.

5. "In this case, it is a fact to be left to the jury to determine, whether the acts done or contemplated were wilfully and knowingly done." I give that.

6. "Conspiracy is a corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or an end." That, I suppose, is a true definition of conspiracy at common law.

7. "If the jury merely find that several of these defendants conspired to do one illegal act, and that certain others of the defendants conspired to do another illegal act, they cannot bring in a verdict of guilty against any of the defendants." There must have been a concert of action to do the illegal acts charged in the indictment or else you cannot find them guilty.

Case No. 16,393.

UNITED STATES v. STEVENS et al.

[2 Int. Rev. Rec. 54.]

District Court, S. D. New York. 1865.

INTERNAL REVENUE — MANUFACTURERS OF KNAPSACKS.

[Persons who, by a special agreement with a government contractor engaged in manufacturing knapsacks, supplied and sewed upon each knapsack two small buckles and straps, without any other connection or participation in the production thereof, were not "manufacturers," within the meaning of the 75th section of the act of July 1, 1862 (12 Stat. 462), and are not liable to pay the tax thereunder. Reaffirming Cases Nos. 16,393a and 16,393b.]

This was an action [against Stevens and Carples] for the recovery of some $16,000 taxes upon certain knapsacks in part manufactured by defendants. The defendants resisted the payment on the ground that they were not manufacturers, but only employed by the manufacturers to add to the knapsacks buckles and tags. It was shown on behalf of the government that more than one-half of the value of the goods consisted of these additions.

BETTS, District Judge. This case was submitted May 23, 1865, to the judgment of the court by the counsel for the United States as defendants, on written arguments, with the restriction "not to be decided before July 24 next." I am not advised of the reason for the restriction. The action was in assumpsit for the recovery of duties or taxes to the amount of $16,000. The declaration charged that the defendants, as copartners, on the 1st of March, 1863, were indebted to the plaintiff at New York in that sum, according to the provisions of the 75th section of the act of congress, approved July 1, 1862 [12 Stat. 432], entitled "An act to provide internal revenue, to support the government, and to pay interest on the public debt." The declaration alleges, the indebtment accrued "for the duties on knapsacks manufactur-

ed and sold, and removed for consumption and for delivery to others than agents of the manufacturers within the United States or territories thereof, between September 1, 1862, and January 31, 1863, inclusive: and being so indebted, undertook and promised to pay the same," &c. A plea of the general issue was interposed, with a notice annexed, that on the trial the defendants would give in evidence and insist that the aforesaid knapsacks were manufactured and sold, not by the defendants, but by one Henry S. McComb, under contracts entered into by him with the government. The defendants had no interest in said contracts, and were neither parties nor privies thereto. That the materials used in making said knapsacks, except buckles and brass trimmings, were furnished by said McComb; and that the defendants and workmen were employed by McComb simply to strap and finish the knapsacks after the same had been delivered to the defendants by McComb in an advanced stage of completion, and received compensation from said McComb for such work and labor. The action was brought to trial before the United States district court, and a jury in the city of New York, December 20, 1864. There was no difference between the government and the defendants in the facts of the case. They corresponded also fully with the pleadings filed by the parties and stated above.

After the evidence was given and the counsel for the United States and the defendants had presented to the court their views of the purport and legal effects thereof, and the court had suggested to the counsel its impression that the defendants were not shown by the evidence produced to be parties within the description of the act of congress referred to and declared upon, and more especially are not included in that portion of the act rehearsed and counted upon in the declaration filed in this suit, charging the indebtment of $16,000 to be duties legally collectable from the defendants, and the liability of the latter to pay the same in this action; and as this form of procedure does not appear to have been sanctioned by any considered judicial construction of the law of the case, the court shall advise the jury to find upon the evidence that the defendants were not liable to the libelants for the amount of duties claimed in the suit, and that they render a verdict in the cause for the defendants; but with leave to the plaintiffs to move upon a case to be made by them to set aside such verdict and have judgment at the discretion of the court entered in their favor for the amount of duties claimed in the action. Such verdict was rendered accordingly. [See Cases Nos. 16,393a and 16,393b.] The motion to set aside that verdict has now been argued in writing by the counsel for the defendants and by the assistant district attorney for the plaintiffs.

The action instituted and pending before the court in the instance relates, exclusively to the collection under the laws of congress of duties and taxes upon articles of domestic internal manufactures, composed of military equipments and knapsacks, approved July 1, 1862 (12 Stat. 432, § 75). The fabric is according to the proofs equally entitled to that denomination, whether manufactured in an exceedingly simple and cheap form, a single bag or sack, or being connected with additional appendages, the union of the two comprising larger conveniences, superior finish and greater mechanical skill and labor. They are, when either way constructed, a manufactured article, the complete knapsack, embraced in the denomination given to the article stated in the revenue law declared upon. Two classes of citizens or subjects of the government are liable to taxation under the statutes in question, and to pay assessments pursuant thereto. The first may be said to be the producers thereof;—because being an article of general and extensive merchandise and traffic, the masses in number and value of the commodities will probably be concentrated in most instances in the hands of capitalists or general dealers, and not be supplied individually by them as citizens and manufacturers. They acquire, hold and vend the articles, and pay assessments upon them as marketable property and effects in the capacity of producers equally if obtained in market overt, or in fabrication as mechanics themselves. The second general class will be that of the actual manufacturers of the commodities taxable. There, also, it will doubtless be found that practically a meagre proportion of the artisans personally are made liable to pay duties directly upon the fabrics, or that the actual makers are known from contributors of materials, funds, labor, or other aids to the general production. Where cases do exist in which manufactured property is owned and held and both sold, or removed for consumption, or for delivery to others than agents of the manufacturer, &c., &c., upon whatever terms or conditions their manufactures may have been created and produced as between the mutual proprietors thereof, it will be competent to the government to deal with common property so produced and held under the law in question, with all the legal rights and remedies that might be exercised by individuals against persons standing in like relations in respect to each other, and reciprocal rights and responsibilities springing therefrom. Upon that principle the United States, in this action, assuming that the defendants are manufacturers of dutiable products which are subject by law to the payment of $16,000 of duties or assessments, claim by implication a contract and premium by the defendants to pay that sum to the plaintiffs. This suit is brought and its proceedings are framed to enforce that supposed engagement and liability. The defendants are sued as copartners, claimed by the plaintiffs to be

engaged in the business of manufacturing knapsacks, who prove them to have been employed therein by H. S. McComb, under an agreement with him to assist and aid in that business. The defendants made no engagewith the plaintiffs, but performed their engagement with McComb exclusively under a special contract in writing with him to that end. The only work they did in the making of the knapsacks was supplying and sewing the small straps and buckles on each one and furnishing materials therefor of the value of a few cents to each knapsack. All the rest of these knapsacks, it is proved by the evidence, were made, painted and materials furnished by McComb, with whom the defendants were not connected in business except in the special particulars of mechanical labor and supply in aid of the business of McComb. The declaration avers no undertaking on the part of the defendants binding them to make the knapsacks for the use of the government, or to secure or pay the plaintiffs the amount of duties recoverable from any parties on the completion of the manufactured articles. That matter on the terms of contract between the defendants and McComb, as proved on the trial of the cause by the plaintiffs, remained in the hands of the defendants as agents or sub-workers of McComb, or was entirely at the disposal of McComb, as the producer or manufacturer thereof, or the sole agent shown by the evidence entitled to their delivery. It is not proved by the plaintiffs that the defendants were any way parties or privies to engagements or responsibilities (if any subsist) between McComb and the plaintiffs in relation to the making of the said knapsacks. The incidental services performed toward completing the business intrusted to the defendants by McComb, and performed by them according to the evidence furnished by the plaintiffs, cannot in any propriety of speech be termed making or manufacturing the article, more than cutting and stitching on pairs of straps to the legs of boots by a boot or shoemaker can be called manufacturing or making indefinite quantities or furnishings of boots. The plaintiffs establish no right of action against the defendants to recover from them the sum demanded by the plaintiffs "for" (in the averments of the declaration) "knapsacks manufactured and sold and removed for consumption, and for delivery to others than agents of the manufacturers within the United States or territories thereof."

Considering this suit, then, upon the pleadings and proofs offered by the plaintiffs, it must be adjudged not sustained upon grounds of legal sufficiency, in technical points of view or upon the merits, and the decision of the case must be in favor of the defendants and against the plaintiffs. I am accordingly of opinion that the plaintiffs have shown upon the case no lawful cause of action in this suit, and that judgment be confirmed upon the verdict rendered in favor of the defendants and against the plaintiffs, without cost.

Case No. 16,393a.

UNITED STATES v. STEVENS et al.

[N. Y. Times, Aug. 12, 1865.]

District Court, S. D. New York. 1865.

INTERNAL REVENUE LAWS — WHO IS A MANUFACTURER.

[A person, having a contract with the government to furnish a lot of knapsacks, purchased the cloth, and had it cut and sewed together and painted elsewhere, and then delivered the goods to defendants, who put upon them the leather straps, buckles, &c., necessary to complete the knapsacks. The cost of this work was nearly but not quite as much as the cost of what was previously done. *Held*, that the government contractor, and not the defendants, were the manufacturers of the knapsacks, within the meaning of the statute.]

This was an action [against Stevens & Carples] to recover the internal revenue duty on twenty-five thousand knapsacks alleged by the government to have been manufactured by the defendant, amounting to about $12,000. It appeared in evidence that a man named McComb, residing in Delaware, had a contract with the government to furnish so many knapsacks. He accordingly bought the cloth and had it cut, sewed together and painted elsewhere, and then delivered them to the defendants to have them put on the leather straps, buckles, &c., which were necessary to finish them,—the cost of the work which they did being nearly but not quite as much as the cost of what was done before the knapsacks were delivered to them. When they had done their work on them they delivered them to McComb, who delivered them to the government on his contract.

Mr. Smith, U. S. Dist. Atty.
Mr. Fullerton, for defendants.

BY THE COURT (BETTS, District Judge). The evidence being in, the judge directed the jury to find a verdict for the defendant, holding that McComb was the manufacturer, instead of the defendants. But as the point was new, he directed it to be entered subject to the opinion of the court, that it might be brought up for fuller argument if desired.

[The case was afterwards twice argued upon motions for a new trial, and to set aside the verdict, and the conclusion above reached was sustained in both instances. Cases Nos. 16,393b and 16,393, respectively.]

Case No. 16,393b.

UNITED STATES v. STEVENS et al.

[N. Y. Times, Aug. 12, 1865.]

District Court, S. D. New York. 1865.

INTERNAL REVENUE — WHO ARE MANUFACTURERS.

[Persons who, by a special agreement with the manufacturers of knapsacks, supplied and

sewed upon each knapsack two small straps and buckles, without any other connection with or participation in the production thereof, are not to be regarded as manufacturers, within the 75th section of the act of July 1, 1862 (12 Stat. 462), and are not liable to pay the tax thereon.]

This was a motion for a new trial on a case. The action was in assumpsit [against William S. Stevens and Bernard Carples] for the recovery of taxes to the amount of $16,000. The declaration alleged that the defendants, as copartners, were indebted to the plaintiffs in that sum on March 1, 1863, according to the provisions of the 75th section of the internal revenue act of July 1, 1862, "for the duties on knapsacks manufactured and sold and removed for consumption and for delivery to others than agents of the manufacturers, within the limits of the United States," &c., &c. A plea of the general issue was interposed, with a notice annexed that on the trial the defendants would prove that the knapsacks were manufactured and sold, not by the defendants, but by one Henry S. McComb, under contracts entered into by him with the government; that the defendants had no interest in the contracts, and were neither parties nor privies thereto; that the materials used in making the knapsacks, except buckles and brass trimmings, were furnished by McComb; and that the defendants and their workmen were employed by McComb simply to strap and finish the knapsacks after they had been delivered to them by McComb in an advanced stage of completion, and were paid by McComb for such work and labor.

The case being brought to trial before a jury, there was no difference between the government and the defendants as to the facts of the case, and accordingly the court directed the jury to find for the defendants, with leave to the plaintiffs to move, upon a case to be made, to have the verdict set aside, and have judgment entered in their favor for the amount of taxes claimed. [Case No. 16,393a.]

Mr. Courtney, for the United States.
Mr. Elmore, for defendants.

BY THE COURT (BETTS, District Judge). According to the proofs a fabric is equally entitled to the denomination of knapsack, whether manufactured in an exceedingly simple and cheap form, a single bag or sack, or connected with additional appendages, the union of the two comprising larger conveniences, superior finish and greater mechanical skill and labor. They are, when constructed either way, a manufactured article, the complete knapsack embraced in the denomination given to the article in the revenue laws declared upon. Two classes of citizens or subjects of the government are liable to taxation under the statute in question. The first may be said to be the producers of the article. Being an article of general and extensive merchandise and traffic, the masses in number and value of the commodities will probably be concentrated in most instances in the hands of capitalists or general dealers, and not be supplied individually by them as citizens and manufacturers. They acquire, hold and vend the articles and pay assessments upon them as marketable property and effects, equally if obtained in market overt or in fabrication as mechanics themselves.

The second general class will be that of the actual manufacturers of the commodities taxable. There, also, it will doubtless be found that practically a meagre proportion of the artizans personally are made liable to pay duties directly upon the fabrics, or that the actual makers are discriminated or known from contributors of materials, funds, labor or other aids to the general production. Where cases do exist in which manufactured property is owned and held, and sold or removed for consumption, or for delivery to others than agents of the manufacturers, &c., &c., upon whatever terms or conditions the manufacture may have been created and produced as between the mutual proprietors thereof, it will be competent to the government to deal with common property so produced and held under the law in question, with all the legal rights and remedies that might be exercised by individuals against persons standing in like relations in respect to each other, and reciprocal rights and responsibilities springing therefrom.

Upon that principle the United States, assuming that the defendants are manufacturers of dutiable products which are subject by law to the payment of $16,000 of duties or assessments, claim by implication a contract and promise by the defendants to pay that sum to the plaintiffs, and the defendants are sued as co-partners, claimed by the plaintiffs to be engaged in the business of manufacturing knapsacks. But they prove themselves to have been employed therein by McComb under an agreement with him to assist and aid in that business. The only work they did in the making of the knapsacks was supplying and sewing two small straps and buckles on each one, the material being of the value of a few cents for each knapsack. All the rest of the knapsacks were made and painted and the materials furnished by McComb, with whom the defendants were not connected in business except in these special particulars.

The declaration avers no undertaking on the part of the defendants binding them to make the knapsacks for the use of the government, or to secure or pay the duties recoverable from any party on the completion of the manufactured articles. That matter on the terms of the contract between the defendants and McComb remained in the hands of the defendants as agents, or sub-workers of McComb, or was entirely at

the disposal of McComb, as the producer or manufacturer thereof, or the sole agent shown by the evidence entitled to the delivery. The incidental services performed by the defendants cannot in any propriety of speech be termed making or manufacturing the article, any more than cutting and stitching a pair of straps to the legs of boots by a bootmaker, can be called manufacturing or making indefinite quantities of boots.

Considering the suit, then, upon the pleadings and proofs offered by the plaintiffs, it must be adjudged not sustained upon grounds of legal sufficiency in technical points of view, or upon the merits, and the decision of the case must be in favor of the defendants. Judgment for defendants on the verdict.

[The case was again submitted on written briefs, and the conclusion above reached was adhered to by the court, and judgment entered accordingly. Case No. 16,393.]

Case No. 16,394.

UNITED STATES v. STEVENS.

[4 Wash. C. C. 547.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1825.

SEAMEN — CONFINING THE MASTER — PLEADING AND PROOFS—VARIANCE.

1. What constitutes the offence of confining the captain. What is the offence of an assault, with a dangerous weapon.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867.]

2. An indictment for confining the captain, and for an assault with a dangerous weapon, committed on the high seas in the "outer road" off St. Domingo, in a vessel belonging to citizens of the United States, is supported by proving those offences to have been done in the "inner" road, and in port.

[Cited in U. S. v. Staly, Case No. 16,374; Ex parte Byers, 32 Fed. 407.]

3. The rule as to variance between the indictment and the evidence, as to time and place.

4. The indictment need not negative the fact, that the defendant was tried and convicted or acquitted by the foreign tribunal.

The first count in the indictment was for confining the captain, and the second for an assault on board of a vessel belonging to citizens of the United States, with a dangerous weapon. Both offences are charged to have been committed on the high seas, in the outer road off the port of St. Domingo. The master gave in evidence that, whilst the vessel was lying in the port of St. Domingo, and in the "inner road," he was hastily passing the mate at night, and might unintentionally have touched him with his arm. The mate immediately seized him by his collar, twisted his hand in his cravat, where he held him for some time, and in the struggle, the mate fell on the deck, and the captain on him, the mate still retaining his hold, and the captain repeatedly ordering him to loose his hold and he would let him get up. The mate at length cried out for assistance, which brought two or three persons forward, who with difficulty, relieved the captain from the hold the mate had of him. The captain, apprehending himself to be in danger, retreated to his cabin and got out his pistol, which he laid on his bed, and was then returning to the deck, when, at the foot of the stairs, he was met by the mate, who presented a pistol, which he declared to be loaded, to the breast of the captain. The latter immediately seized the muzzle and turned it from his breast, and succeeded finally, with the assistance of some persons from the deck, to wrest the pistol from his hand.

The District Attorney and Mr. Biddle, for the United States.

Grillin & Pettit, for defendant.

WASHINGTON, Circuit Justice (charging jury). 1. That upon the facts stated by the captain, if believed by the jury, both of the offences charged in the indictment were proved. That the captain was confined upon the deck by the hold taken of him in the first rencontre, and afterward by presenting the pistol at his breast in the cabin, and thereby preventing him, for a time, from going upon deck. And that the latter act amounted to an assault with a dangerous weapon.

2. It has been objected, by the counsel for the defendant, that the evidence being that the alleged offences were committed in the port of St. Domingo, and not in the outer road, off the port, as laid in the indictment, the latter was not supported, and consequently that the verdict must be for the defendant. This objection, in the opinion of the court, cannot avail the defendant, see Chit. Cr. Law, 184–241. Where place or time is material, and enters into the substance of the description of the offence, there it must be precisely laid and proved. So if a scienter be laid, when it forms no part of the offence, or it be laid to be feloniously done when the act is not felonious, neither need be proved. Chitty, in his first volume of Criminal Law, 241, after having stated with what seeming accuracy time, place, sums, magnitudes, quantity, and value must be described in the indictment; sums up the whole doctrine by observing, that a variance in the evidence from those points will never be material, unless the essence, or degree of the offence consists in their correctness. Now it has been decided that the offence of confining the master may be committed in port, as well as on the high seas, and such is the manifest construction of the twelfth section of the crimes act of 1790 [1 Stat.

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

112]. And by the fifth section of the late crimes act it is declared, that if any offence shall be committed on board of a vessel belonging to a citizen of the United States, while lying in a port within a foreign jurisdiction, by any person belonging to the ship's company, or by any passenger, it may be cognizable by the proper circuit court of the United States, in like manner as if it had been committed on the high seas. The place then where the offence was committed, if it be committed in a foreign port, or on the high seas, does not at all constitute any part or degree of the offence; and being therefore immaterial, it need not be proved. Nor does the proviso to the fifth section make any difference, as the counsel for the defendant contended it did. It is not necessary that the indictment should negative the fact that the defendant had been tried, and convicted or acquitted by the tribunal of the country where the offence was committed. If he was so, it is for the defendant to plead it. The plea is still immaterial to the substance of the description of the offence, or to the degree of it.

Case No. 16,395.

UNITED STATES v. STEVENSON.

[1 Abb. U. S. 495.] [1]

District Court, S. D. New York. Feb. Term, 1869.

PROCESS ACTS—FOLLOWING STATE PRACTICE—ATTACHMENTS—RULES OF COURT.

1. An information prosecuted in a district court must be regarded and treated as a common law proceeding; except in that aspect a district court can have no jurisdiction of it.

2. The forms of process (except style) and modes of proceeding in the United States courts, sitting within the thirteen states which originally composed the Union, in actions at common law, are the same as those which were employed in the supreme courts of the states, respectively, on May 8, 1792; except so far as the United States courts may have prescribed alterations.

3. Section 1 of the act of May 19, 1828 (4 Stat. 278), relative to process of the United States courts, does not apply within states which were members of the Union before September 29, 1789 And the act of May 8, 1792 [1 Stat. 275], does not adopt, prospectively, laws which may have since been passed by the states (though it enables the several courts to adopt them), but only adopts those then existing.

4. It is not necessary, in order to establish that a particular mode of proceeding has been adopted by a United States court, that there should be found a written rule declaring such adoption. The practice of a court may be established without the existence of a positive written rule.

5. Under the practice which has prevailed in the district court for the Southern district of New York, an attachment may be issued in aid of a common law information prosecuted by the United States.

Motion to vacate an attachment.

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

J. E. Ward and C. A. Seward, for the motion.

T. Simons, Asst. U. S. Dist. Atty., opposed.

BLATCHFORD, District Judge. This is an action at common law. The first paper placed on the records of the court in it was an information, which was filed on March 1, 1867. It states that the attorney of the United States comes "in a suit of common law and informs the court" that the United States bring suit against the defendant for the cause of action propounded in two articles which follow in the information. The substance of them is, that the United States were entitled to the immediate possession of certain bales of cotton, their property; that the defendant, being in possession of the cotton, unlawfully converted and disposed of it to his own use; that such conversion was fraudulent; and that the proceeds of the property had been disposed of by the defendant with intent to secrete the same from and to defraud the United States. The information prays that process of attachment may issue against the property of the defendant, and is accompanied by an affidavit in support of the application for an attachment.

Indorsed on the information is a direction signed by my predecessor, and dated February 28, 1867, in these words: "Let process of attachment issue against the property of the within-named Vernon K. Stevenson, agreeably to the prayer of the within-named information, and let the said Vernon K. Stevenson be cited to appear on the return of process herein, and answer to the allegations in this behalf." Thereupon, process was issued to the marshal on March 1, 1867, reciting that the information had been filed "in a certain action at common law," and commanding the marshal to cite the defendant, if found in his district, to appear and answer the information, and, also, to attach the property of the defendant. The information and the process stated the claim at the sum of one million dollars.

The return of the marshal to the process was that he had served a copy of it on the defendant, and had also served a copy of it on the president of a bank in the city of New York, stock in which was alleged to be owned by the defendant.

On March 1, 1867, a notice, signed by the district-attorney, and entitled in the suit and indorsed as being a lis pendens, was filed in the office of the clerk of this court. The notice states "that an action has been commenced, and is now pending, in this court, upon an information against the above-named defendant, and that a warrant of attachment, according to the rules and practice of this court and the statute in such case made and provided, has been duly issued therein against all and singular the property of the said defendant, Vernon K. Stevenson, both real and personal, situate and being within the city and county and state of New York, and also

situate and being in the Southern district of the United States for the state of New York, and that the following is a description of all and singular the real estate of the said defendant, Vernon K. Stevenson, situate and being within the said city and county and state of New York, attached, levied upon, and affected under and by virtue of said process or warrant of attachment," and closes with a specific description, by metes and bounds, of the real estate referred to, which embraces forty lots of land in the city of New York. A like notice of lis pendens was filed by the district-attorney in the office of the clerk of the supreme court for the city and county of New York.

The defendant put in his answer in the suit, and the issue has been tried by a jury, resulting in a verdict for the defendant, under the direction of the court, on a question of law. [Case No. 16,396, opinion of district court.] The government has taken steps toward a review of the decision. [Id., opinion of circuit court.]

The defendant now moves to vacate the attachment on the ground that it was issued without authority of law, and to set aside the notices of lis pendens, on the ground that they were filed without authority of law.

In regard to the attachment, it is claimed that this court has no authority to issue any attachment in a common law action; that in the practice of the courts of the United States for this district, no attachments have ever been issued in common law actions; that the right to issue attachments and the right to file notices of lis pendens are not matters of ordinary legal right, but exist only as creations of positive statutes; and that there is no statute of the United States which authorizes this court to issue an attachment, or to sanction the filing of a notice of lis pendens in a suit of the character of the present one.

This suit must necessarily be regarded as a suit at common law, or this court would have no jurisdiction of it; for, by sections 9 and 10 of the judiciary act of September 24, 1789 (1 Stat. 77), no jurisdiction of any equity suit is given to this court, except of suits in equity against consuls or vice-consuls; and by section 9 of that act, in connection with section 4 of the act of March 3, 1815 (3 Stat. 245), jurisdiction is expressly given to this court of all suits at common law where the United States sue.

The statute which governs the forms of process and the forms of proceeding, and the modes of proceeding in suits at common law, in the courts of the United States, is the act of May 8, 1792 (1 Stat. 275). The second section of that act provides that "the forms of writs, executions, and other process, except their style and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States,' . . . . except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." The act referred to, "to regulate processes in the courts of the United States," is the act of September 29, 1789 (1 Stat. 93), the second section of which provides "that until further provision be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." This court existed when these acts of 1789 and 1792 were passed. It, therefore, is required, by the act of 1792, to use as its forms of process and modes of proceedings in suits at common law, the forms and modes which it was using in such suits on May 8, 1792 (and which forms and modes were required by the act of 1792, taken in connection with the act of 1789, to be the forms and modes used or allowed on September 29, 1789, in the supreme court of the state of New York), subject only, as provided by the act of 1792, to any provisions contained in the judiciary act of September 24, 1789 (1 Stat. 73), and also to such alterations and additions as this court shall, in its discretion, deem expedient, and also to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to this court.

The first section of the act of May 19, 1828 (4 Stat. 278), does not apply to the present case, because the state of New York was admitted into the Union before September 30, 1789; and the third section of that act applies only to final process.

It is unnecessary to cite authorities to show that on September 29, 1789, there was no process of attachment of property used or allowed in the supreme court of New York in a common law action where an individual was the plaintiff, and where the defendant was personally served with process in the action, unless the defendant was shown to be an absconding or concealed debtor. No general process of attachment of property in a common law action in favor of an individual plaintiff was known to the common law. The only statute authority which existed on September 29, 1789, for the issuing of an attachment by the supreme court of New York in a common law action, was that conferred by the act of the legislature of New York, passed April 4, 1786 (1 Greenl. Laws N. Y. 214),

which provides that when a debtor secretly departs the state, or keeps concealed within it, a creditor, or creditors, to a certain amount, may apply to a judge of the supreme court showing the debt, and the departure or concealment of the debtor, with intent to defraud his creditors of their just dues, or to avoid being arrested by the ordinary process of law, and proving the departure or concealment by two credible witnesses, and obtain from the judge a warrant to attach the real and personal estate of the debtor. The present case was not one of that kind.

No provisions on the subject are found in the judiciary act of September 24, 1789; and the supreme court of the United States has never, by rule, prescribed any regulations to this court in regard to the issuing of attachments in common law actions.

The supreme court decided, in Wayman v. Southard, 10 Wheat. [23 U. S.] 1, that the act of 1792 was confined, in its adoption of state laws, or regulating the modes of proceeding in suits at common law, to those in force in September, 1789; that it did not recognize the authority of any laws of that description which might be afterwards passed by the states; and that it enabled the several courts of the Union to make such improvements in their forms and modes of proceeding as experience might suggest, and especially to adopt such state laws on the subject as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789.

It is not necessary that a practice of a court to be recognized or sustained, should be embodied in a written rule. Written rules are undoubtedly preferable, but a practice in respect to a particular matter in a court may be established without the existence of a positive written rule. Fullerton v. Bank of U. S., 1 Pet. [26 U. S.] 604, 613; Duncan v. U. S., 7 Pet. [32 U. S.] 435, 451. The fact that my learned predecessor, who presided in this court for more than forty years, granted this attachment, is the strongest possible evidence that he must have regarded it as the practice of the court to issue an attachment in a case like the present one, and that he must have understood either that such practice existed in the supreme court of New York on September 29, 1789, or that a departure had been established, either by written rule or by the practice of this court, from the practice which existed in September, 1789; and that this court had, within section 2 of the act of 1792, altered its form of process and mode of proceeding in the suit, like the present one, in such manner as to authorize the issuing of the attachment that was issued in this case. The judge who issued it knew better than any other person the practice of this court in the respect in question, and his action in a case of the character of the present one, involving a claim of so large an amount, and affecting real estate of such large value, must be regarded by me as conclusive in regard to the fact of the establishment and existence of a practice which warranted the attachment in this case. Whether he regarded it as reposing on the privilege of a prerogative of the United States, or on the construction of some written rule of this court, or on acquiescence and uniform mode of proceeding, or on some specific acts. of congress, cannot be ascertained, as his views are not on record, and the point is immaterial on this application. I am satisfied, from inquiry, that the matter of issuing the attachment was deliberately considered by him, and that his conclusion was not hastily reached. The propriety of that conclusion is strengthened by the fact that nearly two years have elapsed without the authority of the court to issue the attachment being questioned by the defendant. So far, therefore, as the motion to vacate the attachment is founded upon an alleged want of authority in this court to issue it, the motion must be overruled.

The act of March 14, 1848 (9 Stat. 213), was referred to as affecting the question. The act provides "that whenever, upon process instituted in any of the courts of the United States, property shall hereafter be attached to satisfy such judgment as may be recovered by the plaintiff in such process, and any contingency occurs by which, according to the laws of the state, such attachment would be dissolved upon like process pending in, or returnable to, the state courts, then such attachment or attachments made upon process issuing from, or pending in, the courts of the United States within such state, shall be dissolved, the intent and meaning of this act being to place such attachments in the courts of the states and the United States upon the same footing." No contingency, such as is referred to in this act, is shown to have occurred, as a ground for dissolving this attachment.

So far as the motion is based upon the ground of amnesty and pardon, of which the defendant claims the benefit, those matters go to the entire action, and not merely to the question of attachment, and must be brought up, if at all, by way of plea. The question of pardon was so brought up in the Case of Armstrong's Foundry, 6 Wall. [73 U. S.] 766.

If the attachment was properly issued, it was not irregular to file in the office of the clerk of this court the notice of lis pendens that was filed therein. As to the one filed in the office of the clerk of the state court, this court has no control over the records of that court, or over the action of the district-attorney in filing it there.

Motion denied.

Case No. 16,396.

UNITED STATES v. STEVENSON.

[3 Ben. 119; [1] 9 Int. Rev. Rec. 49; 10 Int. Rev. Rec. 140.]

District Court, S. D. New York. Jan. 12, 1869.
Circuit Court, S. D. New York. Oct., 1869.

SEIZURE OF ENEMY PROPERTY ON LAND—FORFEITURE—ACTS OF JULY 13 AND AUGUST 6, 1861, AND MAY 20 AND JULY 17, 1862.

1. The seizure of enemy property as prize of war on land is not authorized by the law of nations, and can only be upheld by the municipal laws of the nation which seeks to enforce the forfeiture.

2. Where a statute denounces a forfeiture of property as the penalty for an offence, and does not say that the property or its value is forfeited, the forfeiture takes place at the time the offence was committed, and operates as a statutory transfer of the right of property to the government.

3. The act of July 13, 1861 (12 Stat. 255), was not a mere temporary act. Forfeitures incurred under it during the continuance of hostilities might be enforced afterwards.

4. The 5th and 9th sections of that act must be construed together, and the forfeiture declared in the 5th section can be enforced only by a seizure of the property.

5. The act of August 6, 1861 (12 Stat. 319), May 20, 1862 (12 Stat. 404), and July 17, 1862 (12 Stat. 589), are subject to the same construction, and forfeitures under them can only be enforced by a seizure of the property.

This suit was a suit in trover brought by the government against the defendant [Vernon K. Stevenson], to recover the value of 1,000 bales of cotton, alleged to have belonged to the government and to have been converted by the defendant to his own use. The ground taken by the government was, that the defendant, being president of the Nashville and Chattanooga Railroad, came into possession of the cotton, which had belonged to the Confederate government, and thus, by right of forfeiture, to the government of the United States, and that he brought the cotton to New York and there disposed of it and kept the proceeds.[2]

BLATCHFORD, District Judge (charging jury). The right of recovery, in this case, on the part of the government, rests upon municipal statutes, because the action, although not a suit in rem, following a seizure of property on land, is sought to be made equivalent to such a suit. The case, therefore, does not fall within the class of suits which follow captures of property on the sea, jure belli, under the law of prize. The law in regard to captures of property on land, which is claimed to be forfeited to the government under the operation of the rules of war, has been settled by the courts of the United States, by repeated adjudications; and the government must recover, if at all, in this case, precisely as if it had now under seizure the cotton in question. The government claims that the defendant has taken the cotton and disposed of it to his own use, and that it has the same right to maintain this action of trover against the defendant, for the conversion of the cotton, as it would have had to maintain a suit in rem against the cotton, or as it would have had to maintain a suit against the defendant for the conversion of the cotton, if, after a decree of condemnation of the cotton, in a suit in rem against it, and before a sale of it, the defendant had got possession of it and converted it to his own use.

As early as the year 1814, in the case of Brown v. U. S., 8 Cranch [12 U. S.] 110, it was held by the supreme court of the United States, that the seizure of enemy property as prize of war, on land, jure belli, is not authorized by the law of nations, and can only be upheld by the municipal laws of the nation which seeks to enforce the forfeiture. That decision and the doctrine of it were cited and approved by Mr. Justice Nelson, in the circuit court of the United States for this district, in May, 1865, in the case of U. S. v. 1756 Shares of Capital Stock [Case No. 15,961]. That was a suit in rem, prosecuted under the confiscation acts of August 6, 1861 (12 Stat. 319), and July 17, 1862 (12 Stat. 589). In his opinion in that case, Mr. Justice Nelson, speaking of those acts, remarks, that they expressly provide that the proceedings under them shall conform to the proceedings in admiralty and revenue cases; and the conclusion he draws, and it is one which applies to all the confiscation acts relied on in this case, from the act of 1861 down, is, that these acts are nothing but an extension, by act of congress, to enemy property captured on land, of the rule which, according to international law, had always been applied to enemy property captured at sea, and that the same rules must be applied in both cases. It necessarily follows, that the right which the United States are seeking to enforce in this suit, and the rights which they would seek to enforce by a suit in rem, if they had seized this cotton under these laws, are rights which rest wholly upon statute law.

It has been held by the supreme court of the United States, in the case of The Reform, 3 Wall. [70 U. S.] 617, that the act of July 13, 1861 (12 Stat. 255), which is one of the acts on which the government relies for a recovery in this case, was not a mere temporary act; and that, although the restrictions upon commercial intercourse prescribed by that act were limited in duration to the period of the existence of hostilities, still, forfeitures incurred under it during the continuance of hostilities may be enforced afterwards. Therefore, in a proper case, the government could now enforce a forfeiture incurred by the defendant in respect to property, notwithstanding the proclamations of the president in regard to the ces-

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

[2] An attachment was issued at the beginning of the suit, under which real and personal estate belonging to the defendant was seized. After the trial of the cause, a motion was made to dissolve the attachment. Judge Blatchford's decision, denying the motion, is reported in [Case No. 16,395].

sation of hostilities. But the difficulty in the present case lies here, that the government has failed to prove the first material allegation in the information; and that is, that they are entitled to the possession of this cotton in such a manner that they have a right to enforce that right of possession in this action.

The 5th section of the act of July 13th, 1861, declares that all property in transit to or from any insurrectionary state or section shall be forfeited to the United States. It was held in one case by Chief Justice Taney, in the Maryland district (U. S. v. 2,000 Bushels of Wheat, cited in U. S. v. The Francis Hatch [Case No. 15,158]), that the proper interpretation of that 5th section is, that no property can be condemned under it unless such property be actually seized while in such transit. But, without passing upon that point, I am entirely satisfied (notwithstanding the declaration, in the 5th section of the act, that, for the offence defined therein, the property shall be forfeited to the United States), that, inasmuch as the title of the United States must be based wholly upon the statute, the whole statute must be construed together. The 9th section must be construed in connection with the 5th section. The 9th section provides, "that proceedings on seizures for forfeitures under this act may be pursued in the courts of the United States in any district into which the property so seized may be taken and proceedings instituted; and such courts shall have and entertain as full jurisdiction over the same as if the seizure was made in that district." My view of this statute is, that it clearly contemplates that the forfeiture declared in the 5th section is to be enforced only by a seizure of the property; and that such forfeiture cannot be enforced in any other manner. Inasmuch as the whole right is statutory, if congress has seen fit to limit the statutory right to a forfeiture to be enforced only by a seizure of the property, the United States are so limited; and, inasmuch as that is their only right, if they are unable to seize the property, their right does not come into being, but remains an imperfect right. Congress has not seen fit to go any farther than to say: "You shall have this forfeiture if you seize the property." But if, for any reason, whether from the act of the defendant himself, or from any cause whatever, the government cannot seize the property, it cannot enforce the forfeiture.

This view is entirely consistent with the decisions that have been referred to by the counsel for the government, in reference to the time when a forfeiture declared by statute in favor of the government takes effect. The general language of all those decisions is, that where a statute denounces a forfeiture of property, as the penalty for the commission of an offence, if the denunciation is in direct terms, and not in the alternative, that is, if the statute does not say that the forfeiture shall be of the property or its value, the forfeiture takes place at the time the offence was committed, and operates as a statutory transfer of the right of property to the government. But, in every one of the cases cited, and in all the cases on the subject, in the courts of the United States, which have fallen under my observation, in the first place, the proceeding was in rem, and, in the second place, the question always came up upon the point as to whether, in such proceeding in rem, the title of the government to the property, and to a decree condemning it as forfeited, could be cut off by reason of the intervening, after the commission of the offence, of the title of a bona fide purchaser. It is only in respect to such a question that the decisions have been made. The principle is a sound one, unquestionably, and the whole subject has been fully considered in an opinion given by the district judge of the district of Kentucky, (Judge Ballard,) in the case of U. S. v. 56 Barrels of Whiskey [Case No. 15,095]. In that case, which was a suit in rem for a forfeiture of whiskey, a person claimed to be a bona fide purchaser of the whiskey, and that his purchase before prosecution, though after the commission of the offence, cut off the title of the government; but the court decided in favor of the government and against the claimant. In the case of Caldwell v. U. S., 8 How. [49 U. S.] 366, which is one of the leading cases on the subject, the opinion of the court was delivered by Mr. Justice Wayne, and all that he says on the point must be taken together. He says: "The forfeiture is the statutory transfer of right to the goods at the time the offence is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of the contrivance by which he has violated the law. The title of the United States to the goods forfeited is not consummated until after judicial condemnation; but the right to them relates backward to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation." That decision cannot be considered as going any farther than the question then before the court; and it is, in my judgment, contrary to principle and precedent to hold, that the United States can enforce a right of property, in a suit of the kind now on trial before this court, by claiming that the forfeiture, solely as between themselves and the defendant, was complete and perfect at the time of the commission of the offence, without any judicial proceeding to enforce such forfeiture.

But, even if the rule could be different under some statutes, I do not think it could be different under this statute of 1861, because, the forfeiture provided for by the 5th section of that act, taken in connection with the 9th section, is a forfeiture that can be enforced only by a seizure of the property.

I now pass to the act of May 20, 1862 (12

Stat. 404). Even if the regulations of the secretary of the treasury, made under the acts of 1861 and 1862 and other acts are to be considered as matters of which the court can take judicial notice, because they are expressly referred to by their dates, and adopted, in the third section of the act of July 2, 1864 (13 Stat. 376), and even assuming that this cotton would have been forfeitable by virtue of regulations made by the secretary of the treasury in pursuance of the act of 1862, still that act is subject to the same construction as the act of 1861; and, although the 3d section of that act declares that property which shall be transported in violation of the act, or of any regulations of the secretary of the treasury established in pursuance thereof, shall be forfeited to the United States, yet the 4th section of the act says, that "the proceedings for the penalties and foreitures accruing under this act" (covering those accruing under regulations to be established by the secretary of the treasury, as well as those accruing under the act itself), "may be pursued * * * in the modes prescribed by the 8th and 9th sections of the act of July 13th, 1861, to which this act is supplementary." Therefore, in this respect, the construction of the act of 1862 must be the same as that of the act of 1861. The proceedings for a forfeiture under the act of 1862 must be pursued in the manner prescribed by the 9th section or the act of 1861, that is, by seizure, and in no other way.

The next statute is the act of August 6th, 1861, before referred to. That act provides, that if any person, during an insurrection, after the president shall have declared by proclamation that there is an insurrection, shall acquire, sell, or give any property to aid the insurrection, the president shall cause such property to be seized, confiscated, and condemned, and that the condemnation shall take place in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty, in any district in which it may be seized, or into which it may be taken and proceedings first instituted. The statute does not declare any forfeiture at all. It merely provides that the president may cause any property to be seized; and, unless he causes it to be seized, the statute does not cover it at all. Therefore, it is plain that there can be no suit or recovery founded on that act, unless the property is first seized.

The remaining act is the act of July 17th, 1862, before referred to, the 5th section of which provides, that "to insure the speedy termination of the present rebellion, it shall be the duty of the president of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section," (including persons thereafter acting as officers of the army or navy of the rebels in arms against the government of the United States,) "and to apply and use the same and the proceeds thereof for the support of the army of the United States." No forfeiture is declared by that act, in any other language. It merely states that the president may seize the property and apply it to the support of the army of the United States.

As it does not appear, in this case, that any of the cotton was seized, these views of the various statutes relied on by the government seem to me to dispose of this case. They lie at the very threshold of it, without the examination of any other questions.

The theory upon which the information in this case proceeded when it was filed, if that theory can be judged of from the information and the affidavit appended to it—for, the information refers to and embodies the affidavit as a part of the information, and the affidavit refers to and embodies the information as a part of the affidavit—is, that this cotton was the property of the public authorities concerned in the rebellion, and that the United States, by virtue of their sovereign right, became the owners of the cotton, eo instanti, at the very moment the rebel authorities claimed to own it. Such a right in the United States, if it existed in this case, would not at all depend upon any of the statutes which have been cited; and, if it were shown, in point of fact, by the testimony in this case, that this cotton belonged to the acting public authorities who were carrying on the rebellion, and calling themselves the Confederate government, the right of the United States, by virtue of their being the sovereign power, and by reason of such acting public authorities being rebel authorities, would come into operation over the property, by virtue of the constitution of the United States, and of their sovereign authority, irrespective of any statute, so as to make the subsequent conversion of the property by the defendant a tort, as against the immediate right of possession of the United States. But there is no such testimony in the case. The evidence is quite clear that none of the cotton, for the proceeds of which the government sues in this case, was the property of this so-called "Confederate Government," or of any of its subordinate governments acting in rebellion and hostility to the United States.

Therefore, as I before remarked, the right which lies at the threshold of the claim of the government to recover in this case, being a right resting wholly on the statute, and such right not being supported by any statute, even conceding all the facts to be as shown by the government, it is the duty of the court to instruct you, upon the facts and the law, that the government cannot recover, and that the defendant is entitled to your verdict. I should hesitate so to direct you in a case like this, if I were not entirely satisfied that the government cannot recover in it under any circumstances. I, there-

fore, direct you to find a verdict for the defendant.

The jury, under the foregoing instructions, rendered a verdict for the defendant.

The case was taken, by writ of error, to the circuit court, which, in October, 1869, affirmed the judgment. The following was the opinion of that court:

NELSON, Circuit Justice. This is a writ of error to the United States district court of the Southern district of New York. The suit is an action of trover brought by the United States against Stevenson, to recover the value of a large quantity of cotton, which, it is alleged, belonged to the plaintiff, and had been converted by the defendant to his own use. The cause was tried before a jury, and, on the trial, it appeared that the defendant, being a resident and citizen of Tennessee when the recent civil war broke out, remained in the state, and took part with the insurgent states, and was the president of the Nashville and Chattanooga Railroad, and ran the road in their service; and that, while thus engaged, he bought cotton within those states, and shipped it, with the knowledge and assent of the so-called "Confederate States," from Wilmington, North Carolina, to foreign ports, in violation of the United States blockade. It also appeared that, as the Union army approached Tennessee, and Nashville, he removed cotton that he had bought, and cotton also that belonged to others, further into the interior, to prevent the same from being captured by the forces of the United States. There is no proof in the case, that any part of the cotton was ever in the possession of the United States, or that they ever had any title to the same, or that it ever belonged to the so-called "Confederate States," but, on the contrary, it was purchased in the Confederate States, by the defendant, and shipped by him abroad, in violation of the existing blockade, and sold abroad, or sold within the said states. The court below, at the close of the testimony, being of opinion that no case was made out on the part of the plaintiffs, directed a verdict for the defendant.

The act of July 13th, 1861 (section 5), made it lawful for the president of the United States, where a state of insurrection existed, to declare it by proclamation, and provided that, thereupon, all commercial intercourse by and between the same, and the citizens thereof, and the citizens of the rest of the United States, should cease, and be unlawful, &c., and the goods, &c., coming from said state or section into other parts of the United States, &c., should be forfeited to the same. 12 Stat. p. 255. The act supplementary, passed May 20th, 1862, (12 Stat. p. 404,) section 3, confers on the secretary of the treasury the power, upon satisfactory grounds of belief that the goods, &c., are intended for any place in the possession or under the control of the insurgents, in all cases where he may deem it expedient to do so, to require security that they will not be carried to such place, nor used to give aid or comfort to the insurgents; and provides that a transportation in violation of the act, or of the regulation, shall work a forfeiture.

The act of August 6, 1861 (12 Stat. p. 319, § 1), provides that, during the insurrection, goods purchased or sold with intent to use or employ the same, &c., in aiding or promoting the insurrection, shall be subject of prize and capture, and it is made the duty of the president to cause the same to be seized and confiscated.

The act of July 17, 1862 (12 Stat. p. 591, § 6), makes the property of persons engaged in rebellion, who will not return to their duty in sixty days after warning by proclamation of the president, subject to seizure, and it is made the duty of the president to seize, &c.

The only remaining act that is material to refer to is that of March 3, 1863, § 1, (12 Stat. p. 820,) which authorizes the appointment of agents to collect captured and abandoned property.

I need hardly say, that neither of these statutes, or any provision in them, has any bearing on the facts, as disclosed in the case, or affords any ground for an inference or conclusion that the cotton in question, sold and converted to his own use by the defendant, belonged to the United States. Certainly not, unless all the property of citizens or people in the Confederate States belonged to the United States during the war.

There is another branch of this case that furnished, perhaps, the grounds for its original institution, which, as has turned out in proof, has utterly failed. The original information, as it is called, went on the ground that the defendant had fraudulently converted the cotton to his own use, and that the proceeds were disposed of with intent to secrete the same, and defraud the government, and prayed for process of attachment against the property of the defendant. Thereupon process of attachment issued, and a large amount of real and personal estate was attached, and still remains under the said process. The affidavit upon which this process was issued is remarkable, when compared with the facts of the case, as proved before the jury. The affiant states, that he was the person who filed the information against the defendant, which was on the 17th of December, 1866; that 3,000 bales of the cotton, or thereabouts, being in the states of Georgia, Alabama, and Tennessee, were the property of the Confederate States, when the defendant took possession of it; that, in the summer of 1865, he transported the same to the city of New York, within the Southern district of New York, to be sold and disposed of at that city, and converted the cotton into money, the proceeds of which,

amounting to $1,000,000, or thereabouts, the defendant received, and has converted the same into real or personal estate in that city; that the cotton was brought into the state of New York from the insurrectionary states, in violation of the proclamation of the president, of the 16th of August, 1861, and of the acts of congress, (referring to them;) and that it was the property of the United States. It was upon this affidavit that the process of attachment was issued, which seems to have been in some way regarded as a seizure, not of the cotton, but of the real and personal estate of the defendant, as a substitute for the same; and yet, the case has been tried as a simple action of trover and conversion in personam.

The case, as tried in the court below, and as ruled by the learned judge, is a very simple and plain one, and, in every aspect in which it has been presented, on the testimony, can lead to but one result, and that is, that the United States showed no title to the property, or to the possession of it, which was indispensable to maintain this action.

As it is shown that the affidavit on which the process of attachment issued was wholly untrue and false, or mistaken, the process of attachment must be set aside and discharged. Instead of the cotton belonging to the Confederate States, it belonged to the defendant; and, instead of being shipped to New York in violation of the acts of congress, it was shipped from a Confederate port to a foreign country, in violation of the blockade of the port of Wilmington; but this fact could not change the title of the property, or work a forfeiture of the same to the United States, unless seized as prize of war.

The judgment below is affirmed, and the process of attachment is set aside and discharged.

[A motion had been made in the district court to discharge the attachment, but was denied. See Case No. 16,395.]

Case No. 16,397.

UNITED STATES v. STEVENSON et al.

[Hoff. Land Cas. 156.] [1]

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

MEXICAN LAND GRANTS—CONFIRMATION.

[Grant confirmed, where the title paper produced by the claimants was regular and proven to be genuine, and the expediente from the archives showed that all the preliminary proceedings were in due form, and that the grant was confirmed by the departmental assembly about six months after its date, it appearing that the conditions had been complied with.]

Claim for two leagues of land in Contra Costa county, confirmed by the board, and appealed by the United States.

William Blanding, U. S. Atty.

Volney E. Howard, for appellees.

[1] [Reprinted by permission.]

HOFFMAN, District Judge. The claim in this case is for a piece of land called "Medanos," embracing two square leagues "a little more or less." It was confirmed by the board, and the cause has been submitted to this court on appeal, without argument, or the statement of any objection to its validity.

The title paper is produced by the claimants and its genuineness duly certified. The expediente from the archives not only shows that the preliminary proceedings were in due form, but that the grant was confirmed by the departmental assembly about six months after its date. It is also shown that the conditions were fully complied with. The delineation on the diseño appears to be rude and inexact, but the title itself describes the boundaries of the tract with some precision. In that document the land is mentioned as that known by the name of "Medanos," and bounded on the south by the land of Citizen Noriega, on the north by that of Citizen Salvio Pacheco, on the east by the river San Joaquin, and on the west by the "lomarias" or small hills. The third condition states the extent of the granted land to be two square leagues, a "little more or less." Some of the witnesses appear to have supposed that the land embraced within these boundaries would include a tract of far greater extent than that mentioned in the condition. But it is clear that they have confounded the "lomarias" mentioned in the grant with the range of mountains known as the "Contra Costa Hills," which lie at a considerable distance, and which would, if taken as the western boundary, not only include a tract of country of great extent, but also one or more intervening ranchos. It would seem, however, that the "lomarias" spoken of are a range of low hills, and that the land included within these and the other boundaries of the grant has about the extent mentioned in the grant.

Such appears to have been the view taken of the case by the board, and we see no reason for a different conclusion. The mesne conveyances appear to be regular. Under the proofs offered, the claimant, [Jonathan D.] Stevenson, is entitled to a confirmation of the part conveyed to him by the deed as reformed according to the intentions of the parties under the decree of the district court of this state.

A decree affirming the decision of the board must be entered.

Case No. 16,398.

UNITED STATES v. STEVENSON.

[6 Int. Rev. Rec. 221.]

District Court, S. D. New York. 1867.

PRACTICE—POSTPONEMENT OF TRIAL—COURT RULES—AMENDMENT OF PLEADINGS.

[1. Where the plaintiff in a common-law case, which has been placed on the calendar, and is called in its regular order for trial, desires a postponement until the next term for the purpose of obtaining the testimony of new witness-

es, it is not the proper practice to move on affidavits for such postponement. The practice in such case is (by district court rule 240) regulated by the rules of the circuit court, under which (rules 38 and 51) the plaintiff alone can notice a jury case for trial, and if, when it is called, he is not ready, all that is required is that he shall fail to respond, in which case it is marked as "Passed." After the jury for the term has been discharged, defendant may move for a judgment of dismissal, and plaintiff in answer thereto may show his excuse, and if it be deemed sufficient, the court can permit him to stipulate to try the cause at the next term.]

[2. In an information at law against defendant for removing and converting to his own use certain cotton belonging to the United States, *held*, that certain newly-discovered evidence, showing new transactions, in relation to the cotton, and in respect to which plaintiff showed that he was guilty of no laches, was sufficient ground for allowing a postponement of the trial until the next term, and for permitting an amendment to the information, even after the case was called for trial on the calendar.]

S. G. Courtney, U. S. Dist. Atty.
John E. Ward, for defendant.

BLATCHFORD, District Judge. This cause, which is an information filed by the United States, in a common-law action, against the defendant [Vernon K. Stevenson] for the alleged conversion of certain cotton, the property of the United States, being on the jury calendar of this court for trial at the present term, and being called in its order for trial, the district attorney moves on affidavit that the trial of the cause be postponed to the next term on the alleged ground that the testimony of sundry witnesses who are named, and who reside in Tennessee and elsewhere in the United States, cannot be procured in time for a trial at the present term and must be taken by commission, and that the necessity for the testimony of those witnesses has just been discovered under circumstances which excuse all charge of laches on the part of the United States. The motion so made is wholly unnecessary and not according to the practice of the court. By rule 240 of this court, the practice applicable to this case, at its present stage, is regulated by the rules of the circuit court now in force. By those rules (rule 38) only the plaintiff in a common-law suit can notice it for trial before a jury on an issue joined. The defendant cannot notice it. When it is noticed and put on the calendar by the plaintiff, if when it is called for trial the plaintiff is not ready to go to trial, it is unnecessary for him to make any motion, or to do anything more than fail to respond to the case when it is called. If he so fails, the case is marked as "Passed," and the defendant cannot then or there ask for any action of the court in the matter. But by rule 51 of the circuit court, after the discharge of the jury in the same term for which notice of trial was given by the plaintiff, or at the next term, the defendant may move for judgment dismissing the suit because the plaintiff did not go to trial. If, in answer to such motion, the plaintiff shows sufficient excuse, to be approved by the court, for not having gone to trial, the court can permit the plaintiff to stipulate to try the cause at the next term. It would be sufficient in the present case to deny the motion of the plaintiff, as unnecessary and not according to the practice of the court; but, inasmuch as the whole subject is before the court now on affidavits on both sides, and the defendant moves to dissolve the attachment issued in the case, and the district attorney expresses his willingness to consider the defendant as moving to dismiss the suit under rule 51 of the circuit court, I shall dispose of the matter as if the defendant were making that motion.

The plaintiff also asks leave, on notice, to amend his libel by adding a new count. The testimony of the witnesses named in the affidavits on the part of the plaintiff as therein stated goes directly to the averments contained in such new count. The libel, as it stands without such new count, would seem to be confined to the transportation by the defendant of the cotton in question to New York, and the conversion of it there. The new count is not confined to transactions in the cotton at New York, but is broader in its scope. The answer already put in by the defendant denies all transactions in the cotton in question, at New York or elsewhere, and is therefore broad enough to cover the new count. I think that, under the facts disclosed in the affidavits on the part of the plaintiff, the amendment to the libel must be allowed, and that those affidavits show that the plaintiff has not been guilty of any laches. They show a sufficient excuse on the part of the plaintiff for not going to trial at this term. I shall therefore permit the plaintiff to stipulate to try the cause at the next term, and shall hold the attachment.

An order will be entered allowing the amendments proposed, and also dismissing the suit and dissolving the attachment because the plaintiff failed to proceed to the trial of the cause when it was called, in order, at the present term, unless the plaintiff, within five days after the entry of such order, gives to the defendant's attorney a stipulation to try this cause at the next term of this court at which a jury shall be in attendance, and the cause shall be called for trial in its order on the calendar; and if such stipulation be so given, then the suit is to stand and the attachment is not to be dissolved.

Case No. 16,399.

UNITED STATES v. STEWART et al.

[2 Biss. 412.] [1]

District Court, N. D. Illinois. Jan., 1871.

DISTILLER'S TRANSPORTATION BOND—DEFENSES—SEIZURE OF GOODS IN TRANSIT—PLEADING—REPLICATION.

1. To a suit upon a bond for the transportation of highwines, it is a sufficient defense that during the act of transportation the officers of the government seized them, and that the collector of the district to which they were consigned refuses to grant a certificate of delivery to him.

2. The government having by its own act prevented the performance of the condition of the bond, is estopped from recovering upon such a breach.

3. The fact that the seizure was made by reason of the wrongful act of the persons having the highwines in charge makes no difference. The government had the election to seize them in transit or await their delivery; but if it does the former, it cannot afterwards sue for the breach of the bond.

4. To a plea setting up the above facts it is not a good replication that the seizure was properly made for a violation of the internal revenue laws, for which the wines were afterwards duly forfeited in the district court.

This was an action of debt on behalf of the United States against Stewart and his sureties upon his transportation bond.

J. O. Glover, U. S. Dist. Atty.

Goudy & Chandler, for defendants.

BLODGETT, District Judge. This is a suit upon a distiller's bond for the transportation of 100 barrels of highwines from Keithsburg, Ill., to St. Louis, Mo., and the delivery thereof to Barton Able, collector of the First district of Missouri. The third plea of the defendants sets forth in substance that said wines were duly transported to St. Louis and landed upon the levee there, and were then, immediately after their arrival, seized by an officer of the United States, and while in the exclusive possession and control of such officer, seven barrels of said wines were, without the consent, fault or neglect of defendants or either of them, carried away to some place unknown by some person or persons unknown; and that the remaining 93 barrels of said wines were afterwards by the said officer removed from said levee, and delivered to Barton Able, collector of the First district of Missouri, who received the same and placed them in a warehouse in St. Louis, where they have ever since remained. Defendants also aver that such seizure was without their privity or consent, and that said Barton Able hath ever since refused to make and deliver to defendants a certificate showing that said highwines or any part thereof have ever been delivered to him.

To this plea a replication was filed, setting up in substance that 93 barrels of said wines were seized upon an information filed in the United States district court for the Eastern district of Missouri for an alleged violation of the internal revenue laws, and that afterwards such proceedings were had in said court on said information that a degree of forfeiture was entered against said highwines for said violation of the internal revenue laws; and to this replication a demurrer is interposed by the defendants.

Some technical objections to the form of this replication were made in the demurrer, but as no stress was laid upon them in the argument I shall proceed at once to consider the main question raised by the pleadings, which is, whether the replication is a sufficient answer to the plea, and whether said plea is a sufficient answer to the declaration.

The condition of the bond is that the said 100 barrels of highwines shall be transported from the bonded warehouse of said Stewart at Keithsburg, in the Fourth district of Illinois, to the city of St. Louis, and there delivered to Barton Able, collector of the First district of Missouri, within ten days from the date of said bond; and that within ten days thereafter a certificate of said Able, or his successor as such collector, showing that said wines had been so delivered to him, and by him placed in a bonded warehouse in his district, should be produced to the collector of the Fourth district of Illinois. The effect of the defense thus set up is that while the obligors in the bond were in the act of performing said condition, said highwines were seized by the revenue officers of the United States, and while so held seven barrels were taken away by some person unknown, and the replication avers that the remaining 93 barrels were afterwards libelled and condemned for alleged violation of the internal revenue laws. By the conceded facts, then, performance of the condition of this bond has been prevented by the acts of the agents of the obligee. In other words, the plaintiff has, through the agency of its officers, rendered the performance of the condition of the bond impossible. True, the seizure which made it impossible for the defendants to fulfill the condition of the bond, was made by reason of the wrongful act of some one having said wines in charge. But does that make any difference? The government had its election to seize them in transit, or await the performance of the condition of the bond and seize them afterwards. The wines could not be in two places at once. If the government interposed to prevent their delivery under the bond, is it not estopped from recovering for a breach of the bond caused by its own act?

No direct authorities upon bonds of this character have been cited, nor have I been able to find any. But the case seems analogous in all essential principles to the case of People v. Bartlett, 3 Hill, 570. In that case a recognizance had been entered into for the appearance of the principal to answer a criminal charge. Default was made, and to a sci.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission.]

fa. on the recognizance it was pleaded that the principal had, after giving said recognizance, been arrested, and was then held in confinement in state's prison under another criminal charge. The court held the plea sufficient, and Nelson, Chief Justice, said: "I am of opinion that the plea is a good answer to the action. It is a general principle of law that when the performance of the condition of a bond or recognizance has been rendered impossible by the act of God, or of the law, or of the obligee, the default is excused." The principle enunciated in this authority is certainly broad enough in its fair, logical application to support the defense to the bond set up by the plea, and the replication, instead of answering the plea, only goes more into the detail of the same proceedings on the part of the government which the plea relies upon. It certainly does not answer the plea to say that the goods were not only seized, but were afterwards condemned by the same judicial proceedings initiated by the seizure. The replication only makes it more certain that the performance of the condition of the bond has been rendered impossible by the act of the obligee.

The demurrer to the replication is sustained.

Case No. 16,400.

UNITED STATES v. STEWART.

[Crabbe, 265.] [1]

District Court, E. D. Pennsylvania. May, 1839.

NAVY—ENLISTMENT OF MINORS.

[Cited in Re McNulty, Case No. 8,917, to the point that minors might be enlisted in the navy, but not in the army, without the consent of their parents or guardians.]

This was a habeas corpus, addressed to Commodore [Charles] Stewart, as commanding the navy yard at Philadelphia, requiring him to produce the body of Bishop Priest, alias Lewis Johnson, alleged to be a minor improperly enlisted in the navy. The proof of minority wholly failed, and the petitioner was remanded.

In connexion with the case, Judge HOPKINSON prepared the following summary of cases, on the question of the enlistment of a minor in the navy:

The question came before the circuit court of the United States for the First circuit, in 1816. U. S. v. Bainbridge [Case No. 14,497]. One Robert Treadwell, an infant of the age of twenty years and about eleven months, born on the 2d August, 1795, enlisted in the navy, to serve two years, in May, 1815. He had deserted, was brought to trial before a court martial, in June, 1815, and was sentenced to serve in the navy for two years from the 19th June, and to forfeit the wages then due him. He had a father living, then absent at sea, and it appeared that the enlistment had been without the father's consent. It was contended for him: (1) That congress had no power to pass an act authorizing the enlistment of minors without the consent of their father; (2) that congress had passed no act authorizing such enlistment; (3) that it was not a contract for the benefit of the infant. The other side took these grounds: (1) That the contract, as made by the minor, was a valid one; (2) that if he might, at any time, have avoided it, he could not do so after he had been legally sentenced by a court martial; (3) that the acts of congress, for enlistments in the navy, make continual and particular mention of "boys," who are required by the nature of the service. Story, Circuit Justice, delivered the opinion of the court. He stated the first question to be, whether the contract of enlistment, supposing it to have been made without the consent of the father, was void or not. By the common law, the father has a right to the custody of his children during their infancy. He is also entitled to the benefit of their labor, while they live with him, and are maintained by him. These rights, however, depend upon the mere municipal rules of the state, and may be enlarged, restrained, or limited, as the wisdom or policy of the times may dictate, unless the legislative power be controlled by some constitutional prohibition. The constitution of the United States gives congress the power "to raise and support armies," and "to provide and maintain a navy," and "to make all laws which shall be necessary and proper" to execute these powers. The services of minors may be useful and important to the country, both in the army and navy. In the navy, the employment of minors is almost indispensable. Congress, therefore, have the power to enlist minors in the naval service, and the exercise of the power is justified by the soundest principles of national policy. They need not require the consent of the parents; such an assertion is extraordinary; it assumes that the legislative power cannot be exercised in derogation of the common law. Minors are enrolled in the militia, to perform military duty; and in the British navy minors are not only enlisted without the consent of their parents, but employed against their own consent. Do the laws of the United States authorize the enlistment of minors into the navy? All the acts authorize the employment of midshipmen, who are invariably minors. All the acts since June, 1798, authorize the president to engage "boys," in the ordinary duties of the navy. In no one of the laws is the consent of the parents or guardians required. The laws manifestly contemplate that it is a personal contract made by the infants themselves, for their own benefit. They are entitled to the pay, bounty, and prize-money. As to the case of a voidable contract made by an

[1] [Reported by William H. Crabbe, Esq.]

infant, at common law, it is meant that the contract is voidable by the infant, at his own election, and not by the assent or dissent of the parents. The acts of congress could not intend to authorize an infant to enlist in the navy, and yet to avoid the contract at his election. "Upon the whole, as congress have authorized 'boys' to be engaged in the service of the navy, without requiring the previous consent of their parents to the contract of enlistment, that contract, when fairly made with an infant of reasonable discretion, must be deemed to have a semblance of benefit to him, and to be essential to the public welfare, and, therefore, binding to all intents and purposes." The acts respecting enlistments in the army provided "that no person, under the age of twenty-one years, shall be enlisted by any officer, or held in the service of the United States, without the consent of his parents, guardian, or master, first had and obtained, if any he have." Afterwards, in January, 1813, the enlistment of minors, over eighteen years of age, was expressly authorized; and the proviso which required the consent of the parents, &c., repealed in December, 1814. Story's Laws, 1285, 1433 [2 Stat. 791; 3 Stat. 146].

The case of Emanuel Roberts, 2 Hall, Law J. 192, before Nicholson, C. J., Baltimore county, 1809: The constitution gives to congress the power of raising and maintaining a navy; the petitioner enlisted in the service of the United States; it is, therefore, a proceeding under the authority of the United States. It is alleged that the party is only sixteen years of age, and was drunk when he enlisted. The court recognises the contract of enlistment as a contract or agreement in which the United States was one party, and the petitioner the other. In the extreme case of a child eight or ten years of age, the court would discharge him, because of his incapacity to make a contract; not an incapacity arising from the general principle that he who has not attained the age of twenty-one years is incapable of binding himself, but from an actual imbecility of mind, owing to his tender years. The petitioner is not of this description. If he be only sixteen years of age, he is remarkably well grown. "Although it is a general rule that a person under twenty-one years of age cannot bind himself by contract, yet I am far from saying that this rule will apply in its unlimited extent, to prevent young men from enlisting in the service of their country, or to authorize their discharge upon an application to the courts of the United States." He was of opinion that the court had no right to interfere in the case.

Com. v. Gamble, 11 Serg. & R. 93, before the supreme court of Pennsylvania, in 1824: Gibson, C. J. "The single question to be decided is, whether the enlistment of a minor, into the corps of marines, is void by any act of congress, or at common law. The act which regulates enlistments in the army, prohibits the enlistment of minors, except as musicians; and, on the other hand, the act which regulates the enlistment of seamen, expressly authorizes the enlistment of minors." The marine corps has no necessary connexion with the army; it is a part of the naval establishment, and is exclusively subject to the orders of the secretary of the navy. He thinks that the contract of enlistment in the navy, by a minor, is good, independently of the statutes, at common law. Such a contract is good, if for the benefit of the minor, and he is far from being convinced that the contract of enlistment is not of this kind. He puts the case on the ground of public policy, which requires that a minor be at liberty to enter into a contract to serve the state, whenever such contract is not forbidden by the state itself. This is the common law of England. The petitioner was in confinement, on a charge of desertion. The chief justice said: "The law is clear, that he must abide the sentence of a court martial, before he can contest the validity of his enlistment." Prisoner remanded.

Com. v. Murray, 4 Bin. 487, in 1812: The syllabus of the case is: "Under the act of congress of January 31, 1809 (2 Story's Laws, 1109 [2 Stat. 514]), authorizing the president of the United States to cause to be engaged certain able seamen, ordinary seamen, and boys, to serve in the navy, an infant who has arrived at years of discretion, and has neither father, master, nor guardian, may make a valid contract to serve according to the act, notwithstanding he has a mother with whom he resides at the time, and whose consent was not given to the contract." "An infant owes reverence and respect to his mother, but she has no legal authority over him, nor any legal right to his services." "Under the constitutional power of congress to provide and maintain a navy, that body may by law authorize minors to enter into contracts for service in the navy, notwithstanding such contracts if made by an infant might not be binding upon him at common law." The opinion of Tilghman, C. J., cites section 8, art. 1, of the constitution, giving congress power to raise and support armies, and to provide and maintain a navy; this includes all powers necessary to the object intended. The service of persons, under twenty-one years of age, is useful to the country and to themselves. Certainly infants, not under the control of any other person, may make such a valid contract. He gives no opinion whether infants may not engage themselves in the navy, without the consent of parents, master, or guardian. In this case there was no father, master, or guardian, and the mother had no legal rights. The petitioner was of an age fully to comprehend the nature of the engagement, and there was no person who had any lawful authority over him. Yeates, J.: It has not been contended that an infant under the

years of discretion, or one whose services have been engaged by a personal contract, can lawfully engage in the navy. The petitioner was seventeen years and seven months old. His father was dead; his mother had no legal rights; there was no prior contract; and the court presumes this contract which he has made is for his benefit. Brackenridge, J., goes on the ground that the contract is for the benefit of the infant. He had neither father nor guardian, nor any means of living, except the trade of a shoemaker, which his health did not permit him to pursue. All idea of the act of congress is excluded. The judge will not touch it, as it has nothing to do with the case; he can give no authority to the other contracting party. Congress cannot change the principles of the common law; the legislature of a state, alone, may do it.

Case No. 16,401.

UNITED STATES v. STEWART.[1]

SAME v. WRIGHT.

[2 Dall. 343; Whart. St. Tr. 172.]

Circuit Court, D. Pennsylvania. 1795.

TRIALS FOR TREASON—TIME ALLOWED DEFENDANT FOR BRINGING WITNESSES—RIGHT TO BAIL.

[1. In trials for treason, especially where the trial is held in a county distant from that in which the crime is laid, the prisoner is entitled, in all cases, after being furnished with the names of the witnesses against him, to a reasonable time in which to bring testimony from the counties in which those witnesses live.]

[Cited in Logan v. U. S., 144 U. S. 304, 12 Sup. Ct. 630.]

[2. Where a person indicted for treason obtained a postponement on the ground of the absence of witnesses, but afterwards, when the court was about to adjourn for the term, announced his readiness to proceed to trial with the same witnesses previously available, *held*, that this would not entitle him to be released on bail, the court being then unable to hear the case.]

The prisoners being brought to the bar, on separate charges of high treason, Lewis read their depositions, stating the absence of material witnesses in both cases, and moved to postpone the trials 'till an opportunity was given, to procure the attendance of those witnesses from the western counties. He urged, the general inconveniency of a commitment and trial at so great a distance, from the scene of the criminal transaction; the friendless situation of the prisoners, and the poverty of the witnesses; and he alledged, that, under such circumstances, an immediate trial would be a mere ex parte proceeding. To shew the lenity with which persons thus charged have always been treated, he cited Fost. Crown Law, 1, and to account for the delay in procuring the witnesses, he observed, that as the act of congress (1 Story's Laws, 63, § 29 [1 Stat. 88]) declared, that "in cases punishable with death, the trial shall be had in the county where the offence was committed," if it could be done without great inconvenience, the prisoners might reasonably have expected that indulgence, until the motion for a special court had been refused, on account of the peculiar difficulties of the case, in opposition to the general inclination of the judges. Nor could there be any preparation for trial 'till the charge was known, and the names of the witnesses who were to prove the indictments. By the practice under the constitution and laws of Pennsylvania (and the case is the same here) a defendant cannot have compulsory process to bring in his witnesses, before he has sworn that they are material; and he cannot so swear 'till he knows the charge and the witnesses that support it. It is essential to the administration of justice, and to the feelings of humanity, that the defendants should have time to investigate the characters of witnesses, and to bring proofs in contradiction to the accusation. Hence, even in England, where the counties are generally smaller than in this country, a period of ten days is allowed, between the time of furnishing lists of the witnesses and jurors, and the time of trial. 7 Anne, c. 21; 4 Bl. Comm. 345. And altho' the act of congress (1 Stat. 112, § 29) only says that copies of the indictment and a list of the jury and witnesses shall be delivered to the prisoner "at least, three entire days before he shall be tried," yet it must certainly be the intention of the legislature to afford an opportunity to canvass the characters of the witnesses, or the provision would be nugatory: that opportunity cannot be deemed to commence 'till he knows their names, and it cannot be deemed to be compleat, unless he has had time to send for information to the places in which they reside. The court will, therefore, exercise a discretion as to the length of time to be allowed, in proportion to the distance; and, conformably to the case in Fost. Crown Law, 1, the time so allowed for preparation, will be subsequent to the delivery of the copy of the indictment, and the lists of witnesses.

Rawle (attorney for the district) premised, that an acquiescence in the present motion, would, probably, put off the trial for the term. He urged, that the prisoners must long ago have known the nature of the charge, and the proofs necessary to their defence; and ought to have made an earlier application for the aid of the court to procure their witnesses. Due diligence has not been used, nor, indeed, is it so stated in the affidavits; and it is not only necessary to satisfy the court that the witnesses are material; but also that the party applying has been guilty of no laches, or neglect, in omitting to apply to them and endeavouring to procure their attendance. 3 Burrows, 1513. Ever since the 20th April, there has been an opportunity to make this motion; which was not the case in Fost. Crown Law,

[1] [This was one of the trials arising out of the so-called "Whiskey Insurrection," occurring in western Pennsylvania in the year 1794. For a full account of the proceedings, see U. S. v. Insurgents, Case No. 15,443.]

1, as that arose before a special court, acting under a special commission, for special purposes. Nor can there be a just reason to object to the trial's coming on, because of the place at which the court is held. On the motion for a special court, sufficient was disclosed to shew, that the indictments would be presented in Philadelphia; and it was a mere speculation afterwards to suppose that another place would be appointed for the trials; particularly as all the jurors and witnesses had been actually summoned.

BY THE COURT. The only argument of weight in support of the present motion, is that which relates to the period of furnishing the prisoners with the names of the witnesses; but it is, of itself, conclusive: for, unless an opportunity were afterwards given to investigate the characters, and trace the conduct of the witnesses, it would be nugatory and delusive to furnish the list of their names. The act directs notice to be given; this must be intended for the purpose alluded to, and, for the attainment of that purpose, time is, undoubtedly, necessary. It must, therefore, be considered as a rule in this case, and in all other cases of a similar nature, that a reasonable time shall be allowed, after a list of the names of the witnesses is furnished to the prisoners, for the purpose of bringing testimony from the counties in which those witnesses live. The trials of Stewart & Wright were, accordingly, postponed; and it was then agreed that they should not be brought on 'till the trial of the other prisoners, who were ready for trial, was concluded; but so much time was consumed in this previous business, that the judges declared they could not longer protract the sitting of the court, on account of other circuits, and, therefore directed the cases of Stewart & Wright to be continued generally 'till the next term. It appeared, however, that on the preceding day, Lewis had informed the attorney for the district, that he would proceed to trial in the case of Stewart, with the testimony already in his possession, though he expected other witnesses; and, on this ground, as the court was about to break up, he moved, that Stewart should be admitted to bail.

But, BY THE COURT, it was Stewart's own fault, not the fault of the prosecutor, that the trial was postponed. He has now the same witnesses, that he had at the time of the postponement; but the judges cannot, consistently with their other duties, enter on the trial. It is true, that we have established it as a principle, that no laches should be imputed to the prisoner, for taking time to send into the counties where the witnesses for the prosecution reside, after he had received notice of their names; but that is not the case at present. Stewart has no claim upon the legal discretion of the court; and, indeed, the circumstances must be very strong, which will, at any time, induce us to admit a person to bail, who stands charged with high treason.

Case No. 16,401a.

UNITED STATES v. STEWART et al.

[2 Hayw. & H. 280.] [1]

Criminal Court, District of Columbia. Aug. 18, 1857.

CONSTITUTIONAL LAW—CALLING OUT MILITARY IN DISTRICT OF COLUMBIA—RIOT—ELECTIONS.

1. The 15th clause of the 8th article of the constitution of the United States, which confers upon congress the power to provide for the calling forth of the militia to execute the laws of the United States, and the act of congress of February 28, 1795 (1 Stat. 424), apply to the states.

2. The 2d section of article 2 of the constitution, which makes the president commander in chief of the army and navy of the United States; and section 3 of the same, which makes it his duty to take care that the laws be faithfully executed, empower him to call out the military in aid of the civil authorities of the District of Columbia.

3. Where the commissioners of election closed the polls contrary to the law, which required them to be open from 7 a. m. to 7 p. m., it was the duty of the mayor to demand that the polls be opened, but he had no power to enforce the demand.

4. Where parties, at least three in number, did in a violent and turbulent manner, to the terror of the people, with a determination to assist one another against any who should oppose them, act together according to previous concert and arrangement, for the purpose of thwarting the efforts of the mayor to have the polls open, and opposing his efforts to preserve the public peace, as many of them who thus acted would be guilty of a riot.

After the close of the testimony on the part of the United States and the prisoners [Dan Stewart and others], Mr. Key asked two instructions of the court to the jury, which he read to the court as follows: If the jury believe, from the evidence, that the mayor of Washington made an application to the president of the United States and the secretary of the navy to order out the United States marines to assist him in preserving the public peace, and the said marines were accordingly ordered by the secretary of the navy, and were marched by the direction of the mayor to the place of disturbance, to wit: to the first precinct of the Fourth ward, then the said mayor and the said marines were there legally. If the jury believe, from the evidence, that the commissioners of election of the said first precinct of the Fourth ward closed the polls of said precinct for no other reason than the one given, that is, the presence of the said marines, then the act of said commissioners in closing said polls was an illegal act, and the said mayor, by virtue of his office, and in execution thereof, possessed full power and authority to order the said polls to be opened, and all persons who in a violent and turbulent manner, acting together, either by previous concert or by concert springing up at the time, opposed

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

the efforts of the said mayor, either to have the said polls opened or to preserve the public peace, are guilty of a riot.

Mr. Scott said that he could not admit such a point to be allowed, of the right of the secretary of the navy to call out the military under arms, and give the discretionate authority to the mayor to use them as he might think best. The president had no right to use the military force of the United States in a proper case, to quell or prevent a riot; he might use the means which were provided by law, and such means only; he contended that the constructions of the court of the article in the constitution in relation to the execution of the laws had an important qualification. A justice of the peace had authority to make others keep the peace; sheriff's, constables, marshals are peace officers, all have the like authority; a sheriff charged with the process of a court has authority to summon his posse to aid him; but all this authority pertains to all these officers only in certain cases; these means provided by the law are only to be resorted to when these means are necessary. If the marshal of this district receives authority to summons or execute upon citizens of this district, has he power to go into the streets to summons a posse to assist him to execute? With certainty does that authority belong to him only when resistance is made to such execution of the laws Yet if the act of the president or secretary is beyond question; if the act of the mayor is beyond question; if the discretion of the parties is to be the law on that occasion, how long will it be before military rule fixes its iron grasp upon us? The laws of congress give a municipal charter to this district. It confers upon them legislative powers. It provides for stated elections; time and place is prescribed for the election, and to prepare the points or places of election, and of giving the votes. Has the president the right, or any subordinate member of the cabinet, of their own heads, or at the suggestion of the mayor, to march the military to these places and make the citizens vote through a file of marines? If they have the right at their will, there must be a call existing to justify the ordering out—there must be something to make the act necessary. Now, what circumstances can make such an act necessary, or excuse it? If the peace is disturbed, if riots occur, or affrays, the law imposes the duty on the civil authority of that community to suppress it, and imposes the means of discharging that duty. The mayor has his police, his auxiliary guards. He has power to increase this force by especial appointment. The law imposes the duty on them of suppressing, and providing for the means of suppressing, those riots or disturbances. If all this is not so, your marshal may go with a file of marines to execute a summons—the United States military may be used for almost any peaceable purpose in the walks of life. When this military was called out there was no justifiable cause, there was absolutely none. It is necessary that it should be shown in this case that there was a lawful necessity existing at the time before calling out the military. As to the point raised in the second instruction, Mr. Scott asked whose duty it was to open the polls and conduct the elections? He apprehended it would be found that the duty was conferred upon those commissioners who were judges of the election; that to their honor, integrity and discretion the law confided the faithful conduct of that election; that they were the judges of the manner and the time for receiving votes, with no appeal from their decisions, which were such as the law provides, peaceably engaged in the performance of their duty; when peace and quiet prevailed around them, and the citizens engaged in the exercise of their rights, a portion of the United States military parades upon the ground, with loaded muskets and flashing bayonets, to participate in the business of election.

The district attorney exalts the mayor into an officer in command of a military force, to dictate to the judges; the proposition is confined to the simple fact of opening the polls, but he goes further, and says that he has the power to open the polls, and to proceed with the election; and it is but one step further to command how they shall proceed with the election, and to say, if the peace was disturbed, who disturbed it; if a riot occurred, who occasioned it; he apprehended, the military. If the mayor, with his army in array, transcended his right, have the people not the right to express disapprobation; to resist his assumed dictation?

As to the second proposition of the district attorney, they asked the court in effect to say that these commissioners were guilty of a riot; he assumes as a fact what is a matter of proof, to be expressed at the termination of the trial. The mayor had a right, for a proper reason, and for sufficient cause, to call out the military; but in no case is this to be done in the absence of that cause, or the president to be marshal of this district. He closed by saying that he apprehended that he had pointed out in a lucid manner the reasons which the counsel for the defence had for refusing to accede to the extraordinary proposition of the district attorney.

Mr. Key proceeded to read to the court, from the charter, the laws governing the conduct of municipal elections.

Mr. Bradley proposed to offer law authorities in relation to the points contained in the proposition of the district attorney. He entered his protest against those propositions in a most emphatic manner; that no irresponsible discretion was vested in the mayor or any other civil officer, either by the laws

of this country or of England; he referred to the case, among others, of the British rioters, as reported in the Common Law Reports of England, in support of his position. Mr. Bradley went on to say that the first thing to be considered by the jury was: was it an unlawful assemblage? Was there a breach of the peace? If there was none, then the marines were unlawfully called out. It might be an unlawful assembly in a very slight degree, then there was no pretence for calling out the military. Such cases must depend upon their own circumstances. The jury was to judge, under the particular circumstances, whether the mayor used more violent means than were necessary to disperse the mob. He apprehended that it would not be determined that the discretion of the magistrates in this country went further than it did in England. If there is no law to justify the mayor in his course, then we are justified, and could to all intents and purposes, resist any unjustifiable and irresponsible exercise of such discretionary power.

Mr. Key replied, contending, in the course of his remarks, that the act of the mayor was just and legal; and that the act of the president in acceding to his application for the marines, fortified by an affidavit which was sworn to by a respectable citizen of Washington, and granting him discretionary power to use them according to the exigencies of the case, was a proof of the confidence reposed in him by the president, to do and act as the danger and peril of the citizens thus disturbed might in the case seem to warrant. He said that it was contended by the other side, that the riot had ceased when the mayor first went to the polls; what did the mayor find to be the case when he arrived there? He found the barricades broken and the polls closed. All was quiet, said the counsel for the defence, but it was the quiet that prevails on the battle-field after the fight is over, and no victim is left to make resistance. Was it not manifestly the mayor's duty, under these circumstances, to employ such force as had been placed in his hands and at his command? He did employ that force, and legally too; he used those means for the maintenance of the public peace and good order in the community, which peace has been flagrantly violated. Was it not remarkable that the judges of election had taken the unwarrantable responsibility of closing the polls in violation of all law, at a time when, according to the testimony which had been given on the part of the defence, all was quiet, and the voting was proceeding peaceably? And upon what plea, then, did they do this? It was upon the vapory excuse springing out of a sickly and absurd sentimentality that they would not receive votes with the flashing bayonets of the marines directed towards their breasts. What right had they to refuse compliance with the express provisions of the law, when all was peace and quietness around them? The marines were a square off; they could not have been afraid of them at the time the polls were closed. He contended that the conduct of the judges ought to be held up to universal opprobrium, and they consigned to everlasting shame.

Mr. Key quoted from the act of congress of 1812, contained in [2 Stat. 721], to show "that the mayor shall see that the laws of the corporation shall be duly executed, and that he shall punish any disobedience of those laws on the part of its officers."

Mr. Key cited many other authorities to sustain the action of the mayor and in support of his instructions. He contended that the commissioners had violated the laws by closing the polls, and that it was but proper, under the existence of all these facts, to ask the court to instruct the jury that the marines were on the ground legally and for the exercise of a legal purpose.

Mr. Ellis said that Mr. Key had referred to the constitution of the United States to show the authority of the president to call out the marines and interfere in the case now before the court. The argument was that this portion of the constitution gave the president the power. He contended that it gave no such authority to the president. At the present time the president is not the United States—not quite. His power then is not here, but in the legislation of congress on the constitution. He quoted from the law to show in what cases the president may call out the military. He contended that there were but three cases in which the president may call out the military; they were only in case of an insurrection, an invasion, and when necessary to the sustaining of the law. He contended that the authorities cited by the district attorney were not applicable to the matter now pending, that the law did not authorize the mayor to do what the district attorney contended to authorize him to do.

P. B. Key, U. S. Dist. Atty.

R. E. Scott, Joseph H. Bradley, Vespasian Ellis, and Ratcliff & Carrington, for the prisoners.

CRAWFORD, J., gave his answer to the instructions as follows: With reference to the first instruction, the court said that much argument had been expended in relation to the president's power to order out the military. The 15th clause of the 8th section of the article of the constitution of the United States, which confers upon congress the power to provide for the calling forth of the militia to execute the laws of the United States, to suppress insurrection and repel invasion, has been referred to, as well as the act of February 28, 1795, in 1 Stat. 424; but the terms of the law itself show that it applies to the states, and to a different class of contingencies than the one that is alleged to exist in this case. The act of 1807 has also been cited, but the court

was of opinion that this provision in the constitution and the laws passed under it have no application to the inquiry submitted to the jury. There was another clause in the 2d section of article 2 of the constitution which makes the president commander-in-chief of the army and navy of the United States; and section 3 of the same article makes it his duty to take care that the laws be faithfully executed. It was under these two last named sections of the constitution that he apprehended the power to call out the military forces in aid of the civil authorities would be found. The 15th clause of section 8 of article 1 of the constitution, under the appropriate head of "What congress shall have power to do," bestows legislative power; and section 2 of article 2 imposes the presidential duty. The chief magistrate of the United States, acting for this district, possesses the power which was exercised in this instance, and being the head of the proper department, the act of the secretary of the navy was, to all intents and purposes, the act of the president. The authority, then, according to the evidence which the jury had heard, was a necessary application of the power granted by congress, and was properly and lawfully exercised by the executive upon this occasion. The president could not make himself personally cognizant of all the circumstances whenever he was called upon to act. The representations made to him were such as not only to justify but to require the executive of the United States to do all that he did do. The marines and the officers who commanded them were legally at the polls of the first precinct of the Fourth ward, for they were there in obedience to orders. The mayor had a legal right to be there also, in his official character as mayor, either to quell the riot or to see that the laws of the city were duly executed. Although the act of the executive in this case was authorized by law and required by duty, the mayor was using a discretionary power when he applied to the secretary of the navy for the assistance of the marines; for the simple fact that he, and he alone, as every other officer similarly situated, must decide when the proper time has arrived to make such an application, shows that it lies at his discretion. Still, an inferior officer must in the first instance resort to the civil power, and it may be material to know whether he had done so, but if the civil power is too weak to repress the riot, or if the riot or disturbance be so great and so dangerous that it must be apparent that an attempt to quell it by the civil officers must be absurd—that such an attempt must necessarily be unsuccessful, and would only be followed by the scoffing at and derision of those who should attempt it, and by an increased tumult—the court was of opinion that resort might be had to other means, without further recourse to the civil power.

If the jury believe from the evidence, that marines made the first attack upon the rioters, and whatever of violence and turbulent conduct and acts proceeded from the defendants, or from any others connected with them, were resorted to in resisting such attack, then it would be their duty to inquire whether the defendants were guilty of a riot at that particular time and hour of the day; for the disturbance of the morning was wholly unconnected with the marines in any shape, except so far as it was the ground upon which the military were brought out. But if they should believe from the evidence in the case that the marines, after their arrival at the polls, where they were then legally, without any offence or violence upon their part, were first assailed in a violent and turbulent manner, according to previous concert, whether remote or immediate, on the part of the defendants, or any of them, either with or without connection with others who are not now upon trial, for the purpose of driving off the marines in spite of their opposition, then the defendants or so many of them as thus assailed the marines would be guilty of a riot.

With regard to the second instruction asked by the district attorney, the court remarked that the conduct of the elections, in the city of Washington, is confided by law to these commissioners, to be appointed as the law prescribes. Their duties are expressly pointed out by the law, and among these it is specified that they shall keep the polls opened from 7 o'clock in the morning until 7 o'clock in the evening. The commissioners cannot lawfully close the polls between those hours, and nothing short of some overruling necessity which makes it impracticable for them to receive the votes offered, or to continue the election, will excuse the closing of the polls. If the jury believe from the evidence that the polls were closed in the first precinct of the Fourth ward, in the language of the prayer, for no other reason than the presence of the said marines, then the act of closing them was illegal.

The mayor of the city of Washington has no powers other than those which are given him by the acts of congress and the laws of the corporate authorities, passed in pursuance and by virtue of the powers conferred upon them by congress. Among the duties of the mayor it is enjoined upon him by the "Act further to amend the charter of the city of Washington," passed on the 4th of May, 1812 (section 3; 2 Stat. 723), is to see that the laws of the corporation be duly executed. That provision was not repealed as had been asserted here. The act of May 13, 1820, § 1 (3 Stat. 584), repeals only so much of the law of 1812 as is "inconsistent with the provisions" of said act of 1820; and the law of May 17, 1848, § 1 (9 Stat. 223), continues the act of 1820 in full force for 20 years, with the same repeal (section 17; 9 Stat. 230) of the acts in conflict with its own provisions.

As to the recited duty of the mayor, as had been asserted, the mayor had the au-

thority to request or demand that the polls should be opened, but he could not enforce that demand, for there are no specific powers conferred upon him for that purpose. If you believe from the evidence that he demanded of the commissioners to open the polls when closed, but did not take any further or other steps that such demand should be carried into effect, it is no more than his duty required. And lastly, if the jury believe from the evidence that the defendant, or any of them, with or without the conjunction of others named in the indictment, but numbering at least three persons, did, in a violent and turbulent manner, to the terror of the people, with a determination mutually to assist one another against any who should oppose their act together according to previous concert and arrangement, remote or immediate, for the purpose of thwarting the efforts of the mayor to have the polls opened, or to prevent those efforts from succeeding, or for the purpose of opposing his exertions to preserve the public peace and preventing their success, then the defendant, or so many of them as thus acted, would be guilty of a riot.

The jury came into court, and represented to the judge their inability to agree upon a verdict. The judge thereupon discharged them.

Case No. 16,402.

UNITED STATES v. STEWART.

[4 Wash. C. C. 226.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

COUNTERFEITING—BANK NOTES.

Counterfeiting an indorsement on a post note of the Bank of the United States, is not an offence under the eighteenth section of the act incorporating the Bank of the United States [3 Stat. 275].

[This was an indictment against Charles Stewart upon the charge of counterfeiting, under the act of congress incorporating the Bank of the United States.]

WASHINGTON, Circuit Justice. There are two motions before the court: (1) For a new trial; and (2) in arrest of judgment.

The indictment contains four counts. The two first are for forging a bill or note of the Bank of the United States, and for attempting to pass the same. The third is for falsely making and counterfeiting an order on the said bank, indorsed by the defendant upon the said bill, as follows, viz.: "Pay William Weston or order;" signed "John Thornton." The fourth is for falsely altering a bill or note of the said bank, by the same indorsement. The bill or note, stated in the indictment, and given in evidence, is a post note of the Bank of the United States, payable to William Jenner & Co. or order, for one hundred dollars, with the following indorsements on the back of it, viz.: "Pay Mackie, Milner & Co. or order. William Jenner & Co." "Pay William Jenner & Co. Mackie, Milner & Co. William Jenner & Co." "Pay Churchman and Thomas or order. D. Bell." "Pay William Morton or order. John Thornton." The forgery of the last indorsement by the defendant was fully proved. The evidence which was given on the trial, applied only to the third count; and the question is, whether the false indorsement made by the defendant, is an offence within the eighteenth section of the law for incorporating the subscribers to the Bank of the United States, passed the 10th of April, 1816. It is perfectly clear, I think, that it does not amount to a forgery, or alteration of the bill or note itself, which is the sole act of the corporation, and contains its promise to pay; whereas the indorsement is the separate act of a person claiming a right to the note.

Does the indorsement upon a note or bill of exchange, requiring the contents to be paid to a third person, amount to an order, within the meaning and intent of the act of congress? I think not. A bill of exchange is said to be an order by the drawer upon the drawee, to pay the contents to the payee. It is also, and with equal propriety, called an assignment to the payee of so much money in the hands of the drawee. I am not disposed to fall out with either of these definitions. But there can be no doubt, that the indorsement upon a bill or note, directing the contents to be paid to the indorsee, amounts to nothing more than the assignment of a mere chose in action; and whether it be made in the form of an assignment, or of an order, its nature is the same. That the act did not intend, by the word "order," to include an assignment of a bank note, may be fairly presumed from the work "check," with which it is associated; the latter meaning, in common parlance, a draft payable to "bearer," and it was on that account, probably, that the word was added.

I am strongly confirmed in this construction of the act of congress, by observing, that the statutes of England against forgery of negotiable papers of almost every kind, extend, by express words, to the indorsements made on them. Such, for instance, is the statute of 15 Geo. II. c. 13, against forging the notes of the Bank of England, or bills of exchange, or bonds under the seal of the corporation, or "any indorsement thereon." Such are the statutes of 12 Geo. I. c. 2, as to East India bonds; 12 Geo. I. c. 32, as to the moneys of suitors in chancery; 42 Geo. III. c. 1, as to exchequer bills; and 2 Geo. II. c. 25, as to deeds, bonds, bills, notes or receipts. And it is observable that the statute of 45 Geo. III. c. 88, not only includes the forgery of bills and notes, and the

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

indorsements or assignments thereof, but also any warrant or order, for payment of money. I admit that these provisions in the English statute, are by no means conclusive of this point. But as the nature of negotiable paper is as well understood in England, as in any country in the world, the care taken in those statutes to punish forged indorsements, proves, at least, that the legislature of that country has not thought that the word order would be sufficient for the purpose. As the evidence given at the trial applied only to the indorsement, which, in the opinion of the court, is not an offence within the act of congress, the judgment must be arrested.

Case No. 16,403.

UNITED STATES v. STIEN.

[13 Blatchf. 127.] [1]

Circuit Court, E. D New York. Sept. 20, 1875.

CRIMINAL LAW—FORFEITURE OF RECOGNIZANCE—FUGITIVE FROM JUSTICE.

A defendant in an indictment moved to set aside a forfeiture of a recognizance given by him for his appearance to answer the indictment, on the ground of irregularities as to the time and place of calling him to appear, and of entering the forfeiture. He had absconded to avoid a trial on the indictment, and was a fugitive from justice. *Held*, that the motion must, for that reason, be denied.

[Cited in U. S. v. Evans, 2 Fed. 150.]

Asa W. Tenney, U. S. Dist. Atty.

John J. Allen, for defendant.

BENEDICT, District Judge. This is a motion made in behalf of Christian A. Stien, to set aside a forfeiture of a recognizance given by him for his appearance to answer an indictment found against him. The application is based upon irregularities as to the time and place of calling the defendant to appear, and of entering the forfeiture. The application is opposed upon several grounds —among others, that the defendant has absconded and fled the country, for the purpose of avoiding trial for the offences with which he is charged in the indictment referred to, and is now a fugitive from justice. The fact that the defendant has so absconded, not being denied, furnishes a proper ground for the denial of this motion, made as it is on behalf of the defendant. The presence of the accused in court when any proceeding is being taken in his cause, made necessary by the law in many instances, is always desirable, and, under circumstances such as this case presents, a refusal to hear argument in absence of the defendant seems to be a proper course.

Nor should one under indictment be permitted to defy the authorities by flight, and, at the same time, through an attorney, to appeal to them to act in his behalf. See In re Genet, 3 N. Y. Sup. Ct. [3 Thomp. & C.] 734; Brinkley v. Brinkley, 47 N. Y. 49.

The motion is, accordingly, denied, without passing upon any of the questions raised as to the regularity of the forfeiture in question.

Case No. 16,404.

UNITED STATES v. STINER et al.

[8 B'atchf. 544.] [1]

Circuit Court, S. D. New York. Aug. 24, 1871.

FRAUDULENT CONVEYANCES—JURISDICTION OF FEDERAL COURTS—CREDITOR'S BILL.

1. An intent to defraud subsequent creditors is sufficient to avoid a conveyance, at the suit of such creditors, if it was either voluntary or not made in good faith.

2. Under the 11th section of the judiciary act of September 24th, 1789 (1 Stat. 78), this court has jurisdiction of a creditor's bill, brought by the United States, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars.

[Cited in Winter v. Swinburne, 8 Fed. 52.]

In equity.

Thomas Simons, Asst. U. S. Dist. Atty., for plaintiffs.

John Winslow, for Dankel and wife.

BLATCHFORD, District Judge. This is a creditor's bill, founded on a judgment, recovered by the United States, in the district court for this district, against the defendants [Joseph H.] Stiner, Cornelius J. Dankel, and [Bernard] Heller, on the 23d of March, 1870, and docketed against them on the 25th of March, 1870, for $11,040. On an execution issued thereon, $106.72 was made, the expenses of the marshal in making it being $109.16. Otherwise, the judgment and execution are unsatisfied. Such judgment was rendered against Stiner, as principal, and the others as sureties, in a stipulation given on the release of property seized in a suit in rem, brought by the United States against such property, being property found on the distillery premises of Stiner, for the forfeiture thereof, for a violation of the internal revenue laws. The bill is brought especially to reach certain real estate in 33d street, in the city of New York, and certain other real estate in 25th street, in said city, which formerly belonged to Cornelius J. Dankel, and which he, by a deed, dated November 1st, 1869, and recorded December 29th, 1869, at 55 minutes past 2 o'clock, p. m., in the office of the register of deeds of the city and county of New York, conveyed to the defendant [Adolph] Isaacson, and which Isaacson, by a lease, dated November 1st, 1869, and recorded June 12th, 1870, leased to said Cornelius J. Dankel, and which Isaacson conveyed to the defendant Georgine Dankel, the wife of the said Cornelius J. Dankel, by a deed, dated January 1st, 1870, and recorded May 14th, 1870. The bill charges, that, after the execution of the stipulation, and

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

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

prior to the recovery of the said judgment, and at or before the hour of noon, on the 29th of December, 1869, a verdict was rendered by the jury, in the said suit for forfeiture, condemning the property seized, and a decree of condemnation was thereupon duly entered; and that such several instruments were made without consideration, and not in good faith, and with the concurrence of the two Dankels and of Isaacson, in the design of defrauding the plaintiffs, and of transferring to the said Georgine Dankel the ostensible ownership of the property, in view of the liability of the said Cornelius J. Dankel, in consequence of his stipulation, and the rendering of said verdict and decree, and the judgment and execution in pursuance thereof, so as to prevent the plaintiffs from levying upon and selling any of said property, in satisfaction of their recovery and demand. The bill prays for an injunction restraining the Dankels and Isaacson from alienating or encumbering the said real estate, and for a receiver of the property of Stiner, Cornelius J. Dankel, and Heller.

The plaintiffs now move for an injunction against the Dankels, restraining them from alienating any of their property, and especially from alienating or incumbering the said real estate, and for the appointment of a receiver of all the property of each of the defendants. The notice of motion appears to have been served only on the solicitors for the Dankels, and the motion is opposed on their behalf.

The defendants Dankel and wife have put in an answer in the suit, which purports to be the answer of both of them, but is not signed or sworn to by Mrs. Dankel. It sets up, that, when Dankel conveyed the premises to Isaacson, Dankel did not owe the plaintiffs any money, and they did not become judgment creditors of his till the 23d of March, 1870; that the plaintiffs have no right to inquire into any conveyance made by Dankel of his real estate before they became creditors of his; that the conveyance to Isaacson was made in pursuance of an agreement made prior to November 1st, 1869, by which a cash payment of $2,000 was to be made by Isaacson to Dankel, on the delivery of the deed, and Isaacson was to give certain promissory notes to Dankel, and certain other payments, in regular instalments, of $5,000 each, secured by mortgage, were to be made thereafter, at certain specified times; that such cash payment of $2,000 was made when said deed was so delivered, on the 1st of November, 1869, and at that time the notes were made and delivered, in pursuance of the agreement; that, on or about the 1st of January, 1870, Isaacson, finding himself unable to pay such notes, which were then about maturing and had matured, made an agreement with Mrs. Dankel to sell the premises to her for a certain and valuable consideration, which, however, is not stated, and then conveyed such premises to her on terms satisfactory to all concerned, which terms, however, are not stated; that the plaintiffs were not judgment creditors of Dankel at the time of the conveyance to Isaacson, or at the time of the conveyance to Mrs. Dankel; that, prior to the sale of the premises to Isaacson, Mrs. Dankel had an interest in them, and was a part owner of them, and her money had been used by her husband in their purchase, to the amount of about or upwards of $1,000; that, several months before the 1st of November, 1869, Dankel and wife had taken steps to sell such real estate, and without reference to the claims of any possible creditors; and that the sale to Isaacson was not made for the purpose of cheating or defrauding the plaintiffs.

In addition to the facts set forth in the bill in regard to the deeds and lease, it appears, by affidavit, that Isaacson executed to Dankel a mortgage on the premises referred to, for $25,000, dated November 1st, 1869, and recorded January 12th, 1870; that a satisfaction of such mortgage was recorded March 2d, 1870; and that Isaacson and his wife executed to one Joseph Fleischel a mortgage on the same premises, dated December 20th, 1869, for $25,000, and recorded May 14th, 1870, satisfaction of which was recorded January 16th, 1871. It also appears, by the affidavit of Cornelius Stagg that, in January, 1871, Isaacson stated to Stagg, that he resided in Brooklyn, and was by occupation a vermin destroyer, that, about November, 1869, Dankel proposed to him to make a purchase of said premises, that he was induced by Dankel and his friends to enter into an arrangement for the transfer of the property to him, not knowing at the time for what purpose, that he afterwards discovered that it was for the purpose of Dankel's avoiding his responsibility in a suit then pending in the district court, that, in accordance with said arrangement, he, Isaacson, on taking a deed of the property, paid Dankel $3,000, and gave him a promissory note for $2,150, due about January 1st, 1870, and a mortgage on the property for $25,000, payable in instalments of $5,000, the first becoming due about January 1st, 1870, and a lease of the 25th street premises, that it was agreed between him, Isaacson, and Dankel, that, if the note, or the first instalment of $5,000 on the mortgage, should not be paid when due, the entire arrangement should become void, and the property should revert to the possession of Dankel, and it was also agreed that Dankel should collect and pay to Isaacson the rents of all of the said property, that he, Isaacson, at the request of Dankel, executed the mortgage to Fleischel, for the purpose, as was stated to him by Dankel, of money being raised upon it by Fleischel, to be applied to the prior mortgage executed to Dankel, but that no money was paid by

Fleischel to Isaacson in consideration of the execution of the mortgage, nor was any money ever raised thereon, or so applied, that, at some time during January, 1870, Dankel called on him, Isaacson, and stated, that, the note and the first instalment of the mortgage being due and unpaid, the whole transaction was annulled, as agreed on, and he, Dankel, would give him, Isaacson, back his note, or destroy it, the mortgage to him, Dankel, to remain in his possession, and he, Dankel, to destroy the lease, and that he, Dankel, did not wish to hold the property in his name, and he, Isaacson, should make out a deed of it to Mrs. Dankel, that this was done, that the consideration expressed in the deed to Mrs. Dankel was $500, but he, Isaacson, never received anything from her, or from any one, towards such consideration, and that Dankel paid to him, Isaacson, about $1,300, as rents of the property, up to and including January, 1870. Mr. Stagg also states, in his affidavit, that, in January or February, 1871, he had an interview with Mrs. Dankel, who admitted to him that she never paid any consideration to Isaacson for the conveyance of the property to her, and did not know that any was ever paid, that she never saw Isaacson until he brought her the deed already executed, which she then gave to her husband, who kept the same in his possession, that her husband told her that his attorney advised that she should call the transaction of the transfer of the property to her by Isaacson, a sale, that, on the afternoon of the 31st of December, 1869, her husband came home looking worried, and told her that he had been at his lawyer's, and that, a few days after, said deed was brought to her. Mr. Stagg further says, in his affidavit, that, in January, 1871, he had an interview with Cornelius J. Dankel, who admitted to him, that, the day the distillery was condemned, he heard of it, and the next day Isaacson sold the property to his wife.

No affidavit is produced from Isaacson. Dankel makes no affidavit in contradiction of his statements to Stagg, nor does Mrs. Dankel contradict Stagg's statement as to what she said in his conversation with her. Mrs. Dankel states, in her affidavit, that, when the deed from Isaacson was executed and delivered to her, it was thought best, in view of the fact that Mr. Dankel was in ill health, that, as Isaacson was unable to fulfil his contract, an agreement should be made with him, by which he should convey the premises to her, Mrs. Dankel, and that that was done.

The ground is taken, on the part of Dankel and his wife, that the plaintiffs cannot maintain this suit, unless they were creditors of Dankel when he conveyed to Isaacson. This is not the law. Under the statute and decisions in New York, as well as under the decisions of the supreme court of the United States, an intent to defraud subsequent creditors is sufficient to avoid a conveyance, if it was either voluntary or not made in good faith. I had occasion to examine this question recently, in the case of Sedgwick v. Place [Case No. 12,620]. In the present case, there can be no doubt that the whole scheme of the conveyance to Isaacson was a plan to defraud the United States, in view of the approaching trial and the expected condemnation of Dankel's distillery property, and that Dankel and Isaacson knowingly acted in bad faith. But, at all events, before the conveyance to Mrs. Dankel, the verdict of condemnation was rendered, the stipulation having been previously given. The formal judgment against the stipulators had not been entered, but, short of that, their liability had lost its contingent character. If any validity be acknowledged in the agreement between Isaacson and Dankel, the reversion of the title to the premises, on Isaacson's default, was to Dankel, and the conveyance of the premises by Isaacson to Mrs. Dankel, at Dankel's request, in pursuance of Isaacson's liability under the agreement, such conveyance to Mrs. Dankel being without consideration, leaves the premises, as between Dankel and his creditors, in the same position as if they had been conveyed by Isaacson back to Dankel, and, between Mrs. Dankel and such creditors, in the same position as if, after such conveyance back, Dankel had conveyed them to his wife, as a voluntary settlement.

It is urged, in the written brief of the counsel for Dankel and wife (the motion not having been argued orally), that this court has no jurisdiction of this case; that this is the first time it was ever claimed that a suit of this sort could be maintained in this court; that the view that this court has no such jurisdiction is held in other districts; and that the fact, that such jurisdiction does not exist, is so well understood and conceded by the bar and the courts, that, at the last session of congress, an act was introduced, and is now pending, to confer jurisdiction on the courts of the United States in such cases. The point of the objection to the jurisdiction of the court is not stated, and it is not possible to conceive what it is. The jurisdiction is plainly conferred by statute. The eleventh section of the act of September 24th, 1789 (1 Stat. 78), contains this provision: "The circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners." This is a suit of a civil nature, in equity, in which the United States are plaintiffs. It may be that it does not sufficiently appear by the bill that the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, although the judgment in favor of the plaintiffs exceeds that amount, for the want of

averments in the bill or admissions in the answer that the judgment debtors have property exceeding in value five hundred dollars, exclusive of costs, or that the real estate referred to exceeds in value that amount, exclusive of costs. But, as the real estate, which it is the principal object of the bill to reach, is undoubtedly of the value named in the statute, the bill can readily be amended. With that done, there can be no difficulty in the jurisdiction. The district court would have no jurisdiction of the suit, for jurisdiction is conferred upon it, by section 9 of the act before cited, only of suits at common law, where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. If the United States cannot bring such a suit as this in a circuit court, they can bring it in no court of the United States. It would follow, then, that, for eighty years, whenever the United States have had occasion to bring a creditor's bill, they have been unable to bring it in a court of the United States; for, the only legislation covering the case is in the act of 1789. The proposition has no foundation. The act referred to as introduced at the last session of congress, to confer jurisdiction in cases of this kind, was, as I understand it, an act to make the remedy in favor of the United States, in cases of this kind, more speedy and efficient, and not to confer jurisdiction over creditors' bills by the United States on the circuit courts, a creditor's bill being a suit of a civil nature, in equity, in the exercise of a recognized branch of equity jurisdiction, and being covered by the eleventh section of the act of 1789.

The plaintiffs may amend the bill, as suggested, and then an injunction will issue enjoining Dankel from making any transfer of any of his property, and enjoining him and Mrs. Dankel from making any transfer of said real estate and from incumbering the same, and a receiver will be appointed of said real estate and of all the property, equitable interests, things in action, and effects of Dankel. If notice of the motion is not necessary as to Stiner and Heller, the receivership will extend to their property.

Case No. 16,405.

UNITED STATES v. STOCKWELL et al.

[4 Cranch, C. C. 671.] [1]

Circuit Court, District of Columbia. March Term, 1836.

RIOT—PROOF OF INTENT—DECLARATIONS—TRIAL—ARGUMENTS OF COUNSEL—PROVINCE OF COURT AND JURY.

1. Upon an indictment for a riot it is not necessary to prove an agreement or proposal to do the unlawful act before it was done, or at the time of doing it; but from the doing of the act, accompanied by declarations of an intent to do it, the jury may infer a previous intent and agreement to do it, and mutually to assist each other in doing it; and in the absence of all contradictory evidence they ought so to infer.

2. After an instruction has been given by the court to the jury, at the request of either party, and argued by counsel on both sides, the court will not permit counsel to argue the same question of law to the jury in contradiction to the opinion of the court.

3. The right of the jury to decide the law, as well as the fact, in a criminal case, results only from their power to find a general verdict.

[Cited in U. S. v. Taylor, 11 Fed. 473.]

[Cited in Territory v. Kee (N. M.) 25 Pac. 926.]

4. The question whether one fact can be inferred from another, is a question of law, and to be decided by the court; and if, in law, the inference can be drawn, it ought to be drawn, if there be no contradictory evidence.

Indictment for a riot. It charged that the defendants [Stockwell and Cropley], and six others to the jurors as yet unknown, "with force and arms at the county aforesaid, did on the 2d of April, 1835, unlawfully, riotously, routously, and tumultuously, assemble together to disturb the peace and government of the United States, and to break into and destroy the dwelling-house of one Martha Nailor in said county; and being so assembled," &c., made "great noises, riot, tumult, and disturbance," "and remained together, making such noises, riot, tumult, and disturbance and breaking, for a long space of time, namely, for the space of five hours then next following, to the great terror and disturbance not only of the citizens of the United States there and thereabouts inhabiting, &c., but of all, &c., passing and repassing in and along the public highways, and against the peace and government of the United States."

Upon the trial, W. L. Brent, for defendants, moved the court to instruct the jury "that should the United States have failed to prove, to the satisfaction of the jury, that an agreement, or proposal, to attack the house was made before the attack was made, or at the time of the attack, the defendants are entitled to an acquittal;" which instruction THE COURT gave; but at the prayer of Mr. Key, the district attorney, also instructed them "that if they should believe, from the evidence, that an attack was made on the house of the witness, by the traversers, and two or more persons, who had there assembled together with declarations that they were attacking "the rats," and would have out Bell, to revenge the wrongs of an injured craft, then the jury may therefrom infer a previous intent of the parties so to attack the said house, and a previous agreement so to do and mutually to assist each other in doing the same; and in the absence of all contradictory evidence, they ought so to infer."

After these instructions were given by the court, Mr. Brent proposed to argue to the jury that the court had erred in giving the last instruction; but CRANCH, Chief Judge,

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

informed him that the court would not permit him to do so.

Mr. Brent then observed to the court that he thought this rule infringed the right of the jury to decide the law as well as the fact.

CRANCH, Chief Judge, replied that the right of the jury to decide the law, was only the right to find a general verdict which includes both the law and the facts of the case. That the question whether one fact can be inferred from another is a question of law, and to be decided by the court; and that if the inference can, in law, be drawn, it ought to be drawn by the jury, if there be no contradictory evidence.

Case No. 16,406.

UNITED STATES v. STOCKWELL et al.

[1 Hask. 447.] [1]

District Court, D. Maine. Dec., 1872.

INFORMERS—DECREE FOR PAYMENT—AGREEMENT BETWEEN INFORMERS.

1. An informer's share in the registry of the court should be decreed to be paid directly to the persons beneficially interested and entitled to hold it.

2. An agreement between informers to divide the informer's share equally is valid and should be regarded by the court in distributing it.

Petition by several persons that the informer's share of penalties in the registry of the court be decreed to be paid to them severally as the persons giving the information which led to the prosecution.

FOX, District Judge. In the fall of 1867, Bartlett & McCoy were detectives in aid of the revenue, assigned to the northeastern district and acting under N. W. Bingham, special agent of the treasury for the state of Maine. McCoy ascertained from one Johnson, who resided in Fredericton, N. B., that large frauds on the revenue had been committed, and to induce Johnson to afford further information, McCoy gave to him his note for five hundred dollars, but nothing definite was disclosed by Johnson as to the precise character of the frauds, or when, where, or by whom committed. In Dec. Bartlett & McCoy were instructed to go to Fredericton and if possible ascertain further in regard to this matter. They met Johnson at Fredericton who refused to make farther disclosures, and then told McCoy he had destroyed his note and absolutely declined to hold any communication with McCoy upon this subject. Bartlett, who had previously had some slight acquaintance with Johnson, and who had been present at the interview between him and McCoy which had been somewhat unpleasant in its character, that same evening sought another interview with Johnson, the result of which was, that Johnson, without making any disclosures as to the transactions within Dowling's knowledge, that evening introduced McCoy & Bartlett to one Thomas Dowling, a shipping and commission merchant, doing business at Fredericton. Before Dowling would make any disclosures, he insisted that an agreement should be entered into between the four, viz., Bartlett, McCoy, Johnson and himself, respecting the informer's share in the penalties and forfeitures which might ultimately be recovered of the guilty parties. He refused to be known as the informer himself, and insisted that McCoy or Bartlett should institute the proceedings, prosecute them to judgment, claim as the informers, and that the amount thus received should be equally divided between the four persons. An agreement to this effect was then and there drawn up by Dowling, signed by all the parties and intrusted to Dowling for safe keeping, which agreement Dowling subsequently destroyed under the pretense that it known it might affect his credit as a witness, but it was destroyed without the authority or consent of either of the other parties so far as it now appears. After this agreement had been executed, Dowling produced his books and papers showing gross frauds to have been committed by him in shipping to Stockwell & Co. and other parties shingles, which were the production of New Brunswick but documented as American shingles, the product of Maine, in order that they might be entered free of duty, these documents being verified by Dowling's oath. By virtue of these documents the shingles were thus entered at various ports, and the government thereby defrauded of large amounts of duties.

Stockwell & Co. being the importers of various cargoes of these shingles, actions were accordingly brought against them for both duties and penalties, a trial of one of which actions was had and judgment rendered for the government, and thereupon a compromise was made of all of said actions by the payment by Stockwell & Co. of a considerable amount now on deposit in the registry, the informer's share of which amount is now the subject matter of controversy. Bartlett has filed a petition in behalf of himself, McCoy, Dowling, and Johnson, claiming that by virtue of their written agreement, they as joint informers were jointly entitled to this sum. Dowling and Johnson have also presented their petition praying that they alone may be adjudged the informers.

After Dowling had made his disclosures to the officers, he agreed to furnish in ten days to Bartlett, who was to continue in that neighborhood, copies verified by his affidavit of all papers in his possession relating to these frauds, which he did, and soon after these papers were produced by McCoy, Bartlett, and Bingham, to the judge of the district court of Maine, accompanied by McCoy's affidavit and petition for a warrant to search the premises of Stockwell & Co., which was

[1] [Reported by Thomas Hawes Haskell, Esq., and here reprinted by permission.]

issued and their books and papers seized, and they afforded important testimony in behalf of the government upon the trial of the action against them. It is now claimed in behalf of Dowling that he was in fact the sole informer; that from him McCoy and Bartlett obtained the information which established the guilt of Stockwell & Co., and that these officers were then acting only in compliance with the instructions of their superior officers in obtaining this information from Dowling and presenting it to the district judge as evidence to authorize the search warrant. It is quite certain that most important evidence was thus elicited from Dowling without which the government would not have been able to ferret out the fraud and its perpetrators; but this evidence was communicated to the officers where they had no official authority whatever, and moreover was not the only evidence offered in the trial to establish the guilt of the parties, as their own books and papers were very important testimony in fixing upon them a guilty knowledge. Of all the claimants, Johnson appears to have contributed the least to the success of the undertaking, and yet he is joined with Dowling in the petition that they may be adjudged entitled to the whole share. Under the decisions of this court, there can be no question that a revenue officer under certain circumstances may be entitled to claim as an informer; and I am of opinion that these four persons having each borne their respective parts in procuring the necessary information and evidence which resulted in the conviction, and having in the outset agreed in writing that they would make common cause of the undertaking, would work together in accomplishing it and share equally the advantages to be realized therefrom, are thereby now precluded from any inquiry by the court as to the degree of benefit which each conferred by his individual services. Good faith requires that they should abide by their contract, and that neither of them should be permitted without the consent of the others to repudiate it and by extrinsic evidence endeavor to satisfy the court that one or more of the associates did not by his services aid equally with the others in the advancement of the common purpose. Especially should such an agreement under the circumstances be obligatory upon Dowling, as he was well aware of the amount of evidence he could produce to ensure a conviction, and before making any disclosure whatever, acting undoubtedly for his own interest as he understood it, insisted that the officers should procure such further evidence as could be obtained by them, and should prosecute the suits to judgment.

This agreement was not without consideration, being mutual, and was not in contravention of law, and if Dowling should receive the full amount. I hold he would be accountable to McCoy and Bartlett for their respective proportions of it. In the distribution of this fund, it is the duty of the court to ascertain the parties beneficially interested and who are legally entitled to hold it, and to decree the payment to them directly rather than subject them to the expense and delay of further controversy with Dowling for the recovery of their proportion from his hands if he should receive it. In suits at common law, if justice can be done between the parties directly, and circuity of action thereby be avoided, the courts do not hesitate to adopt such a course and allow the party to recover that to which he is entitled, and which he might by ulterior proceedings obtain from one who should receive it from the defendant; and this court cannot hesitate as to the propriety of applying this rule in the distribution of money in its registry, it being entirely free from any technical difficulties which sometimes arise in proceedings at common law.

It is claimed that if the court is of opinion that Dowling was within the language of the act of 1867 "the person giving the information which led to the prosecution," that then the court is bound by the provisions of that law to award to him the informer's share, although he may by his contract be bound to pay the other parties their proportions of it. Under ordinary circumstances such would probably be the result; but the court is of opinion that parties jointly engaged in such an enterprise may, as between themselves, agree as to the distribution of the informer's share; that such an agreement when fairly made is conclusive between them as to their respective rights, and should be recognized and enforced by the court as the only proper evidence in a hearing upon this question in any controversies between the parties relating thereto.

Decree that Bartlett, McCoy, Johnson and Dowling were joint informers, and that the informer's share be divided equally among them.

UNITED STATES (STOCKWELL v.). See Cases Nos. 13,466 and 13,467.

Case No. 16,407.

UNITED STATES v. STONE.

[Cited in U. S. v. Jackson, Case No. 15,458. Nowhere reported; opinion not now accessible.]

Case No. 16,408.

UNITED STATES v. STOTT.

[2 Cranch, C. C. 552.] [1]

Circuit Court, District of Columbia. April Term, 1825.

DISTRESS FOR RENT—POWERS OF BAILIFF.

A bailiff cannot lawfully force himself into a house, by the outer door (although partially opened by one within), to make a distress for rent.

---

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

Indictment for assault and battery upon one Theodore Meade, who was a constable employed by the landlord to levy a distress for rent. Having knocked at the outer door, it was partially opened by Mrs. [Elizabeth] Stott, but seeing the constable, she instantly endeavored to close it. The constable, having one arm and one leg in, forced it open and entered. Mrs. Stott then collared him and struck him with a bed-wrench, and seized his bag and threw it out of the window; and for this assault and battery she was indicted.

Mr. Hewitt, for defendant, contended that the bailiff had no right to force the door open, under those circumstances, but was himself a trespasser, and cited Lee v. Gansel, Cowp. 1.

THE COURT (THRUSTON, Circuit Judge, absent) said that the bailiff had no right to force the door open, under those circumstances. That he could not lawfully use force to get in, although the door was partially opened by the defendant. It was like the case of a door fastened by a chain so as to allow it to be opened a few inches only. In Lee v. Gansel, Lord Mansfield doubted, whether, if the chamber of Gansel could be considered as his castle, and the door so far opened as to admit the thigh of the officer, he could justify forcing himself entirely in, so as to arrest Gansel.

Verdict, "Not guilty."

Case No. 16,409.

UNITED STATES v. STOWELL.

[2 Curt. 153; [1] 18 Law Rep. 76.]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

INDICTMENT — MOTION TO QUASH — DISCRETION OF COURT — POWERS OF COMMISSIONERS — WARRANTS OF ARREST — POWERS OF DISTRICT ATTORNEYS.

1. It is within the discretion of the court to entertain a motion to quash an indictment, or to hold the defendant to plead in abatement, or demur.

2. An indictment under the 22d section of the act of April 30, 1790 (1 Stat. 117), must show by proper averments that the process was legal.

[Cited in U. S. v. Cover, 46 Fed. 285.]

[Cited in Com. v. Doherty, 103 Mass. 444.]

3. A commissioner empowered to issue a warrant under the statute of the United States of September 18, 1850 (9 Stat. 462), must be such a commissioner as is particularly described in that act, and consequently an averment in an indictment for resisting such a warrant, that it was issued by a commissioner of the circuit court of the United States, is not sufficient.

[Applied in U. S. v. Wilcox, Case No. 16,692. Cited in U. S. v. Myers, Id. 15,847; Ex parte Lane, 6 Fed. 36; Pettibone v. U. S., 13 Sup. Ct. 546, 148 U. S. 197.]

4. An averment that a warrant was duly issued, is insufficient; the facts constituting the due issue must be set forth.

5. The want of an averment of the facts showing that the commissioner was authorized to issue the warrant, cannot be aided by referring to the records of this court.

6. That part of the 29th section of the judiciary act (1 Stat. 88), which provides that jurors shall be drawn from such parts of the district as the court shall direct, is not repealed by St. 1840, July 20 (5 Stat. 394), and is still in force.

[Cited in U. S. v. Richardson, 28 Fed. 69.]

[Cited in State v. Kemp, 24 N. W. 351, 34 Minn. 64.]

7. The district attorney has power under the control of the court, at any time before a jury is impanelled, to enter a nolle prosequi.

[8. Cited in Confiscation Cases, 7 Wall. (74 U. S.) 457, to the point that United States courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him.]

This was a motion to quash an indictment against Martin Stowell, for obstructing the marshal in the service of legal process. The obstruction complained of occurred during the proceedings for the rendition of Anthony Burns, in the year 1854.

Before CURTIS, Circuit Justice, and SPRAGUE, District Judge.

CURTIS, Circuit Justice. The grand-jury at the present term returned into court an indictment against Martin Stowell for obstructing the marshal of this district in serving legal process. The indictment is framed under the twenty-second section of the act of April 30, 1790. The accused having been arraigned, submitted, through his counsel, a motion to quash the indictment. It is within the discretion of the court to refuse to entertain such a motion, and put the party to plead in abatement, or to demur, in order to raise questions affecting the regularity of the finding of the indictment, or its formal or substantial sufficiency. In this case, the court being satisfied, on the presentation of the motion, and looking into the indictment, that some of the causes assigned therein, were proper to be discussed and decided in this form of proceeding, have, for the sake of convenience, allowed the counsel to present their views on all the questions, which, in their apprehension, it was proper to make; not intending, however, to depart from what we consider to be a sound rule, that questions admitting of doubt, and involving such difficulty as to require a protracted and elaborate examination, should not be decided in this form of proceeding, especially when the motion is not made till the jurors and witnesses are in attendance for the trial. Having given to some of the questions raised, that consideration which we have found necessary to a decision, I will now state the opinion of the court thereon.

The indictment contains five counts. The first is the most full and particular, and an examination of that will render any extended observations on the others unnecessary. This count alleges, in substance, that the defend-

[1] [Reported by Hon. B. R. Curtis, Circuit Justice.]

ant knowingly and willingly did obstruct, resist, and oppose the marshal of this district in serving and attempting to serve a certain warrant and order, which are set out in the count. The clause of the 22d section of the act of 1790, on which this indictment depends, makes it an offence knowingly, and wilfully to obstruct, resist, or oppose any officer of the United States in serving, or attempting to serve, or execute, any legal process whatsoever. To constitute an offence under this law, therefore, the obstruction must have been of legal process; and whatever may have been the form or purpose of the process, it is not legal process, within the meaning of this act, unless it emanated from, and was issued by, some tribunal, judge, or magistrate, authorized by the laws of the United States to issue such process. It is clear, also, that the indictment must show, by proper averments, that the process was legal, not only in form and purpose, but as emanating from some court or officer empowered by law to issue such process. What particular averments are necessary to show this authority to issue the process alleged to be obstructed, depends upon the character of the tribunal, or officer, from whom it came. If, as in this case, the officer who granted the process, had, by law, only a limited and special authority, dependent for its existence upon particular facts, every fact necessary to the existence of that authority, must either be averred in the indictment, or appear on the face of the process set out therein. Whether it be sufficient, that some of the facts necessary to the existence of power to issue the process, where the jurisdiction is special and limited, appear upon the face of the process itself set out in the indictment, but are not averred in the indictment to be true, so as to be traversed and put in issue by a plea of not guilty, it is not necessary in this case to decide. See Wise v. Withers, 3 Cranch [7 U. S.] 331; Elliott v. Piersol, 1 Pet. [26 U. S.] 340; Allen v. Gray, 11 Conn. 95; Savacool v. Boughton, 5 Wend. 170 (which contains an elaborate review of the cases); People v. Warren, 5 Hill, 440; 1 Russ. Crimes, 511; Fost. Crown Law, 311, 312; 1 Hale, P. C. 460. It will be seen, when we come to examine the indictment, that the defect, which we think exists in the averments to show authority to issue the warrant, is not aided, so far as the act of 1790 is concerned, by any thing on the face of the warrant itself.

The first count alleges that "heretofore, namely, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and fifty-four, a certain warrant and legal process, directed to the marshal of the said district of Massachusetts, or either of his deputies, was duly issued under the hand and seal of Edward G. Loring, Esquire, who was then and there a commissioner of the circuit court of the United States, for said district, which said warrant and legal process was duly delivered to Watson Freeman, Esquire, who was then and there an officer of the United States, namely, marshal of the United States, for the said district of Massachusetts, at Boston, in the district aforesaid, on the said twenty-fourth day of May, in the year aforesaid, and was of the purport and effect following, that is to say: "United States of America. Massachusetts District, ss.: To the marshal of our district of Massachusetts or either of his deputies, Greeting:—In the name of the president of the United States of America, you are hereby commanded forthwith to apprehend Anthony Burns, a negro man, alleged now to be in your district, charged with being a fugitive from labor, and with having escaped from service in the state of Virginia, if he may be found in your precinct, and have him forthwith before me, Edward G. Loring, one of the commissioners of the circuit court of the United States for the said district, then and there to answer to the complaint of Charles F. Suttle, of Alexandria, in the said state of Virginia, merchant, alleging under oath that the said Anthony Burns, on the twenty-fourth day of March last, did, and for a long time prior thereto had owed service and labor to him, the said Suttle, in the said state of Virginia, under the laws thereof, and that, while held to service there by the said Suttle, the said Burns escaped from the said state of Virginia into the said state of Massachusetts; and that said Burns still owes service and labor to said Suttle in the said state of Virginia, and praying that said Burns may be restored to him, said Suttle, in said state of Virginia, and that such further proceedings may then and there be had in the premises as are by law in such cases provided. Hereof fail not, and make due return of this writ, with your doings thereon, before me. Witness my hand and seal at Boston, aforesaid, this twenty-fourth day of May, in the year one thousand eight hundred and fifty-four. Edward G. Loring, Commissioner. (L. S.)" These are the only parts of the first count material to the present inquiry, which is, not whether it could be proved on the trial, that Mr. Loring had authority to issue this warrant, but whether these averments are sufficient, in point of law, to show to the court that he had that authority.

The first section of the act of congress of September 18, 1850, taken in connection with the sixth section of the same act, confers power to issue warrants to arrest fugitives from service upon "the persons who have been, or may hereafter be appointed commissioners, in virtue of any act of congress, by the circuit courts of the United States, and who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace or other magistrate of any of the United States may exercise, in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the 33d section of the act of the 24th of September, 1789, entitled

'An act to establish the judicial courts of the United States.'" It appears, then, that to have authority to issue a warrant under this act of 1850, the person issuing it must not only be a commissioner appointed by a circuit court of the United States, but a commissioner thus appointed on whom have been conferred the powers respecting the arrest, imprisonment, and bail of offenders, which were conferred on justices of the peace by the 33d section of the act of 1789 (1 Stat. 91). That is, he must be such a commissioner as is particularly described by the act of 1850. Does the averment, that the person who issued this warrant was "a commissioner of the circuit court of the United States for said district," amount, in legal intendment, to an averment that he was such a commissioner as is particularly described in the act of 1850? If every person who is a commissioner of the circuit court, ex officio, possesses, by law, the powers as to arresting, imprisoning, and bailing offenders, granted to justices of the peace by the act of 1789, then it might be intended by the court that this commissioner had those powers, and, consequently, that he was one of those commissioners upon whom the act of 1850 conferred the power to grant such a warrant. But, on the other hand, if there may be commissioners appointed by the circuit court, who do not possess those powers, then an averment that a person was a commissioner appointed by this court, does not amount to an averment that he was such a commissioner as is described by the act of 1850, and therein empowered to issue warrants of this kind.

It was argued by the defendant's counsel, that this court issues commissions to take depositions in particular cases, and that the persons thus empowered are commissioners appointed by the circuit court. We feel some doubt whether persons acting under a dedimus potestatem in a particular case, are so far known to the laws of the United States as commissioners appointed by the circuit court, that we could say they might fairly, and would naturally, be included under those terms. But there is a class of commissioners appointed by the circuit court, not adverted to by the counsel, who are known to the laws of the United States as commissioners, and who do not ex officio possess the powers to arrest, imprison, and bail offenders against the laws of the United States. By the act of congress of August 12, 1848, § 1 (9 Stat. 302), passed to give effect to stipulations in treaties with foreign governments, for the extradition of persons charged with certain crimes, power to arrest and hold for extradition, is conferred, amongst others, upon "commissioners authorized so to do by any of the courts of the United States." We think it clear that commissioners appointed for this purpose under this act, would not possess, ex officio, the powers to arrest, imprison, and bail offenders against the laws of the United States. It is true, that it seems to have been the design of congress, when it has from time to time conferred new powers upon commissioners appointed by the circuit courts of the United States, to confer them upon that class of commissioners who were originally authorized to be appointed by the act of February, 1812 (2 Stat. 679), to take bail and affidavits in civil causes in the circuit courts; and, accordingly, by apt terms, the persons so appointed have been described, in subsequent laws, as those to whom the new authority was intended to be given. Acts March 1, 1817 (3 Stat. 350); August 23, 1842, § 1 (5 Stat. 516); August 8, 1846 (9 Stat. 72). In all these instances, as well as in the act of 1850, for the extradition of fugitives from service, the intention of congress is apparent, to confer power on that class of commissioners who had been or should be appointed to take bail and affidavits, &c. But the act of August 12, 1848, for extradition under treaties, does not confine the powers therein granted to commissioners who had been, or should be appointed to take affidavits and bail, or to arrest, imprison, or bail offenders against the laws of the United States. There is not only the absence of any such description of the commissioners who are to exercise the powers conferred by the act of 1848, but the sixth section provides, in terms, that "it shall be lawful for the courts of the United States, or any of them, to authorize any person or persons to act as a commissioner under the provisions of this act." By force of this act, therefore, there may be commissioners appointed by the circuit court for this district, to exercise the powers therein conferred, and those only. The averment that the person who issued this warrant, was a commissioner appointed by the circuit court, would be fully satisfied by proof, that he was thus appointed to make extradition under treaties, though he had no other power whatever. And it necessarily follows, that this averment does not show to the court that this was such a commissioner as had lawful power to issue this warrant, and consequently the indictment does not show that the warrant was legal process, because it does not show that it proceeded from one having lawful authority to issue it.

We have been referred to a precedent of an indictment for resisting an officer of the United States in the service of legal process, found in Whart. Prec. 567. That process issued from a district court of the United States, a court of record, and not technically an inferior court. All its jurisdiction and powers are matter of law, to be judicially noticed. The distinction between such a court and a magistrate having only a special authority, is settled. In favor of the jurisdiction of the latter, the law makes no intendment. 1 Saund. 70, note 3; 1 Chit. Pl. 306; Sackett v. Andross, 5 Hill, 330.

These principles of criminal pleading are so well settled, and their applicability to this

case is so clear, that no authority need be adverted to. But the case of Rex v. Everett, 8 Barn. & C. 114, is in point. That was an indictment for unlawfully soliciting one Hooper, a person employed in the service of the customs, to omit to make a seizure. The law did not make it the duty of all persons employed in the service of the customs, or confer on all such persons the power, to make seizures, but only on certain officers of the customs, and persons empowered for that purpose by the commissioners of customs. The indictment alleged, that Hooper was a person employed in the service of the customs, and that it was his duty in such employment to make a certain seizure. The defendant having been convicted, moved, in arrest of judgment, that the indictment did not show that Hooper could by law make a seizure. The court held the objection fatal; that it was not enough to aver it was the duty of Hooper to make the seizure; that the facts from which that duty arose must be stated; that as all persons in the service of the customs had not this power, and as no other fact besides his being in that service was alleged, the judgment must be arrested. In the case at bar, as in that case, only certain persons possess the power in question. It is not shown that Mr. Loring was one of those persons; and the allegation that the warrant was duly issued, does not help the indictment. Whether duly or unduly issued is a question of law, and the facts to constitute a due issue must be pleaded, that the court may be able to decide whether the issue of the warrant was duly or unduly made; just as in the case in 8 Barn. & C. 114, it was held not sufficient to aver that it was the duty of Hooper to make seizures, but the facts from which that duty arose should be averred. See, also, Rex v. Lyme Regis, Doug. 79; Everard v. Paterson, 6 Taunt. 625, 2 Marsh. 308.

It may be suggested that, inasmuch as the appointment of Mr. Loring emanated from this court, and is a matter of record here, the court may take judicial notice of the fact that he was authorized to act as a commissioner, in arresting, imprisoning, and bailing offenders against the laws of the United States, and so that he was such a commissioner as is described in the act of 1850. We suppose it to be true that Mr. Loring was such a commissioner, and that his authority could be proved by producing the record of his appointment; but this cannot affect the decision of the question now under consideration. An indictment must contain every averment necessary to show that an offence has been committed; and the want of any such averment cannot be supplied, by showing that the fact thus omitted appears on other records of the court. Suppose a conviction upon an indictment thus defective, were to be carried by writ of error to another court; the conviction must be reversed there, because the court of errors could have no judicial knowledge of the omitted fact. Yet, if erroneous in the court above, it would be equally erroneous in the court below. The indictment must be sufficient of itself, when aided by those intendments which the law requires to be made from what appears therein; and it cannot be made good by merely extraneous matter, though that may be matter of record. It is true, this objection to the indictment is technical, and there does not seem to be reason to suppose, that in this case, the absence of this averment in the indictment can be of any practical consequence to the defendant, so far as respects the substantial merits of his case. But the rules of law which prescribe the essentials of a good indictment, are as binding on the court as the act of congress under which the indictment is framed; and the defendant has the same right to call on the court to give complete effect to the former, as the government has, to require the enforcement of the latter. For these reasons we are of opinion, that it does not appear by this first count that the warrant set out therein was legal process.

It has been made a question at the argument, whether the indictment shows that Burns was held, at the time of the alleged obstruction, under the original warrant, or under the order made by the commissioner on the adjournment, or under both. But as it is not shown by the count that Mr. Loring was such a commissioner as was empowered by the act of 1850 to hear and determine this subject-matter, it necessarily follows that it is not material in this case how that question should be decided.

Of the other counts in the indictment, it is necessary to say only, that neither of them is as full and specific as the first, and neither of them contains enough to show, that the process alleged to be obstructed was legal. One of them seems to have been framed in conformity with precedents under the laws of the states, for resisting, opposing, or assaulting an officer of the law while in the performance of his duty. But the act of 1790 requires that the officer should be resisted, obstructed, or opposed, in serving, or attempting to serve, or execute, some order or rule of a court, or some legal process. State officers, especially those who are guardians of the public peace, have many official duties to perform without process. They are protected by the laws under whose authority they act in discharging their duties; and offences may be committed against them, and consequently persons may be indicted therefor without alleging or proving that any legal process existed. So under the 8th section of the act of 1850, the offence of resisting or obstructing the claimant, or any one lawfully assisting him, either with or without process, is described; and an indictment under that section need not show that any legal process existed. But under the act of 1790, the resistance or obstruction of some legal process or

precept is the very gist of the offence, and therefore the indictment must show what the process or precept was, and must set forth such facts as, if true, would make the process legal. Our opinion is, that as neither of the counts in this indictment describes, by sufficient averments, any offence against the act of 1790, under which alone, the government claims that the indictment can be supported, it must be quashed.

This renders it unnecessary to decide the other questions which have been argued, and, with one exception, we desire to be understood as neither expressing nor intimating any opinion thereon. There is, however, one question which has been argued by one of the defendant's counsel, which so far affects both the past and present practice of the court that it would be unjust to the suitors to allow it to be supposed that any doubt can be raised concerning it.

At the October term, 1832, this court adopted a roster of towns and cities, from which jurors to serve in the circuit court were to be returned. This roster contained ten distinct tables of towns and cities, in which the name of the town or city was set down, and opposite each was placed the number of grand and traverse jurors who were to be drawn therefrom. One of these tables was to be used for each term, taking the tables in rotation as they stand on the roster. This practice has been followed, as we understand, from the adoption of the order to the present time. The roster embraces a large part of the maritime towns and cities of the state, and many others, whose local situation renders access to the place where the court is required by law to be held, comparatively cheap and easy. It excluded the more remote interior towns of the state altogether. In forming these lists of towns, this court was undoubtedly governed by that clause of the 29th section of the act of congress of September 24, 1789 (1 Stat. 88), which provided that jurors "shall be returned, as there shall be occasion for them, from such parts of the district from time to time, as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services." In the discharge of the duty thus made incumbent on the court by this act, our predecessors seem to have considered, as we have done, that inasmuch as a large part of both the civil and criminal cases tried here are of a commercial or maritime character, a jury drawn from commercial and maritime towns would be most conversant with such transactions generally, and best able to bring to their investigation that experience which would enable them most satisfactorily to decide such controversies; following, in this respect, as nearly as the circumstances will permit, the well-known maxim of the common law, recognized both in the constitution and laws of the United States, that a jury should come from the vicinage; and also, that in drawing jurors from those cities and towns not remote from the place where the court is held, they would obey the other requirement of the statute, to avoid unnecessary expense. And, further, that the population of the towns and cities embraced in the roster was so great, and the number of the jurors and the length of their attendance necessary to do the business of the court, comparatively so small, that the inhabitants of those towns and cities would not be unduly burdened by the service.

It is now insisted, however, that it has been discovered by one of the defendant's counsel, that since the year 1849 this court has been pursuing an illegal practice by using this roster; that a jury summoned in pursuance of it is not returned according to the laws of the United States; and, consequently, that not only this indictment, but all presentments and verdicts here made or rendered, for a period of upwards of fourteen years, have been illegal and invalid. The supposed ground for attributing this very grave mistake to the court is, that by an act of congress of July 20, 1840 (5 Stat. 394), the clause of the 29th section of the judiciary act, under which the court has acted, was repealed. To ascertain whether this be so, it is necessary to examine the two statutes. The clause in the judiciary act of 1789 is as follows: "And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each state respectively, according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state, and shall be returned as there shall be occasion for them, from such parts of the district from time to time as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services."

This clause provides for three things: (1) The mode of designating jurors, as by ballot, lot, or otherwise. (2) The qualifications of jurors, as age, citizenship, residence, &c. (3) The locality from which jurors, so designated and so qualified, shall be drawn. The first two are required to be governed, as nearly as may be, by the laws of the states, as they existed on the 24th day of September, 1789. The third is referred to the discretion of the court, to be regulated by the considerations as to impartiality, expense, and undue burden of the service, which are pointed out in the act. The third particular is that now in question, and the act of July 20, 1840, which is relied on as repealing this third provision, is as follows: "That jurors to serve in the

courts of the United States, in each state respectively, shall have the like qualifications, and be entitled to the like exemptions as jurors of the highest court of law of such state now have and are entitled to, and shall hereafter from time to time have and be entitled to; and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised and hereafter to be practised therein, in so far as such mode may be practicable by the courts of the United States, or the officers thereof; and for this purpose the said courts shall have power to make all necessary rules and regulations for conforming the designation and impanelling of juries in substance to the laws and usages now in force in such states; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts."

It is obvious, on even a cursory reading of this act of 1840, that it does not expressly repeal the former law, or any part of it; and, also, that it contains nothing touching the subject of the locality from which the jurors are to be drawn. It applies solely to the first two particulars embraced in the former law, namely, the mode of designating jurors, and their qualifications. It changes the law as to the mode of designation, and the qualifications of jurors in this: that whereas by the act of 1789, the laws of the states existing in September, 1789, were the only rules respecting qualifications and mode of designation, this act of 1840 adopts as rules of qualification and mode of designation, the law of the states which existed on the 20th day of July, 1840, and also any state laws which might thereafter be passed touching those subjects. The practical necessity for this change in the law is very apparent. The act of 1789 having reference only to the state laws then in existence, there were no rules on this subject in the new states, by force of any positive law. The necessity is met by the act of 1840, and there it stops. Neither in terms nor by any implication has it repealed the residue of the law of 1789, which confers a discretionary power on the court respecting the part of the district from which the jurors are to be drawn. It is a well-settled and familiar rule that the law does not favor repeals by implication, and a subsequent statute repeals a former statute by implication, only so far as the one is directly and necessarily repugnant to, or inconsistent with, the other. There is no repugnancy between these two acts as respects the locality from which jurors are to be drawn. Both may stand together without conflict or inconsistency. In the same 29th section of the act of 1789, occurs another provision respecting the locality from which jurors are to be drawn. It is as follows: "In cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit-jurors at least shall be summoned from thence." Certainly the act of 1840 has not repealed this clause. Yet there is as good ground for so arguing, as for the assertion that it has repealed the other direction contained in the same section respecting the locality from which jurors shall be summoned. Our clear opinion is, that so much of the act of 1789 as requires this court to determine from what parts of the district jurors are to be drawn, is still in force, and consequently this objection is without foundation.

Upon another objection to the indictment, grounded on the fact that the venire for the grand-jury was issued to, and returned by, the marshal, and that he was not an indifferent person within the meaning of the 29th section of the act of 1789, and that for this cause the court should, on motion, quash the indictment, after it had been received and filed, and the defendant had been put to plead thereto, we have formed no opinion. If it had been alleged that the marshal, or any other person concerned in returning the grand-jury, had been guilty of any unfair or improper conduct in forming the panel, we should have deemed it our duty carefully and promptly to investigate the charge. This would have been due to the purity of the administration of the law, which the court should most sedulously guard. But the objection has been rested merely upon the legal ground, that however fair in point of fact may have been the conduct of the marshal, he was not legally qualified to return this grand-jury. As the question, in the mode in which it is presented, is attended with difficulty, and as it is not necessary to a determination of the motion to quash the indictment, and as it does not affect the general practice of the court, we have thought it proper to reserve our decision thereon, until it shall need to be decided, and until it shall come before us unattended by the difficulties which arise from the time and mode of raising it. The result is, that the motion to quash the indictment for the cause that it does not appear therein that any offence was committed, must be allowed.

SPRAGUE, District Judge, remarked, that he concurred in the opinion delivered by Judge CURTIS. There were, he said, several kinds of commissioners, some of which have power to issue warrants for the arrest of persons escaping from service or labor, and others have not. This indictment does not show that this commissioner is one of the former class, and therefore it does not set forth that the warrant specified was issued by a competent authority. Several other questions have been presented, which would deserve very grave consideration, but it was not then necessary to decide them.

John P. Hale suggested that the same or-

der be issued in the cases of certain other defendants indicted for the same offence, whose counsel had argued to the court as in the case of Martin Stowell.

Mr. Hallett, U. S. Dist. Atty., objected; and said he would enter a nolle prosequi in each of the other cases. He insisted on his right to take this course, declaring that Martin Stowell was the only party arraigned, and his case the only one before the court. Whether, under this decision, it would ever hereafter be possible to frame any indictment to meet these cases, he said, would be a matter of future consideration; but at present he only asked the right which belonged to the prosecuting officer, of disposing of the indictments in the other cases.

C. M. Ellis insisted that justice required that the other cases should be disposed of upon the motions which had really been argued.

After some further remarks, Judge CURTIS said the court did not perceive that it can make any difference, now or hereafter, whether an entry be made that the indictment be quashed, or of nolle prosequi. The court understood that all the cases had been heard upon the motion; but, at the same time, as a general rule, the prosecuting officer has power at any time before a jury is impanelled, to enter a nolle prosequi. The court will not restrain this power, if he chooses to exercise it, in these cases. However, the motion must be made at this time, so that the court may see that the same rights are secured to the defendants as if their cases were included in this order.

Case No. 16,410.

UNITED STATES v. STRICKER.

[12 Blatchf. 389.] [1]

Circuit Court, S. D. New York. Dec. 21, 1874.

FORFEITED RECOGNIZANCES—MOTION TO REMIT—PRACTICE.

An action having been brought on a forfeited recognizance, and a motion being made, under section 1020 of the Revised Statutes, to remit the forfeiture, on the ground that the party bound to appear was, when called, in the custody of a state officer under a warrant issued out of a court of the state, in a civil action, *held*, that the motion must be denied, on the ground that the question could be best determined on the trial of the action.

This was a motion [against Samuel Stricker], made under section 1020 of the Revised Statutes, to remit the penalty of a forfeited recognizance, on the ground that the party bound to appear was, when called, in the custody of a state officer under a warrant issued out of a court of the state, on a criminal charge.

Thomas Harland, for the motion, cited Caldwell v. Com., 14 Grat. 698; U. S. v. Feely [Case No. 15,082]; People v. Bartlett, 3 Hill, 570.

BENEDICT, District Judge, denied the motion, upon the ground that the question could be best determined on the trial of the action which had been brought upon the forfeited recognizance.

UNITED STATES (STROHM v.). See Case No. 13,539.

Case No. 16,411.

UNITED STATES v. STRONG.

[2 Cranch, C. C. 251.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.

LARCENY—BAILMENT.

If goods be delivered to a workman for a special purpose, and he afterwards take them away with intent to steal them, it is larceny.

Indictment [against Samuel Strong] for stealing sundry copper bolts, the property of the United States.

The prisoner was a workman in the navy yard and employed in driving such bolts. The bolts were delivered to him from the shop where they were cut. He offered to sell them, having first carried them home to his house.

Mr. Ashton, for defendant, contended that it was not larceny, unless the defendant took them with intent to steal them. No trespass was committed. There must be an unlawful taking. 1 Hawk. P. C. c. 33, § 2.

Mr. Swann, U. S. Dist. Atty., contra, cited 1 Hawk. P. C. c. 33, §§ 5, 6. That if the person to whom the possession of the goods has been delivered by the owner, takes away a part of them, with intent to steal it; as in the case of a carrier, or weaver, or miller, it is larceny; so if one has the bare charge, or the special use of goods, but not the possession of them, as the shepherd, butler, servant, and guest; for in these cases the offence may properly come under the word "cepit."

THE COURT (THRUSTON, Circuit Judge, doubting) instructed the jury that if they should be satisfied by the evidence that the bolts were delivered to the prisoner for the special purpose of driving them into the vessel, and he afterwards took them away, with intent to steal them, it was larceny.

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

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

Case No. 16,412.

UNITED STATES v. STROTHER.

[3 Cranch, C. C. 432.] [1]

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

EXAMINATION OF WITNESS.

Upon an indictment for a nuisance, in keeping a public gaming-house, the question, Who dealt the cards? is too general. Witness not bound to answer it.

Indictment [against John Strother] for a nuisance, in keeping a common gaming-house.

Mr. Swann, for the United States, asked the witness, O. Carr, "Who dealt the cards?"

Mr. Jones, for defendant, objected that it was too general.

And THE COURT (nem. con.) sustained the objection.

Case No. 16,413.

UNITED STATES v. STURGEON et al.

[6 Sawy. 29.] [2]

District Court, D. Nevada. July 1, 1879.

INDIAN RESERVATIONS—INTRUSION OF WHITES.

The president having set apart the Pyramid Lake reservation for the use of Indians, the whites who go upon the reservation to fish, do so "contrary to law," within Rev. St. § 2147.

[Cited in U. S. v. Bridleman, 7 Fed. 903; U. S. v. Martin, 14 Fed. 821; Id., 17 Fed. 153; U. S. v. Howard, Id. 641.]

[This was an indictment against John Sturgeon and others for violation of section 2147 of the Revised Statutes.]

Charles L. Varian, for the United States.

Robert M. Clarke, for defendants.

HILLYER, District Judge. The defendants, nine in all, are charged with returning to the Indian country, after having been removed, in violation of section 2148, Rev. St.

The special verdict and agreed facts show that these men were engaged within the limits of the Pyramid Lake Indian reservation, fishing, and dealing and trading in fish; that they were, by order of the proper authorities, removed from the reservation, and that thereafter they returned and resumed their former business of fishing.

That the reservation is Indian country, has just been decided in the case of U. S. v. Leathers [Case No. 15,581].

The only point not decided in that case material here is this: It is argued that taking fish inside the reservation is not unlawful; that the superintendent of Indian affairs has no power to decide what is contrary to law, or who is within the reservation contrary to law, under section 2147, or without authority of law, under section 2149, and that the return after removal, to continue a lawful occupation, is no offense.

If this argument is sound, the whole purpose of the law, in setting apart lands for the separate use of the Indians, is defeated.

It has been shown in the Case of Leathers, [supra,] that very large powers and discretion in the management of Indian affairs have been committed to the president, secretary of the interior, commissioner of Indian affairs, and other agents.

It may be added, that by section 2131 of the Revised Statutes a superintendent of Indian affairs is authorized to revoke the license of any person whenever, in his opinion, it is improper to permit such person to remain in the Indian country. By section 2147 the superintendent, agents, and subagents have authority to remove from the Indian country all persons found therein contrary to law. By section 2149 the commissioner of Indian affairs is authorized and required, with the approval of the secretary of the interior, to remove from any tribal reservation any person who, in the judgment of the commissioner, may be detrimental to the peace and welfare of the Indians.

The military force may be used to remove such persons. I think these sections show that whether it is proper to permit a trader to remain in the Indian country, or whether any person is detrimental to the welfare of the Indians, are questions left in the one case to the superintendent of Indian affairs, and in the other to the commissioner and secretary of the interior. The courts will not review their decision in these matters, and the party removed, if he feels himself aggrieved, must seek redress by other means than a return to the reservation in defiance of the authority removing him.

But there is to my mind another good reason for holding that the present defendants were found in the Indian country contrary to law, when they were found established on the reservation engaged in the business of fishing,—i. e. catching them for sale.

The president has set apart the reservation for the use of the Pah Utes and other Indians residing thereon. He has done this by authority of law. We know that the lake was included in the reservation, that it might be a fishing ground for the Indians. The lines of the reservation have been drawn around it for the purpose of excluding white people from fishing there, except by proper authority. It is plain that nothing of value to the Indians will be left of their reservation if all the whites who chose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law.

Hunting and trapping in the Indian country constitute, under section 2137, an offense; but these things are by no means the only

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

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

ones it is unlawful to do in the Indian country.

The reservation having been set apart by competent authority for the use of the Indians, anything which deprives them of that use is unlawful and contrary to law. When the defendants established their fisheries on the shores of the lake, they, contrary to law, appropriated to their own use a portion of that which the United States, acting through its duly authorized agents, had set apart for the use of the Pah Utes and other Indians. Therefore I think that, without reference to section 2149, these defendants were found within the Indian country, contrary to law, within the meaning of section 2147; that they were properly removed, under the orders of the president and secretary of the interior; and that by their return they have committed the offense defined in section 2148 of the Revised Statutes, as charged in the indictment.

They are all consequently adjudged guilty, and must appear for sentence July 15, 1879.

Affirmed on appeal to the circuit court. [Case unreported.]

Case No. 16,414.

UNITED STATES v. STURGES et al.

[1 Paine, 525.] [1]

Circuit Court, D. New York. April Term, 1826.

MORTGAGES — TRUSTS — CREDITOR'S BILL — ASSIGNMENTS OF MORTGAGES — NOTICE OF EQUITIES — PLEADING — WAIVER OF DEFECTS — DISCHARGE OF IMPRISONED DEBTOR — RELEASE OF SURETIES.

1. Where a mortgage is given by a debtor to his co-debtor to secure the latter against the debt of their creditor, equity considers the mortgagee as a trustee for the creditor, and where a judgment has been recovered, will apply the mortgaged property in satisfaction of the judgment, or remove the encumbrance, so that it may be subjected to execution.

[Cited in Warner v. Helm, 1 Gilman, 231.]

2. The principle which governs such cases is, that the collateral security is a trust created for the protection of the debt, and that it is the duty of a court of equity to see that it fulfils the purpose for which it was intended.

3. A judgment creditor who applies to a court of equity for its aid to enforce a judgment at law, if he asks its aid to reach a chattel, must show that he has taken out execution at law, and pursued it to every available extent, in order to show a lien upon the chattel; but if the aid is sought as to land, it is enough to show a judgment creating a lien upon the land.

4. Although a mortgage be absolute upon the face of it, a court of equity will inquire into the real purpose for which it was given, and apply it to that use.

5. It is a rule of equity that a judgment creditor at law is entitled to redeem an encumbrance upon land, and thereby secure his legal priority.

6. The assignee of a mortgage or other chose in action, takes it subject to the same equity that it was subject to in the hands of the assignor.

[Cited in Upham v. Brooks, Case No. 16,797; Corbett v. Woodward, Case No. 3,223.]

7. And the rule that it is only an equity residing in the original debtor, and not the equities of third persons, against the assignor that have this effect, does not exclude a judgment creditor, claiming to redeem: He stands in the place of the debtor, and has his equity.

8. An assignee who might have obtained notice, and ought to have sought it, stands in no better situation than if he had actually obtained it.

[Cited in Re Hook, Case No. 6,672.]

[Cited in brief in Digby v. Jones, 67 Mo. 105.]

9. A mortgage was given in reality to indemnify the mortgagee, but purporting to secure a sum of money payable in one year, and five years afterwards it was assigned, the whole sum appearing from the instrument to be unpaid. *Held*, that the circumstances of the case should have put the assignee upon an inquiry, from which he would have learnt the true consideration of the mortgage.

10. An objection to the equity of the bill, which might have been taken advantage of on demurrer, is not favourably received at the hearing of the cause after answer.

11. A discharge from imprisonment by the secretary of the treasury, of a debtor to the United States, under the act of 1798, does not discharge his co-obligors and sureties in the bond from their liability.

In equity.

R. Tillotson, for complainants.

H. Wheaton and E. Paine, for defendants Burroughs and Sturges.

E. Slosson, for defendant Butler.

THOMPSON, Circuit Justice. By the bill and answers in this cause it appears, that on the 9th of October, 1815, the defendants, Butler and Sturges, became security for Minturn and Champlin, in a bond for the payment of duties, to a large amount; that the bond not being paid at the time stipulated, separate suits were prosecuted against the principals and sureties, and separate judgments obtained, in December, 1816; that payments had been made from time to time upon the judgments, leaving, however, a large balance still due; that after the execution of the bond, and before the judgments were obtained thereon, viz. on the 12th of August, 1816, Butler and his wife executed a mortgage on certain property in the city of New-York, to Josiah Sturges, for the payment of twenty-seven thousand dollars. The mortgage was duly registered on the 16th of August, 1816. The mortgage upon its face purports to be an absolute mortgage to secure the payment of twenty-seven thousand dollars. The bill alleges, that it was in fact given to indemnify Sturges against the bond he had executed as surety for Minturn and Champlin, and for no other purpose; that Sturges had paid no monies on the bond, or towards the judgment recovered against him upon it, and that none had been realized from his property; that the mortgage remained uncancelled of record; and that by reason thereof, the house and lots so mortgaged could not be sold, under the judgment ob-

[1] [Reported by Elijah Paine, Jr., Esq.]

tained by the United States against Butler, as no person would bid for the same, so long as the property remains covered by the mortgage. And the bill seeks to have the mortgage cancelled and discharged of record, or the benefit thereof applied to the use of the United States, or such other relief as shall seem fit and proper.

The original bill was filed against Butler and Sturges only, and they answer separately. Butler admits the execution of the mortgage, as stated in the bill; that he never received any consideration for it from Sturges; alleges, that the bond referred to in the mortgage was never delivered to Sturges, and denies that the mortgage was given for the purpose of securing Sturges; but alleges, that it was executed and recorded, and retained by him for upwards of two years, solely with the view of raising money upon it to pay off the judgments against him on the Minturn and Champlin bond; denies that at the time of executing the mortgage, or at any time since, he was indebted to Sturges. And he sets up, in discharge of his liability on the judgment in favour of the United States, that in the fall of the year 1819, Minturn and Champlin, the principals, were committed to prison on a capias ad satisfaciendum, and were afterwards discharged from imprisonment by the secretary of the treasury, without his consent.

Sturges, in his answer, admits the execution of the mortgage, but denies that it was given to secure him against the Minturn and Champlin debt exclusively, but that it was also intended to secure him for all monies owing to him by Butler, and for all other liabilities incurred by him for Butler, as well as for monies he might be compelled to pay on account of said bond; and alleges, that Butler was indebted to him in a large sum of money, and that he had become responsible for him, endorser of promissory notes, and acceptor of bills of exchange to a large amount; and also alleges, that he had been damnified by reason of his becoming security for Minturn and Champlin, and that his property had been sold and sacrificed under the judgment obtained against him; and also insists on the discharge of Minturn and Champlin by the secretary of the treasury, as in Butler's answer set forth. Sturges also sets up, that being indebted to Oliver Sturges and Benjamin Burroughs in the sum of fifteen thousand dollars, he on the 9th of October, in the year 1821, assigned the said mortgage to them in full and complete satisfaction of said debt, and was thereupon released and discharged by them from the said debt.

In consequence of the disclosure in the answer of Sturges, that the mortgage had been assigned to Sturges and Burroughs, a supplemental bill was filed against Burroughs, the surviving partner, calling upon him to answer the allegations in the bill, and set forth his knowledge in relation to the assignment, &c., and praying that said assignment might be delivered up to be cancelled, or such release executed by Burroughs, as survivor of Sturges and Burroughs, as might be deemed proper and necessary, to enable the United States to enforce their judgment against the mortgaged premises.

Burroughs, in his answer, alleges, that on the 9th of October, 1821, Josiah Sturges was indebted to Sturges and Burroughs in the sum of eighteen thousand eight hundred and sixty-six dollars; that the assignment of the mortgage was made in satisfaction of fifteen thousand dollars, part of the said sum so due from him; that the mortgage has not been transferred by him to any other person; that no part of the interest on the fifteen thousand dollars has been paid: and that the fifteen thousand dollars is now due and unpaid, except so far as it has been paid by the assignment of the mortgage, and that he has no security except the said assignment; and denies any knowledge of the suits of the United States on the Minturn and Champlin bond, or of the judgments, or that the mortgage was executed to indemnify Josiah Sturges against said debt, or that Josiah Sturges was indebted to the United States; and avers that the assignment of the mortgage was executed bona fide by Josiah Sturges, to secure the debt of Sturges and Burroughs, and for no other purpose.

I have been thus particular in noticing the material allegations in the bill, and the admissions in the several answers, because it is upon these alone that whatever relief is given, must be founded so far as the rights of Butler or Sturges are concerned. No testimony has been taken in the cause that can vary such a result. Butler, one of the defendants, is the only witness examined on the part of the plaintiffs. The reading of his examination has been objected to on the ground of interest. The validity of this objection will be hereafter noticed, when I come to consider the cause as it relates to the rights of Burroughs. It is there alone it can be of any importance; for it is unavailing, so far as it contradicts the answer of Sturges. It is but the testimony of one witness, which will not outweigh the answer, asserting a fact responsive to the bill, there being no corroborating circumstances to take the case out of the general rule on this subject. The rights and interests of the several defendants being somewhat at variance with each other, it becomes necessary to consider the case as it stands between the United States and each one separately. The effect and operation of the discharge of Minturn and Champlin from imprisonment by the secretary of the treasury, is a branch of the defence set up, both by Butler and Sturges, and will be afterwards considered.

In the first place then, as it respects Butler, he admits that he never received any consideration for the mortgage. That although it was duly executed and registered, it was retained by him, and was given solely with the view of enabling him to raise money upon it, to pay off the judgment of the United States against him upon the Minturn and Champlin bond. If no consideration was given by Sturges for the mortgage, it is either a mere nominal or a fraudulent encumbrance, and upon either ground cannot be upheld as any impediment to the obtaining satisfaction of the judgment of the United States. And if it was a bona fide transaction, intended for the purposes set out in Butler's answer, the United States were beneficially interested in the use to which it was to be applied. It was to raise money to satisfy their judgment; and Sturges, in this view of the case, would become the trustee of the judgment creditor. And although the mortgage is absolute upon the face of it, a court of equity may inquire into the real purpose for which it was given, and apply it to that use. Moses v. Murgatroyd, 1 Johns. Ch. 119, 473. The allegation in the bill is, that the mortgage was given by Butler to indemnify Sturges, his co-surety, against the bond entered into for Minturn and Champlin. Although the admission in Butler's answer does not support this allegation in terms, yet it is such as to warrant the granting of the relief prayed for, either to have the mortgage delivered up and cancelled of record, or that the mortgaged premises may be sold, and the proceeds applied towards payment of the judgment of the United States; and such application of the proceeds would operate by way of indemnity to Sturges. And besides, there is a general prayer for relief, under which any relief may be granted, which the proofs or admissions will warrant.

It is objected, however, that there is a want of equity apparent on the face of the bill in two particulars: 1. It seeks the aid of a court of equity against sureties, without showing that the United States have attempted to collect the debt of the principals, or alleging that they are insolvent. 2. The bill is filed to obtain the aid of a court of equity to enforce a judgment of a court of law, without showing that the United States have exhausted their legal remedy.

There are several answers to be given to these objections. If, admitting the charges or facts stated in the bill to be true, there is no foundation in equity for the relief prayed; it was a proper case for a demurrer, and the objection comes now with less weight than it would at an earlier stage of the proceedings. But admitting the first branch of the objection to be well founded in principle, it is waived, and the omission supplied by the answer, which shows, that the United States have attempted to collect the debt of the principals, Minturn and Champlin; that a judgment had been recovered against them, and execution issued, upon which they were imprisoned and discharged by the secretary of the treasury, under the act of congress of the 6th of June, 1798 (3 Bior. & D. Laws, 54 [1 Stat. 562]), which could not have been done until it had been ascertained that they were insolvent, and unable to pay the debt. And it is to be presumed, that all the examination required by the act to be made by the secretary of the treasury, was made before he discharged them from imprisonment. At all events it does not lie in the mouth of the defendants, who set up this discharge as a part of their defence, to say it was not given pursuant to the requirements of the act of congress.

The second branch of the objection is not supported by authority to the extent in which it is laid down. The rule seems to be, that if a judgment creditor wants relief in equity as to a chattel, he must show that he has taken out execution at law, and pursued it to every available extent, before he can resort to a court of equity for relief. This is necessary in order to show a lien upon the chattel. If the aid is sought as to real estate, it is enough to show a judgment, creating a lien upon the land. And this the bill does show. 4 Johns. Ch. 676. The objection, therefore, that there is a want of equity apparent on the face of the bill, cannot be sustained. As against Butler then, there can be no reason why the relief prayed should not be granted. If the mortgage was given without consideration, and merely as he alleges, to enable him to raise money to pay off the judgment; he and the United States were the only parties who had any interest in it, and there is no principle on which it can be upheld as a valid outstanding encumbrance.

2. The next inquiry is, how stands the case as it relates to Sturges? He sets out many matters as between him and Butler, not called for by the bill, and which can avail nothing, either against the United States, or against Butler. His rights in the present case, must be determined from his admissions, which are responsive to the bill. He admits the execution of the bond, and the recovery of the judgments as alleged in the bill, and also the execution of the mortgage; but denies it was given solely for the purpose of indemnifying him against the bond as one of the sureties of Minturn and Champlin, but was given as much to secure him for monies owing him by Butler, and against all other liabilities incurred by him on Butler's account, as against the Minturn and Champlin bond. He denies the allegations in the bill, that he had paid no money on account of the bond, or that none had been realized out of his property; but alleges, that his property had been sold at a sacrifice under the judgment against him, and great damage thereby sustained by him. The admissions then of Sturges, show that the mortgage was not given to secure the payment of twenty-seven thousand dollars as it purports upon its face, but that it was

given as collateral security, and to indemnify Sturges against responsibilities he was under for Butler, including the Minturn and Champlin debt. Had the admission of Sturges been that the mortgage was given solely for the purpose of indemnifying him against this debt, there can be no doubt but that it would have been within the proper province of a court of chancery, either to remove the encumbrance, or apply it towards payment of the debt for which it was intended as collateral security. The principle which governs such cases is, that the collateral securities are trusts created for the better protection of the debt, and that it is the duty of the court to see that they fulfil the purpose for which they were intended. 1 Eq. Cas. Abr. 93; 1 Johns. Cas. 205; 2 Johns. Ch. 296. But the admission of Sturges in the present case, shows that this mortgage was given as security for whatever debt there was due from Butler to him, and as an indemnity against the Minturn and Champlin debt, and all other responsibilities he had come under for Butler. If the United States ask for a decree upon this admission, without any other proof, it must all be taken together, so far as it is responsive to the bill; and it would be inequitable to take from Sturges this indemnity, without inquiry into the state of these accounts, and the responsibilities he is under for Butler; and the only course, therefore, that can be adopted, as between the United States and Sturges, is to refer the subject to a master, to make the proper inquiries. If it was a mortgage for the payment of money absolutely, all that the United States could claim, would be to redeem the mortgage. And in the present case, all the legal purposes for which the mortgage was given must be fulfilled, before it can be removed out of the way of the judgment of the United States.

3. The next inquiry is, as to the rights of Burroughs, who is an assignee of the mortgage, without notice of the special purposes for which it was given. He took the assignment in payment and satisfaction of a debt of fifteen thousand dollars, due from Sturges to him; and the question is, whether he stands in any better situation, or has acquired any greater rights under the mortgage than Sturges himself possessed. The mortgage is only a pledge or security for the payment of a sum of money; it does not purport upon its face to be an absolute and unconditional conveyance of the land. It is subject to redemption by the mortgagor; and those claiming under him acquire all his rights in that respect; and the assignee of the mortgage stands in the place of the mortgagee, and can claim no greater rights under the mortgage than he could. It is a general and well settled principle, that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor. This was the doctrine laid down in the case of Turton v. Benson, 1 P. Wms. 496, and in numerous other cases in the English courts. 1 Vern. 691, 764; 1 Ves. Sr. 123; 4 Ves. 121. The same principle was fully adopted and sanctioned by the court of appeals in the state of Virginia, in the case of Norton v. Rose, 2 Wash. (Va.) 233, and by the court of chancery in this state in the case of Murray v. Lylburn, 2 Johns. Ch. 443. The qualification of the rule as laid down by the chancellor in the latter case, does not affect the question now before the court. The rule he says is generally understood to mean the equity residing in the original obligor and debtor, and not an equity residing in some third person against the assignor. All the United States claim here, is the equity residing in Butler, the original debtor and mortgagor. They ask only to be placed in his shoes, and to redeem the mortgage, or have it stand only as an encumbrance to the same extent that it would have stood against him. It is a rule of equity, that a judgment creditor at law is entitled to redeem an encumbrance upon real estate, and thereby secure his legal priority. 4 Johns. Ch. 692.

Although Burroughs is an assignee without notice of the equity now claimed, he is chargeable with negligence in not seeking for information. By proper inquiries from Sturges, he could have ascertained the nature and extent of his interest in the mortgage. An assignee cannot found an equity on his own negligence. If he might have had notice, and ought to have sought it, he stands in no better situation than if he had actually obtained it. And there are circumstances in this case that ought to have excited his diligence, and put him on inquiry. The mortgage is dated the 12th of August, 1816, and the twenty-seven thousand dollars which it purports to secure, is made payable on the 12th of February thereafter; and the mortgage was not assigned to Burroughs until October, 1821. The cause of the delay, and whether any, and what payments had been made, were very natural inquiries for him to have made, and it is hardly presumable, that he did not make them; and if he did, it is most likely he was fully informed as to the situation of the mortgage; and if he did not, it was a negligence which is entitled to no favourable consideration in a court of equity. Had the mortgage been really given to secure the payment of twenty-seven thousand dollars as it purports, and the whole, or any part of it had been paid before the assignment; it could not be pretended that the assignee, although ignorant thereof, could again enforce payment; and still such a claim would be sustained with the same equity as is set up in the present case. Burroughs in his answer does not deny the allegations in the bill, as to the purposes for which the mortgage was given; he only alleges his ignorance thereof. It requires, therefore, but one

witness in support of these allegations; and as Butler is the only witness who has been examined for that purpose, it becomes necessary to decide upon his competency. He is not objected to because a party in the cause: one defendant may be examined in equity for the plaintiff, or for his co-defendants if he has no interest in the event (1 Phil. Ev. 6; 2 Johns. Ch. 530; 3 Atk. 401); though ordinarily this cannot be done at law. In whatever point of light Butler is considered as standing, he does not appear to me to have such an interest as to exclude his testimony. If the mortgage is to be considered as given without consideration, and for the purposes alleged by Butler, he is interested to uphold it; as he would thereby protect his own property against the judgment of the United States; and in this view of the case, his interest is against the party calling him. If the mortgage is considered as a real security for the twenty-seven thousand dollars, Butler stands indifferent between the parties. His property is at all events swept away, either by the judgment or the mortgage; and it is immaterial to him under which it is taken; and so far as respects his liability to costs, his interest is against the complainants, and to defeat the suit. Burroughs must, therefore, under the allegations in the bill supported by the testimony of Butler, be considered as standing in the place of Sturges; and the extent of his interest as assignee of the mortgage, must depend on the result of the reference to a master, in relation to the matters between Butler and Sturges.

4. The only remaining question is, as to the effect of the discharge of Minturn and Champlin from imprisonment by the secretary of the treasury, under the act of congress of the 6th of June, 1798. This act, although it authorizes the discharge of the party from imprisonment, expressly provides, that the judgment shall remain good and sufficient in law, and may be satisfied out of any estate, which may then or at any time afterwards belong to the debtor. The effect and operation of such a discharge upon the liability of the co-obligors in the bond, has received the direct decision of Mr. Justice Story, in the case of Hunt v. U. S. [Case No. 6,900]. The leading cases in the books on this subject are referred to, and it is fully and explicitly admitted, that the operation of the discharge at common law, would be to exonerate the co-obligors: But under the special provisions of the statute, such is held not to be the effect. It is there said that the sole ground upon which a co-obligor is discharged is, that the debt or judgment has been once satisfied; but that when the law has declared that a particular act shall not be deemed a satisfaction of the debt or judgment, it would seem to follow, that it could not be pleaded as a discharge of any party to such debt or judgment. I do not mean to enter into an examination of this point as an open question; nor would I be understood as intimating any doubt as to the correctness of the decision. But finding the point directly adjudicated in one of the courts of the United States of co-ordinate jurisdiction with this, I shall adopt it as governing the present case. It is of the highest importance that there should be a uniformity of decision in the construction of statutes: and I the more readily adopt the construction as laid down in the case of Hunt v. U. S.; because although in that case the question could not have been carried to the supreme court of the United States; yet in the present case, should there be any dissatisfaction with the decision, it may be reviewed by the supreme court, and a construction settled which will be obligatory upon all the other courts of the United States.

Upon the whole, therefore, the cause must be referred to a master, to take and state an account between Butler and Sturges; showing the balance, if any, due to Sturges, and also to inquire into and state the responsibilities he is under for Butler; and the testimony taken upon the reference must be certified to this court, to be used on the final hearing of this cause: and all matters of equity and further directions, are reserved until such hearing and the coming in of the report of the master.

UNITED STATES v. SULLIVAN. See Case No. 15,975.

Case No. 16,415.

UNITED STATES v. SULZBERGER et al.

[7 Int. Rev. Rec. 201.]

District Court, S. D. New York. 1868.

INTERNAL REVENUE LAW—REMOVAL OF WHISKY WITHOUT PAYING TAX—CONSPIRACY.

In the case of the United States against Ferdinand Sulzberger, George Strauss, Charles Hartman, Jacob Fleischauer and Jacob Hess, for conspiring to remove whisky without paying tax, tried before Judge Blatchford in the United States district court, Mr. Phelps, for the government, argued from the evidence that there was abundant proof of the conspiracy charged. He cited the requirements of the law as to the notice to be given by distillers to the collector, the regulations as to the cistern-rooms of distilleries, &c. He then spoke of the peculiar situation and arrangement of the premises in question, as being strong prima facie evidence of intended fraud, and said the evidence of spirits having been removed on the night in question was irresistible, as the testimony showed that the still had been running from 6 o'clock on the morning of the day in question till near midnight, about 17 hours. The capacity of the still was 1,000 gallons in 24 hours, giving about 700 gallons in the time stated, while only 267 gallons were found in

the cisterns, leaving 433 gallons unaccounted for, except on the hypothesis of their removal to the rectifying establishment.

THE COURT, in charging the jury, cited the sections of the law applicable to the case, and said that to prove a conspiracy, such as charged, it was simply necessary for the jury to be satisfied that the defendants were acting in concert, or with a mutual understanding, for the purpose of preventing the spirits from being inspected and branded according to law, or for effecting their removal, without being inspected and branded according to law, to a place other than a bonded warehouse.

After the jury had retired, Assistant District Attorney Bell moved that the defendants be remanded to the custody of the marshal to await the result of the verdict.

This motion was opposed by Mr. Fullerton, counsel for the defendants, who argued that the defendants were out on bail, and were entitled to their liberty until the case was finally disposed of.

Mr. Bell held that the condition of the bail bond was fulfilled, and that whether that was so or not it was the universal practice in this district for the court to remand the defendants to the custody of the marshal after the case had gone to the jury.

THE COURT refused to grant the motion, and thereupon the defendants took their departure.

The jury returned a verdict of guilty against all the defendants but Jacob Hess, who was acquitted.

On Thursday Hartman and Fleischauer appeared in court, the latter having disappeared with the other defendants, except Hartman, since the verdict was rendered. Sulzberger and Strauss were called and their bail forfeited for non-appearance. Hartman and Fleischauer were then arraigned for judgment. Counsel for defendants presented to the court testimonials of Fleischauer's good character and also depositions of Jacob Hess and Fleischauer to the effect that the latter had no connection with, intention or knowledge of the removal, if any had been made, of spirits from the distillery.

THE COURT in passing sentence said substantially that the penalty incurred by the defendant was a fine of not less than $1,000 and not exceeding $10,000 and two years' imprisonment, at the discretion of the court. It was the duty of the court and all those engaged in the administration of the law to carry out its provisions, and by that means to suppress the demoralization that existed, and create a healthy public opinion in its stead. In the case of Fleischauer the conviction should stand against him, but the sentence should be suspended and remain in force to be hereafter, if found necessary, enforced at any time, should the defendant transgress the law. The case of Charles Hartman was different. The sentence of the court in his case should be a fine of $5,000 and ten days' imprisonment, and to be further detained in custody until the fine shall be paid. Hartman was then removed to prison and Fleischauer released.

Case No. 16,416.

UNITED STATES v. SUMMERS.

[4 Cranch, C. C. 334.] [1]

Circuit Court, District of Columbia. Oct. Term, 1833.

CRIMINAL LAW—PEREMPTORY CHALLENGES.

Peremptory challenge allowed, upon an indictment for stealing a slave, in Alexandria, D. C.

Indictment for stealing a slave, the property of Mrs. Jenkins, under the Virginia statutes of December 17, 1792, p. 190, § 29, and January 25, 1799, p. 387, making it a felony punishable by death without benefit of clergy; and the penitentiary act of congress, § 14, changing the punishment from death to penitentiary confinement and labor (4 Stat. 448).

A question was made whether he had a right to peremptory challenge, under the Virginia law of the 13th of November, 1792, p. 103, § 8.

THE COURT (THRUSTON, Circuit Judge, contra) allowed the peremptory challenge.

Verdict, not guilty.

But see U. S. v. Hall, at May term, 1843 [unreported].

UNITED STATES v. SUMMERS. See Case No. 14,820.

UNITED STATES v. The SUN. See Case No. 13,612.

Case No. 16,417.

UNITED STATES v. SUNBERG.

[Cited in U. S. v. Curtis, 16 Fed. 189. Nowhere reported; opinion not now accessible.]

Case No. 16,418.

UNITED STATES v. SUNDRY BOXES OF HAVANA SUGAR.

[2 Bond, 342.] [2]

District Court, S. D. Ohio. Feb. Term, 1870.[3]

CUSTOMS DUTIES — UNDERVALUATION — RIGHTS OF INNOCENT PURCHASERS.

1. Where property subject to duty is imported into the United States at a fraudulent undervaluation, a bona fide purchaser before the government has instituted any proceedings, or made its election to proceed in rem for a forfeiture, or to sue for the value of the property, obtains a good title, unaffected by the fraud in the entry.

2. The government, in such case, has no lien on the property in the possession of such purchaser, for the deficiency in the duty paid.

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

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

[3] [Affirmed by the circuit court; case unreported.]

3. If such a lien existed in this case, a forfeiture could not be claimed, as that ground is not set up in the information.

At law.

Warner M. Bateman, Dist. Atty., and Henry Hooper, for the United States.

Collins & Herron, for claimants.

OPINION OF THE COURT. The proceeding in this case is an information in the name of the United States, in which the forfeiture of 123 boxes of sugar is claimed for having been imported in violation of law. The sugar was imported by the house of Perkins & Co., of New Orleans, and entered by them at the collector's office at that city. A large quantity, numbering some 300 boxes, was consigned to the house of Adolph Wood & Co., of Cincinnati, and was sold in different quantities, some at public auction, and some by private sales. In June last, upon information received by the surveyor of customs at this port, of fraud in the entry of the sugar at New Orleans, several lots were seized by his order in the possession of different purchasers, and libeled in this court. James H. Laws & Co. have intervened for seventy boxes of this sugar, and claim the property. They deny all knowledge of the fraud charged in the entry of the sugar, and claim title as innocent purchasers.

The only ground on which it is claimed that sugar is forfeited to the United States is the alleged entry of the sugar at a fraudulent undervaluation. The question of fraud is not now before the court, but it is conceded that the sugar was invoiced and entered as being of a grade or quality subject by law to a duty of three cents per pound, whereas the legal duty was five cents.

The questions now presented are: (1) Is the sugar subject to forfeiture in the hands of the claimants, the purchasers in this city? (2) If not forfeitable, has the government a lien on the sugar for the alleged deficiency of two cents on the pound, in the duty paid?

As to the first question, the evidence on the hearing proved conclusively that the various lots of sugar were sold openly in this market at their full value, without any knowledge by the house of Wood & Co., the consignees or the purchasers, or any reason for the suspicion that there was any irregularity or fraud in the importation and entry. The evidence on this point is not controverted by the attorney of the United States, and does not admit of a doubt. These claimants, therefore, insist that as innocent purchasers their title to the sugar is valid, and must be protected, and the case of Caldwell v. U. S., 8 How. [49 U. S.] 366, is cited as decisive of this question. In that case the supreme court held that under section 66 of the customs act of 1799 [1 Stat. 677], which gives to the United States, in cases of entries at a fraudulent undervaluation, the right to proceed in rem for the forfeiture of the property, or for the value thereof, a bona fide purchaser, before the United States had made its election as to the mode of proceeding, was invested with a good title, unaffected by any fraud in the entry of the property. The first section of the act of March 3, 1863 [12 Stat. 737], under which these informations are filed, though more specific and comprehensive in providing against frauds by undervaluations, is the same as section 66 of the act of 1799 in recognizing the alternative right of the government to proceed for a forfeiture or a recovery of the value of the property. The case cited is, therefore, directly in point on the question stated, and a decisive authority in favor of the rights of these claimants.

As to the other question, namely, whether the government has a lien on the sugar for the alleged deficiency of two cents a pound in the duty paid, the court entertains no doubt. It is clear that if there existed such a lien, it could not be enforced in these proceedings, for the obvious reason that no such claim is asserted in the informations, and no judgment or decree could be entered on such a basis. The only ground of forfeiture set forth is the alleged fraudulent undervaluation of the sugar; and this is the only ground on which the court could base its judgment of forfeiture. But, apart from this consideration, I am clear the United States has no lien on the sugar in the hands of bona fide purchasers for the deficiency in the duty paid.

It is claimed by the district attorney that the government has a lien for duties on all property or articles imported, in the entry of which a fraud has been committed, from the time of the commission of the fraud, and that such lien inheres in the property, and follows it, into whosesoever hands it may pass, and wherever it may be found. That the general principle is recognized and enforced as applicable to violations of the customs and revenue laws, may be conceded. But its application to the case before the court is not admitted. If it is law, as decided by the supreme court, that a bona fide purchaser, before the government has made its election as to the course it will pursue, acquires a valid title, it is not easy to perceive how that title can be impaired or affected by any supposed lien of the government on the property. It would seem, therefore, that the general doctrine of a continuing lien on property subject to forfeiture for fraud on the customs and revenue laws, does not apply to the statute referred to, denouncing and punishing the entry of property at an undervaluation. The construction given to that statute by the supreme court seems to imply a modification of the law on that particular case, in relation to the general doctrine of the government's lien for taxes or duties. The court more readily adopts this conclusion, for the reason that the enforcement of the lien asserted in this case would operate most inequitably upon the purchasers of the sugar in question.

As before stated, if there was a fraud in the entry, they are not implicated in it. They have purchased the sugar in open market, and paid its full market value. The claim now made of two cents a pound, the alleged deficiency in the duty paid, would be equal to seventeen per cent. on the value of the sugar, and would be a loss to them to that extent. Now, as this sugar passed through the custom-house at New Orleans, after being subject to the scrutiny of the government officers, and was put into the market with their voucher that the law had been complied with in its entry, it would be a grievous hardship that innocent purchasers should be the sufferers. And there would seem to be no necessity, so far as the protection of the interests of the government is concerned, for the enforcement of the rigid doctrine insisted on by the district attorney. The United States has a plain remedy by suit against the importers for the deficiency, if any, in the amount of duty paid. If by reason of the insolvency of the importers, or any other cause, this remedy is not available, the loss to the government is but a just penalty for the negligence, incapacity, or corruption of its custom-house officials. The seventy boxes of sugar seized will be released to the claimants.

This case was appealed by the United States to the circuit court, where the decree of the court below was affirmed.

[See Case No. 15,098.]

Case No. 16,419.

UNITED STATES v. SUNOL et al.

[1 Cal. Law J. 252.]

District Court, N. D. California. 1863.

MEXICAN LAND GRANTS.

[Modification of the official survey directed, on a review of the evidence.]

Official survey of the rancho known as "El Valle de San José," in Alameda county. Rejected February 21, 1863.

HOFFMAN, District Judge. The contest between the claimants in this case and the owners of the Santa Rita Rancho having been settled by mutual agreement, the only remaining inquiry is whether the official survey is within the exterior limits of the Rancho El Valle de San José. It is objected, on the part of the United States, that a rectangular piece of land, on the northeast, is improperly included, as is also a considerable tract on the southwest.

The first objection is evidently untenable. On any construction of the grant and diseño, the Valle of San José, granted to the claimants, extended as far north as the base of the hills called "Lomeria," on the diseño. The northern line, it would seem, from the indications of the diseños, both of the El Valle and of the Santa Rita Ranchos, as well as from the terms of the respective grants, to have been intended to be drawn from the Parage, or Cañada de la Tassajera, eastwardly, to the edge of the lomitas of the Positas, which form the western boundary of the "Las Positas Rancho." But a small portion of this tract is included in the official survey; the line between the Santa Rita and the El Valle Ranchos having been settled, as before stated, by agreement. The grant for El Valle contains no limitations of quantity. It was confirmed by the board and by this court by metes and bounds, and that decree has become final. As, then, the tract on the northeast is clearly within the limits of the grant, there can be no reason for excluding it from the survey.

With respect to the land included on the southwest there is more difficulty. The boundaries mentioned in the decree of confirmation are as follows: "On the southeast by the Corralitos, on the east by the edges of the Lomitas de las Positas, adjoining the water; on the northwest and north by the Place of the Arroyo, or Cañada de la Tassajera." The diseño represents an arroyo issuing from a tular swamp, or lagoon, and flowing in a southeasterly direction, not far from the base of a range of hills, on the west, marked "Loma Alta." From the range of hills, on the eastern side of the diseño, three streams are represented as flowing across the plain from east to west, and nearly at right angles to the general course of the creek issuing from the Tular, or the Arroyo de la Laguna. The first, or most northerly of these, is marked "Arroyo Mocho." It still retains its name, and its identity is not disputed. The second stream, inscribed "Arroyo de las Taumanises," is represented as flowing nearly parallel to the Mocho, and emptying into the Arroyo de la Laguna. Immediately south of it, and extending across the plain from east to west, a range of hills is delineated, which serve to divide the valley of the Taumanises from that of the Arroyo del Alameda, another creek flowing in a similar direction to the south of the hills. It would seem clear, from the topographical map of Lewis, that the Arroyo de las Taumanises of the diseño must be the stream now known and laid down by him as the "Arroyo Valle." The third stream, inscribed "Arroyo del Alameda," is likewise represented on the diseño as flowing from the extreme eastern limits of the map, across its entire breadth from east to west, and falling into the Arroyo de la Laguna. It appears to be assumed, both by the claimants and the United States, that the stream intended to be delineated is the Arroyo de las Calaveras, and not the Arroyo de San Antonio. Mr. Dyer, the witness for the United States, identifies it with the former; but Mr. Lewis, a witness for the claimants, and who prepared the map exhibited by them, expresses his belief that the Arroyo del Alameda, of

the diseño, is the Arroyo de San Antonio. Of the correctness of this opinion there cannot, I think, be much doubt.

The Arroyo de las Calaveras flows from the southeast, and falls into the Arroyo de la Laguna, at a point not far from the confluence of that stream with Arroyo de San Antonio. At this point the latter makes an abrupt turn, nearly at right angles to its previous course, and, breaking through the hills, flows in a direction nearly due west. But the courses of the Arroyo de la Laguna above this point of junction, and that of the Calaveras, though the streams flow, the one from the north and the other from the south, form a nearly straight line along the western side of the plain. But the Arroyo del Alameda of the diseño is represented, as before stated, as issuing from the mountains on the east, and flowing from east to west across the whole breadth of the tract on its southern side. If the Arroyo del Alameda be not the San Antonio, then that stream is wholly omitted, notwithstanding that the much smaller streams of the Mocho and the Arroyo Valle are carefully delineated. The course, too, of the Alameda, with reference to the range of hills represented as lying between it and the Valle, and immediately south of the latter stream, entirely corresponds with that of the San Antonio, as laid down on Lewis' map; while the Calaveras wholly fails to satisfy these indications.

For these reasons I think that Mr. Lewis is right in identifying the San Antonio with the Arroyo del Alameda of the diseño. The point is not important, except in showing that the name of "Corralitos," was intended to apply, not merely to the range of hills on the southern portion of the western line, but, as indicated by the diseño, to the range lying south of the San Antonio, and running from west to east, so as to form the southern limit of the plain. The name may, however, have been also applied to the same hills where, turning to the northwest, they form the southwestern limit of the grant. That the hills on the south of the San Antonio, and not merely those west of the Calaberas, were intended to be designated on the diseño under the name of "Corralitos," is also to be inferred from the language of the grant, which describes the tract as bounded by the Corralitos on the southeast. The same description is given in the decree of confirmation.

Adopting, then, this construction of the diseño, the intention of the grant is clear. It was to grant all the plain, or Valle of San José, up to the hills which bound it on the south, the southwest and the west. This would, necessarily, include the valley of the Calaveras. For, though the junction of the Arroyo de la Laguna and the Alameda (and, in this connection it is immaterial whether the Alameda be the San Antonio or the Calaveras) is laid down on the extreme southwestern edge of the diseño, yet its other indications, and the fact that the Corralitos hills are represented as extending to the point of junction, and nearly connecting with the range on the west, show that it was intended to include all the land bounded by those two ranges. But, in running the lines on the southwest, it has not, apparently, been attempted to follow the line of the Corralitos hills, expressly mentioned as a boundary, both in the grant and the decree. It has been stated that the Arroyo de la Laguna, after receiving its affluents, the San Antonio from the east and the Calaveras from the south, turns abruptly at right angles, and flows through the hills in a direction nearly due west. No part of its course in this direction, or beyond the point of junction, is represented on the diseño; and yet there is included in the survey at least two miles of that stream to the west of the point of junction. The western line of the survey, which, in descending the valley of the Arroyo de la Laguna, appears, in accordance with the diseño to follow substantially the line of hills which form the western boundary of the valley, on reaching the point where the arroyo bends to the west, also makes an abrupt deflection in the same direction, and running due west more than two miles turns to the southeast, running along the crest; or even as stated by Dyer, on the western slope of what the map of Lewis denominates the "Corralitos Hills."

I can see no reason why a line near the base of the hills should not be adopted on the southern, as it is on the northern, portion of the line. The indications of the diseño—the natural limits of the tract, now and at the date of the grant known as "El Valle de San José"—and the terms of the grant and decree, which call for the Corralitos as a boundary, show conclusively that those hills were not intended to be included. It has already been stated that the hills inscribed with that name on the diseño, and mentioned in the grant, are probably the range on the south of the San Antonio, rather than those west of the Calaveras on the southwest, though, perhaps, the term may have been applied to both. But, on either supposition, the diseño shows that the tract was bounded on the south, the southwest and the west by ranges of hills and that boundary should be followed.

I therefore think that the official survey should be modified in this respect and that the line of hills marked "Corralitos" on Lewis' map should be taken as a boundary. By this is meant not that their base should be meandered, or that the low foot or projecting spurs should be excluded, but that the line should be substantially followed, as appears to have been done in the survey of the northern portion of the western line.

[See Case No. 16,420.]

Case No. 16,420.

UNITED STATES v. SUNOL et al.

[Hoff. Land Cas. 74.] [1]

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

MEXICAN LAND GRANTS.

No objection made by the district attorney to the confirmation of this claim.

[Claim of Antonio Suñol and others for the Rancho El Valle de San José, supposed to contain eleven leagues, in Alameda county; confirmed by the board, and appealed by the United States.]

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

Crockett & Crittenden, for appellees.

HOFFMAN, District Judge. The validity of this claim was proved by the production of the original grant and of the expediente from the archives. The expediente also shows that the grant was registered in the secretary's office, and also, by order of the governor, in the office of the prefecture of the First district. Both the expediente and the grant produced by the claimant contain the certificate of registry, and of the approval of the grant by the departmental assembly. The evidence shows a substantial compliance with the conditions, and the boundaries and extent of the granted land are clearly indicated by the description in the grant and the delineations on the map. No objection to the confirmation of this claim having been made by the district attorney, we do not deem it necessary to recapitulate at length the preliminary proceedings before the governor, nor to refer particularly to the evidence by which its validity has been established.

A decree affirming the decision of the board must therefore be entered.

[See Case No. 16,419.]

Case No. 16,421.

UNITED STATES v. SUNOL et al.

[Hoff. Land Cas. 110.] [1]

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

MEXICAN LAND GRANTS.

[Indians had a right to receive grants of land under the Mexican laws.]

Claim [by Antonio Suñol] for a half-league of land in Santa Clara county; confirmed by the board, and appealed by the United States.

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

Halleck, Peachy & Billings, for appellees.

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

HOFFMAN, District Judge. The claim in this case was unanimously confirmed by the late board of commissioners. It has been submitted to this court on the proofs taken before the board, and without argument on the part of the appellants, or the statement of any objection to its validity. On reference to the opinion of the board, we find but two questions discussed, and which, it is presumed, were the only points made on the part of the United States. The first relates to the location of the grant. The board, after an elaborate and thorough examination of the testimony, arrived at the conclusion that the calls in the grant and the delineation of the tract on the diseño are abundantly sufficient to enable a surveyor to locate the grant. On examining the transcript, this opinion of the board seems fully sustained by the proofs, and the doubts or difficulties felt by some of the witnesses as to the proper location of the land seems to have originated in a misconception of the true meaning of some of the calls in the grant. The grantee is shown to have occupied his land from a period anterior to his grant; to have lived there with his wife and children, and to have made considerable improvements. To the discussion of the second and more important question, whether Roberts, the original grantee, being an Indian, had a right to receive grants of land under the Mexican laws, and to convey the land so granted, the board devote a large portion of their opinion. But that question has been settled in the supreme court in accordance with the views expressed by the board, and is no longer open for argument in this court. The genuineness of the original documents is not questioned, and the title of the present claimant appears to have been regularly derived from the original grantee and his heirs, and to have been accompanied by possession.

A decree affirming the decision of the board must therefore be entered.

Case No. 16,422.

UNITED STATES v. The SUNSWICK.

[See Case No. 13,624.]

Case No. 16,423.

UNITED STATES v. SURRATT.

[The trial of Mrs. Mary E. Surratt and others for the murder of Abraham Lincoln, president of the United States, was by military commission sitting in Washington, D. C., in May, 1865. The trial of John H. Surratt was by the criminal court of the District of Columbia, in June, 1867.]

[As decisions by the military courts and the courts of the District of Columbia after their reorganization under the act of March 3, 1863 (12 Stat. 764), are not included in this series, the reader is referred to the pamphlet reports of these trials, which can be found at many of the larger libraries. The trial of Mrs. Mary E. Surratt and others is sometimes denominated the "Conspiracy Trials."]

Case No. 16,424.

UNITED STATES v. SUTTER.

[Hoff. Dec. 27.]

District Court, N. D. California. June 10, 1861.[1]

CALIFORNIA LAND GRANTS—LOCATION OF QUANTITY IN LARGE TRACT—CONVEYANCES—ESTOPPEL—SURVEYS.

[1. When a certain quantity has been granted within limits which embrace a much larger tract, the quantity granted is to be located within the exterior limits, at the election of the grantee. Following U. S. v. Fossatt, 21 How. (62 U. S.) 445.]

[2. As a general rule the conveyance by the grantee to third persons of portions of the lands within the exterior limits may justly be considered as an election of the location, and as estopping him to make any subsequent election inconsistent with it. Yet the building of a house and other permanent improvements by the grantee himself would seem to afford as decisive evidence of an election as the conveyance to some other person, and that a subsequent purchaser of the house and improvements might justly claim that the election was made and the location fixed, so as not to be affected by conveyances made after the making of the improvements.]

[3. Therefore the court will treat the building of a house, and surrounding buildings, as locating the grant upon the site thereof to such an extent as, while it satisfies the latter principle, will at the same time protect the right of early grantees, by treating their grants as successive locations of portions of the tract according to their dates.]

HOFFMAN, District Judge. This cause comes up on objections to survey filed on the part of the United States and of various purchasers under [John A.] Sutter, who have intervened in the proceeding, under the act of 1860. The boundaries of the land confirmed to the claimant are described in the decree of the board as follows: "On the south by a line drawn due east from the Sacramento river, so as to touch the most southerly point of a pond or laguna, situated near said river, and about five miles south of the American river, as represented on the map filed in the case, marked B. and B. P. L., exhibit to the deposition of Juan B. Alvarado, March 15, 1855, which line is also marked on said map Lindero, labeled Norte 38° 49′ 32″, on the north by a line drawn due east from the Sacramento river to the southern base of the mountains known as the Buttes, and represented on the said map as Los Tres Picos, and from thence until it intersects the eastern boundary of the tract as represented on said map and described in the grant and in the depositions of said Vioget; on the west by the said river Sacramento, and on the east by the margins of Feather river inclusive. For more particular description, reference to be had to the copies of the grants filed and proved in the case, marked A and C., to the map marked B., and to the depositions of John J. Vioget and Juan B. Alvarado, all of which are filed among the papers in the case."

This decree was affirmed by the district court, but on appeal to the supreme court it was reversed, so far as it confirmed the claim for twenty-two leagues under the Sobrante grant, but affirmed with respect to the eleven league grant. Eleven leagues have thus far been surveyed and located, and the survey has been returned into court under the provisions of the act of 1860. In the opinion of the supreme court it is stated that "the cause is remitted to the district court for further proceedings in respect to the location of the grant of Alvarado within the limits set forth in the grant and the accompanying map on file in the case." [21 How. (62 U. S.) 170.] It will be observed that the decree of the board and of this court, which was thus in part reversed and in part affirmed, did not attempt to make any discrimination between the right to eleven leagues acquired under the Alvarado grant and that to twenty-two leagues supposed to have been acquired under the Micheltorena or Sobrante grant. It confirmed to the claimant all the land "within his rancho as laid down on the map which accompanied the grant for eleven leagues." But the claim under the Sobrante grant having been rejected by the supreme court, and the cause remitted that the eleven league grant might be located within the limits set forth in the grant and accompaning diseño, it is evident that the smaller quantity must now be located within the limits decided by the board and this court to be the boundaries of the original map; the only effect of the partial reversal of the decree by the supreme court being to reserve to the nation, i. e., to the United States, the excess beyond the eleven leagues, instead of considering it as conveyed to the claimant under the Sobrante grant. If the limits of the tract out of which the eleven leagues are to be taken had not been so explicitly determined by the decree of the board, and adopted by the supreme court, there might be much room to doubt whether the southern boundary line marked "Lindero latitud norte 38 deg. 49 min. 32 sec.," on the map B. P. L., was in fact intended by the governor to be the southern limit of the tract, out of which the eleven leagues just granted were to be taken. It has unfortunately happened that neither the original grant nor the map which accompanied the petition are before us.

The grant has been burnt and the map lost. The contents of the former we learn from the borrador draft in the archives and from a copy of the original of record in the county clerk's office; but the precise indications of the map, according to which the governor granted, cannot now be ascertained with any certainty. The grant describes the northern boundary as Los Tres Picos, and the parallel of latitude 39 deg. 41 min. 45 sec.; and the southern boundary as the parallel 38 deg. 49 min. 32 sec. In fixing these boundaries it might reasonably be inferred that the governor adopted some lines drawn on the map

[1] [Reversed in 2 Wall. (69 U. S.) 562.]

before him, and supposed to be, and marked as, the parallels of latitude mentioned in the grant. But on one of the maps presented as copies of the one which accompanied the petition are the two lines found marked as mentioned in the grant. The map "B. P. L." first appears as an exhibit to the deposition of Governor Alvarado. He states that it seems an exact copy of the diseño, except that on the Feather river were marked localities which Sutter thought would be suitable for the settlement of families under him. "I named the degrees of latitude as Sutter had them marked on his diseño. I told him I did not know the latitude; but, as he insisted on having them so, I described them accordingly." The evidence is silent as to the origin of the map B. P. L., thus introduced to our notice. We are not informed when, by whom, from what origin, or for what purpose it was made. But, if the testimony of Alvarado be accurate, it is not a copy of the map attached to the petition, for the northern line of latitude is not 39 deg. 41 min. 45 sec., as mentioned in the grant, and which Alvarado declares he adopted from the diseño, but 39 deg. 32 min. 45 sec. The southern line marked on the map corresponds with the call of the grant, but the map is in this respect inconsistent with itself as will presently be shown. There was also produced by the claimant a map marked A. P. L. This map Vioget states to have been made by him for Captain Sutter in 1843, and to be a true copy of the original, except that some dotted lines are omitted which were intended to mark swampy lands. As Vioget, at the time of Sutter's application for a grant, made two maps of the tract solicited, one of which was sent with the petition, and was the diseño before the governor when the concession was made, and the other was retained by Sutter, it is reasonable to conclude that the copy A. P. L. was made from the latter and not from the former, which remained in the archives at Monterey. The supreme court seem to have supposed that this copy by Vioget was the map filed by the claimant with his petition. But such was not the fact. The map B. P. L., already referred to, was that filed with the petition, while the Vioget copy marked A. P. L. was not produced until some years afterwards. On this latter map the southern parallel of latitude is laid down precisely as in the map B. P. L., but it is marked "latitud norte 38 deg. 41 min. 32 sec." The position of the northern line is in like manner identical with that of the northern line on B. P. L., but it is marked "latitud norte 39 deg. 33 min. 45 sec." If, then, the original of this map was before the governor, it is evident that he did not adopt either parallel of latitude laid down on the map as the boundary of the tract he intended to concede.

It will be observed that not only do the numbers of the northern and southern boundaries on A. P. L. fail to correspond with those mentioned in the grant, but they also differ from those marked on the same lines on B. P. L. For the southern boundary on the latter is numbered 38 deg. 49 min. 32 sec., while on the former it is numbered 38 deg. 41 min. 32 sec.; and the northern parallel on the map B. P. L. is marked 39 deg. 32 min. 45 sec., while on A. P. L. it is 39 deg. 33 min. 45 sec., neither of which latter corresponds with the call of the grant for latitude 39 deg. 41 min. 45 sec. It is stated by Vioget that in making his preliminary survey or reconnaissance of the land to be solicited, he established with such imperfect instruments as he could command the latitude of two points, viz., Sutter's Fort and the junction of the Sacramento and Feather rivers. The latitudes of these two are laid down on both maps. That of the fort is 38 deg. 45 min. 42 sec. The southern boundary is evidently intended to be fixed about four miles to the south of it. This is shown not only by its position on the map, and by reference to natural objects, but by the testimony of Vioget as to the points from which it was drawn. If, then, the map "B. P. L.," or its original, was before the governor when he made the grant, and the southern lindero, as thereon laid down, was adopted by him, it disclosed on its face its own absurdity, for the latitude of the fort is marked 38 deg. 45 min. 42 sec., while the boundary four miles to the south of it is marked 38 deg. 49 min. 32 sec., thus making the latitude increase towards the equator. Vioget himself declares that such a mistake could never have been committed by him, and the map A. P. L., which he testifies was a copy made by himself from the original, would seem to show that it was not in fact committed, for on that map, as already stated, the southern line is marked 38 deg. 41 min. 32 sec., which would be its true latitude, supposing the latitude of the fort four miles to the north of it to have been correctly determined. But notwithstanding this discrepancy, we might have supposed that a map similar to B. P. L. was before the governor when he made the grant, and that by some error the southern boundary was marked 39 deg. 49 min. 32 sec. instead of 38 deg. 41 min. 32 sec., and the numbers so inscribed upon it were adopted by him, if it were not for the circumstance that the northern line of B. P. L. does not answer the call of the grant, —for that instrument mentions, as we have stated, the parallel 39 deg. 41 min. 45 sec. as the northern boundary, while the northern boundary on B. P. L. is marked 39 deg. 32 min. 45 sec. Under these circumstances it is urged by the United States, with much force, that neither of the lines delineated on the maps was intended to be adopted by the governor. That the southern parallel on the map before him must have been marked 38 deg. 41 min. 32 sec., as on A. P. L.; for Vioget himself declares he could not have committed the blunder of making the

latitude increase towards the south, that the northern line must have been marked as on A. P. L., 39 deg. 33 min. 45 sec., and that the governor determined to grant a tract commencing eight miles north of the southern parallel on the map before him, i. e., eight miles north of a line marked 38 deg. 41 min. 45 sec., making north latitude 38 deg. 49 min. 45 sec., and extending a corresponding distance north of the northern parallel 39 deg. 33 min. 45 sec. as marked on the map, making 39 deg. 41 min. 45 sec., which are the boundaries mentioned in the grant. On this theory alone it is urged we can account for the absence on either map of the parallel called for in the grant as the northern boundary.

In explanation of this supposed action of the governor, it is urged that the application of Sutter was for an impressaire grant, or for a grant of lands to be distributed amongst colonists whom he proposed to introduce. That the extensive establishments he had already formed at the fort below the American river, forbade the idea that he could have wished to distribute amongst new colonists any portion of the land he was already in possession of, and to a considerable extent, had improved and cultivated. That the same considerations apprised him that the land occupied by him and lying almost under the guns of his fort would not be granted to any other person, as valdio or vacant, more especially as he had originally settled on it by permission of the governor. He was therefore secure in his possession. But he was desirous as stated in his petition, of "enlarging his enterprise by the introduction of twelve families," and for this purpose he solicited and the governor granted a tract of eleven leagues, without intending to include the land adjacent to the fort already occupied by him. It was only after he had distributed the land just granted, and had thus conferred on the nation what was deemed an important service, that he asked and obtained for his own use, and that of his son, a tract of twenty-two leagues, or eleven leagues each, being the maximum quantity which any individual could obtain for his personal benefit, and the granting of which indicated that the governor supposed he had already distributed the eleven leagues just granted for that purpose, but which he could not have imagined to have included the fort and large establishment of Sutter, on which so much labor and money had been expended. But whatever force there may be in these views, I am compelled, under the decision of the supreme court, to consider the question presented as no longer an open one. In its opinion the court recognizes in the most explicit manner, the map B. P. L. filed with the petition to the board of commissioners, as proved to be that referred to in the grant, and according to which the governor made the concession. "With this map," says the court, "we have no difficulty in locating the grant so as to include New Helvetia." After alluding to the fact that the exact position of the line of latitude mentioned in the grant is twenty miles to the north of the establishment, the court says: "But the map shows that the line of the southern boundary is south of New Helvetia, and is so related to natural objects represented on it, as to be easily determined. Vioget accounts for the error in the designation of the line by the imperfection of the instruments, and proves that a starting corner was fixed, and the line traced on the ground. This is better evidence of the true location of the southern line, and conforms to the probabilities of the case. Upon the whole evidence we find that the grant and the map filed with the petition in 1852, before the board of commissioners, have been proved." It will of course be noticed that the point more immediately under consideration in the foregoing extract was whether the call in the grant for the parallel of latitude 38 deg. 49 min. 32 sec. should be satisfied by ascertaining with mathematical exactness that parallel, or by adopting a line supposed to be that parallel and so marked on the map. It was of course held that the line actually referred to and intended to be designated by the governor should be adopted, notwithstanding that by reason of imperfect instruments or erroneous observations it might have been incorrectly marked as a certain parallel of latitude. The attention of the court does not appear to have been directed to the circumstance that on the map A. P. L., also produced by the claimants and proved by them to be a copy of the original, the same line is differently marked and does not correspond with the call of the grant, and that on neither A. P. L. or B. P. L. is any northern line found marked as described in that instrument. But whatever may have been the points brought to the notice of the court by counsel, the decision is explicit. The map filed with the petition in 1852, before the board of commissioners, is pronounced to be "proved." That this was the map B. P. L. there can be no doubt. The decree of the board which was affirmed by the supreme court with regard to the eleven league grant, established the southern boundary as the line marked 38 deg. 49 min. 32 sec. on the map B. P. L., and this court is, by the mandate and opinion of the supreme court required to locate the land grant by Alvarado within the limits set forth in the grant and the accompanying map on file in the case. The only effect of the partial reversal of the decree of the board and of this court, was that the surplus land within the limits of the map, instead of passing to Sutter and his son under the Sobrante grant, reverts to the United States. Under this decision of the supreme tribunal, I

have no choice but to consider the map B. P. L. as a copy of that referred to in the grant, and the line of latitude laid down upon it, and marked 38 deg. 49 min. 32 sec. as intended by the governor to be the southern boundary of the tract within which eleven leagues were to be taken and the surplus reserved to the nation.

The survey which is now before the court has been made in conformity with another map, which, for the first time, was produced and placed in the hands of the surveyor when about to make the location. It is marked Exhibit Von Schmidt, No. 2. No proof of its origin or authority is offered. In its general features it corresponds with the other maps produced, but like A. P. L., the southern line of latitude is marked 38, 41, 32; the latitude of the fort, four miles to the north, being marked as on both A. P. L. and B. P. L., 38 deg., 45 min., 42 sec. But it differs from both those maps in having marked upon it in squares colored in green eleven leagues of land,—two to the south of the American river and nine on the margins of Feather river, beginning at a point on that river a short distance to the north of its junction with the Sacramento. Before this map can be treated as fixing the location of the eleven leagues granted by the governor, two points must be established: 1. That it was submitted to him with the petition or before the grant was made. 2. That he adopted his designation of the land solicited and his grant with reference to it. On both these points the proofs almost entirely fail. Governor Alvarado, who was the first witness called to prove the correctness of the map B. P. L., testifies that "that map seems an exact representation of the diseño except that on the latter there were marked on the Feather river localities which Sutter thought would be suitable points for the settlement of families under him." This statement is corroborated by Bidwell, who swears that on the map he saw in the archives certain squares were marked, but he is unable to give their location. But it does not appear from Alvarado's testimony that the localities so indicated by Sutter, as suitable for the settlement of families, were adopted by him as the precise designation of the eleven leagues conceded; and even if they had been so adopted, we shall presently see that they could not have been those delineated on the map recently produced.

In order to explain and establish the location of these squares, alleged to have been marked on the diseño submitted to the governor, the claimant has introduced in evidence the deposition of J. J. Vioget, taken in the case of U. S. v. Covilland [unreported] which was a claim under a grant by Sutter for a portion of the tract granted to him. In this deposition, Vioget describes the manner in which he surveyed and located the eleven leagues intended to be asked for by Sutter. He states, in substance, that he located two leagues south of the American river; that he then ascended the Sacramento to its junction with the Feather river, and thence up the latter to the Canadian ford, where, finding the land to be good, he commenced to lay off the remaining nine leagues; that he laid them off one after another, taking most of the land on the east side of the Feather river,—but each of the nine leagues had a part of it on the west side of the river. The northern line or boundary of the last league he particularly describes as drawn one league in length from west to east. Of that league about one-quarter of a mile was on the west side of Feather river, and the remainder on the east side of it. He further states, that he did not run the eastern lines of the nine leagues. He ran on the west side of the river, and drew the eastern line parallel to it, and the distance of one league from it. It was not a straight line, on account of the bends in the river. From this testimony of Vioget it is very clear that the squares marked by him on the map were of one square league each,—extending one after the other towards the north,—that each of them embraced land on both sides of the river, and that no one of them was more than a league in breadth, from east to west. But the squares, if such they can be called, marked in green on the map recently produced, in no respect conform to this description. All of them, except the first or most southerly, exceed a league in width, and the last is no less than three leagues in width, making the northern line three leagues in length instead of one league, as positively stated by Vioget. It is therefore evident that even on the supposition that Vioget marked the square described by him on the map transmitted to the governor adopted that designation, and granted the precise parcels of land so marked out (which he does not pretend to have done), the green map now exhibited affords no assistance in ascertaining their location. That map stands, therefore, not only wholly unsupported by evidence, but disproved by Vioget himself, whose testimony shows that the squares marked on it are wholly unlike those marked by him on the diseño. But the green map, even if its origin and authenticity had been more satisfactorily established, could hardly now be substituted for the map "B. P. L." which was originally produced by the claimant, and which his counsel so strenuously insist has been decided to be a correct copy of the diseño, by the supreme court. If, then, I am right in declining to consider the suggestions of the United States as to the probable intention of the governor in fixing latitude 38 deg. 49 min. 32 sec. as the southern boundary, and in treating the location of that line as drawn on "B. P. L." as finally determined by the supreme court, I must, for the same reason, refuse to receive a new map, which can control the location only on the supposition that it and not B. P. L. is a true copy of the diseño adopted by the gov-

ernor. But on other grounds it may well be doubted whether the governor intended or Sutter considered the grant as embracing only the specific tracts of land stated by Vioget to have been marked by him on the map. The fact that the earliest distributions of lands by Sutter on execution of the trust on which the grant was made, was, to a considerable extent, of tracts not included in the squares marked out by Vioget, would seem decisive proof that he did not consider his grant to be confined to those specific parcels, but to be, as decided by the supreme court, of eleven leagues, to be located within the general limits set forth in the grant and accompanying diseño.

Dismissing, then, from consideration, the exhibit von Schmidt, No. 2, we are left, as under the decision of the supreme court we should at all events have been compelled to do, to locate the eleven leagues within the general limits described and delineated on the map B. P. L. In the grant the land is described as eleven square leagues, comprehended in the extension which the diseño attached to the expediente marks out, without including the lands overflowed by the currents and force of the rivers, and having for boundaries on the north the three summits (Los Tres Picos) and latitude 39 deg. 41 min. 45 sec. north; on the east, the margins of Feather river; on the south, latitude 38 deg. 49 min. 32 sec. north; and on the west, the Sacramento river. With this description, and with the map B. P. L. which, under the decision of the supreme court, we are bound to accept as an accurate copy of the diseño referred to, it is not difficult to ascertain with the general limits of the tract within which the eleven leagues were to be located. On the south is the line of latitude marked as mentioned in the grant, and its position determined by natural objects. On the west is the river Sacramento. On the north is a line of latitude which, though it is not marked with the same numbers as those mentioned in the grant, is inscribed "lindero," and must be taken to have been intended to be designated by the governor, if we assume, as just stated, that this map, or an accurate copy of it, was before him. The eastern boundary is the margin of Feather river. Unassisted by the diseño, there might perhaps be room for doubt whether by this description it was intended to include both banks of that stream. But now without referring to the map it would seem most probable that the governor, if he had intended to bound the tract on the east by the Feather river, i. e., to make it include only the west bank of the stream, would have said so in terms. It is not pretended that the grant included the west bank of the Sacramento river, for the grant using the most obvious and natural form of expression bounds the tract on the west by the Sacramento river. But in fixing the eastern boundary, the governor varies the phraseology and declares that boundary to be not the Feather river but the margins of the Feather river. All doubt, however, is removed by recurring to the map. On either side of the Feather river on the east side of the Sacramento, as well as on the north and south sides of the American, is extended a dotted line, evidently intended to indicate the land solicited and to mark the division between the available lands on the margin of those streams, and the overflowed and tule lands, which beginning at a greater or less distance from their banks, extend over so large a portion of the country. Towards the north, as we ascend the Feather river, these lines diverge, leaving a considerable tract of good land on either side of the stream, while along the Sacramento, both above and below its junction with the Feather, the line of tule or swamp land approaches to within a short distance of its margin. It is shown by the testimony that these dotted lines along the Feather river and along the Sacramento, above the mouth of the American river, indicate with as much exactness as could be expected, the limits of the high lands susceptible of occupation and cultivation as distinguished from the tule lands. And we have the direct testimony of Vioget to the fact that they were drawn with that intention. When, therefore, the governor, with a copy of this map before him, declared that the eleven leagues granted were comprehended within the extent of country delineated on the diseño, without including lands overflowed by the currents of the river, it is reasonable to suppose that he referred to and adopted the discrimination between the high and the overflowed lands, which was so clearly made on the diseño. If this be the true construction of the description in the grant as explained and aided by the indications of the diseño, the question as to location presented in this case does not materially differ from that which so often arises in this class of cases, viz., when a certain quantity is granted within limits which embrace a much larger quantity by what rule is the location of the quantity granted to be determined? Under the Mexican system the duty of laying off and segregating the granted land properly belonged to the magistrate who gave judicial possession. There is no reason, however, to suppose that in measuring the land according to the ordinances the party interested was not allowed to exercise a reasonable election as to its location, provided he did not give it such a form as would be inconvenient and impair the value of the adjoining public domain. U. S. v. Fremont, 17 How. [58 U. S.] 565. It was accordingly held by the supreme court in U. S. v. Fossatt, 21 How. (62 U. S.) 445, that one league confirmed in that case was to be located within the exterior limits of the grant at the election of the grantee or his assigns. But in many of the cases presented to this court it has appeared

that the whole tract within the exterior limits has been sold by the grantee to various purchasers, or a part has been sold, perhaps equal to the whole quantity granted, and the remainder retained by the grantee. A contest thus inevitably arose either between the purchasers inter sese, or between them and the grantee, as to the location of the land confirmed. As between the different purchasers there seemed no rule to be adopted but to treat the conveyances as operating as an election on the part of the grantee of the land conveyed, and as estopping him, or subsequent purchasers under him, to float the grant to any other portion of the tract included within the exterior limits than that whereon, by his deeds, he had declared it to be located. This rule, though it has not received the sanction of the supreme court, has, it is believed, been acquiesced in by the bar and the suitors, and it is commended to us by its reasonableness and justice. For nothing would be more unjust than to allow a grantee, after disposing of large portions of the land within the exterior limits mentioned in his grants,—after extensive improvements have been made and numerous persons holding under a title derived from him have settled upon the land,—to elect a location of the quantity confirmed on an entirely different portion of the tract, so as not only to leave without title those to whom he had conveyed, but perhaps to embrace the lands of settlers, who, relying upon his first election, have treated the sobrante or excess beyond the quantity granted as vacant public land. But if this rule, which thus protects purchasers under an ordinary grantee, be just, it should, a fortiori, be applied to a case like the present. For the grant to Sutter was not the usual grant to an individual colonist, but was asked for and made to him by an impressario.

In this petition to the governor, Captain Sutter, after referring to the extensive establishment which by the permission of the government he had already formed, proceeds to say: "For all these reasons he finds himself under the necessity of enlarging his enterprise by establishing twelve families, and to solicit the kindness of your excellency that you may be pleased to grant him eleven leagues of land in his establishment of New Helvetia, situated towards the north, according to the land represented in the sketch which he has the honor to present to your excellency." The governor accordingly makes the grant, subject to the approval, not of the departmental assembly, as was usual in grants to individuals for their own benefit, but to that of the supreme government as was required by law when grants were made to impressarios for the purpose of distribution among settlers. When therefore, Sutter, having obtained this grant, proceeded o distribute it among various settlers, he was for executing the trust, and rendering the consideration on which the grant had been made. Nor should he, or subsequent purchasers under him, for he is understood to have parted with all his interest in the claim, be permitted now to locate the grant so as not to include the lands distributed by himself amongst his early colonists.

As against a grantee, or purchasers under him, seeking to exercise the right of electing a location, subsequently to and differing from a location already constructively elected by deeds of conveyance, the reasoning above mentioned would seem conclusive. But it commonly happens that soon after obtaining his grant, and prior to any conveyance of any portion of the land, the grantee has erected a dwelling house, corrals, etc., and has cultivated portions, more or less extensive, of his land—ignorant of the dimensions of the tract within his exterior boundaries; or supposing, as was formerly not uncommon, that his grant was by metes and bounds, and that the whole tract within his exterior boundaries would be confirmed to him, he may have conveyed away portions remote from his houses and cultivations—the purchaser perhaps taking the risk of having the land purchased included in the survey—and it may be, paying a price less than its value by reason of the uncertainty as to the location. But the grantee or a subsequent purchaser under him might, notwithstanding such conveyance, insist that no location should be made so as to exclude his ancient dwelling house, his corrals, and his cultivated fields. He might urge with great force that his occupation and cultivation constituted the principal equity of his claim; that it would be absurd to confirm his claim because he had settled upon and improved it, and afterwards to declare that his house and improvements were not upon his own, but upon public land. He might also urge that the erection of a house and corrals—the cultivation of the adjacent land—especially when effected at great expense and followed by a residence of many years, are acts which indicate an election far more unmistakably and emphatically than any conveyances could do—and that subsequent purchasers of remote parts of the tract are affected with notice of the fact that so far as his homestead and adjacent lands are concerned his election was already made, and the location fixed. So, too, the purchaser of his house and improvements might reasonably claim that wherever the grant might finally be located, it ought at all events to include what the grantee had by acts so notorious and unmistakable averred it to embrace. And the location so originally made by the grantee should not be affected by the execution of perhaps quitclaim deeds, without consideration, of which he, the purchaser of the house and improved land, neither had nor could have had any notice. In addition to this, when we consider how readily frauds

upon the purchase of the homestead or even upon settlers (who naturally look to the house and settlement of the grantee as determining the location of the tract), might be committed by means of antedated conveyances, it will, I think, be apparent that the mere execution of deeds to purchasers cannot in all cases be accepted as an election by the grantee of the location of the land which is to be adopted by this court by causing the survey to be made of the tracts so conveyed, including them successively in the order of their dates until the whole quantity granted be obtained.

If, then, in any case, the grantee could be deemed by his occupation and cultivation to have fixed the location of the grant as against any subsequent purchases of other portions of it, Sutter must surely be considered to have done so. As early as 1839 and two years before the date of the grant, he had formed a settlement near the junction of the American and Sacramento rivers, which he named New Helvetia. In the year 1841 he commenced the erection of a fort at his own expense, having previously been commissioned by the government to guard the northern frontier. The fort was surrounded by a high wall, and was defended with cannon. Within it were dwelling houses for his servants and workmen, and workshops for the manufacture of various articles of necessity. A grist mill, a tannery and a distillery were attached to the establishment. A number of Indians were domesticated by him, and contributed to cultivate his fields of grain, and to defend the settlement from more savage tribes. He was possessed of several thousands of horses and neat cattle, which were under the care of his servants. There were collected at different times from twenty to fifty families, and there were in the course of years some hundreds of persons connected with the establishment. U. S. v. Fossatt, 21 How. [62 U. S.] 172. Such was the character of the establishment to which Sutter gave the name of New Helvetia, and it had already received considerable development, when, in 1841, he solicited of the governor "eleven leagues of land in his establishment of New Helvetia, situated towards the north, according to the land represented in the sketch." The governor accordingly grants for him and his settlers, the said land called New Helvetia, and in the third condition defines its boundaries as has been stated. It is suggested by the supreme court that even without the aid of any map whereby we could learn the actual location of the southern parallel of latitude called for in the grant, a question might arise whether the general description of "New Helvetia" should not overrule the particular description by metes and bounds contained in the third condition. "But with the map which shows that the line of the southern boundary is south of New Helvetia, we have no difficulty in including it in the grant." It is evident that the supreme court did not anticipate that if New Helvetia was found to be within the exterior boundaries, any location of the eleven leagues so as not to include it would be made. The court even seems to have considered that the designation in the grant of the extensive and well known establishment of Captain Sutter might overrule the description by lines of latitude contained in the third condition, even without the aid of the map, which showed by natural objects the position of the southern boundary. Assuming then, that early settlement, extensive improvements, and the designation of New Helvetia by name, must be taken to have fixed the location of the grant so far at least as that New Helvetia must be included in it, we proceed to ascertain its boundaries. The place called New Helvetia before the grant was made, appears to have had no definite limits. The fort, which was its headquarters, and the land in its vicinity, are stated by the captain to have been understood to embrace all of New Helvetia. The designation, therefore, of New Helvetia in the grant, in no respect assists us in fixing its southern and eastern boundaries, which are disputed. In the official survey a southern boundary has been adopted, which corresponds neither with the line of latitude marked "lindero" on the map, nor with the line run by Vioget, nor even with the green map, which was placed in the hands of the surveyor. The location of the land has been fixed in accordance with a statement of Vioget that he intended to measure exactly two leagues below the American, and that he included a larger quantity because he erroneously reckoned the Spanish league as equal to three terrestrial miles. The line of the survey has therefore been made to correspond with that of Vioget for only a portion of its extent, and it leaves it at a point from which when extended to the American river, it will embrace exactly two leagues. But this location is open to insuperable objections. There is no proof whatever that the governor had any knowledge of Vioget's alleged intentions with respect to the quantity of land to be located in the vicinity of the fort, or that he adopted the boundary described in the grant and delineated on the diseño under the impression that it would include two Spanish leagues and no more. Nor does Sutter himself appear to have at any time, supposed that he was confined within a boundary which should include that precise quantity. In the year 1841 he states that he broke the ground for a vineyard and planted vines at a spot which is to eastward of the line of the official survey, and in 1847 he constructed a flour mill near the same place, at an expense of $24,000. The race for this mill commenced near an oak tree, which by al-

most all the witnesses who were early residents of the country, is stated to have been well known as the eastern landmark of New Helvetia. Hall, Buzzell, Bidwell, and many other witnesses, identify the "blazed oak tree on the southern bank of the American river, about fifty yards above Sutter's old mill-dam, or where the mill-race commences." This tree is stated by Von Schmidt, the surveyor, to be four miles to the eastward of the line run by him as the eastern boundary. It is shown that among the earliest colonists whom Sutter established on his land were Atkinson, Montgomery, Perry McCoon, Wyman and others, who seem to have been settled on the land south of the American river, and near the eastern boundary, which has been excluded from the official survey. The oak tree referred to by the witnesses is situated at or near the spot where, as Vioget states, the line ran by him terminated; and it likewise corresponds with the eastern termination of the dotted line marked on the map B. P. L. I am unable to perceive on what grounds I should be justified in refusing to treat it as the eastern limit of the grant.

With regard to the southern boundary, a more difficult question is presented. The grant states that the land is bounded on the south by the parallel 38 deg. 49 min. 32 sec. of north latitude. The map B. P. L. shows the true situation of the line so designated. The western termination on the Sacramento river of the line is not seriously disputed. It is testified to by Vioget, whose deposition with regard to its actual location, was accepted by the board and adopted by the supreme court as sufficient and controlling evidence on the point. It is contended that that parallel forms the southern boundary throughout its whole extent, until it meets the eastern boundary. In other words, that the southern boundary line is a line drawn due east from the Sacramento at the point of beginning as testified to by Vioget, and that the eastern boundary is a line drawn nearly south from the blazed tree before mentioned, until it meets the southern boundary. In support of this theory, it is argued with great force that the grant calls for that parallel as a boundary, and not for any line run by Vioget which differs from it. That it appears from the testimony of the early settlers that Sutter's eastern line was universally recognized as running south from the blazed tree until it intersected a line drawn due east from the Sacramento. That in the grant to Leidesdorff of land on the American river immediately eastward of Sutter, and which extended two leagues south of that river, the boundary line between these grants is represented as running in a southerly direction for two leagues. And that in the map of the Sacramento valley, made by Bidwell in 1844 at the request of Governor Micheltorena, and compiled from the grants and maps in the archives, the land of Sutter below the American is represented as nearly a square shape, and bounded on the south and east by the lines contended for. It is further urged that the land in the southeast corner which would thus be included, constituted at that time, the most valuable portion of the tract, and that in 1850 it was sold for a large sum to R. Gelston, who has separately presented his claim for it, and now intervenes for his interest. On the other hand, it is urged that Vioget's deposition conclusively shows where the southern boundary was in fact run. That it was delineated on the map by a dotted line, which, as it could not then have been intended to indicate the division between high and tule lands, must have been meant to indicate the boundary of the tract solicited, and that the mention of the parallel 38 deg. 49 min. 32 sec. in the grant, does not show that the governor meant to establish it as a boundary throughout its whole extent, particularly as no eastern termination is given. But that it was mentioned as the southern limit of the tract because the southern boundary as shown by the dotted lines, commenced at the same point on the Sacramento river and for a short distance coincided with it. The question, however, seems no longer an open one. In the decree which was affirmed by the supreme court, the tract is described as bounded on the south by a line drawn due east from the Sacramento river, so as to touch the most southerly point of a pond or lagona situated near such river, and about five miles south of the American river, as represented on the map filed in the case, and marked B. P. L., which line is also marked "lindero latitud norte, 38 deg. 49 min. 32 sec." As to the line so marked on B. P. L., there can be no question. It must therefore be accepted as the southern boundary of the tract, notwithstanding that except for a short distance at its western extremity it differs from the dotted line which Vioget swears he ran for a boundary.

Assuming, then, that the grant embraced all the land contained between this southern boundary and a line run southerly from the "blazed tree," the question arises whether the location should now be made to embrace this large tract, to the exclusion of lands equally within the grant which Sutter had conveyed to other parties long before his deed to Gelston. It has already been remarked that, as a general rule, the conveyances to third persons by a Mexican grantee of portions of the land within his exterior limits may justly be considered as an election of the location, and as estopping him to make any subsequent election inconsistent with it; yet that the building of a house and other improvements, and an ancient and notorious cultivation and occupation of a particular portion of the land, would seem to afford as decisive evidence of an election as the conveyance (it might be, without consideration) of some other portion; and that the purchaser of the house and improvements might

justly claim that the election was made and the location fixed by the grantee so as not to be affected by any subsequent conveyance, of which he, the purchaser, may have had no notice; that the reasoning applied with great force to a case like the present, where the effect of determining the location by the dates of conveyances alone would be to exclude from the survey the great establishment of Sutter, upon which he had settled so many persons, which gave a name to, and was the principal consideration for making the grant. But these considerations furnish no answer to the perplexing and difficult question, to what extent must the establishment of Sutter be deemed to have located his grants? If, for example, his boundary had been a league or more further to the south, should the occupation and cultivation of the fort be treated as having located the grant upon the eight or nine leagues which would then have been found south of the American river, to the exclusion of those lands which he, soon after the grant, and in execution of the trust confided to him, distributed among his settlers, and which were "situated towards the north," as asked for in his petition. It would seem more just to treat the establishment at New Helvetia as locating the grant upon its site and the adjacent lands, to such an extent as, while it satisfies the principle that his establishment fixed to a certain degree his location, will at the same time enable us to protect the rights of early colonists, for whose benefit in part Sutter received his impressario grant, and whom he at once proceeded to establish upon the land. The quantity of land thus to be assigned to New Helvetia is of course to a certain extent arbitrary. I have been unable to discern any better line of limitation than the original line run by Vioget. This, although not adopted by the governor nor by the supreme court, as the southern exterior limit, was, nevertheless, if Vioget is to be believed, run by him as the boundary of the tract to be solicited. That Vioget ran some line as a boundary cannot be doubted; and Sutter himself, in his deposition taken on behalf of Gelston, cordially testifies from a confused and uncertain recollection of the line as established by Vioget. To question 11, "How do you know the eastern line runs south by east?" he says: "I do not know exactly, and don't like to make a mistake. It was fixed by Vioget when I showed him what land to take. Question 12. What are your means of knowledge that the eastern line was ever fixed? Answer. Vioget told me so; he told me he had surveyed it. Question 13. Did he describe to you what boundaries he had surveyed? Answer. Yes; he described them to me, but I cannot describe them. I cannot without riding over the grounds or having my papers, tell much about them. Question 14. Did Vioget inform you how he ran the eastern line; if yea, what information did he give you? Answer. It is now so long ago I do not know what information he gave me. Question 16. What landmarks do you know on the southern line? Answer. I know of none; I have to refer to the surveyor."

In answer to question 22, which related to other lines, he says: "I am not personally familiar enough with these lines to give testimony satisfactory to myself; I am not willing to make mistakes under oath; I cannot answer the question definitely; I refer to the surveys that have been made by Captain Vioget." It is evident from these statements that Sutter considered his boundaries to be the lines run by Vioget, of which, however, he seems to have had a very confused idea; and this conclusion is corroborated by the circumstance that he does not appear to have made any conveyance of, or settlement upon, lands outside of those lines, until in comparatively recent times and after the grant of the Sobrante, which gave him all the lands included in his map. If to these considerations we add that the map itself indicates by dotted lines the boundary which Vioget testifies he ran, and that the land south of those lines, and between them and the parallel of latitude, is marked "Tierras Steriles," it will, I think, be evident that, as against the early colonists of the more northern portions of the tract, we ought to restrict the location of the New Helvetia portion within the lines originally run by Vioget, and delineated on the map which the supreme court has pronounced to have been proved. But it is objected that, of the land lying south of the American river, all those portions which were liable to overflow from the force and currents of the river are to be excluded. That a considerable portion of the tract, including in great part the site of the present city of Sacramento, is overflowed whenever there are floods or freshets in the river, is not only testified to by the witnesses, but demonstrated by the fact that the city of Sacramento has found it necessary to construct very extensive levees at great expense. But it also appears that a great part of the land on the margins of Feather river is liable, in a greater or less degree, to inundation from the same cause; and at periods of extraordinary floods the whole country is submerged except a few high points of land which rise like islands above the waters. The land thus occasionally overflowed yields abundant pasturage throughout the greater part of the year, and it is even said to be superior in that respect to the high land, which is never submerged, though it is doubtless unfitted for the production of cereals. The dotted lines on the map B. P. L. along the Sacramento and Feather rivers, are stated by Vioget to have been intended to mark the limits of the available land which was solicited; but if, construing the grant as is proposed, we exclude all the lands which were liable to inundation, a large, and perhaps the greater portion of the lands along the rivers included within the dotted lines will be excepted from the grant,—

lands which were the first granted by Sutter, on which his earliest colonists were settled, and which have ever since been held under the title so acquired. The dotted lines, running nearly east and west on either side of the American river, could not, like those which followed the course of the Sacramento and Feather rivers, have been intended to mark the division between the high lands and the tule swamps. But if, as we are bound to assume, they were upon the original diseño as they now appear on B. P. L., they would seem to show that Sutter intended to solicit, and the governor to grant, all the land included within them. The testimony of Vioget is positive to the fact that he ran the southern line so as to include the whole tract lying in the angle formed by the Sacramento and American rivers. That Sutter, who at the date of his petition has already formed his extensive establishment at the fort, should have intended to exclude from his grant an irregular and undefined strip of land immediately adjacent to it, and lying between that building and the place on which his embarcadero was situated, would seem highly improbable especially as he had already to some extent cultivated and established his Indian servants upon it; as it afforded good grazing for his cattle throughout the greater part of the year,—and was suitable for the cultivation of vegetables,—and above all, if it be true as stated, that the two years during which he had up to that time occupied the fort, had been remarkable for the absence of rain, and no floods had within his experience occurred to apprise him of the liability to inundation of the land It is also to be observed that the governor, in excluding from the grant the lands periodically overflowed by the impelled currents of the river, merely adopted a suggestion contained in the petition of Sutter, evidently intended as explanatory of the sketch which he submitted. When, therefore, the governor granted him the eleven leagues, as exhibited on the map, without including the lands Sutter desired to except, he may not unreasonably be considered to have accorded a privilege to, rather than imposed a restriction on the grantee, by permitting him to take all the land supposed to be fit for cultivation and settlement, but to reject, if he saw fit, the swampy and unavailable portions which were included within the limits of the map. When, therefore, he saw that immediately adjacent to the establishment of Sutter a tract was laid out, contained within dotted lines, which could have served no purpose but to indicate its boundary,—when the same lines were continued north along the margins of the rivers, while outside of them the lands were marked "Tulares y Tierras Esteriles,"—it is unreasonable to suppose that he meant to prohibit the grantee from occupying a portion of the land within those lines, insignificant in extent, though important now as the site of a city, merely because on a more accurate examination it might be found to come within the terms of the description of the land which the grantee was not bound to take.

For these reasons I am of the opinion that the settlement at the fort, and the extensive establishments erected in its vicinity at so early a day by the grantee, must be taken as an election of a location which neither he nor purchasers claiming under him can now disturb, and that that location must be taken to embrace all the land lying between the American and Sacramento rivers and the dotted line delineated on the map B. P. L., which I understand to coincide substantially with the line actually run by Vioget and described in his deposition. With respect to the remainder of the tract, I know of no rule by which to be governed except to treat the conveyances by Sutter to his colonists as operating as successive locations of portions of the tract in the order of their dates. The first distribution of lands made by Sutter under his impressario grant, was by lease for nine years to Cordua et als. of the north-eastern portions of the tract lying between the Yuba and Feather rivers. This lease was made renewable for a second term of nine years. The reversion has since been bought by the assignees of the lessee, and a claim for the land has been separately presented and confirmed in the case of U. S. v. Covilland [1 Black (66 U. S.) 339]. Under the title thus acquired the land has been occupied since January, 1843. It is objected that the original conveyance did not transfer the whole title, but was merely a lease; the present owners of the land have only such right to priority of location as the release of the reversion would confer upon them, and as the date of that instrument is later than that of several conveyances by Sutter of other portions of the tract, the grant must be located so as to embrace the latter. But the question is, not what particular estate for life, for years, or in fee, may have been originally acquired, by those who settled upon the land under Sutter, but whether the latter has done any acts, or created any interests which limit and control the right of electing the location of his grant which he might otherwise have exercised. When, therefore, Sutter having obtained a concession for the express purpose of settling families upon it, within eighteen months of its date, and as his first act under it not only establishes a colonist upon its most remote and dangerous frontier, but executes to him a lease for nine years, renewable for nine years after the expiration of the first term, it seems clear to me that neither he nor any subsequent purchaser under him is at liberty to give to the tract any location which will not embrace the lands so emphatically affirmed by him to be within its limits. No objection has been made by those representing this claim to the northern boundary, as established by the official survey. That boundary must therefore be

preserved, and the grant to Sutter located so as to embrace the lands to the south of it included within their original lease provided, and so far as they are contained within the dotted lines marked on the map B. P. L. The conveyance next in date is that to Grimes and Sinclair. But independently of the fact that, through some strange misconception of his rights, Sutter appears to have attempted to convey a tract much larger in extent than the whole quantity granted to him, the boundaries of the tract so conveyed are not only beyond the boundaries mentioned in the grant, but would extend according to the scale on the diseño, considerably beyond the margin of the paper on which it is drawn. Grimes himself seems to have been aware that the title so acquired from Sutter was in great part void, and he at an early day applied for and obtained from the Mexican government a grant for ten square leagues, embracing a part of the land conveyed by Sutter. But, it has already been observed that the map B. P. L., when taken in connection with the words of the grant, excluding from the tract the lands overflowed by the currents of the river, indicates unmistakably what were the boundaries of the land intended to be excluded, and especially with reference to the lands east of the Sacramento river, and below the mouth of the Feather, are we compelled to accept the dotted line as indicating the boundary of the tract; for, otherwise, there would be no eastern boundary whatever. The only eastern boundary, mentioned in the grant is "the margins of the Feather river. This description, though, without the aid of the dotted lines it would be vague and undefined, might still be accepted as affording some indication of the extent towards the east of that northern portion of the tract." But for that part of it towards the south, and below the mouth of the Feather, it would afford no eastern boundary whatever, and the grantee would have been at liberty to extend his land indefinitely in that direction, or at all events so as to comprise all the land lying between the Sacramento and the margin of the map —lands which are marked upon it as "Tulares y Tierras Steriles," and which are obviously intended to be excluded. For these reasons, it seems to me clear that only that portion of the land conveyed to Grimes can be included in the location, which lies along the American river, west of the limits of his ten league-grant, along the Sacramento river, and between those rivers and the dotted line marked upon the map B. P. L.

It is stated by Vioget, when describing the measurement of the squares heretofore alluded to, that he laid off a small strip of land on the Sacramento, but did not intend to include in it the grant. But there is no evidence that this intention was known to or acted on by the governor. The strip is clearly within the limits described in the grant, and marked on the diseño B. P. L. It appears on that map as much a part of the land solicited as the wider portions of the same tract where the dotted lines, as they extend northwards, gradually diverge from the rivers. The land has been treated as his own by Sutter, and I can see no reason for concluding that it was not a part of the tract out of which the eleven leagues were to be taken. Various other conveyances by Sutter have been proved, but it is not necessary specially to refer to them. It is sufficient here to say that each of them successively should be taken as fixing the location of the grant, as to the lands embraced in them. They are understood to be within the limits of the general boundaries, and of the dotted lines on B. P. L., and will be particularly mentioned by names and dates in the order of a new survey, to be entered in pursuance of this opinion. It is believed that under this location all of the lands covered by the earlier conveyances made by Sutter before receiving the Sobrante grant will be included in the survey to be made. These have evidently the higher equity. For they were made in execution of the trust created by and out of the lands conveyed in the just grant which has alone been confirmed,—while the later conveyances may have been in great part intended as transfers of rights supposed to have been acquired under the Sobrante grant, which has been rejected by the supreme court. I have felt more difficulty and embarrassment at arriving at a conclusion in this case than in any other it has been my duty to decide. The undefined character of the exterior boundaries; the loss of the original maps; the inconsistencies and differences in the maps which have been presented as copies; the entire absence of any rules settled by judicial authority, which might have guided me in making a location of the comparatively small tract of eleven leagues out of the large area included in the map; the numerous alienations by Sutter of lands greater even in extent than the quantity included in both grants, and of which until the decision of the supreme court, he was supposed to be the owner. All these circumstances have contributed to render it more than ordinarily difficult to arrive at any satisfactory decision.

I am fully aware of the force of the objections which may be urged against the conclusion to which I have come. The most that can be said is, that that conclusion is perhaps less objectionable than any other. Its correctness rests mainly on the answers to be given to the following questions: 1. Is the settlement at New Helvetia to be treated as a location by Sutter of at least a portion of his grant, to which any subsequent location by conveyances must be sub-

ordinated? 2. Is the location so made properly restricted to the land the boundaries of which were run by Vioget and delineated by dotted lines on the map B. P. L., or ought it to include all the land between the American river and the parallel of latitude drawn on the map and mentioned in the grant? 3. Should the lands shown to be subject to inundation at periods of high water be excluded from the tract? 4. Should the various sub-grants by Sutter be deemed to have operated as locations by him of the tracts conveyed, and should they now be successively included in the survey in the order of their dates, until the whole quantity granted is obtained? I have put the points on which this decision chiefly turns in this form in order that the attention of the supreme court may more directly be drawn to them, and in the hope that in the answers to be given to them by the superior tribunal, I may be furnished with some definite rules, established by the highest authority, to guide me in this most difficult and perplexing class of cases.

[NOTE. An appeal was taken to the supreme court, where the decree of the district court confirming the survey and location of 11 square leagues to Sutter, approved May 11, 1863, was reversed and set aside, and the survey and location of the grant by A. W. Von Schmidt, approved February 18, 1860, substituted in place thereof. The case was remitted to the district court, with directions to confirm the survey as to the location of the said grant. 2 Wall. (69 U. S.) 562.]

Case No. 16,425.

UNITED STATES v. SWANN.

[1 Cranch, C. C. 148.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

COMPETENCY OF WITNESSES.

A slave is not a competent witness for a free mulatto in a public prosecution.

[Cited in U. S. v. Mullany, Case No. 15,832; U. S. v. Gray, Id. 15,252.]

Indictment for theft [against Nancy Swann, a free mulatto].

Mr. Hewitt, for defendant, prayed for a summons for a negro slave as a witness for the defendant.

THE COURT inclined to think that the slave could not be a witness against her, and therefore not a good witness for her, and refused the summons.

UNITED STATES v. SWANSON. See Case No. 16,156.

UNITED STATES (SWAT v.). See Case No. 13,680.

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

END OF CASES IN BOOK 27.

*

INDEX.

[The references are to pages. The asterisk (*) indicates that the case has been reversed.]

ADMIRALTY.

See, also, "Courts"; "Shipping."

Page

Admiralty has no jurisdiction of the offense of obstructing a navigable stream by a bridge..... 91

Adoption.

See "Parent and Child."

ALIENS.

The city court of Yonkers is a court having common-law jurisdiction, within Rev. St. § 2165, and may naturalize an alien..... 607

The words, "if any person shall make, forge," etc., a certificate of naturalization (Act March 3, 1813, § 13), are intended to be general in their operation, and are not confined to seamen..... 709

ALTERATION OF INSTRUMENTS.

An obligee who has torn off the seal and canceled a bond, in consequence of fraud and imposition practiced by the obligor, may maintain an action on such bond, and set forth the special facts in the profert.....1278

APPEAL AND ERROR.

The power to issue "all other writs not specially provided for by statute" (Judiciary Act, § 14) only applies where jurisdiction already exists 561

The nature of a writ of error, and when it lies, discussed in an opinion by Clifford, J. 561

A finding of fact by the district court is not a subject of review by a writ of error when the record does not show that any rules of law were violated, or that any erroneous construction of statute was applied to the facts proved.....1114

Where the record is actually returned and filed in due time, and the copy of the writ of error is correct, a mere clerical error in the return day in the original writ is immaterial, and is cured.....1097

On reversal of a judgment in an action brought by a writ of error from the district court, the circuit court may, if justice require, award a venire facias de novo, triable at the bar of the circuit court..... 967

APPRENTICE.

Where the indenture is void by the law of the state where made if the apprentice is carried out of the state, the master cannot hold him in another jurisdiction..... 975

ARMY AND NAVY.

See, also, "Perjury."

Page

Minors may be enlisted in the navy, but not in the army, without the consent of their parents or guardians.....1336

ARREST.

See, also, "Criminal Law."

A certified copy of an information filed for an offense against the laws of the United States, without copies of some oath or affirmation to facts showing probable cause to believe defendant guilty, does not authorize issuing a warrant of arrest.....1056

A marshal who receives a warrant to be served upon a circuit court commissioner is bound to make return of his doings thereunder 1000

A United States attorney has no authority to take from the hands of the marshal warrants regularly issued to him by a circuit court commissioner, for the purpose of deciding whether or not such warrants shall be executed.....1000

An officer may hold a person upon a warrant without informing him that he is arrested upon it..... 236

ASSAULT AND BATTERY.

Striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist, if done in anger or a menacing manner, constitutes an assault... 359

The mere taking hold of another's coat, if done in anger, or a rude and insolent manner, or with a view to hostility constitutes an assault and battery..... 359

It is an assault to double the fist and run it at another, saying, "If you say so again, I will knock you down."..... 43

It is an assault to threaten to strike a woman with an uplifted club if she open her mouth 798

A person who flourishes or points a deadly weapon at another, intending personal harm, is guilty of an assault, within Act March 3, 1825, § 22, although no battery has been committed 930

A person is guilty of the offense if he could have reached the person intended by extending his arm, so as to inflict a blow, although no blow was actually given..... 930

If a man be present, and encourage an assault and battery, he is a principal..... 806

Whether an assault was with a dangerous weapon or not may depend upon matter of fact, as upon the manner of the assault; and the court cannot declare, as a matter of law, that an assault, if committed with a belaying pin, was with a dangerous weapon..1128

ASSIGNMENT.

Page

An assignee of a mortgage, or other chose in action, takes it subject to the same equity that it is subject to in the hands of the assignor 1358

An assignee who might have obtained notice, and ought to have sought it, stands in no better situation than one having notice..1358

ATTACHMENT.

In the district court of the Southern district of New York, an attachment may be issued in aid of a common-law information prosecuted by the United States.....1326

ATTORNEY AND CLIENT.

The court will strike an attorney from the roll for malpractice, though it be not indictable 595

Upon an indictment for barratry, no evidence can be given of specific acts without notice given before the trial..... 595

BAIL.

See, also, "Criminal Law."

The announcement of readiness to proceed to trial at the close of the term before adjournment will not entitle the prisoner to be released on bail, where he had previously obtained a postponement on the ground of absence of witnesses.....1338

A certificate in the usual form, by the treasury officials, that a certain balance is due by the defendant to the United States, is not sufficient cause for bail.....1158

Where the indictment does not describe an indictable offense, the magistrate has a discretion as to the amount of bail, and is not criminally liable for taking insufficient bail 1157

An acknowledgment without the signatures of the parties certified by a justice of the peace is all that is required to make a recognizance valid and obligatory..... 528

A recognizance of bail is not objectionable because embracing the amounts required upon two separate indictments..... 746

Where the accused is admitted to bail pending consideration of objections to the indictment, the recognizance is a binding obligation, though the indictment be eventually adjudged void..... 746

A person under recognizance to appear at a certain place at a certain hour is not in default before the expiration of that hour, and he is not bound to appear elsewhere.. 915

The cognizor must be called at the time and place when and where he was bound to answer, and an entry made of his default on the minutes of the commissioner, which he returns to the court, to show a breach of the condition of the recognizance..... 915

It is not sufficient to aver and prove aliunde that the cognizor had in fact absconded, and did not intend to appear, and could not have appeared if he had been called 915

Where defendant absconded, and the trial proceeded in his absence, and he was acquitted, *held*, that the estreat would be set aside on application of the bail..... 954

A motion to set aside a forfeiture of a recognizance given for appearance to answer an indictment, on the ground of irregularities, will be denied, where defendant is a fugitive from justice.....1344

A motion to remit the forfeiture of a recognizance on the ground that the party, when called, was in the custody of a state officer, under warrant issued out of the state court, will be denied on the ground that the question can be best determined on the trial of the action on the forfeited recognizance 1356

A bond signed by a third person, whose name did not appear in the body thereof after its execution by defendant and another, does not import a joint liability, and a joint action cannot be sustained thereon... 528

BANKRUPTCY.

A discharge in bankruptcy does not discharge debts due the United States..... 873

Act 1867, § 44, punishing the fraudulent disposition of the goods of a debtor, obtained on credit, and remaining unpaid for within three months next before the commencement of proceedings in bankruptcy, is within the power of congress, as a law "necessary and proper" for carrying the bankrupt law into effect..... 631

A deputy clerk, being authorized to act the same as the principal, has the right to administer oaths in bankruptcy; and such oaths are presumed to be administered in the presence of the court, and by virtue of its authority 151

The repeal of the bankrupt law of 1800 by Act Dec. 19, 1803, bars a criminal prosecution thereunder 458

An indictment under Rev. St. § 5132, will lie before an order of adjudication in bankruptcy 49

In an indictment under Act 1867, § 44, all matters necessary to constitute the offense as defined therein must be pleaded.. 614

The description of the goods should be as definite as in a declaration in trover..... 614

The word "feloniously" should be omitted, the offenses being indictable as misdemeanors 614

An indictment for obtaining goods under false pretenses (Rev. St. § 5132, cl. 9) need not charge an intent to defraud creditors generally 49

The negative averment that the accused was in fact not carrying on business and dealing in the regular course of trade when he obtained credit for goods on false pretenses is not necessary..... 49

Under an indictment based upon Rev. St. § 5132, cl. 9, it must be shown that defendant falsely represented that he was carrying on business in the ordinary course of trade, and that such representations induced the seller to part with his goods.... 490

Under clause 10, it must be shown that the intent to defraud existed in the mind of the bankrupt against his creditors generally, and not against the particular creditor from whom the goods were obtained.. 490

To sustain a conviction for concealing assets from the assignee, it is not necessary to prove a demand by the assignee.....1170

To sustain a conviction for a fraudulent disposal of goods, it is not necessary that such goods shall have been obtained within three months prior to the commencement of the proceedings in bankruptcy.....1170

The compulsory examination of a bankrupt under oath cannot be given in evidence against him on a criminal proceeding.... 616

BANKS AND BANKING.

See, also, "Internal Revenue."

Customs bonds left with a bank for collection, and paid with the proceeds of notes made by the principal, and bearing forged indorsements, will be *held* discharged, and the bank cannot enforce the priority of payment of the United States out of the assets of the principal..... 905

BILLS, NOTES, AND CHECKS.

Page

The payee of a bill drawn by a public officer upon a general agent of the United States must show that value was given therefor, where a strong ground is made out to show a want of consideration..... 623

Stolen bank notes, received in good faith in the course of business, will not be ordered to be restored to the person from whom stolen 716

BONDS.

See, also, "Bail"; "Customs Duties"; "Internal Revenue"; "Office and Officer"; "Post Office"; "Shipping."

A printed form of bond was signed by persons who had consented to become sureties. The blanks were subsequently filled out without express authority from them, and the same was subsequently accepted by the United States. *Held* not a valid bond, as to the sureties..... 82

Conditions inserted in a statutory bond in excess of the statute requirement may be rejected as surplusage, and the bond sustained as to the others.....53, 64

A bond taken under an act of congress is not governed by the local law, but is, in contemplation of law, given at the seat of the federal government.....1305

It is no defense to a bond that it was executed on the agreement that it should be signed by another, and that such other was falsely personated, when defendant procured such personation..... 635

The assignment of the breach of a condition by a direct negative of its words is good 1278

The question whether nil debet is properly pleaded to a declaration on a penal bond assigning breaches can only be raised by demurrer 1281

A plea seeking to avoid a bond for being illegally taken colore officii should specially state all the facts which show such irregularity 967

If a plea of performance be too narrow, or contain a flat negative pregnant, it is bad 967

If defendant on oyer does not set out the whole of the bond, plaintiff may relieve himself by praying it to be enrolled..... 967

Separate profert need not be made of the condition of the bond, where the declaration states the condition in assigning the breach..1278

Bounties.

See "Fisheries."

Bridges.

See "Navigable Waters."

CITIZEN.

See, also, "Aliens"; "Civil Rights."

Free persons of color born within the allegiance of the United States have always been regarded as citizens..... 785

The emancipation of a native-born slave by the thirteenth amendment removed the disability of slavery, and made him a citizen of the United States, subject, however, to any lawful restriction imposed upon his right to vote, or other powers or privileges.. 785

CIVIL RIGHTS.

See, also, "Citizens."

The civil rights bill is not a penal statute, but a remedial one, and is to be liberally construed 785

Page

A prosecution for burglary is "a cause affecting" the owner of the building entered, within the meaning of Act April 9, 1866, § 3, giving the federal courts jurisdiction where the rights secured thereby cannot be enforced in the state courts..... 785

The circuit court has jurisdiction of a prosecution for burglary, where the owner of the building entered is, on account of color, incompetent by the law of the state to testify in support of the indictment as a white person might, though the indictment does not aver the statute denying the right 785

Whether an indictment for unlawfully preventing certain citizens of African descent from registering or voting at a municipal election should charge that the acts were done on account of race, color or previous condition of servitude, quære..... 506

A clerk in charge of the reception of travelers at a hotel is liable under Act March 1, 1875, for refusing accommodations to a negro traveler by reason of his color 127

COMMON LAW.

In the absence of statutory provisions, the federal courts resort to the common law for guidance in the construction of legal terms and phrases..... 390

COMMON SCOLD.

An indictment charging defendant with being a common slanderer or common brawler is not sufficient. It should charge defendant as a common scold or common barrator, in technical language..... 906

Upon the trial on an indictment for being a common scold, particular instances of scolding may be given in evidence..... 907

The offense of being a common scold is punishable as a nuisance at common law, by fine and imprisonment, the punishment by ducking being obsolete..... 907

CONSPIRACY.

See, also, "Internal Revenue."

A conspiracy is where two or more persons confederate or combine to do an unlawful act, and it may be proved by direct and positive evidence, or by facts showing that there was a concert of action and a unity of purpose in effecting an unlawful object 1144

Both the agreement or combination to do an unlawful act, and an act done by one or more in pursuance thereof, are necessary to constitute the offense..... 197

An agreement whereby a commissioner taking evidence in support of a claim against the United States is to have a contingent fee of $5,000 is not necessarily criminal 181

Employés, if acting without any illegal purpose, may quietly and peaceably leave the service of their employer by concerted action at a given time, so long as they do not violate any contract to remain longer..1312

It is unlawful for employés whose employment is at an end to combine to induce others to quit the same service at the same time, but before their employment has expired 1312

A conspiracy to obstruct the mail in violation of Rev. St. § 3995, is a violation of section 5440, as a conspiracy to commit an offense against the United States.....1312

Where the existence of an unlawful conspiracy is proved, an overt act by one of the

Page
parties thereto becomes the act of all, and they are all alike guilty..... 181
The fact that the overt acts charged and proven were severally criminal is no answer in an indictment for conspiracy, and such overt acts may be proven to show the existence of the conspiracy charged..... 813
Identity of conspiracy is not destroyed by the connection at a subsequent time of new parties therewith..... 197
A conspiracy to do an unlawful act, formed in one district, and in part executed there, is punishable in that district, though it was consummated in other parts of the United States 181
The defendants may be tried in any district where the overt acts were committed. 813
An indictment will lie for a conspiracy to cheat by selling a free negro as a slave...1277
The time and place of conspiracy must be alleged in the indictment.....1260
On a joint indictment against several, the acquittal of some of defendants does not prevent the conviction of two shown to have conspired 813
It is not necessary to set forth the county in which the alleged conspiracy was formed, and it may be rejected as surplusage..1144
Where the syndic of a firm is charged with conspiracy to defraud the United States in preferring a false claim, there is no conclusive presumption that he had acquired all the knowledge from the books of the firm which a proper execution of his trust would have required him to gain.... 181
Upon prima facie proof of a conspiracy, the acts and declarations of each conspirator are admissible upon the trial of any one of them 1312
The jury must be first satisfied of a common design, confederation, and purpose, before the acts and declarations of one participating are competent evidence against a confederate to prove the scope and purpose of the conspiracy.....1312

CONSTITUTIONAL LAW.

While the power to regulate commerce among the states is vested in congress, the judicial power cannot act until congress prescribes the rule in regard to commerce.. 686
Congress has power to pass a law imposing a license duty on those who are engaged in a business which is a subject of a police regulation by the states..... 810
Act May 8, 1830, providing a new remedy, is not invalid as affecting prior vested rights 932
A state law cannot take away rights and privileges secured by the constitution and laws of the United States..... 711
In the absence of an express prohibition, a grant of power to congress does not prevent the states from continuing to act on subjects within the grant until congress legislates fully concerning it, and so as to conflict with the acts of the state..... 91
Defendant is not put in jeopardy where the jury are impaneled and sworn before he has been arraigned or has pleaded to the indictment, and after he has been arraigned and has pleaded a new jury may be impaneled and sworn..... 810
After the jury is sworn the court will not quash the indictment for a fatal variance, the prisoner having a right to a verdict 479

CONSULS.

A foreign consul is indictable and triable in the federal courts for the common-law offense of sending anonymous letters and threats, with intent to extort money..... 714

CONTEMPT.

Page
The authority to punish for contempt follows as a necessary incident in establishing a tribunal of justice..... 91

CONTINUANCE.

It is no cause for a continuance that defendant has not been furnished with a copy of the indictment and a list of the jurors, if he has not applied for them.....1065
In the case of felony the prisoner is entitled, after being furnished with the names of the witnesses against him, to a reasonable time in which to bring testimony from the counties in which such witnesses live..1338
The court will not postpone a criminal trial on the ground of the absence of witnesses, unless the evidence to be given by such witnesses is pertinent to the issue, and the witnesses are material.....1192
A criminal trial will not be postponed to enable defendant to obtain evidence which would have an influence upon the mind of the court in mitigation of punishment, but which is not legally admissible before a jury 1192
The affidavit for the continuance on the ground of the absence of witnesses residing out of the district must particularly set forth in what matters their testimony is material 1192
Proper practice where a postponement is desired by plaintiff for the purpose of obtaining testimony of new witnesses.....1333

COSTS.

No costs can be allowed, other than those specifically enumerated in the act of February 26, 1853..... 310

COUNTERFEITING.

Where an original paper executed with printed signatures is not good under the statute, yet, where it purports to be a genuine certificate, it is a felony, under Act March 3, 1825, § 19, to counterfeit it..... 976
The law presumes the intention in passing counterfeit paper to be to defraud any person who may suffer a loss by receiving it as genuine.....1051
An indictment will lie under Act June 30, 1864, § 11, for aiding and assisting in the making of a counterfeit plate from which national counterfeit banknotes could be printed 901
Counterfeiting an indorsement on a post note of the Bank of the United States *held* not an offense under section 18 of its charter 1343
Intoxication is no defense to an indictment for passing counterfeit notes, if defendant was possessed of his reason, and was capable of knowing whether the note he passed was good or bad..... 902
An indictment for counterfeiting, not found within two years subsequent to the commission of the acts charged, is barred by the statute of limitations.....1070
The offenses of passing counterfeit coin at different times and on different occasions may be joined in the same indictment 216
An indictment for counterfeiting United States coin, under section 20 of the crimes act of 1825, need not aver an intent to pass the coin as true, nor an intent to defraud 506
Contents and sufficiency of an indictment for uttering as true a forged note of the Bank of the United States after the expira-

Page

tion of the term for which the corporation was created 179

On an indictment for counterfeiting notes of the Bank of the United States, an intent to defraud some corporation or person must be shown..... 5

The notes stated in the indictment and given in evidence as counterfeited, and those alleged to be counterfeited, must be shown to be the same..... 5

Defendant may be convicted of uttering or passing spurious notes upon proof that he sold and delivered them as spurious, with intent that they should be passed upon the public as genuine. (Act June 30, 1864, § 10.)..... 80

On trial of an indictment for passing counterfeit notes of a certain bank, evidence of passing a counterfeit note of another bank at another time is not admissible 902

But evidence is admissible of the passing of similar counterfeit notes, or of passing notes of a different bank, at the same time, or of having them in possession..... 902

COURTS.

See, also, "Admiralty"; "Appeal"; "Criminal Law"; "Habeas Corpus"; "Mandamus."

Comparative authority of federal and state courts: Process.

The execution of writs of mandamus issued by the federal circuit court cannot be interfered with by the process or judgments of the state courts, and such interference is illegal and void.....1077

A county judge who has levied a tax to pay a judgment against the county, in obedience to a writ of mandamus issued by a federal circuit court, is guilty of a contempt where he annuls the levy in obedience to a subsequent order of the state court.....1077

Federal courts—Jurisdiction in general.

The grant of powers to congress over certain subjects does not invest any particular courts with that authority until expressly conferred by congress, except in the case of jurisdiction expressly given to the supreme court..... 91

Where the jurisdiction of the federal courts has once attached, a change in the relation or condition of the parties in the progress of the cause, will not oust such jurisdiction 38

Congress has power to confer jurisdiction on the federal courts of suits brought against defendants nonresident in the districts where the suits are brought..... 387

Such jurisdiction has been conferred as to suits against nonresidents commenced in the state courts by attachment, and removed to the federal courts, by Act March 3, 1875, §§ 2, 4..... 387

Previous to the passage of Act June 17, 1844, the federal courts had no jurisdiction to hear, try, and punish offenses committed in the Indian country west of Arkansas, and such act was not retrospective..1296

The federal courts have no jurisdiction to punish the crime of murder committed within a fort of the United States existing in the state of Kansas at the time such state was admitted into the Union.....1288

—— Grounds of jurisdiction.

Where jurisdiction depends upon a party, it is the party on the record..... 38

—— Supreme court.

The constitutional provision vesting in the supreme court "original jurisdiction" in all cases affecting ambassadors, other public ministers, and consuls, does not make that jurisdiction exclusive..... 713

—— Circuit courts. Page

Under section 11, Judiciary Act, giving the circuit court jurisdiction of all crimes and offenses cognizable under the authority of the United States, such courts have jurisdiction to try an indictment against a foreign consul for offenses committed in this country 713

Where there is an obstruction to commerce which operates to the irreparable injury of an individual, or of the United States, the federal circuit court may act to prevent the injury..... 686

The circuit court has jurisdiction over a revolt on a vessel which has not cleared, but is lying at anchor in a navigable stream where the tide ebbs and flows.....1290

The circuit court has jurisdiction of a creditor's bill brought by the United States, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500. (Act Sept. 24, 1789, § 11.).....1344

—— District courts.

The jurisdiction of the district court for the district of Oregon over offenses committed in Alaska does not extend to the crime of distilling spirits therein without paying a tax therefor. (Act July 27, 1868, § 7.) 1021

A case will not be remitted to the circuit court from the district court except when it appears that the questions of law are, in the judgment of the district court, of so grave a character that it must judicially declare them both difficult and important..... 365

The fact that the judge had given strong and decided views of the law in a charge to the grand jury is no ground for remitting the case to the circuit court..... 365

—— Procedure.

The practice of the court may be established without the existence of a positive, written rule 1326

The forms of process and procedure of the federal courts in actions at common law within the 13 original states are the same as those employed therein May 8, 1792, except so far as the federal courts may have prescribed alterations 1326

Act May 19, 1828, § 1, does not apply within states which were members of the Union before September 29, 1789.....1326

The practice and jurisdiction of the federal circuit court as a court of equity cannot be controlled by the practice of the state courts..... 444

Criminal proceedings in the federal courts are not governed by the laws of the several states, except as provided by act of congress 1056

The state regulations for the procurement of grand and petit jurors to serve in the federal courts, as well as their qualifications and exemptions, are adopted by Acts Sept. 24, 1789, § 29; May 13, 1800; July 20, 1840 727

Peremptory challenges in criminal cases in the federal courts are regulated by the common law..... 727

CRIMINAL LAW.

See, also, "Arrest"; "Assault and Battery"; "Bail"; "Bankruptcy"; "Common Scold"; "Conspiracy"; "Constitutional Law"; "Continuance"; "Counterfeiting"; "Courts"; "Disorderly House"; "Dueling"; "Elections and Voters"; "Extradition"; "False Pretenses"; "Forgery"; "Fraud"; "Gaming"; "Grand Jury"; "Habeas Corpus"; "Highways"; "Homicide"; "Indians"; "Indictment and Information"; "Internal Revenue"; "Jury"; "Larceny"; "Literary Property"; "Mayhem"; "Neutrality Laws"; "New Trial"; "Obstructing

Justice"; "Pardon"; "Perjury"; "Piracy"; "Postoffice"; "Receiving Stolen Goods"; "Riot"; "Robbery"; "Treason"; "Witness."

In general. Page

A doubt whether an act charged in an indictment is embraced in the criminal prohibition must be resolved in favor of the accused 742

Where a penal statute is complete without certain words, and giving them effect will render the whole act meaningless, they should be rejected as surplusage.....1310

Criminal liability.

Insanity, to constitute a defense, need only to have existed at the moment when the act was charged to have been committed..1074

A person who can discriminate a right from a wrong act is liable to punishment, and his acts are the best test of his sanity..1072

The concealment of the offense, as well as flight from justice, and a judicious use of the money stolen, by a thief, show a knowledge of the offense.....1072

Where there is conflicting testimony on the question of the sanity of the prisoner, he is entitled to the benefit of a reasonable doubt 1074

Principal and accessory.

An accessory after the fact cannot be tried as a principal unless the indictment show either that the principal has been convicted, or has fled from justice, or cannot be found..... 90

Jurisdiction.

Extent of the criminal jurisdiction of the United States stated by Field, C. J.....1132

The federal courts have no common-law jurisdiction to try and punish crimes, but only such jurisdiction as is expressly authorized by the constitution or by congress.. 91, 694

The federal courts have jurisdiction of all criminal cases arising under the federal laws 1147

The circuit court has jurisdiction to inquire into and pass upon all acts charged by competent authority to be public offenses, and presented to it by such authority for its consideration..... 746

The jurisdiction of the United States to punish crimes extends to vessels sailing under their flag, wherever they may be.....1132

Except offenses committed on the high seas, or in places in the states which are under the exclusive jurisdiction of the United States, there are no felonies against the United States cognizable by courts of the United States, except those which are expressly made such by act of congress.....1060

"High seas" (Act April 30, 1790, c. 9, § 8) mean any waters on the sea coast which are without the boundaries of low-water mark 899

An offense committed in a bay which is entirely landlocked and inclosed by reefs is not committed on the high seas within Act March 26, 1804, c 40..... 871

The federal courts have jurisdiction, under the act of 1825, over their own citizens, in foreign countries, for offenses committed on tide waters..... 822

An American vessel was wrecked within 150 feet of the Mexican shore, and completely broken up and destroyed. Defendant recovered a part of her treasure, buried in the sand under water, and converted the same. *Held*, that the United States courts had no jurisdiction either over the place or property 1132

The court, in a capital case, arrested judgment on its own motion, for want of jurisdiction, and directed that the prisoner be turned over to the state authorities.... 923

Preliminary hearing: Arrest, commitment, custody, and discharge of accused.

Page

No instruction or official authorization is required for the institution of a criminal prosecution, and it is the duty of a judge to issue a warrant on the complaint of any citizen 1123

A United States commissioner has power to let to bail one brought before him on a criminal complaint, pending the proceeding, in those states where justices of the peace have a similar power..... 915

The commissioner has power to adjourn to another time and place, as incident to the power to hear and determine, but he cannot adjourn in the absence of the accused 915

Pending the hearing of a motion for new trial on conviction as a common scold, defendant was required to give bail for appearance and for good behavior..... 907

In order to justify a committing magistrate in holding the accused for trial, it is only necessary that the evidence should show probable cause to believe that the prisoner committed the offense charged.....1303

A person arrested in one district cannot be removed to another until after examination and commitment, but is entitled to examination in the district in which arrested 1056

A warrant for the removal of a prisoner to another district, in which he was indicted, will not be granted, in the absence of the original affidavit or information or indictment, or duly-certified copies thereof, or proof of the commission of the offense.. 128

Limitation of prosecution.

Act April 30, 1790, § 32, limiting the prosecution of offenses not capital to two years, is applicable to common-law misdemeanors, in the District of Columbia..595, 1124

The finding of an informal presentment is not the finding or instituting of the indictment, so as to take the case out of the statute 1124

There must be a leaving of one's home, residence, or place of abode within the district, or a concealing of one's self therein, to avoid detection or punishment for some offense against the United States, to constitute a "fleeing from justice," under 1 St. 117, § 32..... 212

Control of prosecution.

The United States district attorney has no absolute power to dismiss a criminal charge while an examination of the accused is proceeding before a commissioner, or the grand jury 984

After indictment found, and before trial commenced, the district attorney has absolute power to enter a nolle prosequi.... 984

The district attorney has power, under control of the court, at any time before a jury is impaneled, to enter a nolle prosequi..1350

Arraignment and plea.

In cases of felony the prisoner must be arraigned in the criminal bar, or dock..521, 543

The prisoner charged with a felony need not hold up his hand when called, if he admits himself to be the person indicted.... 543

In misdemeanors, as well as in felonies, two or more pleas in abatement, not repugnant to each other, may be pleaded together 750

On demurrer to an indictment, where it is not suggested that defendant has any defense thereto, judgment absolute will be rendered against him on overruling the demurrer 673

Pleas of the general issue and the statute of limitations, being double pleading,

Page

are not allowable, and the special plea will be stricken out....1070

Time and place of trial.

A motion to bring on the trial will take precedence of a motion for an attachment against absent witnesses....1192

Conduct of trial.

Practice of abusing witnesses and attacking absent persons by counsel, in arguments to the jury, commented on..... 819

When several persons are charged in one indictment with the same offense, each defendant has a right to be tried separately..1041

Trials for misdemeanors may be had, after service of summons upon the accused, without his actual presence in court, especially if he be represented by counsel..1030

The accused is not entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him....1275

Where there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury to be furnished the accused 1275

Upon an indictment for a nuisance in keeping a public gaming house, the question, "who dealt the cards?" is objectionable as too general 1357

Counsel will not be permitted to argue a question of law to the jury, in contradiction of the previously expressed opinion of the court 1347

Evidence.

The court will take judicial notice of the public statutes of the state referred to in the indictment 673

The examination of a witness before an examining court, where the witness has since died, is competent evidence upon the trial of the party for the same offense.... 490

The rule that the testimony of a deceased witness may be given in evidence on a second trial between the same parties does not apply to a criminal case....1307

Words accompanying acts are admissible to show the intent..... 236

The statements of a party charged with absconding, made on his way from the place of his residence, as to his intention of returning, is competent evidence to disprove the charge 490

Where the evidence shows that defendant made a false statement about the circumstances of the commission of the crime charged, he may show that he had good reason to believe at the time that the statement was true..... 696

False and contradictory statements, and falsification of records by defendant, and special circumstances not consistent with his innocence, may all be considered in determining his guilt..... 696

Confessions extorted from the prisoner cannot be used against him..... 631

Confessions to be excluded from the jury must have been made by the prisoner under some hope of advantage, or extorted by some apprehension of danger..... 189

Confessions made to an examining magistrate under hopes excited by statements that his punishment might be mitigated are not admissible 580

While a confession made upon promise of favor is not admissible, the fact that the prisoner went to the place where the property was secreted, and identified it, is admissible 798

The whole confession must be given in evidence if any part is given, but the jury is not bound to accept it all as true...624, 1233

Page

Good general character avails a defendant only in a doubtful case..... 902

Proof of good character may afford good ground for a presumption of innocence if there is doubt of guilt, but it will not overcome satisfactory proof of guilt.....1144

A reasonable doubt is a doubt for which a reason may be assigned, not necessarily sufficient to convince another, but such as may properly influence a juror honestly endeavoring to perform his duty.....1312

Jury.

The jury are not the judges of the law in the federal courts. 810

The question whether one fact can be inferred from another is a question of law, to be decided by the court.....1347

The right of the jury to decide the law as well as the facts results only from their power to find a general verdict.....1347

Where the jurisdiction depends upon facts to be found by the jury, the latter may, under the direction of the court as to matter of law, affirm, through the medium of a general verdict, whether there is or is not jurisdiction..... 950

The court may require that the constitutionality of the act on which the indictment is founded shall be argued to the court, instead of the jury..... 810

After the jury is sworn in a capital case, and the cause has been opened, the court, without the prisoner's consent, cannot discharge a juror at his own request..... 696

A jury sworn, even in a capital case, may be discharged by the court under any sudden and uncontrollable emergency, and such discharge is no bar to another trial..1067

The prosecuting attorney, after the jury are impaneled and witnesses sworn, has no right to enter a nolle prosequi, because the evidence is not sufficient to convict, which will not have the effect of a verdict of acquittal.....1067

The jury having been discharged after being out only about four hours and reporting that they were equally divided and could not agree, the court was divided on the question whether the discharge was justifiable under the circumstances..... 504

Verdict: Judgment: Sentence.

One good count in an indictment will sustain a general verdict although the others are bad..... 604

Where a sealed verdict is brought in by consent of the parties, the court will not permit the jury to be questioned as to their finding, but will order them to be polled... 604

The court will not delay judgment merely to give defendant time to discover new evidence on which to ask a new trial..... 696

In misdemeanor cases in the federal courts, the court, and not the jury, should assess the fine..... 23

Where a statute merely alters the punishment of a common-law offense, the statutory punishment may be inflicted, although the indictment does not conclude against the form of the statute..... 187

In cases of statutory crimes punishable by fine, or by fine and imprisonment, the federal courts may sentence defendant to confinement in jail until the fine is paid... 822

A prisoner confined in a New York jail under a sentence which did not fix the place of confinement is not entitled to the deduction of five days during every month, under Act March 3, 1875, but to the deduction allowed by Rev. St. § 5543..... 977

Review.

A writ of error does not lie from the supreme court to the circuit court..... 551

Page

If the alleged error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it 561

A writ of error coram vobis does not lie in the circuit court, either from its own judgment, or the judgment of the district court 561

CUSTOMS DUTIES.

See, also, "Forfeiture"; "Seizure."

Customs laws.

The revenue acts of 1799 and 1863 apply to commercial intercourse between Canada and the United States as well as to other foreign countries 1030

The contemporaneous exposition by the government of an act prohibiting certain importations, followed by the concurrent practical construction for 30 years, will govern, as against the claim of the government to a different construction..... 718

Rates of duty.

To authorize the entry of small pieces of bolt iron under the name of "chain links," it must be proved that they have been previously known in commerce by that name.. 958

Where bar or bolt iron has been changed by subsequent manufacture, it ceases to be subject to duty as such, although it may not have become a new and distinct manufacture, having a new name or use..... 958

A vessel sailing in ballast from Boston, by way of New York, to San Francisco, for a cargo to Europe, is not engaged in "coastwise" trade, within Act June 1, 1872, § 10; and articles withdrawn from bond, and used in repairing her, are exempt from duty 460

Trade between the Atlantic and Pacific ports of the United States is "foreign trade," and not "coastwise trade," within Act June 1, 1872, § 10..... 460

Invoice: Entry: Appraisal.

An oath taken under Act March 1, 1823, not so modified as to conform to the provisions of Act March 3, 1863, is not sufficient to support an entry, and will work a forfeiture of the goods.....1036

Under Act Aug. 30, 1842, the price or value of the goods must be stated in the invoice according to the actual market value or wholesale price at the time of purchase in the principal markets of the country from which the imports are made.... 240

Goods imported by the manufacturer must be invoiced at the actual market value at the time and place of manufacture. (Act March 3, 1863).....1099

"Market value" is the price at which the manufacturer holds the goods for sale, and which purchasers are willing to pay in the ordinary course of trade.....1099

Evidence is not admissible to show that there was not in fact such an actual market value 1099

The cost of production, with the addition of a manufacturer's profit, is admissible as tending to show market value, when no evidence of sales can be given.....1099

The cost of the raw materials is to be taken at the market price of such material at the time when the manufacture of the goods was completed.....1099

The sum at which an agent who purchased goods for his principal surrendered them to the latter, because he was unable to pay more, is not the proper invoice price; otherwise where the agent violated his authority in purchasing the goods.....1115

The government is not bound by the acts of its consul in certifying to the correctness of an invoice, when based upon false and fraudulent statements 1099

Page

In assessing ad valorem duties on given weights, the actual weight when landed governs 75

The merchant appraisers in whose presence the packages must be examined by the customhouse officer under Act 1799, c. 22, § 67, must be in a situation to be able to witness the examination, and to see and testify to a part, at least, of the contents of each package 340

Under Rev. St. §§ 2927, 2928, there can be an appraisement for an abatement of duties for damage sustained to the goods during the voyage after entry and payment of the estimated amount..... 523

Within a year from the entry a collector may make a reliquidation, notwithstanding a previous liquidation and payment of the duties, which will be binding upon the importer in the absence of an appeal..... 521

Neither accident, mistake, nor innocence of fraudulent intention is a sufficient defense to an information for forfeiture of a package of goods containing an article not described in the invoice. (Act May 28, 1830.) 401

But evidence of accident or mistake may be given to rebut the inference of fraudulent intention 405

The decision of the collector as to the rate and amount of duties is final and conclusive, under Rev. St. § 31, unless the owner, within 10 days after the ascertainment and liquidation, appeal therefrom to the secretary of the treasury 1276

In the absence of such appeal, the courts cannot grant relief.....1276

Manifest.

Articles purchased for the ship's equipment to replace articles lost or deteriorated by use are not subject to duty, and need not be entered in the manifest..... 264

Hempen cables and hawsers are not "vessel and cabin stores" (1 Stat. 644, § 23), nor are they "sea stores" (Id. § 45)..... 264

Importations from Canada *held* governed by Act March 2, 1821, and not by Act August 30, 1842, § 19..... 187

A horse brought in from adjacent foreign territory as a mere instrument of conveyance in the prosecution of a temporary journey, is not within Act 1821, § 1, and no manifest thereof is necessary..... 315

The master is not liable for not entering on a manifest goods brought on board a foreign vessel, and concealed by the steward. (Act March 2, 1799.).....1283

An information will lie directly against a vessel for the recovery of the penalty for importing goods not included in the manifest without a previous prosecution of the master 669, 672

In such suit proof that the master had no actual knowledge that the goods were on board will not exempt the vessel from liability 672

The district court has jurisdiction on an information against a vessel and her master alleging importation of merchandise not included in the manifest to enforce the penalty against the vessel without a trial by jury 669

A suit to recover the penalty against the master of the vessel for the importation of merchandise not included in the manifest is a suit at common law, and he is entitled to a trial by jury..... 669

An information against a vessel and her master charging the importation of merchandise not included in the manifest may be amended without terms in respect to allegations of ownership of the vessel..... 669

On an information against a vessel and her master for the penalty for the importation of merchandise not included in the

Page

manifest tried as a civil cause of admiralty and maritime jurisdiction, where the answer of the vessel does not except to such joinder but that of the master does, the information will be dismissed as to him and a decree entered against the vessel....669, 672

If the master make report of arrival he is not liable to the penalty (Act March 2, 1799, § 30), though he do not repair to the office of the principal officer of customs for that purpose 779

Unlading.

Goods free of duty cannot be lawfully unladen and delivered without a written permit from the collector and naval officer. (Act March 2, 1799, § 50.)..... 954

Mackerel, the property of an American citizen, caught in an American vessel by an American seaman, and shipped in an American vessel from a foreign port of transshipment, cannot be landed under such section without a written permit.... 954

Innocence of intention cannot, any more than ignorance of law, afford a defense to the master or owner of a vessel for a violation of Act March 2, 1799, § 50..... 954

The removal of dutiable goods from the vessel to the wharf is an unlading, within Act July 18, 1866, and, where no permit was granted, will subject them to a forfeiture 161

Goods were taken at night in a boat from the vessel, and when partly unloaded on the wharf the witness discovered himself, and the goods were all returned to the vessel. *Held* not a landing, within Act March 2, 1799 1246

Act March 2, 1799, § 27, which makes the unlading an offense, applies only to the captain and mate.....1246

Liability for duties: Lien: Actions.

Although included in the invoice, goods lost on the voyage are not subject to duty.. 75

Payment of duties into the state treasury or to the Confederate government, on goods imported at a place entirely in control of the rebel forces during the war of the Rebellion, will not discharge the duties 494, 1029

A deputy collector has no authority to waive a tender proposed to be made by importers, by acknowledging a tender when none is made..... 75

The lien on imported goods for duties is relinquished by the taking of bond and security therefor, and delivery to the consignee 34

Violations of law: Forfeiture.

A bona fide purchaser of goods imported at a fraudulent undervaluation before the government has instituted proceedings obtains a good title unaffected by such fraud, and the goods are not liable for the deficiency 1363

To subject goods to forfeiture for fraudulent undervaluation, it must be shown that the goods were invoiced below their value, with an intent to defraud the United States 1033

To entail a forfeiture for undervaluation, under Act March 2, 1799, § 66, and Act May 28, 1830, § 4, there must be a concurrence of undervaluation, and intent to evade payment of duties..... 269

An intent to evade the payment of duties is essential to the maintenance of a prosecution for the personal penalty for fraudulent entries, and the declaration must aver a scienter. (Act March 2, 1799, § 66).... 546

The government may proceed in the first instance either for the forfeiture, or for the personal penalty 546

To authorize a recovery against a consignee of the value of goods fraudulently invoiced, where he is not the owner, but merely an agent to sell, knowledge on his part of the fraudulent undervaluation is necessary to establish the "actual intention to defraud." (Act June 22, 1874, § 16.).. 129

Goods invoiced at their actual market price cannot be forfeited for undervaluation, although in fact the price stated was below the market value at the place of exportation 268, 269

Goods invoiced at the price paid on a bona fide sale are not subject to forfeiture, though it be below the ordinary market price. (Act 1799, c. 128, § 66.).....1111

But the terms "actual cost" do not apply to the case of a voluntary gift or conveyance, where the substantial consideration is not money, or its equivalent estimated at a money price, nor where the consideration is partly money, and partly love and affection 1111

An information alleging fraud in the importation of merchandise at an undervaluation (Act March 3, 1799, § 66) must aver that the valuation was under cost at the place of exportation.....1030

A direct averment that the person making the fraudulent entry was either owner, consignee, or agent of the property (Act March 3, 1863, § 1) is not necessary where it appears from the statements of the information that the person was either the owner, or acted as agent of the owner...1030

An averment that the requirements of the statute, which are merely directory to the revenue officers and the importer, have been complied with, is not necessary. (Act March 3, 1863).....1030

Where probable cause of seizure is shown, claimants have the burden of showing the absence of fraudulent intent....1099

Where it appears that the goods were entered at only about one-half of the invoice price of like goods purchased by other importers at the same time, and imported by the same vessel, the claimants have the burden of substantiating the invoice by clear proofs.....1115

Evidence of prior undervaluation is admissible only to show the intent with which the present undervaluation was made....1099

On a libel to forfeit goods for false valuation, proof of correct entries made about the same time of the same kind of goods by the claimant is admissible to show that he knew their real value..... 274

In a case of false invoice valuation, evidence of other fraudulent acts, of a similar nature, committed at about the same time, is admissible on the question of intent.... 274

Advances made in good faith, by auctioneers in possession, upon goods entered at a fraudulent undervaluation, before the government had elected to proceed for a forfeiture, or to sue for the value, are a lien upon the proceeds.....1035

Fraud will not be imputed to an importer in invoicing goods at the weight as given by the customary method of weighing, but the appraisers are not bound thereby..... 75

An indictment for an offense against Act Aug. 30, 1842, is not barred, if found within five years subsequent to the act charged..1071

A false and fraudulent valuation in an invoice not demanded by the statutes, and which can be of no avail at the customhouse, is not of itself sufficient to justify condemnation of the goods..... 240

The limitation of five years for prosecutions for crimes under the revenue laws (Act 1804, § 3) is applicable to an action of debt to recover the value of imported goods for fraudulent entries..... 546

Act March 2, 1821, § 1, as re-enacted March 3, 1823, is not repealed by Act Aug. 30, 1842, § 19.....1136

The latter act is aimed at frauds on the revenue in cases where an entry of goods

Page

and an invoice are required as prescribed by the act of 1823.....1136

An attempt to make an entry by means of any false or fraudulent invoice, affidavit, etc., with intent to defraud, completes the ground of forfeiture, though the fraudulent entry is not carried out. (Act June 22, 1874, § 12.).....1092

The making of a false affidavit of damage, with intent to defraud the revenue, is sufficient to incur the forfeiture.....1092

Where an affidavit of damage is in fact false, there is a prima facie presumption of an intent to defraud the revenue.....1092

Evidence of other fraudulent transactions is admissible to show the intent with which the act was committed.....1092

The illegal act of one partner without the knowledge or consent of the others is sufficient to forfeit the partnership goods....1092

Dutiable goods, imported as passenger's baggage, where no attempt was made to have them passed as such, and the owner, without knowledge of their seizure, offered them with correct bills of lading and moneys for entry at the customhouse, *held* not forfeitable, either under Act March 2, 1799, § 50, Act March 3, 1863, § 1, or Act July 18, 1866, § 4..... 171

Where the claimant sets up mistake as an excuse for disagreement with the entries, the fact that probable cause of seizure has been made out does not impose upon him the necessity of making out an unusually clear case of mistake..... 154

The hurried entry of goods in the absence of the owner, where pillage by the enemies' soldiers was threatened, *held* a sufficient excuse for a mistake..... 154

The question whether the difference between the entry and the invoice arose from accident or mistake is one exclusively for the secretary of the treasury, and cannot be raised at the trial on a seizure as forfeited under Act April 20, 1818..... 244

Where an article not described in the invoice is found in a package, the whole package, and not the article alone, is forfeited. (Act May 28, 1830.)..... 405

To justify the forfeiture of a package of goods under section 4, Act May 28, 1830, either the package must contain an article not described in the invoice, or the package or invoice must be made up with intent to evade or defraud the revenue..... 401

Under Act March 2, 1857, c. 63, if an invoice or package of imported goods contains some articles which are indecent or obscene, and others which are not so, the whole are liable to forfeiture; the unlawful ones being destroyed, and the others sold 255

Under a count alleging that certain articles imported were indecent and obscene, and asking that they be condemned and destroyed, the government cannot ask for a forfeiture and sale of other articles in the same case, which the verdict finds to be lawful 255

A bond for the delivery of goods seized must be for the market value of the goods at the place of seizure, without any deduction for the regular amount of duties... 343, 1015; contra, 340

The amount of duties payable on giving bond for the value of goods seized is only that demandable if the fairness of the importation had not been impeached.....1015

Where the goods are afterwards condemned, the claimant loses the amount of the duties thus assessed, as well as the value of the goods forfeited.....1015

Where a bond has been given with the addition of penal duties under protest, the excess will be directed to be paid to the claimant 1015

Page

A certificate of probable cause of seizure will be granted where it appears that the seizure was made in good faith, and after consultation with the surveyor, naval officer, and district attorney..... 264

Proof that the fact of an intended illegal importation was previously known to the revenue officers, and that they acted thereon in making the seizure, is admissible..... 164

A violation of an act requiring that certain goods shall be packed in a certain way does not subject goods not so packed to forfeiture, in the absence of a statute declaring such forfeiture..... 167

Upon information filed against goods alleged to be forfeited, the goods pass out of the hands of the collector who seized them into the hands of the marshal, whose custody is thenceforth that of the court.....1015

After information filed against goods alleged to be forfeited, no penal increase of duties can be exacted by the collector, and such an exaction will not affect the prosecution 1015

Where the claimant knew that his method of importation was contrary to law, the burden is upon him to show affirmatively that he did not adopt such method with intent to evade the payment of duties..... 164

Where the duty of the master of a vessel arriving from a foreign port to repair to the office of the chief officer of the customs, and there make report (Act 1799, c. 22, § 36), cannot be performed, by reason of the neglect of the officer to do that which is prerequisite, the statute is not violated... 708

Foreign distilled spirits.

It is unlawful to fill with domestic tax-paid spirits any casks in which foreign spirits have been imported, even where the brands, stamps, and marks required by law have been removed. (Act March 1, 1879, § 12.) 263

The certificate required to be given on the importation of distilled spirits (Act March 2, 1799, § 41) is an "official document granted by the collector," within Act 1825, § 19, relating to forging and counterfeiting. 976

The provision requiring the certificate to be signed and countersigned is complied with where the signature is printed..... 976

Where the certificate which the supervisor of the revenue was authorized to issue (Act March 2, 1799, § 41) was issued by the collector, an indictment under Act March 3, 1825, § 19, for altering it, must allege that the collector was designated by the president to fulfill the duties of the supervisor under Act March 3, 1803, and that the certificate was issued in such capacity..... 975

Bonding: Warehousing.

An instrument not in the form of a bond with a penal sum and condition, but containing the requirements of the statute (1854, c. 30), where the obligors were not prejudiced by the form, *held* a sufficient bond under the statute..... 539

A surety who has discharged a duty bond to the United States is entitled to be subrogated only to the preference and priority of the United States to be first paid out of the estate of the principal. (Act March 2, 1799, § 65.)..... 616

A surety in such case cannot maintain assumpsit in the name of the United States against the assignees of the principal..... 616

Where a surety pays the bond, he cannot maintain an action on it in the name of the obligee against his co-obligors, nor an action for money laid out and advanced, except in his own name..... 616

The "additional duty of 100 per cent." secured by transportation bonds under Act 1854, c. 30, § 6, is 100 per cent. on the

Page

original duty, and not on the invoice value of the goods..... 539

The transportation bond, under such section, properly includes the original duty as well as the additional duty, the bond first given for the original duty being canceled 539

Customs officers.

Inspectors are, in law, officers appointed by the head of the treasury department... 1

An inspector is an officer of the customs, the obstruction of whom is an offense, under Act March 1, 1799, c. 128, § 71.....1006

Proof that an inspector was commissioned and sworn, and in the actual execution of the duties of the office, with the knowledge of the treasury department, is sufficient proof of his appointment to support an indictment for obstructing him in the performance of his duties.....1006

It is not necessary to produce the commission of appointment to prove such appointment 1006

The offices of deputy collector and of inspector may be held by the same person. (Act 1822, c. 107.)..... 1

A deputy collector acting also as inspector may receive additional compensation therefor 1

A collector removed from office before the expiration of the year is entitled to the maximum amount of $3,000 out of the fees, etc., collected at such time, under Act 1822, c. 107, providing that the excess of emoluments over $3,000 in any one year shall be paid into the treasury..... 482

DEED.

Where the description in a deed is not impossible or repugnant, the court will not reform it, as against third persons who purchased the remaining interest of the grantor at sheriff's sale without knowledge of the error in the description..... 474

An application to reform a deed, *held*, should not be entertained after the lapse of 11 years, where all persons had dealt with the land on the theory that the description was correct..... 474

DEPOSITION.

A motion for the appointment of commissioners to take testimony abroad is not grantable of course, and previous notice to the adverse party is necessary..... 444

On an application for a dedimus potestatem, the court will consider the materiality of the testimony, and the purposes for which it is invoked..... 444

A commission opened before it came into the hands of the clerk will be set aside... 623

A false certificate of magistrate as to the time and place when and the person by whom the deposition was reduced to writing will render it inadmissible.....1158

A party attending on the taking of depositions will be presumed to have waived objections to the competency of witnesses not raised at the time. But objections not known at the time may be raised on the reading of the deposition..... 244

DISORDERLY HOUSE.

The sale of spirituous liquors to negroes assembled in considerable numbers in and about a house on Sunday constitutes a disorderly house 625

The name of a prosecutor must be indorsed on an indictment for keeping a bawdyhouse 715

Page

On a prosecution for keeping a bawdyhouse, the United States cannot give evidence of the general reputation of the house 894

Upon an indictment for keeping a house of ill fame, evidence of the ill fame of defendant cannot be given..... 69

Under an indictment for keeping a bawdyhouse, evidence is admissible of the general reputation of the people who frequent it...1312

Under an indictment for keeping a disorderly house, charging that defendant suffered persons of ill fame to come together, etc., evidence is admissible of the general reputation of such persons.....1312

DUELING.

Upon an indictment for unlawfully carrying a challenge to fight a duel, a scienter must be proved.....1037

EJECTMENT.

Defendant cannot rule the marshal to return a hab. fac. poss., although plaintiff may do so.....1127

If, after plaintiff is put into possession under a hab. fac. poss., he is turned out by the defendant, he may, upon suggesting vice comitatus non misit breve, obtain an attachment or an alias hab. fac. Aliter, if he is turned out by a stranger.....1127

If the first writ be returned executed, plaintiff cannot issue out an alias. If the writ, though executed, has not been returned, and an alias issues on the suggestion of the plaintiff, resistance to such writ is an offense. Aliter, if the first writ had been returned 1127

The hab. fac. poss. cannot be executed after the return day, and, if it be attempted, resistance to it is no offense against the act of congress.....1127

ELECTIONS AND VOTERS.

The offense of preventing the free exercise of the right of suffrage (Act May 31, 1870, § 19) is complete by the forcible expulsion from the polls of voters waiting in line to cast their ballots, though they afterwards returned and voted.....1267

Act May 31, 1870, § 20, providing for the punishment of persons illegally registering under the state law at an election for a representative in congress, is not unconstitutional 673

The offense is sufficiently described in the words of the statute adapted to the particular circumstances involved therein.... 673

Act La. April 11, 1877, does not authorize the use of separate ballot boxes for state and federal offices..... 143

Rev. St. § 5515, does not apply to a violation of the state laws regulating elections, when such violation does not affect the election, or the result of the election, of a delegate or representative in congress.... 143

An allegation that defendant knowingly offered to give O. a bribe to vote, the said O. being then under 21 years of age, sufficiently charges knowledge of such nonage 310

The mayor of Washington, D. C., has no power to enforce a demand that the polls should be kept open as required by law....1339

A copy of a township election return filed with the county clerk, accompanied by his certificate that it is a full and correct return of such election as filed, sent to the office of the secretary of state, is not an official paper under the election law of New Jersey..1267

EMBARGO AND NONINTERCOURSE.

Page

Construction and effect of Acts March 1, 1809, and March 2, 1811, in relation to the place of lading of prohibited articles..... 69

Imported cargo taken in at a port with which intercourse is prohibited is prima facie presumed to have been laden with an intention to import the same into the United States 467

The value of $400, in determining the liability to forfeiture for taking on goods without permit and inspection (Act Jan. 9, 1808), may be made up by the aggregate of different shipments at different times and places 587

Sea stores and provisions are not to be considered as a part of the cargo, so as to be forfeitable under such act, along with goods which the vessel was prohibited from taking on board..... 587

An inspector may go on board of any vessel to discover if any goods, etc., were illegally laden on board contrary to the embargo acts; and, if obstructed, an indictment will lie, under Act March 1, 1799, c. 128, § 71.....1006

A British subject living in Bermuda, who came to the United States in his own vessel to take his children home from school, returning after two weeks with a cargo, *held* not a resident within the United States, under 2 Stat. 351..... 486

Vessels and cargoes liable for forfeiture under Act April 18, 1818, may be delivered to the claimants upon giving a bond for value 541

Validity of bond given under Act Dec. 22, 1807 1161

An action of debt upon a bond given under the embargo laws is a penal action, and the jury are judges both of the law and the facts..... 608

Sufficiency of bond given under Act March 1, 1809, c. 91, § 13..... 967

An open boat is not a ship or vessel, within Acts 1820, c. 122, and 1823, c. 150, which prohibit commercial intercourse from the British colonies.....346, 354

British ships or vessels excluded from our ports by such statutes are such as are owned by British subjects having a British domicile, and sailing under a British flag, and not ships or vessels owned by British subjects domiciled in the United States... 346

British-owned vessels are included in the prohibition, although not registered or navigated according to the British navigation and registry acts..... 354

The forfeiture attaches to the cargo on board at the time the vessel enters or attempts to enter our ports, and not to any cargo subsequently taken on board, though on board at the time of the seizure..... 354

The government has the burden of showing that the goods seized were part of the cargo on board at the time of the offense.. 354

EQUITY.

See, also, "Injunction."

In the exercise of its equity jurisdiction, the federal circuit court, as to persons and matters within its jurisdiction, can afford relief where it can be afforded by the principles of the high court of chancery in England 416

The right of the United States to retain moneys due their debtors by an award under a treaty with a foreign power will not affect their right to proceed in a court of equity 38

Page

Where the party has a legal remedy, but a trust is created, equity has concurrent jurisdiction 38

The aid of equity will not be given to enforce a judgment at law against a chattel, unless it appear that the creditor has tried to enforce the same by execution at law; otherwise as to land upon which the judgment is a lien 1358

A written instrument will not be reformed upon the ground of mistake unless the same be made out by the clearest and most unequivocal evidence..... 32

A bill of review lies either for error in law appearing on the face of the decree, or for new material matter which has come to light afterwards, and which could not have been used at the time the decree was made.. 932

Act May 26, 1824, confers on the superior court of the territory of Arkansas the powers of a court of chancery for the purpose of trying the validity of claims mentioned therein, and a bill of review may be maintained therein..... 932

A bill of review must be founded on new matter to prove what was before in issue.. 932

It rests in the sound discretion of a chancellor to grant or refuse a feigned issue, and it will not be awarded where there is sufficient proof to enable him to decide..... 932

The verdict of the jury on a feigned issue is not conclusive..... 932

Where the allegations of the bill are so defective or vague that a precise decree cannot be rendered upon them, proof must be adduced before a decree can be made.. 932

Where the case is submitted upon the bill and answer, the answer must be taken as true, and where it denies the case made by the bill the bill must be dismissed..... 999

Error.

See "Appeal and Error."

ESCAPE.

After a prisoner has been released upon a limit bond, the sheriff can confine him again only on the bail's becoming insufficient. He cannot accept a surrender.... 176

Under Act Jan. 6, 1800, the sheriff is bound to take a bond for the limits, as provided by the state laws, from a prisoner confined on process from a federal court.. 176

The assignment of such a bond discharges the sheriff from liability for a subsequent escape 176

An assignment of such a bond to the United States, when they are plaintiffs, is valid, and its acceptance by the secretary of the treasury will be presumed to have been authorized 176

EVIDENCE.

See, also, "Criminal Law," "Names of Particular Crimes."

The federal courts take judicial notice of the acts of congress, and they need not be set forth or specially referred to in the proceedings before them..... 696

A waiver or right of a privilege must plainly and clearly appear, and every reasonable presumption may be made against it 711

After notice given to produce the original policy of insurance, and proof of the existence thereof, the register in the hands of the company should be introduced in evidence, and not a copy therefrom..... 467

Where a contract alleged by a party appears to have been in writing, he must

Page

either produce it, or show that it is not in his power to produce it, to prove its execution or contents..... 598

Rev. St. § 886, applies only to suits against persons accountable for public moneys as such, and is inapplicable to an action for moneys alleged to have been paid to defendant by the mistake of a government disbursing officer..... 684

A certified statement of a balance due, and a report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury as may be given in evidence under Act March 3, 1797, § 2..... 462

A certified copy made evidence by statute must show that the statutory requirements have been complied with..... 873

A journal kept by the master of a ship alleged to be insane *held* admissible to prove his sanity, by the style in which it was kept.....1041

When the intent or guilty knowledge of a party is material to the issue, collateral facts tending to establish such intent or knowledge are properly admissible in evidence 274

EXECUTION.

An alias cap. ad resp. must be tested at the return of the original writ, and made returnable at the next ensuing term..... 411

An extent under Act Mass. March 17, 1784, upon real estate, is not good unless it appear by the return that all the appraisers are sworn, nor unless all the appraisers concur in the appraisement.....1125

But it is not necessary that the levy should be recorded in the registry of deeds within the time prescribed by the statute, as between the parties to the execution, nor that the certificate of appraisement should be made and signed by the appraisers....1125

A debtor of the United States, discharged, by order of the president, under Act March 3, 1817, cannot be arrested again on a new ca. sa. by the marshal for his fees, irrespective of an agreement to that effect...1149

EXECUTIVE DEPARTMENTS.

Neither the war department nor the treasury department has authority to sell public property put under its management or superintendence, and the bringing of an action for the price or value of such property is not an affirmance of a sale made without authority..... 149

The head of a department is authorized, in the administration of the duties of his office, to employ agents, and to determine when an exigency arises demanding their employment 603

EXECUTORS AND ADMINISTRATORS.

A probate court has no jurisdiction to make an appointment of an administrator of the goods of a person who at the time is alive 470

Where an administrator is appointed of a person who at the time is alive, money paid to him in that capacity may be recovered back, where it has not been paid over.. 470

Right of action upon an administration bond by a creditor of the intestate in the District of Columbia.....1048

An action cannot be maintained upon an administration bond of an executor for not giving in a claim against himself, until the claim has been established under Act Md. 1798, c. 101, § 20, cl. 8..... 895

In Washington county, D. C., there must be a return of non est, or of fi. fa., against the executor or administrator, before suit upon his bond. (Act Md. 1720, c. 24.).... 673

An executor indebted to the estate cannot, in an action upon the administration bond brought by creditors or legatees, discharge himself by showing payments to his co-executors 895

The administrator of the surety in a collector's bond, who pays away the assets on the intestate's debts before notice of the government's claim, is not guilty of a devastavit 806

In a suit against the administratrix of a surety in a revenue bond, brought 13 years after the breach, a plea of want of assets, and fully administered before notice of the bond, *held* good..... 624

In an action upon an administrator's bond to recover a distributive share of the estate, defendants may retain for necessaries furnished the distributee..... 819

EXTRADITION.

Article 27 of the treaty of 1794 with Great Britain, which provides for the reciprocal extradition of fugitives charged with the crimes of murder and forgery, is not in contravention of the constitution of the United States, as violating the right of trial by jury..... 825

Article 27 of the treaty of 1794 with Great Britain applies to citizens of the United States who have committed the specified crimes within the jurisdiction of Great Britain, and have fled to this country 825

A murder committed on board a British vessel of war on the high seas is committed within the jurisdiction of Great Britain, within the meaning of the treaty of 1794... 825

Where a treaty of extradition does not state which department of the government shall execute its provisions, the judiciary will take jurisdiction..... 825

Where a person is arrested, and brought up to be held to bail for trial in another district, a certified copy of the indictment found in such other district, if it be consistent and set forth an offense, is competent evidence against defendant..... 593

FALSE PRETENSES.

An indictment cannot be sustained in one place for obtaining money by false pretenses, made in another place..... 578

FISHERIES.

No registered ship or vessel, while she remains registered, can engage in the whale fisheries (Act 1793, c. 52); but she must surrender her register, and be enrolled and licensed for the fisheries..... 890

A fishing vessel licensed to catch codfish cannot catch mackerel, except as bait, or provisions for the crew.....454, 456

A vessel licensed for the codfishery will not be forfeited for catching mackerel, which is incidental merely, and not the main object of pursuit..... 758

On a libel for forfeiture for breach of a license to catch codfish, by catching mackerel at a certain time and place, parol evidence is admissible of catching mackerel at other times and places during the trip, as showing the real business of the voyage... 454

Act July 29, 1813, c. 35, § 7, in relation to bounties, does not require any oath to the agreement referred to therein..... 146

FORFEITURE.

Page

See, also, "Customs Duties"; "Informers"; "Internal Revenue"; "Shipping."

Where a party, for fraudulent purposes, mixes up goods prohibited by a revenue act with those not prohibited, the whole will be forfeited..... 284

A forfeiture denounced in direct terms in a statute as a penalty takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the government..256, 753, 1118, 1329

In such case, possession of the property by a sheriff under civil process will not prevent the federal courts from taking jurisdiction on a libel of information, claiming forfeiture..... 753

But where there is more than one remedy provided, and the government may elect to proceed for the forfeiture, or in some other way not involving a forfeiture, the title does not vest in the government until the performance of some act amounting to an election..... 1118

Act June 22, 1874, § 16, which makes the finding of an intent to defraud a prerequisite to a forfeiture of goods, though in terms restricted to cases in which issue of fact is joined, is applicable to suits in rem in admiralty, even where there is no answer or appearance..... 167

On a libel to forfeit goods for alleged violation of the revenue laws, where the goods had been seized by, and were in the possession of, a collector of customs, the marshal will be required to attach the property by leaving a copy of the monition with the collector, and a notice requiring him to retain the property until the further order of the court..... 248

Jurisdiction to proceed by information for the condemnation of property forfeited under the revenue laws depends upon the possession of the property, actual or constructive..... 174

On an information of forfeiture, the goods themselves are regarded as the defendant, and it is no objection to the admission of proof of communications made to the revenue officer that they were made in the absence of the claimant..... 164

In a suit on a bond for the redelivery of property seized, the amount of the judgment is the highest price for the property between the date of the bond and the date of the judgment..... 873

Where property seized as forfeited before information filed is bonded as for a seizure made under Act July 13, 1866, § 9, a verdict of condemnation on a count based upon section 26 cannot be sustained..... 174

The difficulty is not remedied by the fact that after the information was filed the property was reseized, and then taken possession of by the marshal on a monition founded on the information, and then rebonded by its owner..... 174

In a suit to forfeit manufactured tobacco, raw materials, and certain tools, the words "condemning the goods," in a verdict "in favor of the United States," may be rejected as surplusage..... 665

Claimants contesting a forfeiture under Act 1864, § 48, are subject to costs on a judgment of forfeiture..... 1026

In suits brought to enforce forfeitures, the clerk is entitled to tax 1 per cent. on the proceeds (Act Feb. 26, 1853, § 1), and the district attorney 2 per cent. (Act March 3, 1863, § 11), notwithstanding the repeal by Act June 22, 1874, § 2, in relation to payments of commissions, etc., to federal officers..... 266

FORGERY.

Page

Any addition to a genuine paper, or any alteration of it in an essential particular, so as to give it a different meaning, is a forgery..... 362

To forge the name of a magistrate to the jurat of an affidavit is a forgery of the affidavit..... 362

A note of an unincorporated bank, "payable out of the joint funds thereof, and no other," is a promissory note, within Act Md. 1799, c. 75, § 1..... 1148

Aiding or assisting in forging papers with intent to defraud the government consists in the commission of any act having a tendency to forward or facilitate a forgery committed by another..... 362

To trace a name with a pencil, afterwards filled up by another in ink, or to take measures to prevent surprise or detection while the forgery is being committed, would be such an act..... 362

Act March 3, 1823, § 1, applies only to instruments altered or forged for the purpose of obtaining moneys from the United States, their officers or agents..... 746

A forged paper, inclosed at B., directed to a person in W., and put into the post office at B., is not uttered in W..... 578

The offense of attempting to pass a knowingly falsely altered national banknote (Rev. St. § 5145) is not a felony, and the indictment need not charge such offense to have been feloniously committed..... 1060

In an indictment for forging a bill in the name of a fictitious drawer and indorser, the subsequent indorsements need not be stated..... 479

In an indictment for forging a bill of exchange, the omission of the words "account of" is fatal..... 479

Defendant has no right to peremptory challenges..... 1065

On an indictment for forging a bill in the name of a fictitious drawer and indorser, the prisoner's indorsement is admissible to prove his intent to defraud, although such indorsement be not set forth in the indictment..... 479

Evidence is admissible that a parcel of counterfeit checks and drafts on other banks than that alleged in the indictment, and others printed on bank paper not filled up, were found in defendant's possession.. 179

Witnesses skilled in handwriting will not be permitted to give their opinion, upon inspection of the papers, whether the forgery was done by defendant..... 625

FRAUD.

Fraud is not indictable unless it concerns the public, or be committed by false tokens or false pretenses..... 595

An indictment for defrauding the United States of a land warrant will not lie, under Act 1823, c. 38..... 50

FRAUDULENT CONVEYANCES.

An intent to defraud subsequent creditors is sufficient to avoid a voluntary conveyance, or one not made in good faith, at the suit of such creditors..... 1344

GAMING.

Sections 1, 12, Act March 2, 1831, so far as they relate to the offense of keeping a faro bank, or other common gaming table,

Page

are to be construed together, and when so construed they contain a complete description of the offense and its punishment....1149
A single day's use of a gaming table, called a "sweat cloth," at a race track, is not the keeping of a common gaming table, within Act March 2, 1831, §§ 1, 12.....1155
The game called "equality" *held* within the meaning of the words "other device," as used in the Maryland gaming act (1797, c. 110) 1280
An indictment for keeping "a gaming table" is bad..... 817
An indictment for keeping "a faro bank" is bad, unless it aver the faro bank to be a common gaming table..... 817
An indictment for keeping "a certain public gaming table, called 'faro bank,'" is bad 817

GRAND JURY.

Witnesses cannot be sent to the grand jury on the part of the accused..... 410
The absence of a venire for the summoning of a grand jury, in a case where it is required, is a ground of challenge to the array 727
Challenges to the array of grand jurors, being abolished by the laws of New York, are abolished in the federal courts of New York; but in the case of improper conduct in designating, summoning, and returning them, the accused has a remedy by motion 727
The court will not interpose for technical irregularities for which there is no right of challenge, unless it appear that the accused is prejudiced 727
Under Act Aug. 8, 1846, providing that no grand jury shall be summoned except upon an order for a venire to be made by a judge, a verbal order given by the judge to the clerk is sufficient, though no order be filed or entered of record..... 727
The omission to issue a venire in such case is ground of challenge to the array.. 727
Such omission, however, is not good ground for a motion to set aside the panel for cause 727
A challenge to the array on the ground that the jurors have been selected, summoned, and returned by a person unfit to summon an indifferent jury touches the qualification of the panel..... 727
A challenge to a grand juror for favor, on the ground that he is the prosecutor, or a witness for the prosecution, duly subpœned or recognized, goes to his qualification 727
The fact that a grand juror had on a previous summons attended the court as a juror, within two years, does not constitute such a disqualification (Rev. St. § 812) as will render bad an indictment found by the grand jury of which he is a member.. 750
Where a period of two full years has elapsed between the beginnings of two terms at which a juror was summoned, he is not liable to challenge under Rev. St. § 812, irrespective of the term of service.. 750
Under 2 Rev. St. N. Y. p. 724, §§ 27, 28, persons "held to answer" are the only persons who can challenge either the array of grand jurors, or the individual grand jurors, for favor..... 727
A grand juror cannot be withdrawn after he is sworn, for a cause which existed before he was sworn..... 410
Defendants who have not had any earlier chance to object to the composition of the grand jury by which they have been indicted may do so by plea in abatement..... 750
The federal officers in New York have no right to change or alter the state boxes and ballots as furnished to them by the state officer 727
Evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before a petit jury..... 727
Any abuse or improper conduct on the part of any person admitted to the grand jury will be investigated by the court..... 727
Witnesses before the grand jury may consult their previous affidavit to refresh their recollection, and affirm facts previously stated on paper..... 727
Sufficiency of oath of witnesses sworn to testify before a grand jury..... 727
A general oath to give evidence touching criminal charges to be laid before the grand jury without reference to any particular person is unobjectionable..... 727
But where the oath names one or more persons, evidence cannot be given under it in support of an accusation against others.. 727
A grand juror may be required to testify as to the evidence given before the grand jury 595

GRANT.

See, also, "Public Lands."

Indians had a right to receive grants of land under the Mexican laws.....1367
The fact that the grantee himself was acting governor, and made out the papers to himself, according to a petition presented to a previous governor, *held* not sufficient to justify rejecting the claim, where the possession had been long continued, and all the papers were regular..... 537
Prior and continued occupancy of a tract adjoining that granted will extend to the latter, so as to rebut any presumption of abandonment of the grant.....*896
Under a grant designating the quantity as two leagues, a little more or less, the court will not confirm a claim to a tract of four or five leagues..... 502
Where the conditions of a grant have been performed cy pres, though no approval has been given by the departmental assembly, the claim is entitled to confirmation 716
In the absence of archive evidence of the grant, the fullest and most satisfactory proofs of possession and occupation during the existence of the former government, under a notorious and undisputed claim of title, and clear and indubitable evidence of the genuineness of the grant produced, will be required 580
The record of the act of possession, based on depositions containing statements upon which the alcalde acted, cannot be contradicted by testimony of aged, illiterate, and infirm witnesses as to their recollection of what was done or intended by the alcalde.. 471
Where land is granted with reference to a map which clearly indicated the quantity, it will be assumed that the intention was to grant all the land included in the boundaries, though in a subsequent condition the quantity was erroneously stated..... 395
The claimants of a grant are estopped to object that parts of the land which they have sold and conveyed as part of their rancho are not within its limits, for the purpose of completing their quantity by embracing in the survey lands not conveyed by them 393
Land will not be excluded from the claimant's survey because included in the diseño of a neighboring rancho, where the latter has not been surveyed, and the owners have not intervened 393
One claiming title to a confirmed grant in opposition to the confirmee, but under

Page
the same original grantee, is entitled, under Act 1851, § 13, to enjoin the issuance of a patent to the confirmee pending a suit in the state courts to determine the title as between the two..... 946
The recital in a grant of pueblo lands by the prefect as "within the demarkation" of the pueblo affords presumptive proof, in the absence of opposing evidence, that the land was so situated, and that the officer acted within the limits of his authority 1062
A grantee will not be decreed an equivalent for a deficiency within his exterior boundaries out of a sobrante accidentally found to exist within the exterior boundaries of a neighboring grant..... 881
The word "point" in the description, "a straight line drawn to the beach, and from that point" another line, *held* not to mean a mathematical point, but to refer to the beach as one of the boundaries.....1264
A junior grantee cannot insist on a survey which will overlap a prior grant for which a patent has been issued, where he will obtain the full quantity without such overlapping 1261
When a certain quantity has been granted within limits which embrace a much larger tract, the quantity granted is to be located within the exterior limits at the election of the grantee.....1368
The building of a house and the making of improvements within such limits by the grantee may be considered as an election of location in favor of a subsequent purchaser thereof, and will be so treated by the court, to protect an earlier grantee, where there are conflicting claims 1368
Where it appears that the governor intended to accede to the petition, and the land has been long occupied and enjoyed under the grant or promise to grant, and by everybody recognized as belonging to the grantee, the latter has an equitable title, which the United States will respect.....1264
The failure to strictly comply, in regard to time, with a condition requiring a house to be built upon the land, will not prevent the confirmation of a grant otherwise valid, and confirmed by the departmental assembly..1262
A case in which an order has been entered rejecting the original survey, and giving directions for a new and reformed survey, is still "pending," within Act June 14, 1860 1019
In a proceeding to contest or reform a survey, no decree can be deemed final which does not adopt and approve some survey and plat fixing with precision every line of the land 1019
A case is "pending," within the act of 1860, where a motion for rehearing remains unargued and undisposed of at the date of the passage of the act..... 36
The extension of the line beyond the limits of the grant recognized by the government and adjoining proprietors for a number of years *held* sufficient to warrant confirmation of a survey adopting such boundary 72
A grant of land, *held*, should be surveyed in accordance with the claimant's original survey and election, where large expenditures have been made, in reliance thereon, without objection by adjoining owners..... 798
In a proceeding to correct a survey under the act of 1860, the district court has no jurisdiction to review and reverse the final decree whereby the genuineness and validity of the claim is established..... 806
After affirmance of a decree of the district court, it may, upon objections to the survey, inquire whether the boundaries described therein are in accordance with its own decree, and with the title papers upon which the judgments of both courts, as shown by their opinions, were founded... 497
Claim confirmed on evidence from the archives supported by long-continued possession, though the original title was lost.... 883
Claim to a Mexican land grant confirmed on evidence of continued occupancy and proper proceedings leading up to its issue, and of its issue and loss.....1262
Mexican land grant confirmed where it appeared that all the preliminaries were in due form, the conditions complied with, and the grant confirmed by the departmental assembly 1333
Mexican land grant confirmed on proof of due preliminary proceedings, approval by the departmental assembly, and a compliance with the conditions.....1367
Modification of the official survey of the Mexican grant directed on a review of the evidence 1365
Claims to Mexican land grants confirmed upon the evidence.....37, 358, 365, 395, 409, 410, 477, 502, 532, 592, 752, 809, 876, 883, *896, 948, 1051
Claims to Mexican land grants rejected upon the evidence.....495, 531, 532, 891
An official survey of a Mexican land grant confirmed upon the evidence.....529, 877
Official survey of Mexican land grant rejected upon the evidence..... 879

GUARDIAN AND WARD.

A guardian will be held liable on his bond for money received in another jurisdiction for the use of his ward.....141, 142
A guardian is liable upon his bond to pay over the money in his hands to a person appointed as his successor, though the latter has not given bond as guardian..... 142
In an action on a guardian's bond, for failure to comply with an order of court, it is not necessary to set forth the facts justifying the granting of the order..... 141

HABEAS CORPUS.

Neither the state nor the federal courts have power to take from the custody of each other persons confined under their lawful authority 726
A writ of habeas corpus was issued just prior to the suspension of such writ as a military necessity by the president, and the marshal was directed by the president not to execute the same. The court unanimously protested against the action of the military authorities..... 599

HIGHWAYS.

There is no public road in Maryland, the obstruction of which may be punished by a criminal prosecution, unless it be properly laid out and recorded..... 985

HOMICIDE.

A particular malice against deceased is not necessary to constitute murder, if there be deliberate malignity and depravity in the conduct of the party..... 899
The difference between murder and manslaughter consists in the existence of malice, express or implied, in one case, and the absence of malice in the other..... 390
Where it is shown that a person was intentionally killed, the law implies malice, and the party who caused the death has the burden of rebutting the implication...390, 1074
To make a man a principal in murder, it is not necessary that he should inflict the

Page

mortal wound, if he be present, aiding and abetting the act..... 899

If a number of persons conspire together to do an unlawful act and death happen in the prosecution of the design, it is murder in all. If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony it will be murder in all, although the death happen collaterally, or beside the principal design..... 899

If several persons conspire to commit a felony, and, if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in prosecution of the design, it is murder in all who are present, aiding and abetting in executing the design 899

There are no degrees of murder, under the laws of the United States..... 390

An indictment as accessory before the fact of murder will not lie in the federal courts, there being no act of congress covering such offense..... 694

Neither words nor gestures, however insulting or irritating, nor an assault, will justify the killing of the aggressor. His killing is justifiable only when there is an apparent intent by him to commit a felony, and the danger is imminent, and the species of resistance used necessary to avert it... 390

By "imminent danger" is meant immediate danger, such as must be instantly met, and cannot be guarded against by calling upon the assistance of others, or the protection of the law..... 390

A man may repel force by force in the defense of his person, his family, or property against any one who manifestly endeavors, by violence or surprise, to commit a felony.. 390

Mere threats against the person or life of another will not justify homicide, even when an attempt at execution is made, unless the danger be so imminent as not to admit of any delay in meeting it on the part of the assailed..... 390

An offender having made public threats against the life of an officer having a warrant for his arrest, the latter is justified in taking his life, where he so acts with a rifle when the attempt at arrest is made that the officer has reason to believe that he intends to execute such threats..... 795

An indictment for murder will not lie in a federal court, except as authorized by an act of congress..... 997

Sufficiency of indictment for murder under the act of congress punishing opposition to the enrollment of the national forces.... 997

A person indicted for murder on the high seas is entitled to only 20 peremptory challenges 918

INDIANS.

Indians belonging to a tribe maintaining a tribal organization on a reservation within the limits of a state are amenable to the state laws for offenses off the reservation, and within the limits of the state.... 923

A white man may incorporate himself with an Indian tribe, be adopted by it, and become a member of it, so as to be included within the effect of a pardon of offenses committed by citizens of the tribe..... 684

A white man, who, at a mature age, is adopted into an Indian tribe, is not an "Indian," within the exception of Act June 30, 1834, § 25, of jurisdiction of "crimes committed by one Indian against the person or property of another Indian"..... 886

Where land is set apart by the president for the use of Indians, whites who go upon the reservation to fish do so "contrary to law," within Rev. St. § 2147.....1357

The federal circuit court has no jurisdiction, under the act of 1834, to punish offenses committed by one Indian against the person or property of another Indian.. 950

Congress has the power to prohibit the traffic of spirituous liquors between the Indian tribes, or members thereof, within as well as without the limits of the state.....1049

An Indian may be punished for disposing of spirituous liquors to another Indian, under Act March 15, 1864.....1049

The "Indian country," within the meaning of Act June 30, 1834, declaring it a crime to introduce spirituous liquors therein, is only that portion of the United States which has been declared to be such by act of congress.....1021

Such act was not extended, propria vigore, over the territory of Alaska, upon its cession to the United States.....1021

Such act as amended March 15, 1864, was not extended over Alaska by Act July 27, 1868, extending the laws "relating to customs, commerce and navigation" over that territory 1021

The title of the Cherokee tribe to their lands is a base, qualified, or determinable fee, without the right of reversion, but only a possibility of reversion, in the United States 742

The Cherokee tribe derived the title to their lands by grant from the United States, and such lands cannot be held to be "lands of the United States," within Rev. St. § 5388..... 742

The treaty-making power of the United States can make a sale or grant of land to an Indian tribe without an act of congress.. 742

Without the assent of the general government, the state probate courts cannot administer upon the property or credits of Indians who were members of a tribe which maintained towards the United States its tribal relation..... 470

INDICTMENT AND INFORMATION.

See, also, "Criminal Law"; "Internal Revenue."

When lies.

Where a statute has prescribed the mode of prosecution, no other can be sustained... 528, 904

An offense against the laws of the United States, which is of a character not capital or infamous, may be prosecuted in the federal courts by an information according to the course of the common law.....1056

The district attorney may proceed by information, though an indictment against the same person for the same offense has been quashed for insufficient averments..... 68

A preliminary examination, or an order to show cause, and a hearing thereon, is not a necessary preliminary to a proceeding on information..... 894

An information prosecuted in a district court must be regarded and treated as a common-law proceeding.....1326

Finding.

On a motion to quash an indictment on the ground that no evidence of defendant's guilt was adduced in support of an application for a warrant for his arrest, the court cannot inquire into the sufficiency of the evidence, but may quash the indictment, where none was given.....1056

The court has no power to inquire into the mode in which the examination of witnesses was conducted before the grand jury, for the purpose of invalidating an indictment 727

It will, however, inquire into the competency of evidence, whether oral or documentary, and into the manner of authenticating the latter..... 727

Page

The court cannot revise the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint..... 727

It cannot be pleaded in abatement to an indictment that it was founded on illegal testimony introduced before the grand jury..1186

It is discretionary with the court to quash an indictment, or to hold defendant to plead in abatement or demur.....1350

Form.

A conclusion of an indictment founded on a statute, "contrary to the true intent and meaning of the act of congress of the United States in such case made and provided," is good.....1167

When a statute makes one or more distinct acts, connected with the same transaction, indictable, they may be charged as one act..... 949

A motion to quash an indictment is a proper mode of taking objections to it for want of form or substance..... 367

It is discretionary with the court whether it will quash an indictment for defect of form 367

A defect pleadable only in abatement is not ground for quashing an indictment.... 590

A defendant acquitted upon a flaw in the indictment will be remanded for trial at the next term.....1148

Indorsement.

The designation "foreman" is sufficient to show that the person to whose name it was appended was foreman of the grand jury 561

The sworn assistant of the district attorney may sign the latter's name to an information 68

At common law, the name of the prosecutor need not be written at the foot of the indictment 23

The name of a prosecutor must be written at the foot of an indictment for a misdemeanor under the Virginia law.....1037

It is not a good ground for arrest of judgment that the name of the prosecutor was not indorsed upon an indictment for a misdemeanor in Virginia.....1085

It is no ground for general demurrer to an indictment for a misdemeanor under Acts Va. Nov. 13, 1792, and Act 1795, p. 346, that the name of a prosecutor is not written at the foot of the indictment.. 952

Description of offense.

An indictment need not aver the existence or provisions of a public statute upon which the prosecution is founded..... 785

Where an exception in an act does not occur in the enacting clause, it is not necessary to set it out, or negative it in the indictment 973

It is generally sufficient to describe a statutory offense in the words of the statute 367

In indictments for misdemeanors it is sufficient to lay the charge in the words of the act describing the offense, unless it appear that those words include cases not intended to be embraced within the laws, in which event the indictment must show the case to be one not thus excluded..... 590

Where a criminal statute does not so define the acts constituting the offense as to give the offender information of the nature and cause of the accusation, an indictment which does not go beyond the words of the statute is defective 1300

The particulars constituting the offense are matters of evidence, and need not be pleaded 367

Page

It is not charging an offense in the alternative where the language describes the same offense 604

Time and place.

An allegation that the crime was committed on board a vessel belonging to citizens of the United States, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of the court, and without the jurisdiction of any particular state, sufficiently shows the jurisdiction 561

An indictment for a statutory misdemeanor need not charge the offense with the particularity of time, place, and circumstance required for a felony or a common-law offense, as defendant has a remedy by application for a rule for specifications and particulars..... 973

Joinder of parties and offenses.

It is not a misjoinder of offenses in different counts unless they belong to different families, or the judgments and punishments are inconsistent with each other.. 515

Offenses of the same class may be included in the same indictment..... 216

A count for a misdemeanor and one for a felony cannot be joined in the same indictment 1046

Counts for conspiracy cannot be joined with counts for murder..... 997

Two or more counts for misdemeanor may be joined in one indictment..... 595

A count for stealing and a count for receiving stolen goods may be contained in the same indictment..... 624

Where an indictment describes in different counts different offenses, of different grades and punishments, implied from the same transaction, and the verdict is guilty of the last count only, judgment may properly be rendered on the verdict.....1311

Variance.

Where an indictment for resisting a customs officer improperly describes the office, the variance is fatal..... 526

An allegation in an indictment, which is not impertinent or foreign to the cause, must be proved, though a prosecution for the same offense might be supported without such allegation..... 598

An indictment for an assault committed on the high seas in the outer road off St. Domingo, on an American vessel, is supported by proving the offense to have been committed in the inner road, and in port..1325

Conviction of other offense than that charged.

On an indictment for a felonious entry and taking of goods from a storehouse, *held*, that defendant might be found guilty of simple larceny..... 716

INFORMERS.

The informer is he who first gives to some officer authorized to act upon it information which leads in fact to a seizure and forfeiture 300

An officer who obtains information by the examination of witnesses compelled to testify before the grand jury is not the informer 300

An officer who acts on information furnished him by another officer, intended to be given the government, and does not discover new facts by his own diligence, or who merely makes certain what was suspected, is not the informer..... 300

Under Act 1864, § 179, as amended July 13, 1866, officers of the internal revenue may be informers..... 300

Page

It is only when the amount of the penalty has been recovered by judgment of the court that an informer is entitled to a moiety thereof 300
Where liquor is forfeited by consent in pursuance of an agreement with the commissioner of internal revenue, a person, to be entitled to a share in the proceeds, must make out a clear case..... 168
The informer's share is to be calculated upon the gross proceeds of the forfeitures without deducting costs. (Act June 30, 1864, § 179, as amended July 13, 1866.) 318
Where the proceeds of a condemnation do not exceed $500, the informer is entitled to his percentage upon the gross amount after deducting costs of the proceedings.....1027
An informer may sue in his own name under Act Feb. 28, 1799, § 8..... 544
Where the informer is not a government officer, the United States is not liable for costs 544
The court may require an informer to give security for costs, and in case of refusal strike his name from the record.... 544
An informer's share in the registry of the court should be decreed to be paid directly to the persons beneficially interested, and entitled to hold it.....1348
An agreement between informers to divide the informer's share equally is valid, and will be regarded by the court in distributing it 1348

INJUNCTION.

Injunction may issue to stay irreparable mischief or waste in cases of disputed title 416
Where the amount in dispute is great, and the inability of the party to respond is greatly disproportioned to such amount, such insolvency is a proper subject for an allegation in the bill..... 416
The institution of an action at common law is not an indispensable prerequisite to a bill for an injunction..... 416
On a motion to dissolve an injunction, matters set up by way of avoidance in the answer responsive to the bill should be deemed on such motion equivalent to an affidavit by defendant..... 416
Where the answer denies directly and positively, upon personal knowledge, the allegations of the bill, the injunction will be dissolved, in the absence of extraordinary circumstances 416
A denial on information and belief of facts distinctly alleged making out a case for injunction, cannot arrest the issue of the injunction, or authorize a dissolution of it, if one has been granted.....416, 444
Such denial will not be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge... 444
A general denial of allegations by one uninformed as to their truth is not sufficient to dissolve an injunction..... 932

INTEREST.

Interest will run from the time of a statement of a balance of account against a person, though the amount was subsequently reduced on the allowance of further credits claimed 357

INTERNAL REVENUE.

See, also, "Forfeiture"; "Informers"; "Seizure."

Assessments and collections.

A provision for the collection of a tax in districts where the same is forcibly resisted so soon as such resistance is put down does not show a want of uniformity in the tax.. 810
Visitorial powers are not conferred upon internal revenue officers under Rev. St. §§ 3177, 5241, authorizing them to examine the checks of the national bank..... 414
A national bank is not exempt from examination by the internal revenue officers under Rev. St. § 3177..... 784
A clerk of a supervisor of internal revenue cannot make such examination..... 784
A dealer in tobacco has no right to forcibly eject a customs officer from his premises after the officer has fulfilled his errand 4
The obligation or duty to pay taxes is one which may be enforced by suit, by an action at law, or a bill in equity, according to the nature of the relief sought..... 397
A demand for the payment of taxes is necessary, under Rev. St. § 3186, to create and bring into operation a lien therefor, and such demand must state the amount of the tax..... 399
A suit will not lie to recover a tax in a district other than that in which the tax accrues, or that in which the delinquent resides, although he may be found and served with process therein. (Rev. St. § 733.) 139
In a suit for taxes defendant cannot plead a set-off, legal or equitable, growing out of independent claims..... 397
To a suit to recover the balance of a tax the defense that the amount already paid was determined to be the true amount by the assessor cannot be tried upon demurrer 133
The remedy against an illegal tax assessment pointed out..... 397
An internal revenue collector is not responsible for more than ordinary care and diligence in the collection of bonds for duties placed in the hands of an attorney by his predecessor for suit by direction of the commissioner of revenue.....1257
In such case the collector is not bound by a treasury statement charging him with the amount of such bonds.....1257

Special taxes.

An association whose initiation fees were used to buy a stock of liquors which were dealt out to members only on payment by the drink, at cost price, is a partnership for the sale of liquors at retail, and each member thereof is guilty of violating the statute, where the special tax is not paid.. 893
Where a person has complied with section 24, Act July 13, 1866, as to giving notice, bond, etc., he is not liable to indictment for carrying on the business within the 10 days after the receipt by the collector of the assessment list without having paid the special tax.....1050
An intent to defraud forms no part of the offense of the omission to pay the special tax imposed by Act June 20, 1868, § 44.. 724
Where the tax has been paid, and the barrels properly marked, branded, and stamped, the spirits cannot be seized under Act July 20, 1868, § 44, while in the hands of an innocent purchaser, for frauds of the distiller..... 303
Section 45 (14 Stat. 163) is not rendered unconstitutional by the provision which requires affirmative proof on the part of the claimant of the payment of the taxes due on the spirits seized.....1029
Act July 20, 1868, § 96, does not authorize a forfeiture of spirits or liquors thereunder for a violation of section 45, as a specific penalty or punishment is imposed by the latter section for its violation..... 332
The knowing and willful omission, neglect, or refusal of the wholesale liquor deal-

Page

er to cause packages of distilled spirits to be gauged, inspected, and stamped (Act July 20, 1868, § 25) will expose all distilled spirits and liquors owned by him to forfeiture under section 96..... 282

A knowing and willful failure to comply with section 25 will cause a forfeiture by virtue of section 96. Otherwise with a neglect of the requirements of section 47, which provides a penalty for a breach thereof. (Act July 20, 1868.)..... 168

A retail dealer in liquors, who also purchases and sells malt liquors in quantities of more than five gallons at the same time, is not required to keep the book provided for in Act July 20, 1868, c. 186, § 45..... 717

The book is to be kept only by wholesale dealers in domestic spirits, and a person does not become such dealer by taking out a wholesale license for selling ale, though he also sells domestic spirits at retail.... 717

A rectifier and wholesale liquor dealer, who enters upon his books spirits bought by him, and the names of the manufacturers or rectifiers marked on the barrels as the names of the persons from whom purchased, instead of the names of the actual sellers, incurs the forfeiture denounced by Act July 13, 1866, § 26..... 344

The forfeiture denounced by section 26 (Act July 13, 1866) applies only to the spirits, apparatus, and articles in the possession of the offender at the time of the act or neglect whereby forfeited, and not to those subsequently acquired, and found in his possession..... 344

Wholesale dealers are bound to "cause" their casks to be stamped and branded in the cases which come under Act July 20, 1868, §§ 25, 47..... 168

The forfeiture by section 57 (Act July 20, 1868) is general, and that section imposes a penalty for a violation of section 25 in case the unstamped packages contain more than five gallons 170

The intention of congress must be manifest and unmistakable to justify the courts in construing a law imposing a forfeiture as extending to property which, before seizure, had been sold to an innocent purchaser *303

The fact that barrels containing spirits purchased in the open market bear all the brands indicating payment of the taxes does not create a presumption that such taxes have been paid.....1029

The ticket given by a pawnbroker under the California law is "an agreement or contract," within section 170, Act 1864.....1174

A person whose occupation is to sell agricultural produce in public market is liable to a tax as a "produce broker" (Act 1866, § 79), though the produce is raised by himself upon his farm.....1080

Liability of a peddler for carrying on business without payment of the special tax after application for a license, where he stopped business before the tax was assessed, and refused to pay it..... 616

Persons supplying and sewing two small buckles and straps upon knapsacks, under agreement with the government contractor, are not liable for the manufacturer's tax. (Act July 1, 1862, § 75.).....1321, 1323, 1323

A person who gave out to customers combinations of numbers, specifying them as being in certain lotteries, entering the same in his policy book, and paying the customers according to the drawings, though no certificate or ticket was given, *held* a policy holder, and liable for the special tax.....1291

Construction of Act July 24, 1813, in relation to duties on refined sugars..... 493

Wine made from grapes grown in the United States is not subject to a tax under Act June 6, 1872, § 12, because made in

Page

imitation of sparkling wine by injecting carbonic acid gas by a separate process of manufacture 238

Distilled spirits.

A person who makes alcoholic vapor in the process of making vinegar by machinery which is not adapted to the condensation of such vapor, *held* not a distiller. (Act July 13, 1866, §§ 21, 23; Act March 2, 1867, § 16.) 320

The manufacture of alcohol in the process of making vinegar, though the alcohol is not released from its impure state, is within the prohibition of Act July 20, 1868, § 4. 626

The premises and property thereon are forfeited where there is a wash and a still on the premises capable of distilling, and fermented liquors are there distilled without authority, though the product of the establishment is not distilled spirits, but only vinegar 1303

A distiller is bound to pay taxes on 80 per cent. of the producing capacity of his distillery, although this may be more than the amount of spirits actually produced.. 175; contra, *1082

The "deficiency" tax is based upon the quantity of spirits actually produced, or on 80 per cent. of the capacity of the distillery. (Act July 20, 1868.)..... 739

Where the producing capacity of a distillery is reduced by a direction of the government that the distillery be run only a certain number of hours, a pro rata tax only can be collected..... 411

The words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of."..... 202

A distiller's bond given under Act July 1, 1862, § 39, conditioned that the distiller should comply with the conditions of such act and of such other acts as might thereafter be enacted, *held* valid....64; contra, 53

In a suit on a distiller's bond for the amount of an assessment (Rev. St. § 3182) defendant may impeach the assessment, though he has not first appealed to the commissioner 43

It is no defense to a prosecution for executing and signing a false and fraudulent bond that defendant knew nothing of his sureties, but hired a man to obtain them, and that they swore to all that was required by law..... 213

The testimony of a subscribing witness that the bond was taken away and returned with the signature of a person whom the witness had seen sign another bond, *held* sufficient proof of execution by him..... 213

Under Act July 13, 1866, a removal by a distiller of spirits from the place of distillation to a bonded warehouse is a legal act..*303

Spirits in bond may be forfeited for noncompliance of the provisions of the revenue laws 636

Distilled spirits, purchased in good faith, while in a bonded warehouse of the United States, upon which the purchaser paid the taxes, cannot be afterwards seized and condemned as forfeited for the failure of the distiller to keep proper books and to make proper reports. (Acts July 13, 1866, and March 2, 1867.).....*303

The fact that distilled spirits are seized, condemned, and sold for violation of the internal revenue law while bonded, does not release the obligors on the warehouse bond..1272

The fact that the purchaser at the sale paid the tax is immaterial.....1272

It is a good defense to a suit on a distiller's transportation bond that during the act of transportation the government officers seized them, and the collector of the district to which they were consigned refuses to grant a certificate of delivery.....1335

Page

It is immaterial that the seizure was made by reason of the wrongful act of the persons having the goods in charge....1335
Under Act July 13, 1866, § 9, the raw material found, if intended to be used for a fraudulent purpose, may be seized, and is subject to forfeiture, without reference to the place where it is found.....1110
Under Rev. St. § 3453, it is not necessary, in order that other personal property found with the distilled spirits be forfeited, that raw materials intended to be used in the manufacture should be found in the same place 1098
Personal property found in buildings in the same inclosure with a building in which an illicit distillery is carried on, and in such juxtaposition to it that the owners thereof could not be ignorant of the existence of the still, is subject to forfeiture. (13 Stat. 240, § 48.)..... 638
Personal property situated upon distillery premises and used in the business of illicit distilling is subject to forfeiture, irrespective of its ownership and knowledge by the owner of its unlawful use..... 256
The interest of a mortgagee of personal property remaining in possession of the mortgagor may be condemned for unlawful acts of the mortgagor, though the mortgagee be innocent thereof.....1025
The tools, implements, and other personal property must be found in the place or building or within the yard or inclosure where they were intended to be used, and the information should aver such fact....1110
Act June 30, 1864, § 68, confers no authority for the seizure of a distillery, and the lot on which it is situated, or for subjecting such real estate to forfeiture..... 237
"Form 122" for the return of spirits emptied for rectification, *held* authorized by law 292

Fermented liquors.

The penalty of $200 (Act July 13, 1866, § 49) is imposed not for the omission to make the proper entries, but for the failure to keep any books at all..... 211
An indictment for removing malt liquors without affixing or canceling the proper stamps (Act July 13, 1866) need not negative the cases where the law authorizes a removal without affixing a stamp..... 973

Tobacco and cigars.

Under Act July 13, 1866, § 9, a tobacco manufacturer is required to keep a book showing the goods manufactured as well as those sold..... 639
An entry was made on the sales books of tobacco sold, and a check was taken for the amount, but subsequently the manufacturers gave their check to the purchaser for the same amount, and the tobacco did not pass from their possession, but was treated and disposed of as their own. *Held*, that the tobacco was illegally returned for tax. (Act June 30, 1864, § 94.).....639, 650
Manufactured goods under Act 1864, § 90, means goods the manufacture of which is completed, so that the goods are in a condition to be sold..... 639
Under Act June 30, 1864, §§ 90, 94, as amended by Acts July 13, 1866, and July 20, 1868, a completed sale or a completed removal of manufactured tobacco is a necessary preliminary to the accruing, assessment, and payment of the tax upon it.... 650
Goods found in the possession of a person for the purpose of being sold or removed in fraud of the law are subject to forfeiture under Act June 30, 1864, § 48, as amended July 30, 1866, though there has not been a completed sale or removal thereof 650
It is illegal for a tobacco manufacturer to remove from the wholesale to the retail department a quantity of tobacco, and to make a return and pay tax on it as one sale instead of on the actual sales in the retail department..... 650
The fraudulent intent or purpose of the person in possession of articles seized because found in a place where the articles or raw materials mentioned in section 48 (Act June 30, 1864, as amended July 13, 1866, § 9) are found does not constitute an element of the ground of forfeiture..... 317
In such case the burden is on the claimant to show that the situation of the property is consistent with his entire innocence of complicity with the offenses for which such articles or raw materials were seized.. 317
The forfeiture of the raw materials is not made dependent on their being seized in the possession of the person in whose possession forfeitable taxable articles are found 650
Where cigars are made in the back part of a room and sold in the front part thereof, the back part is to be regarded as a manufactory, and they cannot be removed to the front part without first branding and stamping 79

Banks and bankers.

But one penalty is imposed by Act June 30, 1864, §§ 110, 120, as amended July 20, 1866, for all failures to make returns prior to commencement of a suit to recover penalties for such failure..... 133
National banks are liable to a penalty for failing to make return of dividends declared, etc., during the period between July 1 and December 30, 1870. (Act July 14, 1870.) 1299
Said dividends, etc., are subject to a tax of 2½ per cent. during said period.....1299
Sufficiency of complaint in an action against a bank for the $1,000 penalty for failing to make return of its net earnings, incomes, or gains under Act June 30, 1864, § 120, as re-enacted July 14, 1870.....1297

Income taxes.

A person's compensation as state's attorney for a certain county is not liable to the income tax..... 818
The income tax acts require a return for taxation as income of all gains derived from the sale of corporation stock in 1868, if purchased at any time after August 5, 1861..1175
A bona fide exchange of stock for other property is not a sale thereof from which profits are derived liable to taxation as income 1175
A transfer of stocks for a collectible promissory note, or an exchange thereof for lands which are sold within the year for collectible promissory notes, is considered as a sale of such stock for so much cash...1175
The beneficiary of a trust fund under a will, who had not on October 1, 1870, become entitled to the possession or enjoyment of, or to the beneficial interest in, any of the principal sum (Act July 14, 1870, § 3), is not liable to the legacy tax under Acts June 30, 1864, §§ 124, 125, and July 13, 1866, § 9..... 134
The amount of a promissory note taken in 1871 on a sale in that year of a patent right not maturing or paid until 1872, is not taxable as income for 1871. (Act July 14, 1870, § 6.)..... 973
The compensation of a state officer cannot be applied to the satisfaction of the $1,000 exemption from the income tax.... 818

Violations of law and punishment—Forfeiture proceedings.

The circuit courts have original jurisdiction of suits in rem for forfeitures under the internal revenue laws.....1025
The charge of fraud is sufficient if made in the words of the statute. (Act July 13, 1866, § 9.).....1110

Page

An information under Rev. St. § 3453, is sufficient if it follow the language of the statute, and without an express averment that the taxes were not paid.....1028

An information of forfeiture for violation of Act July 20, 1868, § 44, need not aver that the special tax was assessed, or that payment was demanded and refused, or neglected to be paid, but only that the business was carried on without payment of such tax. 724

An information of forfeiture must aver that the property sought to be adjudged forfeited was used in the illicit distillation charged, or was the product of such distillation 259

A description of property claimed as forfeited as "all the boilers, stills, and other vessels used in the distillation of spirits, and all the distilled spirits—being about twelve barrels—now in the distillery owned by W.," is not sufficiently specific..... 259

In an information of forfeiture for neglect to make the entries required by Act July 20, 1868, § 45, it is not necessary to aver the time the liquors were received or sent out, or from whom received, or to whom sent 724

The validity of an assessment against a distiller may be inquired into by defendant's answering a bill by the United States to subject to the payment of such assessment lands transferred to them..... 816

The courts have no power under the act of 1864 to release on bond or stipulation goods seized for forfeiture under sections 48, 68 1122

The notice required to be given to persons executing a bond for the return of property seized is that prescribed by Rev. St. § 3459, and not the previous rules of the court 1028

It is no defense to a surety in a stipulation for property seized that on appeals by the claimant bonds were taken without surety, with the approval of the district attorney, and that government bonds had been given as further security, which had been stolen 637

An agreement by a district attorney to release a surety on a stipulation for value on condition of his giving information against other persons is not valid without the concurrence of the commissioner of internal revenue, the secretary of the treasury, and the attorney general..... 635

A stipulation by the government officials of immunity from penalties or forfeitures in consideration of testimony of violations of the law will be enforced by the courts.. 884

—— Penalties: Actions therefor.

The penalties prescribed in section 96, Act July 20, 1868, apply to those who knowingly or willfully do or omit to do the thing forbidden or required, only when there is no specific penalty imposed by any other section of the act.....313, 724

The penalty imposed for a violation of section 48, Act June 30, 1864, must at least equal double the amount of duties sought to be evaded, and in no case must it be less than $500.....1253

An action in personam to recover the forfeiture of $500 under Act July 1, 1862, § 54, will lie, although the seizure provided for therein has not taken place..... 50

—— Offenses.

Conspiracy, under Act March 2, 1867, is a combination between two or more persons by agreement, expressed or implied, to effect the illegal purpose, regardless of the manner in which it is to be done..... 813

A person who, with unlawful intent, designs or directs the removal of spirits on which the tax has not been paid, is equally guilty with the one who actually carries out the unlawful object..... 197

—— Indictment. Page

Upon an indictment for removing whisky from a distillery, and sending it to another state, under a false inspector's brand, without paying the tax, the court of the latter state has jurisdiction, where the whisky was not taken from the possession of the railroad company by which it was shipped, before arrival at its destination.....1282

An indictment under Rev. St. § 3257, which describes the offense in the language of the statute, is insufficient.....1300

An indictment under Rev. St. § 3281, which describes the offense in the language of the statute, is sufficient.....1300

An indictment under Act 1866, c. 184, § 25, must allege that the still was intended to be used within the United States for distilling spirits, and that defendant failed to give the notice, etc..... 742

An indictment which charges defendant with carrying on the business of a wholesale liquor dealer without the payment of a special tax therefor, at a certain place, continuously between certain dates, is sufficient without stating the means or circumstances by which he became such dealer.. 409

An indictment averring the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, "and" the concealment thereof, is not bad for duplicity, under Rev. St. § 3296 202

An allegation that the tax on certain spirits "had not been paid" is sufficient without an allegation that it "was still due and owing"..... 202

On an indictment for removing distilled spirits on which the tax has not been paid, the precise quantity alleged, and that the removal took place at the precise time stated, need not be proved..... 197

Under a count for removal and concealment, conviction may be had if removal is proved, though concealment is not shown 197

On an indictment for carrying on the business of a liquor dealer without having paid the tax, evidence is admissible of a sale of liquor on a day subsequent to that named 810

A distiller's bonded warehouse which the law requires him to provide is a part of the distiller's premises, and proof of the unlawful removal of spirits therefrom sustains the averment that the removal was from the distillery.....1144

Where indictments are found under Act June 30, 1864, both for making false returns (section 15) and for perjury (section 42), the prosecution must elect between them 914

—— Evidence.

Where rectified spirits are seized while in process of sale by a rectifier as free of tax, a claimant has the burden to show that the tax has been paid. (Act July 13, 1866, § 45.).....1085

Where defendants have rebutted the presumption of law as to the validity of the assessment, the burden of proof is shifted upon the government to establish its validity 816

On an information to enforce a forfeiture the statute of limitations is available as a defense under a plea of the general issue.1089

Previous fraudulent intent and previous fraudulent acts are admissible to show a fraudulent intent in a subsequent transaction 639, 650

On the trial of an indictment against a manufacturer for making false and fraudulent returns for a given month, evidence of false returns in previous months is admissible to show a fraudulent intent..... 914

On an indictment under Act March 2, 1867, § 30, the government is not bound to

Page

strict proof of the ownership of the rectifying distillery to which it is alleged the spirits were unlawfully removed.....1144

On an indictment for a conspiracy under Act March 2, 1867, § 30, there must be satisfactory evidence not only of the conspiracy charged, but of the overt act averred, to carry into effect the object of the conspiracy 1144

Where the evidence on a question is all one way, the court need not submit the question as one of fact to the jury..... 317

To prove a conspiracy to remove whisky without paying the tax, it is only necessary to show that defendants were acting in concert, or with a mutual understanding, to effect the removal without inspection and branding according to law.....1362

—— **Verdict: Judgment.**

Where an information of forfeiture in different counts avers several frauds under different sections of the statute, a verdict of forfeiture will be sustained if any one count is good 260

Under Act July 13, 1866, § 45, the judgment or decree of forfeiture relates back only to the date of the seizure, and does not affect the title of an innocent purchaser, acquired subsequent to the date of the wrongful act, and before the seizure.....1118

INTERNATIONAL LAW.

See, also, "Neutrality Laws"; "War."

A combination of citizens or subjects for the purpose of overturning a government does not become entitled to the privileges of national sovereignty until a revolution is actually accomplished.....1134

The fact that the number of insurgents in a state is so great that they carry on a civil war against the government does not entitle the government set up by such insurgents to the privileges of sovereignty..1134

INTOXICATING LIQUORS.

See, also, "Internal Revenue."

The widow and administratrix of a deceased tavern keeper cannot sell spirituous liquors under her husband's license, nor can she transfer it to another..... 392

Selling less than a pint under a license to sell not less than a pint is selling without a license 16, 370

A servant selling spirituous liquors for his master, without license, is not liable to the penalty 470, 1072

JUDGMENT.

A judgment rendered by a federal circuit court is a lien upon all lands of defendant within the district, without being recorded in the several counties where such lands lie..... 999

A decree of forfeiture of spirits for alleged frauds on the revenue is not conclusive in a subsequent proceeding for the forfeiture of the distillery and numerous articles contained therein..... 260

A judgment distributing the proceeds in the registry upon an information of forfeiture cannot be modified or altered by the court after the close of the term..... 278

The federal district court, three years after rendering a decree in a confiscation case, cannot reverse the same.....1097

Judgments and decrees are not assignable at law, so as to vest the legal title in the assignee; but the latter takes only an equitable interest, subject to the equities attaching to them in the hands of the assignor 932

JURY.

See, also, "Grand Jury."

Page

The federal courts cannot deprive parties of the right of trial by jury by referring the issues of fact to referees..... 711

The constitutional right to trial by jury may be waived by the party..... 711

In a proceeding in the federal district court against property seized as forfeited under the internal revenue laws, to which a claim is interposed, the claimant has a constitutional right to a trial by a jury 281

In forming a jury the federal court need not adopt the mode required by the state laws, when, in the opinion of the court, it is impracticable to do so..... 620

The provision that jurors shall be drawn from such parts of the district as the court shall direct (Act Sept. 24, 1789, § 29) is not repealed by Act July 20, 1840.....1350

It is discretionary with the court to give, or not to give, any directions as to the place from which jurors shall be summoned; and it is no ground of challenge to the array that the marshal summoned the jurors according to his own will, where there was no application for directions..... 620

A juror who has sat on the trial of a person indicted for the same offense as defendant is not competent.....1246

An objection that one of the jurors had served on the jury of the next preceding term is too late after the jurors are sworn.. 477

Where defendant accepts a juror with knowledge that he has had a conversation with a third person about the case, he cannot afterwards object to a verdict on that account 1175

Under Act March 3, 1868, § 2, there is no right of peremptory challenge except in capital cases 696

Peremptory challenge allowed upon an indictment for stealing a slave in Alexandria, D. C. 1363

The court will at a subsequent term order a fine against an absent juror to be struck out, where the clerk neglected to enter a similar order made at a previous term 1148

LANDLORD AND TENANT.

A bailiff cannot lawfully force himself into a house by the outer door, although partially opened by one within, to make a distress for rent.....1349

LARCENY.

Logs in a fence are not the subject of larceny, the fence being in law annexed to the freehold 1148

Foreign and domestic coin and bank bills are "personal goods," within Act 1790, c. 36, § 16, relating to larceny on the high seas 11

Quære: Whether stealing a bank note is larceny, within the act of April 30, 1790, § 16 38

A driver of a coach, who, with knowledge of the ownership of goods left therein by the owner by mistake, takes and converts them with intent to steal them, is guilty of larceny..... 484

A person who procures goods under the false pretense that the owner had sent him for them, and appropriates them for his own use, is not guilty of larceny..... 825

A workman is guilty of larceny where goods delivered to him for a special purpose are taken away by him with intent to steal them 1356

Property abandoned is not within the meaning of Act March 3, 1825, § 9, against

Page
plundering or stealing property from or belonging to a vessel in distress or wrecked, lost or abandoned.....1132
The federal courts have jurisdiction of the offense of plundering property from a stranded vessel or after it has been thrown upon the shore. (Act 1825, c. 65, § 9.).... 540
"Plunder," as used in such section, includes the criminal taking of the goods of another by open force, or by secret fraud, and furtively, from a vessel in distress, etc., and also an embezzlement by the master and others 540
"One silver coin of the value of fifty cents" is a sufficient description of the property stolen 810
An indictment charging the stealing of "notes of some bank established by a charter from the government of the United States, or of some individual state of the United States," in the language of the act, is not sufficient..... 595
The goods of the wife, in her separate shop, where not kept for her separate use, must be averred to be the goods of the husband 36
Goods stolen from a married woman living by herself, her husband not contributing to her support, may be charged as her property 452
An indictment alleging articles stolen to belong to owners unknown is good on its face, and the objection that the owners were in fact known must be taken to the evidence at the trial for a variance, or by special plea 1311
On a trial for larceny, *held*, that the prisoner was entitled to a peremptory challenge of 20 jurors, under Act Va. Nov. 13, 1792 506
A slave convicted of larceny in Alexandria county, D. C., sentenced to be burnt in the hand and whipped..... 78
A slave convicted of larceny is to be punished by whipping, although not charged as a slave in the indictment..... 86

LIMITATION OF ACTIONS.

The suspension of the statute of limitations provided for by Act June 11, 1864, did not continue in Georgia after the president's proclamation April 2, 1866, though no term of the federal court was held and no clerk appointed, until six months later.. 18

LOTTERIES.

A scheme for the disposal of town lots, by the terms of which a purchaser has a chance of obtaining one of the reserved or prize lots as a part of the consideration, is a lottery 233

MANDAMUS.

Mandamus will not issue to compel municipal officers to levy and collect a tax, unless the legislature has made it their duty to levy and collect such tax.....*131
The federal circuit courts outside the district of Columbia cannot issue the writ in the exercise of original jurisdiction, but only as necessary to the jurisdiction of the court, and to enforce a judgment rendered..1129
The circuit court of the District of Columbia has no jurisdiction to compel the superintendent to deliver certain documents to the public printer for printing.....1004
The federal circuit court has not jurisdiction in the first instance, by mandamus, to compel a postmaster to furnish the advertised letter list to the newspaper having the lawful right to the printing.....1129
Page
The court refused the writ to compel the marshal to pay witness fees to the petitioner, an attorney of the court.....1018

MARINE INSURANCE.

Liberty to touch at a place does not justify trading, and trading would be a deviation avoiding the policy..... 467

MARSHAL.

The marshal is bound to obey the writ as he receives it, where the statute is directory to the court or the clerk only, but in demanding bail he acts at his peril.... 23
An indorsement even by the court, will not justify the marshal in requiring bail, where the statute does not require it.... 23
The marshal is entitled to interest on sums due to him and not paid after demand, and must pay interest on sums due from him after demand.....1249
A marshal is not entitled to commissions on money paid to his deputies for taking a census 1249
A marshal who pays over to his deputies or assistants, for taking a census, less funds than he received from the government, is liable to the penalty of $500. (Act March 3, 1839.).....464, 465
A sale of treasury notes by the marshal for currency at 8 per cent. premium, and a payment of his deputy in such currency, is a violation of the law.....464, 465
A marshal who extends an execution on real estate for the government is entitled to his fees from the government, though the land be not yet sold or redeemed or in any way converted into money.....1249
A marshal is not to be allowed for services as keeper or inspector of the state jails, except in a case where especially directed by the court.....1249
A charge by a marshal for distributing venires to town clerks at $2 each is legal, but not for travel as if serving venires himself, when they are in fact served by a constable 1249
Though the certificate of a judge allowing a marshal's account is prima facie evidence of its legality and proper amount, the treasury department may reject it, if believed improper 1249
Rev. St. § 786, limiting the time within which actions must be commenced on marshal's bonds does not apply to actions instituted by the United States..... 695

MASTER AND SERVANT.

:One employed to work a day cannot lawfully quit work before the day is done.....1312
A locomotive engineer employed by the day to daily make a particular run cannot lawfuliy quit before the run is made.....1312

MAYHEM.

The disabling or disfiguring of any limb or member of a person need not be done by cutting, to constitute an offense under Act 1790, § 13..... 999
The particular weapon, means, or instrument used is not material, providing the result is maiming or disfiguring with intent to do so..... 999

MILITIA.

Const. art. 8, cl. 15, which confers power upon congress to provide for the calling forth of the militia to execute the law of the

Page

United States, and Act Feb. 28, 1795, applies to the states.....1339

MINES.

The United States have not conveyed or dedicated the minerals in the public lands to individuals or the public..... 416

MINISTER.

The privileges of a foreign minister are not extended to a person having a commission from a revolutionary government not acknowledged by the United States.....1123

If a foreign minister commits the first assault, he forfeits his immunity so far as to excuse defendant for returning it..... 359

It is no defense to an indictment for an assault on a foreign minister that defendant was ignorant of his public character.. 359

Upon an indictment for an assault committed on a foreign minister, proof that the person assaulted is received and recognized by the executive of the United States, is conclusive as to his public character..... 359

MORTGAGES.

An assignee of a mortgage four years overdue, and wholly unpaid, is chargeable with notice of its true consideration, which inquiry would have revealed.....1358

A judgment creditor may redeem a mortgage upon land upon which his judgment is a lien, even as against an assignee of the mortgage 1358

MUNICIPAL CORPORATIONS.

Authority to incur a debt does not carry with it the power to levy a tax to pay the debt, where other provision is expressly made for such payment.....*131

Where a city exhausts its revenues in defraying current expenses, mandamus will lie to compel it to pay matured, outstanding bonds 1308

NAVIGABLE WATERS.

The states composed from the Northwestern Territory cannot obstruct their navigable rivers, they being by the ordinance declared to be forever public highways 91

An individual suffering special damages by an obstruction of a navigable river may have a civil redress by a suit, though the obstruction be authorized by a state, if it be contrary to, or conflict with, an act of congress 91

Where a bridge to be constructed over navigable waters, with the draws as proposed, will not cause any appreciable obstruction to commerce, the federal courts will not act to enjoin the same..... 686

The obstruction of navigable rivers under the laws of the original states is not punishable as a crime, unless contrary to some clause in the federal constitution, or a treaty or an act of congress..... 91

The circuit court has no jurisdiction to punish as a crime the obstruction of navigable tide waters by the erection of a bridge, without an express grant of authority by congress..... 91

NEUTRALITY LAWS.

A federal judge has power, on just grounds of suspicion, to require a bond to observe the neutrality laws..... 680

Page

The presentation of a grand jury, charged with the duty of inquiring into the existence of the organization whose object was the invasion of the territory of a friendly power, that they believed such organization to exist, but could get no evidence, because witnesses refused to testify on the ground that their answers might criminate them, *held* sufficient ground of suspicion 680

Act June 5, 1794, extends to warlike expeditions from this country, though not intended to aid one belligerent against another, but directed against a friendly power at peace with all the world.....367, 380

To constitute the offense against section 3, the vessel must not only have been fitted out with intent to be employed against a friendly nation, but actually armed for that purpose 1123

An expedition, to be within Act June 5, 1794, § 5, need not to have been consummated without deviation of course. It is sufficient if it was begun and the means prepared to be carried on from the United States, though the vessel, at the identical time of sailing, was not in complete readiness for hostile engagements.....1233

To constitute the offense of beginning, setting on foot, or providing the means for a military expedition against a nation with whom the United States are at peace, under Act April 20, 1818, § 6, there must be a hostile intention connected with the act of beginning or setting on foot the expedition.. 380

When connected with such hostile intent, the crime is completed either by beginning, or setting on foot an expedition, or providing or procuring the means therefor..... 380

To constitute the offense, it is not necessary that the expedition should start for its destination 380

The guilty purpose must be proved, and the guilty acts done, within the judicial district where the indictment is found..... 380

The fact that defendant set on foot a military expedition, in violation of Act June 5, 1794, § 5, with the knowledge and approbation of the president, is no justification, as the president has no authority to set on foot a military expedition against a nation with which the United States are at peace 1192

On a trial on indictment under Act June 5, 1794, § 5, the president's message to congress, and other documents transmitted therewith, are inadmissible to show the existence of a war at the time the acts were charged to have been committed.....1233

Sufficiency of indictment for setting on foot and preparing the means for a military expedition against a foreign country with which the United States were at peace.... 367

A French citizen transiently within the United States cannot be criminally prosecuted for piracies and robberies committed by the captain of a privateer owned by him, upon neutral vessels..... 393

NEW TRIAL.

It is ground of new trial that the court submits as a question of fact to the jury a material fact, where the case was tried upon the assumption that such fact was admitted 1131

Where the government has so conducted the trial that defendant is entitled to take certain facts as admitted, and does not offer evidence thereon, he is entitled to a new trial, where such facts are subsequently left to the jury.....1138

A verdict for defendant in a suit to forfeit goods for violation of the internal revenue laws will not be set aside as against the evidence, though as to a small part of

Page
the goods the court entertains no doubt that upon the evidence the verdict is wrong. 277
The newly-discovered evidence must have come to the knowledge of the party since the trial, and must be so material that it would probably produce a different result..1175
Newly-discovered evidence impeaching the credibility of one of the witnesses is no ground for a new trial..... 604
A new trial will not be granted on the ground of surprise unless it appear that such surprise is in no degree attributable to the negligence of the applicant.....1175
A new trial will not be granted for misconduct of a juror in which the applicant participated 927
Grounds stated upon which a court of common law may grant a new trial..... 340
A motion for a new trial is too late after the case has gone to the supreme court on a certificate of a division of opinion on a motion in arrest of judgment.....1080

OBSTRUCTING JUSTICE.

A warrant of distress is not a legal process, within Act 1790, § 22, in relation to resisting officers 47
It is an indictable offense to combine to oppose the execution of a justice's warrant, without knowing its nature, and assaulting one of the parties attempting to execute it 237
It is not necessary that a constable should have a warrant to suppress an affray, in order to make opposition to him unlawful 538
An attorney and client conspiring to resist an officer are equally guilty.....1161
An indictment under Act April 30, 1790, § 22, must show by proper averments that the process was legal.....1350
A commissioner empowered to issue a warrant under Act Sept. 18, 1850, must be such a commissioner as is particularly described in that act.....1350
An averment in an indictment for resisting such a warrant that it was issued by a commissioner of the circuit court of the United States is not sufficient.....1350
The want of an averment of the facts showing that the commissioner was authorized to issue the warrant cannot be aided by referring to the records of the court....1350
An averment that a warrant was duly issued is insufficient. The facts constituting the due issue must be set forth.....1350
On an indictment for conspiring to resist an officer, actual violence need not be shown, but threats, and acts intended to terrify, or of a character to terrify, a prudent officer, are sufficient, even though he be not prevented thereby from executing his process 1161
The taking away of a vessel by her owner after she has been attached by a marshal, but while not in his actual custody, or that of a keeper, is not an offense under Act March 2, 1831, § 2.....1010
The expressions "obstruct" and "impede," as used in the act, refer only to direct acts of violence or menace, disturbing the ordinary functions of the court.....1010

OFFICE AND OFFICER.

See, also, "Customs Duties"; "Internal Revenue"; "Marshal"; "Obstructing Justice."

A person disqualified by the fourteenth amendment from holding office, by having engaged in the Rebellion after taking an oath to support the constitution of the United States, is indictable, under Act May 31, 1870, § 15, for subsequently accepting the office of sheriff..... 605
Page
Acts done under compulsion of force, or of a well-grounded fear of bodily harm, do not come within the constitutional provision 605
Accepting and holding the office of justice of the peace under the confederate government is not of itself sufficient evidence of engaging in the insurrection..... 605
The superintendent of public printing is subject wholly to the control of the joint committee of congress on printing. (Act Aug. 26, 1852).....1004
Where the words of a statute prescribing compensation admit of two interpretations, they will be construed most favorably for the officer 1
An officer cannot be allowed extra compensation for services performed, properly pertaining by law to his office.....1139
An officer with a salary payable quarterly, appointed for four years "unless sooner removed by the president," is not entitled to his salary to the end of a quarter during which he is removed.....1139
A surveyor of customs is entitled to commission on moneys paid to him for the treasury department, but not on moneys already in the treasury, which are transferred to him from other places of deposit...1065
The register of the treasury, though receiving pay as such, *held* entitled to compensation as agent for disbursing money appropriated for contingent expenses of the treasury department, library of congress, and other appropriations for public purposes 192
Salaries of officers of the territory of Minnesota 1139
In an action to recover a balance due from a receiver of public moneys, a claim that a certain sum had been stolen from him *held* not supported, he never having presented a claim for a credit of such amount 783
The auditor's report of a balance due from a person accountable for public money is not evidence in an action for the debt 462
Rev. St. § 1766, authorizing the salary of an officer in arrears to be withheld, and Id. §§ 300, 307, 308, in relation to the payment of warrants after three years from issuance, form no part of the contract with the officer's sureties..... 603
United States, in an action upon a collector's bond, cannot obtain judgment against the surety for more than the penalty 806

PARDON.

A pardon may be partial, and contain any lawful conditions.....1097
A pardon for offenses against the revenue laws cannot relieve the offenders of payment of taxes..... 884

PARENT AND CHILD.

The child must partake of the condition of the mother, and where the mother is a white woman, and the father an Indian, the child will be deemed of the white race.... 950
The marriage of the mother of a bastard, and the acknowledgment by the husband of the child, are prima facie evidence that he was the father.....1122
The declarations of a father as to the maternity of his child are competent evidence 950

PAYMENT.

While a company may issue promissory notes, in the form of banknotes, in pay-

Page

ment, they have no right to issue them for the purpose of putting them in circulation as a current circulating medium..... 715

PENSION.

An adopted child is not entitled to a pension, but a legitimated child is entitled to a pension under Act March 4, 1814.....1122

An indictment for retaining a greater sum than the statutory allowance for collecting a pension cannot be sustained where the amount was paid under a prior contract for services in causing to be removed from the rolls of the war department a charge of desertion.....1255

PERJURY.

Perjury consists in swearing falsely and corruptly, contrary to the belief of the witness, and not in swearing rashly and inconsiderately according to his belief.....1051

Where affiant stated the facts truly, and signed an affidavit on the advice of his lawyer, in whom he confided, that they were substantially the same therein, he is not guilty of perjury, though the affidavit be false 1292

A person cannot be convicted of perjury in swearing falsely to an income tax return, where it was not made with a corrupt intention, but with the honest belief that it was correct.....1175

Although the income tax act makes no provision for compelling a person to make oath to his return, yet, as it permits him to do so, intentional false swearing therein is perjury.....1175

Where an act expressly describes the kind of proof of compliance with its requirements, it is not competent for any officer of the United States to require new oaths, so as to make the false taking of them perjury 146

An indictment for an act which does not constitute an offense under the laws of the United States is still "a suit, controversy, matter or cause pending," in which perjury may be committed. (Act 1790.)..... 746

The act of 1825 in relation to perjury, being a general law, applies to all subsequent cases which come within it..... 151

The bankrupt's intentional omission to state a part of his property in his sworn schedule is perjury under the act of 1825.. 151

To constitute the offense of false swearing under the fisheries bounty act of 1813, there must be a willful and corrupt intent to swear falsely.....1165

The secretary of war may prescribe the contents of affidavits by drafted soldiers claiming exemption from military service, and false swearing as to such facts is perjury. (Act March 3, 1863.).....1259

A notary public is an officer authorized to administer oaths in such cases.....1259

Whether a false oath was taken under mistake as to the law or fact involved therein is a question of fact for the jury..1175

Upon a conviction of perjury the court may inflict the punishment of fine, imprisonment, and the pillory.....1255

PIRACY.

A commanding officer making seizures of vessels carrying contraband of war to the enemy acting in good faith under a forged commission, is not guilty of piracy.....1172

The United States court will treat as pirates all persons engaged in plundering vessels of United States citizens under authority of a government set up by insurgents against whom a civil war is being waged 1134

A subordinate officer, who in good faith enters a formal protest against a seizure by his vessel, is not guilty, with the others, of an act of piracy.....1172

The seizure of a vessel carrying arms and munitions of war to a port of the enemy by an armed ship, whose officers held commissions from the hostile country, is not piracy 1172

The federal circuit court has jurisdiction of piracy on board of an American ship, committed in an open roadstead adjacent to a foreign territory, and within half a mile of the shore. (Act April 30, 1790, c. 9, § 8.)..... 899

PLEADING AT LAW.

A demurrer goes to the first defect in pleading 1281

The amendment of a libel in the district court will not be allowed where the same introduces a new, substantive cause of action, and a new charge against defendant. Otherwise where the new cause of action corresponds in character, and is kindred in nature, to that presented in the original libel 291

The variance is fatal where the paymaster general of state militia is described in a suit on his bond as "principal paymaster" of the state militia.....1284

POST OFFICE.

Post routes and roads, and private letter carrying.

A person who sends a packet of letters by a passenger over a post road, without the knowledge of the proprietors or their agents, is not subject to the penalty provided by Act March 3, 1825, § 19..... 588

Officers.

A postmaster, until the action of the postmaster general, does not vacate his office by remaining out of the neighborhood.. 480

An action on a bond of a postmaster is barred after two years after the date of the last item charged against him. (Act 1825, § 3.).....1006

Offenses—Unmailable matter.

The mailing of a postal card containing words imputing illicit intercourse to third persons, but no epithet in the form of a substantive or adjective, is an offense under Rev. St. § 3893, punishing the mailing of postal cards containing "indecent or scurrilous epithets." 611

—— Robbery: Theft: Embezzlement.

Rev. St. § 5467, is not confined to the offense of stealing or taking things out of a letter packet or bag, but includes the taking of the letter itself..... 485

An employé in a post office, who steals gold dust from a letter in the mail, is liable to indictment, whether the same be mailable or not, under Act July 1, 1864, § 12.. 696

No one can be convicted under Act 1825, § 21, who is not employed in the post-office department 189

To convict a person of stealing a letter, etc., who is employed in the department, such employment must be distinctly alleged and proved 189

To constitute the offense, it is not necessary that the letters stolen should have been taken out of the post-office building..... 189

Some evidence is necessary of the genuineness and value of banknotes charged to have been stolen out of a letter..... 189

A letter dropped in a post office, intended for a person at such place, is not a letter

Page

intended to be "conveyed" by post. (Act 1825, c. 275, § 21.) 232
The stealing or taking a letter, etc., under section 22, means a taking with a criminal intent, and not a taking through mistake, or with an innocent intent..... 480
A letter delivered to an authorized agent cannot be charged to have been embezzled 949
A person who receives a letter from a letter carrier, addressed to another, without fraud or artifice, is not liable to indictment under Act March 3, 1825, § 22, where he opens the same and embezzles money therefrom 451
In an indictment for embezzling a letter containing money (Act July 1, 1864, § 12), it is not necessary to aver that the letter embezzled was intended to be conveyed to any particular place, but only that it was intended to be conveyed by post..... 231
An averment that a letter deposited in the post office at New York was addressed and directed to a person named at Philadelphia, and was intended to be conveyed by post, is not an averment that the letter was intended to be conveyed by post from New York to Philadelphia..... 231
An averment as to the ownership of the money is not necessary..... 231
An indictment under Act March 3, 1825, § 22, which alleges that defendant did secrete "and" embezzle a certain letter, is not defective 949
In an indictment for embezzlement, it is sufficiently certain to charge that defendant was "a person employed in one of the departments of the post-office establishment of the United States."..... 466
When the embezzlement is of a letter containing a banknote, it is not necessary to describe the note..... 466
The presumption of theft arising from the disappearance of mail matter may be repelled by evidence of the miscarrying of mails sent through the same office after defendant's removal 1307

— **Obstructing correspondence.**

It is an offense to open a letter, which has been in the post office, before delivery to the addressee, with intent to obstruct his correspondence, or pry into his business or secrets, though the letter was not sealed, and was written by defendant himself, and the addressee's name was not correctly given. (Act March 3, 1825, § 22.).... 590
The indictment need not allege any venue of the lawful intent, nor that the opening was unlawful, nor that the addressee was a real person 590
Section 21, which prescribes a punishment for the detention of a letter or packet, refers to a letter or packet detained before it reaches the place of destination..... 480
An intention to obstruct the mail flows from an unlawful act that so operates, although its primary object was to accomplish another purpose..... 1312
Act March 3, 1825, § 22, in relation to opening letters to obstruct correspondence, etc., applies only where the possession of letters was obtained wrongfully from the post office, or from a mail carrier..... 451
A person who, without artifice, receives a letter for another, addressed in his care, and opens and destroys the same, cannot be convicted of opening the same with the design to obstruct the correspondence, etc., of another 22
A letter carrier who delivers letters from house to house is a mail carrier, within Act March 3, 1825, § 22..... 451
The writer of a letter which has passed from the office where mailed has no right to intercept it, or authorize its delivery to a person other than the one to whom it is directed 206

Page

On an indictment for taking a letter from the post office with intent to obstruct correspondence (Rev. St. § 3892) defendant may be convicted without evidence of an unlawful, clandestine, or fraudulent taking 206
Proof of an intentional nondelivery of a letter so taken from a post office may be sufficient 206
A person indicted for such taking of a letter with intent to pry into the business or secrets of another cannot be convicted if he knew the contents of the letter before he received it 206
It is no defense that the letter related in part to defendant's business, or that in good faith he believed that the letter was of no value to the person to whom it was addressed, even if such be the fact, or that the letter was voluntarily delivered to defendant by the postman..... 206

PRACTICE AT LAW.

A stipulation induced by misrepresentations is not binding on the court..... 502

PRACTICE IN ADMIRALTY.

The practice of the federal courts in admiralty is governed by the rules of admiralty law found in the English Reports...1027

PRESIDENT.

The president has power to call out the military in aid of the civil authorities of the District of Columbia. (Const. art. 2, § 2.)..1339

PRINCIPAL AND AGENT.

No action will lie in the name of a principal on a written contract made by his agent in his own name, although defendant knew the agent's character..... 415

PRINCIPAL AND SURETY.

See, also, "Bonds"; "Office and Officer."

The sureties on the bond of a receiver of public moneys are not liable for moneys received before the date of the bond, but during his term of office.....1281
The sureties on the bond of a receiver of public moneys are not liable for money which came into his hands the day after the expiration of his term of office.....1281
A discharge from imprisonment by the secretary of the treasury of a debtor to the United States, under the act of 1798, does not discharge his co-obligors and sureties in the bond from their liability.....1358

PRIZE.

A capture by naval forces of property stored in a warehouse near the shore of a harbor is a subject of prize jurisdiction...1027
Where no prevarication or other improper conduct on the part of the captured vessel is shown, the question of condemnation of the vessel is to be determined from the papers found on board.....1273
A captured vessel is subject to trial and condemnation for violating the law, whether the persons or means employed in making the seizure were authorized or not.... 236
The destination of arms and munitions of war, and the use intended to be made thereof at the time of seizure, furnishes a test of their status as contraband or otherwise 1087

Page

A United States vessel is not subject to condemnation because it carries a special pass or license from the enemy, or the enemy's agent 1273
Seamen on board a prize captured and condemned as enemy property have no lien for wages, as against the title of the United States and the rights of the captors.... 932
The absence of all papers, where the vessel was captured off a blockaded coast, far out of the route of her ostensible voyage, after a long chase, *held* a strong presumption of intentional destruction..... 236

PUBLIC LANDS.

See, also, "Grant."

The state, under its power of eminent domain, may make public roads through the lands of the United States, unrestricted by the proprietary right of the latter.. 686
The person commencing an improvement has a right to continue, and any one that intervenes may be considered a trespasser..1292
On the abandonment of a military reserve by giving notice to the secretary of the interior, the same may be considered as a part of the public lands open to entry and sale as other lands..... 686
An indictment will lie for cutting or removing timber from any of the public lands, though the same are not reserved for naval purposes.....726, 978
Persons occupying under the pre-emption, homestead, and mining acts, before becoming the owners of the land, may cut and use the timber thereon, so far as the same may be necessary to accomplish the purpose for which the land is occupied, but no further 86
The cutting and sale of timber from four acres in advance of the mining operation, where the only reason assigned is that the stumps may rot and be more easily removed, *held* unnecessary, and therefore unlawful 86
A nominal fine, only, imposed for cutting timber, where defendant had made full reparation, and there was no intention to defraud the public 38
The term "timber" signifies the standing trees and the felled trees prepared for transportation to a vessel or sawmill, such as sawlogs or lumber in bulk, but does not embrace any article manufactured from the tree, such as shingles or boards..... 978
An indictment for removing timber from public lands must state the particular section or quarter section from which the timber was taken, as a part of the description of the offense..... 978
An indictment which describes the land, in general language, as "lands of the United States," is not sufficient..... 978
An indictment for removal need not allege that the timber was removed from the land on which it was grown, or from which it was cut..... 978
In an indictment for trespass in cutting timber, it is not necessary to describe every kind of timber cut..... 726
The grant of lands under water to adjacent proprietors, under Act N. Y. April 10, 1850, c. 283, must be confined to a line starting at the intersection with the shore, and extending at a right angle with the thread of the stream, or at a right angle into the lake, without any regard to the course or direction of the line upon the land 911
A person obtaining a grant in violation of the statute will be restrained, at the suit of a proprietor of adjacent lands entitled to the grant, from making erections upon the lands..... 911

RAPE.

Page

An attempt by a slave to ravish a white woman is punishable by death..... 460

RECEIVING STOLEN GOODS.

The receiving of stolen goods in one jurisdiction with knowledge that they were stolen in another is an offense in the former jurisdiction 3

RELEASE AND DISCHARGE.

While a defendant is charged in execution, the debt is considered as satisfied, and a discharge of one co-debtor is a discharge of all 411

RIOT.

To constitute a riot, three or more persons must assemble with intent by force and violence to do some unlawful act, and mutually to assist each other against any one who should oppose them in doing such act; and the act must be done in a violent and turbulent manner, to the terror of the people 477
Premeditation and conspiracy, or promises of mutual assistance, are not necessary to constitute a riot..... 477
A man may be convicted of a riot, who was not actively engaged therein, if he was present and ready to give support if necessary 477
Three or more persons who act in concert, by prior arrangement, in a violent and turbulent manner, in opposing a public officer in the performance of his duty, *held* guilty of riot.....1339
The previous intent and agreement to do the unlawful act may be inferred from the doing of the act accompanied by the declaration of an intent to do it.....1347
A person convicted of assault and battery committed in a riot may still be tried and convicted of the riot..... 477

ROBBERY.

To constitute robbery, there must be fear or force 1080

SALE.

A usage in the grain trade in a certain locality to deliver barley in sacks may be shown, when nothing is said in the contract as to the mode of delivery..... 871
Where the seller notifies the buyer that he regards the contract as rescinded, and will make no more deliveries under it, the purchaser may treat the contract as wholly broken, and at once recover damages upon the entire contract, without demand.. 871

SEAL.

The common-law rule that a seal must consist of wax, or some tenacious substance, does not apply to a bond taken under an act of congress; and, under the general usage, a scroll is sufficient to make the instrument a sealed instrument.....1305

SEAMEN.

Shipping articles to a certain port and a market are sufficiently definite.....1290
The statutes requiring bond for the return of all the crew do not apply to foreign seamen shipped at their own home

Page

for a particular cruise, ending where it began, and discharged there according to the terms of their contract..... 452
Under the statutory bond to exhibit the crew list and produce the persons named therein, the master is bound to exercise all his lawful authority for the purpose of bringing back the persons named therein.. 406
It is the duty of the master to find and apprehend all deserters or seamen leaving the ship openly..... 406
The master is not exonerated from his covenant by merely showing physical inability subsequently accruing on his part to perform it, or that others, whose consent and concurrence were necessary, would not permit its performance..... 406
The master should be considered as relieved from the performance of the condition of the bond when, by reason of sickness, or by being superseded in a foreign port, he becomes unable to perform the conditions 406
In an action on a bond for the safe return of the crew, parol evidence is admissible of the contents of a consul's certificate authorizing the discharge of one of the men, on proof that such paper has been lost 452
A voyage from A. to B., or some other port, and return to the United States, is not ended on arrival at the first port of the United States, unless it be the port of discharge 1166
The master has authority to confine his seamen in a common jail in a foreign port for offenses and misconduct, in extreme cases, where the proper correction or punishment cannot be effectual on shipboard.. 912
To complete the offense of maliciously and without justifiable cause forcing an officer or mariner on shore, or leaving him behind in a foreign port (Act 1825, c. 276, § 10), it is not necessary that he should be in a condition to return, and willing to return 89
It is an offense, under such act, to leave behind a seaman imprisoned by the master for using abusive language on the refusal of his application for a discharge... 89
The offense of maliciously forcing a mate on shore at a foreign port, and leaving him there, may be committed, although no physical force was used, as in the case where the mate left the ship under a well-grounded fear of his life had he remained on board 809
The forcing a mariner on shore must be done both without justifiable cause, and maliciously, to justify a conviction under Act 1825, c. 65, § 10..... 912
"Maliciously," in such statute, means, with a willful disregard of right and duty, or doing the act against a man's own conviction of duty..... 912
A mere intention to give pain, or to torture the person assaulted, will not support an indictment against the master for an assault on the mate with intent to kill..... 809
The owners may change the master after the seamen have shipped..... 210
The master has authority to displace the mate and all other subordinate officers during the voyage..... 966
The mate is a seaman, within the act of 1790, c. 36, § 12..... 966
One who secretes himself on board before sailing, and discovers himself after the vessel is at sea, is not one of the crew, though the master requires him to work, as a condition of his having food, and he does work 1128
Seamen of the United States, put on board a vessel of the United States by a consul, are bound to the same obligations, which exist in cases of articled seamen....1041

Page

A distressed American seaman, sent home on board an American vessel, his fare being paid by the American consul, is bound to do duty as a seaman when called upon by the mate of the vessel..... 930
Foreign seamen on board American vessels are as much subject to punishment for acts of revolt, or attempts to commit revolts, as Americans..... 515
Where a registered vessel has entered on a whaling voyage without surrender of her register, she is not an American ship, within Act 1835, c. 40, and an indictment will not lie against her crew for an endeavor to make a revolt..... 890
A revolt, under Act March 3, 1835, c. 40, consists, not only in an attempt to usurp the command from the master, or to transfer it to another, or to deprive him of it, for any purpose, by violence, but in resisting him in the free and lawful exercise of his authority 515
The crew have no right to disarm the master, though using a deadly weapon, if they are in a mutinous state, and exercising personal violence to resist his lawful command 515
Seamen who, with good reason, believe a vessel to be unseaworthy before the voyage is begun, may lawfully refuse to go to sea in her 210
An endeavor to make a revolt, within Act April 30, 1790, c. 9, § 12, is an endeavor to excite the crew to overthrow the lawful authority and command of the master and officers of the ship.....1166
A combination by the crew to prevent the vessel from going to sea pursuant to the order of the master is an attempt to commit a revolt 210
To constitute an endeavor to commit a revolt (Act 1790, c. 36), there must be some effort or act to stir up others of the crew to disobedience of the master..... 966
A seaman who comes on deck to ascertain the cause of a disturbance, and refuses to go below when ordered by the master, may be punished for an endeavor to make a revolt..... 822
Any confinement of the master, whether by depriving him of the use of his limbs, or by shutting him up in the cabin, or by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement, under Act April 30, 1790, § 12 1246
To constitute a confinement of the master (Act 1790, c. 36), it is sufficient that there is a personal seizure or restraint, although it may be for the purpose of inflicting personal chastisement..... 966
Any confining of the master, whether by force or intimidation, is a confinement, within 1 Stat. 112.....1041
The master cannot be confined by the officers and crew, except in a clear case, to prevent his committing acts which might endanger the lives of all on board.....1041
A seaman may endeavor to escape the infliction of personal chastisement for offensive language used, and may resist for the mere purpose of protecting himself from injury 1247
Where the master uses an unlawful weapon, or the seaman is exposed to danger of his life or limbs, he may resort to any necessary species of defense to avoid the danger 1247
Where the master strikes a seaman, and is seized and so firmly held by him that he cannot extricate himself, the seaman is guilty of confining the master.....1247
One who joins in the general conspiracy, and by his presence countenances acts of violence, but who does not individually use force or threats to compel the master

Page

to resign the command, is guilty of the offense of confining the master.....1041
Where seamen who request a survey, when in port or within sight of land, are treated with unnecessary severity, their remedy is at law after their return, and not a resort to violence, unless in danger of the actual loss of life, and then at their peril, as the result may turn out.....1290
A vessel lying on the sea outside of the bar of a harbor of the United States, within three miles of the shore, is on the high seas 1166
A vessel lying in the mouth of a river a mile and a half wide is on the high seas, within Act April 30, 1790.....1246
A vessel lying in a harbor, fastened to the shore by cables, and communicating with the land by her boats, and not within any inclosed dock, or at any pier or wharf, is on the "high seas," outside of low-water mark on the coast.....1002
The federal circuit court has jurisdiction of the offense of endeavoring to make a revolt on board of an American ship in an inclosed dock into which ships are floated on high tide, in the port of Havre..... 822
An indictment for confining the captain, for an assault in a foreign port on a vessel belonging to a citizen of the United States, need not negative the fact that defendant was tried and convicted or acquitted by the foreign tribunal 1325
Seamen are not liable criminally, where, on going on board, and after examining the vessel, they refuse to serve on the ground that she is unseaworthy, though she was not in fact unseaworthy; otherwise where they refuse to continue after commencement of service 1290
The crime of endeavoring to make a revolt is one against the master, and it is sufficient to charge it in the words of the act of 1835 to give the court cognizance of it, even within the requirements of Act March 3, 1825.....1002
On an indictment for an endeavor to make a revolt (Act March 3, 1835, § 2), it is not necessary to give documentary proof of the national character of the vessel..1002
To render a vessel American, so as to punish offenses on board of her, it is enough to show that she sailed from and to an American port, and was apparently owned and controlled by citizens of the United States..... 515
The log book kept by the master is not evidence in an indictment for a revolt and confining the master 1041
Where there is a verdict of guilty on two counts,—one for a revolt, and another for an attempt to excite it,—the judgment will not be arrested..... 515

SEIZURE.

See, also, "Customs Duties"; "Internal Revenue."

The provisions of Act May 8, 1792, § 4, requiring the marshal to take custody of all goods seized by revenue officers, were abrogated by Act July 18, 1866, § 31.... 248
Reasonable cause sufficient to justify seizure means probable cause, and imports a seizure under circumstances which warrant suspicion 315
Where probable cause of seizure is shown, claimants have the burden of showing by a fair preponderance of evidence that the illegal acts charged were not committed 1092
The seizure of a vessel which, under a codfishing license, has incidentally caught mackerel, is a municipal seizure, expressly provided for by acts of congress as justifiable if a certificate of probable cause is given 758
A certificate of probable cause will be given if the officer making the seizure acts in good faith, and has reasonable grounds to suppose that the law has been violated. 758
A certificate of reasonable cause for seizure will be granted where it appeared that the collector acted under the instruction of the former officer in making the seizure, upon a construction of the statute adopted by the secretary of the treasury in conformity with an opinion of the attorney general 723
It makes no difference whether the collector acted under a mistake of facts or of the law 723
A reasonable ground of suspicion is reasonable cause for a seizure..... 723
A lapse of two years *held* no bar to the application, but the laches were sufficient to cast the costs of the action against the collector upon him 723

SET-OFF AND COUNTER-CLAIM.

Claims against the government are not admissible as a set-off which have not previously been presented to and disallowed by the proper accounting officer, except in the case of absence from the United States, or unavoidable accident preventing such presentation 1139
The rejection of a claim by an officer authorized by special act to settle the same on equitable principles does not preclude its being set up as a set-off.....1139
In a suit by the government on a marshal's bond to recover moneys collected on execution, defendant cannot set off accounts which had been presented as a charge against the government in another claim to which they have a good defense under the statute of limitations..... 613

SHIPPING.

See, also, "Fisheries."

An enrollment and license duly executed does not require delivery to give it validity. 544
The vessels included within Act 1831, § 3, are not subject to forfeiture under Act 1792, § 16, relating to sales to foreigners without delivering up the certificate of registry 987
A vessel which has been enrolled and licensed under the act of 1831, but whose license has become void by a subsequent sale, is no longer a licensed and enrolled vessel, so as to be subject to forfeiture by her sale in whole or in part to a foreigner in violation of section 32..... 987
A vessel enrolled and licensed under the act of 1793 for the coasting trade and fisheries is not subject to forfeiture under the act of 1792, § 16, for false swearing on application for registration..... 987
The master is not liable for the penalty for the nondelivery of the temporary register (Act 1793, c. 52, § 3) unless there be an arrival at the port to which the vessel belonged, not by accident or from necessity, but intentionally, as one of the termini of the voyage 1038
The mere touching at a port to land passengers when on the way to another port will not make a case within the act.....1040
To work a forfeiture of a vessel for having been engaged in a trade other than that for which she is licensed, the old employment must have been abandoned, and a new trade must be permanently and exclusively pursued 758

Page

A libel under Act Feb. 28, 1793, § 32, need not specify the particular trade in which the vessel was engaged at the time of the seizure..... 454

A canal boat without motive power of its own, towed through a canal by horses, and on navigable waters by a steamer, does not come within Act Feb. 18, 1793, in relation to vessels employed in the coasting trade.. 219, 494

The exception in section 42, Act Aug. 30, 1852, applies to a vessel built and used as a ferryboat, and employed one day only in carrying passengers three miles distance to a state fair 386

A steamboat employed in transporting passengers between ports in the same state is not within the inspection law of August 30, 1852 1021

A passenger steamer navigating the Ohio river between Pittsburg and Gallipolis, having but one licensed pilot on board, the captain acting also as pilot, has not the number of pilots required by law..... 986

The captain may temporarily supply a deficiency in the complement of pilots which arises during a voyage without his consent, fault, or collusion, but he cannot begin a new voyage with a deficiency..... 986

A master who, without being licensed, performs the duty of pilot to make up the required number, is liable to a penalty of $100 (Act Aug. 30, 1852), besides subjecting the boat and its owners to a penalty of $500. (Act July 7, 1838, § 1.)..... 986

Where a mate appointed master in a foreign port knowingly sails with a larger number of passengers than that allowed by law, he is liable for the fine of taking an excessive number of passengers on board, though the agreement of shipment was made by the former master..... 4

The penalties provided for by the passenger act of 1848 can only be recovered by an action of debt on the common-law side of the court..... 89

SLAVERY.

A slave charged with simple larceny is to be tried and punished by a justice of the peace 1080

History and construction of the statutes in relation to slave trade..... 78

Construction of Act May 10, 1800, in relation to the transportation of slaves from one foreign place to another.....1158

Act April 20, 1818, § 1, does not apply to a case of a colored person born and reared within the United States sailing to a foreign port or place on an American ship, and returning to a port of the United States 218

Sufficiency of indictment founded on the slave trade act. (April 20, 1818, c. 83, §§ 2, 3.) 1167

Prosecution and punishment under Maryland acts for enticing a slave to run away.. 625

Quære. Whether an indictment will lie at common law for enticing away a slave.. 590

Sufficiency of indictment under Act Md. 1796, c. 67, § 19, for giving a pass to a slave 625

Congress has power to pass the acts of 1793 and 1850, providing for the rendition of fugitive slaves..... 990

A member of a vigilance committee formed to prevent the arrest of a fugitive slave is liable for aiding, assisting, and abetting in his escape..... 918

On a prosecution for aiding in the escape of one arrested under lawful process as a fugitive slave, it is not necessary to show that he actually was the slave of the person at whose instance the process was issued 918

Page

The rendition of fugitive slaves under the acts of 1793 and 1850 is an executive, and not a judicial, proceeding, and trial by jury is not necessary therein..... 990

STATES.

On the admission of a state into the Union, the United States parts with jurisdiction over land owned by them therein, so far as the general purposes of government are concerned, except as to such jurisdiction as is expressly reserved and accepted.....1288

Jurisdiction which a state has once exercised cannot be withdrawn from it, and conferred on the general government, without the consent of the state.....1288

STATUTES.

Where a statute of the United States makes any provision upon a subject within the scope of the powers of the general government, the state laws upon the same subject cease to operate..... 23

Where any part of a state law is not applicable to the case at the time of the enactment of an act of congress referring to the laws of the states as rules of decision, the whole statute is inapplicable..... 23

The title of an act of congress, when at variance with its provisions, will not be considered, except to explain doubtful meanings 709

A penal statute will not be given a retroactive effect unless the intention is clearly expressed 1296

In the construction of a penal statute an offender who is protected by its letter cannot be deprived of its benefit on the ground that his case is not within the spirit and intention of the law..... 684

Repeals by implication are not favored, particularly in revenue laws, and will be only held to exist when the repugnance is positive, and then only to the extent of such repugnance 303

The provision in a subsequent act providing a limitation for a prosecution, "any law or provision to the contrary notwithstanding," repeals prior provisions on the same subject 546

Where a subsequent statute expressly substitutes a different tribunal to determine a question, it impliedly repeals the former statute 244

The repeal of a statute pending proceedings to enforce a penalty or forfeiture under it will bar further proceedings, where there is no saving clause.....1089

Where a statute makes it a felony to steal the notes of any particular incorporated bank, the act of incorporation becomes a public statute, and may be proved by the statute book..... 595

The unwritten law of a foreign government may be proved by parol evidence, but the written law can only be proved by itself 359

The statutes of England may be proven by the printed publications thereof obtained from the queen's printer..... 276

The construction of a foreign statute by those whose duty it is to apply and administer it will be followed, unless it appear clearly that it has been misinterpreted...1062

SUBROGATION.

Where a debtor gives his co-debtor a mortgage to secure the latter against the debt of their creditor, the mortgagee will be considered in equity a trustee for the creditor....1358

TERRITORIES.

Page

Act July 20, 1868, imposing a tax on distilled spirits, being a general act, and passed since the acquisition of Alaska, is in force there 1021

TRADE-MARKS AND TRADE-NAMES.

The fact that the eagle is the national emblem of the United States does not prevent its appropriation by private parties for use as a trade-mark, especially when there is but slight resemblance in the figure of the eagle so used to that of the national emblem 1303

The right of the proprietor of a trade-mark to its exclusive use, and to protect and enforce such right by proceedings in chancery, exists by virtue of the common law, and independently of the trade-mark acts 875

A person cannot imitate the trade-mark of another by using any of its prominent and distinguishing words, where calculated to deceive the cautious and careful purchaser 875

The certificate of the commissioner of patents as to the registration of a trade-mark *held* admissible in evidence under Rev. St. § 4940, and prima facie evidence of proper registration 1303

TREASON.

The going from the enemy's squadron to the shore for the purpose of peaceably procuring provisions for the enemy is not an act of treason; otherwise where provisions are carried towards the enemy with intent to supply them, though such intention is defeated 628

TRIAL.

See, also, "Continuance"; "Criminal Law."

The construction of the federal constitution by the supreme court is binding on the jury as well as the court.....1065

The constitutionality of an act of congress is not a proper subject for the consideration of a jury 1065

If a contract is to be made out through a correspondence, the question of its construction is one for the court, regardless of its extent 1046

Where, after a jury is sworn, it appears necessary to examine and determine accounts between the parties, the jury will be discharged, and the case sent to an auditor 895

The court has no right to give the jury any direction upon questions of fact, but should call their attention to particular points, and observe upon the tendency, force, and comparative weight of conflicting testimony 958

A verdict is nugatory in so far as it finds facts not put in issue by the pleadings.... 255

Under Act Sept. 24, 1789, § 32, the court may give judgment as the right appears, without regarding any imperfection or want of form in the verdict..... 665

Where a cause of action against three is joint and several, and two join in their plea, and the other pleads severally, but no finding is made as to one of those pleading jointly, it is no ground of arrest of judgment against the other..... 217

TRUSTS.

Page

A broker for an army paymaster, who accepts his official checks in payment for stock transactions, is charged with notice of the trust which a suitable inquiry would have revealed, and is liable to the government for property thus embezzled..... 585

UNITED STATES.

On the admission of Kansas into the Union, jurisdiction within forts of the United States within the state was not excepted, and the consent of the state is necessary to the exercise of federal jurisdiction therein..1288

A suit prosecuted in the name and for the benefit of the United States will not be recognized in the federal courts unless they are represented by the district attorney, or some one designated by him.....1350

No property belonging to the United States can be disposed of except by authority of an act of congress. (Const. art. 4, § 3.)..... 149

A contract made with the secretary of the navy cannot be rescinded by the chief of the bureau having charge of such contracts 1046

The acts giving the United States preference in cases of insolvency will not be so construed as to destroy prior legal liens....1065

An assignment, to entitle the United States to their priority (Act March 3, 1797, § 5), must be an assignment of all the debtor's property, but it need not be for the benefit of all his creditors..... 6

The United States is not entitled to a priority, under Act 1799, c. 128, § 65, out of funds in the hands of assignees, unless there be a general assignment by the debtor of all his property..... 32

An assignment by partners of all their effects for the payment of their debts, for which the partnership estate is inadequate, is an act of insolvency which will give the United States preference in the payment of their debts against the firm or its members 1056

The fact that a creditor gave up his intention of levying in consideration of a general assignment in trust, first to pay his claim, and then the debt of the United States, will not prevent the assignment being fraudulent and void as against the United States 6

WAR.

See, also, "Limitation of Actions"; "International Law"; "Neutrality Laws"; "Prize."

The power of making war is exclusively vested in congress, but the president has power to repel invasions by hostile forces, even when congress has not declared war..1192

The condition of peace or war, in a legal sense, must be determined by the political department of the government, and the courts are bound by that decision.... 284

The conditions of war and peace are purely for political determination, and courts will not take judicial notice that hostilities of the late Civil War ceased, and peace was restored, by the surrender of any particular army. (Reversing 324.)..... 325

The prescriptions of the federal government impose no legal or moral obligation, and obedience is justified only on the ground of deadly coercion by violence or threats 325

The principle of the law of nations, that where a war exists between two distinct and independent powers there must be a suspension of all commercial intercourse between their citizens, is not applicable to the war of the Rebellion.....1087

Assumpsit will lie by the United States, after the return of peace, to recover against a person indebted for money had and received to one of the insurgent state governments, as on a common-law obligation..1163

Page

Under Act July 13, 1861, and the president's proclamation in pursuance thereof, citizens of the rebellious states prima facie become, for purposes of commerce, quasi enemies, and cannot sue in the federal courts 292

A granting of a license to trade by the secretary of the treasury restores the standing of the grantee, so as to enable him to be heard in the federal courts..... 292

Every inhabitant of a state in rebellion during the Rebellion is considered as an alien enemy, and incapable of appearing in a federal court as a claimant of property libeled therein 334, 335

In determining the status of rebel persons and property, the federal courts are guided by municipal, and not by international, law 292

The concession of belligerent rights by the government of the United States to the Confederate States did not operate to suspend the revenue laws, so as to relieve goods imported in a port under control of the insurgents from the payment of duties to the United States 1293

Nor was such effect produced by the proclamation of April 19, 1861, declaring a blockade of certain ports.....1293

Upon a libel of information to condemn certain railway shares of an alien enemy, the railway company cannot become a party without showing that it is the true and bona fide owner, and that no other person is the owner of the property in dispute. (Admiralty rule 12.)..... 335

The confiscation act (Aug. 6, 1861) is constitutional, and applies to real estate... 781

A forfeiture of property is imposed by Act Aug. 6, 1861, only where it is employed, with the knowledge or consent of its owner, in aid of insurrection..... 337

A federal district court in New York cannot acquire jurisdiction in rem to declare a forfeiture under the confiscation acts of August 6, 1861, and July 17, 1862, of shares in the capital stock of an Illinois corporation 337

Under such acts the proceedings to condemn enemy property when seized must conform to the proceedings in admiralty and revenue cases..... 337

An alien enemy has a right to appear as claimant, and to answer and defend the suit under such acts..... 337

Act July 13, 1861, is not a penal, but a revenue, statute, and is to be construed liberally, so as to accomplish its proposed object 284

Goods are "proceeding to" the interdicted port (Act July 13, 1861), and the shipper is guilty of an "attempt" to transport them in violation of law (Act May 20, 1862), when he procures a permit by the use of fraudulent invoices 284

A license to trade in the rebellious states, obtained through error, mistake, or fraud, will not prevent the forfeiture under Acts July 13, 1861, and May 20, 1862, the same being prohibitory acts..... 292

Merchandise at sea, consigned to merchants in an insurrectionary state, but assigned to creditors in New York, to cover previous advances, three days before the proclamation of August 16, 1861, and passing into the custody of the assignees on its arrival, *held* not subject to confiscation.... 271

A sale of contraband property by a citizen of one belligerent country to a citizen in the other belligerent country is a breach of allegiance 284

The mere existence of a law prescribed by an insurrectionary government in itself is not sufficient to justify a sale to it, and prevent a forfeiture of the property sold, under Act Aug. 6, 1861. (Reversing 324.). 325

Page

In a proceeding under Act Aug. 6, 1861, to forfeit an interest in a vessel, the pleadings and proceedings are subject to like rules as in ordinary cases of prize of war; and the mere charge of the offense is all the specification that need be made in a libel alleging that the property was seized as prize 527

A pardon and amnesty do not annul past transactions, so far as to invalidate a previous judicial confiscation and sale of a claimant's property 1097

Forfeitures incurred under Act July 13, 1861, during the continuance of hostilities, might be enforced afterwards.....1329

Forfeitures declared under Acts July 13, 1861, § 5, Aug. 6, 1861, May 20, 1862, July 17, 1862, can only be enforced by seizure of the property 1329

The establishment of the provisional court for Louisiana by the president, as commander in chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations 768

Such court continued rightfully to exercise its functions so long as its commission remained unrevoked, and the power of the United States continued to support it in the exercise of them..... 768

The agreement of capitulation between Generals Sherman and Johnston was a mere military parol, terminating with the war, and the persons included were liable to arrest for treason after the war..... 911

The seizure of enemy property by the United States as prize of war on land, jure belli, is not authorized by the law of nations, and can be upheld only by an act of congress 337, 1329

WASTE.

The working of a gold mine is the taking away the substance of the estate..... 416

A court of equity will, in some cases, enjoin the removal of the fruits of past waste 416

On a motion for injunction to enjoin waste, complainant, on bill and answer, cannot read affidavits in support of his title 416

WITNESS.

A person convicted of an infamous crime is restored to competency by a pardon.... 918

On a joint indictment of three persons for a riot, where one only is put upon trial, the others, who have forfeited their recognizances, cannot be examined as witnesses for him..... 918

Free-born negroes, not subject to any term of servitude by law, are competent witnesses in all cases..... 20

A slave is a competent witness for a free black man on a criminal prosecution.....1072

A slave is not a competent witness for a free mulatto in a public prosecution.....1379

Competency as a witness of a negro generally reputed to be free..... 79

The wife of the owner of stolen goods is not a competent witness for the prosecution, unless the husband has released to the United States his share of the fine.....1072

The owner of goods stolen by a slave, being entitled to one-half of the fine, is not a competent witness for the prosecution... 794

The person whose name is forged may testify for the prosecution under a charge of forgery 479

The person defrauded is a competent witness for the prosecution upon an indictment for the fraud..... 595

Page

Upon an indictment for usury, the borrower is a competent witness for the prosecution, if he has paid the money, and be not the informer..... 18
An informer is a competent witness, although he may receive part of the penalty. 464, 465

A person who has been convicted of a conspiracy to defraud the creditors of an insolvent debtor is incompetent as a witness. 595
Upon an indictment of a husband for assault and battery upon his wife, the wife may testify for the government.....1131
A particeps criminis, where the statute of limitations has run in his favor, may be compelled to testify against the defendant.1158
Jurors should not disbelieve a witness unless for good reason.....1312
A witness is not bound to answer the question whether he sold certain stolen goods to defendant..... 5
In a criminal prosecution, the officer who apprehended defendant will not be compelled to disclose the name of his informant 5

Page

Persons who are material as witnesses for a party in a federal court may be compelled to appear, though they are members of the cabinet of the president of the United States 1192
Quære: Whether an attachment should issue for the refusal of federal cabinet officers to obey a subpœna in a case where their testimony would not be legally admissible 1192
The power to issue an attachment to punish a person for failure to obey a subpœna is incident to courts of justice.....1192
Where a witness living in another state and district fails to obey a subpœna, and an attachment is issued for him, such attachment should be directed to the marshal of the court issuing it..... 602
Where a witness arrives before service of an attachment for not attending, and makes a reasonable excuse, the attachment will be countermanded on payment of the costs of issuing it..... 975
An attachment for contempt for not attending must not be served in the courthouse 975

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.